

THE RESULT OF 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 main objective is to present and analyze the final result of 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.

In 2011 I published in CKS 2011 an article regarding 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.

Meanwhile the European Court of Justice decided in this case.

Keywords: *transposition, discrimination, European Court of Justice, preliminary ruling, TFUE.*

Introduction

In 2011 CKS, I analyze the first case introduced against Romania in front of Court of Justice of European Union, Case C-310/10¹.

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 Cetățenesti v Ștefan Agafitei and Others². The case was about salary rights of judges - Discrimination on grounds of membership of a socio-professional category or place of work - Conditions for compensation for the harm suffered - Directives 2000/43/EC and 2000/78/EC.

This was the first case 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).

On 7th of July 2011 the Judgment Court (Fourth Chamber) ruled that the reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) is inadmissible.

Based on the facts mentioned above, I took the decision to analyze the whole C-310/10 case for CKS 2012. This research could be one of the fewest on the cases submitted to Court of Justice of European Union.

In order to have a clear picture of this case, I will introduce also the procedure for the preliminary ruling in front of Court of Justice and the EU legal frame work on combating discrimination.

The preliminary ruling in front of Court of Justice of European Union

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

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¹ For the full research see CKS 2011. Challenges of the Knowledge Society, 5th Edition, (ProUniversitaria Publishing House, 2011).

² Text of the preliminary ruling available in OJ C234/27 from 28.08.2010

the Court of Justice (2010/C 177/01)³ and on Information Note on References from National Courts for a Preliminary Ruling (2009/C 297/01)⁴.

Under the preliminary ruling procedure, the Court's⁵ 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 TFEU⁶, 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 ruling⁷:

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 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?

³ Text available in OJ C177/1 from 02.07.2010

⁴ Text available in OJ C297/1 from 05.12.2009

⁵ See also <http://curia.europa.eu/> (27th of January, 2012)

⁶ Text of article 267 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, (Published by Publications Office of the European Union, Luxembourg, 2012).

⁷ Text available at http://www.csm1909.ro/CJUE/C310_10RO.pdf (27th of January, 2012)

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?

Legal Framework of European Union on Combating 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 market⁸;
- 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 occupation⁹;

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 commitment¹⁰ and 2008 Renewed social agenda: Opportunities, access and solidarity in 21st century Europe¹¹.

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 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*

⁸ Text of the Directive available in OJ L180/22 from 19.07.2000

⁹ Text of the Directive available in OJ L303/16 from 02.12.2000

¹⁰ Text available under COM (2008) 420

¹¹ Text available under COM (2008) 212

Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.”

Preliminary ruling of Court of Justice of European Union in case C-310/10 (Agafitei and Others, Romania)

After Curtea de Apel Bacău referred the question mentioned above to the Court of Justice of European Union for a preliminary ruling, the Court of Justice asked the Romanian Government and other interested EU member states to make observations related to the question referred.

The Romanian Government¹² and Ireland entertain doubts in their written observations as to whether the questions referred are admissible, in particular on the ground that the situation at issue in the main proceedings does not fall within the scope of Directives 2000/43 and 2000/78 or, more generally, of European Union law.

In that regard, under Article 267 TFEU¹³, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and of acts of the institutions of the European Union.

According to settled case-law, the procedure provided for in Article 267 TFEU is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seized of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court.

Consequently, where questions submitted by national courts concern the interpretation of a provision of European Union law, the Court is, in principle, obliged to give a ruling.

Nevertheless, the Court in exceptional circumstances, can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it.

It is therefore apparent from settled case-law that a reference by a national court can be rejected if, *inter alia*, it is obvious that European Union law cannot be applied, either directly or indirectly, to the circumstances of the case.

In the present case, it should be noted at the outset that the Curtea de Apel Bacău is not asking the Court whether a situation such as that at issue in the main proceedings falls within the scope of Directives 2000/43 and 2000/78, in particular Articles 15 and 17 respectively thereof, to which the questions referred relate.

Article 1 of Directive 2000/78 states that the purpose of the directive is to lay down a general framework, as regards employment and occupation, for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation. The purpose of Directive 2000/43, as is apparent from Article 1 thereof, is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin.

However, it is apparent from the order for reference that the discrimination at issue in the main proceedings is not based on any of the grounds thus listed in those directives, but operates instead on the basis of the socio-professional category, within the meaning of national legislation, to which the persons concerned belong, or their place of work.

¹² Text available at <http://www.dae.gov.ro/admin/files/Raport%20de%20activitate%20DAE%20-%202010.pdf> (27th of January, 2012)

¹³ Text of article 267 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, (Published by Publications Office of the European Union, Luxembourg, 2012).

It follows that a situation such as that at issue in the main proceedings falls outside the general frameworks established by Directives 2000/43 and 2000/78 respectively for combating certain forms of discrimination.

As is apparent from Article 2(1) of those directives in particular, the principle of equal treatment enshrined in the directives applies by reference to the grounds exhaustively listed in Article 1.

It should also be recalled in that connection that Article 13 EC – now Article 19 TFEU¹⁴ – which contains only rules governing the competences of the Community and on the basis of which the directives in question were adopted, does not refer to discrimination on grounds of socio-professional category or place of work, so that neither Article 13 EC nor Article 19 TFEU can even constitute a legal basis for Council measures to combat such discrimination.

It follows from all the foregoing that a situation such as that at issue in the main proceedings falls outside the scope of measures adopted on the basis of Article 13 EC, in particular Directives 2000/43 and 2000/78, so that Articles 15 and 17 respectively of those directives, to which the reference for a preliminary ruling refers, do not relate to such a situation.

However, since the Curtea de Apel Bacău has stated, both in the grounds of the order for reference and in the first question referred, that Legislative Decree No 137/2000 transposes Directives 2000/43 and 2000/78 into national law, it is necessary also to consider whether an interpretation by the Court of Articles 15 and 17 is capable of being justified, as submitted by the Commission, on the ground that those provisions were rendered applicable by domestic law to circumstances such as those at issue in the main proceedings as a result of the reference made by that law to those provisions.

The Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning European Union provisions in situations where the facts of the cases being considered by the national courts were outside the scope of European Union law and therefore fell within the competence of the Member States alone, but where those provisions of European Union law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions.

The Court has stated in particular in that regard that where, in regulating purely internal situations, domestic legislation seeks to adopt the same solutions as those adopted in European Union law in order, for example, to avoid discrimination against foreign nationals or any distortion of competition or to provide for one single procedure in comparable situations, it is clearly in the European Union interest that, in order to forestall future differences of interpretation, provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

As has just been pointed out and is admittedly clear from the order for reference, the purpose of Legislative Decree No 137/2000 is, *inter alia*, to transpose Directives 2000/43 and 2000/78 into national law and Article 27 of the decree, which provides that discrimination prohibited under the decree gives rise to liability on the part of those responsible for it and to the right to obtain compensation on the part of victims of such discrimination, implements Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78. None the less, it does not follow that the interpretation of Article 27 of the decree, in cases in which it is applicable to discrimination which is prohibited under national law alone and falls outside the scope of those directives, should be contingent on the provisions of the directives or, more generally, those of European Union law.

Indeed, it has not in any way been established that, in the present case, it is clearly in the European Union interest that provisions or concepts taken from European Union law should be interpreted uniformly, irrespective of the circumstances in which they are to apply, in such a way as

¹⁴ Text of article 19 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, (Published by Publications Office of the European Union, Luxembourg, 2012).

to confer jurisdiction on the Court to answer the questions referred to it for a preliminary ruling by the national court.

First of all, the order for reference does not contain sufficiently precise information from which it can be inferred that, by making infringements of rules prohibiting discrimination under Directives 2000/43 and 2000/78 and infringements of rules prohibiting discrimination under national law alone subject to one and the same compensation scheme, the national legislature intended, as regards infringements of the national rules, to refer to the content of provisions of European Union law or to adopt the same solutions as those adopted by those provisions.

Next, it should be noted, first, that rules on sanctions such as those which the Member States are required to implement under Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 constitute an adjunct to the substantive rules prohibiting discrimination laid down by those directives, such rules on sanctions being intended to ensure that those substantive rules are effective. However, as pointed out at paragraphs 31 to 36 above, those directives do not contain any rule prohibiting discrimination on the ground of professional category, such as the rule at issue in the main proceedings.

Second, Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78 simply require the Member States to introduce rules on sanctions applicable to infringements of the national provisions adopted pursuant to those directives and state that such sanctions must be effective, proportionate and dissuasive and that they may comprise the payment of compensation. It follows that the various specific measures required to implement the provisions of European Union law concerned can hardly be regarded, where they are intended to apply to situations which fall outside the scope of those provisions, as referring to concepts used in those provisions or as adopting the same solutions as those adopted by those provisions, which it would be necessary to interpret in a uniform manner irrespective of the circumstances in which they are to apply.

In the present case, the questions referred do not in essence seek an interpretation of the substantive content of Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78. They seek rather a determination as to whether the principle of the primacy of European Union law precludes a rule of domestic law having constitutional status, as interpreted by the constitutional court of the Member State concerned, which, in a situation falling outside the scope of those provisions of European Union law, requires the domestic rule which moreover transposes those provisions of European Union law to be disapplied or that rule to be interpreted in a way that would be contrary to those provisions if that situation fell within their scope.

The need to ensure uniform interpretation of the provisions of European Union law may, as pointed out above, justify extending the Court's jurisdiction in matters of interpretation to the content of such provisions, including in situations in which, because a rule of national law refers to such provisions, they are applicable indirectly to a given situation. Such a consideration cannot, however, without disregarding the divisions of powers between the European Union and its Member States, confer on that provision of European Union law primacy over higher-ranking provisions of domestic law which would require that, in such a situation, the rule of national law or any interpretation of it must be disregarded.

It follows from all the foregoing that the questions referred by the Curtea de Apel Bacău, the purpose of which is not to ascertain whether a situation such as that at issue in the main proceedings falls within the scope of Article 15 of Directive 2000/43 or Article 17 of Directive 2000/78, but which are in fact based on the assumption that that is the case in order to seek an interpretation from the Court, even though those provisions of European Union law clearly cannot be applied, either directly or indirectly, to the circumstances of the case, are inadmissible.

On those grounds, the Court (Fourth Chamber) ruled on 7th of July 2012 that the reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) is inadmissible¹⁵.

¹⁵ Decision of the Court available in JO C 234, 28.8.2010

Conclusion

On July 7th 2011 the European Union Court of Justice passed a judgement in the cause **C-310/10, Agafitei and others, declaring inadmissible the preliminary questions formulated in terms of article 267 TFUE Bacău Court of Appeal, Romania.**

The purpose of preliminary questions was the UE Court to determine whether art. 15 of Directive 2000/43 and art. 17 of Directive 2000/78 oppose to a national legislation and to some decisions of the Constitutional Court of Romania to forbid the national courts to grant to some salary discriminated persons depending on social-professional category or the job the salary rights stipulated by law and granted to other social-professional categories that that of such persons, with a view to amend the prejudice caused.

If the answer is positive, it is asked to be determined whether a national court has the obligation to remove the application of such disposal of internal law or constitutional jurisprudence without expecting that such disposal forms the object of a legislative amendment or of a new interpretation provided by the constitutional court able to assure the conformity of it to the Union law.

With respect to the application admissibility, **the Court showed that it may refuse to pass a judgment on a preliminary petition submitted by a national court if it is obvious that, considering the circumstances of the case, the Union law applied directly or indirectly to the situation that forms the object of dispute presented to the national court.**

Thus, the Court considers that, given such discrimination, not grounded on any of the reasons stipulated by the Directives 2000/43 and 2000/78, but on the criterion of social-professional category that includes the interested persons or by their work place, a similar situation to the one discussed on the docket of Romanian court exceeds the application field of the foregoing EU directives.

Simultaneously, the Court considers that, relying on the case data, we do not conclude that the norm of transposing the art. 15 of Directive 2000/43 and art. 17 of Directive 2000/78, when it is applicable with respect to the discriminations forbidden by the national law and which do not belong to the field of application of the two directives, is conditioned by the disposals of the foregoing directives or of the EU law in general. Therefore, the Court considers that it was not proved „*a certain interest to provide uniformity to the interpretation of some disposals or of some notions taken over by EU law, regardless the conditions of application, which authorises the Court to answer to the preliminary questions submitted by the sending court*”.

Within its observations, the Romanian Government, by the governmental agent for the European Union Court of Justice, supported the inadmissibility of the demand of passing a preliminary judgement, formulated by Bacău Court of Appeal.

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