
Effective, Proportionate, Dissuasive Sanctions and Remedies.

Non-discrimination in Romania

Amelia Onișor, judge

Court of Appeal of Bucharest



Available procedures for enforcing the principle of equal treatment

Judicial (civil courts);

Administrative (national equality body);

Alternative dispute resolution – mediation.

Choosing a forum

Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination

Procedural path	administrative	judicial
Institution	National Council Against Discrimination (NCAD)	courts
Limitation period	1 year (from the committed facts or the knowledge of the facts)	3 years (from the committed facts or the knowledge of the facts)
Substantive remedies	Administrative fine/warning	Compensation
	restore the parties to their pre-contractual position	restore the parties to their pre-contractual position
	Injunction	Injunction/interim relief
	An abstract of the decision of NCAD is to be published in media	An abstract of the decision of the court is to be published in media
Appeal	Court of Appeal	Tribunal (Second Instance Court – lower than Court of Appeal) or Court of Appeal

Are the sanctions imposed by NCAD effective, proportionate and dissuasive?

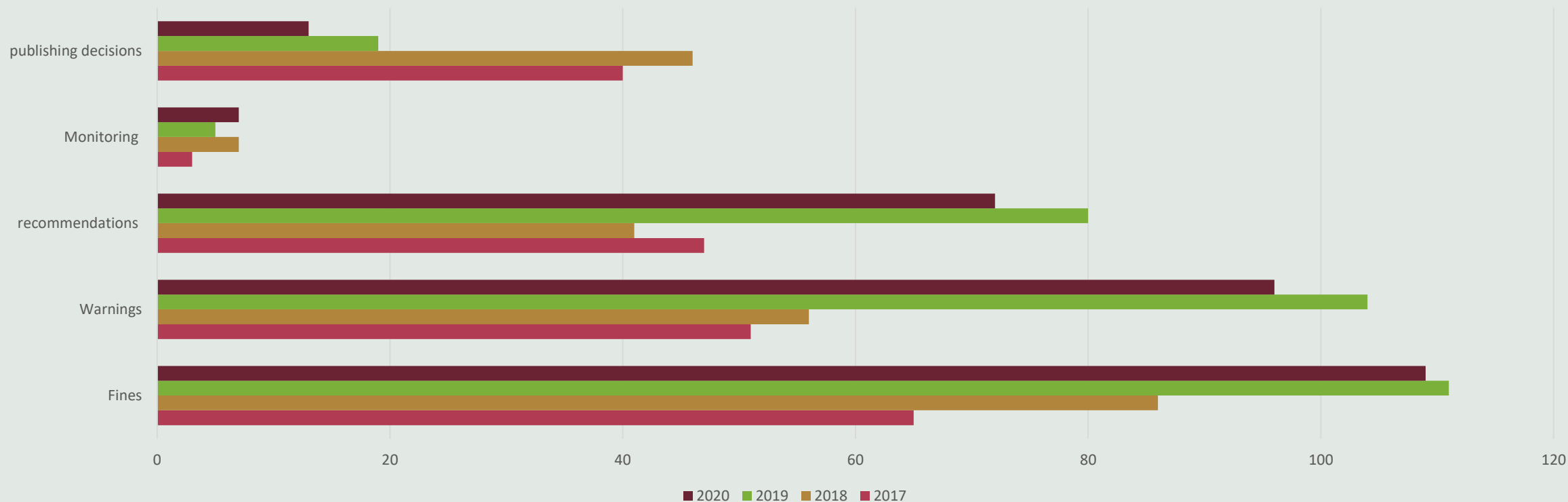
when the perpetrators are central or local government agencies or public sector actors
- the NCAD informal practice for administrative warnings or of issuing recommendations;

Fines range EUR 250-7.500 (victim is individual) and EUR 500-25.000 (victim are a group or a community);

Failure to observe orders issued by the NCAD upon finding moral harassment is in itself defined as a misdemeanour, punishable by a fine ranging from EUR 20.680 to 41.360.

Overall view of the sanctions

Types of decisions/number of decisions of NCAD



Warning and recommendations

when the perpetrators are central government agencies or public actors such as politicians

when the conditions established by the law are not fully met

when the deeds do not constitute serious breaches of law;

NCAD - preventive mandate and future oriented;

NGOs - fail to provide effective remedies.

C-81/12,

Asociația Accept

- the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must also be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim;
- **the severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality;**
- It is for the referring court to ascertain in particular whether those with legal standing to bring proceedings might be so reluctant to assert their rights under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive. Regarding the dissuasive effect of the sanction, the referring court may also take account, where appropriate, of any repeat offences of the defendant concerned.

C-81/12,

Asociația Accept

- a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages;
- **it is for the referring court to ascertain whether a sanction such as a simple warning is appropriate for a situation such as that at issue in the main proceedings.** In that connection, the mere existence of an action for damages under Article 27 of GD No 137/2000, for which the limitation period for bringing proceedings is three years, cannot, as such, make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified by that court with regard to the situation set out in paragraph 66 of the present judgment.
- national courts are obliged, when applying national law, to interpret the latter as far as possible in light of the wording and the purpose of the directive concerned in order to achieve the result envisaged by it;
- it would be for the national court to determine in the dispute in the main proceedings in particular whether, as Accept suggests, Article 26(1) of GD No 137/2000 may be interpreted as meaning that the six-month limitation period laid down in Article 13(1) of GD No 2/2001 does not apply to the sanctions laid down in Article 26(1) thereof.

Court of Appeal of
Bucharest, Decision
4180/23.12.2013, Asociația
Accept

Considered that CJEU imposed for an assessment on the adequacy of the sanction;

Considered that the national body applied the correct sanction given the circumstances of the deed – the journalist provoked a certain response of the perpetrator, the lack of certain effects of the declaration - no limitation of the right to access to employment;

High Court of Cassation and Justice, Decision 224/29.05.2015, Asociația Accept

warning (as sanction) is not incompatible with Article 17 of Directive 2000/78/EC and cannot be considered *de plano* as a *purely symbolic* sanction.

In applying this sanction, the NCAD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Not lastly, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in the society

High Court of Cassation and Justice, Decision 5026/17.04.2013, Romani CRISS

NCAD decision for a
recommendation to the
Minister of External Affairs -
declaration of discrimination of
the Roma community

- - The Supreme Court stated that recommendation is not a legal sanction when a discriminatory act is established and all the legal conditions for attracting liability are fulfilled.

Sanctions imposed by NCAD. Possible general problems

administrative warnings or
recommendations - not generally
dissuasive;

recommendations are not even
prescribed by the law;

no mechanism that allow NCAD
to adequate monitoring of
compliance with the decision
issued

Compensations. Test of effectiveness, proportionality and dissuasiveness

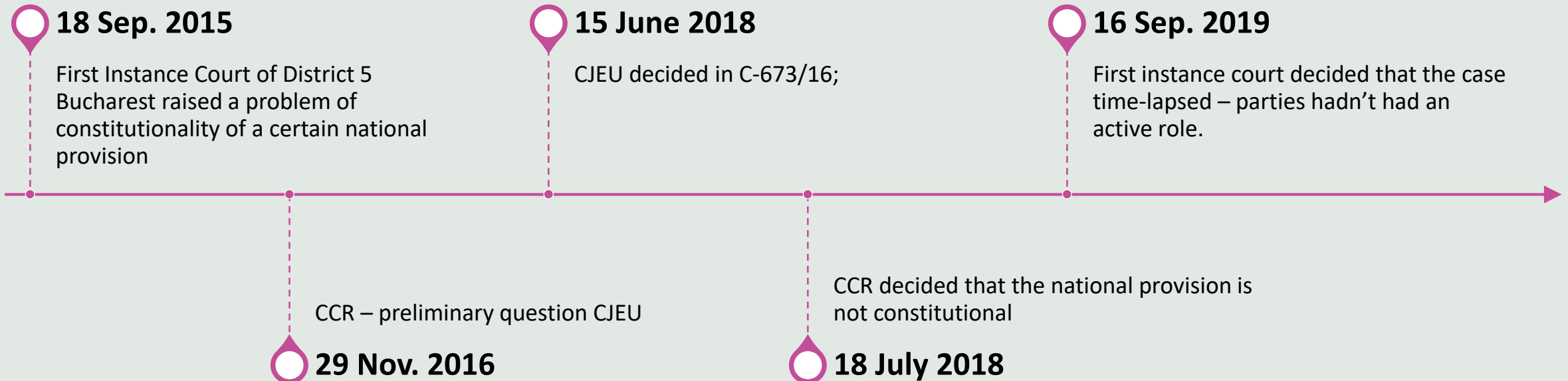
- **Awarded solely by the courts** (NCAD declares it has no jurisdiction as in Decision 129/15.02.2017, file 535/2016);
- **No ceiling**, but the courts are reluctant to award major amounts;
 - Court of Appeal Craiova – awarded EUR 10.000 in a case of discrimination of a Roma pupil (19 May 2010, case 8011/101/2009);
 - Court of Appeal Bucharest – confirmed a district decision which awarded EUR 40.000 in case of discrimination and unfair dismissal (203/4 April 2016)
- The solicited amount is important *prima facie* also for establishing civil courts competence (first instance court for EUR 0-40.000; and district courts for superior amounts), based on the Decision of HCCJ 10/2016
- No judicial taxes for application;

Injunction.

Coman case

- Mr. Coman solicited an extension of Mr Hamilton's right of temporary residence in Romania on grounds of family reunion
- Action against the refusal of the national seeking a a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement in the EU
- CJEU, C-673/16- a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the MS of which the Union citizen is a national for more than three months.

Coman case timeline



Coman case. To be continued...

- ECHR.Application no. 2663/21
- request of the parties for declaring infringement



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- breach of their right of access to court due to the dismissal of their action on procedural grounds without a decision on the merits, arguing that the reopening of the proceedings should have been done *ex officio*?

Thank you!

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