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Using AI in Recruitment and Selection Processes. The Romanian Case

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1.   Introduction

Romania transposed European Directives covering equality between women and men in the workplace, in self-employment, in access to goods and services, in social security, in pregnancy and maternity and on family-related leave and flexible working arrangements for parents and carers. In essence, the main national sources of law regarding the protection of workers in the recruitment process are:

- Labour Code[1], recently amended by Law no. 151/2020[2], which detailed the rules for protection against discrimination in the workplace, defining concepts such as moral harassment, discrimination by association or victimization. As of this year, it also defines indirect discrimination, when the absence of the intention to discriminate appears to be irrelevant, as long as the effect of the recruitment policy leads, in concrete terms, to discriminatory results;

- Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination[3]. Based on this regulation, a candidate can challenge in court the recruitment policies implemented by the employer, claiming their discriminatory character;

- Law no. 202/2002 on equal opportunities between women and men[4].

Notably, the recent Telework Law[5] brought to light a category of pre-existing but silent employment work relationships or disguised as home working contracts. As a side note, we mention that flexible employment contracts were completely neglected by law and even by doctrine as long as they were associated with the work of women, who often opted for these contractual arrangements due to family concerns. Only

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[1] Law no. 53/2003, republished in the Official Gazette of Romania, no. 345 of 18 May 2011

[2] Published in the Official Gazette of Romania, no. 658 of 24 July 2020

[3] Republished in the Official Gazette of Romania no. 166 of 7 March 2014. The prohibition of discrimination, including on the basis of gender, is provided for the different stages of the employment relationship, being expressly specified in art. 3 lit. a) "employment terms, criteria and conditions for recruitment, selection and promotion, access to all forms and levels of guidance, training and professional development".

[4] Republished in the Official Gazette of Romania, no. 326 of 5 June 2013, with subsequent amendments and supplements

[5] Law no. 81/2018 on the regulation of telework activities, published in the Official Gazette of Romania, no. 296 of 2 April 2018.

when, as a consequence of digitalization, telework became a phenomenon in which men began to be massively involved, the issue caught the interest of the legislator.

Romanian legislation includes numerous rules to ensure equal treatment of women, once they have been hired[6]. But in the pre-employment stage, things are different. In the recruitment process, women are frequently confronted with policies of indirect discrimination, which perpetuate gender stereotypes. The perception of occupations as par excellence "masculine" limits women's access to jobs that are supposed to require qualities and dispositions perceived as being "naturally" masculine: physical endurance, resistance to stress, mobility, etc.[7]

In addition, even the overly protective rules during the employment relationship, which for a long period of time prohibit the dismissal of people having young children in care may be a problem. The employer may hesitate, under these conditions, to hire women, because this could lead to a very long period of prohibition of any dismissal. Such protective rules can turn exactly against the category of people they would have intended to protect.

The use of recruitment algorithms is quite recent in the practice of Romanian recruitment companies. There is neither any regulation on how to use these algorithms nor a guide to acceptable conduct among data processors.

As a principle, the candidates have the possibility to notify the use of recruitment algorithms with discriminatory potential to the National Council for Combating Discrimination (NCCD), based on Government Ordinance no. 137/2000[8].

Indeed, in Romania, the use of recruitment algorithms is still in its infancy; they are mainly used by large recruitment companies. Algorithms are completely lacking in transparency; they cannot be known by candidates or by any external audit body. All the less can they be known by the representative trade union organisation. Theoretically, they could be disclosed in court, during a case where discrimination in the recruitment process is invoked. But this would require at least the evidence of the existence of some premises of discrimination, which in reality the candidate can rarely produce.

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[6] From annual leave to rest leave, parents enjoy special rights at work, which, given the rather asymmetrical distribution of the family responsibilities of raising and caring for the child, are exercised predominantly by women. Due to their number and duration, these leave periods go beyond the usual European standards, in terms of the protection of the job of the pregnant woman or of the parent of the young child.

[7] In the Police, for example, only 15% of all employees are women.

[8] It should be noted, however, that the national legislator has limited the persons who have active procedural capacity before the NCCD (in terms of a legitimate interest) to the person who has been discriminated against and/or non-governmental organizations that have a legitimate interest in combating discrimination. As a result, certain cases brought before the NCCD on the grounds of discrimination in the recruitment process, were rejected by this body, for lack of active procedural capacity. For example, NCCD Decision no. 223 of 9 April 2014.

2.   The beginnings of a public debate

In Romania, although the gender structure of the population aged 15 and over is marked by a slight predominance of women (1,069 women per 1,000 men), labour market participation is higher for men: the ratio between men and women employed is of 1.3.[9]

AI is supposed to reduce hiring discrimination, eliminating unconscious bias in recruiting and hiring. The premise is that by using recruitment algorithms it will be possible to select candidates – in the first phase – in an efficient and objective way. But, of course, recruitment algorithms could internalise the prejudices of those who design them. For instance, the selected keywords are often those of action and ambition, externalising a certain social aggression (perceived as desirable in the organisation) and which automatically favours male candidates.

It must be stated from the beginning that the use of recruitment algorithms has not generated a substantial public debate in Romania so far. Their complete lack of transparency has prevented an applied analysis from being carried out, and the rejected candidates have no means of effectively verifying them. Sometimes even the employer does not know the recruitment procedures step by step, being informed by the recruitment company directly about the candidates who have passed this stage.

As a result, AI has often been used in the first phase of the recruitment process, without a thorough assessment of the impact of this method. Thus, tools that include game-based cognitive assessments and artificial intelligence-based assessments (CodeVue) are used according to the job-specific skills desired. Some Romanian companies require candidates to solve a test built on the model of the Graduate Management Admission Test, regardless of the position for which they apply (for example, Bookster, Procter & Gamble, etc.). Such tests, although seemingly neutral, can sometimes be perceived as unsuited to the educational and gender pattern of each candidate.

Often, the tests used to recruit new employees are designed starting from the data provided to the AI on the company's current top employees. Thus, data on current employees with the best ratings are introduced, looking for a candidate who meets the same parameters. It is therefore possible to perpetuate an already male-oriented organisational culture, the company remaining encapsulated in outdated gender standards. In addition, the fewer women employed in the company so far, the less data on female employees can be provided to the application, so that the evaluation of new candidates will be asymmetric by the simple difference in the amount of data available in the evaluation of masculine versus feminine employees.

From a probative point of view, the Romanian legislation laid down the principle of reversing the burden of proof; moreover, this principle is not only applicable in

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[9] National Institute of Statistics, 2018, [Women and men. Work and life partnership](#)

discrimination disputes, but in all labour disputes. However, the lack of transparency of recruitment firms regarding the algorithms used is an obstacle in identifying their possible direct or indirect discriminatory nature, so that *prima facie* discrimination, leading to the reversal of the burden of proof, appears difficult to invoke. In addition, in the case of indirect discrimination, employers are free to claim the existence of an objective ground, which further reduces the candidate's chances of successfully challenging the recruitment algorithm.

In order to ascertain a situation of indirect discrimination in the recruitment process, it would be necessary to be able to statistically identify the percentage of women who applied, compared to that of men, as well as a comparison of the success rate. In case of a significant discrepancy, the employer could prove the objective ground of the selection made. Only to get to this point, access to the initial information is needed. Such access is often hindered by the confidentiality of data entered and processed.

Another problem is the absence of legal criteria for identifying an employment relationship in the event that it is disguised as a civil contract for service[10]. Consequently, the worker who has concluded a civil contract, being selected on the basis of specific algorithms, will find it even more difficult to use the protective instruments of labour law, in revealing the lack of impartiality of the criteria according to which she was selected.

3.   Recommendations

In Romania, as we have shown, the use of algorithms in the recruitment process is just beginning, so there is no experience needed to formulate long-term recommendations. However, a number of recommendations can still be made:

- Improving digital skills through employment agency training courses. In addition to the immediate purpose of this approach, which is to find employment in a labour market that has been digitalized gradually so far and more suddenly in the context of the COVID crisis, such competence will not leave the jobseeker exposed to selection criteria that are inaccessible to her/him;

- Awareness campaigns on gender discrimination in the recruitment process, especially with regard to indirect discrimination, aimed mainly at eliminating neutral decisions, but with discriminatory effects, in the design and use of recruitment algorithms;

- Involvement of trade unions in recruitment policies. Modification of the Labour Code by Law no. 213/2020 takes a first step in this direction, providing that when negotiating, concluding or amending the employment contract or during the conciliation of an individual labour dispute, either party may be assisted by an

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[10] Labour courts have no choice but to use the criteria provided by the Tax Code, but they pursue a tax purpose, therefore other than worker protection.

external consultant or by a representative of the trade union. But it concerns too little the pre-contractual stage, that of the recruitment, which remains exposed to risks in terms of discrimination;

- Development of research on recruitment algorithms used by recruitment companies. These algorithms were implemented without an impact assessment and without being accompanied by analyzes on the risk of discrimination that they harbour, hence the limited Romanian literature that is available on this subject. Thus, an interdisciplinary analysis would be useful, from the perspectives of labour law and human resources management, in mixed teams, to follow the effective way in which these algorithms have their say on equal employment opportunities in Romania;

- Extending the responsibilities of experts in charge of equal opportunities, already present in many companies, so that they can make recommendations on the use of AI in recruitment processes. Indeed, eliminating the risk of gender discrimination in recruitment is only one component of general policies to ensure gender equality in the labour market[11].

- Protection of whistle-blowers who disclose information on the discriminatory potential of recruitment algorithms. Such algorithms are highly confidential and they are generally protected by confidentiality agreements concluded by all those who become aware of their content;

- Implementation of an (independent) external audit system of the employment testing procedure. Also, in order to identify cases of systematic discrimination, it would be advisable to use the statistical evidence in the evaluation of recruitment algorithms. Such statistics can provide some guidance to data processors;

- The processing of candidates' data is carried out on the basis of an agreement concluded in compliance with GDPR that imposes strict contractual requirements with respect to the processor's operations. Such an agreement could also include the candidate's means of action, in the event of algorithmic discrimination[12].

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[11] Romania has made progress from this point of view, for example through the successive amendments of Law no. 202/2002. Thus, art. 2 para. (4) of this law provides that employers with more than 50 employees have the possibility to hire a person responsible for equal opportunities and treatment. Increasing efforts to ensure gender equality in the labour market, including through the policies of the National Agency for Equal Opportunities and Treatment for Women and Men, will lead to better management and recruitment algorithms.

[12] For a comparison between the GDPR and the procedure for implementing recruitment algorithms, see Jack Hensler, Algorithms as allies: regulating new technologies in the fight for workplace equality, Temple International and Comparative Law Journal, vol. 34, no 1 (2019).