Combating the Gener Discrimination in the Independent Activities

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Abstract: This study aims to analyze the application stage and level in Romania of the European Legislation regarding the gender discrimination in the independent activities. We have also tried to emphasize all the directions that Romania has made in implementing all the concepts and definitions regarding the gender discrimination in the independent activities. So, the conclusion, not necessarily the final one, regarding this process which shall last for a significant period of time is that some laws in force are to be changed and related according to both Directive 2010/41/EU, and between them with the final purpose that Romania would be able to totally respect the equality principle in treating the men and women in the independent activities, that shall provide that the spouses or the partners who establish together a company shall be treated under the same conditions as other persons.

Keywords: discrimination; molestation; equality in treatment; independent activity.

Introduction

According to the Explanatory Dictionary of the Romanian Language, discrimination means: „1. Difference, distinction made between several elements. 2. Policy according to which a state or a category of citizens of that state is deprived of certain rights based on unsubstantiated considerations” [1].

According to art. 4, par. 2 of the Constitution, which consecrates the equality between citizens, “Romania is the common and indivisible homeland of all its citizens, irrespective of racial differences, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth and social origin”.

1. The forms of the manifestation the discriminatory

The main forms of discrimination provided in Regulation no. 137 from August 31, 2000 for the prevention and sanctioning of all forms of discrimination – republished, are defined in art. 2, par. (1), as follows:

- discrimination means any distinction, exclusion, restriction or preference in respect of race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, handicap, chronic non-contagious disease, HIV infection, affiliation to an underprivileged category, as well as any other criterion the purpose or effect of which is the confinement, elimination of the acknowledgement, use or exercise, under equal conditions, of human rights and fundamental freedoms or of legally established rights, in the political, economic, social or cultural area or in any other area of the public life.

The form through which discrimination takes place and is manifested, the manner in which discrimination is eliminated, discriminatory behaviour is sanctioned, etc., specified in the following paragraphs of the same art. 2, are:

- (2) The disposition to discriminated people according to any of the grounds indicated in par. (1) is considered discriminatory, in accordance with this regulation.
- (3) According to this regulation, the apparently neutral provisions, criteria or actions which are in the detriment of certain persons are discriminatory, except for the case in which these provisions, criteria or actions are objectively justified by a legitimate purpose and the methods used for reaching that purpose are appropriate and necessary.
- (4) According to this regulation, any active or passive behaviour which by means of the effects it generates unjustifiably favours or disfavours a person, a group of persons or a community as compared to other persons, groups of persons or communities, constitutes a contravention if it does not fall under the penal law.
- (5) Any behaviour based on race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, affiliation to an underprivileged category, age, handicap, refugee or asylee status or any other criteria leading to an intimidating, hostile, degrading or offensive environment constitutes a harassment and it is contraventionally sanctioned.

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- (6) Any differentiation, exclusion, restriction or preference based on two or several of the criteria indicated in par. (1) forms an aggravated circumstance when determining contraventional liability if one or several of its components do not fall under the penal law.
- (7) According to this regulation, any adverse treatment, as a result of a complaint or lawsuit referring to the violation of the principle of equal treatment and non-discrimination, constitutes victimization and is contraventionally sanctioned.
- (8) The provisions of this regulation cannot be interpreted as a limitation of the right to freedom of speech, the right to an opinion and the right to information.
- (9) The measures taken by public authorities or by legal entities of private law in favour of one person, of a group of persons or of a community, for the purpose of ensuring their natural development and the actual achievement of their equality of chances in relationship to other persons, groups of persons or communities, as well as the positive measures targeting the protection of underprivileged groups do not constitute discrimination, according to this regulation.
- (10) According to this regulation, the elimination of all forms of discrimination is achieved by:
  a) preventing any discriminatory actions, by instituting special measures, including affirmative actions for the purpose of protecting underprivileged persons who do not enjoy equality of chances;
  b) mediating, by amicably solving the conflicts arising after the perpetration of discriminatory actions/deeds;
  c) sanctioning the discriminatory behaviour specified in the provisions of par. (1) – (7).
- (11) The discriminatory behaviour specified in par. (1)-(7) leads to civil, contraventional or penal liability, as appropriate, in compliance with the law [2].

On the other hand, the Government Ordinance no. 137/2000 interdicts all forms of direct or indirect discrimination, based on a variety of criteria: race, nationality, ethnicity, language, religion, social category, beliefs, gender, age, handicap, chronic non-contagious disease, HIV infection, affiliation to an underprivileged category, “as well as any other criterion the purpose or effect of which is the confinement, elimination of the acknowledgement, use or exercise, under equal conditions, of human rights and fundamental freedoms or of legally established rights, in the political, economic, social or cultural area or in any other area of public life”. From this enunciation, one can infer that any other criterion (e.g. height, weight, physical aspect, etc.) used with such a purpose or which generates such an effect represents a discriminatory criterion.

2. Areas of manifestation of discrimination

Most certainly the areas in which discrimination can be displayed are very diverse, but in what we are concerned we wish to approach this phenomenon from the perspective of work relationships in general and self-employment in particular.

The provisions of art. 5, par. (1) of the Labour Code, clearly regulate that the principle of equality of treatment for all employees and employers applies in respect of work relations. Also, according to par. (2) of art. 5, any direct or indirect discrimination of an employee, based on criteria referring to gender, sexual orientation, genetic features, age, national affiliation, race, colour, ethnicity, religion, political opinion, social origin, handicap, family status or responsibility, union affiliation or activity, is prohibited.

In par. (3) and (4) of art. 5 the following aspects are determined:
- The actions and deeds of exclusion, difference, restriction and preference, consistent with one or several criteria specified in par. (2), the purpose or effect of which is the non-awarding, limitation or elimination of the acknowledgement, use or exercise of the law provided by the labour legislation constitute direct discrimination.
- The actions and deeds apparently consistent with other criteria than those specified in par. (2), but which generate the effects of a direct discrimination constitutes indirect discrimination.

Art. 6 mentions that any employee that is carrying out a certain operation benefits from work conditions appropriate to the activity carried out, from social protection, safety and health conditions at the work place, as well as from the observance of his/her dignity and perception, without any discrimination.

In the art. 8 are brought under regulation two of the main principles of the work report, i.e.: the work relations are based on the consensuality principle and of the good faith [3].

We shall not avoid the fact that in the Law no. 202 from 19th April 2002 regarding the chances and treatment equality between women and men in the art. 4 are mentioned definitions of several discrimination and molestation forms in the following way:
a) by direct discrimination we understand the situation where a person is treated less favorable based on gender criterion as is, was or would be treated other person in a comparable situation;

b) by indirect discrimination we understand the situation where a disposition, criterion or a practice, apparently neutral, would put in disadvantage the persons of a certain gender in relation to the persons of other gender, excepting the case where this disposition, this criterion or this practice is objectively justified by a legal purpose and the methods in achieving that purpose are appropriate and necessary;

c) by molestation is understood the situation where is manifested an unwished behavior regarding the sex of the person, having as object or as result the violation of the person’s dignity and creation of an intimidating, hostile, degrading, humiliating or insulting environment;

d) by sexual molestation is understood the situation where is manifested an unwished behavior with sexual connotation, expressed physically, verbally or non-verbally having as object or as effect the violation of the person’s dignity and especially creating an intimidating, hostile, degrading, humiliating or insulting environment;

e) by positive actions are understood those special actions which are temporarily undertaken in order to accelerate the realization in fact of the equality between women and men and which are not considered discrimination actions;

f) by work of equal value is understood the paid activity which based on comparison and on the same indicators and measurement units with another activity reflect the use of some professional knowledge and customs similar or equal and making the equal or similar intellectual and/or physical effort;

g) by discrimination based on the gender criterion is understood the direct discrimination and the indirect discrimination, the molestation and the sexual molestation of a person by other person at the workplace or in other place where this person carries his/her activity and also any kind of behavior less favorable caused by rejecting this type of behaviors by that person or forcing the person to make/accept them;

h) by multiple discrimination is understood any discrimination action based on two or more discrimination criterion [4];

3. Prevention and elimination of discriminatory behaviors and practices

The lawmaker has introduced in the art. 8 of Law 202 a series of provisions which are meant to prevent and eliminate any kind of behaviors, defined as discrimination based on the gender criterion, establishing for the employer the following obligations:

a) to assure the equality and treatment between employees, women and men within the work relations of any kind, including the introducing of dispositions regarding the prohibition of the discriminations based on the gender criterion in the organization and functioning rules and in the intern rules of the units;

b) to provide in the intern regulations of the units disciplinary sanctions under the conditions provided by law for the employers that violate the personal dignity of other employees by creating intimidating, hostile, degrading, humiliating or insulting environments, as they are defined in art. 4 let. a) - e) and in the art. 11;

c) to permanently inform the employees, including by displaying in visible places on the rights they have regarding the respect of the chances and treatment equality between women and men in the work relations;

d) to immediately inform after they have announced the public authorities responsible for the application and control of the law regarding the chances and treatment equality between women and men.

The legislation regarding the establishing, organization and functioning of the labor unions provides a series of protection measurements of the labor union members generally talking and particularly of the members chosen in the leading bodies of the labor unions. At the same time, are forbidden all discriminations of the employees based on the union membership and activity regarding: the employment, work repartition, professional development and advance in profession, salary, disciplinary measures and layoff. The employment forms shall not contain problems regarding the union affiliation and the clauses of union non – membership included in the work agreements are null. In order to justify the existence of a union nature discrimination is enough for an employee to prove that he/she hasn’t benefited from the same advantages as the others employees from the moment he/she was chosen as member in the union leadership or attended some union activities, if the employer can’t prove that this situation is based on objective reasons without being related to the union membership or activity.
At an institutional level, based on Law no. 202/2002 regarding the chances and treatment equality between women and men was established and has functioned the National Agency for Equality between Women and Men (ANES), specialized body of the central public administration with legal personality under the ferule of the Ministry of Labor, Solidarity and Family of which main attribution was the implementation of the equality principle between women and men in all the national politics and programs. By the Government Emergency Ordinance no. 68/30 June 2010 regarding some reorganization measurements of the Ministry of Labor, Family and Social Protection, ANES was abolished and by the Decision no. 728/21st July 2010 for the changing and completion of the Government Decision no. 11/2009 regarding the organization and functioning of the Ministry of Labor, Family and Social Protection in the organizational structure of the ministry was established the Direction of Equality between Women and Men.

According to law, the Direction of Equality between Women and Men has the following attributions:
- elaborating the national politics and plans regarding the government actions in the field of equality between women and men and their coordination;
- registering the claims regarding the violation of the chances and treatment equality principle between women and men and getting wise to the discrimination facts based on the gender criterion from natural and legal persons, public and private institutions and sending them to the competent institutions in order to settle them and apply the sanctions;
- advising the projects of normative documents initiated by the others ministries and other specialized bodies of the central public administration regarding the integration and respecting the gender perspective.

At the level of EU Law, the principle regarding the treatment equality between women and men is materialized by a direct and punctual manner by a legal pack built up from more rules, directives, decisions connected and joint between them and which are meant to consolidate their application at different levels in actions or fields of activity contributing hereby to assuring the free circulation of the services and persons in the European space.


Union Directive allows the Member States of the European Union to take positive measures concerning the guarantee of complete equality for men and women in concrete aspects of professional life, such as promotion of enterprises founded by women. Equal treatment principle for men and women supposes that in this area wives/husbands or spouses and their partners founding an enterprise together are to be treated under the same circumstances as the other persons. Additionally, the Union Directive defines that in case of a national social protection system for self-employed workers, wives/husbands or spouses and partners engaged in an activity in a self-employed capacity have the right to own social protection [5].

Considering also the issue that is to be treated in the present research, it was taken into consideration by the authorities of Romania, by the application of Emergency Ruling Nr. 83 of 4 December 2012, for modification and completion of Law Nr. 202/2002 concerning equality of chances and equal treatment for men and women, also the partial transposition of specific provisions in the area of chance equality of Union and Council Directive 2010/41/EU concerning implementing principle of equal treatment for men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC as well as Union and Council Directive of The European Parliament and Council of 5 July 2006 concerning implementing the principle of equal chances and equal treatment for men and women concerning work integration and work (reform), as well as correlating interior norms to the community ones. Romanian side also took into consideration, by publishing of this normative document, the fact that European Commission delivered to the authorities of Romania the letter C (2012) 6700/23 final concerning delaying cause 2012/0399 drawing attention to non-performance by Romania of Member State obligation of communication of national transposition measures deadline 05 of August 2012, as well as Union Directive 2010/41/EU implementing principle of equal treatment for men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. The delay of the implementing of this normative
document Romania started to be amenable to law for breaking commitments of transposition Union Directive 2010/41/EU and resulted in a lump sum as well as in periodic penalty payments.

The major modifications brought by this normative act document are, as follows:
- actualization of infringement penalty payment ratio in case of law prevision violation;
- actualization of institution names as a result of the new legislative previsions;
- repealing and modification of law texts, as follows: - repealing art. 12, its content being overtaken by art. 8 of the Project; - repealing (3) of art. 9, its content being overtaken by art. 6 (1) of the Project; - repealing art. 34 and 35, its content being overtaken by art. 16 and 18 of the Project; - repealing (a) (b) and (d) of art. 49, as a consequence of repealing Council Directive 76/207/EEC, Council Directive 75/117/EEC and Council Directive 97/80/EC by Council Directive 2006/54/EC, as well as repealing (f) of the same article as a result of repealing Council Directive 86/613/EEC by Union and Council Directive 2010/41/EU;

By modification and completion of Law 202/2002 concerning equality of chances and equal treatment for men and women, the normative document framework in the area is applied also for a new category of social protection law beneficiary, namely spouses engaged in self-employment collaborations, in conformity with the previsions of Union Directive 2010/41/EU of 7 July 2010 implementing principle of equal treatment for men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC. The normative document framework will be having a coherent and unified character as well, in order to contribute to accessibility increase of all the citizens towards its previsions and of defense grade concerning personal rights in the case of discrimination based on sex.

As a result of transposition obligation for previsions of Union Directive 2010/41/EU of 7 July 2010 implementing principle of equal treatment for men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, defining a new category of social protection beneficiary, namely spouses engaged in self-employment collaboration, a serial of normative documents are to be modified, as follows:
- Law 76/2002 concerning protection system for unemployed and stimulation of employment;
- Law 95/2006 concerning reform in health area;
- Regulation 233/2006 concerning acknowledgment of the unique sick leave Certificate and of instructions concerning the usage and fill in of certificates;
- EGR 158/2005 concerning holidays and social health insurance allowances;
- Regulation 60/2006 concerning acknowledgment of application Norms of Emergency Regulation 158/2005 concerning holidays and social health insurance allowances;

As a result of a preliminary evaluation provided by the European document mentioned above, The Ministry of Employment, Family and Social Protection initiated consultation of the involved institutions in the area aimed by the dispositions of the directive (National Agency for Employment, National Institute on Retirement, Ministry of Health, Health Insurance Fund, Ministry of Justice, National Council for Combating Discrimination, Ministry of Economy and Commerce, Ministry of Public Finance). On behalf of workgroup assemble discussions coordinated by European Ministry of Foreign Affairs in the period between 2011 – August 2012, turned up the necessity of including the term of collaborating spouse of self-employed worker into the transposition of Directive. This resulted - regarding that there is none of such a beneficiary category included in national operational legislation and reported to the fact that the activity engaged by this new category is directly related to the activity of the self-employed worker, namely of the authorized individual in the case of national legislation system, institution regulated by EGR 44/2008 concerning unfolding of economic activities by authorized individuals, individual and family enterprises, with subsequent modifications and completions – the necessity of 44/2008 EGR modification, referring to the introduction of the terms ‘collaborating spouse of the individual worker, namely of authorized individual among the other terms defined by the emergency regulation. Ministry of Economy and Commerce committed according to a well prepared schedule to undertake necessary modifications of EGR 44/2008, so that the actual modification and completion project of Law 202/2002 could be modified as well.

On this issue, in October 2013, The Government of Romania initiated a new law project on modification and completion of Emergency Regulation 44/2008 concerning unfolding of economic activities by authorized individuals, individual and family enterprises. The normative document project aims, among the others, the introduction of a new category of beneficiary in the social services system, namely spouses of

Regarding that there is none of such a beneficiary category included in national operational legislation and reported to the fact that the activity engaged by this new category is directly related to the activity of the self-employed worker, namely of the authorized individual in the case of national legislation system, institution regulated by EGR 44/2008 concerning unfolding of economic activities by authorized individuals, individual and family enterprises, with subsequent modifications and completions, resulted the necessity of EGR 44/2008 modification, with the necessity of 44/2008 EGR modification with subsequent modifications and completions, referring to the introduction of the terms ‘collaborating spouse of the individual worker, namely of authorized individual’ among the other terms defined by the emergency regulation.

According to previsions of EGR 44/2008, with subsequent modifications and completions, an individual enterprise refers to ‘economic enterprise, without any legal entity, organized by an individual enterpriser’, while authorized individual (AI) is ‘the individual authorized for any kind of economic activity approved by law, using basically own work-force’, but according to art.2 (b) of Union Directive 2010/41/EU individual workers are defined as being ‘persons unfolding an activity in a self-employed capacity, under circumstances prevised by inner law.’

Conclusions

Taking into consideration that Romania, as State Member of the European Union – even by the partial transposition of the previsions characteristic to the area of chance equality defined by European Parliament and Council Directive 2010/41/EU of 7 June 2010 implementing principle of equal treatment for men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC - proves, by the two normative documents mentioned above (Emergency Ruling Nr. 83 of 4 December 2012, for modification and completion of Law Nr. 202/2002 concerning equality of chances and equal treatment for men and women, approved by Law 115/24 April 2013, published in G.240/25 April 2013 and Law Project for modification and completion of Emergency Government Regulation 44/2008 concerning unfolding of economic activities by authorized individuals, individual and family enterprises, discussed by the Upper House in October hoc anno), that had taken and takes the responsibility for the modification of the whole general framework treating this issue. As a conclusion, discrimination is followed with attention by the authorities, in its multiple and various forms, in order to find every elimination possibility of this attitude.

References


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