

STUDY

JULY

2015

Compatibility analysis of Moldovan legislation with the European standards on equality and non-discrimination

Pavel GRECU Nadejda HRIPTIEVSCHI Iustina IONESCU Romanița IORDACHE Sorina MACRINICI



LRCM

LEGAL
RESOURCES CENTRE
FROM MOLDOVA

STUDY

**COMPATIBILITY ANALYSIS
OF MOLDOVAN LEGISLATION
WITH THE EUROPEAN STANDARDS ON
EQUALITY AND NON-DISCRIMINATION**

Authors:

Pavel GRECU

Nadejda HRIPTIEVSCHI

Iustina IONESCU

Romanița IORDACHE

Sorina MACRINICI



This publication was carried out within the project "Promoting equality - Strengthening the agents of change" implemented with the support of the European Union. The contents of this publication are the sole responsibility of the Legal Resource Centre from Moldova and the Euroregional Center for Public Initiatives and can in no way be understood to reflect the views of the European Union.

Chișinău, July 2015

Compatibility analysis of Moldovan legislation with the European standards on equality and nondiscrimination : Study / Pavel Grecu, Nadejda Hriptievski, Iustina Ionescu [et al.] ; Legal Resources Centre from Moldova (LRCM). – Chişinău : Imprint Star, 2015. – 200 p.

Referințe bibliogr. în subsol. – 150 ex.

ISBN 9789975300292.

342.7+341.231.14(4)

C 63

Table of contents

Authors	7
Executive Summary	9
Abbreviations	15
Acknowledgements	17
Introduction	19
I. Methodology	21
II. General Legal Framework	23
2.1 What is discrimination	23
2.2 Relevant constitutional provisions for equality and non-discrimination	26
2.3 Special legislation	32
2.4 Specific procedural issues in the field of discrimination	38
III. Grounds protected against discrimination	43
3.1 Race or ethnic origin	43
3.2 Nationality	46
3.3 Language	47
3.4 Religion or belief	48
3.5 Disability	54
3.6 Age	57
3.7 Sex	58
3.8 Sexual orientation	63
3.9 Opinion	65
3.10 Political affiliation	68
3.11 Any other similar ground	70

IV. Forms of discrimination	73
4.1 Direct discrimination	73
4.2 Indirect discrimination	78
4.3 Harassment	81
4.4 Instigation to discrimination	87
4.5 Discrimination by association	91
4.6 Severe forms of discrimination	93
V. Exceptions from the prohibition of discrimination	97
5.1 Reasonable accommodation	97
5.2 Positive measures	98
5.3 Genuine and determining professional requirements	101
5.4 Exceptions stipulated by the Directives	104
5.5 Abuse in exercising freedom of expression	108
5.6 Additional exceptions introduced by Law no.121	110
VI. Personal and material scope of non-discrimination principle	113
6.1 Personal scope of the non-discrimination legislation	113
6.2 Work and employment	114
6.3 Education	131
6.4 The access to goods and services	138
6.5 Access to justice	140
VII. Institutions mandated to combat discrimination	159
7.1 The Council for Prevention and Elimination of Discrimination and Assurance of Equality	159
7.2 Courts	174
Recommendations	187

Authors

Pavel GRECU - is a lawyer specializing in human rights. He works as legal officer within the Legal Resource Centre from Moldova since 2013. Pavel is engaged in activities related to applying the standards of the European Convention on Human Rights in the Republic of Moldova, preventing and combating discrimination and promoting an independent and responsible judiciary system. Pavel received his Bachelor's degree and Master's degree at the Department of Law of the Moldova State University.

Nadejda HRIPTIEVSCHI - is a human rights lawyer, founder and Director of Programs of the Legal Resource Center from Moldova (LRCM). Nadejda is a member of the European Commission against Racism and Intolerance (ECRI) since 16 December 2013. Her main areas of expertise include non-discrimination, judiciary and legal aid. Between 2001 and 2006 she was working at the Open Society Foundations in Budapest. Nadejda received her Master's degree in Comparative Constitutional Law with additional expertise in Human Rights at the Central European University in Budapest and her Bachelor's degree at the Department of Law of the State University of Moldova.

Iustina IONESCU – is a human rights lawyer in Romania and a member of the European Network of Legal Experts in the field of Gender Equality of the European Commission. Her expertise consists in anti-discrimination and sexual and reproductive rights. Iustina headed the Anti-Discrimination Program of the Legal Resource Center (2003-2007). In 2010, having completed a two-years legal traineeship within the framework of the European program of the Center for Reproductive Rights (New York), Iustina joined the Euroregional Center for Public Initiatives (ECPI) where she currently holds the position of Director of Programs. Iustina represents persons victims of discrimination in legal cases before national courts and authorities in Romania and in 2012-2013 was a member of the team of lawyers and attorney for defence in the case ACCEPT against NCCD, at the Court of Justice of the European Union, the first case of refusal in employment based on sexual orientation found by the Luxembourg Court.

Romanița IORDACHE – a graduate of the University of Bucharest Law School, Romanița received her Master's degree in Comparative Constitutional Law at the Central European University and a Master's degree in International Human Rights Law at New York University School of Law and carried out her PhD work in Diversity Management and EU

Governance at Karl Franzens University from Graz, Austria and Bologna University, Italy. Romanița worked as a consultant for the United Nations Organization, the International Labour Organisation, the Council of Europe, and the European Union Fundamental Rights Agency. Currently, Romanița is the independent expert for Romania within the European Network of Legal Experts in Gender Equality and in Non-discrimination of the European Commission and Senior Expert coordinating the team for Romania within FRANET of the European Union Fundamental Rights Agency.

Sorina MACRINICI - is a human rights lawyer and researcher at the Legal Resource Centre from Moldova. Sorina specializes in justice sector reform in the Republic of Moldova and non-discrimination. Sorina was granted a Muskie scholarship and in 2013 received a Master's degree in International Human Rights Law at the University of Notre Dame in Indiana, the USA. She did an internship at Maricopa Superior Court in Phoenix, the USA, between June and August 2013, where she was involved in various issues concerning the administration of courts.

Executive Summary

The Compatibility Analysis of Moldovan Legislation with the European Standards on Equality and Non-discrimination (*hereinafter referred to as "compatibility study" or "study"*) was caused by the authors' intention to get a broader understanding of the legal framework in force, existing constraints at the level of normative acts, public policies and actual practice of enforcement of certain laws. The aim of the study was to facilitate the harmonisation of rules and practices concerning equality and non-discrimination with the Acquis and the relevant international and European standards. Therefore, the recommendations presented at the end of the study aim at improving the regulatory and institutional framework.

The EU acquis on equality and non-discrimination, together with the standards of the European Convention on Human Rights (ECHR) and their interpretation in the case law of the European Court of Human Rights (ECtHR), provide an excellent framework for comparison and critical analysis of the legislation and the national practice in the Republic of Moldova. By harmonising the legislation with the Community acquis, the Republic of Moldova should ensure the necessary conditions to protect its citizens against discrimination. This is the basic reason for which the compatibility study was initiated and it also determines the major focus of the study on conformity of legislation.

The study contains seven chapters, focused on the following topics: general legal framework, protected grounds, forms of discrimination, exceptions to the prohibition of discrimination, the scope of the principle of non-discrimination, and institutions involved in combating discrimination. Because such a study is carried out in the Republic of Moldova for the first time, the authors tried to make an analysis of both the legislation and the national practice. We used the legislation and the international case law relevant to each topic addressed in order to provide an analytical support adjusted to the local context that could be useful to policy makers and individuals who are going to enforce the non-discrimination legislation. The emphasis was placed on the detailed analysis of grounds, forms of discrimination and exceptions to the prohibition of discrimination, which are relatively new concepts for the Moldovan legislation and practice, in order to contribute to a more accurate application of these concepts. Regarding the scope of the non-discrimination principle, the study does not include an exhaustive analysis given the limitations entailed by the volume of the study. The authors selected areas that were most often targeted in the decisions of the Council for Preventing and Eliminating Discrimination and Ensuring Equality (*Consiliul pentru Prevenirea și Eliminarea Discriminării și Asigurarea Egalității*, CPPEDAE). The final emphasis was placed on analysing the national mechanism for the

protection against discrimination established by Law no.121 on Ensuring Equality and namely the mandate and practice of the CPPEDAE and of the courts.

The authors found that Law no.121 establishing the general framework of protection against discrimination is largely in line with the European standards, but the Law has a major loophole related to the CPPEDAE competences. The law grants the CPPEDAE an important mandate –competencies in three areas: legislation and policies, prevention of discrimination, and examination of individual complaints. However, the law does not ensure two important powers for the Council, and their absence reduces the CPPEDAE's role significantly and prevents it from exercising fully its mandate. Namely, the law does not provide for the CPPEDAE the power to impose sanctions for acts of discrimination and it does not ensure the power to file requests before the Constitutional Court for constitutional review of legislative provisions considered to be discriminatory. Law no.121 and the related regulatory framework establish an unreasonably complicated mechanism for sanctioning acts of discrimination: the CPPEDAE examines the individual complaints regarding discrimination and can only issue a decision on finding discrimination and make recommendations for the person who discriminated. If the act of discrimination falls under the provisions of the Misdemeanours Code, the CPPEDAE draws up the minutes regarding the misdemeanour and sends the case to the court to apply the misdemeanour sanction. The legislation does not stipulate exceptions regarding the way in which minutes by the CPPEDAE should be prepared and in many cases the minutes were annulled by the courts simply because they did not meet fully the formal provisions of the Misdemeanours Code. These provisions limit the CPPEDAE's role to being merely a body with powers of issuing recommendations.

The CPPEDAE decisions can be challenged in administrative proceedings, according to the general rules. Although it is a quasi-judicial body, under the current legislation, the CPPEDAE decisions are examined in the administrative proceedings similar to any other administrative act. The judicial practice is different concerning the limits of court's examination of administrative acts. In some cases only the procedure is examined, while in other cases also the merits of the complaints are analysed. When examining only the procedural issues, practically access to justice in cases examined by the CPPEDAE is limited. Moreover, due to the multitude of possible legal venues, a case examined by the CPPEDAE can be examined in parallel by a court in administrative proceedings, and by another court in misdemeanour proceedings. If the victim filed a civil complaint in the same case, another judge could examine the case in the civil litigation procedure. This mechanism creates favourable conditions for a non-uniform judicial practice on exactly the same case.

The key recommendation of the study is to review Law no.121 and the related regulatory framework in order to grant the CPPEDAE full powers to exercise its mandate and namely the power to impose sanctions for acts of discrimination and the competence to submit requests for constitutional review. The study also includes recommendations on the CPPEDAE's membership, supply with adequate resources, including an adequate office, the right of the CPPEDAE to intervene in judicial proceedings in which cases of discrimination are examined, more detailed regulation of the procedure for examining individual complaints by the CPPEDAE.

The study revealed that several laws require amendments to meet the European standards on non-discrimination. The legislation does not stipulate the obligation of public authorities to actively promote equality while exercising their duties. It also does not provide for the obligation of public authorities to ensure that third parties who are awarded contracts, loans, grants and other benefits observe the principle of non-discrimination. The Labour Code is not harmonised with Law no.121 on several issues, including the lack of provisions regarding harassment, different regulations concerning "sexual harassment" when compared with Law no.121. The Labour Code also contains some over-protective provisions regarding the possibility of taking childcare leave up to three and six years while maintaining the position at work, provisions that actually lead to discrimination of women. These provisions should be adjusted in parallel with the development of childcare services ensuring the access of children aged 1 to 3 years to pre-school institutions. Although a draft law on granting paternity leave of 14 days during the first 56 days after childbirth was debated, on 9 June 2015 the authorities opted for the amendment of the Collective convention (at the national level) "Working time and rest time",¹ which granted the fathers of new-born children a paternity leave for three calendar days, maintaining the average salary paid by the employer.² In order to ensure the effective implementation of the paternity leave it is recommended to increase the number of days on paternity leave. Also, the state shall assume total responsibility for the parental leave allowance payment from the social insurance funds or shall share this responsibility with the employer.

The Criminal Code, the Code of Criminal Procedure and the Law on the Mental Health lay too much emphasis on the role of the medical institution opinion in the course of cases investigation with regard to the hospitalization examination and carrying out the psychiatric assessment without consent. The attorneys also rely to a great extent on medical conclusions, rarely collecting additional proofs for representing their clients. The study recommends reviewing the legal framework and adopting a guide for defending/representing the interests of persons with mental disabilities, in order to ensure the effective defence.

The Law on the freedom of conscience, thought and religion favours the Moldovan Orthodox Church, providing in Art. 15 par. (5) that "The State recognizes the special importance and the leading role of the Orthodox Christian religion and of the Moldovan Orthodox Church, respectively, in the life, history and culture of the people of the Republic of Moldova." These provisions should be excluded to avoid establishing a discriminatory environment on religious grounds. The dominant role of the Orthodox Church is quite obviously reflected in the educational system through the optional course "Religion", which is mainly focused on the Orthodox religion. The study recommends that the Ministry of Education should replace the optional course "Religion" with a non-confessional course dedicated to the history of religions, taught by competent staff, with reputation of observing the human rights, with a view of effective implementation of Art. 35 par. (8) of the Constitution.

¹ Collective convention (at the national level) no. 2 from 9 July 2004 "Working time and rest time", available at <http://lex.justice.md/viewdoc.php?id=285912&lang=1>.

² Collective convention (at the national level) no. 15 from 9 June 2015 for approving the amendments and additions to the Collective convention (at the national level) no. 2 from 9 July 2004 "Working time and rest time", available at <http://lex.justice.md/md/359461/>.

The accessibility of buildings remains a major barrier for persons with disabilities. Although the legislation is sufficiently comprehensive regarding the accessibility, according to the CPPEDAE observations, the practical enforcement of these provisions is imperfect. The central authorities adopt the necessary regulations, but their implementation depends on the local authorities who issue the certificates of urbanism and construction licences and do not verify if the regulations in force are fully observed. The CPPEDAE also highlighted the ineffectiveness of the examinations carried out by the State Construction Inspectorate given the low number of sanctions applied, but also the ambiguity of the legislative norms regarding liability for non-compliance with the rules on the accessibility of constructions.

The courts are an important component of the national mechanism for protection against discrimination, because victims of discrimination can file complaints directly to the court with the view to obtain a finding of discrimination and damages (pecuniary and non-pecuniary), as well as due to the fact that the courts examine the appeals regarding the CPPEDAE decisions. However, it is difficult to provide a comprehensive analysis of the judicial practice given the lack of data regarding the number of pending cases and the lack of relevant judgments. The authors recommend the Superior Council of Magistracy to modify the Integrated Case Management Program (ICMP) by introducing a category of cases regarding "discrimination". The courts at all levels should keep records of discrimination and collect segregated statistical data based on the category of specialised cases in the field of "discrimination", this should be also reflected on the websites of the courts. The search engines of the courts' case databases should be adjusted to facilitate the identification of the judgments/court rulings concerning cases of discrimination. In order to ensure the uniform judicial practice on cases of discrimination, the Supreme Court of Justice (SCJ) should develop an explanatory decision for the SCJ Plenary or a recommendation regarding the enforcement of the law when examining the cases of discrimination. The SCJ should also adopt a recommendation or an advisory opinion regarding the language in which the court complaints should be submitted, based on the legal framework and practice of the Republic of Moldova.

The CPPEDAE is a relatively new institution, acting only since the second half of 2013, but it has already accumulated a rich experience and confirmed itself as an important part of the national system of human rights protection. The Council expressed a pro-active attitude in the field of legislation analysis, both of that in force and of draft laws, an approach that is very important to be maintained. As far as the working methods used, these could be improved in particular by addressing the legislation problems through collaboration with the decision makers that can initiate legislative amendments and requests for constitutional review (currently through the Ombudsman) of the constitutionality of the legal provisions considered by the Council as being discriminatory. The Council undertakes significant efforts in the field of preventing discrimination which are important to pursue. In order to support these efforts an adequate budget needs to be ensured permanently to protect the institution from fluctuations or interference and to guarantee the continuity of the institution's independence and professional growth.

The CPPEDAE was particularly active in examining individual complaints regarding discrimination. For example, the Council received 151 complaints for examination and

registered 12 ex officio notes during 2014.³ Since the beginning of its activity and until 31 December 2014, out of the total number of the examined complaints, 65 were concluded with decisions, 61 were declared inadmissible, 7 complaints were withdrawn by the petitioners, 6 complaints were submitted to other competent authorities, an Advisory Opinion was requested in 4 petitions and one complaint was settled amicably. The Council needs improvements as regards various aspects of its activity, some of them are highlighted in this study. It is recommended to improve the quality of reasoning of the CPPEDAE decisions, including reconsidering its use of some concepts and its approach towards systemic problems. In general, these needs are specific to a new institution which requires time to establish a uniform practice. In this regard, it is important that the international, governmental and non-governmental partners support the Council in its need of capacity building.

As far as the international instruments are concerned, the study recommends the ratification of the European Charter for Regional and Minority Languages and the reorganization of the legal framework regarding the rights of national minorities in order to harmonise it with the European standards adopted in this field. The study also recommends the ratification of the Additional Protocol No.12 of the ECHR and the ratification of the Optional Protocol on the mechanism of collective complaints of the Revised European Social Charter, standards that would lead to a better structure and coherence of the legislative framework and would constitute guarantees for Moldova's democratic path.

³ CPPEDAE, Activity Report for 2014.

Abbreviations

CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CERD	UN Convention on the Elimination of All Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CFR EU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ConstC	Constitutional Court of the Republic of Moldova
CPPEDAE	Council for Prevention and Elimination of Discrimination and Assurance of Equality
CRPD	UN Convention on the Rights of Persons with Disability
Directive 2000/43/CE	Council Directive 2000/43/EC as of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
Directive 2000/78/CE	Council Directive 2000/78/EC as of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
Directive 2006/54/CE	Directive 2006/54 / EC of the European Parliament and of the Council as 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)
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant on Economic, Social and Cultural Rights

ILO	International Labour Organization
ILO Convention no.100.	ILO Equal Remuneration Convention as of 1951
ILO Convention no.111.	ILO Convention on the Non-Discrimination (employment and occupation) as of 1958
Law no. 121	Law no. 121 as of 25 May 2012 on Ensuring Equality
Law no. 125	Law no. 125 as of 11 May 2007 on Freedom of Conscience, Thought and Religion
MisdemCode	Misdemeanours Code of the Republic of Moldova as of 24 October 2008
MoJ	Ministry of Justice of the Republic of Moldova
NAE	National Agency of Employment
Protocol No.12	Additional Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms
RESC	Revised European Social Charter
SCM	Superior Council of Magistracy of the Republic of Moldova
Special Rapporteur on freedom of religion or belief	Special Rapporteur on freedom of religion or belief of the Human Rights Council of the United Nations
TEEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCRC	UN Convention on the Rights of the Child

Acknowledgements

The Compatibility Analysis of Moldovan Legislation with the European Standards on Equality and Non-discrimination was carried out by the Legal Resources Centre from Moldova (LRCM) together with the Euroregional Centre for Public Initiatives (ECPI) within the project “Promoting Equality - Strengthening the Agents of Change”, funded by the European Union.

Following the publication of the Compatibility Analysis we would like to express our sincere thanks to the representatives of the Council for Preventing and Eliminating of Discrimination and Ensuring Equality for their cooperation and assistance while drafting of the analysis.

We would also like to acknowledge the openness of the representatives of the Ministry of Education and the Ministry of Labour, Social Protection and Family. We would also want to express our appreciation to the social workers and school teachers that accepted to participate in our focus groups on discrimination. We are grateful to the judges, prosecutors and lawyers who participated in the workshops debating the findings and recommendations included in this study. Their expertise helped us better understand the real situation of the discrimination phenomenon in education and social assistance.

We would like to express our sincere thanks to Mr. Istvan Haller, expert in equality and anti-discrimination, member of the Steering Board of the Romanian National Council for Combating Discrimination for his valuable recommendations in drafting the compatibility analysis.

The team who drafted the study consisted of Nadejda HRIPTIEVSCHI, Director of Programs at LRCM, Sorina MACRINICI and Pavel GRECU, legal officers at LRCM, Romanița IORDACHE, expert in equality and anti-discrimination, member of the European Legal Network on Non-discrimination of the European Commission, and Iustina IONESCU, expert in anti-discrimination, Program Director at ECPI. Romanița and Iustina have guided the LRCM team throughout the study, from developing the methodology until the final draft, providing valuable recommendations both for drafting the study and for strengthening LRCM capacity. Romanița IORDACHE edited the Romanian and English versions of the study. Florin BUHUCEANU, expert in communication, Executive Director for ECPI, has edited the text ensuring its readability for general public. Doina DUMBRĂVEANU-MUNTEANU, project coordinator and Mihaela CIBOTARU, communication coordinator at LRCM have proof-read the final version of the study in Romanian and oversaw the publication of the text in three languages (Romanian, English

and Russian). Nicolae CUȘCHEVICI prepared the cover, design and layout, preparing the text for publication. Irina MARCHITAN translated the study from Romanian to English.

The elaboration of the present Compatibility Analysis was possible due to the financial support of the European Union and we express our gratitude for it and for their continued efforts in preventing and combating discrimination in the Republic of Moldova.

Introduction

The present Compatibility Analysis of Moldovan Legislation with the European Standards on Equality and Non-discrimination (hereinafter, *Compatibility Study or Study*) was conducted in order to identify the gaps in legislation and its implementing practice with a view to draft recommendations for their improvement. Through its scale and comprehensive nature this is a first analytical study ever conducted in the Republic of Moldova in this field.

The EU acquis on equality and non-discrimination, which includes the standards of the European Convention of Human Rights (ECHR) and their interpretation in the European Court of Human Rights (ECtHR) case law, is an excellent framework for comparing and providing a critical analysis of the national law and practice. The EU acquis constituted the basis for the adoption of the national legislation in 2012 and by harmonising its national legislation with the European Standards, Moldova would ensure the necessary conditions to protect its citizens against discrimination. This is the main reason for which the compatibility study was initiated and it also determines the major focus of the study on conformity of the legislation.

The Republic of Moldova adopted a framework-law on preventing and combating discrimination, the Law on Ensuring Equality (*hereinafter, "Law no.121"*), only in 2012. The law was adopted in order to create a necessary framework for the application of the Directive 2000/43/CE and Directive 2000/78/CE. In this context, the study undertakes to provide relevant authorities with the necessary information regarding the compatibility of the national legislation and practice with the EU Directives, as well as with other relevant directives, as mentioned in the Preamble to Law no.121.

The recommendations from this study are issued in relation to various stakeholders from the Republic of Moldova within the framework of their competences and powers. The study is primarily addressed to decision-makers: MPs, Government (including the relevant ministries) and Judiciary (including the Superior Council of Magistracy). The study also includes recommendations for public authorities, especially for the Council for the Prevention and Elimination of Discrimination and Assurance of Equality, the Interethnic Relations Bureau and the Ombudsman Office. The Study also includes recommendations for the representatives of the civil society and of the donor community interested in the promotion of equality and anti-discrimination in the Republic of Moldova.

The Study was drafted by the Legal Resources Centre from Moldova (LRCM) together with the Euroregional Centre for Public Initiatives (ECPI), Romania, within the project "Promoting Equality - Strengthening the Agents of Change", funded by the European Union, during the period 2014-2015.

I. Methodology

The compatibility study of the national legal framework, of the policies and practice on equality and non-discrimination in Moldova was determined by the authors' intention to provide a comprehensive picture of the current national legal framework, to identify gaps in legal provisions, public policies and in the implementation of the law. Our aim was to facilitate the harmonisation process of the national legislation with the *acquis* and with relevant European and international standards by formulating recommendations aimed at improving the regulatory and institutional framework.

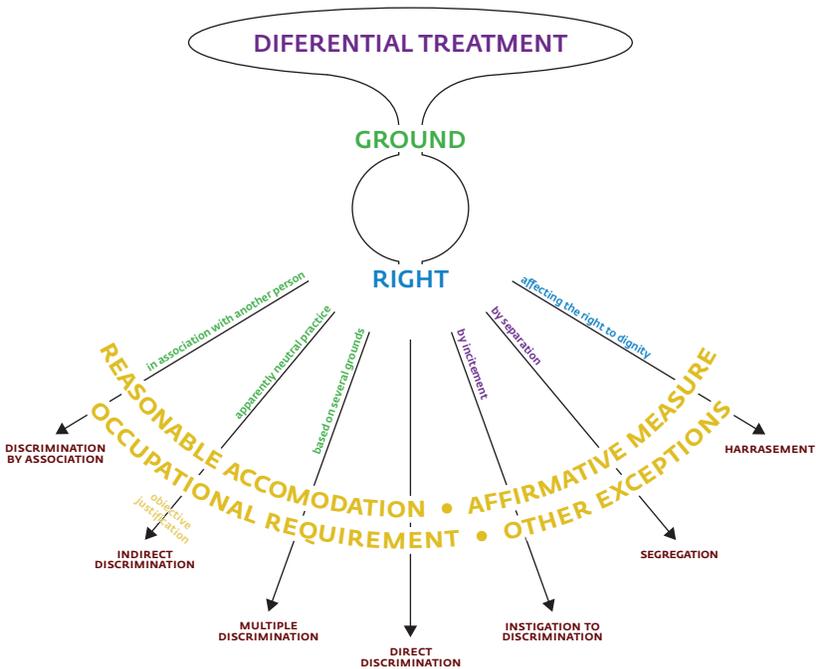
The Study is based mainly upon standards such as the European Union directives on equality and non-discrimination and relevant case law of the European Union Court of Justice. When the standards developed by the European Court of Human Rights (ECtHR) regarding the application of Art. 14 of the European Convention on Human Rights (ECHR) and the Additional Protocol no.12 to the ECHR include additional elements to those guaranteed by the *acquis*, the Compatibility Study used as a reference the standard which provides a broader degree of protection. Similarly, in order to understand various protected grounds (race, ethnic origin, sex, age, disability) the UN international conventions and covenants, as well as other relevant instruments adopted by the Council of Europe, particularly the Revised European Social Charter were used as reference.

This Study is neither a report on human rights nor a quantitative or qualitative sociological survey on equality and discrimination in the Republic of Moldova. The Compatibility Study is not intended to be a blueprint for discrimination in Moldova, but rather a legal research of the existing regulatory framework and the way in which legal provisions are implemented, mainly the efficiency of the institutional framework developed for implementation of the legal norms. To this end, the authors have consulted and analysed the primary and secondary legislation, various national legal norms, national policies and strategies from the fields of employment, education, health, access to services, housing, as well as legal provisions and relevant statistical data for a better understanding of the protected grounds of discrimination under Law no.121 from 25 May 2012: race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation or any other similar grounds. The analysis includes, among the studied grounds, sexual orientation, explicitly mentioned in Art. 7 of Law no.121 and interpreted by the ECtHR in its case law as one of the grounds protected by the ECHR. We also analysed such grounds as social origin, health status, marital status which are not explicitly mentioned in Law no.121, but which are included in the concept "any other similar grounds".

The analysis of current legal provisions was doubled by the analysis of cases dealt with by the Council for the Prevention and Elimination of Discrimination and Assurance of Equality and by the courts, as well as by the requests for public information which allowed us to assess the implementation by various state institutions of the norms under scrutiny.

II. General Legal Framework

2.1 What is discrimination



Discrimination involves unfavourable treatment of an individual or group in exercising a particular right based on certain specific, identifiable characteristics - a protected ground, taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation.

The prohibition of discrimination covers situations in which individuals or groups receive a differential treatment though they were in a similar situation, and situations in which individuals or groups in different situations are treated similarly.⁴

Since its establishment, the CPPEDAE has underlined that the ECtHR case law would constitute the basis of its activity. In the explanation regarding the complaints that

⁴ ECtHR, *Thlimmenos v. Greece*, 6 April 2000.

can be lodged with the CPPEDAE, available on the web page of the CPPEDAE, the schematic representation of the process of examining complaints can be found. It includes the following four elements: (1) differential treatment; (2) protected ground; (3) violated right and (4) lack of an objective and reasonable justification for the differential treatment.⁵

There are differences between in the application of the anti-discrimination rights in the *acquis* and in the ECHR standards as regards the sphere of application, protected grounds, as well as allowed justifications/exceptions. The EU standards can be applied to a limited list of protected grounds, initially in the context of the prohibition of discrimination on grounds of nationality as a corollary of the fundamental freedoms guaranteed by the EU (prohibition stipulated in Art. 18 TFEU) and then by expanding this list to include sex, race or ethnic origin, religion or belief, disability, age and sexual orientation under Art.10 TFEU.⁶ The principle of non-discrimination as a fundamental principle of Community law was developed especially in the directives concerned with the principle of equality and non-discrimination (Directive 2000/43/EC, Directive 2000/78/EC and consolidated Directive 2006/54/EC), as well as the European Union Court of Justice case law. The scope of the principle of non-discrimination, as it is developed in the directives, focuses on labour relations, access to social assistance, access to goods and services, including housing and access to justice. As regards the standards established by the directives, the justifications for violating the right to non-discrimination have an exceptional character and are listed exhaustively.⁷

The ECHR standards based on Art.14 are more comprehensive and they include an open list of protected grounds. They also have a much broader scope of application, including substantive rights guaranteed by the Convention or, after the ratification of the Additional Protocol no.12, the rights provided under national legislation. The ECtHR also states that direct and indirect discrimination can be generally justified, provided that the difference in treatment is objectively and reasonably justified by a legitimate aim and can pass a proportionality test.⁸ The ECtHR case law distinguishes between cases where Member States have a broad margin

⁵ CPPEDAE, information regarding the content of complaints: <http://www.egalitate.md/index.php?page=page&id=845&cl=ro>, last accessed on 15 March 2015.

⁶ TFEU, Art. 10 - In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

⁷ Directive 2000/43/EC enumerates special measures and genuine occupational requirements and does not allow other justifiable exceptions for direct discrimination on the grounds of race or ethnic origin. As regards indirect discrimination, it can be justified under Community law if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Directive 2000/78/EC establishes as exceptions occupational requirements, positive actions and specific measures, measures of reasonable accommodation for persons with disabilities. Directive 2000/78/EC also stipulates some justifiable exceptions in connection with certain public services such as the armed forces, police, prison or emergency services. Directive 2000/78/EC also introduces two very strict exceptions. The first exception states that a difference of treatment shall not constitute discrimination in the case of private organizations the ethos of which is based on religion or belief (churches or religious organizations by reason of the nature of their religious activity). The second exception allows, in certain cases, discrimination based on grounds of age. Meanwhile the states will have to prove the fulfilment of strict conditions that shall be analysed restrictively. Directive 2006/54/EC also stipulates specific mechanisms limiting the principle of non-discrimination, such as occupational requirements.

⁸ ECtHR, *James and others v. the United Kingdom*, 21 February 1986.

of appreciation and cases demanding a higher degree of scrutiny for justifying the differential treatment. Cases of discrimination based on the grounds of sex,⁹ religion,¹⁰ sexual orientation,¹¹ nationality,¹² ethnic origin¹³ or race¹⁴ automatically trigger a stricter scrutiny.

The ECHR guarantees the prohibition of discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” The concept “other status” has been interpreted extensively by the Court in order to include those grounds that were not expressly stipulated in the Convention such as disability or health status,¹⁵ age¹⁶ or sexual orientation¹⁷ and gender identity,¹⁸ as well as parenthood of a child born out of wedlock,¹⁹ type of property,²⁰ membership in an organization,²¹ military rank,²² parental status,²³ marital status.²⁴

The Additional Protocol no.12 to the Convention, which has not been ratified up till now by the Republic of Moldova, introduced additional ways of guaranteeing the right to equality and non-discrimination as a fundamental right by extending the scope of application of the protection guaranteed by Art. 14 of the ECHR. Given the comprehensive nature of Law no.121, the ratification of the Additional Protocol 12 will not require subsequent amendments of other legal norms.

Other European standards which guarantee the principle of equality and non-discrimination include: the Additional Protocol to the Revised European Social Charter, the European Charter for Regional or Minority Languages; both documents introducing additional instruments for the protection of minority rights. **We recommend that the Government and the Parliament prioritize urgent ratification of the Additional Protocol No.12, of the Optional Protocol to the RESC and of the European Charter for Regional or Minority Languages which, when introduced into national legislation, will effectively guarantee the principle of equality and non-discrimination.**

⁹ ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985.

¹⁰ ECtHR, *Hoffman v. Austria* or *Thlimmenos v. Greece*, 6 April 2000.

¹¹ ECtHR, *S.L.V. v. Austria*; *Frette v. France*, 26 May 2002.

¹² ECtHR, *Moustaquim v. Belgium*, 18 February 1991; *Gaygusuz v. Austria*, 16 September 1996.

¹³ ECtHR, *D.H. v. the Czech Republic* (MC), 13 November 2007.

¹⁴ ECtHR, *Cyprus v. Turkey*, 10 May 2001; *Timishev v. Russia*, 13 December 2005.

¹⁵ ECtHR, *Glor v. Switzerland*, 13 February 2006 or *Price v. the United Kingdom*, 10 July 2001, *Pretty v. the United Kingdom*, 29 April 2002. ECtHR cases regarding discrimination on the ground of disability can be accessed, ECtHR, *Factsheets: Mental Health*, available at <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c>, last accessed on 27 May 2014.

¹⁶ ECtHR, *Schwizgebel v. Switzerland*, 10 June 2010. Similarly *T v. the United Kingdom* and *V. v. the United Kingdom*, 16 December 1999.

¹⁷ ECtHR cases regarding discrimination on the ground of sexual orientation can be accessed, ECtHR, *Factsheets: Sexual Orientation Issues*, respectively, ECtHR, *Factsheets: Gender Identity*, available at <http://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c>, last accessed on 27 May 2014.

¹⁸ ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002.

¹⁹ ECtHR, *Camp and Bourimi v. the Netherlands*, 3 October 2000. *Mazurek v. France*, 01 February 2000.

²⁰ ECtHR, *Chassagnou v. France*, 29 April 1999.

²¹ ECtHR, *Danilenkov and others v. Russia*, 30 July 2009.

²² ECtHR, *Engel and others v. the Netherlands*, 8 June 1976.

²³ ECtHR, *Andrle v. the Czech Republic*, 20 June 2011. *Weller v. Hungary*, 31 March 2009.

²⁴ ECtHR, *Petrov v. Bulgaria*, 22 May 2008.

In Moldovan context, the principle of equality and non-discrimination are not recent concepts. Such provisions existed before 2012 in both the USSR legislation and in the Constitution of the Republic of Moldova and other norms, such as the Labour Code. Law no.121 adopted on 25 May 2012 provides a consolidated framework which responds to current challenges in the society. It introduces new elements of protection compatible with European standards, provides for certain legal remedies in cases of discrimination and establishes an institutional mechanism for combating discrimination and ensuring equality by the creation of the Council for the Prevention and Elimination of Discrimination and Assurance of Equality (CPPEDAE). The national equality body has the mandate to assure equality and non-discrimination standards at the national level and to prevent discrimination, by carrying out awareness campaigns, by receiving and processing complaints regarding cases of discrimination and finding misdemeanours, where appropriate. In the event of a misdemeanour, the CPPEDAE issues recommendations which can be challenged by the parties in administrative court proceedings. Besides issuing recommendations in cases involving discrimination, the CPPEDAE brings misdemeanour protocols to court for the court to confirm the infringement, in accordance with the provisions from the Misdemeanours Code. The CPPEDAE cannot impose sanctions or provide remedies to victims of discrimination. Potential victims of discrimination can address their concerns to courts, in accordance with civil legislation, on the basis of which the court can confirm the misdemeanour and provide a remedy to the person concerned. The administrative sanctions can be established only in administrative proceedings, after the CPPEDAE brings misdemeanour protocols to court.

2.2 Relevant constitutional provisions for equality and non-discrimination

Art. 4 of the Constitution „guarantees not only human rights and fundamental freedoms enshrined in the Constitution but also universally recognized principles and norms of international law... Universally recognized principles and norms of the international law, ratified international treaties and treaties to which the Republic of Moldova adhered, are part of the legal framework of the Republic of Moldova and become rules of the national law. If there are any conflicts between the international covenants and treaties on fundamental human rights and the national laws of the Republic of Moldova, in accordance with Art. 4 para. (2) of the Constitution, the law enforcement authorities are bound to implement international regulations.”²⁵

The ECHR "constitutes an integral part of the national legal system and should be applied directly as any other law of the RM except for the fact that the ECHR has priority over the rest of internal laws when they contravene to it... National courts and not the ECtHR are primarily in charge of the enforcement of the Convention... Thus, when assessing the cases the courts have to establish whether the law or the norm to be applied and regulating the rights and freedoms guaranteed by the ECHR is compatible with its provisions, and in case of incompatibility the court shall directly apply the Convention,

²⁵ ConstC, Judgement No. 55 on the interpretation of certain provisions of Art. 4 of the Constitution from 14 October 1999.

mentioning this in its judgement... The prior study of the ECtHR case law, as ECtHR is exclusively entitled through its judgements to request the enforcement of the ECHR officially and, therefore, compulsory, is necessary for proper application of the Convention. The courts are compelled to follow these interpretations.²⁶

Art. 16 of the Constitution of the Republic of Moldova²⁷ provides that "all citizens of the Republic of Moldova are equal before the law and public authorities regardless of race, nationality, ethnic origin, language, religion, sex, political affiliation, financial position or social origin". The list of protected grounds provided by the Constitution is exhaustive. Art. 1 para. (1) of Law no. 121 on Ensuring Equality provides protection against discrimination "irrespective of race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, opinion, political affiliation or any other similar criterion". Different from the Constitution, Law no.121 does not expressly include as protected grounds "financial position or social origin", but it expressly provides the ground of "sexual orientation" in relation to employment relations and includes an open list of grounds.

Several provisions of Law no. 121 were challenged before the Constitutional Court (ConstC). The complaints were rejected by the ConstC on 8 October 2013.²⁸ The referral argued among others that the notion "any other similar ground" is completed by the notion "sexual orientation", and the latter infringes human dignity, guaranteed by Art. 1 para. (3) of the Constitution and it is not expressly provided by Art. 16 of the Constitution. The author of the referral also invoked the unconstitutionality of establishing a new body, namely the CPPEAE, arguing that "justice is pursued in the name of law only by courts". The provision of Law no.121 regarding the burden of proof was also challenged, as, according to the author of the referral, it is contrary to the principle of presumption of innocence. The Constitutional Court rejected the referral on all counts. With regard to the notion "any other similar ground", the Court underlined the priority of the international norms on human rights and invoked the provisions of Art. 14 of the ECHR, which also includes an exhaustive and not restricted list of grounds based on which the discrimination is prohibited. The Court also mentioned that Art. 16 of the Constitution supplements the other substantive provisions of the Constitution and shall not be interpreted restrictively as ensuring equality only based on expressly listed grounds. Concerning the constitutionality of the establishment of the CPPEAE, the Court found that the decisions of the latter can be challenged in the courts. The ConstC did not find arguments to prove a causal link between the provisions of Law no. 121 regarding the establishment and powers of the CPPEAE and the alleged violation of Art. 114 of the Constitution. Regarding the burden of proof in cases of discrimination, the Court deemed as inappropriate the challenge of the provisions of Law no. 121 given that they expressly exclude acts leading to criminal liability. It is commendable the judgement of the ConstC to reject the complaint in question, which is obviously ungrounded and vexatious, and revealed a narrow interpretation of the universality of human rights is. At the same time, it is regrettable that the ConstC did not

²⁶ SCJ, the SCJ Plenary Judgement No. 17 from 19 June 2000, p.1.

²⁷ The Constitution from 29 July 1994, in force since 27 August 1994.

²⁸ ConstC, Judgement No. 14 from 8 October 2013.

express its opinion on the argument concerning „sexual orientation” and it did not clarify that this provision does not violate in any way human dignity, on the contrary, it is consistent with the international standards on human rights, as the ECtHR case law constantly shows.

The Constitutional Court examined several cases in the past four years, raising issues related to equality and non-discrimination. Below are briefly presented several judgements by the Constitutional Court regarding the following fields: establishing special regimes for certain employees/freelancers due to their age, gender equality regarding parental leave, establishing retirement allowances and other social guarantees; payment of salaries in the public sector; establishing age limits for access to master's and doctoral studies; conditioning of children's access to educational and recreational facilities by their vaccination. The list of ConstC judgements on issues of equality and non-discrimination is not exhaustive.

- *Establishing special regimes for certain employees/freelancers due to their age*

In its Decision no. 30 of 23 December 2010,²⁹ the ConstC found constitutional the norms³⁰ stipulating cessation of the notary activity upon reaching the age of 65. In its Decision no. 6 of 22 March 2013,³¹ the ConstC found constitutional the provisions according to which employment relationships shall expire when the civil servant reaches the required age for receiving an old-age pension, except for cases provided by the respective law.³² The Court established that different provisions on the cessation of the employment relationship related to the age of civil servants shall not constitute discrimination against the persons working in other fields, because these two groups are not in equal situations. The establishment of a special legal regime for civil servants is justified given the different character of their duties and responsibilities as compared to those employed in other areas. The Court also mentioned that there are more flexible conditions regarding the retirement age for civil servants as stipulated by the Law on State Social Insurance Pension.

In its Decision no. 5 of 25 April 2013,³³ the ConstC found constitutional the provisions of the Labour Code under which the individual employment contract with education professionals and with the staff of scientific and innovative organizations ceases when the old-age pension is awarded.³⁴ The Court determined that the setting of additional requirements on

²⁹ ConstC, Judgement No. 30 for constitutional review of Art. 16 para. (1) letter g) of Law No. 1453-XV from 8 November 2002 on Notary services, with subsequent amendments and completions from 23 December 2010.

³⁰ Art. 16 para. (1) letter g) of Law No. 1453-XV from 8 November 2002 on Notary services.

³¹ ConstC, Judgement No. 6 on exception of unconstitutionality of Art. 62 para. (1) letter d) of Law No. 158 from 4 July 2008 on the Public Service and the Status of Civil Servant, from 22 March 2013.

³² The employment relationship does not cease upon the occurrence of the circumstances set forth in Art. 42 para. (5) of Law No. 158, which stipulates as follows, "When reaching the required age for receiving an old-age pension, the civil servant shall be appointed, upon the decision of a person/body with legal competence to appoint, for limited periods, but which shall not cumulatively exceed 3 years, to the position held, or to an equivalent or lower level position, receiving pension and salary under the law. The appointment shall be made only with the civil servant agreement, if s/he fulfils the requirements stipulated by Art. 27, except for para. (1) letter d)."

³³ ConstC, Judgement No. 5 on the constitutionality of Art. 301 para. (1) letter c) of the Labour Code, from 25 April 2013.

³⁴ Art. 301 par. (1) letter c) of the Labour Code in edition of Law No. 91 from 26 April 2012

the cessation of the employment relationship for education professionals is not discriminatory compared to regulations for other activities, relying mainly on two reasons: peculiarities of the education professionals' activity and the possibility of education professionals who have reached the age of retirement to continue an employment relationship based on contracts with a limited duration. The Court emphasized the complex intellectual activity of education professionals who "have to maintain *professional and personal skills*, intellectual skills and the ability to exercise educational tasks at the highest level, the possibility to communicate and to be dynamic, and to meet greater exigencies associated with changes occurring in educational system."³⁵ The Court mentioned that the margin of appreciation of the state in regulating the scope and the process of education is higher than in other areas and can be achieved through various instruments, given the importance of this area for the development of the society. Due to the specificity of the activity of education personnel and to the margin of appreciation of the state in the educational area, the Court considered that it is justified to establish additional grounds for cessation of the individual employment contract when the old age pension is awarded, the age in this case being considered essential genuine and determining requirement for holding this position.³⁶ Moreover, the Court pointed out that the legislative power provided for the possibility of concluding an individual employment contract for a limited duration with persons retired on grounds of age or tenure.³⁷

- ***Gender equality in relation to parental leave***

Developing a similar reasoning to that used by the ECtHR in the case of *Konstantin Markin v. the Russian Federation*,³⁸ the ConstC in its Decision no. 12 from 1 November 2012,³⁹ found that the provisions of the Law on Status of the Military Personnel which excluded the right of male military personnel to parental childcare leave amount to discrimination on grounds of sex.⁴⁰ As a result, Law no. 162 was amended, by excluding the difference between male and female military personnel with regard to parental childcare leave.⁴¹

(which introduced additional grounds for the cessation of the individual employment contract with education professionals and with the staff of scientific and innovative organizations, and namely letter c): awarding the old age pension.)

³⁵ Para. 62 of the ConstC judgement No. 5, *ibidem*.

³⁶ Para. 60 – 83 of ConstC judgement No. 5, *ibidem*.

³⁷ As provided by Art. 54, 55 and 69 of the Labour Code.

³⁸ ECtHR, *Konstantin Markin v. the Russian Federation*, 22 March 2012.

³⁹ ConstC, Judgement No. 12 on the constitutionality of some provisions of Art. 32 para. (4) letter j) of Law No. 162-XVI from 22 July 2005 on military personnel status, from 1 November 2012.

⁴⁰ The ConstC declared unconstitutional the word "woman" in the compound word "servicewoman" in the following provisions of Law No. 162: Art. 32 para. (4) letter d): "the dismissal from office due to organisational measures - for a period that does not exceed 4 months, and in the case of servicewomen who are on a maternity or childcare leave - for the entire period of this leave.[...]" and Art. 32 para. (4) letter j): "servicewoman being on childcare leave - for the entire period of the leave." The period of childcare leave is included in the overall tenure, in the length of general contributory period, in accordance with the current legislation, but is not included in the calendar tenure of military service. At the expiry of this period the servicewoman has the right to continue the military service; [...]"

⁴¹ Law No. 93 from 29 May 2014 on Amendments and Addenda to some Legal Acts.

- *Awarding retirement allowances and other social guarantees*

In judgment no. 27 from 20 December 2011,⁴² the ConstC found unconstitutional provisions of item 2 of Art. III of Law no. 56 of 9 June 2011 concerning the method of calculation for the general contributory period. These provisions stipulated a gradual increase, for a period of 9 years, of general contributory periods for acquiring the right to pension for all categories of employees, both men and women, from 30 to 35 years. The Court considered disproportionate the establishment of equal contributory periods for men and women, while maintaining a difference of five years for the general retirement age - 62 years for men and 57 years for women.

- *Public sector salaries*

In its Decision no. 24 from 10 September 2013,⁴³ the ConstC found unconstitutional the salary grades established in Appendix no. 2 of Law no. 48/2012 on the System of Salaries of Public Servants Employed in Judicial System (the Secretariat of the ConstC, of the SCM, of the SCJ, of the General Prosecutor's Office, of the courts of appeal and other courts, including military, and territorial and specialised prosecutor's offices). The ConstC ruled that establishing a lower salary level for public servants employed in the judicial system compared to those established for officials of the legislative and executive bodies, for exercising identical or similar functions in terms of complexity, represents a discriminatory treatment, and requested the Government to present a new set of salary grades for public servants employed in the judicial system, which should be recalculated since the date of adoption of the ConstC's decision. As a result, on 17 July 2014 the Parliament approved the amendments to the salary grading for public servants employed in the judicial system, which entered into force on 1 October 2014.

- *Setting age limits for the access to master's and doctoral studies*

In its Decision no. 26 from 19 September 2013,⁴⁴ the CConst examined the constitutionality of normative acts which established the age limit for access to doctoral studies in educational institutions with funding from the state budget providing doctoral programs (35 years)⁴⁵ and for access to master's studies at the Academy of Public Administration under the President of the Republic of Moldova⁴⁶ (45 years)⁴⁷. The ConstC

⁴² ConstC, Judgement No. 27 on constitutionality of certain laws concerning the amendment of conditions on awarding pensions and other social payments for some categories of employees, from 20 December 2011.

⁴³ ConstC, Judgement No. 24 on constitutionality of certain provisions of Appendix No. 2 of Law No. 24 from 22 March 2012 on the System of Salaries of Public Servants, from 10 September 2013.

⁴⁴ ConstC, Judgement No. 26 on the constitutionality of provisions regarding the age limit for enrolment to masters' and doctoral studies, from 19 September 2013.

⁴⁵ According to item 16 of the Regulations on the organization and implementation of doctoral and postdoctoral studies, adopted by Government decision No. 173 from 18 February 2008, for full-time education with budget funding, the age limit for enrolment of candidates to doctoral studies was 35 years.

⁴⁶ The status and the name of the institution were modified by Government Decision No. 225 of 26 March 2014, regarding the Academy of Public Administration, in force since 1 April 2014.

⁴⁷ Pursuant to item 4 of Government Decision no. 962 from 5 August 2003, for masters' degrees programs at the Academy of Public Administration may apply public servants and elected senior position officials listed in the Appendix No.1 of the decision, as a rule, aged up to 45 years."

found that the norm which provided for the enrolment to master's studies in the educational institution concerned of candidates "aged, as a rule up to 45 years ", was disproportionate in relation to the guarantees stipulated by the legal framework for organisations that delegated public servants to master's degree programs to the educational institution concerned and in relation to the commitments undertaken by them. Moreover, the ConstC underlined that the respective norm is a discretionary and unpredictable one that creates a risk of abuse because it contains the phrase "as a rule up to 45 years." The Court concluded that "the state may establish certain conditions for exercising this right in order to benefit from the intellectual capital of the public servant delegated by the public authorities with the aim to increase the professional qualifications, or as far as studies represent an investment in one's future, that should generate measurable and tangible results, nevertheless these conditions have to be in line with the constitutional principles." As regards establishing the age limit of 35 years for enrolment to doctoral studies funded from the state budget, the Court found that this constitutes an unjustified obstacle for the right of access to education and also unequal treatment in relation to other categories of optional studies. Both challenged provisions were found unconstitutional.

The statute of the Academy of Public Administration which entered into force on 1 April 2014 no longer includes norms similar to those challenged. The Regulations on the organization of the superior doctoral studies, the third cycle, which came into force on 26 December 2014,⁴⁸ no longer include a condition concerning the age limit for candidates applying to doctoral programmes. The Regulation provides only the age limit for the PhD research advisor, and namely the possibility to require the registration of new Ph.D. students until s/he reaches the age of 65 years. Having reached this age, the PhD research advisers continue to guide PhD students that are already enrolled until the completion of their doctoral studies, but these PhD research advisers may require the registration of new Ph.D. students only on a basis of joint supervision with another PhD research advisor who has not reached the age of 65 years (item 58 of the Regulations).

- ***Immunization as requirement for children's access to educational and recreational facilities***

In its judgement no.1 from 22 January 2013,⁴⁹ the ConstC examined the constitutionality of the norms that condition children's access to collectives, educational and recreational facilities by their immunization.⁵⁰ The ConstC examined the subject of compulsory immunization of the population from several perspectives, including alleged discrimination of non-vaccinated children compared to those vaccinated, in terms of access to educational

⁴⁸ Regulations on the organization of the superior doctoral studies, the third cycle, adopted by Government Decision No. 1007, from 10 December 2014.

⁴⁹ ConstC, Judgement No.1 from 22 January 2013 on suspending the process for the review of the constitutionality of Art. 52 para. (6) of Law No. 10-XVI from 3 February 2009 on State Surveillance of Public Health.

⁵⁰ Namely Art. 52 para. (6) of Law No. 10 from 3 February 2009 on State Surveillance of Public Health, that stipulates, "Children access to collectives, educational and recreational facilities is conditioned by the fact of their systematic preventive immunization."

institutions. The ConstC suspended the case because of the parity of votes of Court judges and the challenged norm is presumed constitutional.⁵¹ Although the norm is maintained as being constitutional, the division of votes of constitutional judges suggests the complexity of the subject and the need to approach it with due diligence. The judgement and the legislation in force state that only in case of medical contraindications the child may be exempted from compulsory immunization.

To conclude, due to the ECHR role in the national legal system, its standards, including their interpretation in the case law of the ECtHR are directly applicable in the Republic of Moldova. In a similar way the protected grounds of the ECHR are also applied in the Republic of Moldova, even if the list of grounds covered by Art. 16 of the Constitution and by Art. 1 of Law 121 are slightly different from the text of the ECHR. When applying Art. 16 of the Constitution, which according to the interpretation of the ConstC "does not exist independently, but plays an important role while complementing other provisions of the Constitution, as it protects the persons in similar situations from any discrimination in exercising the rights set out in these provisions",⁵² the ConstC usually examines the relevant case law of the ECtHR regarding Art. 14 of the ECHR.

2.3 Special legislation

Besides the constitutional guarantees, the legal framework of the Republic of Moldova comprises special provisions on non-discrimination and ensuring equality.

⁵¹ Three judges found the norm constitutional, grounding their decision on the legitimate aim pursued by the public authorities "to protect human lives and health" by ensuring "community immunity" as one of the most effective ways to prevent diseases. Those three judges mentioned that the requirement for the compulsory immunization of children is proportionate to the purpose set forth, because "In case of failure to comply with the requirement for the compulsory immunization, the legislation allows training within the framework of other forms of education that do not involve contact with collectives such as distance or individual learning" (para. 138). They also concluded that "the differentiation between vaccinated and non-vaccinated children with regard to the access to collectives relies on objective criteria and does not deny equal protection under laws" (para. 143). The legislation allows an exception to the compulsory immunization only in case of medical contraindications (item 10 of Government Decision no. 1192 on the approval of the National Immunization Program for 2011-2015, 23.12.2010.). The legislation does not provide exceptions from immunization for those who are against it due to religious or philosophical reasons. Those three judges did not consider the absence of such provisions unconstitutional, noting that "the state can adopt laws that stipulate compulsory immunization, because the freedom of the individual must sometimes be subordinated to the common well-being and may be subjected to the state control" (para. 159). The other three judges found that the norm according to which the children's access to collectives, educational and recreational facilities is conditioned by their „systematic preventive immunization“ is unjustified and discriminatory in relation to children's access to the compulsory education (para. 161). The respective judges mentioned, inter alia, that the state has various means to promote immunization for children, and by setting restrictions on the access to educational institutions for non-immunized children the state actually escaped from fulfilling its obligations (para. 181 and 182). Moreover, the challenged legal norm does not clearly stipulate whether children can be admitted in case of not having one vaccine or can be admitted only if they administered all compulsory vaccines guaranteed by the state. The legislation does not regulate training of non-immunized children and who is in charge of it.

⁵² ConstC, Judgement from 22 January 2013, para. 140.

In this respect, the main legislative source is Law no. 121 from 25 May 2012 on Ensuring Equality, which prohibits discrimination on the following grounds: race, colour, nationality, ethnic origin, religion or belief, sex, age, disability, opinion, political affiliation or any other similar ground” in the political, economic, social, cultural fields and other fields of life. Also, Art. 7 of Law no. 121 expressly stipulates that „prohibition of discrimination on grounds of sexual orientation shall be enforced in the field of employment and recruitment”. Chapter II of Law no. 121 provides in detail the actions that may be regarded as discrimination in the field of employment and regarding the access to services and goods available for the public. In addition, Law no. 121 establishes an institutional framework to prevent discrimination and ensure equality and regulates the liability for acts of discrimination as well. Under this law, the Council for the Prevention and Elimination of Discrimination and Assurance of Equality (CPPEDAE) was established. Its activity is regulated by Law no. 298 from 21 December 2012.

Discrimination in work relations is expressly prohibited by Art. 7 of the Law no. 121. Art. 8 of the Labour Code prohibits direct and indirect discrimination on grounds related to sex, age, race, skin colour, ethnicity, religion, political affiliation, social origin, residence, incapacity (disability), HIV/AIDS infection, affiliation or trade union activity, as well based on other grounds not related to the professional skills of employees.⁵³ The fact that only these two forms of discrimination have been stipulated, compared with Law no. 121, is caused by timing since in 2003, when the Labour Code was adopted, the concepts of equality and non-discrimination were in an early stage of development. The lists of protected grounds in respect of concluding an individual employment contract and regulation of salary settlement and payment, are closed lists. This means that they do not allow the possibility to be applied to grounds other than those expressly spelled out unlike the provisions of Art. 8 which has an open list due to the wording: „and other grounds irrelevant to the professional skills of employees”. The existence of different lists of protected grounds may create confusions in the enforcement of law and cause the emergence of different protection standards. Because these reasons they need to be correlated. The Labour Code provides obligations both for the employers,⁵⁴ and the employees⁵⁵ with the purpose of observing the principle of equality and non-discrimination in labour relations.

Besides the Labour Code, the legislature also adopted other laws and policy documents, which establish measures to ensure equality in employment.

Law no.102 of 13 March 2003 on Employment of Population and Social Protection of Persons Seeking Employment stipulates the implementation of both, active measures – geared to stimulate employment, professional counselling for adults and professional trainings for persons seeking employment – and passive measures - payment of monetary allowances for limited periods of time⁵⁶. Law no.102 provides that the enforcement of its

⁵³ Art. 8 para. (1) of the Labour Code. Since the approval of the Labour Code in 2003 the protected grounds gradually evolved.

⁵⁴ Art. 10 para. (2) letter f¹)- f⁵) and letter g) of the Labour Code.

⁵⁵ Art. 9 para. (2) letter d¹) and d²) of the Labour Code.

⁵⁶ Art. 4 of Law no.102.

provisions excludes any discrimination on such grounds as race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, income or social origin.⁵⁷

Law no. 279 of 11 February 1999 on Youth stipulates that the state shall elaborate socio-economic and fiscal policies aimed to facilitate the enrolment of the youth seeking employment.⁵⁸ In 2009, the Parliament adopted the National Youth Strategy for 2009-2013.⁵⁹ Even if no reference was made regarding the topic of equality and non-discrimination as priorities among other objectives, the Strategy provided specific objectives for the development of professional skills of youth according to the labour market demands and improvement of employment opportunities for the youth. At the same time, the Strategy does not provide certain facilities for youth employment.

Law no. 5 of 9 February 2006 on Ensuring Equal Opportunities for Women and Men stipulates the right of equal access to employment⁶⁰ and public positions.⁶¹ To ensure the equality between men and women in employment relations, the employers must ensure equality of opportunity and treatment in hiring, professional development, career promotion, evaluation, sanctioning and dismissal, settlement and payment of salary, etc.⁶² In addition, in 2006 the institutional framework stipulated by Law no.5 was developed through the establishment of the Government Commission for Equality between Men and Women⁶³ and the adoption of the Regulations for its operation.⁶⁴ In 2009, the National Program on Ensuring Gender Equality for 2010-2015⁶⁵ was adopted. Among other objectives, the program provides for ensuring the promotion of gender equality in the field of employment. To achieve this aim the program provides for the implementation of the following objectives: to increase the rate of employment of women and reduce the gender-based wage gap, to eliminate all forms of gender-based discrimination in employment and to promote economic empowerment of women in rural areas.

Law no. 60 from 30 March 2012 on the Social Inclusion of Persons with Disabilities guarantees the right to work for persons with disabilities.⁶⁶ The employers are obliged to provide reasonable accommodation at the workplace, to design and adapt the workplace in order to ensure accessibility for these persons, to apply new technologies, tools and equipment that will help the persons with disabilities to obtain and keep their job, and finally, to organize trainings for them.⁶⁷ Law no.60 regulates the employment of persons

⁵⁷ Art. 8 of Law no.102.

⁵⁸ Art. 7 of Law no. 279.

⁵⁹ Law no. 25 from 3 February 2009 on the approval of National Youth Strategy for the years 2009-2013.

⁶⁰ Art. 9 of Law no. 5.

⁶¹ Art. 6 of Law no. 5.

⁶² Art. 10 , para. (3) of Law no. 5.

⁶³ Government Decision no. 350 from 7 April 2006 on establishing of the Government Commission for Equality between Men and Women

⁶⁴ Government Decision no. 895 from 7 August 2006 on the approval of the Regulations regarding the Government Commission for Equality between Men and Women.

⁶⁵ Government Decision no. 933 from 31 December 2009 on the approval of the National Program on Ensuring Gender Equality for the years 2010-2015.

⁶⁶ Art. 33 of Law no. 60.

⁶⁷ Art. 33 para. (7) of Law no. 60.

with disabilities without any discrimination.⁶⁸ The employers who have 20 employees and more, are obliged to create work places and employ persons with disabilities in proportion of at least 5% from the overall number of employees. Employers also must inform the territorial agency of employment about the positions created/designed for persons with disabilities in a 5 days term from their creation, as well as about the employment of persons with disabilities in 3 days from the date of the employment.⁶⁹ In addition the law stipulates the possibility of persons with disabilities to fulfil their work at home⁷⁰ and in specialised enterprises which are exempted from the income tax and the VAT.⁷¹

In 2011, the Government approved the Action Plan for the Support of the Roma in the Republic of Moldova for 2011-2015.⁷² The Plan provides for the implementation of actions with the view to significantly increase the enrolment of Roma in labour relations and improve their economic welfare.

Discrimination in the field of education is prohibited both by Law no. 121,⁷³ and other legal acts regulating this area. The Code of Education stipulates that education is grounded on the principle of ensuring equality and social inclusion.⁷⁴ The teaching staff has the obligation not to allow discrimination in any form.⁷⁵ Chapter VI, title III of the Code of Education regulates education of children and pupils with special educational needs and inclusive education. The Code of Education also stipulates that the education for children and pupils with special educational needs is free of charge, it is organized in general education institutions, including special education institutions or through home-schooling.⁷⁶ Also, the inclusion of children and pupils with special educational needs is ensured through an individual approach, establishing the form of inclusion, examination and/or complex re-examination of the child or pupil with special educational needs, performed under a methodology approved by the Ministry of Education.⁷⁷

Law no.5 from 9 February 2006 on Ensuring Equal Opportunities for Women and Men stipulates that the access to education must be equal irrespective of gender.⁷⁸ The National Program on Ensuring Gender Equality for 2010-2015 sets up in objective 6 „Education” measures mainstreaming the gender equality dimension in the education policies and the education process, as well as decreasing the degree of feminisation of the education system in the Republic of Moldova.

Law no. 60 of 30 March 2012 on the Social Inclusion of Persons with Disabilities guarantees the right to education, training and professional training of persons with

⁶⁸ Art. 34 of Law no. 60.

⁶⁹ Art. 33 para. (4) and (5) of Law no. 60.

⁷⁰ Art. 35 of Law no. 60.

⁷¹ Art. 36 of Law no. 60.

⁷² Government Decision no. 494 from 8 August 2011 on the approval of the Action Plan for the Support of the Roma in the Republic of Moldova for the years 2011-2015.

⁷³ Art. 9 of Law no. 121.

⁷⁴ Art. 7, item g) and h) of the Education Code, Law no. 152 from 17 July 2014.

⁷⁵ Art. 135 para. (1), letter e) of the Education Code.

⁷⁶ Art. 133 para. (1) of the Education Code.

⁷⁷ Art. 133 para. (3) of the Education Code.

⁷⁸ Art. 13 of Law no. 5.

disabilities. The Action Plan for the Support of the Roma in the Republic of Moldova for 2011-2015 has as an objective the establishment of an inclusive and efficient education system based on principles of equity, non-discrimination and respect for diversity, which shall contribute to the integration of Roma in the society.

Discrimination regarding the access to goods and services available to the public is prohibited by Art. 8 of Law no. 121, including access to services provided by public authorities, medical assistance and other healthcare services, social protection services, banking and finance services, transportation, cultural and recreational services, sale or lease of movable or immovable property, and other services and goods available to the public.

With regard to **services provided by public authorities**, there is no express obligation of public authorities to promote equality in the exercise of its powers, specifically in the following acts: Law no. 158 of 4 July 2008 on the Public Service and the Status of Civil Servant, Law no. 199 of 16 July 2010 on the Status of Persons Holding Senior State Functions, Law no. 80 of 7 May 2010 on the Status of Personnel from the Cabinet of Persons Holding Senior State Functions, Law no. 98 of 4 May 2012 on Specialised Central Public Administration, and Law no. 436 of 28 December 2006 on Local Public Administration. It is necessary to include such a provision in these legal acts.

Also, there is no obligation of public authorities to ensure that third parties, with which the government has concluded agreements and/or provided loans, grants and other benefits – observe the principle of non-discrimination (for instance, Law no. 96 of 13 April 2007 on Public Procurement). As a rule, public funds should not be used unless there is an assessment of the impact upon vulnerable groups. Law no. 5 of 9 February 2006 on Ensuring Equal Opportunities for Women and Men stipulates the obligation of the Central Electoral Commission, electoral circumscription councils and offices to observe the principle of equality between men and women in the electoral field.⁷⁹ Another measure promoted as a draft law is related to ensuring the 40% quota of minimum representation for women in the Parliament and the Government. This draft law⁸⁰ was adopted by the Parliament in the first reading on 17 July 2014.

Criminal prosecution and judicial proceedings shall be conducted under the principle of equality. The Criminal Code⁸¹ provides that the persons who have committed offences are equal before law and shall be held liable irrespective of their sex, race, colour, language, religion, political or any other opinion, national or social origin, membership to a national minority, wealth, birth or other grounds.⁸² The equality before the law, prosecution authorities and courts is also stipulated by the Criminal Procedure Code and the list of grounds protected is the same with the one provided by the Criminal Code.⁸³ The Misdemeanours Code⁸⁴ stipulates that the persons who have committed misdemeanours are equal before the law and

⁷⁹ Art. 7 para. (1) of Law no. 5.

⁸⁰ Draft law no. 180 on amendment and supplement of some legislative acts.

⁸¹ Criminal Code of the Republic of Moldova, Law no. 985 from 18 April 2002.

⁸² Art. 5, para. (1) of the Criminal Code.

⁸³ Art. 9, para. (1) of the Code of Penal Procedure of the Republic of Moldova, Law no. 122 from 14 March 2003.

⁸⁴ Misdemeanours Code of the Republic of Moldova, Law no. 218 from 24 October 2008.

public authorities, and are subjects of misdemeanour liability irrespective of race, nationality, language, religion, sex, political affiliation, income, social origin or other grounds.⁸⁵ The Civil Procedure Code⁸⁶ included the rule on the administration of justice in civil cases based on the principle of equality for all persons, by providing an open list of protected grounds, including the type of property and form of legal organization, subordination, legal address and other circumstances.⁸⁷ Law no. 514 of 6 July 1995 on the Organisation of the Judiciary limits the application of the principle of equality before the law and the judicial authority only to the citizens of the Republic of Moldova, by hindering foreign citizens and stateless persons.⁸⁸ This provision requires a correlation with Art. 1 of Law no.121, which establishes the applicability of the law for all persons living on the territory of the Republic of Moldova. Law no. 320 of 27 December 2012 on the Activity of Police and the Status of Policeman, stipulates that the activity of police shall be carried out under the principle of non-discrimination.⁸⁹

With regard to **healthcare services**, neither Law no. 411 of 28 March 1995 on Healthcare, nor Law no. 264 of 27 October 2005 on Medical Professions and Law no. 263 of 27 October 2005 on Rights and Responsibilities of the Patient do not provide for the principle of equality and non-discrimination. The Law on the Rights and Responsibilities of the Patient provides that the patient has the right to respectful and human attitude on behalf of the healthcare service provider, regardless of age, sex, ethnic affiliation, socio-economic status, political and religious beliefs.⁹⁰ It is necessary to introduce the obligation of medical service providers and doctors to exercise their duties with the observance of the principle of equality and non-discrimination. Law no. 5 of 9 February 2006 on Ensuring Equal Opportunities for Women and Men prohibits any form of discrimination based on grounds of sex with regard to women and men access to all levels of medical assistance and to disease prevention programs and health promoting.⁹¹

Recommendations:

- Harmonisation of the list of grounds protected against discrimination in Art. 8, 47, 128 of the Labour Code with the protected grounds of Law no. 121 and Art. 14, and Additional Protocol 12 of the ECHR to prevent any confusions arising from the legislative gap and a differentiated protection regime;
- Introduction into legislation of the express obligation for public authorities to promote equality in the exercise of their duties (for example, Law no. 158 of 4 July 2008 on the Public Service and the Status of Civil Servant, Law no. 199 of 16 July 2010 on the Status of Persons Holding Senior State Functions, Law no. 80 of 7 May

⁸⁵ Art. 6, para. (1) of the Misdemeanours Code.

⁸⁶ Code of Civil Procedure of the Republic of Moldova, Law no. 225 from 30 May 2003.

⁸⁷ Art. 22, para. (1) of the Code of Civil Procedure.

⁸⁸ Art. 8 of Law no. 514.

⁸⁹ Art. 4 para. (1) of Law no. 320.

⁹⁰ Art. 5, letter b) of Law no. 263.

⁹¹ Art. 14 of Law no. 5.

- 2010 on the Status of Personnel from the Cabinet of Persons Holding Senior State Functions, Law no. 98 of 4 May 2012 on Specialised Central Public Administration, and Law no. 436 of 28 December 2006 on Local Public Administration);
- Introduction into legislation of the obligation for public authorities to ensure that third parties who are given contracts, loans, grants and other benefits, observe the principle of non-discrimination (for example, Law no. 96 of 13 April 2007 on Public Procurement);
 - Adoption in the second reading of the draft law no.180 which establishes the minimum representation quota of 40% for women in the Parliament and the Government;
 - Correlation of the list of beneficiaries of protection under the equality principle before the law and judiciary authority under Art. 8 of Law no. 514 of 6 July 1995 on the Organisation of the Judiciary with Law no. 121 and Art.14, and Additional Protocol 12 of the ECHR, for all persons on the territory of the Republic of Moldova.
 - Introduction of the obligation for medical service providers and doctors to exercise their duties with the observance of equality and non-discrimination principle (for example, Law no. 411 of 28 March 1995 on Healthcare, Law no. 264 of 27 October 2005 on the Medical Professions, and Law no. 263 of 27 October 2005 on Rights and Responsibilities of Patients).

2.4 Specific procedural issues in the field of discrimination

Given the nature of discrimination, the need to protect the victim, the difficulty to obtain and administer evidence in discrimination cases, specific procedural guarantees in the European non-discrimination law have been developed and adopted. These procedural guarantees are minimum standards and were also spelled out in the national legislation as rules of special nature complementing the procedural rules in force. We can not speak of real protection against discrimination as long as the procedural aspects of proving the discrimination cases are not appropriate for the specificities of discrimination. These elements specific for non-discrimination law refer to the burden of proof and the rules of evidence applicable to cases of discrimination, victimization as a way to protect the victim or witnesses sanctioned due to their involvement in a case of discrimination and the legal standing recognized to NGOs or trade unions.

2.4.1 Burden of proof

Different from the general rule in civil procedure under which the complainant must prove his allegations, *onus probandi incumbit eius qui dicit no eius qui negat*, the burden of proof is shared between the complainant and the respondent in non-discrimination law. Both the Directives on equality⁹² and the case law of the CJEU⁹³ and of the ECtHR⁹⁴

⁹² Art. 8 of Directive 43/2000/EC, Art.10 of Directive 78/2000/EC, Art. 19 of Directive 54/2006/EC.

⁹³ CJEU, *Case c-54/07 Centrum voor gelijkheid van kassen en voor racismebestrijding*, 10 July 2008. Similar to *C-81/12, ACCEPT v. NCCD*, 25 April 2013.

⁹⁴ ECtHR, *D.H. v. the Czech Republic* (MC), 13 November 2007, para.178 explicitly states the respondent's obligation resulting from the implementation of a presumption of discrimination by the applicant under the principle of reversing the burden of proof.

or that of the European Committee of Social Rights⁹⁵ provide details for the content of this concept: the petitioner must provide sufficient evidence to create the presumption of the discriminatory treatment and only after that presumption has been established, the alleged perpetrator will have to rebut it. The alleged perpetrator can rebut the presumption of discrimination established by the applicant either by proving that the applicant is not in a situation similar to that of the comparator used or by proving that the differential treatment is caused not by the protected grounds, but it is based on other objective differences thus being objectively justified, or by showing that the alleged right does not exist.

It is also important to note that the existence of a bias or intention to discriminate do not have to be proved in non-discrimination law, and that the victims' consent to be subject to discrimination can not be invoked as a defence.⁹⁶

When filing the complaint against discrimination the petitioner should provide evidence concerning the right infringed, the unfavourable treatment (including in terms of the comparator where appropriate), as well as the protected ground invoked which is in a causal relationship with the differential treatment. The respondent shall argue if s/he disagrees to the petitioner's claims with respect to each of the three elements, and provide information regarding the justification of the differential or similar treatment, depending on the case. The respondent's refusal to rebut the presumption created by the complainant results in confirming this presumption.

Law no.121 includes provisions compliant with the principle of sharing the burden of proof set forth in the Directives, both with respect to the proceedings before the CPPEDAE and the proceedings before the courts. The following norms are relevant to the CPPEDAE: Art. 13 para. (2) which provides that "a complaint must contain a description of the violation of the person's right, the moment when the breach occurred, the facts and any evidence supporting the complaint, the name and address of the complainant" and Art. 15. para. (1) which provides that "the burden of proving that the act in question does not constitute discrimination lies with those persons who are alleged to have committed the discriminatory act". Also Art. 15 para. (2) of Law no. 121 provides the legal persons' and the natural persons' obligation to submit information requested by the CPPEDAE and Art. 15 par. (3) states that "The failure to submit the information requested by the Council is sanctioned by the legislation in force and interpreted by the Council to the detriment of the person who does not submit the required data."

The courts must also observe the principle of sharing the burden of proof in the misdemeanour and civil proceedings under Art. 19 of Law no. 121 as *lex specialis*, which provides the following: "(1) A person filing a case to the court should present facts allowing presumption of an act of discrimination. (2) The burden of proving that the facts do not constitute discrimination lies with the respondent, except for the acts that entail criminal liability."

2.4.2 The rules of evidence specific for discrimination

The judicial bodies or the responsible national bodies carry out the assessment of the facts from which it may be inferred whether there was a form of discrimination by any means,

⁹⁵ European Committee of Social Rights, *Mental Disability Advocacy Centre v. Bulgaria*, 3 June 2008.

⁹⁶ ECtHR, *D.H. v. the Czech Republic* (MC), 13 November 2007.

including statistical data, audio-video recordings or based on situation testing. This more permissive approach of the framework of evidence in cases of discrimination is explicitly mentioned in both the EU directives and the case law of the ECtHR (for example in the case of *D.H and others v. the Czech Republic*) and it is justified given the difficulty triggered by the vulnerability of the victim and the specific context in which discrimination occurs in most cases.

Law no.121 has no supplementary provisions for the rules of evidence in the cases of discrimination. The Civil and Criminal Procedure Codes and the Misdemeanours Code regulate the rules of evidence in those proceedings. Given the direct applicability of the ECHR and the ECtHR case law in the Republic of Moldova, a more permissive approach of the framework of proof in the cases of discrimination should be accepted both by the CPPEDAE and the courts. The CPPEDAE has already demonstrated openness to accepting various types of evidence, including investigating circumstances in the field, although carrying out the investigation activity should be conducted under clear rules in compliance with specific quasi-judicial safeguards.⁹⁷

2.4.3 *Victimization*

The European directives developed the concept of victimization to ensure the effective protection against discrimination, a concept designed to protect the persons – the victims or the witnesses - from any unfavourable treatment or unfavourable consequence as a reaction to a complaint or proceedings which have the aim to observe the principle of equal treatment. The concept of protection against victimization as a forbidden act carried out in connection with a procedure following a complaint against discrimination does not require the existence of a ground but only a punitive treatment, which is retaliatory as a result of initiating a complaint or giving evidence as part of a discrimination case.

Law no. 121 provides in Art. 2 the following definition of victimization: "any action or inaction leading to the adverse consequences as a result of filing a complaint or initiating proceedings in the court in order to ensure the application of the provisions of this law or in order to provide some information, including some testimonies, which is connected to the complaint or the proceedings initiated by another person". This definition implies that the victimization can be established only as a result of an unjustified differential treatment applied to a person who filed a discrimination complaint before a public authority or initiated proceedings in the court, or in the case of providing information or giving evidence by the person in a case of discrimination regarding another person. The definition provided by the law is in line with the European Directives. So far there is limited application in practice of this provision by the courts to draw some conclusions about the correctness of its application.⁹⁸ The CPPEDAE found victimization in several cases⁹⁹.

⁹⁷ CPPEDAE, Decision 047/14 from 11 April 2014, as an example of verification of the circumstances in the field.

⁹⁸ On 27 March 2015 the Buiucani District Court dismissed the lawsuit in the case of Nina Negru v. the National Library of Moldova, the applicant claimed to have been victimized by the employer after filing complaints of harassment. The case is pending before the Chisinau Court of Appeal.

⁹⁹ CPPEDAE, Decision no. 004/13 from 22 November 2013; Decision 047/14 from 11 April

2.4.4 Legal standing of NGOs and trade unions

To counteract the risk of victims not identifying cases of discrimination or not filing complaints due to fear of retaliation, the Directives established an obligation that the Member States should recognize a special role for associations, organisations, trade unions or other legal entities who have a legitimate interest in promoting equality and in combating discrimination in accordance with the grounds set forth by the national legislation. This mandate consists in the possibility to initiate legal and/or administrative proceedings, either on behalf of the victim based on a power of attorney or in support of the victim provided as an intervener or *amicus curiae*. This latter support can be granted in *nomen proprio* without a power of attorney from the individual victims, when the discrimination has as target a group or a community (*actio popularis*).

Under Art. 13 para. (1) of Law no. 121, the CPPEDAE examines the cases *ex officio* or at the request of the interested persons, including the requests of trade unions and associations that work in the field of promotion and protection of human rights. Considering that there is no requirement for a complaint to be filed for the protection of rights of a certain person, we can conclude that the complaint may also be filed in *nomen proprio* when the discrimination has as a target a group or community. The CPPEDAE accepted public associations as complainants, as for example in the case no. 082/14 initiated by the Association for the Maternity Protection and Parental Rights "MAMI",¹⁰⁰ or in the case 129/14 initiated upon the complaint of the "Islamic League of the Republic of Moldova."¹⁰¹ The CPPEDAE has another positive practice, and namely to accept and even to seek intervention / *amicus curiae* from public associations specialised in a particular field.

Unlike the CPPEDAE, it seems that the trade unions and the associations may submit complaints to the courts only on behalf of specific persons. This conclusion can be inferred from Art. 18 par. (2) of Law no. 121, which states that "The trade unions and public associations in the field of promotion and protection of the human rights may also initiate proceedings before the courts to protect those who consider themselves to be victims of discrimination". The Civil Procedure Code does not provide the possibility of associations to submit a court complaint on their behalf without a power of attorney from the individual victims / *actio popularis*. The public associations may participate as accessory interveners under Art. 67 of the Civil Procedure Code. **It is recommended for both Law no. 121 and the Civil Procedure Code to be modified to recognise the legal standing of organizations active in the field of human rights in the cases of discrimination which have as the subject a group or a community, without imposing the condition of the existence of a power of attorney from an individual victim.**

2014; Decision 056/14 from 15 May 2014; Decision no. 125/14 from 28 July 2014; Decision no. 158/14 from 11 December 2014

¹⁰⁰ CPPEDAE, Decision no. 071/14 from 26 May 2014.

¹⁰¹ CPPEDAE, Decision no. 124.14 from 22 September 2014.

III. Grounds protected against discrimination

Law no. 121 provides for the following protected grounds against discrimination: race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation or any other similar ground and sexual orientation mentioned separately in Art.7. Each of these grounds will be examined below. Similarly to Art.14 of the ECHR and the Additional Protocol 12, Law no. 121 includes an open list of protected grounds. The legislation of the Republic of Moldova does not include for the time being, specific definitions or provisions for each protected ground. In the absence of express provisions, the grounds must be interpreted under international acts applicable for the Republic of Moldova.

3.1 Race or ethnic origin

The ground of „**race**” can be understood based on the General Policy Recommendation no. 7 of the European Commission against Racism and Intolerance (ECRI), which provides that "racism means believing that a reason such as "race", colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons or the idea of superiority of a person or group of persons".

As for the term "race", the position of the ECRI is the following: "Since all human beings belong to the same species, the ECRI rejects theories based on the existence of different "races". However, this recommendation (recommendation no. 7) of the ECRI uses this term to ensure that all persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided by law."¹⁰²

In *D.H. and others v. the Czech Republic*,¹⁰³ the ECtHR established several key principles regarding racial discrimination. The Court found that discrimination against persons on grounds of ethnicity is a form of racial discrimination. Racial discrimination is a particularly offensive form and, from the point of view of the dangerous consequences, it requires special vigilance and a determined response from the authorities. Thus authorities must use all available means to combat racism, thereby reinforcing democracy where diversity should not be perceived as a threat but as a source of wealth. The Court also highlighted that a

¹⁰² P. 1 letter a) General Policy Recommendation no.7 of the European Commission against Racism and Intolerance, CRI (2003) 8 adopted on 13 December 2002.

¹⁰³ ECtHR, *DH and others v. the Czech Republic* (MC) from 13 November 2007, especially para. 176 and 181.

difference in treatment based solely or, to a decisive extent, on the grounds of ethnicity can not be objectively justified in a contemporary democratic society built on the principles of pluralism and respect for cultural difference (para 176). The Court also found that the vulnerable situation of Roma implies attention to their needs and their different lifestyle both regarding the relevant regulations and when making decisions in this regard (para 181).

In *Stoica v. Romania*,¹⁰⁴ the ECtHR reiterated that racial violence particularly affects human dignity and due to its dangerous consequences, requires more attention and a decisive response from the authorities (para 117). Thus, where authorities are investigating violent incidents of alleged racial motivation, the states have the additional duty to undertake a reasonable effort to highlight any racist motivation and to establish whether ethnic hatred or prejudice did or did not play a role in the course of events. Treating racially motivated violence like violence that has no such motivation means that it is overlooked the specific nature of those acts that are particularly destructive in relation to fundamental rights. Failure to make the necessary distinction between the ways in which essentially different situations are handled may constitute in itself an unjustified treatment contrary to Art. 14 of the Convention. The obligation of states to investigate racial motivation is an obligation that involves undertaking every effort and it is not an absolute one, the states must take all reasonable steps under the circumstances of cases (para 119).

In 2013 - 2014 the CPPEDAE examined several cases where discrimination based on "race" was found. For example, Decision no. 139/14 from 6 October 2014 by the CPPEDAE found racial discrimination in the field of access to public services. The act consisted in stopping and checking two persons from Nigeria by the Border Police of the Republic of Moldova because of suspicions about the validity of their Schengen visas and also the refusal of the company "Austrian Airlines" to wait for these two passengers and board them on the plane. The CPPEDAE found that "the Border Police of the Republic of Moldova incited to discrimination of the petitioners on grounds of their race because they avoided speaking directly to the issuing authority of Schengen visas to ensure the clarification of the suspicions as quickly as possible and informed the airline company about their suspicions, being aware that the petitioners, due to their race, most likely will be treated with suspicion by the Austrian authorities as well".

In another case, the CPPEDAE found incitement to discrimination in the form of a racist speech made by a leader of a political party. At the press conference from 15 September 2014 Mr. Usatâi, referring to the leader of another political party, uttered the following words: "this dirty and stinky Gypsy [...] will go where he belongs!"; "[...] it is known that Filat is half Gypsy, only Filat is a finished Gypsy." By Decision no.159/14 of 13 October 2014 the CPPEDAE found that the statements of the leader of the political party "PaRus" constitute incitement to discrimination based on the "ground of race."

The "colour" ground refers to skin colour and usually falls under race. For example, Decision no. 180/14 of 16 December 2014, by the CPPEDAE found "incitement to discrimination in the form of racism"¹⁰⁵ in the case of launching by the fast food Burger

¹⁰⁴ ECtHR, *Stoica v. Romania*, from 4 March 2008, in particular para. 117 and 119.

¹⁰⁵ Racism is not a form of discrimination itself, but may be the motivation behind some forms of discrimination.

Beef of the burger named O.N.O.J.E. with black bread (this being also the name of a citizen of the Republic of Moldova, who has different skin colour, John Onoje) and promoting of racist message associated with this product. The Council mentioned that "respondents have launched and promoted this product, and comments launched in public about John Onoje leave no doubt that this happened in order to humiliate the person because of his skin colour, showing their own ethnic superiority."

The ground of „**ethnic origin**” is to be interpreted as related to the concept "race" and "nationality/citizenship”, the term nationality being synonym with the term citizenship (see below the analysis of the nationality ground). In the UN Convention on the Elimination of All Forms of Racial Discrimination, the definition of racial discrimination includes ethnicity, including previous nationality/citizenship of the person, lost or given through naturalization, or it could refer to membership to a "nation" within a state.¹⁰⁶ According to the UN Committee on the Elimination of Racial Discrimination, identifying persons as members of an ethnic or racial group should be based on personal identification of the person concerned, if there is no justification to the contrary.¹⁰⁷

In the case *Timishev v. the Russian Federation*,¹⁰⁸ the plaintiff of Chechen origin was prohibited to cross the border checkpoint because of an internal act prohibiting access for persons of Chechen origin. The ECtHR found the following: „Ethnicity and race are related concepts that overlap. While the concept of race is based on the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial features, ethnicity has its origins in the idea of social groups marked by nationality/common citizenship, tribal affiliation, faith/religion, shared language, or cultural and traditional origins or the past.”The ECtHR is very strict when examining cases of discrimination based on race or ethnic origin of the person, noting that "no difference in treatment based solely or to a decisive extent on the person's ethnic origin can not be objectively justified in a contemporary democratic society based on principles of pluralism and respect for different cultures".¹⁰⁹

In 2013-2014 the CPPEAE found no discrimination based on ethnic origin in any of the examined cases. In Decision no. 003/13 of 14 March 2014, the CPPEAE examined a complaint concerning discrimination in employment and harassment on the grounds of ethnicity. Although the discrimination was not established, it is important to examine the decision by the CPPEAE in the context of the State's obligation regarding collection of segregated data with their anonymization in different areas where discrimination is prohibited. Collecting relevant data for equality policies is instrumental precisely to prevent indirect discrimination and to make possible the development of public policies or adopting

¹⁰⁶Handbook on the European non-discrimination law, the European Union Agency for Fundamental Rights and the Council of Europe, 2010, p. 105.

¹⁰⁷General Recommendation VIII concerning the interpretation and application of Art. 1, para. 1 and 4 of the Convention (United Nations Convention on the Elimination of All Forms of Racial Discrimination), adopted at Session 38, 1990.

¹⁰⁸ECtHR *Timishev v. Russia* from 13 December 2005, especially para. 55.

¹⁰⁹ECtHR *Sejdic and Finci v. Bosnia and Herzegovina*, from 22 December, 2009, para. 44.

and monitoring special measures. In Decision no. 003/14, the CPPEDAE recommended to the State Registration Chamber not to fill in items 4 and 5 of the personal file (a standard form no. DP-1) when hiring persons, especially the information about nationality, ethnicity, birthplace once these are not essential professional requirements. Also the CPPEDAE recommended the National Bureau of Statistics of the Republic of Moldova to revise the standard form no. DP-1 in order to exclude items 4 and 5 from the personal file of the employee, and namely the information about nationality, ethnicity, birthplace, given they are not essential professional requirements, noting that "the collection of such data for any scientific studies and statistics can be made by other means being de-personalised". The CPPEDAE recommendations are important to ensure proper collection of segregated data on different criteria by public authorities. However, the recommendations should be explained in more detail to prevent their misinterpretation and the cessation of the practice of collecting anonymous data. Indeed, data on ethnicity, nationality and place of birth should not be included in the employee's personal file, to which certain persons have access. At the same time, it is important that such data are collected in an anonymised manner. Only in such a way the analysis of the diversity at workplace or the need for special measures is possible. Accordingly, the solution would be not to exclude completely the collecting of such data, but to create databases or depersonalised files in every institution, organization, enterprise, with the possibility of regular updating of these data and presenting them to the National Bureau of Statistics, also in a depersonalised manner. **We recommend that the CPPEDAE, in cooperation with all ministries and the National Centre for Protection of Personal Data, elaborate a common instruction or the instructions for each field on how to collect segregated data that are important in determining and analysing the phenomenon of discrimination in the Republic of Moldova.**

3.2 Nationality

The ground of "nationality" should be interpreted under the European Convention on Nationality,¹¹⁰ as well as the Framework Convention for the Protection of National Minorities,¹¹¹ the term nationality shall be synonymous with that of citizenship.¹¹² Art. 2 (a) of the European Convention on Nationality defines nationality as "legal link between a person and a State, not indicating the ethnic origin of the former". Thus, the term "nationality" in the context of Law no. 121 is synonymous with the term "citizenship" and

¹¹⁰The European Convention on Nationality from 6 November 1997 in force for the Republic of Moldova from 1 March 2000.

¹¹¹The Framework Convention for the Protection of National Minorities from 1 February 1995 in force for the Republic of Moldova since 1 February 1998.

¹¹²English term 'nationality' creates a confusion, being translated into Romanian as "ethnic origin", but meaning citizenship. If we interpret the term as referring to ethnic groups, it overlaps the concept of racial discrimination. There are theories that consider that the term 'nationality' refers to the ethnic communities that have a "mother country", for example Hungarians in relation to Hungary, Russians in relation to Russia. Within the frame of this concept, Roma or Gagauz are not a 'nationality', as there is no national Gagauz or Roma state, but they represent an ethnic groups.

the term "national minority". In cases of differential treatment of citizens and non-citizens, not only the existence of citizenship is important but also the person's de facto links with the state. In cases that raise issues of differential treatment of non-citizens in comparison to citizens, the ECtHR will not consider differential treatment based on citizenship as justified, if de facto links of a person to a State are tight, especially due to the period s/he lived in that state and the links established through paying taxes.

For example, in the case of *Andrejeva v. Latvia*,¹¹³ the complainant was a citizen of the former USSR with permanent residence in Latvia. The ECtHR considered discriminatory the provision of the national legislation according to which the plaintiff's pension was calculated solely on the basis of the period of time worked after the independence of Latvia, although the complainant worked in the same position before the declaration of independence. Different from the situation of the plaintiff, for Latvian citizens, the pension was calculated for the entire period of work, including the period prior to the declaration of independence. The ECtHR considered that the complainant was in similar situation to Latvian citizens, since she had permanent resident status under the national law and she paid taxes similarly to the citizens. Also, the ECtHR mentioned the need for "very solid grounds" to justify differential treatment based on nationality/citizenship.¹¹⁴ Other cases in which the ECtHR mentioned a violation of the Convention based on the ground of citizenship are *Gaygusuz v. Austria* (16 September 1996) or *Koua Poirrez v. France* (30 September 2003).

In Decision no. 035/14 from 22 January 2014, the CPPEDAE mentioned severe continuous discrimination based on religion, sexual orientation and nationality grounds in access to web design services. In particular, "Autonavigator" LLC, the web page www.whitespace.md placed on its website the following information: „*We do discuss with producers or distributors of alcoholic and tobacco products, religious organizations, gay, "Al Qaeda" and Stas Mihailov fans*". Petitioners complained of discrimination on grounds of homosexual orientation in access to the services of web design provided by the respondent. The Council, analysing the information on the website of the respondent, found that the respondent excludes potential customers based on two additional grounds: religion and nationality. The finding by the Council was based on the redrafted text of the company, indicating that it does not offer services to organizations from several fields, including "religious organizations and organizations that protect interests of sexual and national minorities".

3.3 Language

As regards the ground "language", national legislation and international treaties do not provide a clear definition of this term. It shall be interpreted in the light of Art. 6 para. (3) of the ECHR, that stipulates the right of the accused person to be informed, within the shortest possible time frame, in a "language that s/he understands" or to be assisted by an interpreter if s/he does not understand or speak the language used in courts.

¹¹³ECtHR, *Andrejeva v. Latvia*, 18 February 2009.

¹¹⁴Handbook on the European non-discrimination law, the European Union Agency for Fundamental Rights and the Council of Europe, 2010, p. 109-110.

Art. 13 of the Constitution stipulates in para. 1 that "the state language in the Republic of Moldova is Moldovan language, operating based on the Latin alphabet". Para. 2 states that "the State recognizes and protects the right to preserve, develop and use the Russian language and other languages spoken in the country." Functioning of the languages on the territory of the Republic of Moldova is still regulated by Law no. 3465 on the functioning of languages in the Moldovan SSR as of 1 September 1989.

The CPPEAE examined several cases that involve the ground of "language" in different fields. In its Decision 007/13 from 30 November 2013, the CPPEAE found a language-based discrimination as regards the access to public information and access to social services provided by the Mayor's office of Bălți and Municipal Fund for Social Support of Population of Bălți, caused by the publication of the information only in Russian. Even before the delivering of the decision, the relevant authorities have initiated activities and have committed themselves to correct in the future the shortcomings regarding the language in which the public information is published.

In several decisions the CPPEAE found discrimination on the ground of "language" in relation to access to justice. For instance, in Decision 009/13 of 2 December 2012, which is the first decision in this field, the application for summons, which was written in Russian was returned to claimants, and they were informed about the possibility to submit the application when translated into the State language. In this case the CPPEAE found discrimination given the following major considerations: First, the current legislation grants a special status to the Russian language in the Republic of Moldova, being a "language of interethnic communication." Second, the judicial practice is not uniform in respect to this issue, as certain courts accept applications written in Russian, while others do not. The decision thereof raises many questions about the fairness of the applicability of the ground and qualification for the refusal to accept the application for summons in Russian. The detailed analysis of these decisions is provided in *item 7.5.2*.

The legal framework on the functioning of languages in the Republic of Moldova is outdated. The European Charter for Regional or Minority Languages has not been ratified until present.¹¹⁵ **We recommend the authorities of the Republic of Moldova to prioritize the analysis of the actions that should be undertaken until the ratification as soon as possible and ratify the European Charter for Regional or Minority Languages as soon as possible.**

3.4 Religion or belief

Freedom of religion and conscience is a right guaranteed by the majority of international conventions for the protection of human rights.¹¹⁶ The most relevant for the Republic of

¹¹⁵The European Charter for Regional or Minority Languages from 5 November 1992, in force since 1 March, signed by the Government of the Republic of Moldova on 11 July 2002, not ratified until July 2015.

¹¹⁶For example: International Convention on Civil and Political Rights (Art. 2, 18-20, 26 and 27); International Convention on Economic, Social and Cultural Rights (Art. 13); Convention on the Elimination of All Forms of Discrimination against Women (Art. 2); International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5); Convention on the Rights of the Child (Art. 2, 14 and 30) etc.

Moldova are, however, provisions of the ECHR and those of the EU directives. According to the ECHR the signatory states are obliged to recognize the freedom of thought, conscience and religion of every person in their jurisdiction (Art. 9 of the ECHR), no one can be discriminated in exercising of this freedom (Art. 14 of the ECHR, Additional Protocol 12, respectively), and also no one can abuse when invoking this right in order to limit the rights of others (Art. 17 of the ECHR).¹¹⁷ The ECtHR stipulated in its case law that states should not define religion or belief, and that these notions protect atheists, agnostics, sceptics and those indifferent towards religious matters in order to protect those who choose to follow or not a religion and those who choose to practice or not a religion. Therefore, religion and belief are essentially personal and subjective and should not necessarily refer to an institutionalized belief.¹¹⁸ However, "belief" in the sense of this ground always refers to religious or philosophical beliefs and not to political or social beliefs that are protected under other rights.¹¹⁹

In the Republic of Moldova freedom of religion is guaranteed by Art.31 of the Constitution. However, the Constitution confirms the principle of equality of all citizens without making any distinction, including on the grounds of religion (Art. 16 para. (2)). In order to implement these principles, the organic law ensures that everyone is equal in terms of religion and beliefs (Art. 1 para. (1), Law no.121). In addition pursuant to Art. 1 para. (2), c) of Law no.121, its provisions cannot be interpreted as affecting in any way religious cults and their component parts in relation to their religious beliefs.¹²⁰ Discrimination on the ground of religion in severe circumstances is prohibited by criminal law (Art. 176 of the Criminal Code).¹²¹ This provision, however, might be applied only when the offence is committed by a senior position official, if large-scale damages were caused, committed by the installation of discriminatory messages and symbols in public places, committed based on two or more grounds or by two or more persons. Furthermore, the title of this article suggests that the Criminal Law prohibits only the discrimination against citizens of the Republic of Moldova. By the time this report was drafted there have been no convictions yet under this article. This might be due to the requirement that the consequences of this offence shall be quantified as "large-scale damages" or due to the lack of commitment of prosecution bodies to consider these provisions important. In addition, the criminal law

¹¹⁷Non-discrimination on the grounds of religion is also mentioned by Directive 2000/78/CE, which concerns the establishment of equal conditions of employment (Art. 1).

¹¹⁸ECtHR, *Metropolitan Church of Bessarabia and others v. Moldova*, 13 December 2001, §114.

¹¹⁹See the Guidance for practitioners, Non-discrimination in International Law. INTERIGHTS. Edition of 2011.

¹²⁰See Section 5.6. for more details about this exception.

¹²¹Under this article, any distinction, exclusion, restriction or preference of rights and freedoms of a person or a group of persons, any support of discriminatory behaviour in the political, economic, social, cultural and other areas of life, based on grounds of race, nationality, ethnic origin, language, religion or belief, gender, age, disability, political affiliation or any other ground shall be punished with a fine of 400 to 600 conventional units or unpaid community labour from 150 to 240 hours or by imprisonment for up to 2 years, in all circumstances with (or without) the deprivation of the right to hold certain positions or to practice certain activities for a period from 2 to 5 years.

prohibits incitement to hatred (Art. 346 of the Criminal Code)¹²² and desecration of graves (Art. 222 of the Criminal Code)¹²³.

The Misdemeanours Code of the Republic of Moldova of 24 October 2008 (hereafter "Misdemeanours Code") also includes a problematic provision. Under Art. 54, para. (4), it is prohibited to exercise religious activity by foreigners in public places without preliminary notification of the respective mayor's office of the locality. Although we do not have information regarding the application in practice for this article, this provision may generate some discriminatory situations. Freedom of religion and conscience is a universal right and its exercise by a citizen or non-citizen of the Republic of Moldova should not be conditioned by a notice or agreement of the public authorities, as long as the exercise of freedom of religion does not contravene the legislation. Also, the requirement to notify state authorities could lead to situations in which a person of a particular "acceptable" religion, but with the citizenship of a foreign country is allowed to exercise his religious activities, while a person of an "unacceptable" religion, from the same foreign state may not receive authorization for these activities.

An important issue to be considered in terms of compliance with the principle of non-discrimination on the grounds of religion is the implementation of registration of religious denominations/ cults. In the Republic of Moldova religious cults and their constituent parts are registered at the Ministry of Justice.¹²⁴ The registration data is recorded in the Register of Religious Cults and their Constituent Parts. Religious cults are religious structures with legal entity status and the constituent parts of the religious cult represent a religious community or institution that belongs to a religious cult. The MoJ may refuse registration of a religious cult, if the submitted documents do not correspond to the provisions of the law or if the exercising of some of their practices and rituals affects the interests of society, state security, life and physical or mental health of citizens, jeopardizes public order and seriously infringes public morality or rights and freedoms of others. The refusal of the MoJ shall be justified and may be appealed against by the signatories of the Memorandum of Association in court (Art. 19 para. (7) of Law no. 125).

¹²²Under this article, deliberate actions, public urges, including written and electronic media, aimed at incitement to hatred, national, ethnic, racial or religious differentiation and disunity, humiliation of the national honour and dignity, as well as direct or indirect limitation of the rights, or establishment of the advantages, direct or indirect, for citizens depending on their national, ethnic, racial or religious status, are sanctioned with a fine of up to 250 conventional units or unpaid community labour from 180 to 240 hours or by imprisonment for up to 3 years.

¹²³Under this article, desecration by any means of a grave, a monument, a funeral urn or of a corpse and appropriation of objects that are in the tomb or on the corpse, shall be punished with a fine from 200 to 500 conventional units or unpaid community labour from 180 to 240 hours or by imprisonment for up to 1 year.

¹²⁴Under the Law on Freedom of Conscience, Thought and Religion, no. 125 from 11 May 2007 (hereafter "Law no. 125"), the application shall include enclosed: the statutes adopted by the founders, the minutes of the constitutive assembly, the list of at least 100 founders, natural persons, citizens of the RM with the residence in the RM, fundamental principles of belief, copies of identity documents of the founders and documents proving the location of the headquarters (Art. 19, para. (1)). If the submitted documents correspond to that list, the MoJ shall issue, within 30 days, the registration certificate, without charging a state fee. Similar procedure is also stipulated for the registration of the constituent parts of the religious cults.

The procedure for registration of a religious cult in Moldova is difficult and could cause certain technical problems in the exercise of a freedom which normally should not require prior approval of the authorities. A 2012 report stated several problems encountered by religious denominations in the registration process, such as: long-waiting periods and delayed registration procedures, request of information not specified by the legislation, unreasonable checking of intentions of the cult founders, refusal to register the religious cult on the basis that there already exists one cult representing this religion, refusal to register a religious cult because of pressure from outside of the country.¹²⁵ Although, according to the report, the representatives of religious cults claim that since 2009, the practice of registration for religious cults has been improved, in 2015 we can notice persecution against religious groups that are difficult to explain.¹²⁶

In 2012, within the course of the mission, Special Rapporteur on Freedom of Religion or Belief of the Human Rights Council of the United Nations, Mr. Heiner Bielefeldt, (hereinafter "the UN Special Rapporteur on Freedom of Religion or Belief") made several recommendations concerning the respect of the right to freedom of religion and conscience in the Republic of Moldova.¹²⁷ *Inter alia*, he mentioned in his report that the registration process of a cult should be fast, transparent and non-discriminatory, and that no religious or belief group should decide in relation to the registration process of another religious or belief group. Additionally, the UN Special Rapporteur on Freedom of Religion or Belief emphasized that the registration should not be a precondition for practising one's religion or belief, and that the state must respect both, the right of registered religions and of those unregistered to practice their freedom of religion.¹²⁸

A serious problem identified in the legislation of the Republic of Moldova is a norm that leads to the direct favouring of the Christian Orthodox religion, in particular the Moldovan Orthodox Church.¹²⁹ Such a legal provision creates obvious preconditions for a discriminatory attitude towards other religions. This also contravenes the provisions of

¹²⁵ See the *Study on the right to freedom of thought, conscience and religion in the Republic of Moldova*, drafted by the Information Centre for Human Rights, in partnership with the Non-discrimination Coalition and the National Youth Council of Moldova, Chisinau, 2012, pp. 7-9.

¹²⁶ By the SCJ Decision no. 2rac-1/15 from 28 January 2015, the high court upheld the decisions of the lower courts by which the MoJ was obliged to introduce the symbol „Falun“ used by the Public Association „Falun Dafa“ and Public Association - Association of Qigong „Falun Gong Moldova“ in the registry of materials of extremist nature, on the grounds that it resembles the symbol of "swastika". As a result of this series of procedures, by the SCJ Decision no. 2rac-5/15 from 11 February 2015, high court upheld the decisions of the lower courts which ordered the dissolution of the Public Association „Falun Dafa“ and Public Association - Association of Qigong „Falun Gong Moldova“. The Court of Appeal, for example, argues in a strange way that there is no other alternative than the dissolution of the associations, otherwise ordering associations not to use their symbol could be an unacceptable interference in their operation.

¹²⁷ Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt. United Nations, General Assembly, Human Rights Council, nineteenth session. Distributed on 27 January 2012.

¹²⁸ *Ibidem*. §§ 82-83.

¹²⁹ Under Art. 15 para. (5) of Law no. 125, state recognizes the great importance and leading role of the Christian Orthodox religion and of the Orthodox Church of Moldova respectively, in the life, history and culture of the Republic of Moldova.

the Constitution according to which the Republic of Moldova is a secular state (Art. 31 para. (4) and Art. 35 para. (8)). Considering the findings of the UN Special Rapporteur on Freedom of Religion or Belief, differential treatment of the Moldovan Orthodox Church subordinated to the Moscow Patriarchate compared to other religious denominations can also be noticed in practice. In particular, differential treatment was observed in restitution of the property expropriated during the Soviet period, regarding the priests serving in the army, the presence of priests in public schools or their involvement in the management of municipal cemeteries.¹³⁰ In 2014, these issues have not been settled.¹³¹ Both legislative adjustments and development of an efficient practice of non-involvement of the state in issues related to the activity of religious cults and interdiction of abusive involvement of religious actors in public policies are needed in this respect.

One of the most urgent practical problems regarding discrimination of individuals based on grounds of religion is teaching of religion in schools and religious activities within schools. Theoretically, there are two possibilities to organize religious trainings so that it does not affect the rights and freedoms of children and their parents. The first one is to teach a quasi-mandatory subject that would educate children in an unbiased manner related to all types of religions, moral values and history of religions. The second one is the optional training in a particular religion, which is basically confessional education. The authorities of the Republic of Moldova have chosen the optional training in confessional religious education.¹³² Informally, religious denominations have agreed to have a common course of Catholic and Orthodox Christian religion, and a special training course for Christian Protestant confessions. However, practically, this initiative is not fully implemented. In 2013 the majority of religious cults (including Christian Protestant) have complained that they do not have access to schools, while the Moldovan Orthodox Church teaches religion in most of the schools, carries out religious activities and even is supported and funded by public authorities.¹³³ This leads to the spread of the phenomenon of religious indoctrination (Christian Orthodox) in some schools and also generates intolerance towards children and parents belonging to other religions.¹³⁴

Unjustified differential treatment based on grounds of religion has been also observed by the CPPEDAE that by the decision from 21 January 2014, found *de facto* discrimination against a religious cult in comparison with Orthodox parishioners from Cantemir district.¹³⁵

¹³⁰Ibidem § 29.

¹³¹The meeting of the representatives of religious cults and civil society with the UN Rapporteur from 15 May 2014.

¹³²The Republic of Moldova Government Decision on teaching religion in schools no. 596 from 2 July 2010.

¹³³Study on the right to freedom of thought, conscience and religion in the Republic of Moldova, *ibidem*, pp. 26-30.

¹³⁴The preliminary findings within the *Study on discrimination in the education system in the Republic of Moldova*, drafted by the Information Centre for Human Rights, Chisinau, 2013, pp. 8-11.

¹³⁵CPPEDAE Decision no. 029/2013 from 21 January 2014, initiated based on the application of Pentecostal cult of the RM, regarding the discrimination grounded on religious belief in the exercise of the right to freedom of expression and freedom of assembly.

Representatives of the religious cult (Pentecostal Cult from the Republic of Moldova) complained to the CPPEDAE that they were discriminated since the authorities refused to allow the performance of a series of activities in Chioselia village, Cantemir district. The refusal was justified, *inter alia*, by ensuring the public order and safety, by a number of applications from Orthodox parishioners, and by a decision of the Community Council Chioselia, prohibiting the assemblies and the performance of religious services for all cults in public places. The CPPEDAE found that public authorities have not proven the existence of a legitimate purpose for the refusal of the Pentecostal cult meeting and pointed out that involvement of representatives of religious confessions in the exercising of freedom of expression and of religious assemblies of individuals belonging to different religious confessions is inadmissible.¹³⁶ Although the decision on prohibiting religious cults to perform activities in public referred to all religious cults, the CPPEDAE found that, *de facto*, parishioners of the Orthodox Church carried out religious events and rituals in public places. Therefore, this decision was an excuse of the public authorities for the refusal of applications by the religious cults other than those of Orthodox rite.

Recommendations:

- **Extension of the protection stipulated by Art. 176 of the Criminal Code in respect to all individuals under the jurisdiction of the Republic of Moldova;**
- **Exclusion of the para. (4), of Art. 54 of the Misdemeanours Code, in order not to create unjustified situations in which individuals that do not have the Republic of Moldova citizenship are sanctioned for carrying out religious activities in public places;**
- **Review of the recommendations by the UN Special Rapporteur on Freedom of Religion or Belief and their implementation. In particular, registration of the religious cults and their component parts shall be simplified;**
- **Amending of Art. 15, para. (5), of Law no. 125, in order not to create a discriminatory environment in which the Moldovan Orthodox Church is favoured. The Republic of Moldova is a secular state, and should avoid provisions and practices of favouring a particular religious cult;**
- **Public authorities shall understand the importance of observing the right to religion and conscience of all citizens and create a tolerant environment so that individuals of all confessions can practice their religion without obstacles;**
- **The optional course "Religion" shall be replaced with a non-confessional one, dedicated to the history of religions, taught by competent persons, renown for respecting human rights. Otherwise, with the view of the effective implementation of Art. 35, para. (8) of the Constitution, any confessional religious course shall be excluded in public schools.**

¹³⁶A representative of the Orthodox Church, a member of the Community Council Chioselia participated in adopting of the refusal.

3.5 Disability

The ground "disability" refers to the health status of a person. According to Law no. 60/2012 disability is a „generic term for impairments/deficiencies, limitations in activity and restrictions in participation, which denote negative aspects of interactions between a person (who has a health issue) and contextual factors where the person is found (environmental and personal factors)“, but person with disabilities is „a person with physical, mental, intellectual or sensory disability that in interaction with various barriers/obstacles may hinder his/her full and effective participation in social life on equal conditions with others“. ¹³⁷ Definition of the disability within the national context was stipulated by the Convention on the Rights of Persons with Disabilities to which Moldova is a party and which offers a socio-medical approach to disability.

The ECHR does not expressly stipulate disability as one of the protected grounds, but disability is repeatedly examined in the light of the notion "any other similar ground". In case of *Glor v. Switzerland*,¹³⁸ ECtHR found that the plaintiff who had diabetes could be considered as a disabled person, and his obligation to pay a fee to compensate the failure to undertake military service under conditions when he was unable to serve in the army, constitutes discriminatory treatment.¹³⁹

The ECJ in its turn revised its opinion regarding the definition of disability as a protected ground for equality of treatment, it gradually evolved from a primarily medical approach to disability to a socio-medical approach, reflecting the standard set forth by the UN Convention on the Rights of Persons with Disabilities. In 2006 in the case of *Sonia Chacon Navas v. Eures Colectividades SA*¹⁴⁰ the ECJ distinguished between the concept "disability" and "disease" and underlined that the concept "disability" shall be understood as a „limitation which results in physical, mental or psychological deficiency and which prevents a person from participation in professional life.“ In 2013 the CJEU moved to a socio-medical approach to disability showing that the term "disability" within the meaning of Directive 2000/78 must be understood as referring to a limitation which results in particular from a long-term physical, mental or psychological disorder, that in interaction with various barriers may hinder the person concerned from their full and effective participation in professional life on an equal footing with other workers."¹⁴¹ In 2014 already in the case of *Kaltoft*¹⁴² the CJEU analyses the general principle of non-discrimination on the reasons of disability in the context of a dismissal which from the worker's perspective was due to his obesity. As requested by the application for a preliminary decision by the national court, the CJEU had also to decide on the possibility of

¹³⁷ Art. 2 of Law no.60 from 30 March 2012 on the Social Inclusion of Persons with Disabilities.

¹³⁸ ECtHR, *Glor v. Switzerland*, 30 April 2009.

¹³⁹ In order to consider the ECtHR cases relevant to discrimination on the ground of disability, see ECtHR, *Factsheets: Mental Health*, available at http://www.echr.coe.int/Documents/FS_Mental_health_ENG.pdf, last accessed on 15 March 2015.

¹⁴⁰ ECJ, *Sonia Chacon Navas v. Eures Colectividades JSC*, 11 July 2006, case C-13/05, para. 43-46.

¹⁴¹ CJEU, *HK Denmark*, judgement in the case EU:C:2013:222.

¹⁴² CJEU, case of FOA, *acting on behalf of Karsten Kaltoft v. Kommunernes Landsforening (KL), acting on behalf of Billund municipality, judgement regarding the case C354/13*.

applying the EU acquis concerning the prohibition of discrimination on grounds of disability in the case of discrimination on the ground of obesity in the context of labour relations, the Court of Luxembourg has shown that while "obesity itself can not be considered an additional reason to those under which Directive 2000/78 prohibits any discrimination", yet "the mentioned concept "disability" should be interpreted as referring not only to impossibility to carry out a professional activity, but also to obstacles in exercising of such activities. Another interpretation would be inconsistent with the objective of this directive aimed in particular to the fact that a person with disability should have access to a work place or exercise an activity related to it." The CJEU, therefore, concludes that "if, under certain circumstances, the state of obesity of the worker concerned determines a limitation which results in particular from his/her physical, mental or psychological conditions, which in interaction with various barriers may hinder him/her from full and effective participation in professional life under conditions of equality with other workers, and if that is a long-term limitation, such a condition may fall within the definition of the concept "disability" in the sense stated in Directive 2000/78."

The most frequent decisions by the CPPEDAE concerning discrimination pronounced between 2013-2014 referred to the ground "disability".¹⁴³ In the field of education the CPPEDAE found that the refusal by the Ministry of Education and Directorate General of Education, Youth and Sport of Municipal Council of Chisinau to ensure the right to a child with disabilities who undertook home-schooling for 12 years to take the Baccalaureate exam at home without providing necessary conditions,¹⁴⁴ amounts to a refusal of providing reasonable accommodation.¹⁴⁵ The Council, however, failed to examine thoroughly the specific institutional responsibilities, the role of each entity in generating the discriminatory situation for the pupil and the measures taken to remedy and prevent infringement of rights. In other 2 cases the CPPEDAE found refusal of providing reasonable accommodation and lack of access to preschool institution by the fact of refusing to admit a child with type 1 diabetes¹⁴⁶ and a child with autism to kindergarten.¹⁴⁷ In another case the CPPEDAE found the discrimination of a petitioner due to the failure to adjust curricula and her evaluation according to her particular needs, followed by expulsion, as well as harassment of the petitioner and failure on the side of administration of the educational institution to undertake preventive actions on the ground of disability.¹⁴⁸

¹⁴³According to the data provided by the CPPEDAE in April 2015, within the period of 2013-2014, 18 decisions referred to the ground "disability".

¹⁴⁴The petitioner moves with the wheelchair, but the exam was held on the 2nd floor of the lyceum and the petitioner was lifted in the arms by his colleagues. WC was not adjusted for disabled people. The petitioner complained about aches in the body because of the lack of movement within 3 hours during the examination.

¹⁴⁵CPPEDAE, Decision no. 122/14 from 9 September 2014, *B.C. v. the Ministry of Education and Directorate General of Education, Youth and Sport of Municipal Council of Chisinau*

¹⁴⁶CPPEDAE, Decision no. 005/13 from 25 November 2013, *F.V. on behalf of the minor E. v. V. Gavriluc, Director of the kindergarten no. 151 and I. Burlac, Director of the kindergarten no. 168.*

¹⁴⁷CPPEDAE, Decision no. 083/14 from 28 June 2014, *M.O. on behalf of the son M.T.v. the Director of the kindergarten no. X, V.M., N.T., Director of the Directorate General of Education, V.R., Republican Centre of Psychological and Pedagogical Assistance of the Ministry of Education.*

¹⁴⁸CPPEDAE, Decision no. 004/13 from 22 November 2013, *Ludmila Bobeica and Valentina Ursu v. the Vocational Lyceum no. 1.*

With regard to employment, the CPPEDAE found that the refusal of Chisinau Work Recruitment Agency to enrol a person with mental disabilities in free manicure-pedicure training courses constitutes discrimination.¹⁴⁹ In another case the CPPEDAE found the discrimination by association of the petitioners who were mothers of children with severe disabilities, because their leave for childcare was not included in the record of work.¹⁵⁰ In this case the CPPEDAE mentioned that the petitioners were treated less favourable than the parents who have institutionalized children with severe disabilities and who had opportunities to be employed and obtain the record of work.

The most frequent cases when disability discrimination was found are related to the access to goods and services. The CPPEDAE considered that the refusal of a minibus driver to serve a person with disabilities constitutes direct discrimination.¹⁵¹ The CPPEDAE found direct discrimination and refusal of reasonable accommodation in case when a person with disabilities was refused to have access to a sport club.¹⁵² When a person with disabilities was refused to have access to a night club, the CPPEDAE found that this person was a victim of discrimination both on the side of the club and of the law enforcement representatives who did not intervene and did not sanction the club owners as stipulated by the law.¹⁵³ In two other cases,¹⁵⁴ the CPPEDAE considered the absence of access to buildings and constructions for persons with disabilities. In the first case¹⁵⁵ which was launched on its own initiative after repeated complaints about the lack of access to buildings, the CPPEDAE carried out the analysis of legislation in the field, notifying the authorities responsible for ensuring the accessibility of buildings and constructions, without referring to any particular building. The CPPEDAE concluded that, although the legislation is sufficiently comprehensive in terms of accessibility, yet practical enforcement of these provisions is flawed. While adopting of regulations is under the responsibility of central authorities, their implementation depends on the local authorities that issue certificates of

¹⁴⁹CPPEDAE, Decision no. 110/14 from 9 September 2014, *V.I. v. the National Agency for Employment, the Ministry of Labour, Social Protection and Family and the National Council for Disability and Work Capacity Determination*. See detailed description of the case in section 6.2 related to discrimination in employment.

¹⁵⁰CPPEDAE, Decision no. 030/13 from 13 February 2014, *A.M., V.M. and N.C. v. the Directorate of Social Assistance, Chişinău Municipality and the Ministry of Labour, Social Protection and Family*.

¹⁵¹CPPEDAE, Decision no. 157/14 from 9 December 2014, *M.M.v. LLC "Remta-Transport-private" and V.L.*

¹⁵²CPPEDAE, Decision no. 140/14 from 27 October 2014, *F.V. v. LLC „OLIMPUS-85”*.

¹⁵³CPPEDAE, Decision no. 156/14 from 17 October 2014, *C.A. v. LLC „ADRILUX – COM” and its employee G.V., V.R. and D.N., Police Inspectorate of Ciocana District and V.S., Special mission police unit „Fulger”*.

¹⁵⁴CPPEDAE, Decision no. 160/14 from 11 December 2014, *launched on own initiative v. the Ministry of Regional Development and Construction, State Construction Inspectorate and General Directorate of Architecture, Urbanism and Land Relations*, and CPPEDAE, Decision no. 176/14 from 30 December 2014, *V.S. v. Centre District Court of Chisinau and Chişinău Court of Appeal*. See detailed analysis of these 2 cases in section 6.4 related to discrimination in access to goods and services (subsection 6.4.1.).

¹⁵⁵CPPEDAE, Decision no. 160/14 from 11 December 2014, *launched on own initiative v. the Ministry of Regional Development and Construction, State Construction Inspectorate and Directorate General of Architecture, Urbanism and Land Relations*.

urbanism and construction permits. Also the CPPEDAE mentioned the ineffectiveness of the controls carried out by the State Construction Inspectorate because of the small number of sanctions applied, and also the ambiguity of legislative norms on accountability for non-compliance with the norms related to the accessibility of constructions. In the next case the CPPEDAE found discrimination in relation to access to justice because of the lack of reasonable accommodations in the Centre District Court of Chisinau and Chisinau Court of Appeal.¹⁵⁶ In the absence of particular proposals or appropriate sanctions, general findings and recommendations made by the CPPEDAE are also faulty as they imply the same lack of efficiency in terms of existing mechanisms stated by the institution. **It is recommended to develop institutional partnerships between the CPPEDAE, State Construction Inspectorate and local authorities to ensure continuous verification of public spaces accessibility and sanctioning of those who fail to fulfil this obligation.**

3.6 Age

The protected ground "age" refers to a differential treatment of a person on the basis of age and is stipulated by Art. 1 of Law no. 121. The ECHR does not expressly contain such ground as "age" but it is examined in the light of the notion "any other similar grounds" in various cases.¹⁵⁷ As regards the practice of the Court of Luxembourg the ground age is considered quite often, especially regarding retirement policies of various countries and the social needs to ensure intergenerational solidarity,¹⁵⁸ in order to establish minimum or maximum age of retirement¹⁵⁹ or the age limit for the employment in certain professional activities. Initially the CJEU discussed prohibition of discrimination on the ground of age in the case of *Mangold*¹⁶⁰, but the nature of the principle was later reconfirmed in the case of *Küçükdeveci* as well.¹⁶¹

The most frequent cases of age discrimination appear in the field of employment when maximum and minimum age limits to accede certain professions are established. The employer should justify the establishment of those age limits in accordance with the nature of certain functions. The Constitutional Court examined several cases¹⁶² that raise issues related to the discrimination in the labour market on the ground of age that were related in particular to established age limit of 65 years for the activity of public notary,¹⁶³ termination of employment

¹⁵⁶ CPPEDAE, Decision no. 176/14 from 30 December 2014, *V.S. v. Centre District Court of Chişinău and Chişinău Court of Appeal*.

¹⁵⁷ ECtHR, *Boumar v. Belgium*, 29 February 1988.

¹⁵⁸ CJEU, case C-341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.

¹⁵⁹ CJEU, case C-447/09 *Prigge v Deutsche Lufthansa AG, Judgement of the Court* (Grand Chamber), 13 September 2011. See case C-388/07 *Age Concern England (Incorporated Trustees of the National Council for Ageing)* [2009] ECR I-1569.

¹⁶⁰ CJEU, case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

¹⁶¹ CJEU, case C-555/07 *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

¹⁶² See detailed description of this decisions in section 3.2 of the study.

¹⁶³ ConstC, Judgement no, 30 from 23 December 2010 on the constitutionality of Art. 16 para. (1) letter g) of Law no.1453-XV from 8 November 2002 on Notary services as amended and supplemented.

relationship for civil servants when they reach the required age for receiving an old-age pension¹⁶⁴ and termination of the individual employment contract with education professionals and with the staff of scientific and innovative organizations when the old-age pension is awarded.¹⁶⁵

By 1 May 2015 the CPPEDAE found discrimination on the ground of age in the field of employment in several cases that referred to labour relations. In two decisions the CPPEDAE found as discriminatory several employment advertisements that included requirements that were not essential for the announced position, including requirements related to the age of the person and other grounds.¹⁶⁶ In another decision the CPPEDAE found age limit as discriminatory for the access to the position of personal assistant.¹⁶⁷ The Council took into account the declarations by the respondent - Directorate General of Social Assistance of Municipal Council of Chisinau, under which the retirement age is not an obstacle for a person providing services of personal assistant, provided that the person can perform all tasks required by this position. The CPPEDAE found that the retirement age is not an essential occupational requirement in this case, but rather physical capacity and health condition of a person being the requirement stipulated separately in terms of employment. Consequently, the CPPEDAE found that the inclusion of this requirement in Government Decision no. 314 from 23 May 2012 on approving the Framework Regulation for social service "Personal Assistance" leads to discrimination on the ground of age. The CPPEDAE indicated to the MLSPF to propose amendments to Government Decision no. 314 of 23 May 2012 regarding the exclusion of the condition "has not reached the standard retirement age according to the legislation in force". On 16 June 2015 the Government excluded this condition from the list of conditions for employment of personal assistants.¹⁶⁸

3.7 Sex

Art. 2 of the Law on Ensuring Equal Opportunities for Women and Men¹⁶⁹ defines discrimination on the ground of sex as „any distinction, exception, restriction or preference having as an aim or consequence limitation or deterrence in recognising, exercising and implementing of fundamental human rights and freedoms based on equality between women and men”.

¹⁶⁴ ConstC, Judgement no. 6 from 22 March 2013 on the exception of the unconstitutionality of Art. 62 para (1) letter d) of Law no. 158 from July 4, 2008 on the Public Service and the Status of Civil Servant

¹⁶⁵ ConstC, Judgement no. 5 from 25 April 2013 on the constitutionality of Art. 301 para. (1) letter c) of the Labour Code.

¹⁶⁶ CPPEDAE, Decision no. 050/14 from 22 February 2014, *Rodion Gavriloi v. LLC „Legis-Com” and web page www.jobinfo.md* and CPPEDAE, Decision no. 041/13 from 24 February 2014, *launched on own initiative v. the web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md* and by LLC „Carolina Bulat”, LLC „Bulat-Grup”, LLC „Castomagic”, JSC „Leogrand” LLC, LLC „Rejans-Prim”, LLC „Brights Land”.

¹⁶⁷ CPPEDAE, Decision no. 030/13 from 13 February 2014, *A.M., V.M. and N.C. v. the Directorate of Social Assistance, Chisinau Municipality and the Ministry of Labour, Social Protection and Family*.

¹⁶⁸ Government Decision no. 374 from 16 June 2015, item. 1, para. 1).

¹⁶⁹ Law no. 5 from 9 February 2006 on Ensuring Equal Opportunities for Women and Men (hereinafter Law no. 5).

In the cases examined by the CPPEDAE, most often the situations of discrimination on grounds of sex implied the unjustified differential treatment of women in comparison with men by the exclusion of their access to certain positions on the basis of sex or the establishment of differentiated regimes of obtaining some benefits or social guarantees. According to the ECtHR case law, in order for a differential treatment on grounds of sex to be accepted, there should be very solid reasons to justify it objectively and reasonably.¹⁷⁰ The legislation of the European Union in the field of labour relationships accepts such justification in the situations where sex represents an essential and determining professional requirement (for example, reservation of places for male guardians in a detention centre for men¹⁷¹).

The CPPEDAE found discrimination in several cases examined on grounds of sex/sex in the field of employment. For instance, in Decisions no. 050/14¹⁷² and 041/13,¹⁷³ the CPPEDAE found as discriminatory several employment advertisements that included requirements that were not essential for the announced position, including requirements related to the sex of the person. In another decision, the CPPEDAE found discrimination on grounds of sex and maternity in the refusal of the Directorate General for Social Assistance to offer a female employee, who had returned from the maternity leave, a special work regime according to the schedule that she requested pursuant to Art. 97 para. (1) of the Labour Code that grants the right to a part-time work for parents with children aged under 14 years.¹⁷⁴ In Decision no. 074/14, which is a decision questionable from the perspective of the argumentation of the evidence that grounded the solution, the CPPEDAE found discrimination on the ground of sex because of the lack of internal practices on promoting in career and enrolment to professional training courses.¹⁷⁵ In Decision no. 105/14 from 19 June 2014, the CPPEDAE

¹⁷⁰ ECtHR, *Abdлуaziz, Cabales and Balkandi v. the United Kingdom*, 28 May 1985, para. 78.

¹⁷¹ ECJ, *Commission v. France*, no. 318/86.

¹⁷² CPPEDAE, Decision no. 050/14 from 22 February 2014, *Rodion Gavriloi v. LLC „Legis-Com” and web page www.jobinfo.md*.

¹⁷³ CPPEDAE, Decision no. 041/13 from 24 February 2014, *launched on own initiative v. web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md and v. LLC „Carolina Bulat”, LLC „Bulat-Grup”, LLC „Castomagic”, JSC „Leogrand” LLC, LLC „Rejans-Prim”, LLC „Brights Land”*.

¹⁷⁴ CPPEDAE, Decision no. 056/14 from 15 May 2014, *T.B. v. Valeriu Negru, acting Head of the Directorate General for Social Assistance of Municipal Council of Chişinău*.

¹⁷⁵ CPPEDAE, Decision no. 074/14 from 12 June 2014. The decision refers to the complaint of an employee of the JSC “Apa Canal Chisinau”, who claimed to be discriminated in the domain of employment through several actions. The CPPEDAE decision in this case is questionable from the perspective of determining of the discrimination fact, because in this case the claimant failed to explain the fact that the differentiated treatment that she complained of was due to her affiliation to a protected ground, this being a compulsory element which has to be mentioned and claimed by the petitioner. The CPPEDAE itself mentions this fact in paragraph 6.3. of the decision. However, the CPPEDAE found discrimination only in the fact that „from the debates of the parties and the evidence enclosed to the file, it has identified the absence of some internally regulated procedures that should establish the way of the employees’ promotion in careers and ensurance of the access to life-long training, with the view to guarantee decision-making transparency and equal opportunities for all potential candidates for the vacancy competitions”. The conclusion that just the absence of internal regulations encouraging equality constitutes discrimination in the absence of other evidence that would prove the internal practices of the respective legal person is excessive. The CPPEDAE could make recommendations to the

found that the dismissal of the pregnant complainant was discrimination on the grounds of sex and maternity.¹⁷⁶ In this case, the CPPEDAE failed to establish that in the cases of discrimination regarding pregnant women's, the comparator needs not be established, as stipulated by the CJEU case law.¹⁷⁷ The CPPEDAE found the infringement stipulated by Art. 54² paragraph (1) letter b) by the legal entity "Air Moldova". On 31 January 2015, Buiucani District Court recognized it as being guilty and sanctioned "Air Moldova" to pay a fine of 450 c.u., which means MDL 9.000. On 5 March 2015, the Court of Appeal Chişinău referred the case back, and on 18 June 2015 Buiucani District Court maintained the finding of the infringement, not sanctioning it with a fine. The judgement was maintained by the irrevocable judgement of the Court of Appeal Chişinău from 13 August 2015.¹⁷⁸

In another case, the CPPEDAE found discrimination on the grounds of sex concerning women-wives of employees in the penitentiary system, regarding the access to maternity allowances.¹⁷⁹ The CPPEDAE rejected the respondent's arguments that the employees of the penitentiary system do not pay social insurance premiums and therefore cannot benefit from social allowances. In the opinion of the authors of the analysis, in this situation the CPPEDAE provided wrong arguments that a man could not request a maternity allowance and, therefore, there was no need to prove it under a comparative approach. This decision is contrary to a prior decision by the CPPEDAE¹⁸⁰ which found discrimination by association on the grounds of special status assimilated to the military one of the servicemen's wives being dependants of them as compared with women dependent on their husbands who are not servicemen. In that case, the CPPEDAE rejected the justification of MLSPF regarding the fact that servicemen are not covered by social insurance because they do not pay the social insurance premiums, comparing the situation of servicemen with police associates, who, beginning with March 2014 receive such allowances, even though they do not contribute to the social insurance fund.

Making reference to the ECtHR case law,¹⁸¹ it is commendable that the CPPEDAE found that the inactions of the law enforcement agencies to start criminal prosecution against the aggressor and protect the victim of a case of domestic violence represent discrimination on

administration of JSC "Apa Canal Chişinău" to elaborate rules for internal promotion and other aspects mentioned in the decision, but, in no way, to state discrimination only because of their absence without a motivated complaint that would contain all the compulsory elements.

¹⁷⁶ CPPEDAE, Decision no. 105/14 from 19 June 2014, *S.T. and A.E. v. SEAC „Air Moldova”*.

¹⁷⁷ In the case of *Webb v EMO Air Cargo (UK) Ltd (No 2) (1994)C-32/93*, CJEU found that the situation of a pregnant woman cannot be compared with the situation of a sick man, because pregnancy is not comparable to none of the pathogenic conditions and even less to the incapacity to work on non-medical reasons, decision available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0032>.

¹⁷⁸ Information offered by the CPPEDAE on 18 August 2015.

¹⁷⁹ CPPEDAE, Decision no. 203/14 from 13 February 2015, *M.M. v. the Department of Penitentiary Institutions*.

¹⁸⁰ CPPEDAE, Decision no. 071/2014 from 26 May 2014, launched on own initiative, joined to case no. 082/14, P.A. „MAMI" v. the Ministry of Labour, Social Protection and Family and the Ministry of Defence.

¹⁸¹ ECtHR, *E.S. and others v. Slovakia*, 15 September 2009; *Eremia and others v. Moldova*, 28 May 2013; *Mudric v. Moldova*, 16 July 2013; *B. v. Moldova*, 16 July 2013; *N. A. v. Moldova*, 24 September 2013; *T.M. and C.M. v. Moldova*, 28 January 2014.

the ground of sex.¹⁸² The CPPEDAE informed the General Prosecutor's Office and the MIA in order to decide on the application of disciplinary sanctions. Until the time the analysis has been drafted, the CPPEDAE was not informed about any actions undertaken in this regard.¹⁸³

In three cases, the CPPEDAE found sex discrimination in the schedule of meetings between parents and children; in two of these the petitioners were women¹⁸⁴, in one case the petitioner was a man.¹⁸⁵ However, even if there was a differential treatment of the parents, the CPPEDAE reasoning does not certainly result in the fact that the unfair establishment of the schedule of meetings between parents and children was determined especially by the sex of parents and not by other considerations taken into account by the authorities or abuses, other than the discriminatory treatment. The same conclusion is valid for another case related to the establishment of the minor child's domicile, where the CPPEDAE found that the establishment of the domicile of the minor child with the mother led to the father's discrimination, providing no sufficient reasoning that the treatment considered discriminatory was due to the ground of sex.¹⁸⁶

Gender Identity

A specific aspect of Law no. 121 regarding the application of the ground of sex consists in the protection against discrimination of a group of persons that raise some particular issues on gender identity. *Gender identity* is understood as an individually and deeply psychologically perceived gender experience that can or cannot correspond to the gender attributed at birth, and it involves a personal perception of one's own body and of other gender expressions, such as: clothes, discourse, gestures, etc.¹⁸⁷

In every society there are persons whose gender identity or expression differs from the norm of the gender acquired at birth; these persons are referred to in the specialised literature

¹⁸²CPPEDAE, Decision no. 098/14 from 30 October 2014, *A.T. v. the Police Department Calarasi and the prosecutor S.M.*

¹⁸³Information offered by the CPPEDAE on 21 May 2015.

¹⁸⁴CPPEDAE, Decision no. 028/13 from 21 January 2014, *N.B. v. the Municipal Directorate for children rights protection*; Decision no. 034/13 from 13 February 2014, *I.T. v. Botanica District Police Department and v. the Municipal Directorate for children rights protection*.

¹⁸⁵CPPEDAE, Decision no. 213/15 from April 28, 2015, *D.I. v. the Directorate of Social Assistance and Family Protection of Balti municipality*.

¹⁸⁶CPPEDAE, Decision no. 054/14 from 1 May 2014, *O.M. v. the Municipal Directorate for children rights protection*.

¹⁸⁷ACCEPT, ECPI, *Transgender people in Romania. The Legal Recognition of Gender Identity*, p. 47, available at <http://www.ecpi.ro/TEST/wp-content/uploads/2014/02/Recunoasterea-juridica-a-identitatii-de-gen-a-persoanelor-trans-in-Romania-page-by-page.pdf>. See also, The World Professional Association for Transgender Health, *Health Care Standards for Transsexual, Transgender and Gender non-conforming people*, Romanian translation by ACCEPT Association, available at <http://transgen.ro/pdf/brosuraTrans.pdf>. The Yogyakarta principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted by a group of independent experts in the international human rights law, in March 2007, define gender identity as "the deep inner and individual experience of every person regarding his/her gender, which can or cannot correspond to the gender at birth, including body perception (which can comprise if chosen freely, the change of the body function or appearance by medical, surgical or other means) and other gender expressions, including clothes, way of talking and mannerisms".

by a general term “transgender persons”. The category of *transgender persons* includes *transsexual persons*, i.e. persons who intend to undergo, are undergoing or have went through the process of gender reassignment to live permanently with the gender they attribute themselves to (different from the gender they were born), *persons who transvest*, i.e. persons who wear, occasionally or regularly, clothes traditionally associated with the other gender, *the intersex persons*, i.e. persons with genetic, physical and psychic features which are not exclusively masculine or feminine, typical for both genders at the same time or are not clearly defined for both of them, *the androgens*, i.e. persons who do not have identities based on gender polarization or do not identify themselves as man or woman or *persons with a variable gender*.¹⁸⁸

Transgender persons were also to a certain extent recognized in the Republic of Moldova, where in 2012, the Plenary of the Supreme Court of Justice issued a recommendation on the judicial practice standardization regarding the procedure for the examination of applications related to the correction of the civil status documents due to gender reassignment.¹⁸⁹ In the recommendation it is stated that, in so far as the petitioner can present conclusions of experts in the field regarding gender reassignment, the court can accept the application concerning modification and correction of the civil status document in conformity with gender reassignment. The refusal of the civil registry offices to modify the civil status documents can be appealed against in the courts in administrative court proceedings.¹⁹⁰

The European Court of Justice interpreted the Directives in the field of discrimination on the ground of sex as applicable to cases that result from the gender reassignment, that is in cases related to transgender persons, in particular, transsexual persons.¹⁹¹ In the case of *P v. S and Cornwall County Council*, the Court found that discrimination on the ground of sex is not limited only to discrimination based on the fact that the person is of one sex or another, but it should be understood as covering the situations resulting from gender reassignment of a person, “situation in which discrimination is based, even if not exclusively, on the gender of the person concerned”.¹⁹² The Court explains that when a person is dismissed based on the reason of intending to carry out some interventions of gender reassignment, s/he is treated unfavourably if compared to persons of the gender s/he was assigned before being a subject to gender reassignment.¹⁹³ Besides the situation of dismissal, the European Court of Justice has expressed its opinion on the applicability of the antidiscrimination legislation on the grounds of gender in the case of transsexual persons in cases regarding the equality of

¹⁸⁸ ACCEPT, ECPI, *Transgender people in Romania. The Legal Recognition of Gender Identity*, p. 49, available at <http://www.ecpi.ro/TEST/wp-content/uploads/2014/02/Recunoasterea-juridica-a-identitatii-de-gen-a-persoanelor-trans-in-Romania-page-by-page.pdf>. See also, The World Professional Association for Transgender Health, *Health Care Standards for Transsexual, Transgender and Gender non-conforming people*, Romanian translation by ACCEPT Association, available at <http://transgen.ro/pdf/brosuraTrans.pdf>.

¹⁸⁹ SCJ, Recommendation no. 16 from 1 November 2012 on the procedure of examination of applications related to the modification of the civil status documents due to gender reassignment, available at http://jurisprudenta.csj.md/search_rec_csj.php?id=33, last time accessed on 15 March 2015

¹⁹⁰ *Ibidem*, page 3.

¹⁹¹ ECJ, *P v. S and Cornwall County Council*, C-13/94, 1996, para. 19-21.

¹⁹² ECJ, *P v. S and Cornwall County Council*, C-13/94, 1996, para. 21.

¹⁹³ ECJ, *P v. S and Cornwall County Council*, C-13/94, 1996, para. 19-21.

the qualification for the pension of the surviving spouse¹⁹⁴ or the minimum retirement age corresponding to the new sex¹⁹⁵.

Additionally, the ECtHR found in the case *P.V. against Spain* that gender identity is an independent ground that benefits from the protection of the clause on equality and non-discrimination.¹⁹⁶

Taking into account the interpretation given to discrimination on the ground of gender identity by the international mechanisms for human rights protection, one shall conclude that based on Law no. 121 as well, transgender persons should be protected against discrimination on the ground of “sex” or “any other ground” under Art. 1 of Law no. 121. Until today, the CPPEDAE did not solve any cases referring to alleged facts of discrimination committed against a transgender person.

Recommendations:

- **The CPPEDAE should pay more attention to the reasoning of the decisions in general and especially in the case of discrimination on the ground of sex in the establishment of the schedule of meetings between children and parents and in the establishment of the minor child’s domicile;**
- **The CPPEDAE should unify the practice regarding the statements on discrimination in the cases of failures to have access to maternity allowances by women-wives of the employees that do not contribute to the social insurance fund.**

3.8 Sexual orientation

The ground of “sexual orientation” is not mentioned by Art.1 of Law no. 121, but it is expressly provided as a protected ground against the discrimination in labour relations in Art.7 of the Law. As it was analysed above in section 3b, although the ground of sexual orientation is expressly provided only in the context of labour relations through direct application of the ECHR and the notion “any other similar ground”, the discrimination based on sexual orientation is prohibited in the Republic of Moldova in any field.

Sexual orientation refers to “the ability of any person to feel a deep emotion, affection and sexual attraction and to have intimate relations with persons of different sexes, same

¹⁹⁴ECJ, *K.B. v. NHS Pensions Agency*, C-117/01, 2004.

¹⁹⁵For example, in *Richards v. State Secretary for Labour and Pensions*, ECJ, Case C-423/04 [2006] ECR I-3585, 27 April 2006, the plaintiff was born a man and later changed his sex by operation. At that moment in Great Britain the retirement age for women was 60 years, and for men – 65 years. Mrs Richards lodged the documents for retirement at 60 years, but was refused by the British authorities because legally she was recognized as a man. ECJ found it discriminating based on gender identity and contrary to Art. (4) 1 of the Council Directive 79/7/EEC from 19 December 1979 regarding the progressive implementation of the principle of equal treatment of women and men in the domain of social protection.

¹⁹⁶ECtHR, *P.V. v. Spain*, 30 November 2010.

sex or both sexes”.¹⁹⁷ Usually, the cases of discrimination on the ground of sexual orientation imply a person who is unfavourably treated because this person is or is perceived as being homosexual or bisexual. But this ground also prohibits the discrimination based on heterosexuality.¹⁹⁸

The CPPEDAE examined this ground in several areas. For example, in decision No. 028/13 of 31 December 2013, the Council found the decrease in the number of scheduled meetings with the child because of the alleged homosexual orientation of the parent as being an incitement to discrimination on the basis of sex and sexual orientation grounds. Acting correctly, the Council directly applied the ECHR, stating that sexual orientation is a ground protected by Art 14 of the ECHR in accordance with the ECtHR case law.¹⁹⁹ The Council recommended the Municipal Directorate for children rights protection (MDCRP) to repeal the decision by which it was stated to reduce the number of scheduled meetings of the child with the mother, who was the victim of the discrimination, and to ensure equal opportunities for the mother to participate in the growing up and education of the minor child, having meetings with the child equally with his/her father. The decision by the CPPEDAE was challenged in the court by the MDCRP. By the decision from 20 November 2014 (case No.3-416/14), Buiucani District Court dismissed the application for summons presented by the MDCRP, thus maintaining the decision by the CPPEDAE. The MDCRP appealed against the decision of the first instance. By decision from 5 March 2015, Chisinau Court of Appeal, (case No.3a-22/15) dismissed the appeal, upholding the decision of the first instance court. The Courts didn't consider the application of the protection ground of sexual orientation, which indicates proper application of the ground of sexual orientation by the courts.

By decision No. 035/14 of 21 January 2014 the Council mentioned the continuous and severe discrimination on the ground of religion, homosexual orientation and nationality in access to web design services. The Council recommended the respondent to modify the advertisement on the website whitespace.md, so that it corresponded to what is stated by the decision of the Council.²⁰⁰ In decision No. 158/14 of 11 December 2014, the Council found the incitement to discrimination, harassment and victimization on the ground of sexual orientation regarding the leader of the group: *Оккупай-Педофилияй Молдова* / "Scutul Social (Society Shield)," Stas Ghibadulin. The Council submitted a copy of the decision to the General Prosecutor's Office in order to undertake measures under the Criminal Code regarding the findings of the decision.²⁰¹

The Courts also apply the ground of sexual orientation as a protected one in any area, which is in conformity with the ECtHR case law. For example, the decision of Botanica District Court from Chisinau municipality of 15 May 2013, case No. 2-1218/13, found

¹⁹⁷The Yogyakarta principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted by a group of independent experts in the international human rights law, in March 2007.

¹⁹⁸Handbook on the European non-discrimination law, the European Union Agency for Fundamental Rights and the Council of Europe, 2010, p. 97.

¹⁹⁹CPPEDAE, Decision No. 028/13 from 31 December 2013, item 6.7.

²⁰⁰CPPEDAE, Decision No. 035/14 from 21 January 2014.

²⁰¹CPPEDAE, Decision No. 158/14 from 11 December 2014.

the victimization and the harassment of the victim on the ground of sexual orientation. The Court prohibited the respondent to continue harassment and collected the state duty from him. In another case the SCJ upheld the decision by the first instance, Riscani District Court from Chisinau municipality and the decision by Chisinau Court of Appeal. This case envisaged the hate speech against homosexuals. In the first instance “the fact of drawing up of a “blacklist” of public persons that support homosexuality being posted on the website <http://marianvitalie.eu> was acknowledged as being a speech that incites to discrimination against persons with homosexual orientation. Vitalie Marian was obliged to delete the “black list” from the pages of his website, and to refrain from republishing, modifying and renaming this list in any other form. Vitalie Marian was also obliged to post on his website public apologies to the claimants regarding drawing up of the black list with the names of public persons who support the activity of LGBT organization. Vitalie Marian was charged with paying damages in the amount of 300 lei in favour of the Public Association Informational Centre “GENDERDOC-M” and Angela Frolov. Vitalie Marian was also obliged to reimburse legal expenses in the amount of 2000 lei in favour of the Public Association Informational Centre “GENDERDOC-M”. In other respects the claim was rejected.”²⁰²

To conclude it can be stated that the practice of the CPPEDAE and the courts to apply the case law of the ECtHR directly and examine the complaints regarding discrimination based on the ground of sexual orientation in any field, not just in the labour field, is a correct one and should be continued.

3.9 Opinion

In international practice, discrimination on the ground of opinion is usually linked to the ground of “political opinion”. For example, under Art. 14 of the ECHR, the discrimination for “political and other opinions” is prohibited. The same conclusion is provided by the ICCPR (Art.2 and 26). This is because the discrimination on the ground of opinion usually occurs when the opinion expresses a doctrine or a political vision. Also, sometimes it is difficult to distinguish whether this is an opinion of political nature or not. In Law no. 121, the legislature regulated the prohibition of discrimination on the basis of two different grounds: “opinion” and “political affiliation”. The explanation of this distinction could be seen in the analysis of the ground “political affiliation” in section 3.10.

In the cases analysed by the CPPEDAE, the discrimination based on opinion occurs mostly with regard to labour relations of servicemen and public officials. This form of discrimination is applicable for all aspects of work, such as employment, transfer to another unit, salary payment, transfer to another project, disciplinary aspects or dismissal.²⁰³ For example, in a case examined by the CPPEDAE it was found that a policeman was discriminated by his superiors on the ground of opinion. Mostly, the discrimination was

²⁰²SCJ, Judgement from 19 March 2014, case No. 2ra-731/14.

²⁰³See the Guidance for practitioners, Non-discrimination in International Law. INTERIGHTS. Edition of 2011, page 207.

found on the basis of the fact that the petitioner was harassed after he expressed his opinion regarding the illegal actions of his superiors in mass media.²⁰⁴ Under Art.2 par.(2) of Law No. 121, the harassment should be based on one of the grounds stipulated by law. In this particular case, it is not clear if the ground of opinion is applicable. The undesirable treatment against the petitioner was due to critical views expressed by him with regard to his superiors, therefore, due to interpersonal conflict. Being significantly different, the ground of “opinion” in the field of non-discrimination regulated by the national legislation and international treaties involves some key ideas regarding social or political life. The provisions of Art. 10 ECHR that protect the right to receive and share information and ideas of public interest are relevant in this respect.²⁰⁵ Therefore, although we do not challenge the illegal character of the superior’s actions towards the petitioner, it is not clear how relevant is the ground of opinion applied to the conflict that appeared in this case. The petitioner has failed to demonstrate that the opinions concerning the conflict with his superiors are a part of his identity and therefore deserve to be protected when serve as the basis of discriminatory treatment.

In another case the CPPEDAE found discrimination in access to housing of internally displaced persons from the left bank of the Dniester river on the ground of opinion.²⁰⁶ According to the decision issued by the CPPEDAE, the petitioner and the members of the association he chairs were discriminated after the protest in which they requested to cancel the decision by the Municipal Council of Chisinau that hindered the privatization of some apartments. We consider that in this case there was no discriminatory situation, because the ground was invoked wrongly. Firstly, the CPPEDAE, does not refer to any opinion under which the refugees were discriminated, that could be considered as such an opinion, and how it was different from that of other citizens, so that it could become an identifier, either objective or personal for the petitioners. Their “requests and applications” within the framework of the protest cannot be qualified as “opinions” under Art. 1 para.(1) of Law No 121, since these actions were legal activities available to any interested person. Secondly, the CPPEDAE did not refer to any act of public authorities that shows a discriminatory attitude based on the petitioner’s opinion. Thirdly, the CPPEDAE, failed to make any causal link between the events in which the petitioners expressed their “opinions” and the allegedly discriminatory decision. In fact, this would be impossible, because the protests held by refugees seem to have occurred after the decision that they consider discriminatory. Therefore, in the absence of a legitimate ground, the petitioner failed to create an appearance of discrimination, and the respondent was not obliged to prove that it did not discriminate.

The ECtHR did not sufficiently clarify the notion of discrimination based on the ground of opinion. This is due to the fact that discrimination based on this ground, occurs

²⁰⁴CPPEDAE, Decision No. 001/2013 from 17 October 2013, Ruslan Saachian v. Vladimir Maiduc and Dorin Recean regarding discrimination and harassment at the workplace.

²⁰⁵ECtHR, Busuioc, v. Moldova, 21 December 2004, § 56.

²⁰⁶CPPEDAE, Decision No. 012/2013 from 30 December 2013, Anatolie Bizgu, on behalf of members of public association “Movement of Transnistrian Refugees” v. Chisinau Mayor’s office regarding the discrimination based on the ground of opinion in access to goods and services available to the public, and namely, in the exercising of the right of property over the housing area received due to the status of an internal refugee moved from the left bank of the Dniester river.

most often in the context of labour relations, and the ECHR protects the right of persons to work indirectly in some exceptional situations under Art.8 (right to privacy) and Art. 1 Protocol 1(right to property). Another explanation is that when the ECtHR states the violation of Art. 10 (right to freedom of expression), it no longer considers the infringement in terms of discrimination based on the ground of opinion.²⁰⁷ Thereof follows the obligation of public authorities to distinguish between cases where the right to freedom of expression was violated and cases where persons were discriminated on the ground of opinion.

The absence of the case law in the field of discrimination based on the ground of opinion leads to an inconsistent approach on the side of national authorities and sometimes leads to unreasonable reference to the ground of opinion. The ECHR case law clearly stipulates that “Article 14 does not protect against any differential treatment, but just against the one that relies on an identifiable, objective or personal characteristic, or that based on the “status” under which a person or a group of persons are differentiated.”²⁰⁸ Opinions are not permanent and have a subjective nature. There might be situations where persons will claim to be discriminated based on the grounds of opinion, even if it is a simple interpersonal conflict. Psychologically, persons tend to feel discriminated when their opinion does not enjoy popularity. Hence, there is a need in restrictive interpretation of opinion as a protected ground. Public authorities should differentiate the situations when the opinions of the persons benefit from the protection against discrimination that is guaranteed by legislation, and when the opinions of the persons are not within their area of competence.

Firstly, the national authorities that apply non-discrimination matters should be aware that the right to opinion protected by the ECHR always refers to opinions of a certain importance in society and not to any interpersonal disagreement. Secondly, for Art. 14 of the ECHR to be applicable the differentiation in discriminatory treatment should be based on a ground or reason related to a personal feature (“status”) by which the persons or a group of persons are differentiated from each other.²⁰⁹ Therefore, the ground of opinion should define and identify a group of persons that is discriminated in comparison with another group of persons treated more favourably. Also, the opinion that is referred to as a ground, should have a long-term nature and should not change from day to day. Thus, the ground of opinion should not be understood as an extensive ground, as the notion “and other similar grounds” can be interpreted. Even this notion should be interpreted in the context of relevant characteristics, identifying persons or group of persons.

The test suggested by the ECHR in the case of *Clift v. the United Kingdom* is the re-evaluation of a general scope of Article 14 and namely that “when the State ensures rights that are related to the field of application of the Convention, which go beyond the minimum guarantees established by the Convention, these additional rights should be fairly and consistently applied to all who are under its jurisdiction, except for the case when there is an objective reasoning.”²¹⁰

²⁰⁷ See the Guidance for practitioners, *Non-discrimination in International Law*, 2011, p.209.

²⁰⁸ ECtHR, *Clift v. The United Kingdom*, 13 July 2010, § 55.

²⁰⁹ ECtHR, *Kafkaris v. Cyprus*, 12 February 2008, § 160.

²¹⁰ ECtHR, *Clift v. The United Kingdom*, 13 July 2010, § 60.

In conclusion, for to be considered as a ground of differentiation in the case of discrimination, the opinion should meet at least one of the following characteristics:

- a) to define and identify a group of persons or have a long-term nature. It is very important that opinions taken into account as protected grounds do not change from day to day. The grounds stipulated by the law and international acts, for example those regarding race, sex or religion, are the main grounds and are protected because they are intrinsic of a group of persons and could not be changed at all or could not be changed without essentially affecting the personality or/and philosophical views of the person. Under these grounds persons are put in situations of vulnerability towards other persons and that is why these are protected grounds. If the opinion of the person under which it could be claimed that this person was discriminated, varies from day to day, then, the person cannot reasonably claim discrimination on the ground of opinion;
- b) to be known to the person who it is alleged that discriminated. For a person to claim that s/he was discriminated on the ground of opinion, s/he should demonstrate that the person who discriminated knew about his/her opinion;
- c) to exist prior to the act alleged as discriminatory and have a causal link. A person claiming that s/he was discriminated on the ground of opinion should demonstrate that the discriminatory act is based only on his/her opinion. Firstly, for this it is necessary that the person made his/her opinion public prior to the alleged discriminatory act (for example: before an administrative act has been issued, etc). Secondly, the causal link between the person's opinion and allegedly discriminatory act should be demonstrated. The mere refusal or limitation of the person's right when s/he expressed a certain opinion should not be considered a discrimination based on opinion. Only if the alleged perpetrator of discrimination fails to justify the differential approach, it could be concluded that the opinion was the basis of the act of discrimination.

Recommendations:

- **The state authorities should interpret the ground of “opinion” narrower, so that the cases in which illegalities occur are not found as discriminatory situations;**
- **While stating “the presumption of discrimination” that leads to reversal of the burden of proof on the respondent, the state authorities should be careful whether claimants or petitioners have indicated the existence of a real ground stipulated by law or reasonably justified.**

3.10 Political affiliation

The ECHR prohibits the discrimination on the ground of political opinion (Art. 14). Under Law no. 121, any person may be not discriminated on the ground of political affiliation. Apparently, the notion "political affiliation" of the law was taken from Art. 16 para. (2) of the Constitution regulating the equality of rights for the citizens of the Republic of Moldova. In comparison with the differential treatment regarding the "political opinion" provided by the

most international treaties,²¹¹ the formulation given by our legislation narrows the spectrum of application of this ground, because it involves a certain political "affiliation", a connection with a particular political group. However, considering that Law no. 121 regulates separately the prohibition of the discrimination based on the ground of opinion, this discrepancy between the national and international provisions should not create practical problems because the competent authorities have the option to apply directly the ECHR or to apply the ground of opinion provided by the law when the persons are discriminated because they share a certain political view, but are not affiliated with any political party.

The registration of a political party in the Republic of Moldova is done by the Ministry of Justice, based on a set of documents provided by Art. 8 para. (1) of Law on Political Parties No. 294 as of 21 December 2007 (hereinafter Law no. 294).²¹² The citizen of the Republic of Moldova files a written application (Art. 7 para. (1) and (4) of Law no. 294) to obtain or renounce party membership of a political party. A person cannot simultaneously be a member of two or more political parties. If the person joins another political party, s/he loses the party membership of the party in which s/he was enrolled previously. Joining a political party, under the law, and the loss of party membership cannot serve as a ground for granting privileges or for limiting the rights and fundamental duties. It is important that the authority that registers the status of the political party checks whether it does not contain premises of discrimination in the process of obtaining or losing the party membership because the state has the positive duty to intervene when there are cases of discrimination caused by private actors, but under Art. 3 para. (6) of Law no. 294, the establishment and the activity of the political parties based on racial discrimination, nationality, ethnic origin, language, religion, sex, wealth or social origin are prohibited.

In addition, the state authorities have the negative obligation not to discriminate. For example, under Art. 5 para. (2) of Law no. 294 discrimination between the political parties is not allowed when receiving support from the state. The state should not favour some political parties and should not have to put the others in unfavourable situations. The legal framework adopted by the Parliament also must not be discriminatory.

In this respect, it is of great interest the situation in which under Law no. 192 of 12 July 2012 the use of the totalitarian communist regime symbols by political parties and the promotion of the totalitarian ideologies were prohibited. This norm was found

²¹¹For example, the International Covenant on Civil and Political Rights (Art. 2 and 26), the International Covenant on Economic, Social and Cultural Rights (Art. 2), the European Convention on Human Rights (Art. 14) prohibit discrimination on the ground of "political opinion".

²¹²One of the specific requirements of political party registration is the presentation of the statute of incorporation accompanied by the list of political party members, whose number can not be less than four thousand. At the moment of establishing of the party, its members must be domiciled in at least half of the administrative-territorial units of the second level in the Republic of Moldova, but not less than 120 members of the administrative-territorial units mentioned above. The application is examined within 30 days, during which the MoJ will take a decision to register the party, or in the case of non-compliance with legal requirements, a decision which refuses registration of the party (Art. 8 para. (3) of Law No. 294). The refusal can be challenged in the court. On the date of registering of the statute, the political party becomes a legal entity and is registered in the Register of political parties. 40 political parties were registered in Moldova on 5 April 2013.

unconstitutional by the Constitutional Court Decision of 4 June 2013. Although the authors of the unconstitutionality complaint cited, among other issues, that the provisions that prohibit the communist symbols violate Art. 16 of the Constitution (equality of citizens before the law), the ConstC examined the complaint of unconstitutionality only through the prism of freedom of expression and freedom of assembly.²¹³

The national legislation protects persons against discrimination based on the ground of political opinion/affiliation. The obvious examples of discriminatory legal provisions on this ground have not been identified. However, in practice there are signs of politicisation of some institutions by their leaders or by the ruling parties. Employing or promoting in career depending on the political affiliation might constitute discrimination, and should be avoided.

Recommendations:

- **The amendment of the list of protected grounds so that the ground of political affiliation to be reformulated as the ground of political opinion in order to widen its applied scope and to adjust the text of the Law to the requirements of the international treaties;**
- **It is recommended to interpret the ground of political affiliation as the ground of the political opinion in order to widen its applied scope and to adjust the text of the law to the international treaties and to change the terminology in case of some future amendments;**
- **The replenishment of public positions within the public authorities at any level must be carried out according to the principle of meritocracy and not of awarded privilege assigned to political parties or to political affiliation. Thus, the capacity and the expertise that the public authorities lack today will step up and the trust of the society in them will increase.**

3.11 Any other similar ground

The notion "any other similar ground" is to be interpreted in the light of the case law of the ECtHR. The ECHR provides the notion "any other ground" both in Art. 14 and Protocol No. 12. The ECtHR included a number of grounds in this category, some of them being already expressly provided by Law no. 121, for example, age, disability, sexual orientation. In addition, the ECtHR also recognized as protected grounds the following²¹⁴: the paternity²¹⁵, the marital status²¹⁶, the membership in an organization²¹⁷, the military

²¹³ConstC, Judgement from 4 June 2013 to review the constitutionality of some provisions on banning the communist symbols and promoting the totalitarian ideologies, §§ 121 and 122.

²¹⁴The following list is taken from the Handbook on the European Non-discrimination Law, the European Union Agency for Fundamental Rights and the Council of Europe, 2010, p. 118.

²¹⁵ECtHR, *Weller v. Hungary*, 31 March 2009.

²¹⁶ECtHR, *Petrov v. Bulgaria*, 22 May 2008.

²¹⁷ECHR, *Danilenkov and others v. Russia*, 30 July 2009.

rank²¹⁸, the paternity of a child born out of wedlock²¹⁹, the place of residence in the light of the phrase "any other status".²²⁰

The ECtHR examined the health condition as one of the protected grounds in the light of the notion "any other ground". For example, in the case *G.N. and others v. Italy*,²²¹ the ECtHR established that Art. 14 protects against the discrimination based on genetic diseases by analogy with the disability protection, although it does not include the health condition. The ECtHR reached this conclusion with reference to the Charter for Fundamental Rights of the European Union, which prohibits under Art. 21 also the discrimination based on genetic characteristics or disability. From the ECtHR and the CJEU practice a clear conclusion comes out, namely that not every health condition can be relied upon to establish the discrimination based on grounds of health, but a prior medical condition and a medical diagnosis are needed regarding the respondent and the differential treatment must be applied precisely because of the health condition indicated in the diagnosis.

Two important findings regarding the identification of a situation of discrimination based on the general concept "any other ground" follow from the ECtHR practice. Firstly, not every situation can be considered as being protected by this notion, because the concept of discrimination would dilute itself, so that every situation of eventual abuse be punishable as discrimination. Secondly, the characteristics that are subsumed under the concept of "any other ground" are to be interpreted in the light of the defining character and of their importance to person's identity i.e. it cannot be included an appearance or a temporary, superficial characteristics as being a protected ground.

Art. 16 of the Constitution stipulates two grounds not mentioned explicitly by Law no.121, and namely the "wealth" and the "social origin". These two grounds are not included in the list suggested by the ECHR, but some decisions targeted these grounds.²²² The interpretation of these grounds can also be fulfilled by the national authorities under the General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights. Specifically, it states that the grounds such as "social origin", "birth" and "property/wealth" are closely interlinked between them. The social origin refers to the social status inherited by the person. This may be related to the position of the person who received it through birth in a particular social class or a particular community, or may be related to a person's social status, such as the poverty or the homelessness status. The property/wealth ground can be linked by the person's relationship with the land that he owns, rents or occupies illegally or may be linked to another person's property.

The CPPEDAE found a case of discrimination in the field of education based on "disability" and "social origin of the orphan child" ground, making reference to Art. 16 of the Constitution of the Republic of Moldova and Art. 14 of the ECHR, applying it in the light of the notion "any other similar ground" of Law no. 121.²²³

²¹⁸ ECtHR, *Engel and others v. The Netherlands*, 8 June 1976.

²¹⁹ ECHR, *Sommerfeld v. Germany*, 8 July 2003.

²²⁰ ECtHR, *Carson and others v. The United Kingdom*, 16 March 2010.

²²¹ ECtHR *G.N. and others v. Italy*, 1 December 2009, para. 126-128.

²²² See, for example, the ECtHR, *Chassagnou v. France* from 29 April 1999 - small landowners who were affected by hunting while large properties were not affected by the same obligation.

²²³ CPPEDAE, Decision no. 004/13 from 22 November 2013.

Apart from the social origin, the CPPEDAE examined several characteristics/conditions through the notion "any other similar ground": the special status of employees (the military rank);²²⁴ the professional status (attorneys);²²⁵ the HIV/AIDS status;²²⁶ the marital status.²²⁷

In conclusion, the CPPEDAE practice shows a correct application of the notion "any other similar ground", following the ECtHR case law, not limiting to the grounds expressly provided by Law no. 121 or the Constitution. The CPPEDAE practice should be followed by the courts in the case of petitions based on similar grounds.

²²⁴CPPEDAE, Decision no. 008/13 from 17 February 2014.

²²⁵CPPEDAE, Decision no. 060/14 from 17 April 2014; CPPEDAE Decision no. 151/14 from 4 December 2014.

²²⁶CPPEDAE, Decision no. 055/14 from 01 May 2014.

²²⁷CPPEDAE, Decision no. 097/14 from 28 June 2014 (marital status referred to the petitioner who was a single mother in the decision).

IV. Forms of discrimination

4.1 Direct discrimination

Under Art. 6 of Law no. 121 any form of discrimination is prohibited. One of the most widely spread forms of discrimination is direct discrimination. Law no. 121 defines direct discrimination as "treating a person on any of the prohibited grounds in a manner less favourable than treatment of another person in a comparable situation" (Art. 2).²²⁸ Labour legislation also prohibits direct discrimination, but without providing any definition for this notion (Art. 8 para. (1) of the Labour Code). However, Directive 2000/43 /CE, Directive 2000/78 /CE, Directive 2006/54 /CE expressly prohibit direct discrimination, while the ECHR includes a general provision prohibiting discrimination.

The legal definition provided by Law no. 121 mentions two inherent elements of direct discrimination: differential treatment of a person and the fact that this differentiation is caused by any of the prohibited grounds stipulated by the law. This definition, however, is not complete because it overlooks the other two important elements in terms of qualification of the concept, namely: the differential treatment occurs in connection with a right and it is discriminatory only when there is no objective and justified reasoning that underlies such differentiation. With the aim to present the missing elements we will refer to the European case law. Although the ECHR does not make a clear distinction between direct and indirect discrimination, the ECtHR introduced a test that determines whether an act or action is discriminatory or not. For the first time the ECtHR has used this test in the case "Belgian Linguistics"²²⁹ and based on it the Court has developed its case law.²³⁰ We will discuss this test below.

The existence of a right

The first element to be considered by the authorities within the framework of the test is whether the person that complains against discrimination has a right stipulated by law and if in the exercising of this specific right the person was disadvantaged. When the ECtHR examines a case under Art. 14 of the ECHR, firstly it determines whether the act of discrimination invoked by the complainant refers to a right or a legitimate interest. Initially the list of protected rights was the one established by the ECHR but the list was extended

²²⁸The definition taken from Directive 2000/43/CE, Art. 2 item 2 item (a).

²²⁹ECtHR, the judgement in the case *Regarding certain aspects of the laws on languages taught in schools in Belgium v. Belgium*, 23 July, 1968, Chapter I, § 9, hereinafter „*Belgian Linguistics*“ case.

²³⁰ECtHR, *Rasmussen v. Denmark*, 28 November 1984, §§ 29-42

to any right provided by the national legislation following the adoption of the Additional Protocol no.12. For this reason, the prior interpretation of the right to non-discrimination was that it is an "accessory" right and was always linked to the right provided by the national legislation or the ECHR. The ECtHR found discrimination in relation to several rights provided by the ECHR, for example, discrimination regarding the right to life (Art. 14 + Art. 2 of the ECHR),²³¹ discrimination concerning the right not to be subject to degrading treatment (Art. 14 + Art. 3 of the ECHR),²³² discrimination concerning the right to privacy (Art. 14 + Art. 8 of the ECHR),²³³ discrimination regarding the right to freedom of assembly (Art. 14 + Art. 11 of the ECHR),²³⁴ discrimination concerning the right to property (Art. 14 + Art. 1 Prot. 1 of the ECHR)²³⁵ discrimination concerning the right to free elections (Art. 14 + Art. 3 Prot. 1 of the ECHR),²³⁶ discrimination concerning the right to education (Art. 14 + Art. 2 Prot. 2 of the ECHR)²³⁷, discrimination concerning the right to freedom of movement (Art. 14 + Art. 2 Prot. 4 of the ECHR)²³⁸ etc. When discriminatory treatment is invoked, the victim of discrimination should indicate the right guaranteed under the national legislation or the ECHR (where directly applicable) in respect of which the person has been discriminated. The CPPEDAE, for example, found discrimination in exercising the right to work²³⁹, parental rights²⁴⁰, access to justice²⁴¹ etc. It is important to note that although Law no. 121 expressly stipulates the prohibition of discrimination in employment (Art. 7), public services and goods (Art. 8) and education (Art. 9), it does not mean that national authorities have the power to examine cases of discrimination only with regard to these rights. The legislature has chosen to provide a detailed regulation of these areas to emphasize the importance of non-discrimination in respect of these rights and also to highlight areas where the problem of non-discrimination has to be solved in particular.

It is worth mentioning that when the violation of a substantive right is invoked before the ECtHR or national authorities (ex. right to assembly) and the right not to be discriminated is invoked separately (ex. discrimination regarding the right to assembly), if the violation of the substantive law in such a case is found, then in many cases, the Court considers that it is not necessary to examine the case in relation to the claim of discrimination, unless there is a situation of compelling differential treatment and this finding is crucial to the case.²⁴²

The ECtHR could address differently the claim regarding the right in relation with whom the complainant was discriminated in case of general prohibition of discrimination

²³¹ ECtHR, *Nachova and others v. Bulgaria*, 6 July 2005.

²³² ECtHR, *Eremia v. Moldova*, 28 May 2013.

²³³ ECtHR, *Vallianatos v. Greece*, 7 November 2013.

²³⁴ ECtHR, *Genderdoc-M v. Moldova*, 12 June 2012.

²³⁵ ECtHR, *Gaygusuz v. Austria*, 16 September 1996.

²³⁶ ECtHR *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009.

²³⁷ ECtHR, The case "Belgian Linguistics".

²³⁸ ECtHR, *Timishev v. Russia*, 13 December 2005.

²³⁹ CPPEDAE, Decision no. 105/2014 from 19 June 2014.

²⁴⁰ CPPEDAE, Decision no. 034/2013 from 13 February 2014.

²⁴¹ CPPEDAE, Decision no. 009/2013 from 2 December 2013.

²⁴² ECtHR, *Chassagnou and others v. France*, 29 April 1999.

(Art. 1 Prot. 12 of the ECHR). For example, in the case of *Sejdic and Finci v. Bosnia and Herzegovina*, the ECtHR found discriminatory the prohibition applied to the complainants to run for the President office because according to the Constitution of Bosnia and Herzegovina, only persons who declare themselves as belonging to one of the "constituent peoples" can apply for this position, and the complainants declared themselves to be of Roma and Jewish origin, accordingly. Although the complainants invoked only the general prohibition of discrimination (Art. 1 of Protocol 12 of the ECHR) without invoking violation of a right (stipulated by the national legislation) in this regard, the ECtHR has accepted the claim and sanctioned the violation of this provision.²⁴³

Differential treatment regarding a group which is in a similar situation (comparator)

The second element in analysing discrimination consists in the differential treatment regarding a group that is in a similar situation. Differential treatment is the essence of discrimination and the key element that distinguishes it from other unlawful acts. For example, in the case *Genderdoc-M v. Moldova*, the Government acknowledged the violation of the right to assembly of the complainant, but tried to prove that the complainant association was not treated differently while exercising the right to assembly because during the reference period there was a general intolerance regarding the right of assembly. On the other hand, the complainant submitted evidence to the ECtHR proving that during the same period other associations were able to carry out peaceful meetings authorized and protected by public authorities. Therefore, after the ECtHR found differential treatment, besides the direct violation of the right to assembly (Art. 11 of the ECHR), the Court could also sanction the discrimination of the complainant association in relation to its right to assembly (Art. 14 of the ECHR + Art. 11 of the ECHR).²⁴⁴

In general differential treatment shall be found when compared with another group of persons in a situation comparable to the person or the discriminated group, as far as this simulation is possible. For example, in the case of *Burden v. the United Kingdom*, the complainants were two sisters who lived together for more than 30 years and had a property under common ownership and each left their legacy to the other sister. Taking into account that the value of the property exceeded a certain value limit, they had to pay a fee to transfer the property one to the other by inheritance, if one of them died. The complainants claimed that they were discriminated, if compared with married persons or persons in a civil partnership who were exempted from this tax. The ECtHR dismissed this comparator, mentioning that marriage or civil partnership is based on the will of persons to assume certain rights and responsibilities, while the complainants were in kinship, therefore, their relationship was different from those mentioned previously.²⁴⁵ Therefore, the test was stopped at this stage, due to the absence of a comparator.

The comparator must be identified in most cases of direct discrimination. However, there are exceptions when it is not possible to establish a comparator. For example, when a person is subject to differential treatment because she is pregnant, this case will be classified as direct

²⁴³ ECtHR, *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009.

²⁴⁴ ECtHR, *Genderdoc-M v. Moldova*, 12 June 2012, §§ 39-55.

²⁴⁵ ECtHR, *Burden v. the United Kingdom*, 29 April 2008, §§ 58-66.

discrimination on grounds of gender, without any need to identify the comparator.²⁴⁶ Many cases of discrimination of persons with disabilities do not require establishing a comparator, the need for special protection coming just from their vulnerability.

Differential treatment based on a prohibited ground

The third distinctive element in analysing discrimination is the ground based on which a person or a group is discriminated. The ground represents the distinctive feature that serves as the cause for the differential treatment. Also the discriminated group possesses this ground and the comparator doesn't. No form of discrimination could exist without the existence of a ground, real or alleged. The only exception is victimization which is actually an atypical form, a guarantee for the effectiveness of protective mechanisms against discrimination, determined by the need for protection once the procedure has been initiated. The protected ground must be stipulated by the law, the ECHR, the EU Directives or national or European practice. Law no. 121 Art. 1 para. (1) prohibits discrimination based on "race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, opinion, political affiliation or any other similar grounds". Discrimination based on these grounds is also stipulated by Art. 176 of the Criminal Code as of April 18, 2002 and Art. 65¹, Art. 71¹ of the Misdemeanours Code from 24 October 2008. Art. 7 para. (1) of Law no. 121 also prohibits discrimination in employment based on sexual orientation. In addition to these grounds, the text of the ECHR ensures equality in exercising the rights based on social origin, and wealth (Art. 14).

Objective and reasonable justification

In the case of "Belgian linguistics" the ECtHR for the first time found that not every differential treatment is an unlawful act of discrimination. Even if the above mentioned elements are cumulatively present, differential treatment would be contrary to Art. 14 of the ECHR, unless there is an objective and reasonable justification for this differentiation. Such justification can be assessed on the basis of the legitimate aim pursued by the measures undertaken by the authorities, considering the democratic principles of the society. Moreover, the legitimate aim must be proportional to the means used to achieve it.²⁴⁷

The first prong of objective and reasonable justification is the establishment of the legitimate aim. In comparison with other articles of the ECHR,²⁴⁸ Art. 14 of the ECHR does not provide a list of legitimate aims that can be invoked by public authorities. However, this does not mean that any legitimate aim will satisfy the reasonable and objective justification test. For example, in the case of *PM v. the United Kingdom*²⁴⁹, the ECHR has not accepted as

²⁴⁶European Union Agency for Fundamental Rights, European Court of Human Rights – Council of Europe, "Handbook on European non-discrimination law", 2011, p. 25.

²⁴⁷ECtHR, *the case of „Belgian Linguistics“*, Chapter I, B, § 10.

²⁴⁸For example, Art. 9, 10, 11 of the ECHR in para. 2 stipulate legitimate aims which can justify limitation of the rights provided in the first paragraphs.

²⁴⁹ECtHR, *PM v. the United Kingdom*, 19 July 2005, § 28.

legitimate aim the tax law regulations of the United Kingdom allowing fathers to request tax exemption on maintenance payments after divorce, but did not allow such an exemption for unmarried fathers after the dissolution of a relationship out of the wedlock. The respondent Government argued that the status of marriage conferred a special status due to parental rights and obligations. The ECtHR mentioned, as a general rule, that for a father who has a family relationship with children, rights regarding exemptions on maintenance payments are the same as for married fathers.²⁵⁰

A clear example when the ECtHR has accepted the legitimate aim invoked by the respondent state is the case of *Sidabras and Dziaunaitis v. Lithuania*. Two former members of the KGB complained to the ECtHR about the restriction and, respectively, their inability to get employed in the private sector due to their past in the Soviet secret services following the adoption of the lustration law. The ECtHR has accepted the argument by the respondent Government that the restriction pursued the legitimate aim of protecting national security, public safety, economic well-being of the society and the rights and freedoms of others. In assessing the legitimate aim the ECtHR took into account the past history of Lithuania, and that restrictions on employment of former KGB members were imposed in several countries that have successfully overcome totalitarian regimes.²⁵¹

At the next stage of evaluation of objective and reasonable justification, the ECtHR shall assess whether the means (restrictions) adopted by the authorities are proportionate to the legitimate aim invoked. While determining the proportionality it should be established whether the difference in treatment between groups constitutes a fair balance between the protection of community interests and freedoms stipulated by the ECHR.²⁵² In the case of *Sidabras and Dziaunaitis*, for example, the ECHR mentioned that restricting the right to employment in private organizations on grounds of disloyalty to the state cannot be justified under the ECHR, irrespective of the economic, political or security importance. At the same time, the ECtHR added that "KGB law" forbidding complainants to engage in private sector didn't clearly define the restricted functions, and therefore the logical link between the legitimate aim pursued and prohibition to occupy these positions could not be established. Also, while assessing the proportionality it was considered that the prohibition was imposed after 13 and 9 years, respectively, since complainants have left KGB. Finally, the ECHR concluded that enforcement of "KGB law" provisions in the respective case was disproportionate, although the aims pursued by the government were legitimate.

When evaluating differential treatment the states enjoy the margin of appreciation that may vary depending on the circumstances, subject and context of the case.²⁵³ According to the ECtHR case law not all prohibited grounds of discrimination are treated equally. Some grounds are inherently suspicious and shall be examined very thoroughly. For example,

²⁵⁰Robin C.A. White and Claire Ovey, Oxford University Press, "European Convention on Human Rights", 2010, page 561.

²⁵¹ECtHR, *Sidabras and Dziaunaitis v. Lithuania*, 27 July 2004, § 55. See similar case *Naidin v. Romania*, 21 October 2014.

²⁵²ECtHR, *Zarb Adami v. Malta*, 20 June 2006, § 73.

²⁵³ECtHR, *Murdock v. the United Kingdom*, 25 January 2000.

when the differential treatment occurs between men and women,²⁵⁴ on the grounds of nationality,²⁵⁵ race,²⁵⁶ religion,²⁵⁷ status of legitimate child²⁵⁸ or sexual orientation,²⁵⁹ there must be brought extremely serious reasons to justify the differential treatment.²⁶⁰ In case of other grounds, the margin of appreciation of the state is wider. Also, states usually have a wider margin of appreciation when it concerns economic measures and social strategies of the states. Taking into account that national authorities are in touch with the needs of the society, they are in a more advantageous position in terms of assessing public interest in economic and social issues, if compared to the international judge, and the ECtHR as a rule, shall respect public policies of the legislature, unless they are obviously lacking reasonable grounding.²⁶¹ For example, in the case of *Stec and others v. the United Kingdom*, the ECHR found that the differential treatment between women and men in terms of retirement age, 60 and 65, respectively, is not discrimination, as issues that are related to the domestic economy are covered by the margin of appreciation of the state, and the differential treatment was aimed to correct "factual differences" between men and women. Considering that the inequity between men and women has decreased substantially over time, the ECHR considered that, although the respective differentiation started at the beginning of the 1940s, the British authorities, starting with 1991, have been taking steps towards establishing the same retirement age for men and women. Therefore, keeping in mind the justification of the British state to correct "social inequity" between men and women, and that in this area there is no European consensus, the ECtHR could not find violation of Art. 14 of the ECHR.²⁶² As we can observe, although the differential treatment was based on the ground of sex, the ground, which is treated with special care, the ECtHR accorded a broad margin of appreciation to the U.K., taking into account that the undertaken measures concerned policies in the economic field. The convincing arguments put forward by the respondent state to justify differential treatment could not be ignored.

4.2 Indirect discrimination

The principle of non-discrimination prohibits both cases when persons or groups of persons in identical situations are treated differently (*direct discrimination*) and when individuals or groups of individuals in significantly different situations are treated identically (*indirect discrimination*).²⁶³ Under Law No. 121, indirect discrimination is defined

²⁵⁴ ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78.

²⁵⁵ ECtHR, *Gaygusuz v. Austria*, 16 September 1996, § 42.

²⁵⁶ ECtHR, *Timishev v. Russian Federation*, 13 December 2005, § 58.

²⁵⁷ ECtHR, *Hoffmann v. Austria*, 23 June 1993, § 36.

²⁵⁸ ECtHR, *Inze v. Austria*, 28 October 1987, § 41.

²⁵⁹ ECtHR, *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999.

²⁶⁰ Robin C.A. White and Claire Ovey, Oxford University Press, "European Convention on Human Rights", 2010, page 561.

²⁶¹ ECtHR, *Stec v. the United Kingdom*, 12 April 2006, § 52.

²⁶² *Ibidem*.

²⁶³ ECtHR, *Hoogendijk v. the Netherlands*, 6 January 2005.

as "an apparently neutral provision, action, criterion or practice, which has the effect of disadvantaging a person in relation to another person based on the grounds stipulated by the present Law, except for the case when that provision, action, criterion or practice is objectively justified by a legitimate aim and when the means of achieving it are proportionate, adequate and necessary "(Art. 2).²⁶⁴ Both Law No. 121 and the Labour Code prohibit indirect discrimination (Art. 6 and Art. 8 para. (1), accordingly).

In order to find indirect discrimination, as well as in the case of direct discrimination, it is necessary to identify the specific right in relation to which it is occurring, the ground prohibited by law which was relevant for the discriminatory treatment, and the presence or absence of an objective and reasonable justification for the differential treatment. If in the case of direct discrimination the differential treatment of a group towards another group of persons has to be proved, for indirect discrimination it is the negative effect, the disproportionate impact that a particular practice or rule has on a group of persons which has to be proved. While establishing this element the factual situation (whether or not a group of persons is affected) shall be taken into consideration and not the intention of public authorities to treat the discriminated group differently. Therefore, indirect discrimination shall be established based on statistical data or analysis demonstrating that although the disputed practice or rule appears not to be directed at the group of persons and is apparently neutral, *de facto* it affects the group negatively.

In one of the cases of reference for indirect discrimination, *Thlimmenos v. Greece*, a person was denied the position of accountant because of a past criminal record which was registered for refusing to do military service as conscientious objector. The essence of the dispute is that no distinction was made between the complainant convicted as conscientious objector and others with convictions for offences, which would have indicated a doubtful moral probity (*persons in different situations*). The offence for which the complainant was convicted did not involve dishonesty or amorality on the part of the complainant and therefore could not have affected the complainant's ability to practice the profession of chartered accountant. Although the authorities just applied the law in force at that time, the ECtHR mentioned that the state failed to fulfil its obligation to protect the person against discrimination based on religious ground, on the basis that it has not added an exception to the rule according to which persons who have committed serious crimes could not be employed as accountants.²⁶⁵

In another case, *Zarb Adami v. Malta*, the ECtHR found indirect discrimination based on statistical data.²⁶⁶ The complainant claimed that men were called to serve as jurors in the court proceedings more often than women. According to statistics, in 1997 the jurors' lists included 7,503 men and 2,494 women, while in the previous year the difference was even

²⁶⁴This definition has been taken from Directive 2000/43/EC, Art. 2 item 2 letter b). In general, the EU regulatory framework widely recognizes the need to combat indirect discrimination. For example the Council of the EU recommends Member States to prohibit indirect discrimination at the workplace (Directive 2000/78/EC (12)). In another directive the Council of the EU explains the burden of proof in cases of direct and indirect discrimination (Directive 97/80/EC, Art. 2 (2), Art. 4 (1)).

²⁶⁵ECtHR, *Thlimmenos v. Greece*, 6 April 2000, §§39-49.

²⁶⁶ECtHR, *Zarb Adami v. Malta*, 20 June 2006, para. 71-84.

bigger, 4,298 men and 147 women. The ECtHR mentioned that in 1996, 174 men and only 5 women served as jurors. The complainant said that due to the practice of exempting women from this social duty based on the arguments that they do not participate as actively in public and professional life as men, men bear a disproportionate burden. The disproportionate burden has been supported by the fact that the complainant was called to serve as juror in four lawsuits for 26 years. As a result of his refusal to attend the hearing of the last lawsuit, he was sanctioned. The ECtHR did not provide an extensive argumentation in justification for the solution, mentioning only that discrimination contrary to the ECHR may result not only from legislative measures but also from de facto situations. However, the fact that the ECtHR recognized the violation of Art. 14 of the ECHR on the basis of statistical data represented the starting point for developing the concept of indirect discrimination.

In the case of *D.H. v. the Czech Republic*, the ECtHR clarified the concept of indirect discrimination in a comprehensive way.²⁶⁷ The case refers to the placement of Roma children into special schools. After the First World War special schools were established in the Czech Republic, and children with mental disorders, unable to attend ordinary schools were placed there. Under the Schools Act from 1984, the decision to place a child in a special school was taken by the supervising teacher based on the results of intellectual capacity tests, with the consent of the legal representative of the child. The complainants claimed that the majority of children placed in such schools in Ostrava were Roma children and, thus, the Schools Act, although apparently neutral, disproportionately affected Roma children, who in fact were segregated from other children. According to statistic data supplied by the complainants and various organizations, 56% of the total number of pupils placed in special schools in Ostrava, were Roma children, although Roma children represented only 2.6% of the total number of children attending school in the region.

The ECtHR could conclude that even though the legal norms regulating the placement into special schools appeared to be neutral, in practice they had a much greater impact on Roma children than on non-Roma ones and resulted in a disproportionately high placement of Roma children in such schools. The ECtHR also found that such cases may constitute indirect discrimination, not requiring discriminatory intention. Therefore, the ECtHR found that the evidence submitted by the complainants was sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. Thus, the burden of proof shifted to the respondent state, which had to show that the difference in the impact of the legislation was the result of objective factors irrelevant to ethnic origin. In the process of establishing the objective justification the state failed to demonstrate it and the Grand Chamber of the ECtHR found a violation of Article 14 of the ECHR together with Article 2 of Protocol No.1 of the ECHR).

In a similar case from 2013, *Horvath and Kiss v. Hungary*, the ECtHR emphasized the importance of the guarantees that the state must provide in the process of testing students who are at risk to be placed in schools for children with mental disabilities. Although the case in question is not a novelty in the field of indirect discrimination qualification, it stresses

²⁶⁷ECtHR, *D.H. v. the Czech Republic*, 13 November 2007, para. 175-210.

the importance of undertaking positive measures to prevent the continuation of the long-standing discrimination or discriminatory practices disguised as apparently neutral tests.²⁶⁸

Indirect discrimination has been found in cases examined by the European Committee of Social Rights (hereinafter "ECSR") in the implementation of the Revised European Social Charter. For instance, in the case *Autism-Europe v. France*, the ECSR found discrimination against petitioners (Art. E of the ESC), with regard to the right of persons with disabilities to independence, social integration and participation in the life of the community (Art. 15 § 1 of the ESC) and to the right of children and young persons to social, legal and economic protection (Art. 17 § 1 of the ESC). The petitioners alleged that the overwhelming majority (80-90 percent) of young adults and children with autism did not have access to adequate educational services. Based on these data and other arguments, the ECSR concluded that French authorities have not made sufficient progress in the field concerning the access to education for persons with autism.²⁶⁹

4.3 Harassment

Under Art. 2 of Law No. 121, harassment is defined as "any form of unwanted conduct that could create an intimidating, hostile, degrading, humiliating or offensive environment, with the purpose or effect of violation the person's dignity based on the grounds stipulated in the present Law." The definition of harassment in Moldovan legislation corresponds to the definition provided by the Directives of the European Union.²⁷⁰

Harassment is an especially detrimental form of discriminatory treatment because of the form it takes (the creation of an intimidating, hostile, degrading, humiliating or offensive environment) and of the potential effect it may have (the violation of human dignity).²⁷¹ The definition of harassment includes all its constituent elements that shall be proved before the CPPEDAE or before courts. Under the European Directives, the special principle regarding the burden of proof, on allegations of direct and indirect discrimination, that divides the burden of proof between the complainant and the respondent shall not apply to

²⁶⁸ ECtHR, *Horvath and Kiss v. Hungary*, 29 January 2013, para. 116.

²⁶⁹ ECSR, *Autism-Europe v. France*, pl. No. 13/2002.

²⁷⁰ Art. 2 para. (3) of **Directive 2000/43/EC** stipulates that "Harassment shall be deemed to be discrimination under the provisions of paragraph 1, when an unwanted conduct related to racial or ethnic origin leads to violation of the person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States"; Art. 2 para. (3) of **Directive 2000/78/EC** stipulates that "Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States"; Art. 2 para. (1) letter c) of **Directive 2006/54/CE** stipulates that harassment is the situation "where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

²⁷¹ CPPEDAE, Decision No. 003/13 from 14 March 2014, *I.Z, N.N., I.H. and S.M. v. V. C., Head of the State Chamber of Registration*, p. 6.5.

cases of discrimination in the form of harassment.²⁷² Consequently, anyone who complains that was subjected to harassment is in a more difficult position from the perspective of evidence, as s/he is expected to present facts showing the unwanted conduct manifested towards him/her; the causal link between that conduct and the creation of an intimidating, hostile, degrading, humiliating or offensive environment; that the purpose or the effect of this conduct was the violation of his/her dignity; that this treatment was based on one of the protected grounds.²⁷³ The complainant can prove that it is an unwanted conduct also by reference to what is generally accepted in society or community/organization where the alleged behaviour took place, if s/he cannot specifically prove the unambiguously expressed refusal mentioned to the person accused of harassment. In case of harassment there is no need to demonstrate the comparator, and the lack of intention to harass from the respondent is irrelevant. Also, given its seriousness, the harassment cannot be justified, which means that if the acts of harassment were proved, the respondent cannot invoke any grounds to justify the harassment.

In addition the legislature prohibited harassment at the workplace in Art. 7 para. (2) letter f) of Law No. 121 by listing prohibited discriminatory actions on the side of employers, probably to emphasize the seriousness of the harassment in employment. At the same time, harassment is not provided as a separate form of discrimination in the Labour Code. Harassment at the workplace can also represent a misdemeanour, being defined by the Misdemeanours Code as "any type of behaviour on the part of the employer based on grounds of race, nationality, ethnic origin, language, religion or belief, sex, age, disability, political affiliation, opinion or any other grounds that could create an intimidating, hostile, degrading, humiliating or offensive environment at the workplace."²⁷⁴ The agent that finds this misdemeanour is the CPPEDAE, which draws up a report that can be subsequently sent for examination to the competent court.²⁷⁵

The CPEDAE developed the test for proving the harassment in the first case it has examined: *Ruslan Saachian v. Vladimir Maiduc and Dorin Recean*.²⁷⁶ In the mentioned case, the petitioner was dismissed from the position of Head of the Criminal Police Department of the General Commissariat of Police, and later was reinstated in the position following a court judgement. The petitioner complained that, after reinstatement, he was harassed by the Head of the Internal Security and Anti-corruption Service Vladimir Maiduc, and by the Minister of Internal Affairs Dorin Recean, through the following: incomplete payment of salary for forced absence from work; refusal to reimburse the costs for the business trip; failure to provide an office for work, the petitioner being forced to work in the corridor; failure to issue service identity card corresponding to the position held; hindrance of the

²⁷² Art. 19 para. (1) of **Directive 2006/54/CE**, Art. 8 para. (1) of **Directive 2000/43/EC** and Art. 10 para. (1) of **Directive 2000/78/EC**.

²⁷³ CPPEDAE, Decision No. 001/13 from 17 October 2013, *Ruslan Saachian v. Vladimir Maiduc and Dorin Recean*, p. 6.3.

²⁷⁴ Art. 54² para. (2) of the Misdemeanours Code.

²⁷⁵ Art. 423⁵ of the Misdemeanours Code.

²⁷⁶ CPPEDAE, Decision No. 001/13 from 17 October 2013, *Ruslan Saachian v. Vladimir Maiduc and Dorin Recean*.

bailiff's actions, who was acting at the requests of the petitioner; placement of the petitioner in subordination of Mr Maiduc, who was publicly criticized by the petitioner and whose actions were challenged by several civil and criminal proceedings still pending at the time of delivery of the decision by the CPPEDAE, etc.²⁷⁷ The CPPEDAE found that such conduct towards the petitioner created an intimidating, hostile, degrading, humiliating and offensive environment for the petitioner, and the respondents' actions cannot be justified and that there was a causal link between the conduct of Mr Saachian superiors and the work environment created for the petitioner. These actions have intensified and gained momentum after numerous complaints of the petitioner addressed to the Minister of Internal Affairs, prosecutors and other authorities with regard to the harassment he was subjected to. The CPPEDAE considered that the petitioner's harassment occurred on the ground of opinion, especially due to the expression of disagreement and criticism towards respondents' actions in mass media broadcasts, but also through complaints and petitions to various authorities. Finally, the CPPEDAE found that the facts described by the petitioner constituted harassment on the ground of opinion and recommended the respondents to refrain from further acts of discrimination against the petitioner. Although the employer's actions in this case include elements that would allow us to speak about harassment, the invoked ground is problematic. The assessment of the authors of this report concerning the ground „opinion“ is that this ground should be interpreted narrower than the CPPEDAE did in this case. By „opinion“ one should rather understand a political opinion or a viewpoint that manifests so strongly in a person's life that comes to characterize or define that person, as opposed to opinions expressed occasionally, that we consider should not constitute protected grounds in cases of discrimination.²⁷⁸ Assuming this interpretation, we consider that this case represents a labour dispute rather than a case of discrimination.

In the case of *Angela Frolov and Information Centre GENDERDOC-M v. Stanislav Ghibadulin*,²⁷⁹ the CPPEDAE found that the respondent performed several acts of harassment towards the members of LGBT community, and namely: the person with homosexual orientation that appeared in six videos on the respondent's website was surrounded by several individuals revealing hostile and violent behaviour, who were insulting and humiliating him, pouring urine over him and forcing him to answer intimate questions. Some individuals who appear in the video were forced to undress completely, others - to perform squats or other physical exercises while being taped and being called paedophiles. The CPPEDAE found the harassment of Angela Frolov, a member of the Centre, which was manifested by threats on her Facebook page, by threatening words addressed during an exhibition, and by throwing eggs into the office of the Centre, where petitioners were, etc.²⁸⁰ The respondent did not present any facts in his defence, and the CPPEDAE decided that the facts alleged by the petitioners were proved and constitute harassment. The CPPEDAE notified the Prosecutor's General

²⁷⁷Ibidem, p. 6.4.

²⁷⁸See Section 4.9 of the report for details on the ground of "opinion".

²⁷⁹CPPEDAE, Decision No. 158/14 from 11 December 2014, *Angela Frolov and Information Centre GENDERDOC-M v. Stanislav Ghibadulin*.

²⁸⁰Ibidem, para. 6.6-6.7.

Office about this case, given the high social danger of the deeds that could be classified as criminal offences. By 30 April 2015 the Prosecutor's General Office has not informed the CPPEAE about the measures undertaken in this case.²⁸¹

When authorities or public officials do not undertake measures to stop the harassment of the victims by other individuals, they also can be held accountable. According to the ECtHR, the states have a positive obligation to protect against harassment committed by individual persons, and the authorities' failure to prevent and stop harassment may constitute an inhuman and degrading treatment (Art. 3 of the ECHR). Thus, in the case of *Đorđević v. Croatia*,²⁸² the ECtHR found that the failure of police and other authorities to react to the complaints of a mother, whose son had physical and mental disabilities and who had been harassed by children attending the neighbouring school, led to the violation of Art. 3 of the ECHR (prohibition of torture, inhuman and degrading treatment) in the case of her son, and Art. 8 of the ECHR (the right to respect for one's private and family life) in case of the mother.²⁸³ In a national case,²⁸⁴ the CPPEAE found that the failure of administration of an educational institution to settle initial discords between room-mates in the case of a petitioner with disabilities and the school administration tolerance towards subsequent verbal and physical abuse committed by her room-mates, despite the petitioner's requests to settle this problem, along with the aggressive conduct of the administration of the educational institution led to the creation of an intimidating, hostile, degrading, humiliating and offensive environment for the petitioner, which constituted harassment.²⁸⁵

When individuals who complain of harassment cannot prove that the actions against them are based on a prohibited discrimination ground, the CPPEAE will not find the harassment.²⁸⁶ Thus, in a case of 2014, the petitioners complained that they were dismissed by the Head of the State Chamber of Registration (SCR) because of their ethnicity and that they were harassed after being reinstated into the positions following a court judgement on grounds of violation of the dismissal procedure, then they were dismissed again on grounds of redundancy. The CPPEAE mentioned that the dismissal of the petitioners was an unwanted conduct for them and because there were committed serious violations of labour legislation regarding the redundancy of staff, the reinstatement of petitioners in the workplace, followed by their

²⁸¹ Information provided by the CPPEAE on 4 May 2015.

²⁸² ECtHR, *Đorđević v. Croatia*, 24 July 2012.

²⁸³ The Court declared the claim on the violation of Art. 14 of the ECHR dismissed on the grounds of non-exhaustion of local remedies.

²⁸⁴ CPPEAE, Decision No. 004/13 from 22 November 2013, *Ludmila Bobeică and Valentina Ursu v. Vocational High School no. 1*, para. 6.5-6.13.

²⁸⁵ The petitioner complained that she was insulted because she is an orphan, threatened with physical violence, slapped across the face, kicked in the back, forced to wash dishes of her room-mates, accused of stealing money although money was found subsequently, and punched in the face, the last fact was confirmed by medical examination. The head master of the lyceum refused to enrol the petitioner stating that the latter has mental disorders. After receiving the medical certificate confirming the petitioner's ability to study, the head master said that the doctor should be imprisoned. After the enrolment, the head master categorically refused to provide her a room in the school hostel and provided it only after the petitioner complained to the Ministry of Education (para. 4.1- 4.3 of the decision).

²⁸⁶ CPPEAE, Decision No. 003/13 from 14 March 2014, *I.Z, N.N., I.H. and S.M. v. V. C., Head of the State Chamber of Registration*.

repeated dismissal, created a hostile, intimidating, degrading and humiliating environment for them. However, the CPPEDAE did not accept that their ethnicity was the basis for their dismissal, arguing that among the employees of the SRC there were persons belonging to different ethnic groups, including those recently employed. Therefore, the CPPEDAE found that there was no harassment at the workplace. In the opinion of the authors of this report it can be criticised that the CPPEDAE argued that the petitioners have failed to demonstrate the respondent's unreasonable and differential treatment towards them, taking into account that the differential treatment should not be demonstrated in case of harassment because the subject of sanctions in this case is the creation of a hostile and humiliating environment against a person based on a protected ground. In the case of *T.B. v. Valeriu Negru, acting Head of the Directorate General for Social Assistance of Municipal Council of Chisinau* (DGSA of MCC), the CPPEDAE reconfirmed that in case where the victims demonstrate all the elements of harassment, except for the protected ground, the deeds shall not be punished under Law No. 121.²⁸⁷ In this case the petitioner proved the unwanted conduct towards her at the workplace and the hostile environment created as a result of this conduct, which led to the violation of her dignity. However, neither the petitioner nor the CPPEDAE could identify any prohibited grounds of discrimination under which the contested actions of the employer took place. Therefore, the CPPEDAE found that the facts alleged by the petitioner do not constitute harassment as defined under Law No. 121.

Sexual Harassment

The legislature considered that sexual harassment is such a serious form of harassment so that it is regulated separately. Since 2010 sexual harassment is defined by Law no. 5 on Ensuring Equal Opportunities for Women and Men and by the Labour Code as “any form of physical, verbal or non-verbal sexual conduct that violates the person's dignity or creates an unpleasant, hostile, degrading, humiliating or offensive environment.”²⁸⁸ Likewise in case of sexual harassment, there is no need to prove the existence of intention in order to issue a sanction. It is sufficient to demonstrate the effect consisting in a violated dignity or creation of an unpleasant, hostile, humiliating environment.

The Labour Code obliges the employers to introduce in the internal regulations, dispositions regarding the prohibition of sexual harassment²⁸⁹ as well as to take measures of preventing sexual harassment at the working place.²⁹⁰ In 2010 sexual harassment was also introduced into the Criminal Code, which defines it as “displaying a physical, verbal or non-verbal sexual behaviour that injures the person's dignity or creates an unpleasant, hostile, degrading, humiliating, discriminatory or offensive environment for the purpose of determining a person to undertake sexual intercourse or other undesired sexual actions

²⁸⁷ CPPEDAE, Decision no. 056/14 from 15 May 2014, *T.B. v. Valeriu Negru, acting Head of the Directorate General for Social Assistance of Municipal Council of Chisinau*.

²⁸⁸ Art. 2 of Law no. 5 on Ensuring Equal Opportunities for Women and Men and Art. 1 of the Labour Code.

²⁸⁹ Art. 10 para. (2) letter f⁵) and Art. 199 para. (1) letter b) of the Labour Code.

²⁹⁰ Art. 10 para. (2) letter f³) of the Labour Code.

committed by threat, constraint, blackmail”, being sanctioned with a fine from 300 up to 500 conventional units (from MDL 6000 up to MDL 10000) or with community service from 140 up to 240 hours, or with imprisoning up to 3 years.²⁹¹ Unlike sexual harassment sanctioned under Law no. 5/2010, the acts sanctioned under the Criminal Code must be characterized by the purpose of “seducing a person to sexual intercourse or other undesired actions of sexual nature” and the way of commitment should take the form of threat, constraint or blackmail.

Regarding the investigation of sexual harassment cases, we did not have enough data to identify until the present moment some cases that had been decided by courts or at least sent to trial, although in the last years more complaints were registered. According to the MMPSF report for 2011 on monitoring the implementation of the Action Plan for the National Program for ensuring gender equality for 2010-2015, during the period between 2009-2010, no cases of sexual harassment were registered at MIA, and during 2011, 6 such cases were registered. However, no case of sexual harassment was examined by the court until 2012.²⁹² In the next MMPSF reports for 2012 and 2013 there are no data regarding the opening of criminal files and the examination by the trial courts of sexual harassment offences. According to the information provided by the MIA,²⁹³ in 2012, 12 criminal cases on sexual harassment were initiated, out of which 6 were submitted to the prosecutor with the proposal to finalise criminal prosecution proceedings, in 2013 – 18 criminal cases were initiated, out of which 6 were submitted to the prosecutor, and in 2014 – 18 criminal cases were initiated, out of which 9 were submitted to the prosecutor. This situation raises concerns as to the efficiency of the investigation carried out by the law enforcement agencies in the application of legal provisions sanctioning sexual harassment provided by the Criminal Code.

The CPPEDAE did not examine any case of sexual harassment until 1 May 2015.

At the same time, the judgement by the Supreme Court of Justice Plenary from 2005 that generalised the judicial practice in the cases related to sexual life offences and having the purpose to interpret and apply correctly and uniformly the legislation that regulates criminal liability for perpetrating these offences²⁹⁴ was not updated after the sexual harassment offence was introduced in 2010. Therefore, there is no generalisation or recommendations for the unification of the judicial practice in the application of the offence of sexual harassment.

Recommendations:

Amendments to the national legislation

- Harmonisation of the Labour Code with Law no.121 in order to sanction harassment at the working place in general, and not only sexual harassment.

²⁹¹ Art. 173 of the Criminal Code.

²⁹² The Ministry of Labour, Social Protection and Family, The Report for 2011 on monitoring of the implementation of the Action Plan for the National Program of ensuring gender equality for 2010-2015, page 15, available at http://www.mmprsf.gov.md/file/rapoarte/raport_PNAEG_final.pdf.

²⁹³ Answer by the MIA no. 14/70 from 27 January 2015.

²⁹⁴ SCJ, the judgement of the Supreme Court of Justice Plenary no. 17 from 7 November 2005 on the judicial practice in the cases related to sexual life offences and sexual harassment, available at http://jurisprudenta.csj.md/search_hot_expl.php?id=17.

The unification of the judicial practice

- **Update of the Supreme Court of Justice Plenary judgement no. 17 of 7 November 2005 on the judicial practice in the cases related to sexual life offences and sexual harassment;**
- **The Prosecutor General's Office should ensure publication of the measures taken as a result of notification on cases provided by the CPPEDAE and publication of the information concerning their settlement, taking into account the increased social danger of the discrimination acts that could be considered criminal offences;**
- **Organization of trainings for criminal prosecution bodies and judges regarding sexual harassment as well as serious forms of discrimination which are sanctioned under criminal law.**

4.4 Instigation to discrimination

Law no.121 defines instigation to discrimination as “any conduct by which a person exerts pressure or shows an intentional conduct in order to discriminate a third person on the grounds provided by the present law.” Therefore, instigation to discrimination implies the existence of a person's behaviour by which s/he obliges or encourages or determines another person or group of persons to discriminate a third person or group of persons based on the protected grounds, irrespective of the fact whether discrimination took place or not. The definition of instigation to discrimination in Moldovan legislation includes both the encouragement and order to discriminate and corresponds to the provisions of the European Union Directives²⁹⁵. The difference between instigation and other forms of discrimination (direct discrimination or harassment) is given by the existence of an intention (the perpetrator exerts pressure or shows intentional conduct, encourages to a certain conduct) to carry out discrimination not directly by the perpetrator, but through an intermediary – the person that is forced, who receives the order or the public that receives the information and is encouraged to react and treat differently the victim or the victims of discrimination. From this point of view a public person has a bigger impact, thus a bigger responsibility and the context is also important because it implies enhancement of popular emotions and their targeting for discriminatory purposes (post-conflict, during a crisis, in the election campaign).

According to the ECtHR, the freedom of expression granted in light of Art. 10 of the ECHR is not protected when the person's actions fall under Art. 17 of the ECHR (prohibition of abuse of rights). In the judgement *Norwood v. the United Kingdom*, the ECtHR mentioned that the display in the window of the complainant's apartment situated on the ground floor of a big poster that showed the image of the Twin Towers in flames,

²⁹⁵Art. 2, par. (4) of the **Directive 2000/43/EC** stipulates that “An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.”; Art. 2, par. (4) of the **Directive 2000/78/EC** stipulates that “An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.”; Art. 2, par. (2) letter b) of the **Directive 2006/54/CE** provides that „ For the purposes of this Directive, discrimination includes: ... (b) instruction to discriminate against persons on grounds of sex”.

with the caption “Islam out of the United Kingdom – Protect the British People” and the symbol of the half moon and a star in a prohibition sign, represented the public expression of an attack against all the Muslims from the UK. The ECtHR found that such a fierce attack against a group, making links between this group and a serious terrorist attack, is incompatible with the values proclaimed and granted by the ECHR, such as tolerance, social peace and non-discrimination, the complainant’s actions being an act falling under Art. 17, the abuse of rights that is not protected by Art. 10 or 14 of the ECHR.²⁹⁶

The CPPEDAE found in several cases instigation to discrimination, some on the ground of sexual orientation, others on the ground of ethnicity or race and others in the field of employment. But the decisions by CPPEDAE do not provide the analysis of the constituent elements depending on the form of discrimination in order to justify the qualification of some facts as direct discrimination, harassment or instigation.

In one case,²⁹⁷ the CPPEDAE found that the respondent has placed video material on the web page of a group that he was a part of, called „*Оккупай-Педофилия Молдова*”, where the members of this group were harassing a homosexual person,²⁹⁸ homosexual persons were called “paedophiles who were committing very serious offences”, they were discussing placement of a bomb at the headquarters of the GENDERDOC-M organization, using hate speech against LGBT community and the complainant who was a member of this organization. Also, instigation to discrimination on grounds of sexual orientation took place when the respondent and the members of the group participated in a counter-demonstration during the LGBT parade on 17 May 2014, where they chanted slogans intended to cause hatred and physical violence against the LGBT community.²⁹⁹ The CPPEDAE submitted to the Prosecutor General’s Office the copy of the decision to take measures stipulated by the Criminal Code.

In another case, the CPPEDAE found that the conduct of the respondent, the president of the organization Pro Ortodoxia (Ghenadie Valuța) amounts to instigation to discriminate, as the defendant before and after participating in a TV broadcast on non-discrimination sprinkled the participants with Holy Water, whereas two of the participants representing an NGO for the protection of LGBT person’s rights, had expressed their disagreement and he addressed to the petitioner the following expressions “*Here Christian freedom prevails and if they do not accept the Holy Water... the majority yields to minority*”, “*But why do you hide, are you non-traditional?*”, “*Do you know who flees from the Holy Water?*”³⁰⁰ The CPPEDAE did not draw up a report on finding an infringement in this case.

In another case, the CPPEDAE mentioned that the freedom of expression is not absolute and can be restricted when the form of expression gains intolerant forms like racism. In a decision, the CPPEDAE found instigation to discrimination in the racist

²⁹⁶ ECtHR, *Norwood v. the United Kingdom*, 16 November 2004.

²⁹⁷ CPPEDAE, Decision No. 158/14 from 11 December 2014, *Angela Frolov and Information Centre GENDERDOC-M v. Stanislav Ghibadulin*.

²⁹⁸ In this case, the CPPEDAE also found harassment of complainants. For details see section 5.3. of the present report.

²⁹⁹ „*оккупай педофилияй пидарасу жизни ломай*”, „*смерть пидарасам*” and „*мы вас повесим и закопаем*”.

³⁰⁰ CPPEDAE, Decision no. 064/14 from 19 May 2014, *Angela Frolov v. Ghenadie Valuța*.

speech of a political party leader, who during a press conference, referring to the leader of another political party, with the intention of encouraging the public not to vote for this candidate, used the following expressions: *"this dirty and stinky Gypsy [...] will go where he belongs!"*; *"[...] it is known that Filat is half Gypsy, only Filat is a finished Gypsy."*³⁰¹ Instigation to discrimination manifested in the form of racist acts were also found by the CPPEDAE in the case of a company that launched a new product with brown bread, called O.N.O.J.E., humiliating the citizen John Onoje, who has a different skin colour, and promoting a racist message in public.³⁰² In another case, the CPPEDAE considered that declarations by the General Mayor of Chisinau municipality are instigations to discrimination on grounds of sex and age. The mayor at his return to the mayor's office delivered a speech where he referred to one of the candidates in the election contest, whom he congratulated and at the same time mentioned that it is inappropriate for a lady aged 59 to candidate. Subsequently, in a post on Facebook, the mayor publicly apologised saying that he had been understood wrongly, making a series of other discriminatory declarations towards women. The CPPEDAE considered the mayor's declarations as being sexist and ageist.³⁰³ Given the public impact and the potential of the declarations from these cases to encourage third persons to discriminate in their turn, the three cases were considered instigation to discrimination.

The CPPEDAE found instigations to discriminate in two cases related to labour relationships, both regarding the publication of discriminatory employment advertisements on web pages.³⁰⁴ The CPPEDAE found that hosting the discriminatory advertisements on web pages specialized in the publication of employment advertisements by the administrators of these web pages is instigation to discrimination. In both cases, the CPPEDAE noted that the owner or administrator of web pages must take "diligence measures that allow him/her to be sure that no one will abuse of his/her virtual platform (web page) and will not use it as a tool for promoting and dissemination of discriminatory employment notices... under cover of anonymity or pseudonym..."³⁰⁵ Referring to the case examined by the ECtHR, i.e. *Delfi v. Estonia*,³⁰⁶ the CPPEDAE underlined that moderation and automatic blocking of some words from announcements and comments is not sufficient for the diligence obligation to be exhausted

³⁰¹ CPPEDAE, Decision no. 159/14 from 13 October 2014, *initiated on self-referral regarding racist declarations in the political speech by Mr. Renato Usatii, the leader of the political party "PaRus"*, para. 6.1-6.3.

³⁰² CPPEDAE, Decision no. 180/14 from 16 December 2014, *initiated on self-referral v. LLC "Salva Horeca" and Andrei Bastannik*.

³⁰³ CPPEDAE, Decision no. 284/15 from 21 July 2015, *a group of persons v. the General Mayor of Chisinau, Mr. Dorin Chirtoacă regarding instigation to discrimination against women on grounds of sex and age*.

³⁰⁴ CPPEDAE, Decision no. 050/14 from 22 February 2014, *Rodion Gavriloi v. LLC "Legis-Com" and web page www.jobinfo.md*; CPPEDAE, Decision no. 041/13 from 24 February 2014, *initiated on self-referral v. web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md and by LLC "Carolina Bulat", LLC "Bulat-Grup", LLC "Castomagic", JSC "Leogrand" LLC, LLC "Rejans-Prim", LLC "Brights Land"*.

³⁰⁵ CPPEDAE, Decision no. 041/13 from 24 February 2014, *initiated on self-referral v. web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md and v. LLC "Carolina Bulat", LLC "Bulat-Grup", LLC "Castomagic", JSC "Leogrand" LLC, LLC "Rejans-Prim", LLC "Brights Land"*, p. 6.3.

³⁰⁶ ECtHR, *Delfi v. Estonia*, 10 October 2013.

and administrators can take various measures in order to prevent publication of discriminatory announcements, like accepting the rules of non-discrimination when the account is registered, placing of some non-discrimination rules on the first page etc. However, the CPPEDAE did not explain how the conduct of the web pages administrators led to the instigation to discrimination, providing no explanation if they considered that the simple publication of announcements can be interpreted as suggesting or encouraging potential readers to have a differential treatment towards certain persons on grounds of their real or supposed affiliation to a protected ground.

A similar interpretation of the CPPEDAE was proposed in the case of an article published on a web platform containing opinions and comments after the March of Equality in May 2014, entitled “The Euro-sodomite Parade in Chisinau: 9 dots above i”.³⁰⁷ The author of the article criticised the MIA actions to ensure public order and safety and protection of persons who participated in the march, the absence of reaction on the side of Chisinau mayor's office in relation “to the extremist minority's intentions to march through the centre of the capital” and inactions of Moldovan Metropolitan “towards the homosexual aggression in the centre of the capital”.³⁰⁸ Taking into account the fact that the respondent did not disclose the author's identity, the CPPEDAE found that the web page administrator committed instigation to discrimination on grounds of sexual orientation due to the failure to moderate the contents of the article. We consider that it is not clear if the article can be assumed as discriminatory or aggressive and inconvenient expression, but still legal, because its text had been blocked by the web platform and it is not available online any more and the decision of the CPPEDAE does not contain enough elements to allow the reader to carry out the analysis in this regard. Because unabridged quotes from the article are missing in the reasoning of the decision issued by the CPPEDAE, the retained text seems to be a bothering, but non-punishable criticism of the authorities and it is unclear that it would have been an encouragement to discrimination, that the author would have exerted pressure to determine third parties to react or that the text would have included insults, which might lead to the violation of a certain group's dignity, therefore, being subject to sanction as harassment. As concerns the administrator of the web page, failure to moderate the contents should be sanctioned separately, and not as instigation, but rather as direct discrimination defined by Law no.121 for supporting the discriminatory conduct.

Recommendations:

- **elaboration by the CPPEDAE of some conceptual steps in order to classify deeds depending on constituent elements in direct discrimination, harassment or instigation to discrimination;**
- **determining the nature of public speeches as forms of instigation to discrimination requires that each case is analysed for the presence of the element of calling/instigating or encouraging to discrimination by the person who delivers a discriminatory speech, including the position of the person who incites to**

³⁰⁷ CPPEDAE, Decision no. 118/14 from 16 October 2014, *initiated on self-referral v. LLC „General Media TV”*.

³⁰⁸ *Ibidem*, para. 4.1.

discrimination in the society, his/her visibility, the impact or the potential impact of his/her call or order to discriminate, the context in which the actions occur. Only the complete analysis of these elements allow correct categorisation of a case as direct discrimination, harassment or instigation to discrimination;

- **close collaboration of the CPPEDAE and criminal prosecution bodies with the view to apply criminal law sanctions for the actions considered instigation to discrimination and which by their degree of aggressiveness or the vulnerability of the group concerned have a high social danger, for instance, conclusion of some memoranda on collaboration for this purpose involving joint procedures and actions (round tables, trainings etc.).**

4.5 Discrimination by association

The concept of discrimination by association is not expressly stipulated by the European Directives, but was defined by the Court of Justice of the European Union through case law by the case of *Coleman/Attridge Law and Steve Law*.³⁰⁹ In this case, the Court considered that the conduct described amounts to discrimination on the ground of disability although the person concerned did not have a disability, but her dependant son had. The Court compared the treatment of the person concerned as a mother of a disabled child with the treatment of other parents who did not have children with disabilities.

Under Law No. 121, discrimination by association is defined as „any act of discrimination committed against a person who, although does not belong to a class of persons identified according to grounds stipulated by this law, is associated with one or more persons belonging to such categories of persons“.³¹⁰ Therefore, discrimination by association occurs when a person is treated less favourably, not because s/he would belong to a particular vulnerable group, but because s/he is associated with a particular person or group of persons ensured protection under a protected ground.

Below we will analyse the CPPEDAE case studies by reference to two cases in which it found discrimination by association, the first case related to disability and the second one related to the military status.

In the first case the CPPEDAE found the discrimination by association of the petitioners who were mothers of children with severe disabilities, because their leave for childcare was not included in the record of work length.³¹¹ The petitioners showed that until the entry into force of Law No. 156 on state social insurance pensions of 14 October 1998 (Law No. 156), the period of care for people with severe disabilities was included in the record of work of the family member who provided this care, but Law No. 156 abrogated this possibility. Parents, particularly mothers, usually can not find a job because children with severe disability require constant care, and in the Republic of Moldova there are no day care centres or home care services for providing care to them. Thus, when they reach the retirement age, the parents,

³⁰⁹ ECJ, *Coleman/Attridge Law and Steve Law*, case C-303/06 [2008] RJ I-5603, 17 July 2008.

³¹⁰ Art. 2 of Law no 102.

³¹¹ CPPEDAE, Decision no. 030/13 from 13 February 2014 (*A.M., V.M. and N.C. v. the Directorate of Social Assistance, Chisinau Municipality and the Ministry of Labour, Social Protection and Family*).

but most often mothers of children with severe disabilities do not have the required record of work and thus receive the minimum pension that is about 500 lei.³¹²

The CPPEDAE mentioned that the petitioners were treated less favourably than parents who institutionalized their children with severe disabilities. Thus, the Council used the comparator of parents who institutionalized their children with severe disabilities, but could use another comparator, the parents of children without disabilities who could work and respectively be provided with a higher pension; in this way it would have revealed more clearly the impact of the association with the ground of disability. Given that this situation is a continuous one since 1999, from the entry into force of Law No. 156 until the examination of the complaint, the CPPEDAE decided that Law No. 121 is applicable for this situation. The CPPEDAE rejected the MLSPF argument that Law No. 156 established the principles of equality and of contribution to the establishment of state social insurance pensions and mentioned that ensuring equality occurs through equal treatment in equal situations and different treatment in different situations. Analysing the argument provided by the MLSPF that the service of a personal assistant was introduced and the parents who care for children with severe disabilities can be employed in it, the CPPEDAE calculated that it will take 12 years to integrate all the parents of these children in such positions, taking into account the financial possibilities of the local public administration. The CPPEDAE considered that differential treatment of the petitioners occurs through their association with children with severe disabilities and concluded that in this case there is a discrimination by association on grounds of disability.

In the case above, the CPPEDAE recommended that the MLSPF should develop amendments to Law No. 156 so that the period of non-contribution of parents who cared for their children with severe disabilities be included in their record of work from 1 January 1999. The Council did not mention the MLSPF argument that according to Law No. 499 on state social allowances for certain categories of citizens from 14 July 1999, persons taking care for children with severe disabilities receive a monthly allowance, which constitutes 75% of the minimum old-age pension. However, even if it is a paid activity, although insufficiently, it does not exclude the fact that the petitioners undertook a work, i.e. that of taking care of the sick members of the family who needed special care, a care that at present can not be ensured by the authorities. This is a domestic work remunerated via a social allowance, but the state did not also finalise this recognition by ensuring the record of work. Meanwhile, a criticism to the CPPEDAE solution may be that it did not analyse the presented situation from the perspective of indirect discrimination of the petitioners on ground of sex, given the fact that the apparently neutral provision of non-recognition of the period of care of the minor with severe disabilities as a record of work, disadvantages disproportionately especially the mothers of children with disabilities who have not institutionalized them. They have chosen to take care of these children at home and because of the lack of any real help in taking care for these children from the state; compared with fathers of these children, mothers are disproportionately affected by measures taken by the state as in the Moldovan society it is mothers that mainly take care of children and bring them up, especially when it comes to children with disabilities.

³¹²Ibidem, p. 4.6.

In decision no. 071/2014 from 26 May 2014 the CPPEDAE found discrimination by association with persons who have a special status assimilated to the military one³¹³ with reference to Art. 14 para. (7) of Law No. 162 of 22 July 2005 on the status of the servicemen, under which the allowances for maternity leave period granted to servicewomen are paid in accordance with the general provisions. The Council compared the situation of women, wives of servicemen, being military spouse dependants with the situation of women, being non-military spouse dependants. In the case of non-military spouse dependants, they receive allowances calculated based on the husband's earned income, and the military spouse dependants receive minimum allowances as uninsured persons. The Council compared the servicemen's situation with the policemen in the sense that it rejected the MLSPF justification regarding the fact that the servicemen do not pay the social insurance premiums, and this is why they do not enjoy social insurance benefits, noting that starting with March 2014 the policemen have received such allowances even if they do not pay the social insurance premiums. The problem was corrected by Law No. 93 of 29 May 2014 which amended Art. 14 of Law No. 162 on the status of the servicemen. Thus, according to Art. 14 para. 7², the calculation basis and the allowance granted to a leave provided in para. 7¹ shall be determined in the manner and under conditions provided by Law No. 289 of 22 July 2004 on allowances for temporary work incapacity and other social insurance benefits, *similar to insured persons*.³¹⁴

So far the CPPEDAE practice has shown an application of the concept of discrimination by association following the case law developed by the CJEU.

4.6 Severe forms of discrimination

Art. 4 of Law No. 121 stipulates the following severe forms of discrimination:

- a) promotion or practice of discrimination by public authorities;
- b) perpetrate the discrimination through mass media;
- c) placement of discriminatory messages and symbols in public places;
- d) discrimination of persons based on two or more grounds;
- e) discrimination perpetrated by two or more persons;
- f) discrimination perpetrated two or more times;
- g) discrimination perpetrated against a group of persons;
- h) racial segregation.

As the severe forms of discrimination referred to in Art. 4 of Law No. 121 are sufficiently explicit in the wording they were formulated by the law, we will explain below only forms that require some clarification. It is noteworthy, however, that given the high level of danger of these

³¹³In this case it is not clear why the CPPEDAE found discrimination by association on the ground on special status similar to the military one and not discrimination by association on the ground on military status, given the fact that victims of discrimination in this case are servicemen wives.

³¹⁴Art. 14 para. 7¹ of Law No. 162 on the status of the servicemen provides the following: the maternity leave, including for the wife of a serviceman on contract who is his dependant, partially paid childcare leave until the age of 3 years, the leave to take care for a sick child under the age of 10 years and the leave to take care for a child under the age of 16 suffering from an oncology disease or with disability due to intercurrent diseases are granted under general provisions.

serious forms of discrimination, it is desirable that in finding them, besides the formulated recommendations, the CPPEDAE should either draw up a report on stating the misdemeanour or inform the prosecution bodies, and that sanctions applied should be appropriate.

According to Art. 2 of Law No. 121, **racial segregation** is „any action or its absence that directly or indirectly leads to separation or differentiation of individuals on the basis of race, colour, national or ethnic grounds“.

Racial segregation occurs by imposing an obligation of separate access to facilities or services on the grounds of race, colour, national or ethnic origin. Given that the outcome of segregation is a differential treatment, it is often considered a particularly severe form of direct discrimination. In the case of *Orsus and others v. Croatia*,³¹⁵ the ECtHR found that although there is no official policy of enrolment for children of Roma origin in separate classes, their placing *de facto* in separate classes thereof without an initial test of knowledge of the Croatian language, teaching based on a reduced curriculum without additional teaching of the Croatian language, without regular assessment of language skills while studying and without the possibility of transferring them in the mixed classes, has no objective and reasonable justification and constitutes discrimination.

An example of racial segregation is the segregation by law of African-Americans in the USA in the nineteenth century until the mid-twentieth century. In the notorious case of *Brown v. Board of Education*,³¹⁶ the US Supreme Court declared unconstitutional laws that established separate schools for the education of black and white children. Another example of racial segregation is apartheid in South Africa in the twentieth century, which provided by law separate housing for whites and blacks, separate access to services, as well as the prohibition of the right to vote and limitations on the freedom of movement for blacks. Although officially the apartheid was abolished by law in 1991, the end of apartheid is considered since the first democratic general elections in 1994.³¹⁷

Neither the CPPEDAE nor the courts have found yet any act of racial segregation in the Republic of Moldova.

The discrimination of persons on two or more grounds stipulated by letter d) Art. 4 of Law No. 121 is also called in the theory and practice of enforcing the non-discrimination law „**multiple discrimination**“. For example, Interights claims that „persons from academic circles, human rights lawyers and NGOs recognized long time ago that the experience of discrimination of a person cannot be fully addressed by analysing only one ground of discrimination. People have complex identities consisting of sex, race, culture and other features, many of them are overlapping, and a person may be discriminated against on the basis of more grounds simultaneously. The combination of more grounds of discrimination that intersect each other, develops something unique and distinct from any other protected ground taken separately. This phenomenon is known as „multiple discrimination“ or „intersectional discrimination“.“³¹⁸ Although the impact

³¹⁵ ECtHR, *Orsus and Others v. Croatia* (MC), (MC), 6 March 2010.

³¹⁶ US Supreme Court, *Brown v. Board of Education*, 17 May 1954.

³¹⁷ Federal Research Division of the Library of Congress, *Country Studies: Towards Democracy*, available at: <http://countrystudies.us/south-africa/36.htm>, last accessed on 15 March 2015.

³¹⁸ See, INTERIGHTS, *Guidance for practitioners, Non-discrimination in International Law*. 2011 edition,

of multiple discrimination is discussed in the academia and among the human rights defenders, in the international treaties the multiple discrimination is not expressly provided as a separate form of discrimination and the international courts for human rights do not examine multiple discrimination as such, but examine each protected ground separately.³¹⁹ In the cases of multiple discrimination, the basis of discrimination is not the collection of discrimination that occurs on the basis of several grounds of vulnerability, but the unique experience of discrimination that occurs as a result of simultaneous belonging to certain groups. A woman of Roma origin can be a victim of multiple discrimination when the differential treatment to which she is subjected is triggered not necessarily because she is a woman or because she belongs to the Roma ethnic group, but due to the overlapping of these two identities.

The CPPEDAE found discrimination on several protected grounds in many cases, usually analysing them individually and without establishing multiple discrimination as a serious form of discrimination based on Art. 4 of Law No. 121. For example, the decision no. 004/2013 from 22 November 2013 in which the discrimination, harassment and victimization were found on grounds of disability and on grounds of social origin of the orphan child on the side of the lyceum administration, which created obstacles to the enrolment to lyceum and failed in the reasonable accommodation in relation to the process of education and housing conditions. In decision no. 030/13 from 14 February 2014 the Council found discrimination based on the grounds of gender and age in relation to mothers that have children with severe disabilities who cannot legally access the social service „personal assistant“ because the retirement age for women is 57 years and for men 62 years, respectively. In the decision No. 056/14 from 14 May 2014 the Council found discrimination based on the grounds of gender and maternity due to the refusal in the reasonable accommodation of the working schedule that would allow breastfeeding.

In decision no. 105/14 from 19 June 2014 the CPPEDAE found discrimination at work on the ground of maternity and gender on the side of the SEAC „Air Moldova“ that terminated the contract with the petitioner while she was on maternity leave. Although the act was not classified as severe form of discrimination, the Council found correctly the offence provided by Art. 54² para. (1) b) of the Misdemeanours Code and drafted a report on the legal person SEAC „Air Moldova“ and the Director General M.M, a responsible person, submitting materials to the court.³²⁰

In decision no. 087/14 of 4 July 2014, the CPPEDAE found discrimination based on gender and disability in exercising of the right to respect the private and the family life, the right to physical integrity and access to information and medical services regarding the reproductive

p.219, with reference to *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims*, discussion Paper, Ontario Human Rights Commission, available at <http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims>.

³¹⁹ See for further analysis of multiple discrimination INTERRIGHTS, Guidance for practitioners, Non-discrimination in International Law. 2011 edition, p. 219.

³²⁰ On 31 January 2015, Buiucani District Court recognized it as being guilty and sanctioned “Air Moldova” to pay a fine of 450 c.u., which makes up MDL 9.000. On 5 March 2015, the Court of Appeal Chisinau referred the case back, and on 18 June 2015 Buiucani District Court stated the infringement, not sanctioning it with the fine. The decision was maintained by the irrevocable decision of the Court of Appeal Chisinau from 13 August 2015.

health of the beneficiaries of the Psycho-neurological boarding school in Balti municipality. The case referred to several situations of abortion in the absence of an informed and freely expressed consent by the beneficiaries of the Psycho-neurological boarding school from Balti municipality. As a result, the Council notified the Prosecutor's General Office to investigate diligently these cases. The notification of the Prosecutor's General Office indicates the seriousness of the facts found by the Council. It would be advisable that while establishing facts the Council defines them not as discrimination in the simple form, but finds them explicitly as a severe form of discrimination, namely multiple discrimination and discrimination in the form of promoting or practising discrimination by public authorities (Art. 4 letter (a) and (d) of Law No. 121).

There should be done a distinction between the cases of multiple discrimination (the victim or the victims have multiple identities or qualities underlying the differential treatment) and the cases involving the multiple forms of discrimination that have as targets different victims, and it is also sanctioned by Art. 4, letter f) as a severe form of discrimination – **discrimination committed two or more times**. In decision no. 035/13 of 22 January 2014, the Council mentioned correctly „the continuous severe discrimination on the ground of religion, nationality and homosexual orientation in access to web design services“ on the side of a company that announced on its website that it did not collaborate with religious organizations and organizations supporting national and sexual minorities. Although it found a severe form of discrimination, the Council did not find that a misdemeanour was perpetrated, as a result the report on establishing the misdemeanour, that would have led to paying a fine, was not drawn up, but only the recommendations were issued to the respondent.

There were no cases to sanction the severe forms of discrimination in the courts.

Law No. 121 does not specify the consequences of finding a severe form of discrimination. We consider that in case of finding a severe form of discrimination, the authority that finds it – the CPPEDAE or the court - should consider the severity of the discrimination form when applying the sanction. In the CPPEDAE case for example, the finding of a serious form of discrimination would also require finding the act of discrimination or the notification of the criminal prosecution to investigate the facts that would constitute a misdemeanour. The report on finding the misdemeanour can not be written if the respondent's behaviour demonstrates the recognition of the committed act and the desire to eliminate the consequences of the committed act. If the CPPEDAE finds a severe form of discrimination and issues only recommendations, without drawing up the report on finding the misdemeanour, the Council should explain why it did not consider appropriate to draw up the report and submit the materials to the court to apply the sanctions.

Recommendations:

- **In the case of finding a severe form of discrimination, if the prosecution bodies are not notified, the CPPEDAE should also find the misdemeanour, if there are relevant provisions in the Misdemeanours Code in addition to submitted recommendations to ensure an effective remedy for the committed act. Otherwise, the Council should explain why it does not consider appropriate the finding of a misdemeanour.**
- **In the case of finding a severe form of discrimination by the courts, they should take into consideration the severe form while granting the non-pecuniary damage to the victim of the act of discrimination.**

V. Exceptions from the prohibition of discrimination

5.1 Reasonable accommodation

There are situations when providing a more favourable treatment to a person or a group of persons does not constitute discrimination, but may constitute an obligation. One of these situations refers to reasonable accommodation which under Law no. 121 is defined as „any necessary and adequate modification or accommodation in a particular case, which does not impose a disproportionate or unjustified burden when, under the law, it is necessary to ensure to a person the exercise of rights and fundamental freedoms under equal conditions with others.”

Reasonable accommodation has the aim to diminish discriminatory effects in relation to a protected person or a group of persons compared to other persons that are not disadvantaged. Reasonable accommodation shall be implemented when it does not impose a disproportionate burden, which usually refers to the costs of accommodation. Given the fact that reasonable accommodation has been stipulated and widely implemented after the adoption of the UN Convention on the Rights of Persons with Disabilities, it is often linked with the accommodations provided for persons with disabilities. However, other disadvantaged groups may also benefit from reasonable accommodation. It is not relevant to use a comparator while determining whether an employer has fulfilled the obligations to provide reasonable accommodation stipulated under the law. For example, in case of adapting working hours or the calendar to comply with the religious holidays of employees, the employer makes a reasonable accommodation as long as these changes will not disproportionately affect his activity.

To a greater extent, the most serious problems faced by persons with disabilities result from the lack of reasonable accommodation in relation to access to buildings and facilities. In a case³²¹ initiated ex officio as self-referral, the CPPEDAE concluded that, although the legislation is sufficiently comprehensive in terms of regulating accessibility, yet practical enforcement of these provisions by central and local public authorities is flawed. In the next case the CPPEDAE found discrimination in terms of access to justice because of the failure of the Centre District Court of Chisinau and Chisinau Court of Appeal to provide

³²¹CPPEDAE, Decision no. 160/14 from 11 December 2014, *initiated on self-referral v. the Ministry of Regional Development and Construction, State Construction Inspectorate and Directorate General of Architecture, Urbanism and Land Relations.*

reasonable accommodation.³²² Also, the CPPEDAE found direct discrimination and the refusal to ensure reasonable accommodation due to the lack of access to a sport club³²³ and a night club for the petitioners who were persons with disabilities.³²⁴

In the field of education the CPPEDAE found refusal of providing reasonable accommodation and lack of access to preschool institution due to refusal to enrol a child with diabetes of type 1³²⁵ and a child with autism to kindergarten.³²⁶ In another case the CPPEDAE found that the refusal by the Ministry of Education and Directorate General of Education, Youth and Sport of Municipal Council of Chisinau to ensure the right to a child with disabilities who was following home-schooling for 12 years to take the Baccalaureate exam at home without providing necessary conditions,³²⁷ constitutes a refusal to provide reasonable accommodation.³²⁸

A clear case regarding the failure to provide reasonable accommodation in the field of employment was examined by the CPPEDAE in the case of *T.B. versus Valeriu Negru, acting Head of the Directorate General for Social Assistance of Municipal Council of Chisinau* (DGSA of MCC).³²⁹ In this case, on her return from the maternity leave the petitioner asked her employer to provide part-time employment of 7 hours per day as stipulated by the Labour Code, from 09:00 to 17:00. The employer accepted the request, but established a working day schedule from 08:00 to 16:00. The CPPEDAE rejected the justification of the respondent that the petitioner accepted the work schedule tacitly, as she continued to comply with it. The CPPEDAE mentioned that providing the work schedule according to the schedule requested by the petitioner did not constitute a disproportionate burden imposed upon the employer. Therefore, the CPPEDAE found a case of discrimination resulting from the refusal to provide reasonable accommodation on grounds of gender and maternity.

5.2 Positive measures

Under Art. 2 of Law no 121, positive measures are defined as „temporary special actions undertaken by public authorities in favour of a person, group of persons or community to

³²²CPPEDAE, Decision no. 176/14 from 30 December 2014, *V.S. v. Centre District Court of Chisinau and Chisinau Court of Appeal*.

³²³CPPEDAE, Decision no 140/14, from 27 October 2014, *F.V. v. LLC „OLIMPUS-85”*.

³²⁴CPPEDAE, Decision no. 156/14 from 17 October 2014, *C.A. v. LLC „ADRILUX – COM” and its employee G.V., V.R. and D.N., Police Inspectorate of Ciocana District and V.S., Special mission police unit „Fulger”*.

³²⁵CPPEDAE, Decision no. 005/13 from 25 November 2013, *F.V. on behalf of the minor E. v. V. Gavriluc, Director of the kindergarten no. 151 and I. Burlac, Director of the kindergarten no. 168*.

³²⁶CPPEDAE, Decision no. 083/14 from 28 June 2014, *M.O. on behalf of the son M.T.v. the Director of the kindergarten no. X, V.M., N.T., Director of the Directorate General of Education, V.R., Republican Centre of Psychological and Pedagogical Assistance of the Ministry of Education*.

³²⁷The petitioner moves with the wheelchair, but the exam was held on the 2nd floor of the lyceum and the petitioner was lifted in the arms by his colleagues. The WC was not adjusted for persons with disabilities. The petitioner complained of body pain because of the lack of movement for 3 hours during the examination.

³²⁸CPPEDAE, Decision no. 122/14 from 9 September 2014, *B.C. v. the Ministry of Education and Directorate General of Education, Youth and Sport of Municipal Council of Chisinau*

³²⁹CPPEDAE, Decision no. 056/14 from 15 May 2014, *T.B. v. Valeriu Negru, acting Head of the Directorate General for Social Assistance of Municipal Council of Chisinau*.

ensure their natural development and effective implementation of equality in relation to other persons, groups of persons or communities”.

Positive or affirmative measures are aimed to address the situation of structural discrimination, they have a temporary nature and are carried out as a differential treatment aimed to redress previous discrimination of a protected group. These measures have an objective to ensure „material, substantive equality” instead of „formal equality”, and shall be implemented in the cases where the measures of general formal equality lead to perpetuation of discrimination. The adopted positive measures must be periodically assessed and have to be stopped when the aim is reached or modified if necessary. It is important to assess the impact of these measures so they would not affect other groups. Positive measures are not considered to be discrimination, but rather an exception from the prohibition of discrimination – a justified differential treatment for the benefit of a previously discriminated group, in order to redress historical inequalities. Examples of positive measures can be the policies to promote the employment of a group who had limited access to labour market, to education and other services, such as it was the case of persons with disabilities, women, certain ethnic groups, etc. However, according to the ECtHR case law³³⁰, under certain circumstances, the failure to implement affirmative measures may represent a case of discrimination (case of *D.H. v. the Czech Republic* regarding education of Roma children).

In the Republic of Moldova, the authorities have adopted several policy documents to ensure the implementation of the equal opportunities principle for disadvantaged groups, and namely: National Youth Strategy for 2009-2013,³³¹ National Program on Ensuring Gender Equality for 2010-2015,³³² Strategy on the Social Inclusion of Persons with Disabilities for 2010-2013³³³ and the Action Plan for the Support of Roma in the Republic of Moldova for 2011-2015.³³⁴ In order to monitor that the actions have the desired impact and with the view to avoid the adverse effects, the implementation of policy documents is supposed to be assessed periodically and the results of assessment will be published. It seems that the authorities in charge of monitoring of the implementation of actions stipulated by the policy documents have rather a formal and quantitative approach than a substantive one, which would suppose the assessment of the real impact of these actions. One of the key actions in the assessment of the implementation of policies is the collection of disaggregated data, which is another problem in the case of the Republic of Moldova, as currently the disaggregated data are only partially collected. For instance, in its statistical report for 2014 the National Agency for Employment (NAE) did not publish the number of Roma registered as unemployed and being employed in the labour market.³³⁵

³³⁰ ECtHR, *D.H. and others v. the Czech Republic* (MC), 13 November 2007.

³³¹ Law no. 25 from 3 February 2009 on the approval of the National Youth Strategy for 2009-2013.

³³² Government Decision no. 933 from 31 December 2009 on the approval of the National Program on Ensuring Gender Equality for 2010-2015.

³³³ Law no. 169 from 9 July 2010 on the approval of the Strategy on the Social Inclusion of Persons with Disabilities (2010-2013).

³³⁴ Government Decision no. 494 from 8 August 2011 on the approval of the Action Plan for the Support of the Roma People in the Republic of Moldova for 2011-2015.

³³⁵ NAE, Statistical report on measures regarding the employment and social protection of persons seeking employment undertaken by the employment agencies of the Republic of Moldova within January – December 2014, 22 January 2015.

Another example refers to the absence of assessment of the sexual harassment phenomenon since 2012 until present in the reports of the MLSPF regarding the implementation of the National Program on Ensuring Gender Equality for 2010-2015.³³⁶

Other positive measures to stimulate the representation of disadvantaged groups in the labour market which have been adopted by the Government of the Republic of Moldova include establishing a minimum number of employees from these groups. A representative example in this regard is the obligation of employers who have 20 employees and more, to create jobs and employ persons with disabilities in proportion of at least 5% of the total number of employees. Under Art. 33, para. (4) and (5) of Law no. 60, the employers are obliged to notify the territorial employment agency about the work places created/reserved for persons with disabilities within 5 days since their creation/reservation, as well as to notify about the employment of persons with disabilities within 3 days from the employment. Failure to comply with these provisions constitutes a misdemeanour which may be found by the State Labour Inspectorate. Unfortunately, the State Labour Inspectorate did not provide any data on the number of misdemeanours found in this regard in 2013.

The differential treatment provided in favour of disadvantaged groups may constitute an affirmative measure. Therefore, under Art. 36 (3) of Law no. 60, specialized enterprises, which have been established by public companies and associations of persons with disabilities which employ persons with disabilities shall be exempted from taxes and duties. Such an approach of encouraging and rewarding the integration of persons with disabilities into the labour market may prove to have more successful results than the punitive option.

Another affirmative measure was adopted in July 2014 by establishing a number of internship places for the youth within public authorities, public institutions and state owned enterprises, which should be not less than 10% of their staff. The internship shall be considered as working experience on employment or promotion.³³⁷

Employment of personnel with the view to improve the quality of services provided to disadvantaged groups in order to enhance employment is, also, considered an affirmative measure. For instance, in 2012, NAE employed 43 persons who were in charge of employment of persons with disabilities, while in 2013, other 43 persons were employed for such positions. Subsequently, in 2013, 29.30% of persons with disabilities who addressed to the NAE were employed, compared to 20.56% in 2012.³³⁸

In the field of education, the positive measures can be assessed based on the rate of schooling of the representatives of disadvantaged groups. For example, under Art. 29, para. (5) of the Law on Social Inclusion of Persons with Disabilities, out of the total number of places provided by education institutions, 15% of places from the enrolment plan with budgetary

³³⁶MLSPF, Monitoring reports for 2011-2014 regarding the implementation of the Action Plan of the National Program on Ensuring Gender Equality for 2010-2015, available at http://www.mmps.gov.md/file/rapoarte/raport_PNAEG_final.pdf, http://www.mmps.gov.md/file/2013/rapoarte/raport_PNAEG_2012_versiune%20finala.pdf, http://www.mmps.gov.md/file/2014/raport_PNAEG_2013finalSIAAS19.05.2014.pdf, <http://www.mmps.gov.md/file/rapoarte/raport-realizare-plan-2010-2015.pdf>.

³³⁷See Art. 211 of Law no. 102.

³³⁸Answer by the National Agency for Employment no. 03-367 from 8 May 2014.

financing (for each specialty/field of professional training, education form and level) shall be provided for graduates with disabilities, and if there are no applications from them or their number is below the indicated quota, the remaining places shall be distributed based on general principle. Unfortunately, the Regulations of the Ministry of Education regarding the conditions of budgetary financed enrolment to public higher education institutions in the Republic of Moldova do not contain references to these quotas.³³⁹ Alongside with it, no measures are stipulated to encourage the participation of Roma children in obtaining higher education, for example, by awarding scholarships for the entire period of study.

Moldova has implemented an affirmative measure for the benefit of Roma by establishing and promoting a nationwide service of community mediators with the view to effectively ensure the access of Roma to education, medical assistance, employment, documentation and better living conditions. Currently, it is not clear how many positions of community mediators out of the 48 available are occupied, although the funding necessary to pay their salaries was planned in the budget for 2014.³⁴⁰

Another measure promoted at the level of a draft law is ensuring the minimum representation quota of 40% for women in the Parliament and Government. This draft law³⁴¹ was adopted by the Parliament in the first reading on 17 July 2014.

Recommendations:

- **Encourage the involvement of Roma children in higher education, for example, by awarding scholarships for the entire period of study;**
- **Adopt in the second reading the draft law no. 180 which stipulates the minimum representation quota of 40% for women in the Parliament and Government;**
- **Ratify the Additional Protocol to the Revised European Social Charter which includes the collective complaints mechanism allowing to ensure a greater degree of adequate enforcement of the equality and non-discrimination principle.**

5.3 Genuine and determining professional requirements

A justified exception which may exclude the discriminatory nature of an action is the necessity of genuine professional requirements that are specific and inherent to a certain activity. For example, a case of genuine and determining professional requirement is the part played in a movie by the actor who should have certain facial features in order to ensure the authenticity of the character s/he plays or the requirement that the staff performing body search of a woman is also a woman. Law no. 121 explains in Art. 7, para. (5) that „any difference, exclusion, restriction or preference regarding a certain work place does not constitute

³³⁹Ministry of Education, Order no. 748 from 12 July 2013 on the approval of the Regulations regarding the conditions of budgetary financed enrolment to the state higher education institutions of the Republic of Moldova.

³⁴⁰Interethnic Relations Bureau, Information on the implementation of the Action Plan for the Support of the Roma in the Republic of Moldova for the years 2011-2015 in 2014, page 4.

³⁴¹Draft law no. 180 on amendment and supplement of some legislative acts.

discrimination, if the specific nature of the activity in question or conditions under which this activity is carried out, require certain essential and determining requirements, provided that the aim is legal and the requirements are proportionate". This definition reproduces to a great extent the provisions of the EU Directives.³⁴² In this context, the labour legislation also stipulates an exception according to which „establishing certain differences, exceptions, preferences or rights of employees, which are determined by specific work requirements stipulated by the legislation in force or by special care of the state towards the persons who need advanced social and legal protection, shall not be considered discrimination" (Art. 8, para. (2) of the Labour Code).

The CPPEDAE has examined in the decision of 24 February 2014 issued for the case no. 041/13 the justification of the employment requirements contained in several job offers posted on some websites. The CPPEDAE found that on a number of web pages, job offers included lists with conditions related, for example, to: age between 18-35, female gender, Chisinau residence, marital status "not married". In this regard, the CPPEDAE found that it is necessary to take into consideration the nature and context of work to be carried out while establishing essential and determining professional requirements. It was also added that the employers, as a rule, shall demonstrate that it is reasonable and proportional to demand professional and determining requirements for a job, showing the direct relation between the presence or absence of the protected ground in the nature of service duties that shall be performed by the candidate. In this particular case, according to the CPPEDAE, all the employers failed to demonstrate that the requirements of the job announcements placed on websites were essential for the exercising of service duties, and therefore, these have been classified as discriminatory. The CPPEDAE did not analyse each job announcement separately, that is why it is difficult to assess how the principles mentioned in the decision were applied in each case.³⁴³

An eloquent analysis of the exception can be found in the case of *Colin Wolf v. Stadt Frankfurt am Main*,³⁴⁴ where the CJEU found that for the difference in treatment to become an essential and determining professional requirement, it has to be based on a characteristic related to the discrimination ground and not on the ground itself. In this case, the CJEU held that establishing a maximum age of 30 years for the employment of persons with intermediate career in the fire services was acceptable, because the German authorities have demonstrated through studies and statistical data that perfect physical condition determined by the age limit stipulated by the law constitutes an essential professional requirement for those job positions. The CJEU found that physical abilities represent a characteristic related to age, which may be considered an essential and determining professional requirement for the positions entailing a lot of physical effort. The CJEU also found that ensuring the operation of the fire service is a legal aim and establishing of the age threshold was not a

³⁴² EU, Directive 54/2006, Art. 14, para. (2); Directive 43/2000, Art. 4; Directive 78/2000, Art. 4, para. (1).

³⁴³ CPPEDAE, Decision no. 041/13 from 24 February 2014, *initiated on self-referral regarding the incitement to discrimination and discrimination in the field of employment by placement and dissemination of job announcements indicating conditions and criteria which exclude or give preferences to certain categories of persons.*

³⁴⁴ CJEU, C-229/08, *Colin Wolf v. Stadt Frankfurt am Main*, 12 January 2010.

disproportionate measure, taking into account necessary physical abilities for that position and the time required before a person holding such a position might be promoted to a higher position which requires less physical effort.³⁴⁵

Institutions which are based on the religious ethos – „religion” or „conviction” may also demand certain professional requirements for their employees in terms of carrying out specific religious activities. Thus, the condition imposed by a religious denomination that priest employed must share the same religion can be justified. But the employment by a religious entity of the cleaning personnel conditioned by belonging to a particular religion cannot be justified. Under Law no. 121 „in the professional activities of religious denominations and their constituent parts, the differential treatment based on the religion or belief of a person, when religion or belief constitute an essential, legal and justified professional requirement, shall not be considered discrimination (Art. 7, para. (6)). The ECtHR does not approach the exceptions of this type specifically, as an essential and determining professional requirement, but focuses on the justification invoked in each case separately, and namely on the issue if the actions of authorities were proportionate to the intended purpose. Further we shall analyse two cases examined by the ECtHR which have two different solutions in order to highlight the extremely detailed approach used by the Court in the analysis of the right to privacy and right to freedom of religion when the professional requirements claimed by employers is examined.

In the case of *Siebenhaar v. Germany*, the ECtHR found that there was no violation of the ECHR in the dismissal of the caretaker for children from a nursery managed by a Protestant parish. To get employed in this position, the complainant, who was a Catholic at that moment, has signed an agreement to be loyal towards the church and not to become a member of any organizations carrying out activities that are contrary to the views of the Protestant church. The dismissal of the complainant was motivated by the finding of fact that she later joined another denomination and was teaching within another religious community – the Universal Church. The ECtHR accepted the arguments submitted at the national level that the dismissal of the complainant was necessary to preserve the credibility of the employer, and that the complainant should have been aware from the moment of signing the employment agreement that her activities in the Universal Church were incompatible with the work provided for the Protestant Church. Also, the ECtHR took into consideration the relatively short time of employment of the complainant.³⁴⁶

However, case law of the ECtHR clearly shows that not all the positions within religious institutions can justify professional requirements which would demand a person to share a certain religion or to strictly observe the canons of the denomination. For example, in the case of *Schuth v. Germany*, the ECtHR found the violation of Art. 8 of the ECHR because the national courts did not examine the nature of the position held by Mr Schuth in the church that dismissed him for violating certain religious norms. In fact, the complainant was employed by the Catholic Church in the position of organ player and choir director. He has served in this position for more than 14 years. During this period, the complainant separated

³⁴⁵ Interights, Non-discrimination in International Law, Guidance for practitioners. Edition 2011, p. 95.

³⁴⁶ ECtHR, *Siebenhaar v. Germany*, 3 February 2011.

from his wife but did not divorce her, and had an extramarital affair with another woman, with whom he had a child. The church condemned this action as breach of loyalty towards the church and dismissed him. The ECtHR analysed the balance between the interests of the church concerning maintaining its credibility by demanding from all its employees to observe the religious and moral requirements of the church, on the one hand, and the interests of the complainant, on other hand, in respect of right to privacy. The ECtHR concluded that the right to privacy of Mr Schuth was infringed based on several factors. Mainly, the ECtHR considered the fact that even though the complainant concluded a contract of employment and committed himself to loyalty towards the Catholic Church which restricted to a certain extent his privacy, this duty could not be considered as a life-long obligation of the complainant to abstinence in case of divorce with his wife.³⁴⁷

Recommendations:

- **Upon examination of cases referring to this type of exception, national authorities shall establish, first of all, if the professional requirement is essential and if it is necessary due to the nature of the position in question. Then, it has to establish, if the professional requirement has a legal aim, and if it is proportionate with the interest of the person whose rights are at concerned;**
- **Upon examination of cases addressing several situations, which may be similar from the perspective of the form of discrimination, but refer to different circumstances, the national authorities have to examine the justification of each complainant separately in order to ensure better understanding of the reasons that make a particular situation discriminatory or not;**
- **Upon examination of a case addressing certain professional requirements imposed by religious institutions for certain positions, the national authorities shall take into account, in particular, the role of the respective position for the performance of religious activities, if they entail loyalty towards the respective institution, the employment period in this position, the way in which the infringement of the professional requirement affects the activity and ideals of the institution, as well as other elements alleged by the complainant which provide information regarding the impact of limitation at personal level.**

5.4 Exceptions stipulated by the Directives

Given the fact that the European Directives on equality and non-discrimination prohibit in absolute terms direct discrimination, allowing no exceptions of general nature, there have been mentioned some particular situations in which the Member States, depending on the national context, can stipulate explicitly in their legislation specific exceptions for the sanctioning of direct discrimination. In this section we shall examine these special exceptions from the European Directives and compare them with the situation of Moldovan legislation in this field.

³⁴⁷ECtHR, *Schuth v. Germany*, 23 September 2010.

5.4.1 *Employers with a religious ethos*

Article 4 para. (2) of Directive 2000/78 provides the possibility granted to the Member States to introduce a special exception for sanctioning direct discrimination in labour and employment relationships when the differential treatment of a person compared to others is based on that person's religion or belief. The Directive stipulates a series of conditions that should be cumulatively fulfilled for such an exception to comply with Art. 4 para. 2. First, the activities exempted should be professional activities carried out in churches or other public or private organizations that have a religious ethos. For example, the category of public or private organizations with religious ethos could include confessional education institutions or hospitals, religious associations and foundations or those established for religious purposes. Second, professional activities attributed to that person or the context in which the activities are performed should involve the person's religion or belief as a necessary, legitimate and adequate professional requirement, taking into account the ethos of the organization. This condition implies the fact that service duties of the person concerned should have a direct relation to practising that religion for the requirement of affiliation to the respective religion to be justified; for instance, at an Orthodox seminar the imposed condition that the religion teacher should belong to the Orthodox religion is justified, but the same condition would not be justified for the Mathematics teacher or the cleaning staff.

Additionally, Directive 2000/78 states that accepting the special exception concerning the religious ethos does not justify discrimination on other protected grounds. This provision is aimed at the exclusion of situations in which actually other reasons than the person's religion and belief serve as basis of the employment requirement, even if churches and other organizations with a religious ethos are concerned. For example, in the opinion of the authors of this report, asking as requirement for the masculine gender in case of the position of Religion teacher in an Orthodox confessional school would not be a justified requirement pursuant to Art. 4 para. 2, as long as female candidates are of Orthodox confession and qualified to teach Orthodox religion.

In Moldovan legislation, the wording that refers to the special exception concerning the religious ethos is provided by Art. 7 para. (6) of Law no.121 (Art. 7 refers to the prohibition of discrimination in the field of labour) and it stipulates: *"The differential treatment on grounds of a person's religion or beliefs when religion or beliefs represent an essential, legitimate and justified professional requirement shall not be considered discrimination within the framework of professional activity of religious cults and their constituent parts."* This provision complies with the cumulative conditions mentioned in Art. 4 para.(2) of Directive 2000/78.

The enforcement of the exception stipulated by Art. 7 para.(6) above shall take into account the fact that it is up to that religious denomination to justify the exception, i.e. the fact that a particular position involves professional activities performed within the religious denomination or its constituent parts and the person's religion is an essential professional requirement for performing the duties related to that position.

Since Law no.121 refers strictly to religious cults and their constituent parts, it means that the legislature, by virtue of the Moldovan context, has chosen that only those forms of

religious organizations called “religious cults” (and their constituent parts), whose statute is established by Law no. 125 from 11 June 2007 on Freedom of Conscience, Thought and Religion can benefit from this exception. Therefore, religious associations or other organizations with religious ethos are not among the beneficiaries of the exception provided by Art.7, para. (6) of Law no.121 as mentioned in Art. 4 (2) of Directive 2000/78.

Currently, no cases examined by the CPPEDAE or trial courts regarding this exception have been identified.

5.4.2 The armed forces or operational positions in the defence and law enforcement agencies

Article 3 para.(4) of Directive 2000/78 provides the possibility granted to the Member States to introduce a special exception to sanctioning of direct discrimination in labour and employment relationships when the differential treatment of a person compared to others is based on the grounds of disability or age in the context of armed forces. Following the interpretation of Art. 3 para.(4) together with item 19 of the Preamble to Directive 2000/78 “armed forces” mean army, police, penitentiary or emergency services staff. This special exception is allowed to keep the operational capacity of these services.

Law no.121 does not provide for such a special exception applicable to employment as in the case of the special exception regarding religious ethos.

5.4.3 Exceptions related to health and safety

Article 7 para.(2) of Directive 2000/78 grants the possibility to the Member States to sustain or introduce provisions for the protection of health and safety of persons at the working place which create differential treatment on grounds of disability. Also those measures that are intended to create or sustain the provisions or facilities granting and promoting inclusion in the work place for persons with disabilities are allowed. The first situation might be compatible with Art. 7 para.(2), if the national legislation imposed some additional tests for employees with a certain disability, compared to employees without that certain disability. The second situation might be compatible with Art. 7 para.(2), if the national legislation imposed granting of some additional facilities for persons with disabilities, for example additional protective equipment, different from the other employees.

Law no.121 does not regulate such a special exception applicable to work relations.

5.4.4 Exceptions related to age – minimum and maximum age threshold

Art. 6 of Directive 2000/78 grants the possibility to the Member States to adopt exceptions for the prohibition of discrimination in case of differential treatment on the grounds of age, if they are justified by a legitimate aim, and if the methods for their implementation are necessary and adequate. Special exceptions regarding the ground of age granted by the Directive in labour and employment relations cover: creating special conditions for the access to work, professional training, labour and occupational relations,

including conditions of dismissal and payment for young people, aged workers and persons taking care of their family members, with the view to promote their professional integration or protection, setting forth minimum conditions on age, professional experience or seniority in that service for acceding to employment or to certain advantages related to labour relations, establishing some thresholds for maximum age for employment depending on the requirements of vocational training for the respective position or profession or depending on the need of having a reasonable period of employment before retirement. Moreover, the Directive allows the Member States to set forth age patterns regarding the admission to or conditions of awarding pension or benefits related to disability, including patterns on different ages of the employees or groups and categories of employees and to use the age ground within the context of these patterns for updated calculations, provided that these provisions do not lead to discrimination on the ground of sex.

Law no.121 does not regulate such a special exception applicable to employment field.

5.4.5 Exceptions related to gender/maternity or breastfeeding mothers and persons having parental responsibilities

In the European legislation on gender equality, *Directive 92/85/CEE of the Council of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding* regulates a series of special exceptions concerning gender, in particular maternity. In these situations, although pregnant women, women who have recently given birth or are breastfeeding are treated differently from the other employees, the employer is not sanctioned for discrimination, on the contrary, failure to ensure accommodation measures can be sanctioned as discrimination. of the justification for the differential treatments consists in the need to ensure special protection for female employees who are in a vulnerable situation from the health perspective.

First of all, Art. 4 of Directive 92/85 provides that the national legislation should regulate the employer's obligation to assess the risks of the activity at the work place for the safety and health of female workers and any possible effects on pregnancy or breastfeeding and inform the female employees about these risks. Afterwards, the employer must have the obligation, provided by the law, to adjust working conditions and/or the working hours of the female employee in order to avoid her exposure to these risks, and if this is not possible due to technical or objective reasons or cannot be requested reasonably due to well-grounded reasons, the employer shall adjust the work place of the particular female employee. In the case when this change is not possible either, the employer should give the employee a work dispensation for the whole period necessary for her safety and health protection (Art. 5 of Directive 92/85/ ECC).

Second, Art.7 of Directive 92/85/EEC provides that the national legislation should regulate the interdiction to oblige female employees in the situations specified above to perform night work. Also, Art.8 of the Directive requests the Member States to regulate employee's right to benefit from a maternity leave of at least 14 consecutive weeks allocated before and/or after giving birth, according to the national laws and/or practices.

Third, Directive 92/85/EEC provides a series of other rights for these employees, like the right to benefit from paid time off to perform prenatal consultations, if they take place during the working hours (Art. 9) and the right of not being dismissed during pregnancy until the end of the maternity leave, save in exceptional cases not connected with their pregnancy (Art. 10).

Law no.121 does not regulate such a special exception applicable to labour field, but the labour legislation stipulates these facilities for employed women.

5.5 Abuse in exercising freedom of expression

Every person has the right not to be discriminated. This right may be perceived as being in conflict with other persons' right to freedom of expression, when these persons invoke free expression as a justification for discriminatory statements infringing other persons' dignity. Far from being a form of exercising freedom of expression, discriminatory statements can be an abuse of this right. Pursuant to Article 3 para. (1) of Law no. 64 on Freedom of Expression (hereinafter "Law no.64") everyone has the right to freedom of expression. This right is not absolute and can be limited in certain cases when other persons' rights are affected (Art. 3 para. (3) of Law no.64), for example, the right to non-discrimination. At the same time, guarantees regarding freedom of expression shall not be applied for discourses that incite to hate or violence (Art. 3 para. (5) of Law no.64). But none of these rights has priority over the others and authorities are obliged to examine in each case the balance between the right to non-discrimination and freedom of expression.

A test of the balance between non-discrimination and freedom of expression examined in detail by the ECtHR can be observed in the case of *Vejdeland and others against Sweden*. The specific nature of this case derives from the circumstances which determined the ECtHR to decide that the freedom of expression had not been violated when the national authorities sanctioned forms of expression which led to the infringement of other persons' right to non-discrimination. In this case, the complainants distributed about 100 leaflets in pupils' lockers in a Swedish school. These leaflets included defamatory information about homosexuals, according to which 'homosexuality has a morally destructive effect on the substance of the society', homosexuals were presented as being primarily responsible of the spread of HIV and AIDS, and it was stated that organizations that protect homosexuals promote paedophilia. As a result, the complainants were convicted to suspended sentences, fines and, respectively, to probation. Complainants claimed before the ECtHR the violation of their right to freedom of expression and justified their actions on the grounds that they wanted to encourage pupils to discuss this subject with their teachers at the same time giving them arguments to use in these discussions. The ECtHR did not find violation of Art. 10 of the ECHR. First, the ECtHR considered that the wording used in the leaflets, although did not directly represent incitement to hatred, contained serious and harmful accusations. Second, the attacks aimed at insulting, defaming or incurring ridicule on a specific group of persons may be sufficient for the authorities to limit freedom of expression in order to fight hate speech, especially taking into account the seriousness of discrimination on grounds of

sexual orientation. Third, the ECtHR took into consideration the fact that the leaflets had been put into the lockers of pupils who were at a sensitive and impressionable age having no possibility to refuse them. Fourth, the ECtHR draw attention to the fact that the sanctions imposed to the complainants, although penal, had been disproportionate with the aim pursued, otherwise, according to the Swedish law they risked up to two years of detention.³⁴⁸

In its turn, the CPPEDAE examined a series of cases where the balance between the right to freedom of expression and the right to non-discrimination was discussed. The first sfamous decision of this kind was issued in the case initiated on the alleged racist declarations of the politician Renato USATÎI. In this case, the fact that the respondent called the politician Vlad FILAT “dirty and stinky Gypsy” and “finished Gypsy” during a press conference was found as amounting to discriminaTION. The respondent’s representative argued that by these statements Mr. USATÎI only had stated the ethnicity of citizen FILAT and the adjectives had not referred to his ethnicity, but to his personality. At the same time, the respondent’s representative claimed that the right to freedom of expression protects also the information which “insults, shocks or bothers” and persons who have public positions may be subject to criticism. The CPPEDAE mentioned in its turn that freedom of expression may be “restricted when the forms of expressing an idea, information or an opinion achieves intolerant forms of exposure like racism, homophobia, xenophobia, anti-Semitism and other. These are unanimously recognised as being destructive forms of hate speech, impeding the ethnic, linguistic, national and social pluralism.” In this context, the CPPEDAE found that the respondent’s statements cannot be justified and that they were intended to “humiliate the ethnicity of his political opponent, showing his own ethnic superiority.”³⁴⁹

In another decision the CPPEDAE found multiple discrimination on grounds of sexual orientation when a group of persons have several times delivered homophobic speeches, harassed petitioners and victimized them after they lodged a series of complaints before the competent bodies. Because the respondents did not legally reacted to this procedure, the CPPEDAE found discrimination without having to analyse the proportionality between the freedom of expression and non-discrimination.³⁵⁰ In another case in which the CPPEDAE acted based on self-referral, the equality institution claimed ex officio that freedom of expression could not justify the launch in the market by a Moldovan enterprise of a brown bread burger with the initials “O.N.O.J.E.” which correspond to the name of the citizen of the Republic of Moldova, who has a different skin colour, John Onoje. The CPPEDAE qualified these actions as racist.³⁵¹

³⁴⁸ ECtHR, *Vejdeland and others v. Sweden*, 9 February 2012.

³⁴⁹ CPPEDAE, Decision no. 159/14 from 13 October 2014, *initiated on self-referral regarding the racist statements in the political speech by Mr. Renato Usatii, the leader of the political party “PaRus”*.

³⁵⁰ CPPEDAE, Decision no. 158/14 from 11 December 2014, *initiated on the complaint of Mrs. Angela Frolov and the Public Association Information Centre “Genderdoc-M”*.

³⁵¹ CPPEDAE, Decision no. 180/14 from 16 December 2014, *initiated on self-referral regarding racism related to the launching in the market of the brown bread burger called O.N.O.J.E. and the racist message associated with this product*.

Recommendations:

- **When the respondent appears before the CPPEDAE or the courts with the position of having exercised the right to freedom of expression and for this reason s/he had not discriminated, the state institutions have to examine in detail, following the ECtHR model, the balance between the right to freedom of expression and other persons' right to non-discrimination, so that the respondent could understand the limits of his/her right to freedom of expression.**

5.6 Additional exceptions introduced by Law no.121

Law no.121 provides additional exceptions besides those discussed above. And namely, in Art. 1 para. (2) Law no.121 provides the following:

- (2) *the provisions of the present law shall not cover and be interpreted as violating:*
- a) *the family established on the freely agreed marriage between man and woman;*
 - b) *adoption relationships;*
 - c) *religious cults and their constituent parts as concerns religious beliefs.*

Provisions of Art. 1 para. (2) letter c) are described in detail in Art. 7 para. (6) and Art. 9 para. (4) of Law no.121.³⁵² Thus, the legislature provided exceptions for religious cults and their constituent parts within the areas of education and labour. Exceptions regarding the employers with a religious ethos as concerns labour relationships within the framework of activities of a religious nature are also stipulated by the European Directives and are examined in more details in subchapter 5.4.1.

Exceptions provided by Law no.121 for religious cults and their constituent parts practically represent genuine and determining occupational requirements provided expressly by the legislature and they should be interpreted restrictively. In each particular case, the religious denomination (cult) or its component have to justify the exception, that is the fact that a person's religion and beliefs represent genuine professional requirements for his/her employment or admission to education. Law no.121 refers strictly to the religious cults and their constituent parts with the statute regulated by Law no.125 from 11 June 2007 on freedom of conscience, thought and religion. Currently, no cases examined by the CPPEDAE or trial courts regarding this exception have been identified. The analysis of the legal text in the absence of cases which could allow its interpretation, suggests that it is in accordance with the European standards, but the enforcement of these provisions is open to analysis.

Regarding the other two exceptions provided by Law no.121 in Art. 1 para. (2), and namely the limitation of the applicability of Law no.121 in the case of the family established

³⁵² Art. 7 para. (6) of Law no.121 (Art. 7 refers to the prohibition of discrimination at work) provides: *"The differential treatment on grounds of a person's religion or beliefs when religion or beliefs represent an essential, legitimate and justified professional requirement shall not be considered discrimination within the framework of professional activity of religious cults and their constituent parts."* Art. 9 para. (4) of Law no.121 (Art. 9 refers to the prohibition of discrimination in education) provides: *"Provisions of the present article shall not represent a restraint of the right of the education institution that trains a certain religious cult staff to refuse enrolment of a person whose confessional status does not correspond to the requirements established for the access to that institution."*

on the freely agreed marriage between man and woman and the adoption relationships, these two exceptions are not provided by any European Directive or ECtHR decision. On the contrary, the ECtHR found the violation of the right to private life and of the right to non-discrimination in an adoption case when French authorities refused to grant the adoption authorization to a lesbian woman (preliminary condition in the adoption process) on the grounds of sexual orientation. Such a distinction on grounds of sexual orientation was considered unacceptable according to the ECHR.³⁵³ Also, the Court found violation of the right to non-discrimination on grounds of sexual orientation in the specific case of Austria, which recognized by law the right of the spouse in a heterosexual relationship to adopt the other spouse's child, but not in the case of the spouses in a homosexual relationship.³⁵⁴ Several local non-governmental organizations and international inter-governmental organizations have pointed to the challenging character of these exceptions during the phase of public consultations on the draft law in 2011-2012.³⁵⁵ Those comments have not been taken into consideration by the decision factors of the Republic of Moldova. It seems that inclusion of these exceptions and the exclusion from Art. 1 of Law no.121 of the following criteria: social origin, wealth, sexual orientation and health condition, contrary to the European standards, were a concession of the Executive power for making a compromise in the tough relations with the religious cults representatives, especially those of the Metropolitan of Chisinau and all Moldova, who were requesting rejection of the law.³⁵⁶

While these two exceptions have been adopted to prevent potential requests on the recognition of partnerships or marriages in the case of the same sex couples or of adoptions by these couples, the exceptions may lead to undesired adverse effects by showing that only the family established on marriage is legal, ignoring the necessity of protecting mono-parental families or extended families. Also, the exception regarding adoption relationships formulated to prevent adoption by homosexuals, in practice can be used to prevent adoption by certain ethnic groups, persons belonging to some religious minorities, persons with disabilities, leaving thus room for discrimination.

Since the entry into force of Law no.121 there have not been any cases identified of application of the exceptions provided by Art. 1 para. (2) letter b) and c). This is a good sign which proves that these provisions are rather norms having no applicability.

³⁵³ ECtHR, *E.B. v. France*, MC, 22 January 2008, para. 70-98.

³⁵⁴ ECtHR, *X and others v. Austria*, MC, 19 February 2013.

³⁵⁵ See for example, The United Nations in Moldova, comments on the draft law submitted to the Ministry of Justice on 23 September 2011; Legal Resource Centre from Moldova, comments on the draft law submitted to the Ministry of Justice on 24 October 2011; Working group made up of representatives of two NGOs and independent experts, comments on the draft law submitted to the Ministry of Justice on 24 February 2012 (all are available on request).

³⁵⁶ See for example the discussions at the round table of 13 May 2012, summary available here <http://discriminare.md/actualitate/societatea-civila-este-indignata-ca-guvernul-cedeaza-in-fata-bisericii/>, last time accessed on 15 March 2015; the declarations of the Democratic Party leader in May 2012, available at <http://discriminare.md/actualitate/legea-antidiscriminare-nu-este-o-prioritate-pentru-pd/>, last time accessed on 15 March 2015.

VI. Personal and material scope of non-discrimination principle

6.1 Personal scope of the non-discrimination legislation

Article 16 of the Constitution of the Republic of Moldova guarantees the principle of equality to all citizens. More extended protection is provided by Law no.121 where para. (1) stipulates that the purpose of the law is to prevent and combat discrimination and ensure equality to all individuals within the territory of the Republic of Moldova. The ECtHR goes even further and guarantees protection to all those within the jurisdiction of a Member State, whether they are citizens or not, and even beyond the national territory to those areas under the effective control of the State (such as occupied territories).³⁵⁷ On the other hand, according to the ECtHR, a State cannot be held responsible for violating the rights of persons within its territory over which it has no *de facto* control, only in the extent to which it fulfilled its positive obligations.³⁵⁸

Natural and legal persons from public and private sector are granted protection against discrimination, but they also have the responsibility not to discriminate (Art.3, Law no.121). The legislator did not make any difference between these two types of subjects, thus stressing the universal application of the principle of non-discrimination. For example, the ECtHR case law safeguards legal persons the right not to be discriminated³⁵⁹. If an individual is deprived of legal capacity and cannot challenge his/her forced confinement in a psychiatric institution without his legal representative, who opposes to his/her release, this situation could violate the provisions of the ECHR.³⁶⁰ Given the position of extreme vulnerability, even a person who was deprived of legal capacity should be able to submit directly to the court a complaint regarding violation of his/her fundamental rights, such as the right for the protection from inhuman and degrading treatment, the right to liberty and the right not to be discriminated. The law establishes some special rules, which will be mentioned below, as regards certain particular subjects of discrimination.

Within the professional activities of religious cults and their constituent parts, the differential treatment is not considered discrimination based on religion or belief when a person's religion or belief constitutes an essential, legitimate and justified occupational

³⁵⁷ ECtHR, *Loizidou v. Turkey*, 18 December 1996.

³⁵⁸ ECtHR, *Ivanțoc and others v. Moldova and Russia*, 15 November 2001, para. 107-111.

³⁵⁹ ECtHR, *Lithgow and others v. the United Kingdom*, 8 July 1986.

³⁶⁰ ECtHR, *Shtukaturov v. Russia*, 27 March 2008, para. 117-125.

requirement (Art.7 para.(6) of Law no.121). Furthermore, in the case of educational institutions of a certain religious group the provisions on non-discrimination will not constitute a limitation of a right, if they refuse the enrolment of a person whose religious status does not meet the requirements established for access to the institution (Art.9 para. (4) of Law no.121). It is worth mentioning that in both cases the religious cults and their constituent parts shall present an objective and reasonable justification of the differential treatment (see Section no. 6.3 on justification of occupational requirements).

With regard to the importance of non-discrimination in employment, Law no.121 expressly provides for the employers actions that can be considered discriminatory. Under the law, the following actions are considered discriminatory: placing job advertisements with the indication of the requirements and criteria which exclude or favour certain persons; unjustified refusal of employment; unjustified refusal to admit certain persons to vocational training courses; unequal remuneration for the same job and/or workload; differential and unfounded distribution of tasks leading to a less favourable treatment; harassment etc. (Art.7 para. (2) of Law no.121). Furthermore, the employer should display the legal provisions guaranteeing the equal opportunities and treatment at workplace in accessible places (Art.7 para. (4) of Law no.121).

Law no.121 includes another important subject in the field of non-discrimination – educational institutions. They have the obligation to comply with the non-discrimination principle by providing equal access: to educational institutions of all types and levels; to the educational process, including evaluation of accumulated knowledge; to the scientific and didactic activity through elaboration of teaching materials and curricula; to the activities having the aim to inform and train teaching staff on the methods and means of preventing discrimination and on bringing a complaint before the relevant authorities (Art.9 para. (1) of Law no.121).

6.2 Work and employment

Law no.121 is applicable to all natural and legal persons in the public³⁶¹ and private sector and in all areas of employment.³⁶²

Art.7 of Law no.121 prohibits any distinction, exclusion, restriction or favour based on grounds established by this law, resulting in limitation or undermining the equality of opportunities or treatment on employment or dismissal, at work and professional training. Harassment as a specific form of discrimination at the workplace is stipulated by Art.7 of Law no.121.³⁶³ The aim of the legislator was to recognize the phenomenon of harassment at the workplace based on a prohibited ground of discrimination as a social problem and to make the employees and employers aware of the need for taking measures in order to prevent and eliminate it, by ensuring equal treatment.³⁶⁴ Furthermore, the employer should

³⁶¹ Art. 3 of Law no. 121.

³⁶² Art. 7 of Law no. 121.

³⁶³ See the detailed analysis of harassment in Section 5.3 of the present Study.

³⁶⁴ CPPEDAE, Decision no. 003/13 from 14 March 2014, *I.Z, N.N., I.H. and S.M. v. V. C., Head of the State Chamber of Registration*, p. 6.5.

display the legal provisions guaranteeing the equal opportunities and treatment at workplace for all employees in accessible places.³⁶⁵

The Labour Code³⁶⁶ provides among the principles governing employment relationships the prohibition of discrimination,³⁶⁷ the equality in rights and opportunities for employees,³⁶⁸ and the duty of ensuring equality to all to employees, without any discrimination, during promotion, training, retraining and improvement of professional skills.³⁶⁹ Internal regulations of the entity should contain provisions concerning observance of the principle non-discrimination in the field of labour.³⁷⁰

Discrimination in the workplace is expressly prohibited by Article 8 of Law no 121 which refers to direct and indirect discrimination on the grounds of sex, age, race, skin colour, ethnicity, religion, political affiliation, social origin, residence, incapacity (disability), HIV/AIDS status, trade union affiliation or activity, as well based on other grounds not related to the professional skills of employees.³⁷¹ The fact that only these two forms of discrimination, compared with Law no. 121, have been mentioned is justified as in 2003, when the Labour Code was adopted, the concepts of equality and non-discrimination were in the early stage of development. Forced (compulsory) labour as a means of discrimination on the grounds of race, social, national or religious status is also prohibited.³⁷²

The Labour Code also stipulates the grounds protected from discrimination as regards concluding the individual labour contract and establishing salary rates and payment. The legislator prohibited any direct or indirect restrictions or any establishment of direct or indirect advantages at the conclusion of the individual labour contract on the ground of sex, race, nationality, religion, place of residence, political convictions or social origin.³⁷³ Any discrimination on the grounds of sex, age, intellectual or mental disability, social origin, marital status, ethnic origin, race or nationality, political views or religious beliefs, membership of a trade-union or participation in trade-union activities is prohibited when deciding the size and payment of salary.³⁷⁴ The list of protected grounds for these two cases is exhaustive which means it does not allow the possibility to apply grounds other than those expressly spelled out unlike the provisions of Article 8 which has an open list due to the wording: „and other grounds irrelevant to the professional skills of employees”. The existence of different lists of protected grounds could lead to confusion in the enforcement of the law, creating the appearance of different standards of protection. In February 2014, the MLSPF

³⁶⁵ Art. 7 para. (4) of Law no. 121.

³⁶⁶ Labour Code of the Republic of Moldova, no. 154 from 28 March 2003.

³⁶⁷ Art. 5 letter b) of the Labour Code.

³⁶⁸ Art. 5 letter e) of the Labour Code.

³⁶⁹ Art. 5 letter g) of the Labour Code.

³⁷⁰ Art. 199 para. (1) letter b) of the Labour Code.

³⁷¹ Art. 8 para. (1) of the Labour Code. Since the approval of the Labour Code in 2003 the protected grounds gradually evolved.

³⁷² Art. 7 para. (3) letter e) of the Labour Code.

³⁷³ Art. 47 para. (2) of the Labour Code.

³⁷⁴ Art. 128 para. (2) of the Labour Code.

drafted a law and proposed to include the prohibitive ground of "sexual orientation".³⁷⁵ The Government referred the draft law back to MLSPF for further consultation and detailed opinions from other authorities.

In order to comply with the principles of equality and non-discrimination in employment, the employers have to fulfil certain obligations, such as:

- ensure equal opportunities and equal treatment of all persons, without any discrimination, as regards employment according to the occupational background, orientation and training and career promotion;³⁷⁶
- apply the same criteria in assessing the quality of work, in sanctioning and dismissal;³⁷⁷
- undertake measures for preventing sexual harassment in the workplace, as well as for preventing persecution for filing discrimination complaints (victimisation);³⁷⁸
- ensure equal conditions for women and men for combining service and family duties;³⁷⁹
- include provisions concerning non-discrimination on any ground and sexual harassment in internal regulations of the enterprise;³⁸⁰
- uphold the respect of dignity at work for all employees;³⁸¹
- provide equal payment for work of equal value.³⁸²

The employees have the responsibility to show a non-discriminatory behaviour towards other employees and their employer³⁸³ and to respect the right to dignity at workplace of other employees.³⁸⁴

The Moldovan authorities have adopted some policy documents for ensuring equal opportunities at workplace for disadvantaged groups.

In 2009, the Parliament adopted the National Youth Strategy for 2009-2013.³⁸⁵ Even if no reference was made regarding the topic of equality and non-discrimination as priorities among other objectives, the Strategy provided specific objectives for the development of professional skills of youth according to the labour market demands and improvement of employment opportunities for the youth. At the same time, the Strategy does not provide certain facilities for youth employment. The Ministry of Youth and Sport is the main institution responsible for the implementation and coordination of the National Youth Strategy.

³⁷⁵ See Draft law on amendment and supplement of the Labour Code, available at <http://particip.gov.md/projectview.php?l=ro&cid=1449>.

³⁷⁶ Art. 10 para. (2) letter f¹) of the Labour Code.

³⁷⁷ Art. 10 para. (2) letter f²) of the Labour Code.

³⁷⁸ Art. 10 para. (2) letter f³) of the Labour Code.

³⁷⁹ Art. 10 para. (2) letter f⁴) of the Labour Code.

³⁸⁰ Art. 10 para. (2) letter f⁵) of the Labour Code.

³⁸¹ Art. 10 para. (2) letter f⁶) of the Labour Code.

³⁸² Art. 10 para. (2) letter g) of the Labour Code.

³⁸³ Art. 9 para. (2) letter d¹) of the Labour Code.

³⁸⁴ Art. 9 para. (2) letter d²) of the Labour Code.

³⁸⁵ Law no. 25 from 3 February 2009 on the approval of the National Youth Strategy for 2009-2013.

Also in 2009, the National Program on Ensuring Gender Equality for 2010-2015³⁸⁶ was adopted. Among other objectives the program provides for ensuring the promotion of gender equality in the field of employment. To achieve this aim the program provides for the implementation of the following objectives: to increase the rate of employment of women and reduce the gender-based wage gap, to eliminate all forms of gender-based discrimination in employment and to promote economic empowerment of women in rural areas. The Ministry of Labour, Social Protection and Family is the institution responsible for monitoring and coordinating the implementation of the actions stipulated by the National Program on Ensuring Gender Equality for 2010-2015.

In 2010, the Strategy on the Social Inclusion of Persons with Disabilities (2010-2013),³⁸⁷ was adopted. It stipulates, among other actions, the development of an efficient mechanism to provide persons with disabilities with vocational guidance, training and rehabilitation. One of the actions included in the Action plan for implementing the strategy is the drafting and the adoption of a Law on Social Inclusion of the Persons with Disabilities.

In 2011 the Government approved the Action Plan for the Support of the Roma People in the Republic of Moldova for 2011-2015.³⁸⁸ The Plan provides for the implementation of actions with the view to significantly increase the enrolment of Roma in the work field and improve their economic welfare. The majority of the actions in the field of employment are scheduled for 2015. The Bureau of Interethnic Relations is the institution responsible for the implementation of the actions and it has to submit to the Government an annual report on the progress of the Action plan implementation.

We will further analyse specific areas and cases of discrimination in employment and mainly regarding access to employment, working conditions, promotion, termination of employment, access to vocational training, as well as the right to social benefits as an ancillary right to the right to work.

6.2.1 Conditions for access to employment or occupation

Art. 7 of Law no.121 prohibits the employer to place job advertisements with the indication of the requirements and criteria excluding or favouring certain persons,³⁸⁹ as well as the unjustified refusal of employment.³⁹⁰ Refusal of employment is unfounded, if the employer requests additional documents besides those legally established and claims that the person does not meet the requirements that have nothing in common with the professional qualifications required to exercise their professional duties or requests compliance with any other illegal requirements with similar consequences.³⁹¹ Art. 47 of the Labour Code also

³⁸⁶Government Decision no. 933 from 31 December 2009 on the approval of the National Program on Ensuring Gender Equality for 2010-2015.

³⁸⁷Law no. 169 from 9 July 2010 on the approval of the Strategy on the Social Inclusion of Persons with Disabilities (2010-2013).

³⁸⁸Government Decision no. 494 from 8 August 2011 on the approval of the Action Plan for the Support of the Roma People in the Republic of Moldova for 2011-2015.

³⁸⁹Art. 7 para. (2) letter a) of Law no. 121.

³⁹⁰Art. 7 para. (2) letter b) of Law no. 121.

³⁹¹Art. 7 para. (3) item a) and b) of Law no. 121.

prohibits unjustified refusal of employment, as well as any direct or indirect limitation of rights or any direct or indirect advantages at the conclusion of the individual labour contract based on sex, race, ethnic origin, religion, residence, political convictions or social origin. As the employer's refusal to hire is drawn up in written form, it can be challenged before the court.

Following an inspection at the Job Fair held in February 2013, the Centre for Human Rights of Moldova found that out of the six employers participating at the fair, two had discriminatory job advertisements on the ground of age, and three – on the ground of sex.³⁹²

In 2014, the CPPEDAE found that the placement of job advertisements excluding or favouring certain persons, without a reasonable justification, constitutes discrimination in two cases. In the first case, the CPPEDAE found as discriminatory a job advertisement including gender and age restrictions.³⁹³ The respondent denied the placement of the job advertisement and did not present any reasonable justification for the discriminatory grounds included in the advertisement. In the second case regarding job advertisements containing restrictions on various grounds,³⁹⁴ the CPPEDAE made a thorough analysis of the concept “genuine occupational requirements” and noted that the burden of proof in discrimination cases under “genuine occupational requirements” lies upon the employer. In this case, the CPPEDAE found that the respondents did not prove that the requirements included in the job advertisement were essential for exercising these functions and found them discriminatory. Nevertheless, the CPPEDAE did not make a detailed analysis of each of the eight job advertisements and did not explain the reasons why the requirements included in each examined job advertisement were not essential occupational requirements and, therefore discriminatory. In both cases, the CPPEDAE found that there was an instigation to discrimination on the side of the web page administrators by keeping the discriminatory job postings on their web pages.³⁹⁵ The CPPEDAE mentioned that the owner or web page administrator should “take diligence measures in order to ensure that no person shall abuse the virtual platform (web page) and use it as a tool for the promotion and dissemination of discriminatory job advertisements ... in anonymous form or by using a pseudonym ...”.³⁹⁶ Referring to the case examined by the ECtHR, *Delfi v. Estonia*,³⁹⁷

³⁹² Centre for Human Rights of Moldova, Report on Human Rights Protection in Moldova for 2013, p. 33. See the interview from 1 February 2013 with Ombudsman Aurelia Grigoriu, after her visit to the job fair, available at http://www.publika.md/avocat-parlamentar--oferetele-de-munca-ale-mai-multor-angajatori-sunt-discriminatorii_1239661.html.

³⁹³ CPPEDAE, Decision no. 050/14 from 22 February 2014, *Rodion Gavriloi v. LLC „Legis-Com” and web page www.jobinfo.md*.

³⁹⁴ CPPEDAE, Decision no. 041/13 from 24 February 2014, *initiated on self-referral v. web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md and v. LLC „Carolina Bulat”, LLC „Bulat-Grup”, LLC „Castomagic”, JSC „Leogrand” LLC, LLC „Rejans-Prim”, LLC „Brights Land”*.

³⁹⁵ CPPEDAE, Decision no. 050/14 from 22 February 2014, *Rodion Gavriloi v. LLC „Legis-Com” and web page www.jobinfo.md*; CPPEDAE, Decision no. 041/13 from 24 February 2014, *initiated on self-referral v. web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md and v. LLC „Carolina Bulat”, LLC „Bulat-Grup”, LLC „Castomagic”, JSC „Leogrand” LLC, LLC „Rejans-Prim”, LLC „Brights Land”*.

³⁹⁶ CPPEDAE, Decision no. 041/13 from 24 February 2014, p. 6.3.

³⁹⁷ ECtHR, *Delfi JC v. Estonia*, 10 October 2013.

the CPPEDAE underlined that moderation and automatic blocking of some words from announcements and comments is not sufficient for the diligence obligation to be exhausted and administrators can take various measures in order to prevent publication of discriminatory announcements, like accepting the rules of non-discrimination when the account is registered, placing of some non-discrimination rules on the first page etc. Nevertheless, the CPPEDAE did not explain what particular behaviour of web page administrators led to instigation to discrimination. The actions of web page administrators could be considered a form of direct discrimination, because keeping discriminatory job announcements placed by the employers does not represent a call for or an encouragement to discrimination, specific to the form of instigation to discrimination; on the contrary, the initiator of the discriminatory advertisement is the employer who placed it – the employer was not incited by the web page administrator. In both cases, the CPPEDAE obliged the employers to withdraw discriminatory job announcements from all mass-media and to train their employees in the field of equality and non-discrimination. Web page administrators were obliged to undertake measures for preventing the publication of discriminatory advertisements in future.

Under certain conditions the age limit in access to employment can be considered discrimination (see also Section 5.3 on occupational requirements). In another decision the CPPEDAE found that the age limit for the access to the position of personal assistant is discriminatory.³⁹⁸ The CPPEDAE found that the retirement age cannot constitute a determining occupational requirement in this case, but rather physical capacity and health condition of a person being the requirement stipulated separately in the terms of employment. Consequently, the CPPEDAE found that the inclusion of this requirement into Government Decision no. 314 from 23 May 2012 on approving the Framework Regulations on social service "personal assistance" leads to discrimination on the ground of age. In addition, given that the petitioners were women, and there is a five year difference between the retirement age for men and women, the CPPEDAE found that women were limited in their opportunity of becoming personal assistant in comparison to men, finding discrimination on the ground of gender, which could be considered indirect discrimination.³⁹⁹ The CPPEDAE recommended to the MLSPF to propose amendments in relation to the Government Decision no. 314 from 23 May 2012 regarding the exclusion of the condition "has not reached the standard retirement age according to the legislation in force". On 16 June 2015 the Government excluded this condition from the list of conditions for employment of the personal assistant.⁴⁰⁰

Notwithstanding legislative provisions that offer guarantees on employment, and the adoption of several policy documents, in reality, there are certain vulnerable groups often subjected to discrimination in the process of employment in the Republic of Moldova, and namely: women, persons with disabilities and Roma.

³⁹⁸CPPEDAE, Decision no. 030/13 from 13 February 2014, *A.M., V.M. and N.C. v. the Directorate of Social Assistance, Chisinau Municipality and the Ministry of Labour, Social Protection and Family*.

³⁹⁹See below the section regarding the analysis of indirect discrimination.

⁴⁰⁰Government Decision no. 374 from 16 June 2015, item. 1, para. 1).

The legislation of the Republic of Moldova guarantees equal opportunities to **women** and men in the field of employment. Law no.5 from 2006 on Ensuring Equal Opportunities for Women and Men guarantees equal treatment in the field of employment for men and women,⁴⁰¹ putting the burden of proof on the employer who has the obligation to provide, in written form, the reasons for refusal to hire a person who considers that was discriminated on the ground of sex in employment relations⁴⁰². The National Program for Ensuring Gender Equality for 2010–2015 stipulates, among other objectives, increasing of the employment rate among women.⁴⁰³ Art. 247 of the Labour Code also enshrines guarantees for the employment of pregnant women and persons with children under 6 years. Refusal to hire based on grounds of pregnancy or having children under 6 years is prohibited. In such situations, the employer has to justify the refusal in written form, thereafter it can be challenged before the court.

Statistical data show that, although women predominate in occupations with a high level of qualification, mainly among high level specialists (65% women compared to 35% men) and medium level specialists (67% women and 33% men), men have the key positions of leaders at all levels, 56% of men and 44% of women, respectively, hold decision-making positions.⁴⁰⁴

Employment rate among women is lower (36.5%) than among men (40.6%). Women aged between 25–49 without children and without children under 16 years have a higher employment rate, constituting 56.9%. The employment rate among women decreases depending on the number of children: from 52.2% for women with one child to 43.9% for women with three or more children. The employment rate also depends upon the age of the child/children, the most significant differences being registered for women with children under two years. In this case the employment rate constitutes 15.3% for women and 53% for men.⁴⁰⁵ This situation may be caused by overprotective provisions of the Labour Code, that actually lead to the discrimination of women, such as possibility to take childcare leave for children under 3 years (Art. 124) and for children under 6 years old (Art. 126), with the requirement for the employer of maintaining the job position. This situation represents a heavy burden upon the employer. However, these guarantees must be reduced gradually together with the development of day nursery services for children aged 1–3 years provided by pre-school institutions. At the same time, employers may be reluctant to employ women of reproductive age, given that most women choose to benefit from childcare leave (maternal leave). According to statistical data, in 2013, approximately 98% of women benefited from maternal leave, in comparison with 1.4% of men.⁴⁰⁶ This contributes to perpetuating and strengthening traditional gender roles.

⁴⁰¹ Art. 9 of Law no. 5.

⁴⁰² Art. 11 of Law no. 5.

⁴⁰³ Government Decision no. 933 from 31 December 2009 on the approval of the National Program on Ensuring Gender Equality for the years 2010–2015.

⁴⁰⁴ National Bureau of Statistics, Statistical Portrait of men and women in the Republic of Moldova, 2012, p. 2.

⁴⁰⁵ National Bureau of Statistics, Statistical Portrait of men and women in the Republic of Moldova, 2012, p. 2.

⁴⁰⁶ MLSPF, Annual Social Report 2013, p. 66, available at <http://www.docdroid.net/n3kk/raport-social-2013.pdf.html>.

In order to encourage fathers to take part in their children's preschool raising and education, it is necessary to introduce paternity leave which would partially redress the difference.⁴⁰⁷ The draft Law no. 180 voted in the first reading in July 2014 stipulates granting of paternity leave of 14 days during the first 56 days after childbirth that shall be paid by the employer.⁴⁰⁸ On 9 June 2015 the Collective Convention (at the national level) no. 2 from 9 July 2004 "Working time and rest time" was amended⁴⁰⁹, it granted the fathers of new-born children the right to paternity leave for 3 calendar days, maintaining the average salary paid by the employer.⁴¹⁰ If compared with draft law no.180, this provision represents a setback both regarding the duration of paternity leave and also because it excludes the provision stating that the retaliation of the employer against the employee, who has applied for his entitled right to paternity leave, constitute discrimination. With the view of effective enforcement of the provision regarding the paternity leave, it is desirable to ensure either full payment of paternity leave allowance by the State from the social insurance fund, or sharing this burden between the state and the employer.

People with disabilities face stereotypes and severe limitations to employment in the Republic of Moldova. Law no.60 on Social Inclusion of Persons with Disabilities provides that employers who have more than 20 employees are obliged to reserve at least 5% of the total number of work positions for persons with disabilities and employ them, keeping a register of the persons with disabilities who have been refused employment, indicating, among other things, the causes for the refusal. Despite the legal provisions, which appear to promote the employment of persons with disabilities, they have not stimulated the process of employment. Out of 2,046 enterprises with more than 20 employees inspected by the State Labour Inspectorate in 2013, 180 reserved jobs for persons with disabilities, and 971 persons with disabilities were employed in 344 entities.⁴¹¹ On 1 January 2014, only 43% of persons with disabilities aged over 15 years were employed.⁴¹² Nevertheless, some progress was registered in this respect as well. In 2012, the National Agency for Employment hired 43 persons responsible for facilitating employment of persons with disabilities while in 2013, other 43 persons were employed for this position.⁴¹³ Therefore, in 2013, out of 548 persons with disabilities who approached the NAE 168 (29.30%) were employed.⁴¹⁴ In addition,

⁴⁰⁷Partnership for Development Centre, Analytical report: Importance of paternity leave for gender equality, p. 2, available at http://progen.md/files/4311_concediu_de_paternitate.pdf.

⁴⁰⁸Draft law no. 180 on amending and supplementing certain legislative acts, Art. X, p. 2, available at <http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/2285/language/ro-RO/Default.aspx>, last accessed on 15 July 2015.

⁴⁰⁹Collective convention (at the national level) no. 2 from 9 July 2004 "Working time and rest time", available at <http://lex.justice.md/viewdoc.php?id=285912&lang=1>.

⁴¹⁰Collective convention (at the national level) no. 15 from 9 June 2015 for approving the amendments and additions to the Collective convention (at the national level) no. 2 from 9 July 2004 "Working time and rest time", available at <http://lex.justice.md/md/359461/>.

⁴¹¹Ministry of Labour, Social Protection and Family, Report on the social protection of the persons with disabilities and the implementation for the period 2010 – 2013 of the Action plan of the Strategy on the Social Inclusion of Persons with Disabilities (2010-2013), p. 18.

⁴¹²Ibidem, p. 17.

⁴¹³Ibidem, p. 16.

⁴¹⁴Answer by the National Agency for Employment no. 03-367 from 8 May 2014.

Art. 36 (3) of Law no.60 offers benefits to specialized enterprises created by companies and public associations of persons with disabilities which employ persons with disabilities and these entities are exempted from taxes and duties. Nevertheless, we consider that the low rate of employment of persons with disabilities is explained by the absence of facilities for their employment by other enterprises.

Roma are discriminated in the labour market of Moldova, being unreasonably refused employment. Although the state implements the Action plan for the support of Roma in the Republic of Moldova for 2011-2015, which includes a general objective of significantly increasing the employment rate among Roma, this amounts to 21% of employable Roma population (aged 15-64) compared to 46% of non-Roma population.⁴¹⁵ Many Roma are forced either to accept jobs without signing a labour contract, or to open own businesses or to seek employment abroad.⁴¹⁶ Roma women are subjected to multiple forms of discrimination on the grounds of their ethnic origin and sex. Thus, only 15% of Roma women aged over 15 are employed, in comparison with 34% of non-Roma women and 25% of Roma men.⁴¹⁷ The access to employment of Roma people is limited by the absence of secondary and high education. Out of 638 Roma registered at the National Agency for Employment in 2013, 98% had primary/gymnasium/high-school education, only 1% had secondary specialised education and only 3% - secondary vocational training. In 2013, only 6% of Roma, registered at the National Agency for Employment, were employed.⁴¹⁸

6.2.2 Work and working conditions, including payment, promotion and termination of employment

Law No 121 prohibits direct discrimination in the field of labour, payment and dismissal.⁴¹⁹ Both the Labour Code and Law no. 121 stipulate the obligation of employers to develop and bring to the attention of employees internal rules ensuring equal opportunities on promotion and access to continuous training.⁴²⁰

Remuneration

Employer's actions such as unequal payment for the same type and/or workload based on a protected ground are considered discriminatory.⁴²¹ Notwithstanding legal warranties, in practice, the statistics show that women earn on average by 12.9% less than men, which is about 87.1% of the average salary of men. The level of payment for women is less than the

⁴¹⁵United Nations Organisation, Roma of the Republic of Moldova in communities with a large population of Roma, 2013, p. 38.

⁴¹⁶ECRI, Report on the RM (IV monitoring cycle), 20 June 2013, para.128, p.29, <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Moldova/MDA-CbC-IV-2013-038-ENG.pdf>.

⁴¹⁷United Nations Organisation, Study on the situation of Roma women and girls in the Republic of Moldova, 2014, p. 36.

⁴¹⁸National Agency for Employment, Annual report for 2013, p. 23.

⁴¹⁹Art. 7 para. (1) of Law no. 121.

⁴²⁰Art. 7 para. (4) of Law no. 121, art. 199 para. (1) letter. b) of the Labour Code.

⁴²¹Art. 7 para. (2) item d) of Law no. 121, art. 128 para. (2) of the Labour Code.

payment of men in most economic activities, the difference can consist in 4.0% in education to 25.5% in financial activities. It occurs despite the fact that employed women have a higher level of training than men: 27.8% of them have higher education and 20.3% specialized secondary education, while among men these data are, respectively, 22.1% and 12.1%.⁴²² However, discrimination in establishing income appears not only in the context of gender inequality, but also in the context of ethnicity. Thus, the average monthly income of a Roma family is about 1.000 lei (58 Euro), representing 40 percent less than the average income of 1.597 lei (93 Euro) of a non-Roma household.⁴²³

The Constitutional Court found that establishment of lower wages for civil servants employed in the judiciary system, compared to those established for officials of the legislative and executive authorities exercising certain duties identical or similar in their complexity is discriminatory treatment contrary to the Constitution, without indicating the protected ground (which could have been defined as belonging to a socio-professional category).⁴²⁴ The ConstC declared unconstitutional the salary grades stipulated by Annex. 2 of Law no. 48 from 2012 on the System of Salaries of Public Servants in the part which refers to the salaries of the Secretariat of the Constitutional Court, the SCM, the courts and the prosecutor's office. The Constitutional Court has recommended the Government to provide new salary grades for civil servants in the judiciary, which should be recalculated from the date of adoption of its judgement. On 17 July 2014 the Parliament approved the amendment of the salary grading for civil servants in the judiciary (Law no. 146), which entered into force on 1 October 2014. The law does not cover the recalculation indicated by the Constitutional Court and maintains a discrepancy, although it is minor, between the personnel who assists judges and officials in similar positions in other public authorities. Examining the complaint filed on 6 November 2014 by the SCJ, the Constitutional Court declared unconstitutional the provisions of Law no. 146 and obliged the Government to modify completely the salary grading for civil servants employed in the judiciary with their recalculation from the date of adoption of the first judgement, i.e. from 10 September 2013.⁴²⁵

Work record

The CPPEDAE found discrimination by association of the complainants who were mothers of children with severe disabilities, because their leave for childcare was not included in the record of work.⁴²⁶ See the analysis of the case in section 4.5. The CPPEDAE

⁴²²National Bureau of Statistics, Statistical Portrait of men and women in the Republic of Moldova, 2012, p. 3.

⁴²³United Nations Organisation, Study on the situation of Roma women and girls in the Republic of Moldova, 2014, p. 38.

⁴²⁴ConstC, Judgement no. 24 from 10 September 2013 on reviewing the constitutionality of some provisions of Annex no. 2 of Law no. 48 from 22 March 2012 on the System of Salaries of Public Servants.

⁴²⁵ConstC, Judgement no. 25 from 6 September 2014 on control of some provisions of Law no. 146 from 17 July 2014 for amending and supplementing certain legislative acts.

⁴²⁶CPPEDAE, Decision no. 030/13 from 13 February 2014, *A.M., V.M. and N.C. v. the Directorate of Social Assistance, Chişinău Municipality and the Ministry of Labour, Social Protection and Family*.

mentioned that in different situations, the treatment should be different, but it has sanctioned discrimination by association of mothers with children with severe disabilities, providing no analysis on presence of the elements of possible indirect discrimination and without discussing if the potential justification is objective or not.

Promotion

The absence of internal rules for career promotion and ensuring access to continuous training of employees, which would ensure transparency in decision-making and equal opportunities, was considered by the CPPEDAE as gender discrimination in one of the analysed petitions.⁴²⁷ The CPPEDAE recommended to the respondent "Apa Canal Chisinau" to elaborate the regulations which will include provisions for ensuring equality and non-discrimination, inform the employees about such regulations and train the employees in the field of non-discrimination. However, we do not believe that the absence of regulations on equal opportunities constitutes discrimination *per se*. The CPPEDAE could have simply recommended the elaboration of these regulations, without finding discrimination, especially given that the claimant "failed to explain what are the protected grounds under which respondents have treated her less favourably than another employee in the situation similar to that of the petitioner." This would mean that all organizations and institutions that do not have internal regulations on equal opportunities, discriminate, which does not necessarily reflect the reality.

Termination of employment

The Constitutional Court examined three referrals regarding the constitutionality of the norms regulating the age limit for exercising particular professional duties.⁴²⁸ One of these concerned the age limit for the profession of notary public.⁴²⁹ The Constitutional Court ruled that establishment of the age limit of 65 years for holding the position of notary is justified because the State is entitled to set the age limit for persons who act on its behalf to exercise certain public services.⁴³⁰

In another judgement, the Constitutional Court ruled that the provision⁴³¹ that stipulates the termination of employment of public servants who have reached the age required to obtain the old age pension is constitutional.⁴³² The Court established that the State has the right to establish a special legal regime for public servants because their

⁴²⁷ CPPEDAE, Decision no. 074/14 from 12 June 2014, *N.G.-J v. A.R., I.C., V.C., V.G.*

⁴²⁸ See detailed analysis of judgements by the Constitutional Court in section 3.2 of the present Study.

⁴²⁹ Art. 16 para. (1) letter. g) of Law no. 1453, from 8 November 2002 on Notary services.

⁴³⁰ ConstC, Judgement no. 30 from 23 December 2010 on the review of the constitutionality of Article 16 para. (1) letter g) of Law no.1453-XV from 8 November 2002 on Notary services as amended and supplemented.

⁴³¹ Art. 62 para. (1) letter. d) of Law no. 158, from 4 July 2008 on the Public Service and the Status of Civil Servant.

⁴³² ConstC, Judgement no. 6 from 22 March 2011 on exception of unconstitutionality of Article 62 para (1) letter d) of Law no. 158 from 4 July 2008 on the Public Service and the Status of Civil Servant.

duties and responsibilities are of public nature and are essentially different from duties and responsibilities of those persons working in other fields.

The Constitutional Court has developed the concept of genuine professional requirement for age when it examined the constitutionality of the norm allowing termination of the employment contract with teaching staff when the old age pension is awarded.⁴³³ The Court emphasised that "the legislator took into account the fact that teaching is a complex intellectual activity, unique in its specificity. ... The teaching staff has to maintain professional and personal skills, intellectual skills and the ability to carry out the educational tasks at the highest level, the possibility to communicate and to be dynamic, to meet greater exigencies associated with changes occurring in the educational system with the view to carry out this activity".⁴³⁴ The Court also mentioned that, under the Labour Code, the teaching staff who have reached retirement age, but did not exercise their right to retirement can continue to carry out their functions without termination of individual employment.⁴³⁵

The dismissal of a complainant who was pregnant was regarded as discrimination based on gender and maternity.⁴³⁶ The CPPEDAE mentioned that the respondent has not met the burden of proof by not presenting the explanations within the indicated period. However, the CPPEDAE took into account the respondent's explanations submitted later, but found that they confirm the position of the complainant. The CPPEDAE found that the respondent company "Air Moldova" concluded individual employment contracts for 1 year, extending them every year. After the complainant worked for this company for five years, "Air Moldova" has ceased labour relations with her when she was pregnant in six months. The complainant was restored to work through a court decision, but again dismissed due to her absence from work. The petitioner was restored in her rights by another court judgement which found that her absence was caused by the fact that "Air Moldova" did not inform her about the date when her right to work was restored. Subsequently, there was the third dismissal and voluntary restoration by the respondent after the judgement of the Court of Appeal which upheld the earlier judgement of the court regarding reinstatement. However, the respondent did not register the petitioner's reinstatement in her work book and did not indicate the exact period of the leave in the order on granting partially paid childcare leave. Consequently, the complainant could not receive her social insurance allowances. The CPPEDAE found that in the same period when the petitioner was fired for the first time, there were dismissed 10 persons, three of whom were pregnant women. The CPPEDAE concluded that it is obvious that "Air Moldova" did not want to continue employment with them because of their pregnancy. Additionally, the CPPEDAE mentioned that actions of "Air Moldova" to seek explanations for the absence of the petitioner from the workplace after she was restored by the court, but was not announced by the respondent, and drawing up documents on the refusal to provide explanations, fall under the definition of harassment, in this case being gender-based

⁴³³ Art. 301 para. (1) letter. c) of the Labour Code.

⁴³⁴ ConstC, Judgement no. 5 from 25 April 2013 on the review of the constitutionality of Art. 301 para. (1) letter c) of the Labour Code, para. 60-61.

⁴³⁵ *Ibidem*, para. 88.

⁴³⁶ CPPEDAE, Decision no. 105/14 from 19 June 2014, case of *S.T. and A.E. v. SEAC „Air Moldova”*.

harassment. However, the CPPEDAE did not analyse all the elements of harassment and the decision indicates only finding of discrimination on the grounds of gender and maternity. It is unclear whether this finding also includes harassment, given that other decisions by the CPPEDAE spell out a form of discrimination directly in provision of the decision.⁴³⁷ In this case, the CPPEDAE failed to establish that in the cases of discrimination of pregnant women, the comparator needs not be established.⁴³⁸ In this case the CPPEDAE found the infringement stipulated by Art. 54² para. (1) letter b) by the legal entity “Air Moldova”. On 31 January 2015, Buiucani District Court found “Air Moldova” guilty and sanctioned it to pay a fine of 450 c.u., which means MDL 9.000. On 5 March 2015, the Court of Appeal Chisinau referred the case back, and on 18 June 2015 Buiucani District Court found the infringement, without sanctioning it with a fine. The decision was maintained by the irrevocable decision of the Court of Appeal Chisinau as of 13 August 2015.

6.2.3 Access to all types and all levels of training

Legislation of the Republic of Moldova provides equality for employees without any discrimination to training, retraining and advanced training courses.⁴³⁹ For this purpose employers have a duty to establish in internal regulations of the entities rules ensuring equal opportunities for employees.⁴⁴⁰ In its decision from 12 June 2014 the CPPEDAE found discrimination on the grounds of absence of internal regulations that would indicate procedures to access continuous training and equal opportunities for women and men.⁴⁴¹ Such a finding is excessive as the absence of clear policies and internal regulations including non-discrimination clauses might be considered elements that would generate a presumption of discrimination, but not an act of discrimination in itself.

Law no. 121 stipulates that unjustified refusal of enrolment of persons to vocational training courses constitutes discrimination.⁴⁴² Similar to refusal of employment, the refusal of enrolment to vocational training courses is unfounded if the employer requests additional

⁴³⁷ CPPEDAE, Decision no. 030/13 from 13 February 2014, *A.M., V.M. and N.C. v. the Directorate of Social Assistance, Chisinau Municipality and the Ministry of Labour, Social Protection and Family*; CPPEDAE, Decision from 22 February 2014, case no. 050/14, *Rodion Gavriloi v. LLC „Legis-Com” and web page www.jobinfo.md*; CPPEDAE, Decision from 24 February 2014, case no. 041/13, *initiated on self-referral v. web pages www.999.md, www.jobinfo.md, www.joblist.md, www.rabota.md, www.alljobs.md, www.moldovajobs.md, www.munka.md, www.birjatruda.md, www.makler.md and v. LLC „Carolina Bulat”, LLC „Bulat-Grup”, LLC „Castomagic”, JSC „Leograd” LLC, LLC „Rejans-Prim”, LLC „Brights Land”.*

⁴³⁸ In the case of *Webb v EMO Air Cargo (UK) Ltd (No 2) (1994)C-32/93*, the CJEU found that the situation of a pregnant woman cannot be compared with the situation of a sick man, because pregnancy is not comparable to none of the pathogenic conditions and even less to the incapacity to work on non-medical reasons, decision available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0032>.

⁴³⁹ Art. 5 letter. g) of the Labour Code, art. 10 para. (2) letter f) of the Labour Code, art 10, para. (3) of Law No 5.

⁴⁴⁰ Art. 10 para. (1) and (2) of Law no. 5, art. 199 para. (1) letter b) of the Labour Code.

⁴⁴¹ CPPEDAE, Decision no. 074/14 from 12 June 2014, *N.G.-J v. A.R., I.C., V.C., V.G.*

⁴⁴² Art. 7 para. (2) letter c) of Law no. 121.

documents besides those legally established and claims that the person does not meet the requirements which have nothing in common with the professional qualifications required to exercise their professional duties or requests compliance with any other illegal requirements with similar consequences.⁴⁴³

Persons with disabilities of employable age who wish to integrate or reintegrate into the labour market have the right to access to guidance, training and vocational rehabilitation, regardless of the type and degree of disability.⁴⁴⁴ In 2013, 25 persons with disabilities out of 565 persons registered during the year have undertaken the training courses offered by the National Agency for Employment.⁴⁴⁵

The CPPEDAE examined a complaint of a person with disability regarding the refusal of the National Agency for Employment (NAE Chisinau) to enrol that person to vocational training courses in manicure-pedicure organized free of charge.⁴⁴⁶ The reason of the refusal of the NAE Chisinau was that in the document on determining the degree of disability of the petitioner it was indicated that it is not recommended for her to be employed. NAE Chisinau indicated that according to the orders of the MLSPF and the ME, the unemployed seeking referral to training courses must submit a medical certificate showing that her health status will allow her to exercise such activity, which is a mandatory requirement of the educational institution where the unemployed are trained. The CPPEDAE highlighted that the certificate held by the complainant was of old-type and new-type certificates issued by the National Council for Determining Disability and Work Capacity (NCDDWC) do not have any indications including that the work activity is not recommended. Thus, the complainant was obliged to be repeatedly examined regarding the degree of disability in order to obtain a new type of certificate, which was not necessary, as the CPPEDAE mentioned. Under Art. 40 of Law no. 60 on Social Inclusion of Persons with Disabilities, persons with disabilities have the right to have access to guidance courses, training and vocational rehabilitation, regardless of the degree of disability. The CPPEDAE found direct discrimination on the grounds of disability in access to professional training courses, applying a corresponding test of direct discrimination. However, this case refers to the neutral legislative provisions, which offer persons with disabilities the right of access to guidance and training, but their deficient enforcement put the complainant at a disadvantage. As it was mentioned by the CPPEDAE, the complainant was affected because she did not have a certificate of new type, which could be received after the repeated control at the NCDDWC. This fact would assume that all persons with disabilities in the country should have went through a repeated control at the NCDDWC, which would disproportionately affect and could block the activity of this institution and its territorial offices. Thus, as it was mentioned correctly by the CPPEDAE, to avoid this situation, there should have been provided certain transitional arrangements from old-type certificates to the new

⁴⁴³Art. 7 para. (3) item a) and b) of Law no. 121.

⁴⁴⁴Art. 40 of Law no. 60.

⁴⁴⁵National Agency for Employment, answer no. 03-0367 from 8 May 2014.

⁴⁴⁶CPPEDAE, Decision no. 110/14 from 9 September 2014, *V.I. v. the National Agency for Employment, the Ministry of Labour, Social Protection and Family and the National Council for Determining Disability and Work Capacity*.

type. The absence of such provisions and the existing wording affected disproportionately only persons with disabilities who did not have certificates of new type, but wanted to (re)integrate into the workforce through training or retraining, the group that the claimant was part of.

Taking into account these elements, we consider that the kind of discrimination to which the complainant has been subjected to could be considered by the CPPEDAE indirect discrimination. At the same time there are different degrees of disability involving different capacity to perform certain activities, such capacities have to be assessed by NCDDWC. In this case, the CPPEDAE criticized the fact that the requirement to change old-type certificate of disability for a new one as a basic requirement for professional training was discriminatory, without considering whether the complainant was capable or not to exercise the profession depending on her disability. Unfortunately, the CPPEDAE did not provide an individual remedy to the complainant, only recommending the authorities to change the existing regulatory framework. In this case the defendants did not contest the decision of the CPPEDAE.

6.2.4 Social protection and social benefits

The national legislation ensures protection and social benefits for disadvantaged groups. In the field of employment, the legislator has provided granting of social leaves such as maternity leave, partially paid leave for childcare until the age of 3 years and additional unpaid leave for childcare for children aged from 3 to 6 years. The maternity leave is granted only to the mother of a child for a period of 126 days (70 days for prenatal maternity leave and 56 days for postnatal maternity leave)⁴⁴⁷, with an allowance paid from the state social insurance budget.⁴⁴⁸ The partially paid leave for childcare until the age of 3 years is granted upon the expiry of the maternity leave both to the mother or the father of a child, to grandmother, grandfather or other relatives who directly take care of the child, and also to the guardian.⁴⁴⁹ The Labour Code provides also the right to additional unpaid leave for childcare for the child aged from 3 to 6 years with the maintenance of employment and the calculation of the record of service.⁴⁵⁰

In practice, women are the majority of those requesting to be granted these leaves. In 2013, approximately 98% women benefited from childcare leave of up to 3 years, as compared to 1.4% of men.⁴⁵¹ This contributes to perpetuating and strengthening traditional gender roles. Draft Law no. 180 voted in the first reading in July 2014 stipulates granting paternity leave of 14 days during the first 56 days after childbirth that shall be paid by the employer.⁴⁵² See the discussion in Section 5.2 on special measures.

⁴⁴⁷ Art. 124 para. (1) of the Labour Code.

⁴⁴⁸ Art. 4 para. (1) of Law no. 289 on Allowances for Temporary Incapacity to Work and Other Social Insurance Benefits.

⁴⁴⁹ Art. 124 para. (2) – (5) of the Labour Code.

⁴⁵⁰ Art. 126 of the Labour Code.

⁴⁵¹ MLSPF, Annual Social Report 2013, p. 66, available at <http://www.docdroid.net/n3kk/raport-social-2013.pdf.html>.

⁴⁵² Draft law no.180 on amending and supplementing certain legislative acts, art. X, p. 2, available at <http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/2285/language/ro-RO/Default.aspx>.

Women and men should have equal opportunities to be entitled to childcare leaves. The Constitutional Court examined the constitutionality of a provision of Art. 32 para. (4) letter j) of Law no. 162 on the Status of the Military Personnel, according to which only female soldiers were entitled to childcare leave.⁴⁵³ The Constitutional Court has referred to the justification of the State according to which the upbringing and the care of children is to be performed by women. Similar to the ECtHR's arguments in the case of *Konstantin Markin v. Russian Federation*,⁴⁵⁴ the ConstC mentioned that "modern European society has evolved towards a more egalitarian distribution of the responsibility between men and women for bringing up children and that the role of fathers in bringing up small children is increasingly recognized" in the majority of the Member States of the Council of Europe. The Court has not accepted the authorities' argument according to which it constitutes "positive discrimination", noting that "on the contrary, this difference has the effect of perpetuating stereotypes based on gender and it is a disadvantage for both women's career and men's family life". The Court rejected also the risk that extending parental leave for male soldiers will prejudice the fighting power and operational effectiveness of armed forces, while granting this right to female soldiers does not involve such a risk, because in the army there are fewer women than men. It mentioned that authorities did not present data that would prove the fact that the number of male soldiers with children up to the age of 3 years who want to benefit from childcare leave is so great that it could jeopardize the operational efficiency of the army. In conclusion, the Court ruled that the differential treatment of male soldiers constituted discrimination on the ground of gender. As a result, the Law on the Status of the Military Personnel was amended, by excluding the difference between male soldiers and female ones with regard to childcare leave.⁴⁵⁵

In two cases, the CPPEDAE found discrimination against women due to the refusal to grant maternity allowances. In the first case,⁴⁵⁶ the CPPEDAE referred to Art. 14 para. (7) of Law no.162 from 22 July 2005 on the Status of the Military Personnel, under which allowances provided to female-soldiers during their stay in the maternity leave are payable according to general provisions, while taking into account that the military personnel did not pay social insurance premiums, wives of servicemen were not entitled to maternity allowance. The CPPEDAE found discrimination by association⁴⁵⁷ on grounds of the special status ground, assimilated to the military one, of the servicemen wives who were dependants and who were not entitled to maternity allowances compared to women dependants on non-military husbands. See the discussion of the case in section 4.5. In the second case,⁴⁵⁸

⁴⁵³ ConstC, Judgement no. 12 from 1 November 2012 on reviewing the constitutionality of some provisions of Article 32 para. (4) lit. j) of Law no. 162-XVI from 22 July 2005 on the Status of the Military Personnel.

⁴⁵⁴ ECtHR, *Konstantin Markin v. Russian Federation*, 22 March 2012.

⁴⁵⁵ See Law no. 93 from 29 May 2014 on amending and supplementing certain legislative acts.

⁴⁵⁶ CPPEDAE, Decision no. 071/2014 from 26 May 2014, initiated on self-referral, joined to case no. 082/14, *P.A. „MAMI” v. the Ministry of Labour, Social Protection and Family and the Ministry of Defence*.

⁴⁵⁷ In this case it is not clear why the CPPEDAE found discrimination by association, based on the special status ground assimilated to the military one, and not discrimination by association on grounds of military status, given that the victims of discrimination in this case are wives of servicemen.

⁴⁵⁸ CPPEDAE, Decision no. 203/14 from 13 February 2015, *M.M. v. The Department of Penitentiary Institutions*.

similar to the previous one, the CPPEDAE found gender based discrimination⁴⁵⁹ of women, wives of employees in the penitentiary system regarding the access to maternity allowances. The CPPEDAE rejected the respondent's arguments that the employees of the penitentiary system do not pay social insurance premiums and therefore cannot benefit from social allowances.

In another decision,⁴⁶⁰ the CPPEDAE found discrimination against lawyers based on professional status as regards the access to allowances for temporary incapacity to work caused by common illnesses or accidents unrelated to work, maternity allowance, childcare allowance until the age of three years, and the allowance for looking after a sick child. The CPPEDAE found that although lawyers pay monthly social insurance premiums in a fixed amount, which is established annually, they can benefit only in part of social benefits, that is, the minimum old-age pension and death allowances, while employees benefit from all kinds of social insurance benefits. Thus, lawyers are treated worse than the unemployed persons that in addition to death allowance of 900 lei, also benefit of maternity allowance and allowance for temporary incapacity to work caused by common illnesses.⁴⁶¹ However, the CPPEDAE has not taken into consideration that, unlike employed persons, lawyers do not pay a certain percentage of their revenues, but a flat contribution. At the same time, as the CPPEDAE has correctly mentioned that this flat contribution can be comparable to the social insurance premiums paid by employees receiving the minimum salary. To ensure equity in the access of lawyers to social insurance and assistance and taking into account different revenues of lawyers, the MLSPF should consider establishing different packages of services for lawyers to access insurance and social assistance depending on the amount of social insurance premiums paid.

The State has provided for social services, including the social service "personal assistance".⁴⁶² The financial constraints present a problem. In the decision 030/13 from February 13, 2014 the CPPEDAE calculated that local authorities of Chisinau municipality need almost 12 years to cover all needs for personal assistant positions, taking into account the annual budget allocations.⁴⁶³ See section 5.3 for the analysis of this case where the CPPEDAE decided that mandatory age requirements in relation to personal assistants in Government Decision no. 314 from 23 May 2012 concerning the approval of the Framework Regulations lead to discrimination on the ground of age.

⁴⁵⁹Finding discrimination on the grounds of gender is problematic, given that in decision no. 071/2014 the CPPEDAE found discrimination based on the special status ground assimilated to the military one.

⁴⁶⁰CPPEDAE, Decision no. 151/14 from 4 December 2014, *M.D., A.T., O.P., D.S., E.B., V.G. and V.V. v. the Ministry of Labour, Social Protection and Family, the National Office of Social Insurance*.

⁴⁶¹Art. 5 para. (2) of Law no. 289 on allowances for temporary incapacity to work and other social insurance benefits.

⁴⁶²Government Decision no. 314 from 23 May 2012 on the approval of the Framework Regulations on the organisation and operation of social service "Personal Assistance".

⁴⁶³CPPEDAE, Decision no. 030/13, from 13 February 2014, *A.M., V.M. and N.C. v. Directorate of Social Assistance, Chisinau municipality and the Ministry of Labour, Social Protection and Family*, p. 6.10.

Recommendations:

- Establishment of a mechanism for the CPPEDAE of regular monitoring actions regarding the employment advertisements in local and national press and on main specialised web pages;
- Elaboration of an instruction/explanatory note by the CPPEDAE to explain the owners or administrators of websites or newspapers which publish employment announcements what are their legal obligations;
- Elaboration by the CPPEDAE of a guide for employers on internal regulations for their entities that would ensure equal opportunities for promotion, access to continuous education, etc.;
- In order to prevent discrimination in the field of employment, the CPPEDAE could collaborate with the NAE both in monitoring the employment advertisements and in developing guidelines for employers and website owners or administrators;
- Amendment of Law no. 156 by means of including the period of care for a person with severe disabilities in the record of work of the family member who provides this care;
- Reduction of certain over-protective guarantees of the Labour Code, leading in fact to discrimination against women, such as the possibility of taking childcare leave up to 3 years (Art. 124) and 6 years (Art. 126) while maintaining the position at work, alongside with the development of day nursery services and ensuring access of children to preschool institutions;
- Granting paternity leave either by ensuring full payment of paternity leave allowance by the State from the social insurance fund, or sharing this burden between the State and the employer;
- The MLSPF should consider the creation of different packages of services for lawyers to access insurance and social assistance depending on the amount of social insurance premiums paid;
- Empowerment of the CPPEDAE and labour relations control authorities to identify different types of discrimination, in particular indirect discrimination and harassment and to ensure proactive intervention in conflict resolution and mediation. Development of protocols to enable speedy transfer of identified cases between these institutions according to their legal mandate.

6.3 Education

Art. 2 of Protocol no. 1 of the ECHR provides for the right to education. Respectively, the ECtHR accepts complaints on discrimination in the context of education based on Art. 14 of the ECHR. The ECtHR already has an extensive case law on discrimination in education. The main cases include the case of *D.H. and others v. the Czech Republic*,⁴⁶⁴ where

⁴⁶⁴ECtHR, *D.H. and others v. the Czech Republic* (MC), 13 November 2007.

the ECtHR found discriminatory the practice of testing students for establishing their intellectual capacity and degree of adequacy in order to determine whether they were to be placed in the ordinary or special schools. The applied evaluation tests were designed for the population representing the majority- the Czech population, and were not adapted for Roma children, representing a disadvantaged group. As a result, Roma pupils scored lower test results, which led to the education of 80-90% of Roma pupils in special schools. Special schools were intended for individuals with mental deficiencies and other difficulties, having a curriculum more simplified than that followed in ordinary schools. Students attending special schools were isolated from the community. The graduation of such schools offered very limited opportunities for employment, if compared to graduation of ordinary schools. The state has failed to integrate Roma children into the general system of education. In the case of *Horvath and Kiss v. Hungary*,⁴⁶⁵ the ECtHR stressed the incorrect practice of placing Roma children in special schools and found that Hungary has failed to take into consideration the special needs of the complainants as members of a disadvantaged group when placing them into special schools. As a result, the complainants were isolated and received an education that made their integration into society very difficult. In the case of *Grzelak v. Poland*,⁴⁶⁶ the ECtHR found discrimination due to the failure of national authorities to offer an alternative course instead of a course in religion to a student who did not want to attend religion classes.

Directive 2000/43/EC⁴⁶⁷ provides protection against discrimination in the field of employment, both for employees and freelancers and covers such fields as education, social protection including social insurance and healthcare, social advantages and access to goods and services as well as their supply.⁴⁶⁸

Art. 9 of Law no. 121 regulates the prohibition of discrimination in the field of education. Para. (1) of Art. 9 stipulates that educational institutions shall ensure observance of the principle of non-discrimination:

- a) by providing access to educational institutions of all types and levels;
- b) in educational process, including evaluation of acquired knowledge;
- c) in scientific and didactic activity;
- d) by developing educational materials and curricula;
- e) by informing and training of teachers to apply methods and means of preventing acts of discrimination and notifying the competent authorities.

Para. (2) provides that educational institutions cannot establish enrolment principles based on certain restrictions, except for cases stipulated by the legislation in force. Pursuant to para. (3) the refusal of an educational institution to enrol an individual, whose grades do not correspond to the level necessary for enrolment, does not constitute a limitation of the right to education. Para. (4) provides an exception and namely the right of an educational

⁴⁶⁵ ECtHR, *Horvath and Kiss v. Hungary*, 29 January 2013.

⁴⁶⁶ ECtHR, *Grzelak v. Poland*, 15 June 2010.

⁴⁶⁷ Council Directive 2000/43/EC from 29 June 2000 on enforcement of the principle of equal treatment of persons irrespective of their racial or ethnic origin.

⁴⁶⁸ Directive 2000/43/CE, Art. 3 – Scope.

institution which trains staff for a certain religious denomination (cult) to refuse the enrolment of a person whose religious status does not meet the requirements established for access to the respective institution.

Art. 9 of Law no. 121 provides an appropriate framework for protection against discrimination in the field of education, covering the process of enrolment to the educational institution, educational and assessment processes, teaching staff activity and the contents of teaching materials and curricula. The text of Art. 9 allows the formulation of various complaints related to the education system. The prohibition of discrimination in education shall not imply the equalization and giving up on the evaluation criteria based on the performance of pupils and students, but ensures equal opportunities, the inclusion of all pupils in education and customises the educational act.

The main education law is the Education Code of 17 July 2014, in force as of 24 November 2014, which stipulates in Art. 5 the mission of education, which includes, inter alia, the promotion of intercultural dialogue, spirit of tolerance, non-discrimination and social inclusion. Art. 7 of the Education Code provides for the fundamental principles of education, including the following principles that ensure equality and non-discrimination:

- the principle of equity – under which the access to learning is carried out without discrimination;
- the principle the freedom of thought and independence from ideologies, religious dogma and political doctrines;
- the principle of social inclusion;
- the principle of ensuring equality;
- the principle of recognising and guaranteeing the rights of persons belonging to minorities, including the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity;
- the principle of secular education.

Also, the Education Code stipulates, among other obligations, the obligation of the teaching staff, scientific and didactic staff and administration not to allow degrading treatment or punishment, any discrimination or the application of any form of physical or psychological violence.⁴⁶⁹

An important area of education is related to education of persons with special needs. Under Art. 3 of the Education Code, special educational requirements are "educational needs of the child/pupil/student, which imply education adapted to individual peculiarities or features due to disability or learning disorders, as well as specific intervention through appropriate actions of rehabilitation and recovery." The Code contains a series of notions intended to regulate inclusive education.⁴⁷⁰ Article 145 para. (1) letter b) stipulates the

⁴⁶⁹ Art. 135 para. (1) lit. i) of the Education Code.

⁴⁷⁰ For instance, the Education Code provides for the notion of adapted curricula, which means "curriculum for a school subject in which there is a correlation of the child or pupil's potential with special educational requirements, with educational outcomes remaining unchanged". The same article defines the inclusive education as "an educational process that responds to the diversity of children and individual development needs and provides opportunities and equal chances to benefit from fundamental human rights to development and qualitative education in common learning environments". The Code also

means of compensatory financing which applies to children with special educational needs, to children with special abilities – through experimental or alternative programs and performance support programs. An important rule of conduct is stipulated in the draft Code of Professional Conduct for Teaching Staff, and namely, "excluding any form of discrimination in relation with children and students, ensuring equal opportunities and promoting the principles of inclusive education."⁴⁷¹ The failure to comply with this rule can constitute a serious breach of labour discipline and of the charter of the educational institution and should be disciplinary sanctioned.⁴⁷² Also, the infringement of the norm could lead to responsibility under Law no. 121, if the act of discrimination is found.

Chapter VI of Title III of the Education Code, entitled General Education,⁴⁷³ regulates the education of children and pupils with special educational requirements. Title VI regulates vocational technical education, which stipulates in Art. 60 para. (5) that "vocational training of persons with special educational requirements is carried out under the Nomenclature of vocational training fields and trades/professions and Nomenclature of vocational training fields, specialties and qualifications in the trade training classes within the special vocational institutions and within vocational/technical education." Title V regulates higher education. Title V does not govern the access to education for students with special requirements. In such circumstances it is not clear whether young persons with disabilities, who are capable and would like to continue their studies, can or cannot do this, and under what conditions. At the same time, Art. 29 para. (2) of Law no. 60 on Social Inclusion of Persons with Disabilities stipulates that "persons with disabilities follow general education, specialised secondary education and higher education in educational institutions, as established by the Government." Also, the Education Code contains some facilities with regard to access to higher education for persons with disabilities, yet without specifying the particular conditions for application of these measures of support. For example, persons with disabilities may repeatedly benefit from the right of access to higher education funded by the state budget (Art. 80 para. (3) of the Education Code). It is desirable that secondary norms elaborated by

stipulates the notion of intervention measures and support services for inclusive education, which is a "set of measures and services designed to meet the needs of children, pupils and students with special educational requirements in order to facilitate their access to educational services in the community". It also includes the notion of individualized education plan, which is a "tool for organisation and coordinated implementation of the educational process for beneficiaries with special educational needs".

⁴⁷¹ Draft Code of Professional Conduct for Teachers, 2015 version, available at www.ipp.md. See item. 6 para. (6)

⁴⁷² Under art. 135 para. (8) of the Education Code and eventually after the adoption of the Code of Professional Conduct for Teachers, in conformity with its norms.

⁴⁷³ According to para. (1) and (2) of Art. 20 of the Education Code, the general education includes:

- a) early education:
 - infants/toddlers groups, for children aged 0 to 3 years;
 - preschool groups, for children aged 3 to 6 (7) years, including preparation groups;
 - b) primary education: grades I–IV;
 - c) lower secondary education: grades V–IX;
 - d) upper secondary education: grades X–XII (XIII).
- (2) General education also includes special education, extracurricular education, educational alternatives.

the Ministry of Education and higher education institutions enforce the general provisions of the Education Code by setting specific mechanisms for ensuring the access to qualitative education for students with special educational requirements and students with disabilities.

According to a recent study, the legal framework largely meets the international standards, the principle of inclusive education being integrated into the education system. But it is an important to ensure the cross-sectoral approach of the relevant ministries, such as the Ministry of Education, Ministry of Health and Ministry of Labour, Social Protection and Family to school inclusion concept and to convey the same message to the relevant specialists at the local level. It is also important to continue teaching staff training concerning the concept of inclusive education so that all teaching staff receive at least one training on this subject.⁴⁷⁴

The CPPEDAE has examined at least 7 cases related to the field of education covering different issues. For example, in a case it was found discrimination on grounds of disability and social origin of the orphan child on the side of the lyceum administration which created obstacles to the enrolment to lyceum and failed in the reasonable adjustment to the process of education and housing conditions.⁴⁷⁵ In another case, although the dispute has been settled amicably, the discrimination of a minor on the grounds of disability was found in terms of access to a preschool institution. In that case, a minor was refused to be enrolled by two preschool institutions because she had type 1 diabetes. The principals of the preschool institutions mentioned in their defence the absence of a doctor in the institution, and of assistants of educators and cooks that could prepare meals in compliance with the special diet. During the course of the friendly settlement, public authorities involved have resolved the issue amicably and the minor was enrolled into one of the preschool institutions.

In decision no. 122/14 from 22 September 2014 the CPPEDAE examined the complaint of a person with disabilities who has been refused to pass the baccalaureate examination at home, as well as the situation of other persons with disabilities who have faced difficulties when taking the baccalaureate examination, the last case was examined based on the self-referral of the CPPEDAE after the information was disseminated in mass media. The CPPEDAE concluded that the Ministry of Education and the Directorate General of Education, Youth and Sport of the City Council of Chisinau, failed to meet the complainant's requirements, person with disabilities that has been refused to take the baccalaureate examination at home and had to take it at the Bacalaureate Centre in a room on the second floor. The respondents justified the refusal by arguing that the file submitted to the National Commission for Examinations by the principal of the educational institution where the petitioner was registered was incomplete, and the principal had been sanctioned disciplinary by the Ministry of Education. The CPPEDAE did not accept the justification of the respondents, noting that documents available to the National Commission for Examinations were sufficient to accept the request to take the Bacalaureate examination at home. In this case it would have been

⁴⁷⁴ See for more details Angela Cara, *Studiu de politici publice „Implementarea educației incluzive în Republica Moldova”*, Institutul de Politici Publice, (Study of Public Policy "The implementation of inclusive education in the Republic of Moldova", Institute for Public Policies), Chisinau, 2014, available at www.ipp.md, last accessed on 15 July 2015.

⁴⁷⁵ CPPEDAE, Decision no. 003/13 from 22 November 2013.

appropriate to clarify the responsibilities of each of the entities involved, particularly within the context of the immediate reaction of the Ministry of Education according to which the student was allowed to take the other exams at home and the principal of the school who submitted incomplete information was disciplinary sanctioned.

The CPPEDAE did not provide a separate opinion on other cases that have been examined, but delivered a general conclusion that "the National Commission for Examinations has failed to objectively assess the situation of each candidate and to decide on the reasonableness of special measures. In the opinion of the CPPEDAE, the encountered failures are due to incorrect assessment of the information provided about the candidate, unduly medical approach to disability in the field of education, and disregard of psycho-emotional and functional aspects of young people with disabilities." (p. 6.12 of the Decision). During the Baccalaureate session in the academic year 2014-2015 complaints of the type mentioned above were not registered, which could be interpreted as an improvement regarding access to education.

In the same case, the petitioner also complained that he was discriminated on grounds of disability as the number of hours and subjects for persons following homeschooling is reduced. When questioned by the Council regarding the reason why the petitioner was taught a limited number of hours and subjects the representative of the Ministry of Education reported that the number of hours/subjects for pupils following homeschooling is regulated by the Framework Plan for Homeschooling in which disabilities are not specified, and it is applicable only in situations of homeschooling. The CPPEDAE did not express its opinion on this issue and did not indicate in the decision the reason why it omitted a conclusion concerning this part of the complaint.

The CPPEDAE also criticized the terminology used in the Methodology of organising and conducting the baccalaureate exam, for the academic year 2013-2014,⁴⁷⁶ stating that it contains "expressions which are troublesome and open to interpretation such as: "under exceptional circumstances", "immovable candidates", "place of immobilization" which only humiliate and stress the medical approach to disability". The CPPEDAE provided no suggestions regarding the recommended terminology.

The Council recommended the Ministry of Education to adapt the Methodology of organising and conducting the baccalaureate exam, for the academic year 2014-2015.⁴⁷⁷ The methodology for the academic year 2014-2015 contains largely the same expressions as the one of 2013-2014, for example p. 68 stipulates the following:

"Under special circumstances, for immovable candidates, the district/municipal commissions for examinations shall organise the exams at the place of immobilization, in strict compliance with the exam schedule, approved by the Ministry of Education. The organisation of these exams is carried out exclusively under notification of the National Commission for Examinations, based on the application by the candidate or parents and a medical document, psycho-pedagogical description attesting the actual condition and the impossibility of the candidate to move issued by the educational institution."

⁴⁷⁶Methodology of organising and conducting the baccalaureate exam, for the academic year 2013-2014, approved by Order no. 64 from 7 February 2014 of the Minister of Education.

⁴⁷⁷Methodology of organising and conducting the baccalaureate exam, for the academic year 2014-2015, approved by Order no. 118 from 31 October 2014 of the Minister of Education.

We recommend the Ministry of Education to replace the phrase "immovable candidates" by the notion "persons who are unable to move independently."

In decision no. 164/14 from 15 October 2014 the CPPEDAE found discrimination of a minor in the form of harassment on the grounds of atheistic convictions on the side of a teacher, as well as the failure to provide reasonable accommodation into the educational process on grounds of atheistic convictions. In this particular case, the Council found that the teacher imposed the Orthodox religion by saying prayers and making the sign of the cross, by discussing only the Orthodox religion during the classes of moral and spiritual education, by organising excursions to monasteries where the minor was teased by his classmates, by the failure of appropriate intervention in cases of aggression towards the minor and by instigating the children against the minor for the reason that he is an atheist, as well as by ignoring the minor during the festivity at the end of the school year 2013-2014, the minor being the only pupil who was not handed the diploma on the occasion of completing the fourth grade. In this case, the educational institution applied the disciplinary sanction by means of reprimand for the event that happened at the end of the school year and decided not to extend the individual employment contract with that teacher once the contract has expired. In this case, the Council has drawn up the report regarding the commitment of misdemeanours act stipulated by Art. 651 letter a), c) and d) of the Misdemeanours Code, and namely discrimination in the educational process, including evaluation of accumulated knowledge and scientific and didactic activity, filing the case for examination to Buiucani District Court with recommendation of imposing a fine in the amount of 140 c.u.

Buiucani District Court by the judgement from 27 November 2014, case no. 4-1343/14, ruled that the CPPEDAE report is to be cancelled with the dismissal of administrative proceedings. The main arguments brought by the court referred to the form and not the content of the report.⁴⁷⁸ The court dismissed the administrative case with regard to the teacher. The court did not express the opinion on decision no. 164/14 by the CPPEDAE, mentioning that it can be challenged in administrative disputes procedure. First-instance judgement was challenged. The decision by the CPPEDAE was also challenged in the administrative dispute procedure, the procedure is pending at the moment of writing the present Study.

Recommendations:

- Adoption of secondary norms and coherent mechanisms that would ensure the effective exercise of rights of persons with special educational needs to qualitative education, including higher education;
- Adjustment of the terminology used in the Methodology of organizing and conducting the baccalaureate exam, by replacing the notion "immovable candidates" with "candidates who are unable to move independently" (in order to avoid

⁴⁷⁸The court mentioned that the report does not indicate the residence, occupation and information from the identity card of the offender; the report is signed not by the offender, but by her lawyer; the official examiner failed to ensure the presence of two witnesses and their signing of the report; the signature of the victim is missing; the official examiner has not handed the copy of the report to the offender contrary to Art. 443 para. (13) of the Misdemeanours Code; the time or the period of the commitment of misdemeanour is not indicated in the report.

medicalisation of disability in the field of education and to correlate it with the terminology used in Law no. 60 on Social Inclusion of Persons with Disabilities);

- The teaching staff is to be aware of the importance of observing the right to religion and conscience of all citizens and create a tolerant environment so that individuals of all confessions can practice their religion without obstacles;
- It is desirable to exclude the optional course "Religion" from the school curricula and replace it with a course in the general theory of religion taught by professional persons, known for respecting human rights. Otherwise, for the effective implementation of Art. 35 para. (8) of the Constitution, any religion course shall be excluded;
- The Ministry of Education should monitor the way of teaching the subject entitled Moral and Spiritual Education to ensure that teaching methods and contents correspond to the framework plan approved by the Ministry;
- Introduction of the subject entitled Equality and Non-discrimination for continuous training of teaching staff and for the departments of Pedagogy.

6.4 The access to goods and services

Under Art. 8 para. (2) of Law no.121 discrimination in the field of access to services and goods available to the public is prohibited. In a democratic society the social life means the unrestricted use of the services and goods available to the public. The access to any good or service, once it is available to the public, must be ensured without discrimination, regardless of the fact if the person that disposes of the goods or renders a service is a public or private person.⁴⁷⁹ A person cannot invoke as defence in a discrimination charge the reason that s/he has a private business, if s/he made an offer of goods and services to the public. When private persons provide goods and services to the public (for example leisure services, banking services, transport services, food services etc.) they have the obligation not to discriminate.

At the same time, the notion "goods available to the public" shall not be mixed up with the notions "public goods" or "goods of public interest" as stipulated by the national legislation. Under Art. 296 para. (2) of the Civil Code, "the public domain of the state or of the administrative and territorial units includes goods established by law as well as goods which by their nature are of public use or interest". The same paragraph defines public interest as "affiliation of a good to a public service or any activity which satisfy collective needs without implying its immediate access while using the goods according to their mentioned destination". Therefore, a public good, although intended for the public interest, does not necessarily imply the use of this good by the society (for example spaces reserved for the permanent location of the military bases and their activity). In other words, not every good from the public domain or of public interest is available to the public, and in this case it cannot be a question of a discriminatory refusal of access to a good or a service. In conclusion, a good available to the public, pursuant to Law no.121, implies, first of all, a good of public use (for example natural parks, streets, markets).

⁴⁷⁹The European legislation provides special protection in the field of the access to public services and goods on grounds of race and sex. (Directive 2000/43/EC, Art. 3 para. (1) and Directive 2004/113/EC, Art. 3 para. (1)).

The field of access to the goods and services available to the public without discrimination is extremely wide and can include a wide range of cases. By Art. 8 of Law no.121, the legislator tried to highlight some specific categories of services and goods to be rendered/granted without discrimination: services offered by public authorities, medical and other health services, social insurance services, banking and financial services, transport services, cultural and leisure services, selling or renting movable or immovable assets, and other services and goods available to the public. Only a few subjects had been chosen for the purposes of the present study, the importance and relevance of which were also stated by the CPPEDAE decisions.

6.4.1 Access to buildings and constructions

The most serious problems that persons with disabilities face are caused by the absence of access to buildings and constructions. Law no.60 provides design and building rules for the social infrastructure objects adapted to the needs of persons with disabilities,⁴⁸⁰ and the Misdemeanours Code imposes sanctions for discrimination regarding the access to services or goods available to the public.⁴⁸¹ However, even if the new public service offices would be built according to the rules of access, most constructions and other social infrastructure objects, which had been built until the entry into force of Law no. 60 did not comply with these rules. There are situations when social infrastructure assets have been adapted to special requirements, but without observing construction norms. Even if buildings have access ramps, many of them are too steep, narrow or slippery, therefore, their use by persons with disabilities is difficult or even impossible.⁴⁸²

*Table. The analysis of 55 buildings of public utility from the municipality Chisinau subjected to control regarding the accessibility for persons with locomotor disabilities in 2011 and 2012*⁴⁸³

2%	entirely accessible, i.e. they have access ramps, wide doors and lifts and adapted toilets
43%	partially adapted, i.e. they have only access ramps.
25%	partially inaccessible because of the inaccessible ramp and unsuitable toilets, though having wide doors and lifts
30%	entirely inaccessible

In two cases, the CPPEDAE examined the issue of the access to buildings and constructions for persons with disabilities. In the first case⁴⁸⁴, which was initiated on

⁴⁸⁰ Art. 18 and 19 of Law no. 60 from 30 March 2012.

⁴⁸¹ Art. 71¹ of the Misdemeanours Code.

⁴⁸² State Department of the USA, Country Report on Human Rights Practices in Moldova for 2012, page 34, <http://www.state.gov/documents/organization/204527.pdf>, last accessed on 15 March 2015.

⁴⁸³ Association „Motivație” (Motivation), Analytical report of normative documents and technical standards in the field of accessibility for persons with locomotor disabilities, Chisinau 2012, page 40, http://www.mmpsf.gov.md/file/rapoarte/Raport_accesibilitate.pdf.

⁴⁸⁴ CPPEDAE, Decision no. 160/14 from 11 December 2014, *initiated on self-referral v. the Ministry of Regional Development and Construction, State Construction Inspectorate and Directorate General of Architecture, Urbanism and Land Relations*.

self-referral after repeated complaints regarding the absence of access to buildings, the CPPEDAE carried out the analysis of the legislation in the field, notifying the authorities responsible for ensuring the accessibility of buildings and constructions. The CPPEDAE concluded that, although the legislation regarding accessibility is comprehensive enough, however, the enforcement of these provisions is deficient. While the adoption of regulations is under the responsibility of central authorities, their implementation depends on local authorities which issue certificates of urbanism and construction permits. Also, the CPPEDAE noticed the ineffectiveness of the controls carried out by the State Construction Inspectorate because of the small number of sanctions applied, and also because of the ambiguity of the legislative norms regarding liability for non-compliance with the rules on the accessibility of constructions. In the next case the CPPEDAE found discrimination in terms of access to justice because of the failure of the Centre District Court of Chisinau and Chisinau Court of Appeal to provide reasonable accommodation.⁴⁸⁵

The CPPEDAE found direct discrimination and the refusal in the reasonable accommodation when a person with disabilities was refused access to a night club, the CPPEDAE found that this person was a victim of discrimination both on the side of the club and of the law enforcement representatives who did not intervene and did not sanction the club owners as stipulated by the law.⁴⁸⁶

6.4.2 Transport services

Although since 2011 the urban transport in municipality Chisinau is partially adapted to the needs of persons with disabilities (102 trolleybuses out of about 200), their drivers keep being reserved in using the ramps, which in fact makes public transport inaccessible. A serious impediment is also the lack of accessibility of the side walks. Although Law no.60 stipulates the refit of the interurban transport, which is probably the most difficult to use by persons with locomotor disabilities, being completely unadjusted to their needs. The CPPEDAE found that the refusal of a minibus driver to serve a person with disabilities constitutes direct discrimination.⁴⁸⁷

6.5 Access to justice

Justice is a public service rendered by the public authorities and, at the same time, a fundamental human right. The right of persons to access to justice results from both international provisions (e.g. Art. 6 of the ECHR) and the national provisions (e.g. Art. 20 of the CRM, Art. 5 of the CPC and Art. 19 of the CPC). The right to non-discrimination

⁴⁸⁵ CPPEDAE, Decision no. 176/14 from 30 December 2014, *V.S. v. Centre District Court of Chisinau and Chisinau Court of Appeal*.

⁴⁸⁶ CPPEDAE, Decision no. 156/14 from 17 October 2014, *C.A. v. LLC „ADRILUX – COM” and its employee G.V., V.R. and D.N., Police Inspectorate of Ciocana District and V.S., Special mission police unit „Fulger”*.

⁴⁸⁷ CPPEDAE, Decision from 9 December 2014, case no. 157/14, *M.M. v. LLC „Remta-Transport-Privat” and V.L.*

in relation to access to justice also results from the international provisions (e.g. Art.14 of the ECHR and Art. 1 Protocol 12 of the ECHR) and national provisions (e.g. Art.16 of the Constitution, Art. 8, letter a) of Law no.121). Nevertheless, access to justice can be limited by the violation of the equality and non-discrimination principle, and in practice it is reflected in various ways, for example, by the refusal to examine procedures on grounds of the respondent's immunity⁴⁸⁸, the establishment of some limitations which could hamper some persons to initiate court proceedings⁴⁸⁹, the extremely formal interpretation of some procedural norms⁴⁹⁰, the establishment of high state taxes⁴⁹¹, by non-assurance of the access to state guaranteed legal aid.⁴⁹² There are cases in which persons claim that the denial of the access to justice has a discriminatory implication. The CPPEDAE examined a series of such cases.

6.5.1 Representation of persons with mental disabilities before courts

A special category of cases concerning access to justice, examined by the CPPEDAE are the causes regarding the provision of legal services to persons with mental health problems. In two such cases, issued until 2015, the CPPEDAE mentioned discrimination on the ground of disability.⁴⁹³ In **case 002/2013** initiated ex officio, the CPPEDAE found that a lawyer that was offering state guaranteed legal aid (hereinafter "SGLA") to a person that was going to be forced to hospitalisation and subjected to medical treatment without her consent, the lawyer had not met the client prior to the examination of the case in court, she supported the request of the psychiatric institution without knowing the client's position, and therefore she had not even challenged the court judgement that was issued to the detriment of her client. At the CPPEDAE hearing the respondent stated that *"according to [her] personal conviction she pleaded for the treatment of the [beneficiary] without his consent because treatment of the disease and relieving pains that he suffered from at that moment was for his benefit."* Thus, the CPPEDAE found that the respondent had behaved differently with the SGLA beneficiary, who had a psychosocial disability, if compared with a hypothetical client accused in criminal proceedings. The Council used as analogy for the alleged treatment that the respondent *"would not support the charges filed by the prosecutor only because she had the personal conviction that it is for the good of the accused to serve the sentence of imprisonment"*. One of the key elements in the discriminatory actions is the comparator, i.e. a group of persons who is in similar situations, but the existence of a hypothetical comparator is not absolutely necessary in all cases of discrimination. Although the CPPEDAE stated that in the respective case the comparator would be the suspects that risk deprivation of liberty, similar to the person forcibly hospitalised for treatment, neither the accused lawyer nor the CPPEDAE provided examples or evidence proving the practice of differential treatment in

⁴⁸⁸ ECtHR, *Urechean and Pavlicenco v. Moldova*, 2 December 2014, para. 45-55.

⁴⁸⁹ ECtHR, *Philis v. Greece*, 27 August 1991, para. 65.

⁴⁹⁰ ECtHR, *Miragall Escolano and others v. Spain*, 25 January 2000, para. 28.

⁴⁹¹ ECtHR, *Kreuz v. Poland* (no. 1), 19 June 2006, para. 61-67.

⁴⁹² ECtHR, *Hot. Steel and Morris v. the United Kingdom*, 15 February 2005, para. 59-72.

⁴⁹³ CPPEDAE, Decision no. 002/2013 from 20 October 2013 and Decision no. 052/14 from 29 April 2014.

the respondent's activity regarding the representation of persons with disabilities in relation to other categories of clients (for example persons accused in a criminal proceeding that risk deprivation of liberty or other beneficiaries of state guaranteed legal aid). It results from the information presented in the decision that the respondent has proved clear prejudice regarding the way a person with psychosocial disabilities should be represented and has not fulfilled the obligation of diligence in relation to her client, the diligence that was more than important taking into account the state of extreme vulnerability of the person forced to hospitalisation and medical treatment.

Subsequently, Decision no. 002/2013 was cancelled by the courts in the part regarding the finding of discrimination and recommendations addressed to the respondent. Buiucani District Court mentioned that the actions of the lawyer are not of discriminatory nature, nevertheless it has not examined the case from the perspective of elements of discrimination, but examined the fact whether the respondent lawyer has fulfilled or not her legal obligations as a lawyer.⁴⁹⁴

This decision was upheld by higher courts.⁴⁹⁵ Thus, the first court instance, citing the legislation relevant to the case⁴⁹⁶ mentioned that the respondent lawyer "*representing the interests [of the client] took into account the conclusion of the specialists in the field, those who have filed the application before the court and, accordingly, acted in the interests [of the client], the reason why the lawyer claimed for hospitalisation to the psychiatric inpatient care unit without free consent of [the client], acting for his benefit as at that moment he posed a threat to himself and others and required urgent hospitalisation.*" The court has also justified the actions/inactions of the lawyer by the fact that the deadline for examining the application for hospitalisation into psychiatric inpatient care unit is limited (3 days), the conclusion of the medical commission recommended hospitalisation without free consent of the beneficiary and the hospital did not have a specialised escort for ensuring the presence of the beneficiary in the court hearing.

Although the relevant legislation does not require the mandatory presence of the person with disabilities at the hearing of the case regarding involuntary treatment, it stipulates the obligation of representation of the person with psychosocial disabilities by a lawyer namely because of the high vulnerability of this group (Art. 316 of the CPC). The increased attention regarding the representation through SGLA to guarantee the right of defence to persons with mental illnesses involuntarily hospitalised and treated, do not exclude ordinary obligations of lawyers in such cases, such as, for example, the obligation not to act contrary to the legitimate interests of the client and not to adopt a position without consulting it with the person (Art. 54 para. (3) of the Law on Lawyering). At the same time, the courts did not express its opinion on the CPPEDAE arguments that the respondent lawyer/

⁴⁹⁴Buiucani Court, Judgement in case no. 3-282/2014 "Rodica Cojocar v. the CPPEDAE regarding challenging of administrative act" from 19 March 2014.

⁴⁹⁵Chisinau CA, Judgement in case no. 3-1010/14 "Rodica Cojocar v. the CPPEDAE regarding challenging of administrative act" from 17 July 2014; SCJ, Ruling in case 3ra-1486/14, "Rodica Cojocar v. the CPPEDAE regarding challenging of administrative act" from 26 November 2014.

⁴⁹⁶Law no. 1260 from 19 July 2002 on advocacy (hereinafter "Law no. 1260 "); Law no. 198 from 26 July 2007 on State Guaranteed Legal Aid (hereinafter "Law no. 198"); Law no. 1402 from 16 December 1997 on mental health (hereinafter "Law no. 1402 ") and CPC.

respondent had not met the client beforehand and had not challenged the judgement of the first instance, although the beneficiary wanted this.⁴⁹⁷

The authors of the present study consider that before taking a position in the court as the voice of the client, the lawyer must prove the increased professional diligence and speak or attempt to speak with the client before the trial to establish if the person can discern the consequences of his actions based on one's own conviction and not on assumptions or prejudices, to study the case materials integrally, ensuring the presentation of other evidence besides the conclusion of the psychiatric institution, in other words to have a similar attitude as in situations when s/he represents other clients. Furthermore, lawyers should be even more active in relation to persons with mental illnesses given their state of extreme vulnerability. The lawyer is obliged to represent the person before the court ensuring the entire range of procedural guarantees resulting from national and international standards. Only after finding that the person has no discernment regarding his/her current situation the lawyer can substitute the position of the beneficiary with his/her position, which also should be in the best interests of the beneficiary, the position that ensures his/her rights, especially the right not to be tortured (Art. 3 of the ECHR),⁴⁹⁸ the right to liberty (Art. 5 of the ECHR),⁴⁹⁹ the right to a fair trial (Art. 6 of the ECHR),⁵⁰⁰ the right to privacy (Art. 8 of the ECHR),⁵⁰¹ the right to an effective appeal (Art. 13 of the ECHR)⁵⁰² and the right not to be discriminated (Art. 14 of the ECHR). The lawyers of persons with psychosocial disabilities should be aware of the multiple possible interferences following the procedures of psychiatric examination or hospitalisation to the inpatient care unit for psychiatric treatment without free consent, and therefore of the high level of diligence that has to be applied in such proceedings. In case of a formalist attitude of the lawyer towards the mentioned procedures one can have doubts, whether the lawyer has such a formalist attitude because of some prejudices, for instance that all persons with mental disabilities are aggressive and cannot decide their own fate or that they shouldn't decide their own fate.

Thus, besides the fact that courts have not carried out a real analysis of the presence or absence of the discrimination elements in the actions of the respondent lawyer/respondent, they issued judgements through which they have encouraged the conduct of neglect of the professional diligence duty and respect for the opinion of the beneficiary. Therefore, the right of access to justice for persons with mental disabilities was infringed both by lawyers and courts. While cancelling the decision by the CPPEAE, the courts have not considered the requirement of special protection for persons with mental disabilities deprived of liberty and have not analysed the failure in effective exercise of the right to defence in conditions when the lawyer present at such hearings supports the conclusions of the psychiatric institutions without consulting the opinion of his/her client.

⁴⁹⁷ CPPEAE, Decision no. 002/2013 from 20 October 2013 item. 4.4.

⁴⁹⁸ ECtHR, *Gorobet v. Moldova*, 11 October 2011, para. 44-53.

⁴⁹⁹ ECtHR, *David v. Moldova*, 27 November 2007, para. 32-41.

⁵⁰⁰ ECtHR, *Shtukaturov v. Russia*, 27 March 2008, para. 61-76.

⁵⁰¹ *Ibidem*, para. 77-96.

⁵⁰² ECtHR, *Stanev v. Bulgaria*, 17 January 2012, para. 214-221.

Inappropriate attitude and practice of the public authorities and lawyers in cases concerning persons with mental disabilities are also determined by an imperfect legal framework. This can be also observed in *case no. 052/14* examined by the CPPEDAE.⁵⁰³ Under this procedure the CPPEDAE took action based on self-referral in relation to a number of lawyers providing SGLA. During the procedure, explanations from 22 lawyers were presented. Unfortunately, the CPPEDAE did not use the opportunity to explain to each respondent lawyer which of his/her actions/inactions raises questions about possible acts of discrimination and which actions/inactions are justified. Instead, the CPPEDAE generally stated that "*the facts presented in the complaint represent discrimination*". Following such generalist findings it would be impossible for a respondent to draw conclusions what is the right thing to do and what is wrong, or many lawyers presented various justifications that have not been sufficiently examined by the Council. Although decision no. 052/14 has the potential to become a powerful educational precedent, it could fail to achieve the goal of adjusting the conduct of advocates to support litigants with mental disabilities in accordance with the standards of non-discrimination. Below we will explain some of the aspects. The CPPEDAE noted discrimination regarding the facts described in the complaint. They were listed in item 4.2. of the decision as follows:

- a) the lawyers do not prepare for the hearings;
- b) the opinion of the SGLA beneficiary is not consulted by lawyers;
- c) the real possibility for the beneficiary to be present at the hearing is not discussed;
- d) passive behaviour regarding the lodging of appeals;
- e) the lawyers support the reports of the psychiatric hospital without consulting the opinion of the beneficiary.

Although largely repetitive, the lawyers' explanations regarding issues raised by the CPPEDAE reveal many difficulties that they encounter in the examination of the applications regarding psychiatric examination and involuntary hospitalisation of persons with mental disabilities. Some difficulties are caused by the imperfect legislation and others refer to deficient practice. Some of them are justified, some are less justified.

However, it should be mentioned that some of the actions qualified by the CPPEDAE as discriminatory are not within the exclusive competence of lawyers, some of them are within the competences of other authorities - for example bringing the beneficiary to the courtroom. However, the conclusion and the operative part of the decision suggests that only lawyers are responsible for the limitation of the rights of persons with mental disabilities. In this regard it would be good to have a clear distinction between the responsibilities of each institution for each action, either lawyers or the courts or psychiatric hospitals.

One of the most important issues raised by the CPPEDAE is that **lawyers granting SGLA do not consult with beneficiaries** who are in psychiatric hospitals before the trial process. This aspect is crucial in terms of the procedure in cases where lawyers are representing persons with mental disabilities, as the fulfilment or failure to fulfil this obligation affects the lawyer's conduct throughout the entire procedure. This conditions whether or not the lawyer is going to support the conclusion of psychiatrists and whether s/he is going to challenge

⁵⁰³ CPPEDAE, Decision no. 052/14 from 29 April 2014.

the court judgement. In their explanation, several lawyers said they are not going to talk to the beneficiaries in the hospital because they are aggressive and dangerous (e.g. item 4.4, 4.9, 4.12, 4.23, 4.39). Others said that they can discuss with the beneficiaries before the trial, when they are brought to the hearing, and therefore there is no need to meet with them in hospital (e.g. item 4.4, 4.9). A lawyer even said that lawyers have the right to visit the beneficiaries under Art. 494 para. (2) of the CPC, but are not obliged to do it (item 4.37).

Regarding the first argument, that patients in psychiatric hospitals are aggressive, it is important to determine whether this statement is a declarative one or the lawyer really had reasons to believe this. However, even if it were found that the beneficiary is dangerous, this is not a reason to avoid the discussions prior to the hearing, because the hospital should have the means to immobilize the aggressive person or should have specially equipped rooms that allow meetings of these patients with persons from outside the hospital. If the lawyers state that their beneficiaries are aggressive giving no proofs that they were informed about the real situation of the beneficiary and about the fact that the hospital does not have means to immobilize the patient or other means that would allow communication between them, this statement *per se* suggests the existence of prejudice of the lawyers towards this category of clients.

The second argument that lawyers will discuss with patients before the hearing is problematic. Firstly, it creates the impression that lawyers do not prepare for the hearings, as without speaking to the beneficiary s/he cannot know what position to take or what kind of evidence to collect. Secondly, as mentioned by one of the lawyers surveyed (item 4.28), the presence of persons requiring treatment or involuntary hospitalisation at the hearing is not mandatory, and even in practice, often these persons are not brought to the hearing by the representatives of the psychiatric hospital (e.g. item 4.12). Under these circumstances the lawyer has a greater interest to discuss with the patient in advance to ensure it is done before in cases when the beneficiary eventually will not be present before the court. Thirdly, the argument that the lawyer will meet with the client before the trial, in the court, on the grounds that he is dangerous, it is not logical, because in the hospital just as during the hearing there must be safeguards against persons that present a threat to the society.

The third argument invoked was that lawyers have the right and not the obligation to meet with their clients. It should be mentioned that the right provided under Art. 494 para. (2) of the CPC does not represent the right of lawyer *per se*, but is the right to defence of a person for whom medical coercive measures were applied. This norm should be interpreted as generating the obligation of psychiatric hospitals to allow meetings with patients in order not to leave the opportunity to meet or not with the clients-patients at the discretion of lawyers. Another interpretation of this norm would be in the detriment of the right to defence of a category of persons that are in a vulnerable situation and, on the lawyers side, such an interpretation would represent a breach of professional duty (Art. 54 para. (1) of Law no. 1260 and item 1.6.1. and 2.3 of the Code of Ethics of Lawyers). At the same time, based on provided explanations, many lawyers met with beneficiary patients before the trials and afterwards acted in accordance with the position of the beneficiary (item 4.11, 4.15, 4.25, 4.28). There is no clear position of the CPPEDAE regarding these lawyers as the reasoning of the decision does not make differences between different categories of lawyers.

The CPPEDAE has qualified as discriminatory **the absence of discussions about the real possibility for the beneficiary to be present during the hearing**. During the CPPEDAE procedure, some lawyers mentioned that their clients were not present at the hearings due to their poor health condition, or that they present a threat to the society (4.23, 4.26) and that the psychiatric institution has no escort transport (item 4.23). The law does not stipulate the absolute obligation that the person with mental disability to be present at the hearing. However, we believe that only the grounds provided by law can be used to justify the absence of the patient during the hearing. The presence of the legal representative (Art. 493 of the CPC) and the defender (Art. 494 of the CPC) is mandatory when deciding medical coercive measures in the context of criminal proceedings. The person under such procedure has the rights of the accused, the respondent, (Art. 66 of the CPC), if the conclusion of the legal psychiatric examination does not state that the diagnostic findings do not prevent him/her to exercise these rights. This means that his/her presence in court could be limited and his/her rights will be exercised by the legal representative if the psychiatric expertise has such a recommendation. The presence of the legal representative and chosen or appointed lawyer during the psychiatric examination or hospitalisation to psychiatric inpatient care unit is also mandatory in civil proceedings. The person whose mental state is established is present if his/her health condition allows this (Art. 315 para. (2) of the CPC). Special provisions go further and state that if the mental health does not allow the person to appear before the court, the request for involuntary hospitalisation is examined in the psychiatric inpatient care unit (Art. 33 para. (2) of Law no. 1402). Thus, the general rule is that the person is not transported to the court only if his health condition does not allow it. Excuses such as one that the psychiatric hospital has no escort transportation is not justified before the court. Since the lawyer asked the court the presence of the beneficiary, the responsibility for his/her presence falls on the psychiatric hospital.

Another problem identified by the CPPEDAE in decisions no. 002/2013 and 052/14 is that **the lawyers endorse medical conclusions without consulting the opinion of the beneficiary**. When the lawyer, a person entrusted by law to represent the rights and interests of persons with mental disabilities, and mandated with the obligation to achieve the adversarial principle or equality of arms in civil proceedings, supports the medical conclusion of the psychiatric institutions where the person is detained and is in relations of vulnerability with this institution, the lawyer must present serious reasons in order to justify this. Nevertheless, when lawyers support the medical conclusions just based on materials in the file, this may raise questions of different nature. In their explanations, the lawyers have provided arguments why they support the conclusions of the commission of psychiatrists. In particular, they have mentioned that they are not experts in Psychiatry and doctors know what is best for the patient, it is in the interest of the client to be treated at an inpatient care unit, that psychiatrists are the representatives of beneficiaries and lawyers are required only to ensure the observance of the procedure (item 4.19, 4.34, 4.36, 4.39), because beneficiaries can commit other crimes. All lawyers have mentioned the legislation according to which the examination of cases occurs "by virtue of the opinion of the medical institution" (Art. 101 para. (2) of the CC), "based on the opinion of medical institution" in (Art. 471 para.

(5) of the CPC) or "taking into account the conclusion of the medical commission" (Art. 20 para. (2/1) of the Law on Mental Health) and suggested that the opinion of the medical institution would be superior to any reasoning.

As regards the legal framework, indeed there are a number of legal provisions stating that these cases are examined based on or taking into account the opinions/conclusions of the medical commission. However, the procedural codes stipulate that the court must examine all the evidence of the case and no evidence has higher probative value by default (Art. 130 para. (2) of the CPC and Art. 27 para. (2) of the CPC). Although we are aware of the importance of the psychiatrists' conclusion in such cases, the courts should interpret the wording of the law to say that medical conclusions amount to evidence that triggers judicial proceedings and not as superior evidence. The same attitude is to be adopted by lawyers as medical conclusions presented by psychiatric hospitals are not the only evidence that may be brought in such proceedings. Lawyers have to demonstrate diligence and try to collect other evidence besides the medical conclusions or opinions submitted by the commissions of psychiatrists. In this sense we can bring examples when respondent lawyers in case *no 052/14*, have requested the hearing of the witnesses (e.g. item 4.21) or even a psychiatric expertise (e.g. 4.28). Such conduct should be encouraged among lawyers and the courts in their turn should examine with the utmost caution the arrangements for the hearing of witnesses or ordering of the additional or repeated expertise, required under law (Art. 90 and Art. 148 of the CPC, Art. 132 para. (2) and Art. 159 CPC). In the presence of much more evidence, the evaluation by the lawyers and courts will not be based only on the medical conclusion. Also, the effective exercise of the right to defence will be ensured by collecting and considering other proofs.

The question regarding **the passivity of lawyers in challenging court decisions concerning the applications regarding disabled persons** is closely linked to the issue of lawyers endorsing the conclusions of psychiatrists. The lawyers mentioned that they did not challenge the decisions of the courts because it is not logical to challenge a judgement issued based on the conclusions that they have supported (e.g. 4.25) because their beneficiaries are dangerous for the society (e.g. item. 4.7) because their beneficiaries do not want this (item 4.8). and to avoid the increase of the case load of the courts (e.g. item. 4.7). Thus, if the lawyers became more active in proceedings representing persons with mental disabilities, they would have discussions with the beneficiary in advance, they would collect additional evidence, they would take informed position regarding the conclusion of psychiatrists, the issue of not challenging the judgements of the courts in such procedures would disappear. At the same time, the lawyer should take into account that in accordance with the law and ethical standards, the lawyer has the duty to defend the interests of his client as effectively as possible, even in relation to his own interests, the interests of a colleague, those of the profession in general or of the state (item 1.6.1 of the Code of Ethics of Lawyers). Therefore, a justification of the lawyer that s/he didn't file the appeal in order not to load the higher courts is contrary to the professional ethical standards.

To conclude, in the context of civil and criminal proceedings when the measures that restrict the rights of persons with mental disabilities are applied, there still persist prejudices such as: the opinions of psychiatrists represent the most important proof, which reduces judicial

proceedings to a formality, with the mandatory presence of lawyers who are placed in a situation to confirm the words of psychiatrists. Some legal provisions indirectly support this situation de facto and incorrect interpretation of some of these norms leads to a passive behaviour of lawyers and courts. It should be noted as a separate issue that some of the psychiatric inpatient care units are not equipped with escort transportation for bringing the patients to the hearing.

Recommendations:

- The notions stipulating that the examination of cases occurs "by virtue of the opinion of the medical institution" (Art. 101 para. (2) of the CC), "based on the opinion of the medical institution" in (Art. 471 para. (5) of the CPC) or "taking into account the conclusion of the medical commission" (Art. 20 para. (2/1) of the Law on Mental Health) are to be excluded from the Criminal Code, Criminal Procedure Code and Law on Mental Health or public authorities and lawyers shall avoid interpretations that would give a higher value to this type of evidence compared to other evidence presented before the court;
- The lawyers should become more active and fulfil their duties of representation of persons with mental disabilities with an increased diligence in order to avoid the suspicion that their formalistic attitude towards the process is triggered by certain prejudices. In this regard, while evaluating the health condition of the beneficiary/client, the lawyers should not rely solely on the conclusion of the medical commission but shall collect, to the necessary extent, additional evidence (e.g. hearing of the witnesses, repeated expertise and others) for the cases concerning the examination of hospitalisation and psychiatric examination without consent;
- If the lawyers identify differences between the conclusion of the medical commission on the one hand and the case materials, the meetings with beneficiaries and other evidence collected on the other hand, they should be able to request for a repeated or additional psychiatric examination carried out with celerity in order to establish the health condition of the patient;
- The courts shall recognize the fact that persons with possible mental disabilities need a better defence. Their treatment by the courts should be better and not superficial. The principle that persons in different situations should be treated differently does not mean to neglect persons with possible psychosocial disability, but rather that authorities and their defenders should be more active to protect their rights and interests. Therefore, the courts shall examine with extreme caution the lawyers referrals in procedures concerning hospitalisation and psychiatric examination without consent;
- In the procedures related to discrimination in access to justice for persons with mental disabilities, as in the case of other procedures after a presumption of discrimination has been established, the courts shall shift the burden of proof on the shoulders of the person accused of discrimination;
- It is recommended that the CPPEAE abstains from collective self-referrals in order to avoid situations where it is not clear what acts of discrimination are charged in relation to each respondent. If still there are collective self-referrals,

the CPPEDAE shall analyse and find discrimination or lack of discrimination in relation to each respondent individually and in relation to each deed in particular, with the coherent establishment of responsibilities;

- **The Ministry of Health shall allocate financial resources to all psychiatric institutions to provide patients with escort transportation to the court hearing when their health condition allows this and shall create conditions for the meetings of patients (even those supposed to be aggressive or dangerous) and their representatives.**

6.5.2 Filing court complaints in Russian

By the middle of 2015 the CPPEDAE had examined several cases on restricted access to justice of Russian-speaking persons, finding that the courts had refused to review or had returned the complaints on the ground that they were not translated into the official language.⁵⁰⁴ In all the four decisions, the CPPEDAE found that the court rulings not to review or to return the complaints filed in the Russian language, on the ground that they were not submitted in the state language, constitute discrimination in the access to justice on the ground of language. As a matter of fact, the circumstances and arguments brought by the CPPEDAE in its decisions are similar. In some cases the difference lies in the justifications provided by the respondents (courts).

The main arguments brought by the CPPEDAE are of regulatory character. First, the CPPEDAE claims that, in accordance with legal provisions, the Russian language is a language of inter-ethnic communication and, therefore, should benefit from special protection.⁵⁰⁵ Moreover, the CPPEDAE invokes legal provisions under which public authorities are obliged to consider applications and documents both in the state language and in Russian.⁵⁰⁶ Having interpreted the provisions of the CPC, particularly those regarding the language of the court proceedings (Art.24) and on the requirements for filing a complaint (Art. 166, 167, 170 and 171), the CPPEDAE found that they "[would] not require the translation of the court complaint" into the state language. The CPPEDAE has also interpreted the complainant's right to "speak in court through an interpreter" under Art. 24 of the CPC guaranteeing both oral and written communication with the court, and concluded that, therefore, the responsibility to provide the translation of the complaints lies upon the courts. In this context, the CPPEDAE stressed the uneven legal practice of accepting court complaints, citing a case in which the Court of Appeal in Balti had accepted a complaint drafted in the Russian language.⁵⁰⁷

⁵⁰⁴CPPEDAE, Decision no. 009/2013 from 2 December 2013; Decision no. 045/14 from 27 March 2014; Decision as no. 058/14 from 19 May 2014; Decision no. 153/14 from 3 November 2014, Decision no. 206/14 from 17 March 2015.

⁵⁰⁵Law no. 545 from 19 December 2003 on approving the Concept of National Policy of the Republic of Moldova (hereinafter "Law no. 545"); Law no. 3465 from 1 September 1989 regarding the Languages Spoken on the Territory of the Moldovan SSR; Art. 3 (hereinafter "Law no. 3465")

⁵⁰⁶Law no. 3465, Art. 11; Law no.382, on the Rights of the Persons belonging to National Minorities and the Legal Status of their Organisations, Art. 12, para. (1) (hereinafter "Law no.382").

⁵⁰⁷CPPEDAE, Decision no. 002/2013 from 30 October 2013.

Although, it seems that the CPPEDAE has already implemented a well-established practice for examining cases of this kind, we consider it is necessary to further analyse the existing legislation relevant to these types of cases, because the interpretations provided by the CPPEDAE raise issues concerning the lack of coherence and correlation with the legislative framework, the absence of political will to recognize a certain status of the Russian language in relation with the authorities, on the one hand, and to clarify the legal framework and secure uniform judicial practices regarding the examination of court complaints submitted in the Russian language, on the other hand.

International standards provide certain additional guarantees to persons belonging to national minorities in areas densely populated by them and assure that they are not placed in a disproportionate disadvantage compared with the majority population of the state.⁵⁰⁸ De facto conditions, which provide additional safeguards for national minorities, such as their percentage representation, geographical areas, types of public services which provide such guarantees, the institutions responsible for their implementation, should be stipulated by national legislation as a component part of the national policy on the use of minority languages in the public sphere. In these circumstances, the CPPEDAE effort to eliminate the disadvantages that would affect the Russian speakers is understandable. However, the question is whether the CPPEDAE had enough legal and factual support to establish discrimination against Russian-speaking population in access to justice when submitting applications in the Russian language. Another question is if the CPPEDAE can replace the legislator by providing very general recommendations. The CPPEDAE solution implies that the refusal to accept court complaints in other languages than the state language should be considered discrimination in access to justice, regardless of the percentage of the minority representation in that locality or region. Such an approach may be excessive, if we consider the principle according to which additional safeguards are granted to national minorities depending on the percentage of their representation in a particular locality. Further on, we will try to briefly discuss these and other questions.

The first issue to be clarified is the status of the Russian language in court proceedings and, mainly, **whether complainants are entitled to submit court complaints in the Russian language**, in accordance with the law and/or practice from the Republic of Moldova. The main arguments brought by the CPPEDAE to support the conclusion that the refusal to accept court complaints in Russian constitutes discrimination, are of legislative nature. The CPPEDAE held that the law allows persons to submit complaints in the Russian language and the courts have the obligation to translate them into the state language. Indeed, Law no.3465 provides in Art. 11 that "*public and governmental institutions ... receive and examine documents submitted by citizens in Moldovan or Russian*". Although, regulated by a special law, this rule is general in nature and governs the communication with public authorities and other legal entities in both languages (state and Russian language). Law no. 3465 provides in a separate chapter special provisions for law enforcement bodies stating that "*legal procedure in criminal, civil and administrative matters ... is carried out in the state language or*

⁵⁰⁸ Framework Convention for the Protection of National Minorities from 1 February 1995, Art. 10 para. (2).

in a language acceptable to the majority of persons involved in the case” (Art. 15). This provision specifically regulates the language for conducting legal proceedings, thus being a special norm in comparison with Art. 11. Consequently, a rule governing the language for a specific category of public authorities, i.e. law enforcement bodies, takes precedence over the rules governing the language generally, in relation to all public authorities. Art. 15 establishes certain important elements that should be taken into consideration when interpreting it. First, Art. 15 regulates legal proceedings from the moment of filing an application or a complaint till the adoption of the final decision. Thus, the entire legal procedure is conducted in the state language. Second, Art. 15 provides for an exception, according to which the language of the legal procedure can be changed, under the condition of the consent of the participants in the case. Under the legislation, changing the language of legal procedure may take place in the stage of preparing the case for judicial debates (Art. 184 and Art. 185 para. (2) of the CPC).⁵⁰⁹ For this reason, the respondent courts in the CPPEDAE cases argued that changing the language of legal procedure can only take place in a lawsuit. However, the norm that the language of court procedure can be changed is too vague and could raise questions such as, whether the legislator provided an extremely broad legal norm for court proceedings in any language, in any circumstances, only involving the consent of the participants in legal proceedings. In this context, it is worth mentioning that the language of the legal procedure can be changed only if the judge and the court clerk know that language.⁵¹⁰ Third, Law no. 3465 does not grant the Russian language a special status in legal proceedings. This aspect results from the provisions that grant the Russian language a special status (e.g. Art. 9, 10, 11, 17, 18 etc.), recognising expressly the Russian language as the language of communication in some areas, while Art. 15 regulating the legal procedure does not expressly mention this.

The CPPEDAE has invoked in these decisions the provision of Art. 12 para. (1) of Law no. 382, according to which “*persons belonging to national minorities shall have the right to appeal to public institutions in writing or verbally in the Moldovan or Russian languages and to obtain the response in the language in which the application was formulated*”. However, in the context of cases dealing with civil proceedings, the provisions cited by the CPPEDAE contradict Art. 24 of the CPC, which states that civil case proceedings shall be conducted in the state language. The aforementioned aspects regarding the application of Art. 15 of Law no. 3465 are also applicable to Art. 24 of the CPC. Moreover, under Art. 2 para. (1) of the CPC “*civil procedural provisions regulated by other laws must comply with the fundamental provisions of the Constitution of the Republic of Moldova and the Civil Procedure Code*”. In the event of an inconsistency between the provisions of the CPC and an organic law, the regulations

⁵⁰⁹Under Art. 24 para. (3) of the CPC, the court issues a (written or protocol) decision on the beginning of the proceedings, which is issued after hearing the opinions of the parties/participants. In case one of the participants in the court proceedings disagrees on the language of legal procedures other than the official language, the court issues a refusal decision and appoints an interpreter to the participant who does not speak the state language, in accordance with adversarial principle and equality of arms in proceedings.

⁵¹⁰Belei E., Borș A., *Drept procesual civil. Partea generală*, (Civil Procedure Law. General Part.) coord. PhD in law Elena Belei, Cartea Juridică, Chișinău 2014, pag. 112.

adopted further should prevail (Art. 2 para. (2) of the CPC). As, the CPC is an act adopted after Law no. 382 and a special act regulating the civil proceedings, its provisions shall prevail over those stipulated in Art. 12 para. (1) of Law no. 382 invoked by the CPPEDAE. Therefore, the provisions of the Law. 3465 and Law no. 382 on communication with public authorities in the Russian language do not refer to communication in courts, regulated by special legal norms.

If the national legislation provides that the language of court proceedings is the state language, the question is whether it also covers court complaints, meaning that they should be submitted in the state language from the very beginning. Although the legislation does not clearly state the language for submitting court complaints, we can deduce that court complaints should be submitted in Romanian, given the fact that the judges in the Republic of Moldova have to know only the Romanian language⁵¹¹. If the complaint in the Russian language can be filed in the court proceedings held in the state language, this means **that the court has the obligation to translate the complaint into the state language**. Thus, the question is whether the interpreters/translators have such competence under the national law. In its decisions the CPPEDAE mentioned that the right to an interpreter also extends to court complaints and therefore, it is the responsibility of the judicial authority to translate an application from Russian and not of the complainant. Art. 24 para. (2) of the CPC provides that *"parties in a lawsuit, who do not speak Moldovan have the right to be provided with a written translation of documents, files of the case and speak in court through an interpreter."* The CPPEDAE interpreted in its decisions the right to speak through an interpreter as a right allowing the complainant to communicate with the court both orally and in written form. We consider this interpretation as excessive and incompatible with the formalism of judicial proceedings. According to national legislation, the right to an interpreter arises only if the court application meets all the content and formal requirements and if the judge admits it for review, in accordance with Art. 168 of the CPC. First of all, this rule derives from Art. 185 para. (1) letter i) of the CPC which states that the judge decides upon the necessity of assigning an interpreter at the stage of preparing the case for judicial debates. According to civil procedural legislation, the interpreter is a subject that bears criminal responsibility. The rights of the interpreter are read during the hearing, in the presence of the participants to the proceedings, who, in their turn, may challenge the interpreter (Art. 51 and Art. 199 of the CPC). Second, Art. 199 of the CPC para. (1) includes an exhaustive list⁵¹² of procedural documents that the interpreter is obliged to translate. The court complaint is not included in this list. However, by applying the analogy of law, in accordance with Art. 12 para. (3) of the CPC, criminal law defines the interpreter as *"person ... who translates orally from one language into another or who translates sign language thus facilitating communication between*

⁵¹¹Law no. 544 from 20 July 1997 on the Status of the Judge, Art. 6 para. (1) letter e).

⁵¹²Under that law, the interpreter shall translate the explanations, depositions and requests for the participants that do not understand the language of the court proceedings. The interpreter has also the obligation to translate explanations, depositions and requests to the participants in the court proceedings, as well as witness statements, the documents that have been read in the court, audio recordings, expert conclusions, consultations and explanations provided by experts, statements of the presiding judge, court rulings and the judgement.

two or several persons" (Art. 6 of the CPC). Thus, in accordance with the law, the interpreter does not have the obligation to facilitate access to justice for individuals by translating court complaints. Therefore, we can infer that the legislator did not intend to create the possibility for court complaints to be submitted in other languages than the state language, because it did not create a clear mechanism for providing their translation.

Although, on the one hand, the legislation does not expressly grant the right to submit court complaints in Russian, on the other hand, the grounds on which the court returns the complaint or does not admit it, because it is not filed in the language of the procedure, are not clear. The CPC does not provide a clear ground which would allow courts to refuse to admit an application or to return it on the ground that it is written in the Russian language. The CPPEDAE noted in its cases that the courts did not take into account the applications submitted in Russian, because they were submitted in a foreign language, with reference to Art. 167 para. (1) letter a) of the CPC that stipulates that the complainant shall attach to the court application a copy of the application and the necessary documents, and *"if the documents are in a foreign language, the court may order their translation in accordance with legal provisions"*. However, based on this article, we can assert whether court complaints and documents are similar concepts or not. The legislator makes a difference between documents and court complaints. It is also arguable whether we can consider Russian as foreign language, given the status of this language as a language of inter-ethnic communication, provided by Law no. 3465 and other regulations. At the same time, the Russian language might be a foreign language to a judge who does not know it, since it is not compulsory.

In the view of the above, we can state that Moldovan legislation provides unclear and contradictory provisions concerning the complainant's right to file a court complaint in the Russian language and that there is no legal mechanism for exercising this right. In its argument, the CPPEDAE stated that not only the legislation, but **the judicial practice** as well, recognize the right of a person to submit complaints in the Russian language. However, it should be noted, first, that even if such a practice exists, it does not have a sufficient legal basis, given the aforementioned analysis. Second, the CPPEDAE in its cases did not prove, based on solid documentation and statistical data, the existence of an uneven practice used by all the courts regarding the acceptance of complaints submitted in the Russian language. In all the cases regarding the rejection of a complaint submitted in the Russian language, the CPPEDAE provided only the example of the Court of Appeal in Balti that had accepted the examination of a complaint for appeal submitted in Russian. Moreover, this example refers to the Court of Appeal in Balti, a different city than the ones where the respondent courts are located. This distinction is important because, even if the practice of submitting court complaints in the Russian language would be acceptable, for example, in Balti, due to a substantial number of Russian-speaking citizens there - a fact which should be established by statistical data, this practice might not be automatically applied to Chisinau municipality, having a different demographic structure. Thus, the CPPEDAE found that the courts applied uneven practices for court complaints submitted in the Russian language, without providing a thorough analysis of this issue based on a decisive and representative number of cases, on the difference between localities in which the complaints were filed, and on the examination

of the circumstances of each case, as well as the courts' justifications in the compared cases. The conclusion is that the CPPEDAE did not bring a credible argument for the right of individuals to submit complaints in the Russian language based on judicial practice.

We have analysed above whether the judicial practice from the Republic of Moldova grants the individuals the right to submit court complaints in Russian. But, the entitlement to a right constitutes one of the necessary elements for finding discrimination. In cases in which all the elements of discrimination can be found, the respondent can bring arguments for **justifying the differential treatment**. If the differential treatment can be justified, there is no case of discrimination. Moreover, a distinction should be made between the circumstances and the justifications of different cases, because they can lead to different decisions. In the cases examined by the CPPEDAE on the court complaints filed in the Russian language, apparently the CPPEDAE took a decision in principle according to which any action to return or reject a court complaint submitted in the Russian language amounts to discrimination regardless of the court justification.⁵¹³ Such an approach is open to criticism because the circumstances and the justifications can differ from case to case, therefore, the CPPEDAE practice might be liable to change as well.

One of the main aspects of the justification regards the excessive burden placed upon the persons allegedly discriminated. In the CPPEDAE cases, the respondent courts argued that the return and/or ruling upon the rejection of a complaint does not prevent the person to file another court complaint corresponding to formal and content requirements. Accordingly, the complainant had the possibility to submit the court complaint again together with its translation into the state language. Thus, once court proceedings are initiated, the complainant enjoys procedural guarantees, such as the possibility to change the language of the proceedings with the consent of the majority of participants (Art. 24 para. (3) of the CPC), procedural safeguards to receive the documents and files of the case and speak in court through an interpreter (Art. 24 para. (2) of the CPC).

In its decisions the CPPEDAE mentioned that "*national minorities do not have a real opportunity to learn and use the state language*".⁵¹⁴ However, this conclusion was not based on any legal or factual support in the decision. In the light of the aforementioned, the complainants are really in the situation to write a court complaint in a language which is not their mother tongue or they have to bear the translation costs. But most of complainants use the services of lawyers who get promoted only after passing an exam held in Romanian, thus, the professional requirements for lawyers include the obligation to know the state language. The complainants with limited financial resources for hiring a lawyer are eligible for state guaranteed legal aid by the State (Art. 7 of Law no. 198 on the State Guaranteed Legal Aid) or for services of paralegals from the localities that have this type of legal assistance.⁵¹⁵ Thus, given that the complainants had the possibility to address the court

⁵¹³CPPEDAE, Decision no. 106/14, from 1 August 2014, item 6.7.

⁵¹⁴Ibidem.

⁵¹⁵Under Art. 2 of Law no. 198, a paralegal is a person that enjoys high respect from the local community, who has incomplete legal education or complete higher legal education that does not practice law and is specially trained and qualified to deliver primary legal aid to members of the

again, and they had the alternative ways to translate their court complaints, it cannot be stated that the complainants in the CPPDAE cases had an excessive burden on exercising their right to access to justice.

Another important issue, which can be discussed regarding the justification provided by the authorities, also linked to the right of individuals to submit applications in the Russian language, is to demonstrate that the jurisdiction of the courts covers a community with a substantial number of Russian-speaking representatives. This exercise is required in order to determine by law whether the acceptance and examination of complaints filed in the language of national minorities in accordance with international standards is justified in the region.⁵¹⁶ In this regard there is legislative vagueness and lack of updated statistics. Moreover, the legislation does not contain any legal norm that would establish in which regions other languages than the state language should be used in judicial proceedings. In this context, the CPPEDAE approach to find discrimination cases in cases of refusal to accept court complaints submitted in the Russian language is worrying, because the CPPEDAE, in its decisions, does not resort either to statistical data which would show the substantial number of Russian-speaking community in the respective region or to a solid legal basis for granting this right.

The decision on determining the use of languages in judicial proceedings is a political one, with implications at the level of use of public resources and of adopting adequate court staff policy and it should be taken primarily by the Ministry of Justice and the Parliament of the Republic of Moldova. The European Charter for Regional or Minority Languages (hereinafter "Charter")⁵¹⁷ provides solutions to this problem. Article 9.1 stipulates that Parties to the convention:

"undertake in respect of those judicial districts in which the number of residents using the regional or minority languages justifies the measures specified below, according to the situation of each of these languages and on condition that the use of the facilities afforded by the present paragraph is not considered by the judge to hamper the proper administration of justice:

b. in civil proceedings:

i. to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages;

and/or

ii. to allow, whenever a litigant has to appear in person before a court, that he or she may use his or her regional or minority language without thereby incurring additional expense;

and/or

iii. to allow documents and evidence to be produced in the regional or minority languages, if necessary by the use of interpreters and translations;"

community from the financial means intended for the delivery of state guaranteed legal aid in accordance with the regulations on the status and qualification of the paralegals.

⁵¹⁶Framework Convention for the Protection of National Minorities from 1 February 1995, Art. 10 para. (2).

⁵¹⁷Adopted in Strasbourg on 5 November 1992.

The ratification and implementation of the European Charter for Regional and Minority Languages by choosing one or more options provided by the Charter could provide national authorities effective means to clarify the issue of the use of regional or minority languages in different social spheres, including in the field of justice. An included minority will contribute more to the progress of society compared to a minority that cannot effectively fulfil its rights. The state should combine short and long-term measures that would allow the communities speaking the languages, recognized as regional or minority ones, to learn the state language, and at the same time, to communicate with public authorities in their native language, where regional situation requires it.

In conclusion, the national legislation regulating the language of court complaints is extremely confusing. The procedural codes and special norms regulate the language of court proceedings stipulating that they should be held in the state language. The provisions on changing the language of judicial proceedings are extremely broad and do not contain clear restrictions on the language of the judicial proceedings. The legislation does not clearly state whether the courts are obliged or not to accept court complaints submitted in the Russian language. The legislation neither provides a clear basis for the rejection or return of court complaints submitted in a language other than the state one, nor an obligation for interpreters to translate court complaints from Russian into the state language. At the same time, there are legal provisions granting a special status to the Russian language in communication with public authorities. Consequently, the law does not give a clear answer whether courts are obliged to admit and translate court complaints submitted in the Russian language or not.

Although the CPPEAE stated in its decisions that the courts do not apply uniform practices for receiving court complaints in the Russian language, it presented only one decision of the Court of Appeal in Balti in support of that claim. Moreover, the CPPEAE cases do not present statistical data that would show that the number of Russian-speaking individuals in the region may activate the guarantee for accepting court complaints submitted in the Russian language. Besides, the legislation does not stipulate a percentage threshold that would activate the legal guarantee for accepting court complaints in a particular language. The CPPEAE recommended that the court should unconditionally accept applications submitted in the Russian language, although it should have made a recommendation for the clarification of the legal framework. The reasoning of the CPPEAE decisions in these cases seems to be problematic, however they are determined by a confusing and contradictory legal framework, which could be interpreted to support minorities in exercising their fundamental rights.

Recommendations:

- **Ratification of the European Charter for Regional or Minority Languages and the adoption of a law implementing the Charter in order to clarify and unify the legal framework on the use of languages other than the state one;**
- **Pending the ratification of the Charter, the norms governing the use of languages in judicial proceedings should be clarified. A temporary solution, until the adoption**

of the Charter, could be the amendment of civil procedure legislation following the next steps: Article on the form and content of the court complaint (Art. 166 the CPC) to be supplemented with the provision that the court complaint shall be filed in the state language, with exceptions provided by the law. As exception, until the ratification of the Charter by the Republic of Moldova, the courts could accept applications filed in the Russian language if the person filing the complaint expressly demands its admission, because s/he does not know the state language and does not have the necessary financial means for its translation into the state language or to access a lawyer. The proof of the complainant's knowledge of the language shall be self-declaration. The proof of absence of financial resources shall be provided in accordance with the rules for obtaining legal aid guaranteed by the state;

- The SCJ should, as soon as possible, draw up a recommendation or an advisory opinion on the language of court complaints, in accordance with the legal framework and practice of the Republic of Moldova: this will clarify the legal status of the Russian language as the language of inter-ethnic communication, with particular obligations entailed by it.

VII. Institutions mandated to combat discrimination

This chapter discusses the role of the CPPEDAE as a specialised body in the field of preventing and combating discrimination, and the role of the courts who can examine cases related to discrimination in the civil, misdemeanour, administrative, and criminal proceedings.

The practice of the courts in criminal cases is very limited and currently there is a working group created under the Ministry of Justice which prepares the legislative amendments regarding hate crimes. The activity of the working group consists of the analysis of the legal framework specific for hate crimes. The current study will not analyse the criminal dimension of the examination of cases related to discrimination, including hate crimes, given the current activity in this field of the respective group.

Besides the CPPEDAE and the courts, the Ombudsman institution has an important role in preventing and combating discrimination, as regulated by Law no. 52 on the People's Advocate (Ombudsman) from 3 April 2014, in force since 9 May 2014. Among the relevant main competences in the field of preventing and combating discrimination of the Ombudsman are the examination of the individual applications regarding the violation of the rights and the freedoms in the Republic of Moldova received from the individuals present on the territory of the country, the possibility to act ex officio, including filing lawsuits and the competence to seize the Constitutional Court. The Ombudsman's activity on equality and non-discrimination is presented in the annual report regarding the observance of human rights in the Republic of Moldova. Given the recent reform of the institution, the current study will not analyse the Ombudsman's activity in the field of equality and non-discrimination.

7.1 The Council for Prevention and Elimination of Discrimination and Assurance of Equality

7.1.1 The analysis of the Council role and mandate

Under Art. 11 of Law no. 121 the CPPEDAE is a collegial body with the status of a legal person of public law, established in order to ensure protection against discrimination and assure the equality of all persons who consider themselves to be victims of discrimination. The CPPEDAE responsibilities are listed in Art. 12 of Law no. 121 and detailed in the regulations

for its activity.⁵¹⁸ The responsibilities of the Council are not listed exhaustively in the law, which is a positive aspect because it gives the possibility to adjust them to challenges easier.

Among the responsibilities of the Council there are the following fields or directions of activity:

1) Ensuring the standards regarding non-discrimination in the national legislation (advocacy and public policies).

The CPPEDAE may carry out analysis of the legislation compatibility, initiate proposals for amending the legislation, adopt advisory opinions on draft legislation and monitor the enforcement of the legislation in the field (Art. 12 letter a) -d) of Law no. 121). These competences are quite broad and give important tools to the Council to contribute to the achievement of a non-discriminatory legal framework and to redress structural discrimination forms identified on the basis of petitions received or analyses carried out.

Even in the first year of activity the CPPEDAE managed to carry out a number of important analyses and to issue recommendations for adjustments and amendments to the legal framework. Thus, in 2013 the CPPEDAE examined policies and normative acts from the perspective of non-discrimination laws in the following fields: (i) preventing and combating hate crimes; (ii) potentially discriminatory provisions within the misdemeanour legislation (iii) legislation regarding the labour inspection; (iv) legislation regarding the state social insurance pensions; (v) legislation regarding the social service "Personal assistance".⁵¹⁹ According to the CPPEDAE activity report for 2014,⁵²⁰ the CPPEDAE examined 10 legislative and normative acts⁵²¹ from the perspective of non-discrimination in the fields of social protection, health, education, accessibility of information and services for the persons with disabilities and issued 11 notices on the draft legislative and normative acts making recommendations in order to bring them in line with the principle of equality and non-discrimination.

⁵¹⁸ Law no. 298 on the activity of the Council for Prevention and Elimination of Discrimination and Assurance of Equality from 21 December 2012, in force since 1 January 2013. The regulations of the CPPEDAE activity and the minimum number of its staff were adopted under the given law (*hereinafter the CPPEDAE regulations*).

⁵¹⁹ CPPEDAE, Activity Report for 2013, approved on 10 March 2014, available at www.egalitate.md.

⁵²⁰ CPPEDAE, Activity Report for 2014 available at www.egalitate.md

⁵²¹ These are: Law no. 1402 on Mental Health from 16 December 1997; Order no. 647 by the Ministry of Health from 21 September 2010 on the voluntary interruption of pregnancy in safely conditions; Government Decision no. 295 from 14 May 2012 on approval of the Regulations regarding the application of the coercive temporary hospitalisation into medical institutions specialised in tuberculosis treatment for persons suffering from the contagious tuberculosis who refuse treatment; Law no. 1593 from 26 December 2002 on amount, procedure and terms of payment of mandatory medical insurance fees, Law no. 30 from 23 December 2013 on compulsory health insurance funds for 2014 and Law no. 1585 from 27 February 1998 on mandatory medical insurance (regarding the lawyer's activity); Law no. 289 from 22 July 2004 on temporary disability and the other social insurance allowances (terminology "husband"/"wife"); Law no. 156 from 14 October 1999 on state social insurance pensions (retirement age for men and women); Law no. 355 from 23 December 2005 on the payment system in the budgetary sector; Draft Education Code (the principle "money follows the pupil" and pre- university education for speakers of minority languages in circulation in the Republic of Moldova); Methodology of organising and conducting the baccalaureate exam, for the academic year 2013-2014, approved by the order of the Ministry of Education no. 64 from 7 February 2014 (terminology related to persons with disabilities); Draft Planning and Construction Code (liability for inadequate adjustment of buildings for persons with disabilities).

Drafting advisory opinions on draft legislative and normative acts is important and gives the Council the opportunity to contribute directly to preventing the adoption of acts with discriminatory provisions. This competence could be enhanced by increasing the visibility of the opinion issued by the Council in the case it is ignored by the competent authorities, for example by organizing some public debates.

The competence of initiating bills for amending the existing legislation gives the possibility to the CPPEDAE to contribute to the amendment of the legislation, but it is limited because the CPPEDAE does not have the right of legislative initiative. Theoretically, the CPPEDAE could use the respective norm to submit directly to the Government proposals for amending the existing legislation. So far, such initiatives have not been registered and the extent to which they would be taken is not clear. Until present it seems that the CPPEDAE submits proposals to other authorities and not directly to the Government or the Parliament.

As for the mandate to carry out the analyses on the compatibility of the legislation, this is the most important one and the CPPEDAE makes use of it, including the analysis of the legislation through examination of cases/complaints carried out by the Council, initiated either based on a complaint filed by a person or a group of persons or as self-referrals (*ex officio*). For example, in decision no. 008/13 from 17 February 2014 initiated on self-referral regarding the control of Art. 1 para. (5) of Law no. 140 on the State Labour Inspectorate and of Art. 372 para. (2) of the Labour Code in the light of provisions of Law no. 121, the CPPEDAE found that the absence of the control on the side of the State Labour Inspectorate in the institutions of force and the "access of the other employees to an independent and specialized mechanism in the field of labour protection, such as the State Labour Inspectorate with extensive powers to detect, punish and prevent the abuse of the employees' rights" constitutes a differential treatment of the employees of these institutions in comparison with the rest of the employers in exercising the right to labour protection and dignity at work.

Case no. 060/14 of 17/04/2014 was initiated at the complaint of several lawyers and as the self-referral of a CPPEDAE member. The self-referral concerned "the alleged discrimination of women lawyers regarding equal access to medical insurance during their stay on maternity leave", which was found by the CPPEDAE as discrimination. Case no. 110/14 from 9 September 2014 was initiated following the complaint of Mrs. V.I. versus NAE, MLSPF and the National Council for Determining Disability and Work Capacity regarding the alleged discrimination in access to vocational training on the grounds of disability.⁵²² The CPPEDAE found discrimination, but did not provide an individual remedy to the petitioner, only recommending the authorities to change the

⁵²²In this case, the petitioner was affected because she did not have a certificate of new type, that could be received after the repeated control at the NCDDWC. This fact would assume that all persons with disabilities in the country should have passed repeated control at the NCDDWC, which would disproportionately affect and could block the activity of this institution and its territorial offices. Thus, as it was mentioned correctly by the CPPEDAE, to avoid this situation, there should have been provided certain transitional arrangements from old-type certificates to the new type. The absence of such provisions and existing wording affected disproportionately only persons with disabilities who did not have certificates of new type, but wanted to (re)integrate into the workforce through training or retraining, the group that the petitioner was part of.

existing regulatory framework. The recommendations by the CPPEDAE in the decisions listed above, actually amount to legislative proposals and are not suitable remedies specific for the case (including the latest decision, initiated on the complaint of a person). Focusing on general recommendations raises the question of their adequacy as effective remedies, proportionate and dissuasive in relation to victims of discrimination.

We consider that the legislation analysis through the analysis of complaints that refer strictly to legal provisions, especially those initiated based on self-referral, is not an appropriate method for examining the legislation. The Council decision in such cases is not an effective remedy offered to the group affected by the alleged discriminatory provisions and from the strictly legal point of view it cannot be imposed on the relevant authorities to amend the legislation because the only empowered authority with the right to declare the normative acts unconstitutional is the Constitutional Court. When the members of the Council identify discriminatory legislative provisions, it would be more useful for the CPPEDAE to issue a well-reasoned opinion and to discuss with the decision makers who could initiate legislative amendments,⁵²³ or request the Ombudsman to notify the Constitutional Court. For the long term perspective, the CPPEDAE should be granted the right to bring cases before the Constitutional Court on issues related to discrimination.

In order to increase the visibility of the Council's activity and to educate the public about the legislative problems raised, it would be helpful to publish the notifications/complaints/opinions of the CPPEDAE regarding the legislative and normative acts, including the bills in a separate section on the website of the CPPEDAE.

In conclusion, the Council expressed a pro-active attitude in the field of legislation analysis, including both norms in force and proposed bills, an approach that is very important to be maintained. As far as the working methods used are concerned, these could be improved in particular by addressing the legislative problems through collaboration with the decision makers that can initiate legislative amendments and by seizing the Constitutional Court (currently through the Ombudsman) to control the constitutionality of the provisions considered by the Council as being discriminatory.

2) Prevention of discrimination including by raising the awareness of the society with the view to eliminate discrimination.

The CPPEDAE has important functions related to the analysis of the discrimination phenomenon in the country, preparing the studies and thematic reports, submitting the proposals to the public authorities with the view of undertaking some measures to combat discrimination and organising trainings in the field as well as raising the awareness of the society with the view to eliminate discrimination.

The CPPEDAE managed to establish effective collaborations with different organizations of the civil society and to publish reports and guides for the population in less than two years of activity. For example, according to the CPPEDAE activity report for

⁵²³Based on competences stipulated by Art. 12 para. (1) Law no. 121, namely: a) reviews compliance of the existing legislation with non-discrimination standards; b) initiates proposals to amend the legislation in the field of preventing and combating discrimination.

2014, there were carried out 27 training activities (in various forms) organised for judges, prosecutors, the staff of the local authorities, representatives of civil society and mass media from the district centres. The training activities were organized in partnership with the international and local organizations.

One of the responsibilities of the CPPEDAE is related to collecting information about the dimensions, status and trends of the discrimination phenomenon at the national level, and elaboration of studies and reports. In 2014, the CPPEDAE managed to carry out an opinion survey regarding the discrimination phenomenon in the Republic of Moldova.⁵²⁴ The opinion survey was carried out by the Council in partnership with the Institute of Public Policy (Chisinau), the National Council for Combating Discrimination (Bucharest), the Institute of Public Policy (Bucharest). The previous opinion surveys about discrimination in the Republic of Moldova were carried out only by the non-governmental actors.⁵²⁵ In order to determine the development of perceptions and attitudes and to establish priorities it is very important to carry out regular opinion surveys on the phenomenon of discrimination.

The Council publishes a monthly newsletter and the annual activity report, which is a useful way to inform the public both about the work of the CPPEDAE and the relevant activities in the field. The information presented in the annual activity report is useful to determine the development both regarding the work of the Council and the issues raised by the petitioners and the trends at the legislative level. Last but not the least, the CPPEDAE website is a very important tool both for the CPPEDAE visibility and the information of the public about the discrimination phenomenon in the Republic of Moldova. The fact that the CPPEDAE created the website in a short time after the beginning of its activity and the information is updated in due time is more than welcomed. Upon the first two years of activity it would be useful to review the concept of website to expand the presented information. For example, it would be useful to create sections related to the analysis of the legislation compatibility/advocacy and public policies, case examination, monitoring of the implementation of the CPPEDAE recommendations/decisions, judicial practice.

The efforts of the CPPEDAE and its partners in the field of preventing the discrimination phenomenon are welcomed and it is needed to be continued. Supporting these efforts requires a corresponding budget constantly ensured to protect the institution from fluctuations or interferences.

3) Examining individual cases and making recommendations/taking a stand on individual cases (quasi-judicial body role).

The CPPEDAE is mandated to examine complaints of persons who consider themselves victims of discrimination and to find misdemeanours in accordance with the Misdemeanour Code (Art. 12 para. (1) letter I and k) of Law no. 121). The CPPEDAE can also intervene alongside with appropriate bodies with referrals on instituting disciplinary procedures regarding

⁵²⁴The survey is available here: <http://www.egalitate.md/index.php?pag=news&cid=837&cl=ro>, last accessed on 15 July 2015.

⁵²⁵For example, Sociological Study: Perceptions of the Population of the Republic of Moldova on Discrimination, Soros Foundation Moldova, 2011, available here: http://soros.md/perceptia_discriminare_RM, last accessed on 15 July 2015.

senior position officials who committed acts of discrimination in their activity and contribute to the friendly settlement of disputes arising from discriminatory actions by mediating between the parties and seeking a mutually acceptable solution (Art. 12 para. (1) letter j) and m) of Law no. 121). In case of committing discriminatory acts that meet the elements of a crime, the CPPEDAE shall notify the prosecution bodies (Art. 12 para. (1) letter l) of Law no. 121).

In the case of discrimination, the CPPEDAE makes recommendations based on the provisions of Art. 15 para. (4) of Law no. 121. Under Art. 15 para. (5) of Law no. 121, the Council shall be informed about the measures undertaken within 10 days. The term "recommendation" suggests the advisory and non-binding nature of recommendations given by the CPPEDAE. However, under provisions of Law no. 121 and Art. 71² and 423⁵ of the Misdemeanours Code,⁵²⁶ the CPPEDAE recommendations are mandatory and those who committed an act of discrimination must comply with them.

Although the CPPEDAE has worked for less than two years, it has showed initiative and fruitful activity. For example, the Council received 151 complaints for examination and registered 12 self-referrals during 2014.⁵²⁷ Since the beginning of the activity and until 31 December 2014, out of the total number of the examined complaints, 65 were concluded with decisions, 61 were declared inadmissible, 7 complaints were withdrawn by the petitioners, 6 complaints were submitted to the other competent authorities, an Advisory Opinion was requested in 4 petitions, and one complaint was settled amicably. To streamline the work of the Council and to avoid the duplication of solutions on cases, the complaints that had the same subject matter and respondent were joined (overall 14 complaints were joined).⁵²⁸

The CPPEDAE responsibilities listed above are particularly important because they offer a quick and accessible remedy to the potential victims of discrimination. However, the current task of the CPPEDAE regarding the examination of individual complaints is too limited and the mechanism provided by the legislator does not provide an effective remedy to the victim of discrimination through the CPPEDAE. More specifically, the CPPEDAE can examine individual complaints, but cannot impose sanctions. The CPPEDAE has only two options: either finds the act of discrimination and makes recommendations or finds the act of discrimination and qualifies it as misdemeanour, and it has to confirm it in the court as an official examiner, with or without recommendations. If the victim wants to get the guilty person sanctioned, s/he must file the complaint before the Council who is the official examiner for discrimination offences.⁵²⁹ If the victim of discrimination wants to obtain the finding of

⁵²⁶ Art. 74² stipulates the following: "Hindering the activity of the Council for Prevention and Elimination of Discrimination and Assurance of Equality with the view to influence its decisions, failure to present the relevant information required for examining complaints within the period stipulated by the law, deliberate neglect and failure to fulfil the recommendations given by the Council, preventing its activity in any other form, are sanctioned by a fine of 50 up to 100 conventional units for natural persons and by a fine of 75 up to 150 conventional units for a senior position official." Art. 423⁵ stipulates that the CPPEDAE is an official examiner in the following offences: Art.542, 651, 71¹ and 71² of the Misdemeanours Code.

⁵²⁷ CPPEDAE, Activity Report for 2014.

⁵²⁸ CPPEDAE, Activity Report for 2014.

⁵²⁹ Art. 423⁵ stipulates that the CPPEDAE is an official examiner in the following offences: Art.542, 651, 71¹ and 71² of the Misdemeanours Code.

the act of discrimination and the sanction of the acts of discrimination and non-pecuniary damage, s/he must submit the application both before the CPPEDAE and the court.

Based on the analysis of the Council decisions and recommendations we consider that it would be useful for the CPPEDAE to establish a mechanism of monitoring the implementation of its recommendations by presenting the information about the implementation of recommendations on its website with the purpose of informing the society. At present neither information regarding the CPPEDAE cases challenged in the court nor information on the development of cases concerning which the CPPEDAE submitted the reports on finding the misdemeanour to the court are available on the CPPEDAE website. Although the CPPEDAE is responsive and provides information upon request, it would be useful to publish information about the progress of cases in the courts so that the interested public can understand and make their own analysis and also to educate the public about the effectiveness of remedies.

The CPPEDAE should be able to conduct research, investigations on site for qualitative examination of complaints and monitoring of the implementation of recommendations issued by the Council. Although the provisions of Art. 13 para. (3) of Law no. 121⁵³⁰ and Art. 74² of the Misdemeanours Code⁵³¹ should be interpreted as providing the Council access to information held by the alleged perpetrator both in written form and access on site for investigation, in practice not all institutions offer access to the site. Therefore, the competence related to the possibility to conduct on site investigations should be expressly provided by Law no. 121.

The CPPEDAE can participate as an intervener and provide opinions or advisory opinions in cases of non-discrimination examined by the courts, even if that competence is not expressly provided. According to the activity report of the CPPEDAE for 2014, the Council was appointed as an accessory intervener in six trials that focused on the examination of the finding the act of discrimination. This practice is a positive one and it is desirable to be continued, including through law provisions that would allow the Council to be summoned as intervener in cases of discrimination pending in the court. The CPPEDAE opinions are not binding for the court and would be only a support provided to the court. The Council can abstain from presenting the opinion whether or not discrimination is found in a particular case, but could present its opinion on relevant standards applicable in the specific case and the opinion on the burden of proof, as well as any studies or relevant statistical data. Such a practice would also help the Council to collect data on the cases pending before the

⁵³⁰That provides the following: All data, information and documents related to discriminatory actions or behaviour that the complaint referred to are to be made available to the Council within 10 days. The failure to submit the information requested by the Council is sanctioned by legislation and interpreted by the Council to the detriment of the person who does not submit the required data.

⁵³¹That provides the following: "Hindering the activity of the Council for Prevention and Elimination of Discrimination and Assurance of Equality with the view to influence its decisions, failure to present the relevant information required for examining complaints within the period stipulated by the law, deliberate neglect and failure to fulfil the recommendations given by the Council, preventing its activity in any other form, are sanctioned by a fine of 50 up to 100 conventional units for natural persons and by a fine of 75 up to 150 conventional units for a senior position official."

courts and remedies granted. On the other hand, the courts would benefit from relevant information on the tackled subject that the parties might not be able to provide.

As far as the CPPEDAE membership is concerned, under Art. 11 para. (2) of Law no. 121, it is provided that it shall consist of five members, three of whom must be representatives of civil society and three members – law graduates. The CPPEDAE members are not affiliated to a party and are appointed by the Parliament for a period of 5 years. Only the Chairperson of the CPPEDAE is permanently employed being a person holding an official senior state position. The other members do not work permanently and receive a compensation of 10 percent of the average salary in the economy for each meeting/ sitting of the CPPEDAE. The activity of the CPPEDAE members should be a permanent one or at least make up 50% of the working time of the Chairperson to ensure sufficient involvement of the members and avoid the unpaid work within an institution whose mandate is so important. The first membership of the CPPEDAE denotes a special involvement and dedication of its members, but an institution cannot count solely on the volunteer work of its members.

The law requirement that at least three members of the Council should be representatives of the civil society is important because it provides a balance of representation of persons with different professional experiences within the Council and excludes the appointment of former civil servants, who may not have a sufficient predisposition to promote actively the objectives of the Council. The Parliament complied with this requirement, even surpassed it, designating all five members of the Council from among the representatives of the civil society.

The requirement that at least three members of the Council should be law graduates is particularly important for quality assurance of the CPPEDAE decisions, particularly because of its quasi-judicial role. Unfortunately, the Parliament did not observe the law requirement regarding the appointment of at least 3 members of the CPPEDAE from among specialists in law. The Parliament must correct this mistake during the next selection.

The efficiency of the Council depends very much on how its activity is organized internally and on its strategic vision. The approval by the Council of the Strategic Development Program of the Council for the years 2014 - 2016 (23 August 2013) and the Roadmap for implementing Law no. 121 on Ensuring Equality (26 March 2014) and their consistent implementation are welcomed.

According to Law no. 298 on the activity of the Council for Prevention and Elimination of Discrimination and Assurance of Equality from 21 December 2012, the minimum number of its administrative staff was set to 20 units, including civil servants and contracted staff performing auxiliary activities. According to the CPPEDAE activity report for 2014, 18 persons were working in the administrative apparatus at the end of 2014. On 8 April 2014 the administrative body structure was modified and currently consists of the following subdivisions: Directorate for Protection against Discrimination; Directorate for Non-discrimination Policy; Department for Promotion of Equal Opportunities; Human Resources; Economics and Finance Service and the Secretariat.

The CPPEDAE efforts in searching the most effective ways of internal organization are welcomed and should be encouraged by the relevant actors, both the governmental and non-governmental ones. One of the problems mentioned in the CPPEDAE activity report

for 2014 is the difficulty in hiring and maintaining specialists due to the low level of training of the specialists, including law graduates, in terms of standards on equality and non-discrimination, and of the low salaries of the civil servants in the administrative apparatus.

With regard to training specialists in the field of equality and non-discrimination, the Council could initiate discussions with law departments/faculties to introduce a course in the university curriculum, at least as an optional topic, in the field of equality and non-discrimination or by integrating key aspects of the law on non-discrimination into other courses for example Civil Procedure, Administrative Procedure, the Law of the ECHR, International Protection of Human Rights, International Law etc. The Department of Law of the State University introduced a course on Non-discrimination and Equal Opportunities in the second cycle, Master's Degree in Human Rights, which has been taught in the autumn of 2014.

With regard to low salaries of the CPPEDAE employees, low salaries are specific for public authorities and both the Council and other non-governmental actors do not have possibilities for improvement, unless the economic situation changes and the salaries in the field of the public service increase. At the same time, it is known that staff motivation is particularly important for hiring and retaining staff, including long term motivation. Therefore, what could be done to attract and maintain the employed staff would be providing a motivational management of the human resources and creating better working conditions, by providing continuous professional training opportunities for the members and the staff of the administrative apparatus. In this regard, the CPPEDAE could apply for external assistance, directly or through the Ministry of Justice, for the capacity building of its members and of the administrative apparatus of the CPPEDAE. A very useful tool would be the twinning programs between similar institutions, for example the National Council for Combating Discrimination in Romania (NCCD), which could assist the CPPEDAE. Such cooperation would be useful and efficient, especially because of the absence of a language barrier. NGOs and local foundations that have opportunities to apply for funds also could cooperate with the CPPEDAE for the capacity building of the members and the administrative apparatus.

The CPPEDAE office/premises should also be improved by making it more accessible and ensuring the possibilities for personal data storage as required by the law in force.

7.1.2 The proceeding before the Council and the burden of proof

The procedure for the examination of the individual complaints is regulated by Art. 13 - 15 of Law no. 121 and the items 37-66 of the Regulations of the CPPEDAE activity, approved by Law no. 298. Only the key elements that are related to the procedure and some aspects that require improvement are outlined below.

According to item 38 of the CPPEDAE Regulations, the complaint is submitted on one's own behalf, in the interest of another person only with his/her consent, in the interest of a group of persons or of a community. According to item 37, the complaint can be filed by any legal means (mail, fax, e-mail) or presented verbally during the audience. In case of verbal complaints, a notice containing the elements of the complaint is drafted. These provisions provide an affordable way of addressing to the Council.

The complaint can be submitted to the Council within one year from the date when the act was committed or the date when it becomes known that was committed (Art. 13 para. 2 of Law no. 121).

As it was explained in chapter 1, in the non-discrimination law the burden of proof is shared between the complainant (petitioner) and the respondent (defendant).⁵³² Specifically, filing the complaint of discrimination the applicant should provide evidence concerning the right which was infringed, the unfavourable/differential treatment (including in terms of the comparator where appropriate), as well as the protected ground invoked that is in a causal relationship with the differential treatment. The respondent shall argue if he disagrees with the claims of the complainant with respect to each of the three elements, and express his views on the justification of the different or similar treatment, depending on the case. The respondent's refusal to rebut the presumption created by the complainant results in confirming this presumption.

The provisions of Law no. 121 are in line with the European Directives and the ECtHR case law on establishing the burden of proof, both regarding the proceedings before the CPPEDAE and before the courts.

The following rules are relevant with reference to the CPPEDAE: Art. 13 para. (2) which provides that "a complaint must contain a description of the violation of the person's right, the moment when the breach occurred, the facts and any evidence supporting the complaint, the name and address of the complainant" and Art. 15. para. (1) which provides that "the burden of proving that the act in question does not amount to discrimination lies with those persons who are alleged to have committed the discriminatory act". Also, Art. 15 para. (2) of Law no. 121 stipulates the obligation of legal entities and individuals to submit the information requested by the CPPEDAE, but Art. 15 para. (3) states that "the unjustified failure to submit the information requested by the Council is sanctioned by the legislation in force and interpreted by the Council to the detriment of the person who does not submit the required data."

As for the practical application of the burden of proof by the Council, the analysis of the CPPEDAE decisions allows us to conclude that generally the Council applies the norms regarding the burden of proof properly, with some minor exceptions. First of all, the description of the elements that should be included in the complaint of discrimination which is currently posted on the website of the Council is welcomed.⁵³³ This particular description could be improved by presenting more clearly the four elements of the act of discrimination (right infringed, differential treatment, protected ground and objective and reasonable justification) and by clarifying the element of differential treatment. Namely, the presentation should be completed with the explanation that in certain exceptional situations, determined by the person's vulnerability, the comparator can be missing (for example, the situation of a pregnant woman or the persons with mental disabilities). Also,

⁵³² See, for example, Art. 8 of Directive 43/2000/EC, Art.10 of Directive 78/2000/EC, Art. 19 of Directive 54/2006/EC.

⁵³³ Available here: <http://www.egalitate.md/index.php?page=page&cid=845&cl=ro>, last accessed on 15 July 2015

while explaining these elements it should be clarified that the complainant is not required to state his/her opinion regarding the objective and the reasonable justification when the complaint is lodged.

Secondly, the fact that the CPPEDAE refers to the burden of proof and explains the elements that should be submitted by every party in every case is also commendable. However, in some decisions that seem to be just exceptions, the Council found the discrimination even if the complainant did not establish the presumption of discrimination omitting certain elements of the act of discrimination. For example, in case no. 001/13, the Council found that a policeman was discriminated on the ground of opinion by his superiors. Mostly, the discrimination was found on the basis of the fact that the complainant was harassed after he expressed his opinion regarding the illegal actions of his superiors in mass media. Thus, the differences in opinions that could be interpreted as protected were not presented in the case, but rather a conflict with superiors. In case no. 012/13, the CPPEDAE found the discrimination on the basis of opinion of internally displaced persons from Transnistria regarding the access to housing, without making reference to any opinion under which the refugees were discriminated. The cases are thoroughly explained in section 3.9 regarding the ground of opinion.

In case no. 074/14 from 12 June 2014 that refers to the complaint of an employee of "Apa Canal Chisinau" who claimed being discriminated in employment through several actions, the CPPEDAE found discrimination, although the complainant failed to invoke the protected ground in the submitted claims, this being a mandatory element which should be proved by the complainant. The CPPEDAE itself mentions this fact in paragraph 6.3. of the decision. However, the CPPEDAE found the discrimination just because „from the debates of the parties and the evidence enclosed to the file, it has identified the absence of some internal regulations that should establish the procedures for the employees' promotion in careers and insurance of the access to life-long training, with the view to guarantee decision-making transparency and equal opportunities for all potential candidates for the vacancy competitions". The CPPEDAE could make recommendations to the administration of "Apa Canal Chisinau" to elaborate rules for internal promotion and other aspects mentioned in the decision, but, in no way, to find discrimination only because of their absence without a motivated complaint that would contain all the compulsory elements.

Regarding the examination procedure of the complaints, it is governed by the Regulations of the CPPEDAE. However, this document does not regulate the procedure sufficiently detailed. For example, there is no provision that would regulate the order of organising the hearings of parties. There is also no general provision which would allow the Council to apply by analogy the rules of the Civil Procedure Code in the case when there are no provisions in the special law (Law no. 121 and 298). Also, there are no provisions that allow the CPPEDAE to conduct investigations on the spot as a means of collecting the evidence in the process of complaints examination. There is also no legal provision that would give the Council the status of the personal data operator that would enable collecting and processing personal data of the persons involved in the proceedings before the Council, specifically required for the decisions of finding the misdemeanour acts. Also, there is no provision that would clarify that in cases initiated on self-referral, the member who initiated

the case is responsible to present the necessary evidence to establish the presumption of discrimination and, consequently, this member cannot participate in adopting the decision. Such a regulation would ensure the impartiality of the CPPEDAE members in examining the complaints and increase the confidence in the mechanism offered by the CPPEDAE.

The deadline for examination of complaints by the CPPEDAE is 30 days from the moment of filing the complaint and it can be extended with maximum 90 days. This period is an advantage of the procedure before the CPPEDAE, giving the possibility of quick examination of cases of discrimination as compared with examination of cases by the courts. However, the period of 90 days is relatively short in the context when the administrative apparatus is not very big and the Council has many other duties. Upon the first two years of activity it would be useful to assess the capacity of the Council to comply with the period of 90 days and assess the opportunity of amending Law no. 121 by granting the possibility to extend the period of 90 days in exceptional circumstances.

The decisions by the CPPEDAE can be challenged in court under norms stipulated by Law no. 793 on Administrative Proceedings. According to the annual report of the CPPEDAE for 2014, 19 decisions were challenged by the parties in administrative proceedings out of the 77 decisions issued by the end of 2014, which represents approximately 25% of the decisions. This percentage includes both the decisions in which the reports on the misdemeanour finding were issued and the decisions in which only recommendations were made. For a body that operates for less than two years, the percentage of challenging the decisions appears to be relatively low, which could mean a trust or agreement of the parties regarding the findings, or lack of interest of the parties given the absence of real sanctions.

The results of examining the cases in the administrative proceedings are not available on the CPPEDAE website and an extensive research regarding the judicial practice regarding the CPPEDAE decisions challenged in the administrative proceedings has not been done yet. Many cases are still pending before the courts. The summary analysis of several cases shows a varied practice that allows us to draw just some preliminary conclusions.

For example, by decision no. 002/2013 from 30 October 2013 the CPPEDAE found the discrimination against persons with mental disabilities through failure to provide appropriate state guaranteed legal aid (SGLA) in respect of a lawyer ensuring SGLA. Also, the CPPEDAE drafted reports of finding the misdemeanour committed by the respondent and her superior under Art. 71² – for hindering the CPPEDAE activity, by not presenting the documents requested by the CPPEDAE. The respondent lawyer challenged the CPPEDAE decision in administrative proceedings and the report was challenged in the misdemeanour procedure. As a result, the court that examined the case in administrative proceedings cancelled the CPPEDAE decision in the part regarding finding the discrimination, drawing up the report regarding the perpetration of the misdemeanour and the recommendation that National Council for State Guaranteed Legal Aid (NCSGLA) should terminate the contract with the respondent lawyer. However, the court did not examine the lawyer's conduct from the perspective of the elements of discrimination, but in terms of her compliance with the professional obligations as a lawyer. See the analysis of the case in section 6.5 – the access to justice.

The decision no. 003/13 from 22 November 2013 found discrimination based on disability and social origin against an orphan committed by the lyceum administration that created obstacles in admission to the lyceum and failed to provide reasonable accommodation in the educational process and regarding housing conditions. The lyceum challenged the CPPEDAE decision, seeking the annulment of the administrative act (the CPPEDAE decision). The Buiucani District Court in its decision of 11 April 2014, case no. 3-315/2014, dismissed the lyceum complaint as unfounded. The first instance court assessed the complaint as the object of action in the administrative proceedings, namely the administrative act with an individual or normative character under which a right recognized by law of a person is infringed, including the third party, issued by the public authorities and similar authorities (Art. 3 para. (1) letter a) of Law no. 793). The court found that the CPPEDAE answer to the preliminary application of the respondent (the lyceum) was detailed and delivered in time. The court also found that under the CPPEDAE decision no right of the lyceum was infringed, but the minor's rights were restored. The court also mentioned that the Lyceum disagreement with the CPPEDAE decision cannot be the subject of a complaint in administrative proceedings, because the decision is based on opportunity and administrative operations, but the administrative court under Art. 26 para. (2) of Law no. 793 is not entitled to assess the opportunity of the administrative act and the administrative operations which were the basis for its issuance. The court also found that the CPPEDAE retained for examination and considered only the relevant and concluding evidence that allowed the Council to find discrimination based on the ground of disability and social origin of the orphan child in the educational process, harassment on the ground of disability, and victimization of the minor. The first instance court judgment was upheld by the Court of Appeal judgment from 18 November 2014, case no. 3-1282/14.

In decision no. 028/13 of 31 December 2013 the Council considered the decrease in the number of scheduled meetings with the child because of the alleged homosexual orientation of the parent as being an incitement to discrimination on the grounds of gender and sexual orientation. The Council recommended the Municipal Directorate for Children Rights Protection (MDCRP) to repeal the decision by which it was stated to reduce the number of scheduled meetings of the child with the mother, who was the victim of the discrimination in this regard, and to ensure equal opportunities for the mother to participate in the growing up and education of the minor child, having meetings with the child equally with the father. The decision of the CPPEDAE was challenged in court by the MDCRP. By the decision from 20 November 2014 (case No.3-416/14), Buiucani District Court dismissed the complaint filed by the MDCRP, thus maintaining the decision of the CPPEDAE. In this case, the first instance court assessed the complaint in the light of the object of Law no. 793 and did not limit itself only to formal issues, but also examined the substantive issues, namely whether the schedule of meetings with the minor child was set incorrectly because of the belief that the mother was of the alleged homosexual orientation. The MDCRP appealed against the judgement of the first instance court. In its decision from 5 March 2015, Chisinau Court of Appeal, (case No.3a-22/15) dismissed the appeal, upholding the decision of the first instance court.

Based on the decisions analysed above it is obvious that in some cases the courts examine the substantive aspects of the CPPEDAE decisions and analyse whether or not there was discrimination, while in others they examine only the compliance with the requirements on the reasoned answer given to the prior complaint and if any of the complainant's right was infringed. When the court looks only to the way in which the CPPEDAE decision was adopted without analysing its content, i.e. whether the act is considered discrimination or not, it means the absence of procedure judicial review against the CPPEDAE decision. The analysis of lawfulness in the administrative procedures by the courts should include the analysis of the elements of the act of discrimination. It would be useful to provide detailed analysis of the judicial practice upon collecting several decisions with the view to determine the level of understanding and application of the European standards by the courts. As regards the legal framework it would be useful to discuss the appropriateness of spelling out an exception regarding the mandatory prior complaint procedure for appeals against the CPPEDAE decisions.

Recommendations:

For the CPPEDAE:

- **When the CPPEDAE members identify legislative provisions that are discriminatory, it would be more useful to draft a reasoned opinion and either to request the competent authority to initiate the amendment to the legislation or make an appeal to the Ombudsman to bring the case before the Constitutional Court, rather than to examine legislation through the mechanism of individual complaints examination;**
- **To increase the visibility of the Council opinions on the draft legislation, for example by publishing the complete opinions and organizing public debates on certain opinions;**
- **In cases initiated on self-referral, it is advisable for the member who initiated the case to refrain from participating in the adoption of the decision in order to avoid suspicions of conflict of interest;**
- **To request external assistance for the strengthening of the motivational management of human resources and for consolidation of the internal operation of the Council;**
- **To consider seeking EU assistance for the implementation of a twinning program between the CPPEDAE and an institution active in the field of equality from a Member State of the EU;**
- **To improve the way of presenting the information about the activity of the CPPEDAE on its web page by creating sections related to the analysis of the legislation compatibility/advocacy and public policies, case examination, monitoring of the implementation of the CPPEDAE recommendations/decisions, judicial practice;**
- **To improve the way of explanation of the burden of proof on the website and of the reasoning in its decisions.**

For the financial and legal framework regarding the CPPEDAE activity:

- Amendment of Law no. 121 and Law no. 317 on the Constitutional Court and the Constitutional Jurisdiction Code in order to assign the CPPEDAE the right to bring cases before the Constitutional Court;
- Amendment of Law no. 121 and of the relevant normative acts for assigning the CPPEDAE the competence to sanction acts of discrimination;
- When selecting a new membership of the CPPEDAE, there should be ensured a strict compliance with the legal requirements regarding the quality and expertise of the members, including the requirement that at least three members have a degree in Law;
- Amendment of Law no. 121 to provide for full time activity to the CPPEDAE members and the status of a person holding senior state function or the provision stipulating at least 50% workload of the working time of the Chairperson;
- Amendment of Law no. 121, the Civil Procedure Code and Law no. 793 on Administrative Proceedings to grant the CPPEDAE the possibility to act as an intervener in all cases of discrimination examined by the courts;
- Amendment of Law no. 121 and Law no. 298 to ensure the detailed regulation of the procedure of examining the cases on discrimination by the CPPEDAE, particularly with regard to applicability of the norms of civil procedure, the order of hearings, the burden of proof in cases initiated on self-referral, extending the powers of the CPPEDAE to carry out investigations on site, granting the CPPEDAE the status of personal data operator;
- To provide adequate space for work or financial means for premises that would ensure smooth functioning of the CPPEDAE and that would be accessible to the complainants.

For the development partners of the Republic of Moldova and local non-governmental organisations:

- To identify opportunities to support the capacity-building of the CPPEDAE activities, including the internal management of cases, conducting thematic studies, the human resources management, and the visibility of the work and the role of the CPPEDAE;
- To identify possibilities for the implementation in partnership with the CPPEDAE of major activities related to the CPPEDAE mandate, for which budgetary resources have not been allocated yet, such as carrying out sociological studies and developing a mechanism for collecting segregated data by public and private institutions;
- To identify possibilities for further monitoring activities of the CPPEDAE on behalf of the civil society as the results could help improve the activity of the CPPEDAE;
- To analyse the judicial practice in cases of discrimination, including cases resulting from the decisions of the CPPEDAE challenged in administrative proceedings, after collecting a relevant number of decisions.

For court instances:

- **Checking of the lawfulness in the administrative proceedings regarding cases of discrimination should also include the analysis of the factual elements of discrimination act.**

7.2 Courts

The courts can examine cases related to discrimination in the civil, administrative, misdemeanour, and criminal proceedings. Within the framework of the civil proceeding the court examines discrimination claims filed directly before the instance. Within the framework of the administrative proceeding, the court examines complaints submitted against the decisions of the CPPEDAE and administrative acts issued by other public authorities. Within the framework of the misdemeanour proceedings, the court examines complaints against misdemeanour reports on discrimination or applies sanctions based on the acts which found an offence of discrimination issued by official examiners. Within the framework of the criminal proceedings, the court applies sanctions for crimes of discrimination (e.g. under Art. 166¹ para. (3), 173, 176 of CC).

7.2.1 Examination of cases of discrimination in civil proceedings

Any person who considers that is a victim of discrimination is entitled to file a lawsuit before a court (Art. 18 para. (1) of Law no. 121). Filing a complaint for discrimination directly before the court initiates a civil proceeding that is processed according to the CPC, with exceptions stipulated by Law no. 121. Persons who consider themselves discriminated are not required to exhaust prejudicial venue before the CPPEDAE. At the same time, filing a complaint before the CPPEDAE does not hinder the person to address to the court with the same claim, if it is within the limitation period of one year from the date of the discrimination act has occurred or the date on which the person could have known about it (Art. 20 of Law no. 121). The situation when the person addresses to the court directly is different from the situation when the person challenges the decision of the CPPEDAE before the court. In the latter case, the court will examine the case in administrative proceedings - i.e. verifying the legality of the decision issued by the CPPEDAE as a public authority.

Within the framework of a civil proceeding, persons who consider themselves victims of discrimination may require to establish the fact of violation of their rights, to prohibit further restriction of their rights, restore the situation previous to the infringement, ask for compensation for material and moral damage caused as well as compensation of legal expenses or to cancel the act which led to discrimination (Art. 18 para. (1) of Law no. 121). Additionally, at the request of the victim of discrimination, the dissemination of information about the victim's private life and identity can be prohibited. On behalf of persons who consider themselves victims of discrimination the court claim may also be brought by trade unions or NGOs active in the field of promotion and protection of human rights (Art. 18 para. (2) of Law no. 121). To represent victims of discrimination public associations shall prove their registration in the state register of public associations and must be empowered

by the victim/s through a power of attorney, certified as established by law. Courts may also require proof that the representing public association aims to promote and protect human rights. Persons filing a case in court regarding acts of discrimination are exempted from paying the court fee (Art. 21 of Law no. 121).

Complaints before the court with the purpose to restore the right not to be discriminated are examined in accordance with the CPC, with some exceptions. One of the main exceptions in examining cases of discrimination refers to the burden of proof (see Section 2.4.1. on the burden of proof). In case of criminal acts of discrimination, the burden of proof is established according to the general rule, corresponding to the CPC and the MisdemCode (Art. 19 para. (2) of Law no. 121).

Although limited, the practice so far shows that the courts encounter difficulties while examining cases of discrimination. Below we shall examine some of the decisions of the courts, issued after the Law no. 121 entered into force, in order to assess the compatibility of judicial practice with the legislation on non-discrimination in force. In the case of *Zapescu v. "Turbo Plus"*,⁵³⁴ a person of Roma ethnicity, went for a job interview for the position of a waiter at "Andy's Pizza" restaurant network. According to the complainant, the attitude of the employer's representative at the interview was superficial, he spoke on the phone several times, left the office, being completely uninterested in the person interviewed. The complainant has not been subsequently contacted regarding the position, which was correctly qualified as a refusal of employment. On the same day, another person was interviewed, who was of the same sex and age, with the same physical characteristics, height, speaking the same language, possessing the same professional experience, but of Moldovan ethnicity. This person was accepted for the position of waiter. The complainant alleged that he was discriminated against on grounds of his ethnicity, meaning that the only visible difference between him and the person employed was the ethnicity. Mistakenly, the first instance and the appeal court rejected the complainant's claims with the reasoning that he did not demonstrate that he was a Roma, by only considering the fact that in his passport his nationality was mentioned as a Moldovan. Thus, courts have concluded that the employer's representative had no way of knowing that the complainant is of Roma origin. Yet, the courts have ignored the complainant's physical appearance, specifically the skin colour that identifies him as belonging to the Roma community and his declaration, including a copy of the questionnaire completed by the complainant at the interview, where he indicates that he speaks Romani language. Therefore, the court concluded that there was no demonstration of discrimination grounds and differential treatment towards a person in similar situation. Unjustifiably courts have criticized the attitude of the complainant and of the other candidate to seek a lawyer immediately after the interview, given that access to justice is guaranteed under Moldovan law. Finally, the courts reminded that the respondent company had employees of different nationalities and ethnicities, including a Roma person, an argument that is not by itself sufficient to demonstrate a non-discriminatory recruitment policy.

⁵³⁴Centru District Court, Chisinau, Judgement no. 2-472/14 from 27 June 2014; Court of Appeal Chisinau, Judgement no. 2a-3692/14 from 22 January 2015.

In the circumstances presented in the case of *Zapescu* it is difficult to assess whether the complainant's claims were justified or not. But both the first instance and the court of appeal made some arguments that raise questions regarding the way in which the evidence was considered.

First, the courts did not recognize the evidence arising from the method of situational testing applied by the complainant and the person who was accepted for the position of waiter. They have qualified the fact that the complainant and the other person addressed to the same lawyer immediately after the interview as a sign of bad faith. Situational testing is a method of proving discrimination used all over the world, seeking to identify the situations that are difficult to prove. The court was called upon to judge a behaviour that it has framed by itself as a refusal of employment, and from this point, it does not matter if the two candidates knew each other beforehand and wanted to "test" the reaction of the employer. Eventually, an issue that could be raised by the court is the measure of damage incurred by the complainant given that he was interested in the testing, and not a candidate who wanted to be indeed employed.

Secondly, the courts have asked the complainant to demonstrate his ethnicity, and stated that in the absence of concrete evidences it is impossible to determine the ethnicity of the complainant. Although the respondent denied that he knew the ethnicity of the complainant during the interview, the court should not have required the complainant to demonstrate his ethnicity. Instead, the only thing that was required was to determine, if the respondent representative had a way to determine the ethnicity of the complainant during the interview and then apply the principle of shared burden of proof in the sense of asking the employer to demonstrate that his decision was based on objective grounds unrelated to ethnicity when he rejected the complainant and preferred the other candidate. The fact that the respondent was not directly informed about the ethnicity of the complainant is irrelevant for the present case. What is important in this case is whether the respondent could identify the complainant's ethnicity on the basis of his physical appearance. Nevertheless, the court has mentioned without any room for doubt, that judging by the exterior features of the complainant, it is impossible to determine his ethnicity. A finding of this kind could be excessive. Wrongly, the court puts a disproportionate task upon the Roma person, and namely, to demonstrate that the Roma community can be discriminated based on physical appearance and that he personally recognizes these features in his own appearance.

The courts also mentioned in the case of *Zapescu* that the complainant did not bring the case before the CPPEDAE, the body specialized in cases of discrimination and, therefore, there is an absence of a real situation of discrimination because otherwise the complainant would have addressed to the CPPEDAE for help to protect his violated right. This affirmation is problematic in several respects. The CPPEDAE has an alternative and not exceptional competence to settle cases of discrimination. The conclusion according to which lack of the complaint before the CPPEDAE diminishes the merit of a claim filed before the court reflects the failure to recognize the courts' role as an authority with responsibilities to prevent and combat discrimination (Art. 10, letter c) of Law no. 121). Such an approach by the courts could have a discouraging effect for persons who want to uphold their right directly in courts. According to the legislation in force, although the CPPEDAE is a body specialized in combating discrimination, it does not possess sufficient competencies to remedy the situation

of victims of discrimination. For example, the CPPEDAE cannot apply misdemeanour sanctions, it cannot impose compensation charges based on the measure of damage suffered by the victim, it cannot declare void an act of discrimination, it cannot place the victim in the state anterior to the violation of the right, etc. The courts, on the other hand, may provide to the complainants these remedies. Therefore, the conclusion of the court, according to which the real claims of discrimination should be examined primarily by the CPPEDAE is worrisome and raises questions about the willingness of the courts to protect persons against discrimination.

Nevertheless, granting moral damage in case of situational testing might not be the most adequate remedy. The main objectives of situational testing are to document difficult-to-prove cases and prevent future discriminatory situations. For this reason, it would be appropriate for persons who performed the testing to address to the CPPEDAE for it to conduct a thorough analysis of whether the testing was properly performed. Upon reviewing these cases the CPPEDAE may find that an administrative offence was perpetrated, and courts could apply an administrative sanction for the offence, based on detailed reasoning provided by the CPPEDAE. In this way, it would discourage discriminatory behaviour, and remove the question whether the compensation of moral damage is justified in cases of situational testing.

In the case of *Genderdoc-Mand Angela Frolov v. Vitalie Marian*,⁵³⁵ national courts have examined whether a "blacklist" of public persons who in the opinion of the respondent support homosexual persons is hate speech against homosexual persons or not. The first instance court recognized that the blacklist is a discourse that incites discrimination against persons of homosexual orientation. The respondent was ordered to delete the blacklist from the website, refrain from republishing, modifying, and renaming it in any form, to apologize publicly to the complainants and to pay the legal expenses of MDL 2,000. However, the first instance court rejected the complainant's request to pay as compensation moral damages in the amount of MDL 5,000 and to charge the respondent all the costs for the legal assistance in the amount of MDL 5,025. The higher courts have upheld the judgement of the first instance court. Although courts have partially upheld the complainant's action, they failed to impose a discouraging sanction against the complainant. One of the main requirements of the sanctions is that they must discourage persons from recurrence of illegal acts. The courts' refusal to impose the full amount of legal costs and expenses is a common (problematic) practice in all types of cases, however it is unclear why the court has rejected the claim for the respondent to compensate moral damage inflicted. Even if the respondent was forced to apologize publicly, it is not enough to discourage the recurrence of this act. The courts have not granted the complainant an effective remedy for the violation of their rights not to be discriminated against on grounds of sexual orientation.

A positive trend in cases of discrimination can be noticed in situations where parties enter into a friendly settlement, where those respondents take responsibility to remedy the complainant's situation. In this regard we can highlight cases *no.2e-412/2014*⁵³⁶ and *no. 2-1809/14*⁵³⁷. In the first case, the complainant claimed that the respondents "Makler" and

⁵³⁵ SCJ, Judgement no. 2ra-731/14 from 19 March 2014.

⁵³⁶ Rîșcani District Court, Chișinău, Decision no.2e-412/2014 from 2 October 2014.

⁵³⁷ Centru District Court, Chișinău, Decision no. 2-1809/14 from 3 July 2014.

"Icotex-first" published and distributed discriminatory employment advertisements. Upon reaching a friendly settlement, the respondents have pledged to include provisions on their on-line platforms or references to Law no. 121, to include a discrimination counselling service line phone number into their website pages, along with other materials on the phenomenon of discrimination. In the second case, the Non-discrimination Coalition brought a case before the court with a complaint claiming the refusal of the respondent to accommodate reasonably several buildings of the network of pharmacies "Felicia". Following the friendly settlement, the respondent was obliged to ensure the reasonable accommodation of several buildings within a nine year period, starting from the date of signing, by constructing access ramps.

On the website of the SCJ there were identified 13 decisions issued in 2013-2014 that examined cases of discrimination in civil and administrative proceedings.⁵³⁸ Out of 13 judgements, in four cases the discrimination of the complainant was found, in one case a complainant was refused the right to receive compensation for maternity leave, although with no sign of discrimination, in six cases the claims of discrimination were dismissed and in two cases files have been sent for retrial. Out of all these cases, only in two cases the non-pecuniary (moral) damage was granted (in one case MDL 5,000 for each complainant for publishing a list that incited to hatred, in the other case MDL 5,000 for the banning the complainant to enter a club). In two cases the courts have obliged the respondent to remove the discriminatory information from the Internet, have forbid further publication of this information and obliged the respondents to apologize publicly. This total number of 13 cases included only those cases in which the complainants sought to find discrimination, or the ones challenging an administrative act that clearly violated the right not to be discriminated against. The small number of cases identified does not allow us to conclude whether the courts are an effective remedy for persons who consider themselves discriminated. The small number of cases identified is due to the fact that the public authorities in the judicial system do not provide disaggregated statistics on cases of discrimination and search engines are not suited for identification of cases of this type.

In conclusion, as it appears from judicial practice, courts have difficulties in determining the burden of proof correctly. The courts are not familiar with situational testing as a way of collecting evidence, which involves creating a situation with a direct aim to verify the phenomenon of discrimination. Even if the discrimination is found, courts are reluctant to impose a compensation of a non-pecuniary damage. Given that even the CPPEDAE cannot impose a compensation for petitioners, persons who consider themselves discriminated do not have an adequate remedy against the infringement of their right not to be discriminated against and sanctions applied do not have a dissuasive (discouraging) nature. The assessment

⁵³⁸SCJ, Judgement no. 2ra-396/13 from 6 February 2013, Decision no. 2ra-1147/13 from 10 April 2013, Decision no. 2ra-2966/13 from 16 October 2013, Decision no. 2ra-3745/13 from 18 December 2013, Judgement. 2ra - 135/14 from 13 March 2014, Judgement. 2ra - 731/14 from 19 March 2014, Decision no. 3ra-633/14 from 22 May 2014, Decision no. 2ra-1623/14 from 22 May 2014, Decision. 3ra-318/14 from 11 June 2014, Judgement no. 2r-881/14 from 10 September 2014, Judgement. 3ra-1169/14 from 1 October 2014, Decision no. 2ra-3016/14 from 23 October 2014 and Judgement. 3ra-1019/14 from 29 October 2014.

of the judicial practice regarding the cases of discrimination is difficult because the competent authorities do not record a detailed statistics of these cases and search engines on their websites are not suited to search for the cases of discrimination.

Recommendations:

- **Professional training courses should encourage the courts to recognize situational testing of discrimination phenomenon and to analyse it from the perspective of evidences generated by testing (testimony, audio, video, documents obtained as a result of testing);**
- **When examining the cases of discrimination the courts should examine the cases in terms of sharing the burden of proof, sanctioning discrimination when the respondent does not rebut the initial presumption created by the complainant;**
- **In cases when discrimination is found, especially when someone incites other persons to discrimination, the courts are to apply sanctions that would deter recurrence of the same discriminatory actions;**
- **The SCM and the SCJ should keep records and differentiated statistics for cases of discrimination. Search engines of the courts should be adapted in order to facilitate the identification of judgements/decisions concerning cases of discrimination.**

7.2.2 The examination of discrimination cases in administrative proceedings

The national legislation and the judicial practice are not clear regarding the procedure of the examination of the challenges against the documents issued by public authorities. Pursuant to Law no.298, the CPPEDAE decisions are challenged in administrative proceedings.⁵³⁹ In the context of adoption of Law no.121, the question rises under what procedure the discriminatory administrative documents issued by other authorities than the CPPEDAE will be examined.

According to the general rule, when a right of a person is infringed by an administrative document, s/he can challenge it in the courts in administrative proceedings. The administrative proceedings are a part of the civil procedure, because these challenges against the administrative documents that infringed a right shall be examined according to the CPC, with the exceptions provided by Law on Administrative Proceedings, no.793 from 10 February 2000 (hereinafter "Law no.793"). The subject-matter of the complaint in administrative proceedings consists in the administrative documents of a normative or individual nature, which infringed a right of a person provided by the law, document issued by public authorities and authorities similar to them, by subdivisions of the public authorities and by servants from the mentioned bodies (Art. 3 para. (1) of Law no.793). The subject-matter of the court complaint in administrative proceedings can be also the failure to settle within the period stipulated by the law of a request / petition regarding a legally recognized right (Art. 3 para. (2) of Law no.793). One of the hallmarks of the administrative proceedings is the preliminary procedure which must be observed mandatorily before bringing the case before the court. The preliminary application petition shall be lodged

⁵³⁹Item 65 of the Regulations of the CPPEDAE activity.

within 30 days from the date of communication regarding the challenged document by the issuing public authority or the hierarchic superior body (Art. 14 of Law no.793).

In a case initiated before the entry into force of Law no.121, *Genderdoc-M v. the municipal Council Balti*,⁵⁴⁰ the complainant association challenged in the administrative proceedings a decision of the municipal Council Balti issued in 2012, which prohibited the propaganda of the information about "untraditional sexual orientations" on the territory of the municipality. By the decision of the first instance and of the court of appeal, the Council's decision was cancelled. However, the SCJ quashed the lower courts judgements regarding item 3 of the challenged decision (which prohibited the propaganda of homosexuality), for the reason that this point of the decision had been already amended by the municipal Council Balti in another decision issued in 2013. Nevertheless, the court did not analyse if the new version of item 3 complies with non-discrimination standards. Moreover, the lower courts judgements were upheld, which generates confusions, because these decisions cancelled the decision to prohibit homosexual propaganda in its entirety. Lately, the SCJ rejected an application regarding the explanation of that decision, missing thus the opportunity to clarify an important issue with the potential to educate the local public authorities and the public.⁵⁴¹

It appears from the decision analysed above that until the adoption of Law no.121, petitioners challenged discriminatory administrative documents in the administrative proceedings. After the entry into force of Law no.121 new rules for the examination of the challenges lodged against the discriminatory administrative documents entered into force. For example, for the actions lodged under Law no.121, the legislation in force provides a one year period from the date when the discriminatory act has occurred or the date on which the person could have known about it. Also, Law no.121 does not provide a mandatory preliminary procedure for persons who want to challenge a discriminatory document. Additionally, pursuant to Art.18 para. (1) letter e) of Law no.121 persons who consider themselves victims of discrimination can request a declaration of annulment of the document which led to their discrimination. It therefore follows that after the entry into force of Law no.121 persons can request the annulment of the discriminatory administrative documents under Law no.121, within one year from the moment they could have learnt about that decision, without observing the necessary preliminary procedure for accessing the administrative proceedings.

A similar case to the one above, which was launched after the entry into force of Law no.121, supports the above mentioned hypothesis. In the respective case, the Public Association "Genderdoc-M" challenged the decision of the municipal Council Bălți⁵⁴² by which item 3 of the decision which prohibited the homosexuality propaganda had been amended (practically by this decision a discriminatory provision was amended and replaced by another discriminatory provision). This time the complainant filed the application in the civil proceeding and not in the administrative proceedings. The Court of Appeal Bălți quashed the decision of the municipal Council Bălți that amended the decision to prohibit

⁵⁴⁰ SCJ, Judgement no. 3ra-318/14 from 11 June 2014.

⁵⁴¹ SCJ, Decision no. 3ds-24/14 from 22 October 2014.

⁵⁴² SCJ, Decision no. 3ra-633/14 from 22 May 2014.

homosexuality propaganda and prohibited future discrimination of homosexual persons. The claims regarding the non-pecuniary damage from the municipal Council Bălți were rejected. The SCJ upheld the judgement of the Court of Appeal Balti.

Both legislation and judicial practice allow us to conclude that after the entry into force of Law no.121 persons can request the annulment of discriminatory administrative documents under non-discrimination law, in the ordinary civil procedure. Nevertheless, the legislation does not prohibit and exclude the possibility of persons to challenge the discriminatory administrative documents in the administrative proceedings, under Law no.793, this duality of venues being able to generate confusions for victims and practitioners.

Recommendations:

- **The development by the SCJ of a recommendation for courts regarding the acceptance of the claims challenging the administrative documents both under Law no.121 and Law on Administrative Proceedings no.793, observing the defining standards and the special procedural guarantees introduced by the right to non-discrimination concerning evidence and the burden of proof.**

7.2.3 Misdemeanour proceedings for discrimination offences

In order to be able to apply a misdemeanour sanction to the person who committed the discrimination offence (misdemeanour / contravention), the CPPEDAE shall find the discrimination offence and draft a report on discrimination offence, and submit the materials of the case for further examination to the court.⁵⁴³ Initially, the CPPEDAE had some competences of the official examiner only for the Misdemeanours provided by Art. 54², 65¹ and 71¹ of the Misdemeanours Code.⁵⁴⁴ By Law no.113 as of 3 July 2014 the misdemeanour provided by 71² was also included into the competences of the Council.⁵⁴⁵ Only the court can apply the misdemeanour sanction.

The misdemeanour provided under Art.71² of the Misdemeanours Code stipulates the following:

"Hindering the activity of the Council for Prevention and Elimination of Discrimination and Assurance of Equality with the view to influence its decisions, failure to present the relevant information required for examining complaints within the period stipulated by the law, deliberate neglect and failure to fulfil the recommendations given by the Council, preventing its activity in any other form,

are sanctioned by a fine of 50 up to 100 conventional units for natural persons and by a fine of 75 up to 150 conventional units for a senior position official."

⁵⁴³ Art. 423⁵ of the Misdemeanour Code.

⁵⁴⁴ Art. 54² - Violation of equality in the field of employment; Art. 65¹ - Discrimination in the field of education; Art. 71¹ - Discrimination regarding the access to public services and goods.

⁵⁴⁵ Art. 71² - Hindering the activity of the Council for Prevention and Elimination of Discrimination and Assurance of Equality.

The express provision that the CPPEDAE is the official examiner for the misdemeanour of hindering the CPPEDAE activity is important because thus the Council will be able to draw reports on the failure to fulfil recommendations stipulated by its decisions, thus enhancing their status. However, the sanctions for these offences are quite soft, providing fines of 1000 up to 2000 MDL for natural persons and of 1500 up to 3000 MDL for legal persons.

According to the CPPEDAE activity report for 2014, in 2013–2014, 15 reports, which make up 23% of the total number of decisions (65 in 2013–2014) were drawn up. From those 15 reports, 9 concerned the hindering of the Council's activity; 1 – failure to fulfil recommendations; 3 – discrimination in the field of education; 2 – violation of equality in the field of employment. Misdemeanour fines were imposed in case of 2 reports, 8 reports were dismissed due to the absence of competence (it makes up 53% of the reports drawn up) and 4 misdemeanour cases were pending examination in the court in March 2015.

The high percentage of the reports drawn up by the CPPEDAE that were dismissed by the courts is alarming and raises a question upon the efficiency of the mechanism of finding Misdemeanours by the CPPEDAE and the imposing of the misdemeanour sanction by the courts. Upon analysis of the court decisions where the reports finding discrimination misdemeanours had been dismissed, we can conclude that, in general, the courts cancel the misdemeanour proceedings due to the fact that the CPPEDAE decisions do not correspond to the form of the misdemeanour reports stipulated by Art. 443 of the Misdemeanours Code.⁵⁴⁶

⁵⁴⁶Art. 443 of the Misdemeanour Code provides the following:

- (1) The report on the misdemeanour shall include:
 - a) the date (day, month, year) and the place of drafting;
 - b) capacity, last and first names of the official examiner, name of the authority s/he represents;
 - c) last and first names, domicile and occupation of the contravener, data from his/her identity card, and for legal persons – name, premises, fiscal code, data of the natural person that represents it;
 - d) misdemeanour, place and time of its commission, the circumstances of the case that are important for establishing the act and their legal consequences, an assessment of the eventual damage caused by the misdemeanour;
 - e) legal implications of the act, the substance of the regulation contravened and the qualifying indicators of the constitutive elements of the misdemeanour;
 - f) notification of the contravener and the victim about their rights and obligations provided by Art. 384 and 387;
 - g) objections and evidence that the contravener brings in his/her defence, as well as objections and evidence of the victim.
- (2) If the contravener is a minor, the report shall also indicate last and first names, domicile of his/her parents or of other legal representatives.
- (3) If the contravener or victim does not speak the language of the report, the assistance of an interpreter/translator shall be provided and his/her data shall be recorded in the report.
- (4) The report shall list and describe the corpora delicti (shape, size, colour, weight, and other individual characteristics) indicating the data of the owner and, if necessary, any measures taken to turn them to good account or to preserve them
- (5) The report shall be signed on each page by the official examiner, by the contravener and by the victim when s/he exists. In case when finding of the misdemeanour is in the powers of a collegial body, the report on the misdemeanour shall be drafted by the Chairperson of the collegial body or by a member chosen by the majority vote of the members present at the meeting where the misdemeanour finding takes place or the member appointed by the Chairperson of the meeting and shall be signed by all the members present at the meeting.

For example, by the decision of the first instance Buiucani District Court, from 20 January 2014, file no. 4-55/14, the misdemeanour proceedings drawn up by the CPPEDAE in case no. 004/13 under Art. 65¹ letter a), c) and d) regarding Valentina (Viorica) Dobinda were terminated. In this case the court found that the report does not contain the date and the hour of the misdemeanour, information from the identity card of the contravener (the person that has committed the alleged discrimination act) and domicile data, month, date and year of birth of the contravener were not indicated, the identity of the contravener was not established, being indicated the name Viorica and in reality being Valentina. Also, the court mentioned that two collaborators of the CPPEDAE were indicated as two assistant witnesses, which was considered inadmissible because they are interested persons, being employees of the official examiner. Also it was found that the report was drawn up in the absence of the contravener, the latter was not summoned legally and her rights were not explained to her. Additionally, the court mentioned that the minor against whom the CPPEDAE found that the offence had been perpetrated, was not recognized and heard as injured party, contrary to provisions of Art.443 para. (5) of the Misdemeanours Code.

By the decision from 19 February 2014, file no. 4r-484/14, the Court of Appeal Chişinău admitted the appeal filed by the CPPEDAE, quashed the first instance decision and referred the case to the first instance for retrial. The court of appeal motivated its decision by reference to Art.458 of the Misdemeanours Code, which stipulates the issues that the court must settle in the examination of the case in the first instance. The court of appeal concluded

-
- (6) The fact of the absence of the contravener or his/her refusal to sign the report shall be recorded in the minutes and shall be confirmed by the signature of at least 2 witnesses with indication of their data.
 - (7) No corrections, completions or other changes shall be made to the report. If it is necessary to make such actions, additional report shall be prepared and this shall be recorded in it.
 - (8) If a misdemeanour stipulated in Chapter XIII of Book One is established by certified technical means or by technical means that are approved and metrologically verified, the official examiner, after establishing the identity of the vehicle driver, may prepare the report also in the absence of the contravener.
 - (9) The resolution section of the report shall include the decision of the official examiner on the sanctioning of the contravener or on referring the case to court with a recommendation, when s/he considers it necessary, regarding the sanctioning or termination of the case and on the timeframe for challenging it in court.
 - (10) If the contravened regulation provides for the application of penalty points or if the imputed misdemeanour provides for the accumulation of 15 penalty points, the resolution section of the report shall also mention this.
 - (11) In the case of a sanction, the resolution section of the report shall also include data informing the contravener about his/her right to pay only half of the fine, if the fine is paid in 72 hours at the most from its finding.
 - (12) In case of a decision to refer the case to court, the official examiner shall submit the report and the materials on the case to the competent court.
 - (13) A copy of the report shall be handed to the contravener and victim upon request. If the report is prepared in the absence of the contravener, a copy of the report shall be handed over as provided by Art. 382 para.(6).
 - (14) In the case stipulated in Art. 16 para.(2), the official examiner shall submit the materials of the case to the local public authority for juvenile issues and, if necessary, may request through a motion that the court apply a coercive measure of educational character according to Art. 104 of the Criminal Code.

that the first instance court examined the case superficially and unilaterally, without making an objective appreciation of the file evidence and namely: it did not establish and did not take into consideration all the circumstances of the case, it did not analyse and research all the pros and cons evidence which indicate the identity of the contravener, moreover it did not check the correctness of the statements by the contravener and the official examiner, which are contradictory, the witnesses were not heard and it did not pronounce on the evidence which proves the termination of the misdemeanour case regarding the contravener.

By the decision of Buiucani District Court from 22 December 2014, file no. 4-1013/14, the misdemeanour proceedings against Valentina Dobinda were annulled. The court came to this conclusion as it had found that the report for the misdemeanour finding was invalid because it contained mistakes regarding the contravener's first name, last name or identification data. Although the court had found that some official documents considered by the CPPEDAE as evidence were signed by Viorica Dobinda in the capacity of lyceum principal, however, the fact that the CPPEDAE obtained the information about the correct name of Valentina Dobinda only after the request of the information from SE "Cris Registru" was not taken into consideration. The court argued that every omission in the report had to be corrected by the official examiner, i.e. the CPPEDAE, before submitting it to the court.

By decision no. 002/2013 from 30 October 2013 the CPPEDAE found discrimination of a person with mental disabilities through failure to grant him proper state guaranteed legal aid (SGLA) perpetrated by a lawyer who provided SGLA. Also, concerning the respondent and the coordinator of the Territorial Office of the NCSGLA, the CPPEDAE drew up reports on administrative misdemeanours under Art. 71², for hindering the CPPEDAE activity due to the failure to submit the documents requested by the CPPEDAE. The respondent lawyer challenged the CPPEDAE decision in the administrative proceedings, and the report was challenged in the misdemeanour procedure. As a consequence, the court that was examining the case in administrative proceedings cancelled the CPPEDAE decision in the part referring to the finding of discrimination, drawing up the report on the misdemeanour and the recommendation to the NCSGLA to terminate the contract with the respondent lawyer. However, the court did not examine the lawyer's conduct from the perspective of discrimination elements, but from the perspective of observing her professional obligations. After several examinations and submissions for retrial, the misdemeanour procedure against the lawyer was also terminated for the reason that the CPPEDAE was absent during the court hearings. Regarding the coordinator of the Territorial Office of the NCSGLA, the misdemeanour procedure was terminated for the reason that the period to elicit liability for misdemeanours had elapsed, yet the court found the perpetration of the imputed misdemeanour.

In decision no. 105/14 of 19 June 2014, the CPPEDAE found that the dismissal of the pregnant complainant by the "Air Moldova" company constituted discrimination on the grounds of sex and maternity. In this case the CPPEDAE found the infringement stipulated by Art. 54² para. (1) letter b) by the legal entity "Air Moldova". On 31 January 2015, Buiucani District Court recognized it as being guilty and sanctioned "Air Moldova" to pay a fine of 450 c.u., which makes up MDL 9.000. On 5 March 2015, the Court of Appeal

Chisinau referred the case back, and on 18 June 2015 Buiucani District Court maintained the finding of the infringement, however not sanctioning it with the fine. The decision was upheld in an irrevocable decision of the Court of Appeal Chisinau from 13 August 2015.

In decision no. 164/14 from 15 October 2014, the CPPEDAE found discrimination in the form of harassment on the grounds of atheistic convictions on the side of a teacher, as well as the failure to provide reasonable accommodation into the educational process on the grounds of atheistic convictions. The CPPEDAE drew up a report on finding the misdemeanour in the case of the teacher. By Buiucani District Court judgement from 27 November 2014, file no. 4-1343/14 the report drafted by the CPPEDAE pursuant to Art.65¹ letter a), c) and d) of the Misdemeanours Code was cancelled. In support of the decision, Buiucani District Court invoked that the report does not contain domicile, occupation and identity card data of the contravener, that the report was signed not by the contravener but by her lawyer, that the report was drafted without 2 witnesses, that a copy of the report was not handed to the contravener and that the report did not indicate the hour or the period of the offence commission.

The examples presented above show an uneven and problematic practice of the application of the provisions of Law no.121 and of the Misdemeanours Code regarding the misdemeanour sanctioning of discrimination offences. The reports drawn up by the CPPEDAE should not be likened to the reports drawn up by the official examiners who work alone and do not have a procedure of case examination in hearings, where persons can be represented by attorneys. Thus, at least the requirement on the report being signed by the contravener when s/he is represented by a lawyer, or the requirement on the participation of two witnesses besides the official examiner, that is the CPPEDAE, should not be applicable to the reports drawn up by the CPPEDAE. The CPPEDAE decision should be sufficient for finding the fact and establishing the sanction. The difficulties of enforcement of the provisions regarding the status of official examiner and collegial quasi-judicial body, which examines individual complaints in hearings according to a quasi-judicial procedure, is an additional argument to prove the deficient and inadequate model stipulated by Law no.121 on misdemeanour liability. The CPPEDAE should not be an official examiner, but a body which examines the case and establishes sanctions, with the possibility to ensure judicial control by challenging the CPPEDAE decision.

An additional reason for the annulment of the reports is the incorrect indication of the contravener's identity data by the CPPEDAE. According to the CPPEDAE, the institution does not have access to data of the SE "Cris Registru" because the Council does not have the status of personal data operator. The CPPEDAE initiated procedures to obtain such a status, but it is not sure it will succeed. Besides the documents that it does not have yet, the National Centre for Personal Data Protection, visited the CPPEDAE office and mentioned that it cannot ensure the security of personal data in its current premises.

Another barrier for the sanctioning of misdemeanours in case of discrimination offences is the short limitation term of the liability for misdemeanours (3 months). It has to be extended to provide the possibility to the authorities to punish persons who commit such offences.

Recommendations:

- **Until the legislation is amended the CPPEDAE should ensure drawing up of reports as compliant as possible to the requirements of Art. 443 of the Misdemeanours Code in order to prevent their annulment by the courts;**
- **The amendment of the legal framework assigning the CPPEDAE the competence to apply sanctions for acts of discrimination;**
- **The extension of the statutory term for liability for misdemeanours in case of discrimination offences to six months from the moment when the discrimination offence is found.**

Recommendations

1. Proposals for amendment of normative acts:

1.1 Regarding national legislation:

Amendment of Law no. 121 on Ensuring Equality:

- The amendment of the list of protected grounds so that the ground of political affiliation is reformulated as the ground of political opinion in order to widen its scope and to adjust the text of the Law to the requirements of the international treaties;
- Amendment of Law no. 121, Law no. 317 on the Constitutional Court, and of the Constitutional Jurisdiction Code in order to provide to the CPPEDAE the right to bring cases before the Constitutional Court;
- Amendment of Law no. 121 and the relevant normative acts for providing to the CPPEDAE the competence to apply sanctions for acts of discrimination;
- Amendment of Law no. 121 and of the Civil Procedure Code to recognize the locus standi of organizations active in the field of human rights in cases of discrimination of a group or community on their own behalf without imposing the condition of having a power of attorney from an individual victim;
- When appointing a new membership of the CPPEDAE, there should be ensured a strict compliance with the legal requirements regarding the quality and expertise of the members, including the requirement that at least three members have a degree in Law;
- Amendment of Law no. 121 to provide full time activity to the CPPEDAE members and the status of a person holding senior state function or the provision stipulating at least 50% workload of the working time of the CPPEDAE Chairperson;
- Amendment of Law no. 121, the Civil Procedure Code, and Law no. 793 on Administrative Proceedings to capacitate the CPPEDAE to act as an intervener in all cases of discrimination examined by the courts;
- Amendment of Law no. 121 introducing an explicit obligation for all public authorities to collect data relevant to equality policies under anonymity conditions, data that are necessary to prevent indirect discrimination, adopt special measures, implement and evaluate public policies coherently;
- Amendment of Law no. 121 and Law no. 298 to ensure detailed regulation of the procedure of examining the cases of discrimination by the CPPEDAE, particularly with regard to applicability of the norms of civil procedure, the order of hearings, extending the powers of the CPPEDAE to carry out investigations on site, granting the CPPEDAE the status of the personal data operator.

Amendments to the Labour Code:

- Harmonisation of the Labour Code with Law no.121 in order to sanction harassment at the working place in general, and not only sexual harassment;
- Correlation of the definition of direct and indirect discrimination in the field of employment of the Labour Code with those in Law no. 121;
- Harmonisation of the list of protected grounds against discrimination in Art. 8, 47, 128 of the Labour Code with the protected grounds of Law no. 121 and Art. 14 and the Additional Protocol 12 of the ECHR to prevent any confusions arising from the legislative gap and a differentiated protection regime;
- Reduction of certain over-protective guarantees of the Labour Code, leading in fact to discrimination against women, such as the possibility of taking childcare leave up to 3 years (Art. 124) and 6 years (Art. 126) while maintaining the position at work, alongside with the development of day nursery services and ensuring access of children aged 1 to 3 years to preschool institutions;
- Granting of paternity leave either by ensuring full payment of paternity leave allowance by the state from the social insurance fund, or sharing this burden between the state and the employer.

Amendment of other normative acts:

- Introduction into legislation of the express obligation of public authorities to promote equality in the exercise of their powers (for example, Law no. 158 on the Public Service and the Status of Civil Servant, Law no. 199 on the Status of Persons Holding Senior State Functions, Law no. 80 on the Status of Personnel from the Cabinet of Persons Holding Senior State Functions, Law no. 98 on Specialized Central Public Administration, and Law no. 436 on Local Public Administration);
- Introduction into legislation the obligation for public authorities to ensure that third parties who are given contracts, loans, grants and other benefits, observe the principle of non-discrimination (for example, Law no. 96 on Public Procurement);
- Criminal Code: extension of the protection stipulated by Art. 176 of the Criminal Code in respect to all persons under the jurisdiction of the Republic of Moldova;
- Criminal Code, Criminal Procedure Code and Law no. 1402 on Mental Health: deletion of the syntagm used in the examination of cases, and namely, "by virtue of the opinion of medical institution" (Art. 101 para. (2) of the CC), "based on the opinion of medical institution" in (Art. 471 para. (5) of the CPC) or "taking into account the conclusion of the medical commission" (Art. 20 para. (2/1) of the Law on Mental Health) with the view to avoid wrong interpretations that would give a higher value to this type of evidence compared to other evidence presented before the court;
- Misdemeanour Code: exclusion of para. (4) of Art. 54, in order not to create unjustified situations where persons who do not have the citizenship of the Republic of Moldova are sanctioned for carrying out religious activities in public places;
- Law no. 125 on Freedom of Conscience, Thought and Religion: exclusion of Art. 15, para. (5) in order not to create a discriminatory environment in which the Moldovan

Orthodox Church is favoured. The Republic of Moldova is a secular state, and should avoid provisions and practices favouring a particular religious cult. More attention should be given to the recommendations made by the Special Rapporteur on Freedom of Religion or Belief and their implementation. In particular, registration of the religious cults and their constituent parts shall be simplified;

- Law no. 156 on State Social Insurance Pensions: amendment of the law by means of including the period of care for a person with severe disabilities in the record of work of the family member who provides this care;
- Draft Law no. 189: adoption in the second reading of the draft law, that provides the establishment of minimum representation quota of 40% for women in Parliament and Government;
- Law no. 514 on Judicial Organization: correlation of the list of beneficiaries of protection under the equality principle before the law and judiciary authority under Art. 8 of Law no. 514 of 6 July 1995 on the Organization of Judiciary with Law no. 121 and Art.14 and Additional Protocol 12 of the ECHR, for all persons that are on the territory of the Republic of Moldova;
- Introduction of the obligation for medical service providers and doctors to exercise their duties with the observance of equality and non-discrimination principle (for example, Law no. 411 on Healthcare, Law no. 264 on Medical Professions, and Law no. 263 on Rights and Responsibilities of Patients).

1.2 With regard to the ratification of international documents that establish European standards:

- Ratification of the European Charter for Regional and Minority Languages and the reorganization of the legal framework regarding the rights of national minorities to harmonise it with the European standards adopted in this field;
- Ratification of the Additional Protocol no. 12 of the ECHR;
- Ratification of the Optional Protocol on the mechanism of collective complaints of the Revised European Social Charter.

2. Justice Sector:

Constitutional Court:

- Considering the text of the regulations, Art. 16 of the Constitution is broader than Art. 14 of the ECHR, i.e. it is not related to the exercise of a right. It is important, therefore, that the Constitutional Court shall interpret the right to equality provided by the Constitution as a self-contained right, in accordance to the recent case law of the ECtHR where the right to non-discrimination and equality has gradually been recognized as a self-contained right.

SCM:

- Modification of the Integrated Case Management Program (ICMP) by introducing the category of cases regarding the "discrimination". The courts at all levels should

maintain the differentiated statistics of the cases of discrimination and collect the statistical data segregated based on the category of specialized cases in the "discrimination" domain, that should be also placed on the websites of the courts. Search engines of the courts shall be adapted in order to facilitate the identification of judgements/decisions concerning cases of discrimination.

SCJ:

- The SCJ should, as soon as possible, draw up a recommendation or an advisory opinion on the language to be used for court complaints, in accordance with the legal framework and practice of the Republic of Moldova: this will clarify the legal status of the Russian language as the language of inter-ethnic communication, with particular obligations entailed by it;
- The development by the SCJ of a recommendation to courts to accept the claims challenging the administrative documents both under Law no.121 and Law on Administrative Proceedings no.793, observing the defining standards and the special procedural guarantees introduced by the right to non-discrimination concerning evidence and the burden of proof;
- To update of the SCJ Plenary judgement no. 17 from 7 November 2005 on the judicial practice in the cases related to sexual life offences and sexual harassment;
- The development of an explanatory judgement of the SCJ Plenary or a recommendation on application of the law in examining the cases of discrimination. Among other things, the judgment/recommendation should refer to the situational testing of the phenomenon of discrimination and to analyse it from the perspective of evidences generated through the testing (testimony, audio, video, documents obtained as a result of testing). Also, the judgment/recommendation should explain the principle of sharing the burden of proof in cases of discrimination and the consequences of failure of the respondent in rebutting the initial presumption established by the complainant. Also the concept of effective remedy against discrimination has to be explained. It should include sanctions that would discourage the respondents to repeat the same discriminatory actions.

Courts:

- The courts shall recognize that persons with possible mental disability need a better defence. The principle that persons in different situations should be treated differently does not mean to neglect persons with possible mental disability, but rather that authorities and their defenders should be more active to protect their rights and interests. Therefore, the courts shall examine with extreme caution the lawyers' requests in procedures concerning involuntary hospitalisation and psychiatric examination;
- In the procedures related to discrimination in access to justice for persons with mental disabilities, as in the case of other procedures after a presumption of discrimination has been established, the courts shall shift the burden of proof on the shoulders of the person accused of discrimination;

- If the courts find a severe form of discrimination, they should take into consideration this severe form when deciding on the moral damage for the victim of discrimination.

National Institute of Justice:

- Given the duty that courts have in solving civil complaints in cases of discrimination and complaints in proceedings against the CPPEDAE decisions, it is necessary for the NIJ to include the topic of equality and non discrimination into the courses of continuous vocational training of the magistrates;
- Professional training courses should encourage the courts to recognize situational testing of the phenomenon of discrimination and to analyse it from the perspective of evidences generated by testing. The training courses should include theoretical and practical discussions on examining cases of discrimination from the perspective of sharing the burden of proof, sanctioning discrimination when the respondent does not rebut the initial presumption established by the complainant. The courts should also be encouraged to apply sanctions that would deter recurrence of the same discriminatory actions in cases when discrimination is found, especially when someone incites other persons to discrimination;
- Organization of trainings for criminal prosecution bodies and judges in the field of sexual harassment as well as on serious forms of discrimination which are sanctioned under criminal law to ensure their recognition, to identify the best ways of working with the victim, to identify specific evidence and provide adequate reasoning based on elements that have to be analysed.

Union of Lawyers and the National Council for State Guaranteed Legal Aid:

- The lawyers should become more active and fulfil their duties of representation of persons in general, and persons with mental disabilities, in particular, with an increased diligence in order to avoid the suspicion that their formalistic attitude towards the process is dictated by certain prejudices;
- While evaluating the health condition of the beneficiary/client the lawyers should not rely solely on the conclusion of the medical commission but shall collect, to the necessary extent, additional evidence (e.g. hearing of the witnesses, repeated expertise and others) for the cases concerning the examination of involuntary hospitalisation and psychiatric examination;
- If the lawyers identify differences between the conclusion of the medical commission on the one hand and the case materials, the meetings with beneficiaries and other evidence collected on the other hand, they should be able to request the performance with celerity of a repeated or additional psychiatric examination in order to determine the health condition of the patient;
- Elaboration, in cooperation with the CPPEDAE of a guide on defence/representation of interests of persons with mental disabilities;
- Given the duty of the lawyers in representing the victims of discrimination before the courts and the CPPEDAE, it is necessary to include the subject of equality and non discrimination into the professional training courses of the lawyers - trainees and continuous training courses for lawyers.

3. Proposals on recommendations for public policies and specific recommendations to public authorities:

General recommendations:

- The incorporation of the principle of equality and non-discrimination as a transversal priority in various national strategies developed by authorities in the field of youth, protection of women, national minorities, rights of persons with disabilities and other vulnerable groups, as well as in the fields of social inclusion, education, health and employment. Such a prioritisation requires permanent collection of segregated data, establishment of clear responsibilities and assigning adequate resources to relevant institutions, particularly to the CPPEDAE;
- Development of some mechanisms for the collection of relevant data on equality. Disaggregated data (anonymous) is essential for implementation of any public policy and progress evaluation in the cases of affirmative measures. The CPPEDAE, in cooperation with all ministries and the National Centre for Protection of Personal Data, shall elaborate a common instruction or the instructions for each field on how to collect segregated data which are important in determining and analysing the phenomenon of discrimination in the Republic of Moldova;
- Regular and substantive assessment of the actual impact following the implementation of documents on equality policies by the institutions responsible for monitoring and reporting;
- It is essential to provide corresponding budgeting of the CPPEDAE as well as the support of other state institutions through implementation of CPPEDAE recommendations in order to achieve the fulfilment of the institution mandate;
- Upon examination of cases invoking determination of the professional requirement, national authorities shall establish, first of all, if the professional requirement is genuine and if it is necessary due to the nature of the position in question. Then, they have to establish, if the professional requirement has a legal aim, and if it is proportionate with the interest of the person whose rights are concerned;
- When examining a case addressing certain professional requirements imposed by religious institutions for certain positions, the national authorities shall take into account, in particular, the role of the respective position for the performance of religious activities, if they entail loyalty towards the respective institution, the employment period in this position, the way a violation of professional requirement affects the activity and ideals of the institution, as well as other elements invoked by the complainant which provide information regarding the impact of the limitation at personal level;
- Evaluation of measures undertaken and continuous control of accessibility of buildings and urban and interurban transport.

Government:

- To provide adequate premises or financial means for adequate premises for the CPPEDAE that would ensure its smooth functioning and would be accessible to the complainants.

Ministry of Labour, Social Protection and Family (MLSPF):

- The analysis of collective labour agreements to prevent the introduction of clauses that could be discriminatory and the inclusion of standard provisions prohibiting discrimination and encouraging equality;
- Collaboration with the CPPEDAE for the amendment of the legal framework that raises issues of discrimination, starting with the fields already identified by the CPPEDAE and non-governmental organizations;
- MLSPF should consider establishing different packages of services for lawyers to access insurance and social assistance depending on the amount of social insurance premiums paid.

Ministry of Education:

- Adoption of secondary norms and coherent mechanisms that would ensure the effective exercise of rights of persons with special educational needs to qualitative education, including higher education;
- Adjustment of the terminology used in the Methodology of organizing and conducting the baccalaureate exam, by replacing the notion "immovable candidates" with the notion "candidates who are unable to move independently" (in order to avoid medicalisation of disability in the field of education and to correlate it with the terminology used in Law no. 60 on Social Inclusion of Persons with Disabilities);
- The teaching staff is to be aware of the importance of observing the right to religion and conscience of all citizens and should create a tolerant environment so that individuals of all confessions can practice their religion without obstacles;
- The optional course "Religion" shall be replaced with a non-confessional one, dedicated to the history of religions, taught by competent persons, known for respecting human rights. Otherwise, with the view of the effective implementation of Art. 35, para. (8) of the Constitution, any confessional religion course shall be excluded from the non-confessional public education;
- The Ministry of Education should monitor the way of teaching the subject entitled Moral and Spiritual Education to ensure that teaching methods and contents correspond to the framework plan approved by the Ministry;
- Introduction of the subject entitled Equality and Non-discrimination in the continuous training of teaching staff and for the departments of Pedagogy;
- Encouragement of the involvement of Roma children in higher education, for example, by awarding scholarships for the entire period of study.

Ministry of Health:

- Allocation of financial resources to all psychiatric institutions to provide patients with escort transportation to the court hearing when their health condition allows this and providing conditions for the meetings of patients (even those supposed to be aggressive or dangerous) and their representatives.

National Agency for Employment and State Labour Inspectorate:

- Collection of segregated data regarding the employment of disadvantaged groups, including vocational training courses - for Roma (also Roma women), young people, and persons with disabilities;
- NAE should allocate sufficient resources to monitor advertisements, including those placed by private companies, and to eliminate discriminatory requirements, by explaining to employers why certain requirements published by them are discriminatory.

General Prosecutor's Office:

- Publication of the measures undertaken in cases referred by the CPPEDAE and publication of the information concerning their settlement, taking into account the increased social danger of the discrimination acts that could be considered criminal offences.

Ombudsman and Office of the Ombudsman:

- Collaboration with the CPPEDAE concerning the analysis of the legislation and referrals to the Constitutional Court in case of detecting some legal provisions that infringe the principle of equality and non-discrimination;
- In case of individual complaints in relation to discrimination, the Office of the Ombudsman should recommend the victims to address to the CPPEDAE, except for the cases when the representatives of the Ombudsman Office decide to represent the potential victim before courts;
- Cooperation with the CPPEDAE in developing and disseminating of educational and promotional materials in the field of non-discrimination.

CPPEDAE:

- It is necessary that the CPPEDAE makes a distinction between problems addressed through individual cases and structural discrimination, avoids examination of structural problems in misdemeanour proceedings initiated on self-referral. Such issues are to be addressed through analysis and proposals for amendments to the legislation;
- The CPPEDAE initiative to examine *ex officio* the content of employment advertisements on various websites is commendable and, for greater efficiency, it is necessary to establish a mechanism for regular implementation by the CPPEDAE of monitoring actions regarding the employment advertisements in local and national press and on main specialised web pages;
- The CPPEDAE could exercise its role in preventing discrimination in employment pro-actively by developing an instruction/explanatory note to explain the legal obligations of the owners and/or administrators of websites or newspapers that publish employment advertisements;
- In order to prevent discrimination in the field of employment, the CPPEDAE could collaborate with the NAE both in monitoring advertisements on employment opportunities and in developing guidelines for employers and website owners or

- administrators. It would also be useful to elaborate a guide for employers on internal regulations for their entities that would ensure equal opportunities for promotion, access to continuous education, etc. (decision no. 074/14 from June 12, 2014);
- In order to ensure the effectiveness of proposed remedies, it is necessary that the CPPEDAE establishes a mechanism of monitoring the implementation of its recommendations, and post this information on its website;
 - Empowerment of the CPPEDAE and labour inspection authorities to identify different types of discrimination, in particular indirect discrimination and harassment and proactive intervention in conflict resolution and mediation. Development of protocols to enable speedy transfer of identified cases between these institutions according to their legal mandate;
 - The CPPEDAE should pay more attention to the reasoning of the decisions in general and especially in the case of discrimination on grounds of gender in the establishment of the schedule of meetings between children and parents and in the establishment of the minor child's domicile (dec. 028/13 from 21 January 2014, 034/13 from 13 February 2014, no. 213/15 from 28 April 2015 and 054/14 from 1 May 2014);
 - The CPPEDAE should unify the practice regarding the finding of discrimination in cases of failure to have access to maternity allowances by women-wives of employees who do not contribute to the social insurance fund (dec. 071/2014 from 26 May 2014 and 203/14 from 13 February 2015);
 - The CPPEDAE should interpret the ground of "opinion" narrower, distinguishing cases in which mere illegalities or interpersonal conflicts occur, situations which are not relevant for the enforcement of Law no. 121;
 - Close collaboration of the CPPEDAE and criminal prosecution bodies with the view to apply criminal law sanctions for the actions considered instigation to discrimination and which by their degree of aggressiveness or the vulnerability of the group concerned have a high social danger, for instance, conclusion of memoranda of collaboration for this purpose involving joint procedures and actions (round tables, trainings etc.);
 - In each case the CPPEDAE should examine the constitutive elements of every act of discrimination and should observe properly the elements of the form of discrimination stipulated by law, providing arguments in its decisions so that they clearly inform the parties and educate the legal community;
 - When establishing the "presumption of discrimination" which leads to the shift of the burden of proof to the respondent party, the CPPEDAE should pay attention if complainants and respondents have indicated the existence of a real ground, stipulated by law or a reasonably justified ground (dec. 001/2013 from 17 October 2013 and dec. 012/2013 from 30 December 2013);
 - When examining cases addressing several situations, which may be similar from the perspective of the form of discrimination, but refer to different circumstances, the CPPEDAE has to examine the justification of each respondent separately in order to ensure better understanding of reasons that make a particular situation discriminatory or not (for example, this was not done in decision no. 041/13 from 24 February 2014);

- It is recommended that the CPPEDAE abstains from collective self-referrals in order to avoid situations where it is not clear what acts of discrimination are charged to each respondent. If still there are collective self-referrals, the CPPEDAE shall analyse and find discrimination or non-discrimination in relation to each respondent individually and in relation to each deed in particular, clearly establishing responsibilities (for example, this was not done in decision no. 051/14 from 29 April 2014).
- In situations where the CPPEDAE members identify legislative provisions that are discriminatory, it would be more useful to prepare a reasoned opinion and either to request the competent authority to initiate amendments to the legislation or make an appeal to the Ombudsman to bring the case before the Constitutional Court, rather than to examine legislation through the mechanism of individual complaints examination;
- It is recommended to develop institutional partnerships between the CPPEDAE, State Construction Inspectorate and local authorities to ensure continuous verification of accessibility of public spaces and sanctioning of those who fail to fulfil this obligation;
- Increase the visibility of the Council opinions in relation to draft legislation, for example by publishing the complete opinions and by organizing public debates on certain opinions;
- In cases initiated on self-referral, the member who initiated a referral shall refrain from participating in the adoption of the decision;
- To seek external assistance for the strengthening of the motivational management of human resources and for consolidation of the internal operation of the Council;
- To consider seeking EU assistance for the implementation of a twinning program between the CPPEDAE and a similar institution from a Member State of the EU;
- To improve the way of presenting the information about the activity of the CPPEDAE on its web page by creating sections related to the analysis of the legislation compatibility/advocacy and public policies, case examination, monitoring of the implementation of the CPPEDAE recommendations/decisions, judicial practice;
- To improve the means of explaining the burden of proof on the website and to improve the reasoning of the CPPEDAE decisions.

For the development partners of the Republic of Moldova and local non-governmental organisations:

- To identify opportunities to support the CPPEDAE through capacity-building activities, including on the internal management of cases, conducting thematic studies, the human resources management, and the visibility of the work and the role of the CPPEDAE;
- To identify possibilities for the implementation in partnership with the CPPEDAE of major activities related to the CPPEDAE mandate, for which budgetary resources have not been allocated yet, such as carrying out sociological studies and developing a mechanism for collecting segregated data by public and private institutions;

- To identify possibilities for further monitoring activities of the CPPEDAE on behalf of the civil society. The results of the monitoring could help improve the activity of the CPPEDAE;
- To analyse the judicial practice in cases of discrimination, including cases resulting from the decisions of the CPPEDAE challenged in administrative proceedings, after collecting a relevant number of decisions.

The Legal Resources Centre from Moldova is a not-for profit non-governmental organization based in Chişinău, Republic of Moldova. LRCM strives to ensure a qualitative, prompt and transparent delivery of justice and effective observance of civil and political rights in Moldova. In achieving these aims, LRCM combines policy research and advocacy in an independent and non-partisan manner.

Legal Resources Centre from Moldova

A. Şciusev street, 33,
MD-2001 Chişinău,
Republic of Moldova
Tel: +373 22 843601
Fax: +373 22 843602
Email: contact@crjm.org
www.crjm.org

Facebook - <https://www.facebook.com/pages/Centrul-de-Resurse-Juridice/192147737476453>

Twitter - <https://twitter.com/CRJMoldova>