

THE RESULT OF THE TRANSPOSITION OF EU DIRECTIVES INTO NATIONAL LEGISLATION. THE FIRST CASE AGAINST ROMANIA REGARDING THE IMPLEMENTATION OF THE RACIAL EQUALITY DIRECTIVE (2000/43/EC) AND OF THE EQUAL TREATMENT DIRECTIVE (2000/78/EC)

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Abstract

The purpose of this research paper is to analyze how the two directives, The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC), were transposed into national legislation. One objective of the paper is to present and analyze some outcomes of the transposition: the national legislation on combating discrimination and the national institutions in this field. The second objective is to present and analyze the first case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC) and of The Equal Treatment Directive (2000/78/EC) into national legislation: preliminary ruling C-310/10 (Agafitei and Others, Romania) and the possible impact of this case. Council Directive 2000/43 is implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Directive 2000/78/EC is establishing a general framework for equal treatment in employment and occupation. The case stems from a salary dispute Agafitei and others, staff of the national anti-corruption board and management research to fight organized crime and terrorism. There is a reward past circumstances arise system with two tracks: one that is followed by the 'attorneys' and by other staff. For the first track counts along the length of service for the second. Since there is no (additional) qualification requirements for the group of prosecutors, according to defendants pay equal. In a national procedure Agafitei others (defendants in the national procedure) in the right, and their employers to pay the lost wages. The respective employers, however, did not agree and make cassation.

Keywords: transposition, discrimination, National Council for Combating Discrimination, European Court of Justice, preliminary ruling

Introduction

In 2010 there was introduced Reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) lodged on 29 June 2010 — Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafitei and Others¹.

This is the first case first case against Romania regarding the transposition of The Racial Equality Directive (2000/43/EC)² and of The Equal Treatment Directive (2000/78/EC)³ into national legislation: Preliminary ruling C-310/10 (Agafitei and Others, Romania).

In order to have a clear picture of this case, there must be analyzed a series of institutions, most of them used for the first time since Romania became member of European Union.

The research will be structured based on four main themes:

- European Union and discrimination;
- The national institutions in the field of combating discrimination;
- The preliminary ruling in front of Court of Justice.

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¹ OJ C234/27 from 28.08.2010

² OJ L180/22 from 19.07.2000

³ OJ L303/16 from 02.12.2000

Based on the four analyzes we could draw same conclusions related on possible impact of this case on Romania.

European Union and Discrimination

It is well known that the combating discrimination legislation lies at the level of European Union in three distinct Directives. The three Directives are:

- Council Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market;
- Council Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation, and in Article 1 lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation;
- Council Directive 2004/113/EC⁴ – Gender Directive (and Gender Recast Directive 2006/54/EC): establishes a framework for equal treatment between men and women in access to and supply of goods and services.

In addition to the Council Directives, European Union considers combating discrimination one of the top priorities. In 2008 was issued another proposal for a new Directive, so called Horizontal Directive, on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

There are another two documents important for this issue, both Communications From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: 2008 Non-discrimination and equal opportunities: A renewed commitment⁵ and 2008 Renewed social agenda: Opportunities, access and solidarity in 21st century Europe⁶.

Recently, February 2011, was published a study called: EU – MIDIS European Union Minorities and Discrimination Survey - Data in Focus Report – Multiple Discrimination⁷.

The referring court, Curtea de Apel Bacau, refers to only 2 EU directives out of the three mentioned above. The referring court refers to Directive 2000/43/EC – Racial Equality Directive and to Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation.

More precise Curtea de Apel Bacau refers to the art. 15 of Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market and to art. 17 of Directive 2000/78/EC – Employment Equality Directive

The content of the two articles mentioned are very much similar.

The art. 15 of Directive 2000/43/EC is named "Sanctions" as has the following content: *"Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them."*

The art. 17 of Directive 2000/43/EC is named "Sanctions" as has the following content: *"Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that*

⁴ OJ L373/37 from 21.12.2004

⁵ COM (2008) 420

⁶ COM (2008) 212

⁷ www.fra.europa.eu

they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.”

The National Institutions in the Field of Combating Discrimination

The National Council for Combating Discrimination (NCCD) was established in august 2002⁸.

The National Council for Combating Discrimination was established pursuant to the adoption of Government Ordinance no. 137/2000⁹ and Government Decision no. 1194/2001 on organization and function of NCCD. These legal acts represented the transposition of the community legislation in the field at national level. At European level there are institutions assigned to human rights protection and combating discrimination but NCCD is unique, its activity combining 14 discrimination criteria, no other institution having such a vast sphere of action, including sanctioning.

The National Council for Combating Discrimination (NCCD) is the autonomous state authority, under parliamentary control, which performs its activity in the field of discrimination¹⁰.

The main Competences and responsibilities of the NCCD are¹¹:

a) prevention of discrimination deeds through information and awareness campaigns regarding human rights, discrimination effects, the principle of equality, formation and informing courses, projects and programmes at local, regional and national level, studies realization, reports etc

b) the mediation of discrimination acts is the way to solve the discrimination deeds on friendly terms of the parts implicated in the discrimination case, in the presence of the National Council for Combating Discrimination representatives. The National Council for Combating Discrimination aims to reduce and eliminate the discrimination acts and by no means to penalize.

c) the investigation, ascertainment and sanction of discrimination acts. For the proper analyze of the cases and decision making about petitions received or internally generated complaints, the Steering Board has means at its disposal in order to investigate the cases, from which it establishes the existence of any discrimination act and penalizes it accordingly.

d) the monitoring of discrimination cases as a result of the ascertainment of discrimination cases by NCCD, through subsequent supervision of the involved parts.

e) granting specialized assistance to the victims of discrimination. The NCCD juridical advisers explain the legislation to those interested through assisted guidance regarding the activity of filing a petition and additional information that results from this.

Following the receiving of your petition, it will be registered and forwarded to the Steering Board, in order to be solved. The NCCD could be notified within one year from the date the discrimination took place or the date a person took cognizance of its commission¹². The discriminated person may demand the annulment of the discrimination facts' consequences and the re-establishment of the situation that existed before the discrimination deed¹³. The term for solving your petition is of 90 days¹⁴. The Steering Board will ascertain the existence of the discrimination

⁸ C. Jura, Combating discrimination in Romania, CH Beck Publishing House, Bucharest, 2004

⁹ Published in the Official Gazette no. 99 from 8 of February 2007

¹⁰ Section VI, art. 16 from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹¹ www.cncd.org.ro

¹² Section VI, art. 20 (1) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹³ Section VI, art. 20 (3) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹⁴ Section VI, art. 20 (7) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

deed by compulsory summoning of the parts, that is realized by any means that ensures the confirmation of receive. The absence of parts involved at the hearings does not affect the petition's solving. In order to take a proper decision, NCCD can perform additional investigation, or NCCD can call the parts involved (you and the person you accuse of discrimination) at our headquarters for hearings¹⁵.

The persons considered discriminated have the obligation to prove the existence of facts from which it may be presumed that there has been discrimination and the person you accuse has to prove that these deeds do not constitute discrimination¹⁶.

The Members of the Steering Board may apply sanctions when they ascertain discrimination has taken place. The sanctions can be warnings or fines of between 400 to 4.000 lei, if the discrimination affects a natural person, and of between 600 to 8.000 lei, if the discrimination affects a group of persons or a community¹⁷.

The solution (The Decision of the Steering Board) is transmitted in writing to the discriminated persons and the person accused of discrimination within 15 days from its adoption in the Steering Board meeting. In another 15 days' time from the receiving of the Steering Board Decision, the parts can dispute it in instance if they are not pleased with the solution of the case. The judicial stamp value is free for both parts¹⁸.

For all discrimination cases, the victims are entitled to claim damages, proportional to the act, as well as the restoration of the situation prior to discrimination or to the cessation of the situation created by discrimination, in accordance with common law. Upon request, the court can order that the competent authorities withdraw the licence of legal entities that significantly prejudice society by means of a discriminatory action or have repeatedly violate the provisions of the Government Ordinance no. 137/2000. Human rights non-governmental organizations can appear in court as parties in cases involving discrimination pertaining to their field of activity and which prejudice a community or a group of persons¹⁹.

The prevention of discrimination deeds is a priority among the Council's functions and prerogatives and the correlation and observance of the guidelines with the objectives and priorities established in the National Strategy implementing the measures of preventing and combating discrimination (SNIMPCD) 2007 -2013 is essential in achieving the objectives of this field.

In order to enforce the guidelines in preventing and combating discrimination, on the basis of policies which promote equality of opportunity, mutual understanding and respect, the National Council for Combating Discrimination sought to strengthen cooperation with civil society and institutions of public administration and local government, increasing knowledge and awareness of the population with regard to the non-discrimination principles.

In the last years, NCCD conducted campaigns which had well established target groups, such as: pre-school children, pupils, students and Master students, kindergartens, schools, high schools and university teachers, clerks, policemen, gendarmes, judges, lawyers, members of non-governmental organizations, doctors and health personnel, representatives of national minorities, etc, both in Bucharest and across the country. We wish to underline the significant fact that these activities pursued the objectives of the National Strategy implementing the measures of preventing

¹⁵ Section VI, art. 20 (4 and 5) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹⁶ Section VI, art. 20 (6) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹⁷ Chapter 3, art. 26 from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹⁸ Section VI, art. 20 (9 and 10) from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

¹⁹ Chapter 3, art. 27 from Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination as modified and approved

and combating discrimination during 2007 -2013, drawn up by the National Council for Combating Discrimination in 2007.

Also, some of the activities have pursued and fallen under the scope of the specific European issues 2008 – European Year of Intercultural Dialogue, designated as such by a joint decision of the European Parliament and the European Council, at the end of 2006.

The preliminary ruling in front of Court of Justice

The procedure of preliminary ruling is based on the Chapter 9 Preliminary Rulings and other References for Interpretation, art. 103 – 104 from Consolidated Version of the Rules of Procedure of the Court of Justice (2010/C 177/01)²⁰ and on Information Note on References from National Courts for a Preliminary Ruling (2009/C 297/01)²¹.

Under the preliminary ruling procedure, the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

8. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule refer a question to the Court of Justice for a preliminary ruling

All national courts must therefore refer a question to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that that act may be invalid.

A national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.

A reference for a preliminary ruling calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

Base on these rules of procedure Curtea de Apel Bacău introduced Reference for a preliminary ruling:

1. Do Article 15 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (1) and Article 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2) — both transposed into national law by OG (Ordonanta Guvernului (Government legislative decree)) No 137/2000, as republished and amended — preclude national legislation or a judgment of the Constitutional Court (Constitutional Court) prohibiting the national judicial authorities from awarding to claimants who have been discriminated against the compensation for material and/or non-material damage which is considered appropriate in cases in which the compensation for the damage caused by discrimination relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong (see, to that effect, judgments of the Constitutional Court No 1325 of 4 December 2008 and No 146 of 25 February 2010)?

2. If the answer to Question 1 is in the affirmative, are the national courts required to await the repeal or amendment of the provisions of national law — and/or a change in the case-law of the

²⁰ OJ C177/1 from 02.07.2010

²¹ OJ C297/1 from 05.12.2009

Constitutional Court — which are, *ex hypothesi*, contrary to the provisions of Community law, or are the courts required to apply Community law, as interpreted by the Court of Justice of the European Union, directly and immediately to the proceedings pending before them, declining to apply any provision of national law or any judgment of the Constitutional Court which is contrary to the provisions of Community law?

Basically the question asked is Do Article 15 of Council Directive 2000/43/EC and Article 17 of Council Directive 2000/78/EC preclude national legislation or a judgment of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants of the Constitutional Court prohibiting the national judicial authorities from awarding to claimants?

The provisions of the Government Ordinance no. 137/2000 were interpreted by Constitutional Court of Romania²² by several decisions: Decision No.818 of July 3rd 2008 on the objection of unconstitutionality of the provisions under Article 1, Article 2 paragraph (3) and Article 27 of the Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination²³, Decision No.819 of July 3rd 2008 on the objection of unconstitutionality of the provisions of Article 1, of Article 2 paragraphs (1) to (3), of Article 6 and of Article 27 paragraph (1) of Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination²⁴, Decision No.820 of July 3rd 2008 on the objection of unconstitutionality of the provisions of Article 1, of Article 2 paragraph (3) and of Article 27 paragraph (1) of Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination²⁵, Decision No.821 of July 3rd 2008 on the objection of unconstitutionality of the provisions under Article 1, Article 2 paragraphs (1), (3) and (11) and Article 27 of the Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination²⁶ and Decision No.997 of October 7th 2008 on the objection of unconstitutionality of the provisions under Article 20 of the Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination²⁷.

The important Decision of Constitutional Court in the analyzed case is Decision No.997 of October 7th 2008.

As grounds for the objection of unconstitutionality the Constitutional Court shows that, as from the interpretation of the criticized legal text, results that the decisions of the Steering Board of the National Council for Combating Discrimination are given only with a view to investigate and prosecute wrongdoing facts or acts of discrimination, acts construed as illegal actions or omission that violate the individual right rules, causing damage to a person. Nothing contained in Government Ordinance no.137/2000 empowers the College to issue resolutions in the exercise of the power of harmonization of legislation. This conclusion is required by several aspects, such as the need for referral to the Council within one year after the act was committed or within one year after the date on which the same could get to his knowledge, the burden of proving the act by the one who considers to be discriminated, the opportunity the use as evidence also audio and video recordings, application of fines, the enforceability of the Council decision as regards pecuniary penalty and the possibility of restoring the previous situation. A contrary interpretation, which would legitimize the National Council for Combating Discrimination to apply fines for the adoption of certain normative acts, would be a nonsense. Likewise, it is impossible to restore the situation preceding the discrimination „created” by a statutory provision by a resolution of the National Council for Combating Discrimination, the provisions of laws and ordinances enjoying, until proven otherwise, the presumption of constitutionality and those contained in an administrative act of the presumption

²² www.ccr.ro

²³ Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

²⁴ Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

²⁵ Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

²⁶ Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.537 of July 16th 2008

²⁷ Published in the Official Gazette (Monitorul Oficial) of Romania, Part I, no.774 of November 18th 2008

of legality. Therefore, it considers that Article 20 of Government Ordinance no.137/2000 is unconstitutional insofar as it is interpreted in the sense that it gives the Council the power to ascertain the breach of the principle of equality before the law by examining and censoring the solutions contained in regulations and administrative acts of normative type.

Examining the objection of unconstitutionality, the Court finds that, in essence, the author challenges the constitutionality of the judicial powers of the National Council for Combating Discrimination, which, according to Article 20 paragraph (3) of Government Ordinance no.137/2000, may order „the removal of the consequences of discriminatory acts and restoration of the situation preceding such discrimination”, to the extent that discriminatory situations arise from the content of certain normative acts.

The decision issued by Constitutional Court decided to Allow the objection of unconstitutionality raised by the Ministry of Justice in the File no.7,604/99/2007 of Iași Court of Appeal – Contentious Administrative and Tax Division and holds that the provisions of Article 20 paragraph (3) of Government Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination **are unconstitutional**, insofar as they can be interpreted as granting to the National Council for Combating Discrimination, as part of its jurisdictional activity, the power to cancel or refuse the application of certain normative acts with force of law, considering that they are discriminatory, and to replace them with rules established by means of the judiciary or with provisions contained in normative acts.

Conclusions

It is difficult to reach a conclusion because any conclusion could interfere with the judgment of Court of Justice in the case of a preliminary ruling, because I am a member of a Steering Board of the National Council for Combating Discrimination and because National Council for Combating Discrimination is one of the Intervening parties in this case.

But still there are some aspects that must be underline. In order to invoke a possible discrimination, there must be a case brought to National Council for Combating Discrimination and solved by Decision of Steering Board of NCCD. Only in the case that Steering Board decided there was an act of discrimination the victims are entitled to claim damages, proportional to the act, as well as the restoration of the situation prior to discrimination or to the cessation of the situation created by discrimination, in accordance with common law.

On the other hand National Council for Combating Discrimination, as part of its jurisdictional activity, has no the power to cancel or refuse the application of certain normative acts with force of law, considering that they are discriminatory, and to replace them with rules established by means of the judiciary or with provisions contained in normative acts. In this particularly case NCCD received no complain from a person or from an authority, not to forget that NCCD is the only the autonomous state authority, under parliamentary control, which performs its activity in the field of discrimination and which could ascertain a fact of discrimination.

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