

# FROM THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION TO THE COURT OF JUSTICE OF EUROPEAN UNION – CASE C-81/12

CRISTIAN JURA\*

## Abstract

*The scope of this research is to present and analyze national and European, jurisdictional-administrative procedural issues, if courts are notified related to certain discriminatory statements. The starting point of the research consists in some statements made during a radio show. During the research, the following are analyzed: notification of the National Council for Combating Discrimination (CNCD), decision of the National Council for Combating Discrimination, challenge of the resolution of the National Council for Combating Discrimination at the Court of Appeal Bucharest, notification of the Court of Justice of European Union by the Court of Appeal Bucharest and the beginning of the procedures before the Court of Justice of the European Union. The scientific demarche has as objectives a better understanding of the mechanisms of operation of every institution involved in this process, as well as the chronology of the terms necessary to settle this case.*

**Keywords:** *discrimination related to sexual orientation, evidence task, national procedural norms, national sanctions, National Council for Combating Discrimination.*

## Introduction

On February 13<sup>th</sup> 2010, Mr. GB made several declarations, during the show „*The League of Mitran*” broadcast on the Sport channel Total FM, deemed to be discriminatory based on sexual orientation. The declarations concerned a Bulgarian football player, considered to be gay. B. declared that he did not intend to bring a gay in his team.

On March 9<sup>th</sup> 2010, A. non-governmental association filed a complaint with the National Council for Combating Discrimination (NCCD), registered under the number 1811/09.03.2010 related to the discrimination in the field of labour and dignity right. The complaint was filed, both against GB, and against the football club, as employer.

The petitioner, A., declares that, during an interview related to a possible transfer of the Bulgarian football player, Ivan Ivanov and his potential sexual orientation, GB stated that, instead of buying a football player with another sexual orientation, he would prefer a player from junior team. *"I would not take a homosexual in my team not even if Steaua were dissolved. The rumours are rumours, but to write something like that if it isn't true and to publish it on the first page as well... Maybe it is a lie that he is homosexual. But what if it is true? –I said to an uncle of mine, who did not believe in Devil and in Christ. I told him: «Let's suppose that God does not exist. But what if He existed? What do you have to lose if you commune yourself? Wouldn't be good to go in Heaven?».* And he agreed. *One month before he died, he went to commune himself, to obtain the God's forgiveness. No gay is welcome in my family and Steaua is my family. We would better use a player from junior team than a gay,. In my case, this is not discrimination. I cannot be forced to work with someone. I have the right to work with whom I like, as they have rights as well"* (declaration made during the show “Mitran’s League” from Sport Total FM).

**From the National Council for Combating Discrimination to the Court of Justice of European Union – Case C-81/12**

---

\* State Secretary, Member of the Steering Board of The National Council for Combating Discrimination and Lecturer at “Dimitrie Cantemir” Christian University, member of GLCUE (EU Working Group on Litigation - Grupul de Lucru Contencios al Uniunii Europene); (cristianjura@yahoo.com).

The petitioner states that the journalistic suspicion appropriated by Mr. B. that this football player, included on the list of transfers were homosexual, determined a potential waiving to concluding a work contract with this player: *"I wouldn't take him not even for free"*.

Considering the foregoing declarations, the petitioner claims that Mr. GB is discriminating directly based on the criteria of sexual orientation, breaching the principle of equality in the field of employment and affecting the dignity of the individuals with homosexual orientation from Romania. The sport practiced at S. Club cannot be for *"all"*, definitely not for homosexuals, regardless their skills and professional capacity.

With respect to the introduction in the case of S. Club as plaintiff, the petitioners states that although the declarations were on the first pages of several journals, news websites, Sc Football Club S. did not deny not even form one moment such declarations. On the contrary, the lawyer of the company acknowledged the presence of this policy on the level of the company, in the field of employment at the football team, motivating that *"the team is a family"*, the presence in the team of a homosexual *"would create tension in the team and public"*. Also, the petitioner states that, on the date when Mr. GB made such declarations, he was still shareholder of Bucharest S. Club.

The plaintiffs state that the petitioner is confused since all Mr. B. did by his declarations was to exercise his right to free expression, these not confirming the existence of a constant rule or practice in the field of hiring the football players at S.C Football Club S., based on discriminatory criterion of the sexual orientation of players. Art. 10 of the European Convention for Human Rights guarantees to all the possibility of having and expressing an opinion, although it is in minority or shocking.

It is shown that, as long as, in fact, it was never considered to hire the player I. I. at S. București SA, lacking any kind of negotiation between the player and the club, it cannot be appreciated that the declarations of Mr. B. were meant to breach the principle of non-discrimination stipulated on the level of European Union, these being related to the freedom of opinion, the construction and resistance of which being secured by the European Convention of Human Rights.

Also, the plaintiffs state that the declarations are given in the context of a journalistic demarche (issue noticed as well by petitioner), when the author of the interview approaches the issue of sexual orientation of such player and not the plaintiff, GB.

Simultaneously, it is shown that the declaration of Mr. GB. has to be regarded as well in relation to his deeply religious nature, being known that the Orthodox Church still criticises the homosexual relations, therefore the opinion of the plaintiff should be regarded as his right to exercise the freedom of thought, of consciousness and of religion.

With respect to the demand of the petitioner to introduce S.C. Fotbal S. in the case, it is shown that the burden of proof is incumbent upon the petitioner, and pursuant to analysing the contents of petition, by which it is demanded the introduction of the club in the case, the petitioner did not prove the existence of some constant rules or practices on the level of the club, adopted by its management, which refer to a discriminatory criterion based on sexual orientation.

Corroborated to the normative act which rules the prevention and combating of all forms of discrimination, as well as the duties and the field of activity of the National Council for Combating Discrimination (NCCD), the College of NCCD analyzed to what extent the object of petition is subject to the disposals of O.G. no.137/2000, republished, with subsequent amendments and completions. Thus, the College of NCCD analyses in close connection to what extent the object of a petition meets, in trial court, the elements stipulated by art.2 of O.G. no.137/2000<sup>1</sup>, republished, included in Chapter I Principles and Definitions of Ordinance and, subsequently, the elements of the facts stipulated and sanctioned contravenitionally in Chapter II Special Disposals, Section I-VI of Ordinance. If it is considered the meeting of discriminatory elements, as defined in art. 2, the conduct

---

<sup>1</sup> C. Jura, „National legislation on combating discrimination”, CH Beck Publishing House, Bucharest, 2003, p. 44.

in the case entails the contraventional liability, if the case, if the constitutive elements of contraventional facts stipulated and sanctioned by O.G. no. 137/2000, republished, are met.

The High Court of Cassation and Justice, by Decision no. 828 of February 16th 2009 considered in the economy of Ordinance no. 137/2000 the disposals of art. 2 which define that the discrimination forms (n.n.) are consecutive to those from article 1 par. (3), which determine the subject of the obligation to meet the principle of equality between citizens – secured by art. 1 par. (2) in exercising the constitutional rights of citizens: „*Any legal or national person has the obligation to meet the principles of equality and non-discrimination*”. Pursuant to the corroboration of the same texts (art. 1-2) it results the object of discrimination: the holders of the constitutional rights enumerated mainly in art. 1 par. (2), tied or prevented in their exercise. Therefore, within the limits of its legal duties, the National Council for Combating Discrimination has the obligation to solve any complaint based on the disposals of art. 2 of O.G. no. 137/2000 by determining the existence of the three elements above mentioned.

From this point of view, the College of NCCD considered that the petitioner claims the breach of the rights of a community of individuals based on sexual orientation, related to the work field and personal dignity, correlatively to the disposals of art. 2 par.1 corroborated to art. 5 and art. 7 respectively art.15 of O.G. no. 137/2000 republished. In his opinion, the declarations of the plaintiff (Mr. GB) discriminate directly based on the criteria of sexual orientation breaching the principle of equality in the field of employment, affecting the dignity of individuals with homosexual orientation from Romania. The declarations in the case represent the expression of a discriminatory policy applied on employment at the football team S. Bucharest. The petitioner refers to the case of Bosman solved by the European Court of Justice, considering, by similarity, that the discriminatory policy of the club is presumed, in this case, through the declarations of the plaintiff, who is the manager of S. Club. In the opinion of the petitioner, S.C Football Club S. Bucharest S.A. did not reject such declarations and did not present clear explanations. In addition, the sexual orientation cannot be a specific occupational condition. The plaintiffs are liable, in the opinion of petitioner, for breaching the disposals of art. 15 considering the declarations made whereas the freedom of expression and religion is not meant to explain the prejudice of personal dignity.

The plaintiffs state that, for the existence of the offences ruled by art. 5 and art. 7 of O.G. no. 137/2000<sup>2</sup> republished, it is necessary to be met the constitutive elements which involve an action of effective conditioning of effective refusal based on sexual orientation. Similarly, the offence stipulated by art. 15 involves the material element, in the case the action with a chauvinistic nationalist propaganda character, the action with character of instigation to hate, actions having as scope or concerning the prejudice of dignity or creation of an intimidation, degrading, humiliating and insulting atmosphere. As for the burden of proof, in case of direct discrimination, it considers necessary to prove the existence of a rule or constant practice which refers to a criterion based on sexual orientation. Therefore, the declarations of the plaintiff stand for a simple exercising of the right to expression, in the context of a journalistic demarche when it was the author who approached the issue of sexual orientation and not the plaintiff. Between S. Club and the player referred to in the complaint, it was never discussed a potential employment, not being any kind of negotiation between the player and the club or any kind of practice appropriated by the management of the club related to the criterion of sexual orientation. The declarations of Mr. GB have to be regarded in relation with his deep religious nature, being known that Orthodox Church is still criticising the homosexual relations therefore they are correlative to exercising the right of free thinking, consciousness and religion.

In the analysis of this species, the College of the National Council for Combating Discrimination recorded the disposals of the Directive of European Union Council 2000/78/EC of

---

<sup>2</sup> C. Jura, „*National legislation on combating discrimination*”, CH Beck Publishing House, Bucharest, 2003, p. 44.

creating a general frame in favour of equal treatment related to the employment and recruitment of workforce. According to Art. 3 par.1, the Directive 2000/78/EC is applied to all individuals, both from the public and private sector, including the public bodies, with respect to: a) conditions of access to employment, to non-remunerated activities or to work, including the criteria of selection and the recruitment conditions, regardless the field of activity and on all levels of professional hierarchy, including in the field of promotion; b) access to all types and all levels of professional orientation and training, of perfection and changing the professional orientation, including the accumulation of a practical experience; c) conditions of employment and work, including the conditions of dismissal and waging; affiliation to and employment within an organization of workers or employers, or any organisation with members exercising o certain profession including the advantages obtained by this kind of organization.

According to Art.1 the scope of Directive 2000/78/CE consists in ruling the general frame for combating discrimination based on the criterion of religion or convictions, disability, age or sexual orientation in what concerns the field of work and recruitment, with a view to implement the principle of equal treatment in the member states of European Union. In conformity to art. 2 of the Directive 2000/78/CE the „*equality principle*” represents the absence of any direct or indirect discrimination based on one of the reasons stipulated by art. 1. According to par.2 lett. a of Art. 2: *”According to par. (1): a direct discrimination appears when an individual is treated less favourably than another individual is, was or will be treated in a similar situation, based on one of the reasons mentioned in art. 1.”*(n.n. religion or convictions, handicap, age, sexual orientation). According to art. 2 par. (3) of Directive *„Harassment is considered a form of discrimination, based on paragraph (1), when it is manifested an undesired conduct related to one of the reasons stipulated by article 1, which has as scope or effect the prejudice of the dignity of an individual and creation of an environment of intimidation, hostile, degrading, humiliating or offending. In this context, the notion of harassment may be defined according to the national legislations and practices of the member states”*.

The Romanian Labour Code<sup>3</sup> included as fundamental principle of work relations the principle of equal treatment of all employees and employers, forbidding any kind of direct or indirect discrimination (Art.5 of Labour Code). The disposals with principle value of Labour Code are approached in detail in the Government Ordinance no. 137/2000 related to the prevention and sanction of all forms of discrimination, republished, which provides, mainly, the transposing in the national law of the disposals of Directive 2000/78/EC and of Directive 2000/43/EC. According to art. 1 par.2 lett. i of O.G. no. 137/2000: *„The principles of equality of citizens, of exclusion of privileges and of discrimination are secured mainly in exercising the following rights: (i) right to work, to free selection of occupation, to fair and satisfactory work conditions, to protection against unemployment, to an equal wage for equal work, to a fair and satisfying remuneration,„* According to par.4 of art. 1: *„Any natural or legal person has the obligation to observe the principles stipulated by par. (2)”. Also, „the disposals of the ... ordinance are applied to all natural or legal, public or private persons, as well as to the public institutions with responsibilities related to: a) employment conditions, criteria and conditions of recruitment, selection and promotion, access to all forms and levels of orientation, professional training and perfecting”* (art. 3 of O.G. no. 137/2000 republished).

According to art. 2 par.1 of O.G. no. 137/2000 republished: *„by discrimination is understood any difference, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, age, handicap, non-contagious chronic disease, infection with HIV, belonging to a disfavoured category, as well as any other criteria which has as scope or effect the restriction, removal of acknowledgement, use or exercising, under equality conditions, of human rights and fundamental liberties or of the rights acknowledged by law, in the*

---

<sup>3</sup> C. Jura, „National legislation on combating discrimination”, CH Beck Publishing House, Bucharest, 2003, p . 57.

political, economic, social and cultural field or in any other fields of public life". According to art. 2 par.5 of O.G. no. 137/2000, republished: „It is a harassment act and it is punished contraveniently any conduct based on criterion of race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, belonging to a disfavoured category, age, handicap, status of refugee or asylee or any other criterion which leads to the creation of an intimidating, hostile, degrading and offensive environment". It is also necessary to state that the Ordinance no. 137 institutes a special chapter including, in section I, the interdiction of discrimination in the economic activity and in the field of employment and profession.

Considering the contradictory assertions of parties and the object of complaint, as formulated, the College considers that it is necessary to determine whether this case is to be analysed as incident to a potential specific work report under the aspect of subjects correlative to such report and legal consequences resulted or to the incidence of a potential unwanted conduct which leads to the creation of an intimidating, hostile, degrading or offending environment based on a forbidden criterion (n.n. sexual orientation) stipulated by the law in the field of discrimination.

The College of NCCD considered that the petitioner submitted only writs, excerpts of the articles published in the sport press as well as audio-video registrations of the declarations of plaintiff during some sport shows, not contested by the plaintiffs. Analysing the writs and registrations in the case, the College takes into account the declarations of the plaintiff as being made as a reaction to certain information from Bulgarian press and taken over by Romanian press related to a Bulgarian football player, Mr. I.I. Considering this issue, it is considered that the sport press reported that the "Rumour according to which the Bulgarian full-back I. I. , that S. wanted to transfer, is drunkard, brawler and even homosexual, intrigued the manager GB" (published in Adevărul on www.adevarul.ro). Similarly, "The Bulgarian journalists confessed in the Romanian press that the football player wanted by S. Club, I. I., would be homosexual". (published in Adevărul on www.adevarul.ro). Also, "After Gazeta Sporturilor revealed in the today's edition that the Bulgarian I. I., wanted by S. Club, has a drunkard and gay reputation, the manager of red-blue team, GB, had a tough reaction" (published by Gazeta Sporturilor on www.gsp.ro). In the interview offered to Sport Total FM, the plaintiff states: "The rumours are rumours, but to write something like this if not true and to publish it on the first page....It may be a lie that he is homosexual".

In the interview offered to Sport Total FM on 13.02.2010, the plaintiff declared: "I will not take a homosexual in the team not even if S. Club is dissolved. The rumours are rumours, but to write something like this if not true and to publish it on the first page... It may be a lie that he is homosexual. But what if it is true? I said to an uncle of mine, who did not believe in Devil and in Christ. I told him: «Let's suppose that God does not exist. But what if He existed? What do you have to lose if you commune yourself? Wouldn't be good to go in Heaven?». And he agreed. One month before he died, he went to commune himself, to obtain the God's forgiveness. No gay is welcome in my family and Steaua is my family. We would better use a player from junior team than a gay,. In my case, this is not discrimination. I cannot be forced to work with someone. I have the right to work with whom I like, as they have rights as well", declared GB, in the show "Mitran's League". Also, in the interview offered to GSP TV on 13.02.2010, he declared: "If they wrote on the first page that he is gay? However, if he isn't gay and God tells me 100% tonight ... it is 100% that he isn't ... if they wrote this on the first page...I was called was well by Sport Total FM ...that he is gay... bye-bye...I will not take him not even for free...I know that he is a very good player but I am not interested not even S. Club is dissolved..."

Therefore, it is obvious that in the context of a journalistic context related to the Bulgarian football player I. I. about whom the press and media wrote, including about his potential sexual orientation, the plaintiff expressed its position providing an opinion about such player. It appears thus the legitimate questions, whether the expression of such position may be correlated to the quality of employer related to the policy of the company it is representing in terms of the potential work reports that the football players may enter as workers. Subsequently, it is asked the question whether such

declarations are enough to presume the existence of a discriminatory employment policy based on the criteria of sexual orientation which would involve the obligation to prove that the employment practice does not correspond to such declarations.

By analyzing such issues, the College refers to the jurisprudence of the European Court of Justice. In the case C-415/93 claimed by the petitioner, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal Club Liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman, the national court turned to the Court of Justice, among others, with respect to the interpretation of compatibility of the Treaty of transfer rules that were inducing a discrimination based on the nationality criterion. As it results from the judgment passed by the European Court of Justice on December 15th 1995, in the case Bossman, several national football associations adopted rules that restricted the possibility to recruit or align in competition players of foreign nationality. On a certain moment, UEFA undertook to suspend the restrictions of the number of contracts concluded by every club with the players from other member states and, on the other hand, to establish on two the number of such players who may participate to every game. In 1991, UEFA adopted the rule called "3+2", providing the national associations the possibility to restrict to three the number of foreign players that a club may align in a first division game of national championships, plus two players who played, continuously for 5 years, in the country of such national association, out of which 3 years as juniors. This restriction is applied as well to the games from the competitions for club teams organized by UEFA. (See the Judgment dated December 15th 1995 in the case C-415/93, parag. 25-27) With respect to the rules determined by sport associations of football, the Court ordered that "considering the objectives of Community, exercising sports concerns the communitarian law to the extent that it represents an economic activity" according to art.2 of the Treaty (see the Judgment dated December 12th 1974, Waleave c. Union Cycliste Internationale, 36/74, Rec.p.1405, pct.5) "*This is the case of professional or semi-professional football players, as long as they exercise a remunerated activity or render remunerated services*" (see Judgment July 14th 1976, Dona c. Mantero, 13/76, Rec.p.1333, pct.12). The application of Art. 48 of Treaty is not excluded by the fact that the rules related to transfers dominate rather the economic relations between clubs than the labour relations between clubs and players. Indeed, the circumstance that the employing clubs have the obligation to pay allowances when recruiting a player from another club affect the possibilities of players to encounter a job, as well as the conditions of offering such job.(see Judgement dated December 15th 1995, Bossman, C-415/93, parag.72 and 74) the European Court of Justice stated with respect to the nationality clauses that these may not be deemed in conformity to art. 48 of the Treaty, subject to the punishment of depriving such disposal of its useful effect and of not depriving the particulars from the fundamental right to access freely a job offered by the Community. (see Judgement dated December 15th 1995, Bossman, C-415/93, parag.128)

On the other hand, in the case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v. Feryin NV company, the national court turned to the Court of Justice to determine whether the public declaration of an employer represents direct discrimination after placing an ostensible job. Essentially, it referred to the public declarations of the manager of an enterprise, according to which, his enterprise was to recruit plumbers, but they wouldn't hire „allochthonous", due to the reticence of clients of allowing the access during the works in their private dwelling. In the Judgment dated 10.07.2008, the Court of Justice considered that "*the public declarations of employer about not having the intention to hire employees with a certain ethnic or race origin are meant to discourage seriously certain candidates to apply, being thus meant to prevent their access on the labour market and representing thus an employment discrimination*" (see the judgment dated 10.07.2008, parag. 25, device pct.1). On the other hand, on the question if such declaration is enough to presume a discriminatory policy, the answer of the Court was positive. The Court considered that in article 8 of Directive 2000/43 is stated that the defendant has the obligation to prove that the principle of equal treatment was not breached when certain facts allow to be

presumed the existence of a direct or indirect discrimination. The obligation to prove the contrary, incumbent thus upon the presumed author of a discrimination, does not depend but on finding a discrimination presumption, as long as it grounds of demonstrated facts. Such facts may be the public declarations by which an employer informs publicly that he does not intend to hire employees of a certain ethnic or race origin (see also judgment dated 10.07.2008, parag. 30, 31 device pct.2).

From the perspective of communitarian law, it is obvious that protection against discrimination based on the criteria of sexual orientation includes the sphere of work reports. The exercising of sports, mainly, in case of professional football players who are performing a remunerated activity or rendering remunerated services, concerns communitarian law, as long as it is an economic activity. In other words, the protection against discrimination covers this sphere of activity as well. However, Directive 2000/78/EC rules the general frame in favour of equality of treatment, with respect to employment and recruitment of work force, being transposed in the national legislation by O.G. no. 137/2000 concerning the prevention and sanction of all forms of discrimination republished.

Directive 2000/78/EC of Article 4 refers to the occupational conditions and rules that: *"Without breaching art. 2 par. (1) and (2), the member states may determine that a differentiated treatment based on a legal characteristic by one of the reasons indicated in art. 1 does not represent a discrimination when, considering the nature of a professional activity or the conditions to exercise it, such characteristic represents an essential and significant professional condition, so as the objective is legitimate, and the condition proportional. (2) The member states may maintain in their national legislation in force n the date of adopting such directive or may include in a future legislation (resuming the national practices existent on the date of adoption of this directive) disposals based on which, considering the professional activities of churches and other public or private organizations having a professional ethic based on religion or convictions, a differentiate treatment based on the religion or the convictions of an individual does not represent a discrimination when, based on the nature of such activities or in the context in which they are exercised, the religion or convictions represent an essential, legitimate and grounded professional condition concerning the ethics of organization"*. This differentiate treatment has to be exercised by observing the constitutional disposals and principles of the member states as well as the general principles of communitarian law, and no discrimination based on another reason will be rightful. (3) Provided that the disposals are met in the other situations, this directive is the one which, without breaching the right of churches and of other public or private organizations having an ethic based on religion or convictions, acting in conformity to the national constitutional and legislative disposals, demands the staff working for them a good faith and loyal attitude towards the ethics of organization.

O.G. no. 137/2000, as amended by Law no. 324/2006, transposed the disposals of the two European Directives. From this point of view, the Ordinance stipulates in art. 9 that the disposals related to contravention in the field of employment and profession (art. 5-art. 8) *„cannot be construed in the sense of restricting the right of employer to refuse to hire an individual who does not correspond to the occupational conditions in such field, as long as the refusal does not represent an act of discrimination in terms of this ordinance and these measures are objectively explained by a legitimate scope whereas the methods of reaching such purpose are relevant and necessary"*. Also, according to art. 11 par.5 of O.G. no. 137/2000 republished, the disposals related to the interdiction of discrimination in the access to education *„cannot be construed in the sense of restricting the right of the unit or institution to education for the training of the religion staff to refuse the enrolment of an individual with a confessional status which does not correspond to the conditions determined for the access in such institution"*.

What concerns related to the case submitted for settlement is whether its object determines the materialisation of an actual or effective legal work report both in terms of subjects and consequences generated by such report. The College of NCCD took notice, based on the writs attached to the file by the petitioner and issued by the Trade Register Office that the Football Club S. Bucharest SA, by

the deed submitted under no. 48138 of 08.02.2010 registered with the Trade Register on 23.02.2010, based on the resolution no. 21980, operated some modifications with respect to the associates/shareholders, namely, Mr. GB withdrew from the company, his shares being assigned to a third shareholder. From this point of view, the College considers that, in the opinion of petitioner, the plaintiff was shareholder on the date of declarations, introducing himself as manager of the Club including after the date of sale of shares. On the other hand, on the hearing terms, the plaintiffs stated that Mr. GB is not manager, since such position does not exist in the company.

Beyond the contradictory assertions of parties, by referring to the jurisprudence of the European Court of Justice and the case submitted for settlement, the College considers a range of issues. For instance, in the case Feryn C-54/07 the active subject of declarations holds a specific capacity, being not only representative but also manager of the enterprise which brings into discussion an exercise of authority considering the role of such subject as employer. In the case Bossman C-414/93, the issue submitted to analysis is represented by an express rule existent on the level of football associations by which it is imposed a clause formulated sine qua non based on a nationality criterion. In the case Feryn, the Court considered that the declarations of the employer discourage the candidates to apply for the job, preventing their access on the labour market.

The College of NCCD considered that this case will be analysed beyond the sphere of application of a potential work report. The College considers that the declaration of the plaintiff couldn't be assimilated as coming from an employer/legal representative of employer or an individual in charge with employment although on the date of declaration he is manager of the Football Club S. Bucharest S.A. As for the consequences caused by the declaration in the case, unlike the case Feryn, this does not have the same reverberation over some potential candidates, since the recruitment process is not performed based on a public tender or direct negotiation, pursuant to a process of selection involving to apply for a job and presetting pursuant to analysis of it. As shown as well by the European Court of Justice, in case of professional football players, the recruitment process is atypical, since the possibilities of players to encounter a job and the tender conditions are correlative to some negotiations between the clubs and not to some negotiations between the player and the club. Similarly, considering the case Bossman, the burden of proof was assigned to the plaintiffs (defendants) with a view to provide objective explanations since the merits approached relied on demonstrated facts, in the case, the existence of some rules formulated sine qua non based on nationality. In this case submitted to settlement, it is discussed, essentially, the reaction of the plaintiff to the demarches of journalists related, among others, to the potential sexual orientation of a football player. Or, the potential material element of contravention stipulated by art. 5 (conditioning) or art. 7 (refusal) of O.G. no. 137/2000 is not circumstantiated in practice not materialised, it does not produce consequences over a community of individuals, as much as, if it had materialised, it would have concerned, indubitably, the particular situation of the player I. I. Or, if considered the object of complaint related to such fact, it would have been discussed the active legal standing of the petitioner, as long as it did not exist a petition of the individual deemed himself discriminated during the negotiation. On the other hand, as long as the subject of sexual orientation is indissolubly related to an issue of private life, it may appear the question whether a "*probatio diabolica*" had been assigned to the plaintiffs which would render impossible the burden of proof in demonstrating that employment does not interfere with the sexual orientation. On the other hand, however, the Football Club S. Bucharest S.A. declared that it did not initiate any negotiation procedure for recruitment therefore the employment was not discussed for any moment, related to the player I. I., which excludes the existence of some potential conditionings or of a potential discriminatory refusal.

The College of NCCD takes into account that according to art. 2 par. (3) of Directive 2000/78/CE „*Harassment is deemed a form of discrimination, when it is manifested an improper conduct related to some of the reasons stipulated in article 1 (n.n. religion or convictions, disability, age or sexual orientation) having as scope or effect the injury of dignity of an individual and the*



creation of an intimidation, hostile, degrading, humiliating or offending environment. In this context, the notion of harassment may be defined in conformity to the national legislations and practices of member". According to art. 2 par.5 of O.G. no. 137/2000 republished, which transposes Art. 2 par.3 of Directive 2000/78/EC „It is an act of harassment and it is punished contravenitionally any conduct based on criterion of race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, belonging to a disfavoured category, age, handicap, status of refugee or asylee or any other criterion which leads to the creation of an intimidating, hostile, degrading or offensive environment".

In the field of non-discrimination legislation, as it is transposed the *acquis communautaire*, in order to be in a situation of harassment, it is necessary to meet cumulatively the constitutive elements thereof. Therefore, the harassment act is circumstantiated in a conduct which may have different forms. The text includes the syntagm of „any conduct". The syntagm „any conduct" denotes the intention of legislator to include a wide range of conducts and not a restrictive one which allows to consider some different qualifications in practice and which may vary from case to case, circumscribed under the form of some assertions expressed in words, gestures, acts, or facts, actions etc. The reason or cause of conduct is determined by an inherent criterion, expressly stipulated by legislator, in a non-exhaustive list, considering that the law text presents in a determined enumeration the criterion of “race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, belonging to a disfavoured category, age, handicap, status of refugee or asylee". The non-exhaustive character is provided by the syntagm itself “or any other criterion" attached to the criteria expressly enumerated in art. 2 par.5. The syntagm “or any other criterion", practically provides the possibility of withholding any other element not stated by law, but which it is materialized as determining fact in committing the form of discrimination called harassment.

The manifestation of conduct based on any of the criteria stipulated by law “leads to the creation of an intimidating, hostile, degrading or offensive environment". This constitutive element of harassment allows considering those conducts which, although not committed on purpose, produce the effect of performance of a definite environment as „intimidating, hostile, degrading or offensive". This issue is much obvious as the Directive of Council 2000/43/EC related to the application of the principle of equal treatment of individuals, regardless their race or ethnic origin, defines harassment in art. 2 par.3 as „an unwanted conduct based on ethnicity or race which has as scope or effect the violation of the dignity of an individual and the creation of an intimidating, hostile, degrading or offensive environment".

Including harassment as form of discrimination in the *acquis communautaire* and the transposition of it in the national legislation is extremely important. The discrimination does not manifest per se, but only as normative disposals or practices, as well as under the form of conducts which create an impact on the environment in general, ranging from physical violence and racist, sexist, xenophobe etc. remarks or assertions to general ostracism. This discrimination form affects psychically and emotionally the dignity of some individuals belonging to a minority or other<sup>4</sup>.

The College of NCCD considered that, in the opinion of the plaintiff, his declarations have to be regarded related to his deep religious nature, as an act of exercising the freedom of thought, of consciousness and religion. From this point of view, the College notices that, indeed, the assertions assigned to him are placed within a context associated with the faith in God. During both the interview offered to Sport Total FM and to the channel GSP TV the declarations are rightful, to a great extent, based on reference to divinity and the importance of human-God relation. (“I told him: «Let's pretend God does not exist. But what if it existed? What do you have to lose if you commune yourself? Wouldn't be better to go in Heaven?». And he agreed. One month before he died he had

---

<sup>4</sup> See “A comparison between the EU Racial Equality Directive and the Starting Line” in I. Chopin and J. Niessen, “The Starting line and the Incorporation of the Racial Equality Directive into National Laws of the EU Member States and Accession States”, 2001, pp.26- 27.

*gone to commune himself, God forgive him. No gay is welcome in my family and Steaua is my family...”; “And, although he is not gay and God tells me 100% this at night ... 100% he is not ... if this is written on the first page...and at Sport Total FM called me to say that ...he is gay... bye-bye...I will no longer take him not even for free...I know that he is a very good player but he no longer interests me...”*)

In its jurisprudence<sup>5</sup>, the College of NCCD took into account that, within the regional institutional system of protection of human rights, the European Convention of Human Rights ratified by Romania based on Law no. 30 of May 18th 1994, stipulates in Art.10 that: “*Every individual is entitled to freedom of expression. This right includes the freedom of opinion and the freedom of receiving or supplying information or ideas without the interference of public authority...*” however it determines expressly the limits of such right in paragraph 2 of the same article: “*exercising such liberties, (n.n. freedom of expression, of opinion and freedom of receiving or supplying information or ideas including duties and responsibilities), may be submitted to some formalities, conditions, restrictions or sanctions stipulated by law, which represent necessary measures in a democratic society, for ... protection of reputation or rights of others*”. On the other hand, article 9 of European Convention stipulates that: “*Any individual has the right to freedom of thought, consciousness and religion; this right includes the liberty to change religion or conviction, as well as the liberty to manifest religion or conviction individually or collectively, in public or in particular, by religion, education, practices and accomplishment of rites. The liberty of manifesting religion or convictions cannot be subject to other restrictions than those which, stipulated by law, represent necessary measures, within a democratic society, for public safety, protection of order, health or public moral or for the protection of the rights and liberties of others*”.

It has to be stated, first of all, that art. 10 of Convention secures as form of the liberty of expression the liberty of opinion, which is related, on its turn, by the liberty of thought, of consciousness and of religion, protected by art. 9. Any individual is entitled to form its own conceptions concerning social life, environment in general, as it may have a certain religious faith, to belong to a religion which it may practice. In other words, any individual is entitled to formulate an opinion on the phenomena among which he lives and which he analyses through the filter of its own thought<sup>6</sup>.

Article 9 of Convention acknowledges to every individual the freedom of thought, religion and consciousness on the one hand, as well as the liberty to express convictions or religion on the other hand. We are in the presence of two components of the same right each having its own legal regime, natural consequence of the circumstance that such liberties have both internal character related to internal experiences of every individual and an external character represented by the external manifestations expressed as such or related to other similar rights and liberties secured by Convention<sup>7</sup>.

On the other hand, the right to the freedom of expression is secured by Romanian Constitution<sup>8</sup> which stipulates in art. 30 par. (1) and (6) that “*(1)The freedom of expressing thoughts, opinions or faiths and the liberty of the creations of any kind, orally, in writing, by images, by sounds or by other means of communication in public, are inviolable*“. However, the liberty of expression, in terms of par.1 of art. 30 has to be corroborated to par.2 of art. 30 which stipulates expressly that “*(2) The freedom of expression cannot prejudice dignity, honour, particular life of an individual or the right to its own image*”.

<sup>5</sup> C. Jura, “*Jurisprudence of National Council for Combating Discrimination*”, CH Beck Publishing House, Bucharest, 2003.

<sup>6</sup> Corneliu Bârsan, “*European Convention of Human Rights*”, Vol.I, rights and obligation, C.H. Beck Publishing House, Bucharest 2005, p.738.

<sup>7</sup> Corneliu Bârsan, *op.cit.*, 2005, p. 738.

<sup>8</sup> C. Jura, “*Jurisprudence of National Council for Combating Discrimination*”, *op.cit.*, 2003, p. 1.

Considering the declarations of the plaintiff, the College noticed that, in its opinion, the explanation of the fact that he does not work with certain individuals, in this case „*homosexuals*” is related to a personal element „*In my family no Gay is welcome and Steaua is my family*” respectively a purely subjective element „*no one can force me to work with someone. I have the right as well to work with whom I like*”.

Based on these assumptions, it has to be stated that the legislation of European Union interdicts discrimination based on the criteria of sexual orientation in the field of work relations, and such disposals are applicable to all individuals both in the public and private sector. The member states of European Union transposed the European directives in this field, the Ordinance no. 137/2000 ruling the prevention and punishment of all forms of discrimination including in the work relations. Directive 2000/78/EC stipulates that a differentiated treatment based on sexual orientation does not represent a discrimination when, considering the nature of a professional activity or the conditions to exercise it, such characteristic represents an essential and determining condition. On the other hand, it stipulates that for the professional activities of churches and other public or private organizations with a professional ethic based on religion and convictions, a differentiated treatment based on religion or convictions of an individual does not represent a discrimination when, by the nature of such activities or the context where they are exercised, the religion or convictions represent an essential, legitimate or rightful professional condition related to the ethics of organization. The Ordinance no. 137/2000 stipulates in art. 9 that the disposals related to contraventions in the field of employment and profession „*cannot be construed in the sense of restricting the right of employer to refuse to hire an individual who does not meet the occupational conditions in such field, as long as the refusal does not represent an act of discrimination based on this ordinance and such measures are explained objectively by a legitimate purpose and the methods of reaching such scope are relevant and necessary*”.

Or, although if accredited the idea that a football club represents a certain family, in the wide sense, of sharing and promoting certain values, traditions or faiths which would entail a certain organizational ethic, the employment of a professional football player is determined sine qua non by the meeting of some conditions related to performance and not by an indissoluble element related to the right to intimate, familial and private life. The act of inducing the idea that the simple supposition related to the sexual orientation of an individual determines ab initio the rejection of it within a potential economic relation, denotes obviously the arbitrary. The assertions of the plaintiff are in this respect the following: „*Not even if Steaua is dissolved I shall bring a homosexual in the team... No one may force me to work with someone. I have the right to work with whom I like, as they have rights too*”.

In the context when the only exceptions allowed on a potential difference of treatment are given by the specific nature of a professional activity or the conditions of exercising this professional activity and the refusal of working with an individual is determined by a potential inconformity in terms of occupational conditions, the College considers that the assertions of the plaintiff represent a conduct placed in close connection with sexual orientation and, by their nature, they entail a hostile, intimidating and offensive environment affecting particularly the community of individuals, in this case, the individuals with a sexual orientation different from heterosexual. From this point of view, the College considers that the assertions of the plaintiff, based on the effect created, were meant to breach the dignity right of homosexual individuals according to the disposals of art. 2 par.5 of O.G. no. 137/2000 republished.

Finding that such assertions meet the elements of a discrimination form, according to O.G. no.137/2000 republished, stipulated by art. 2 par.5, the College considers that they meet subsequently as well the elements of the fact stipulated by Art. 15 of O.G. no. 137/2000 republished. In the opinion of College of NCCD the discrimination form from communitarian law defined by the European legislator as harassment was transposed in the non-discrimination legislation in Art. 2 par.5 and it

was ruled in the special part of law, in 5th Section, Art. 15 by which it is provided in terminis the protection of the right to personal dignity.

In this respect, according to art. 15 of O.G. no. 137/2000 republished: *„It is a contravention, based on this ordinance, an act subject to criminal law, any conduct manifested in public, with a nationalist - chauvinist propaganda character, of instigation to racial or national hate, or such conduct which has as scope or concerns the prejudice of dignity or the creation of an intimidation, hostile, degrading, humiliating or offending atmosphere, directed against an individual, group of individuals, or community and related to them belonging to a certain race, nationality, ethnicity, religion, social category or other disfavoured category or to its convictions, sex or sexual orientation”*.

The College of NCCD considered that art.15 interdicts a wide range of conducts committed in public and with a material object circumstantiated in different hypostases. The wide margin of appreciation of conducts is given by the syntagm used by legislator *”any conduct”* which induces the idea that it may manifest by words, gestures, actions etc. This manifestations are performed in public and are concretized in a conduct with a nationalist - chauvinist propaganda character, in a conduct of instigation to racial or national hate, or such conduct which has as scope or concerns the prejudice of dignity or the creation of a determining atmosphere (degrading, humiliating etc.) related to belonging to an interdicted criterion stipulated by legislator. Therefore, the material element of contravention stipulated by art. 15 may be concretized in different hypostases, not only as a propaganda-like conduct or conduct of instigation to hate but also a conduct that has as scope or concerns the prejudice of dignity or the creation of a humiliating atmosphere for a group or community of individuals based on an interdicted criterion.

Or, from this point of view, it is obvious that the assertions of the plaintiff represent a conduct stipulated by art. 15. The assertions were made in public and were consequently spread in the public space, both based on the fact that the assertions were made through mass media, radio and television channels and by subsequent broadcast and reporting of these by mass-media (written press, television, news channels etc.)

In the opinion of the College of NCCD, such assertions are not included in the plan of a potential propaganda conduct or conduct of instigation to hate, however, by their nature, it is obvious that it is constituted in the material elements ruled by legislator, in this case, a conduct related to the creation of an atmosphere at least humiliating or offending for a community of individuals. Pursuant to the analysis of the assertions, it is clear enough that they referred to sexual orientation, this issue not being contested, but in terms of resorting to the exercise of freedom of expression. Or, in the context of exercising the constitutional rights, the freedom of expression, in terms of par.1 of art. 30 of Constitution has to be corroborated to par.2 of art. 30 which stipulates expressly that *„(2) The freedom of expression cannot prejudice the dignity, honour, particular life of an individual or the right to its own image.”* Similarly, article 1 of O.G: no. 137/2000 republished orders that: *„In Romania, rule of law, democratic and social state, the human dignity, the rights and liberties of citizens, the free development of human personality represent supreme values secured by law”*.

The Directing College of NCCD decided that the issues notified are under the incidence of a potential work report based on Art. 2 par.1 corroborated to Art. 5 and Art. 7 of O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished; that the issues notified are under the incidence of the disposals of art. 2 par.5 and art. 15 of O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished; and to sanction the plaintiff GB with a warning, based on art.2 par.11 and art. 26 par.1 of Governmental Ordinance no.137/2000 on the prevention and punishment of all forms of discrimination, republished.

The non-governmental association A. criticised, by an application in interpretation, the Resolution 276/October 13th 2010 of the National Council for Combating Discrimination at the Court of Appeal Bucharest and demanded the annulment of the administrative deeds, namely the Resolution 276/ October 13th 2010 of the National Council for Combating Discrimination. The

demand of A. non-governmental association was registered on December 21st 2010 at the Court of Appeal Bucharest.

On October 12th 2011 the Court of Appeal Bucharest ordered the notification of the Court of Justice with the preliminary questions drafted and ordered the suspension of the case until the settlement of the procedure.

Questions referred to the Court of Justice are:

1. Do the provisions of Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation apply when a shareholder of a football club who presents himself as, and is considered in the mass media as, the principal director (or 'manager') of that football club makes a statement to the mass media in the following terms:

"Not even if I had to close Steaua down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that if it's not true and, what's more, put it on the front page... Perhaps he's not a homosexual [X, a Bulgarian footballer] ... But what if he is? ... I said to an uncle of mine who didn't believe in Satan or in Christ. I said to him: "Let's say God doesn't exist. But suppose he does? What do you lose by taking communion? Wouldn't it be good to go to Heaven?" He said I was right. A month before he died he took communion. May God forgive him. There's no room for gays in my family, and S. Club is my family. It would be better to play with a junior rather than someone who was gay. That's not discrimination. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose.

Not even if I had to close S. Club down would I accept a homosexual on the team. ... Perhaps he's not a homosexual, but what if he is? There's no room for gays in my family, and S. Club is my family. Rather than having a homosexual on the team, it would be better to play a junior. That's not discrimination. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn't a homosexual I still wouldn't take him! Too much has been written in the papers about his being a homosexual. Even if TSKA Club gave him to me for free I wouldn't have him! He could be the biggest troublemaker, the biggest drunk ... but if he's a homosexual I don't want to know about him?"

2. To what extent may the abovementioned statements be regarded as 'facts from which it may be presumed that there has been direct or indirect discrimination' within the meaning of Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as regards the defendant S.C. Football Club S. Bucharest S.A.?

3. To what extent would there be *probatio diabolica* if the burden of proof referred to in Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation were to be reversed in this case and the defendant S.C. Football Club S. Bucharest S.A. were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?

4. Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down in Article 13(1) of Government Decree No 2/2001 on the legal regime for sanctions, conflict with Article 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?

## Conclusion

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)<sup>9</sup> and on Information Note on References from National Courts for a Preliminary Ruling (2009/C 297/01)<sup>10</sup>.

Under the preliminary ruling procedure, the Court's<sup>11</sup> 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<sup>12</sup>, 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.

The Hearings in the Case C-81/12 at the Court of Justice of the European Union took place on January 23rd 2013. All the parties involved in this case are waiting for the answers of the Court of Justice of the European Union.

## References

- Consolidated Treaties, Charter of Fundamental Rights, Published by Publications Office of the European Union, Luxembourg, 2012.
- Corneliu Bârsan “*European Convention of Human Rights*”, Vol. 1 & 2, Rights and obligations, C.H. Beck Publishing House, Bucharest, 2005.
- I.Chopin and J.Niessen, “*A comparison between the EU Racial Equality Directive and the Starting Line in The Starting line and the Incorporation of the Racial Equality Directive into National Laws of the EU Member States and Accession States*”, 2001.
- C. Jura, „*Combating discrimination in Romania*”, CH Beck Publishing House, Bucharest, 2004
- C. Jura, „*Jurisprudence of National Council for Combating Discrimination*”, CH Beck Publishing House, Bucharest, 2003.
- C. Jura, „*National legislation on combating discrimination*”, CH Beck Publishing House, Bucharest, 2003.
- <http://curia.europa.eu>
- <http://eur-lex.europa.eu>

---

<sup>9</sup> Text available in OJ C177/1 from 02.07.2010.

<sup>10</sup> Text available in OJ C297/1 from 05.12.2009.

<sup>11</sup> See also <http://curia.europa.eu/> (27<sup>th</sup> of January, 2012).

<sup>12</sup> Text of article 267 TFEU available in: Consolidated Treaties. Charter of Fundamental Rights, Published by Publications Office of the European Union, Luxembourg, 2012.