

**NATIONAL COUNCIL FOR COMBATING DISCRIMINATION –
COURT OF JUSTICE OF EUROPEAN UNION – BUCHAREST COURT
OF APPEAL. CAUSE C-81/12**

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Abstract

The scope of this investigation consists in closing the jurisdictional circle initiated in 2010 and analysing the national and European procedural, jurisdictional-administrative issues, in case of notifying some institutions related to certain discriminatory assertions. The investigation relies on assertions made during a radio show.

On 12 October 2011 the Bucharest Court of Appeal ruled the notification of the Court of Justice of European Union related to preliminary questions formulated and ordered the suspension of the case until the settlement of the procedure.

In 2013, the Bucharest Court of Appeal, although initially accepting the preliminary application of ACCEPT, submitting the case to the Court of Justice of European Union in order to determine the manner of interpretation of communitarian legislation related to the claims of plaintiff, eventually all arguments of CNCD have been accepted that is the warning is an effective, reasonable, dissuasive and (contextual) proportional sanction, and such declaration cannot be understood as a discrimination in the labour field.

*De facto, the assertions of CNCD were in full agreement with the resolution of the Court of Justice of European Union, that is the **communitarian legislation does not exclude the application of some sanctions without pecuniary character**, such as the sanction with warning, since this kind of sanction does not have only a symbolic character, being a contraventional legal sanction, mainly when associated a relevant degree of advertising (such in the case), and the addressee is addressed, with arguments, directly and expressly the recommendation of meeting the non-discrimination principle, under the implicit effect of a more drastic sanction in case of relapse (discrimination in the same field).*

Keywords: *discrimination related to sexual orientation, burden of evidence, National Council for Combating Discrimination, Bucharest Court of Appeal, and Court of Justice of European Union*

I. Introduction

The scope of this investigation consists in closing the jurisdictional circle initiated in 2010 and analysing the national and European procedural, jurisdictional-administrative issues, in case of notifying some institutions related to certain discriminatory assertions. The investigation relies on assertions made during a radio show. During the investigation, the following are analysed: notification of the National Council for Combating Discrimination (CNCD), CNCD resolution, appeal of CNCD judgement at Bucharest Court of Appeal, notification of the Court of Justice of European Union by Bucharest Court of Appeal and starting the procedures at the Court of Justice of European Union.

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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 solve this case.

By Judgement 276/13 October 2010 CNCD¹ decided that the assertions of Mr. B. refusing to employ at the team the football player I. I. for the suppositions of being homosexual, affect the dignity right of homosexual persons. On the other hand, CNCD rejected the demands of A. Association to sanction S. Club for labour discrimination. CNCD motivated the decision by the fact that, although he was shareholder of S. Club on the date of making the assertions, Mr. G. B. was not representative of the club.

The non-governmental association A. appealed, by an application of interpretation, the Judgement 276/13 October 2010 CNCD at the Bucharest Court of Appeal and asked for the annulment of the administrative deed, in species the Judgement 276/13 October 2010 passed by CNCD. The demands of non-governmental association ACCEPT was registered on 21 December 2010 at Bucharest Court of Appeal.

On 12 October 2011 the Bucharest Court of Appeal ruled the notification of the Court of Justice of European Union related to the preliminary questions formulated and ordered the suspension of the case until the settlement of the procedure.

In 2013, the Bucharest Court of Appeal, although initially accepting the preliminary application of A., submitting the case to the Court of Justice of European Union in order to determine the interpretation of communitarian legislation related to the claims of plaintiff, eventually, it accepted all arguments of CNCD that is the argument is an effective, reasonable, dissuasive and (contextual) proportionally sanction, and such declaration cannot be understood as a discrimination in the labour field.

The assertions of CNCD were in full agreement with the judgement of CJUE, that is the communitarian legislation does not exclude the application of some pecuniary sanctions, as in the case of sanction with warning, since this kind of sanction does not have only a symbolic nature, being a contraventional legal sanction, mainly if attached a relevant degree of advertising (as in the case), and the addressee is submitted, with arguments, directly and expressly the recommendation of meeting the principle of non-discrimination, under the implicit effect of a more drastic sanction in case of relapse (discrimination in the same field).

This as much as the victim of discrimination holds the legal means of applying tort liability of *damni culpa, dati reparation nature*, in conformity to art. 27 of O.G. no. 137/2000². We declare as well that it is decisive for the settlement of the case the issue that, in species, not on the prescription of applying the contraventional sanction with fine (and, thus, the impossibility of applying another sanction than warning) relied the sanction with warning, but on the conviction of the official examiner, correlatively to its own competences in determining the form of contraventional legal liability, on the satisfying nature of the sanction with warning, and the proportionality of legal constraint, circumscribed to the degree of (low) social risk, not generic, but actual differentiated from the antisocial-reprehensible deed.

On the other hand, in terms of legal liability in the labour field, in the case, the court considered the assertions, as in the answer of CJUE, that is S.C. Fotbal Club S. București S.A., to the extent of considering the dissociation of the declarations of „legal third party” – B. (based on the assertion that he did not refuse to contract such sportsman due to sexual orientation / contracting which he never targeted in fact, not initiating any demarche in this respect, all being reduced to the assertion of the “third party”), third party with no legal relation, or legal representation, is not liable of legal liability related to a fact of discrimination in the labour field.

¹ See Resolution 276/October 13th 2010 of the National Council for Combating Discrimination.

² See O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished.

Also, the Bucharest Court of Appeal considered as well the assertions related to the ungrounded nature and, simultaneously, inadmissible, of the claim of plaintiff considering the application of a sanction agreed by it, since the plaintiff does not hold the legitimacy to claim a breach of rights under the protection of art. 1 of Law no. 554/2004 in the context of managing the remedy at law against the resolution of Council, to the extent that its petition was „accepted” being determined the incidence of the disposals of O.G. no. 137/2000R³, as claimed in the report administratively-jurisdictionally addressed.

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

By application registered on the docket of Bucharest Court of Appeal, the plaintiff A. Association in opposition to the defendant the National Council for Combating Discrimination, asked the court to cause: partly annulment of the Resolution no. 276/13.10.2010 passed by CNCD in the file no. 84/2010, related to point 1 in the enacting terms, by which the defendant decides that the issues notified are beyond the incidence of a potential work relation, based on art. 2 par. 1 corroborated to art. 5 and 7 of O.G. no. 137/2000, republished and related to point 3 of the enacting terms, when the defendant decides to sanction the plaintiff G. B. by warning; to determine that the issues notified by the plaintiff are part of labour field, subject to Chapter II, Section I – Equality in economic activity and in the field of employment and profession, mainly art. 2 par. 1 corroborated to art. 5 and 7 of O.G. no. 137/2000, republished and to compel the defendant to consequently remake the investigation; to determine that in front of CNCD the plaintiff has accomplished the obligation of proving the existence of some deeds that allow to be implied the existence of a direct or indirect discrimination (presumption of discrimination), which involves the fact that the plaintiffs G. B. and S.C. Football Club S. Bucharest S.A. have the obligation to prove that the facts do not represent a discrimination, based on art. 20 par. 6 of O.G. no. 137/2000, republished and to compel CNCD to consequently remake the investigation; 4. to determine that, considering the circumstances of the case, the breaches of O.G. no. 137/2000, republished, are meant to entail the sanctioning by contraventional fine instead of the warning ruled by CNCD on point 3 of the enacting terms⁴.

In fact, the plaintiff declared that on 09.03.2010 it registered at CNCD a notice claiming the discriminatory nature based on the criterion of sexual orientation of the assertions of Mr. G. B. made in mass media on 13.02.2010. The complaint was grounded on the disposals of art. 2(1) corroborated to art. 5 and 7, art. 15, art. 20, art. 26 and art. 28(1) of O.G. no. 137/2000, republished. On the first hearing, the plaintiff asked to be introduced in the case S.C. Fotbal Club S. Bucharest S.A., demand accepted by defendant.

By Resolution no. 276/13.10.2010⁵, the defendant decided that the issues notified to be placed beyond the incidence of a potential labour report in terms of art. 2 par. 1 corroborated to art. 5 and art. 7 of O.G. no. 137/2000 republished, subject to the disposals of art. 2 par. 5 and art. 15 of O.G. no. 137/2000, republished. By the same resolution, the defendant determined the sanctioning of the plaintiff G. B. by warning, based on art. 2 par. 11 and art. 26 par. 1 of O.G. no. 137/2000, republished.

The resolution no. 276/13.10.2010 is no legal related to the points 1 and 3 of the enacting terms, due to the following reasons:

1. Discrimination in labour field⁶;

³ See O.G. no. 137/2000 on the prevention and punishment of all forms of discrimination, republished.

⁴ See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

⁵ See Resolution 276/October 13th 2010 of the National Council for Combating Discrimination.

⁶ See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

The defendant did not apply correctly O.G. no. 137/2000, republished, since it rejected the classification of facts in the labour field. Such an interpretation is non-conform as well to art. 2 of Directive 2000/78/CE of Council dated 27 November 2000 related to the creation of a general frame in favour of equal treatment in employment and occupation of work force.

Although it claims in the recitals C-54/07, (Feryin Case), CNCD does not observe the standards imposed by the European Court of Justice in such case.

In Feryin Case, the European Court of Justice decided that it is direct discrimination the public declaration of the administrator of a company of refusing to recruit individuals of certain race or ethnic origin, declaration with a clear potential of discouraging certain possible candidates, generating the prevention of their access on labour market (C-54/07, paragf. 25, 28).

Before CNCD, one did not contest: public declarations made by Mr. G. B., as shareholder of S.C. Football Club S. Bucharest S.A. on the date of declarations and the lack of reaction of S.C. Football Club S. Bucharest S.A. on such declarations. On the contrary, the representative of S.C. Football Club S. Bucharest S.A. acknowledged that they are not interested in employing a gay football player „since the team is like a family", the presence in the team of a gay „would generate tensions in the team and among the spectators".

In Feryin Case, the European Court of Justice does not distinguish between different representatives of the employer, what is important is that the declaration is made in public and perceived as coming from the employer (C-54/07, paragf. 25, 28). Or it is notorious the fact that Mr. G. B. is the manager, financing the S. Club and establishes the policies of the club. Upon completing such issues related to notoriety, Mr. G. B. was shareholder on the date when he made such declarations, he was self-introducing himself and he was perceived as the manager of S. Club.

Also, the Feryin Case does not distinguish between different kinds of recruiting the staff – based on a public offer or direct negotiation – what is important is that such declaration has clear potential of discouraging certain potential candidates to accede to certain work relations with S.C. Football Club S. Bucharest S.A., since the gay football players are rejected (C-54/07, paragraph 25, 28). In addition, in the jurisprudence of the European Court of Justice (Bossman Case, C-415, 15 December 1995) it isn't made any difference between the labour field in general and the labour field of football players, since it has been acknowledged that communitarian law for protection against discrimination based on the known criteria includes in the category of labour relations “practicing sports, in particular, the professional football players who exercise a waged activity or render remunerated services, /.../ as long as it is an economic activity" (paragraph. 6,1.5).

Although CNCD claims this case in this species, decides contrary to the standards expressed in the Bossman Case. In addition, it cannot be accepted the assertion of CNCD that the professional football player has nothing to declare related to being employed by a tea.

The European Court of Justice stated expressly that sanctioning direct discrimination in the labour field in case of a public declaration that involves a discriminatory criterion on employment must be enforced regardless the existence or inexistence of an identifiable individual filing a complaint for suffering the consequences of imposing the discriminatory condition on recruitment. The assertions of S.C. Football Club S. Bucharest S.A., stating that no negotiation process was initiated for recruitment, thus employment was not considered on any moment related to the player I. I, are not relevant in the case

2. Presumption of discrimination and rebutting the evidence duty⁷;

The defendant CNCD did not apply correctly O.G. no. 137/2000, republished related to considering the presumption of discrimination and rebutting the evidence duty by plaintiffs.

⁷ See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

According to art. 20 par. 6 of O.G. no. 137/2000, republished, before CNCD, the plaintiff accomplished the obligation to prove the existence of some facts that allow to be supposed the existence of a direct or indirect discrimination (presumption of discrimination), which involves that the plaintiffs G. B. and S.C. Football Club S. Bucharest S.A. have the obligation to prove that the facts do not represent a discrimination (rebutting the evidence duty). The enforcement by CNCD in the case is not conform to art. 10 of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related to employment and occupation of labour force.

The plaintiff proved in front of CNCD facts suggesting that, on behalf of the employer S.C. Football Club S. Bucharest SA, Mr. G. B. made public declarations related to imposing some direct discriminatory conditions based on criteria of sexual orientation in recruiting football players for S. football team. Based on such facts demonstrated, in conformity to art.20 par.6 of OG no. 137/2000 republished and the jurisprudence of European Court of Justice mentioned, CNCD should consider a discriminatory presumption in the labour field related to S.C. Football Club S. Bucharest S.A. and to rebut the evidence duty towards the latter. In particular, it should ask S.C. Football Club S. Bucharest S.A. to prove that in practice the recruitment is not possible as stated in such public declaration. CNCD did not adopt such legal procedural attitude.

In the case, simple means of demonstrating a recruitment practice are possible in conformity to the principle of equal treatment and non-discrimination including based on the criteria of sexual orientation – express disposals in the recruiting policy, a reaction of S.C. Football Club S. Bucharest S.A. contradicting publicly the declaration given in the case, an audit in the field of equality and non-discrimination, supporting some relevant initiatives in the field of equal chances and non-discrimination, etc.

3. Sanction of contraventional fine⁸;

In the case, this sanction is not effective, proportional and dissuasive, according to art. 17 of Directive 2000/78/CE, both opposite to the classification assigned by CNCD to the case, and if it were considered upon the completion and breach of art.2 par. 1 corroborated to art. 5 and art.7 of O.G. no. 137/2000, republished.

In the case, it is necessary the application of the sanction of contraventional fine since the fact was qualified as harassment (art. 2 par. 5) and prejudicing the dignity (art. 15), it was committed in public, the declarations were given in several mass-media means, the public declarations do not target a sole individual, but prejudice the dignity and free access on labour market of a group or community of individuals. In addition, the personal circumstances of Mr. G. B. are meant to justify the enforcement of the sanction of contraventional fine instead of warning. Thus, Mr. G. B. is Euro parliamentarian of Romania, public person and proves a repeated discriminatory conduct – being the third case in the last four years when CNCD observes discrimination facts committed by him (CNCD resolution no. 397/04.10.2007 and CNCD resolution no. 602/26.11.2009).

In law, the plaintiff bases the action on the disposals of law no. 554/2004, on the disposals of O.G. no. 137/2000 and of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related to employment and occupation of labour force.

By the statement of defence drafted in the case, the defendant CNCD asked to be rejected the action as insubstantial.

By resolution passed in the open session dated 12.10.2011, the Bucharest Court of Appeal admitted the petition drafted by the plaintiff and ruled the notification of the European Court of Justice with the following preliminary questions:

⁸ See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

1. One may apply the disposals of art. 2 par. (2) lett. (a) of Directive 2000/78/EC of Council dated 27 November 2000 to create a general frame in favour of equal treatment related to employment and occupation of work force if a shareholder of a football club self-represented and is perceived in mass media and in the society as the main manager („chief”) of such football club declares in mass media the following:

„I won't accept a gay at S. not if team is dissolved. The rumours are rumours, but to write something like this if it's not true and to publish on the first page maybe it is a lie that he is gay (n.r. the Bulgarian football player I. I.), but what if it's true? I told 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 does? What do you loose if you receive the communion? Would you dislike going in Heaven?» And he told me I was right. One month before he died, he went to receive the communion. God rest his soul. There is no place in my family for a gay and S. is my family. I prefer playing with a junior than with a gay, there is no discrimination in my opinion. I cannot be forced to work with someone. I have the right to work with whom I like as they have rights as well."

„I won't accept a gay at S. not if team is dissolved! Maybe it is a lie that he is gay, but what if it's true? There is no place in my family for a gay and S. is my family. I prefer playing with a junior than with a gay. There is no discrimination in my opinion. I cannot be forced to work with someone. I have the right to work with whom I like as they have rights as well. Even if God tells me tonight that 100% I. is not gay, I still refuse to take him! The papers wrote too much that he is gay. I won't accept him not even ȚSKA gives him to me for free! He may be the greatest hooligan or drunker /.../ but if he is gay, I never want to hear of him."

2. To what extent may the above declarations be qualified as „facts that may presume the existence of a direct or indirect discrimination" in conformity to art.10 par. (1) of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related employment and occupation of work force, concerning the plaintiff S.C. Football Club S. Bucharest SA?

3. To what extent we deal with a *probatio diabolica* if it appears in the case the rebutting of evidence duty according to art. 10 par. (1) of Directive 2000/78/CE of Council dated 27 November 2000 to create a general frame in favour of equal treatment related employment and occupation of work force and the plaintiff S.C. Football Club S. Bucharest S.A. is required to demonstrate that the principle of equal treatment has not been breached, in particular to prove that employment does not interfere with sexual orientation?

4. Whether the impossibility of applying the contraventional sanction with fine in the cases of discrimination pursuant to the expiration of the prescription term of 6 months as of the date of committing the fact, according to art. 13 par. (1) of Government Ordinance no. 2/2001 related to legal regime of contraventions, is contrary to art. 17 of Directive 2000/78/EC of Council dated 27 November 2000 to create a general frame in favour of equal treatment related employment and occupation of work force considering that the sanctions in the cases of discrimination must be effective, proportional and dissuasive?

Bucharest Court of Appeal ruled the suspension of the case until the settlement of the procedure. On the date of 08.05.2013, it has been forwarded to the court the CJUE resolution passed in the case C-81/12, having as object the preliminary petition of decision formulated in terms of article 267 TFUE by Bucharest Court of Appeal.

Court of Justice of European Union declared:

1. Article 2 paragraph (2) and article 10 paragraph (1) of Directive 2000/78/EC of Council dated 27 November 2000 to create a general frame in favour of equal treatment concerning employment and occupation of work force must be construed in the sense that the facts similar to those on the origin of the main dispute may be qualified as „facts which do not allow the presumption of existence of a discrimination" related to a professional football club

if the targeted declarations are made by an individual who introduces himself and is perceived in media and in the society as the man manager of a club, without being necessary to have however the legal capacity to hire a club or to represent it in the recruitment field.

2. Article 10 paragraph (1) of Directive 2000/78 must be construed in the sense that, based on the hypothesis that the facts similar to those on the origin of the main dispute would be classified as „facts that allow the presumption of the existence of a discrimination" based on reasons of sexual orientation committed upon the recruitment of players by a professional football club, the burden of proof, as conceived in article 10 paragraph (1) of Directive 2000/78, does not entail the acceptance of an evidence impossible to be presented without affecting the right to observe private life.

3. Article 17 of Directive 2000/78 must be construed in the sense that it opposes a national regulation based on which, if a discrimination is determined by reason of sexual orientation, according to this directive, it is not possible to apply but a warning, as the one debated in the main dispute, when such a finding appears pursuant to the expiration of a term of prescription of six months as of the date of committing the fact if, based on the same ruling, such a discrimination is not sanctioned based on substantive and procedural issues which provides the sanction an effective, proportional and dissuasive nature. The submitting court has the obligation to consider if this is the situation of such ruling in the main dispute and, if the case, to construe the national law, to the largest extent possible, in the light of the text and finality of the directive mentioned in order to achieve the result followed by it.

Analysing the documents and works of the file, considering the object of the summons and legal grounds incident in the case, the Bucharest Court of Appeal considered the following:

By Resolution no. 276/13.10.2010, the National Council for Combating Discrimination determined that the issues notified by the petitioner A. Association related to the plaintiffs G. B. and S.C. Football Club S. are beyond the incidence of a potential work report, in terms of art. 2 par. 1 corroborated to art. 5 and art. 7 of O.G. no. 137/2000 concerning the prevention and sanctioning of all discriminatory forms, republished, entering under the incidence of the disposals of art. 2 par. 5 and art. 15 of O.G. no. 137/2000.

Consequently, National Council for Combating Discrimination ordered to be sanctioned the plaintiff G. B. by warning, according to art. 2 par. 11 and art. 26 par. 1 of O.G. no. 137/2000.

The resolution stipulated that, by petition registered with the National Council for Combating Discrimination under no. 1811/09.03.2010, the petitioner A. Association declared that G. B. made discriminatory declarations related to the sexual orientation of a Bulgarian football player and he breached thus the principle of equality in the field of employing individuals with homosexual orientation. Thus, in an interview related to a possible transfer of the Bulgarian football player I. I. and his potential sexual orientation, G. B. declared that he prefers using a junior player than buying a player with other sexual orientation.

In the procedure carried out in front of CNCD, the plaintiffs G. B. and S.C. Football Club S. stated that such declarations represent an exercising of the right to free expression not being meant to demonstrate the existence of constant rules or practices in the field of employing football players at S.C. Football Club S., based on a discriminatory criterion starting with the sexual orientation of players. It has been declared as well that, as long as, in fact, one never approached the issue of hiring the player I. I. at S. Bucharest S.A., it cannot be considered that such declarations are meant to breach the principle of non-discrimination, these being subscribed to the right to freedom of opinion secured by CEDO.

The Board of Directors of CNCD considered that the issues claimed shall be analysed beyond the sphere of application of a potential labour report, since the declaration of the plaintiff couldn't be assimilated as coming from an employer/legal representative of the

employer or a person in charge with employment, although he was holding on the date of such declarations the capacity of shareholder at the Football Club S. Bucharest S.A. in what concerns the consequences caused by such declaration, unlike Feryin case, this does not have the same reverberation over potential candidates, since the recruitment process is not performed based on a public offer, or direct negotiation. On the other hand, S.C. Football Club S. did not initiate any process of negotiation for recruitment, thus employment was out of question on any moment related to the player I. I., which excludes the existence of some potential conditions or discriminatory refusal.

The Board of NCCD considered however that the assertions of the plaintiff represent a conduct in close connection to sexual orientation and by their nature create a hostile, intimidating and offensive frame particularly affecting a community of individuals, in species, the individuals with sexual orientation. From this point of view, the assertions of the plaintiff, under the effect created, were meant to affect the right to dignity of homosexual individuals in terms of the disposals of art. 2 par. 5 of O.G. no. 137/2000.

The assertions of plaintiff related to including the issues notified in the sphere of labour reports, according to art. 2 par. 1 corroborated to art. 5 and art. 7 of O.G. no. 137/2000, are insubstantial.

The Bucharest Court of Appeal considered that, according to art. 2 par. 1 of O.G. no. 137/2000, „In terms of this ordinance, discrimination means any difference, exclusion, restriction or preference, based on race, nationality, ethnics, language, religion, social category, convictions, sex, sexual orientation, age, handicap, non-contagious chronic disease, HIV infection, member of a disfavoured category, as well as any other criterion that has as scope or effect the restriction, removal of acknowledgement, use or exercise, under equality conditions, of human rights and fundamental liberties or rights acknowledged by law, in the political, economic, social and cultural field or in any other fields of public life."

According to art. 5 of the said ordinance, „It is a contravention, based on this ordinance, the conditioning to participate to an economic activity of an individual or the selection or free exercising of a profession of belonging to a certain race, nationality, ethnics, religion, social category, respectively convictions, sex or sexual orientation, age or member of a disfavoured category."

Art. 7 par. 1 and 2 of the same normative act stipulates: „(1) It represents a contravention, according to this ordinance, the refusal of a physical or legal person to hire an individual based on the reason that he/she belongs to a certain race, nationality, ethnics, religion, social category or disfavoured category or due to his/her convictions, age, sex or sexual orientation, except for the cases stipulated by law. (2) It represents a contravention, according to this ordinance, the conditioning for occupying a position by announcement or competition, launched by employer or by its representative, belonging to a certain race, nationality, ethnics, religion, social category or disfavoured category, of age, sex or sexual orientation, respectively the convictions of candidates, except for the situation stipulated by art. 2 par. (9)."

The principle of equal treatment opposite to all the other employees and employers, forbidding any form of discrimination, ruled by labour code, is ruled in the contents of O.G. no. 137/2000, which on art. 1 par. 2 lett. i sets forth: „The principle of equality between citizens, of exclusion of privileges and discrimination are mainly secure in exercising the following rights: i) right to work, to freely choose the profession, to fair and satisfying work conditions, to protection against unemployment, to an equal wage for equal work, to fair and satisfying remuneration /.../".

According to art. 3 lett. a of O.G. no. 137/2000, „The disposals of this ordinance are applied to all natural or legal, public or private persons, as well as to the public institutions with attributions related to: a) employment conditions, criteria and conditions of recruitment,

selection and promotion, access to all forms and levels of orientation, education and professional training;"

The legal disposals mentioned assure transposing in the national law the disposals of Directive 2000/78 and of Directive 2000/43.

According to art. 1, the scope of the Directive 2000/78 is to rule 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 labour and occupation, with a view to implement the principle of equal treatment in the member states of European Union.

According to art. 2 of Directive 2000/78, the equality principle represents the absence of any direct or indirect discrimination, based on one of the reasons stipulated in art. 1.

III. Conclusion

In the recitals of CJUE resolution pronounced in the case C-81/12, it is considered that the appreciation of the facts that allow the presumption of existence of discrimination belongs strictly to the national court or to other competent national authority, without performing any analysis related to the nature of the fact submitted to judgement, the competence of judicial examination being exclusively incumbent upon the national court⁹.

As for the mechanism of the burden of proof in the field of non-discrimination, stipulated by art. 10 par. 1 of Directive 2000/78 and transposed in the national legislation by art. 20 par. 6 of O.G. no. 137/2000, by the same resolution, CJUE declares that, only if the facts that allow the presumption of existence of a discrimination are demonstrated (by the plaintiff), the defendant has the obligation to prove that, despite such discrimination appearance, the principle of equal treatment was not breached.

In the case, the plaintiff did not demonstrate the existence of an effective refusal of the football club to contract the sport services of the player I. I., refusal presumed to have as object a criterion of discrimination, so as, according to the CJUE argumentation, the individual accused of discrimination in the labour field is in the position of proving that this is not the reason of employment refusal.

Thus, the Football Club S. Bucharest S.A. declared that it never intended to transfer the sportsman I. I. and he did not initiate an actual demarche of negotiation with the club holding the federative rights of the player. In this respect, CNCD correctly considered that in the case of professional football players, the recruitment process is atypical, meaning that it does not involve a public offer, or direct negotiation (except for the situation when the sportsman has no contractual obligation, which is not the case), but a specific process of negotiation between the contracting sport clubs.

The plaintiff did not demonstrate either that the Football Club S. Bucharest S.A. was identified on any moment with the declarations of the defendant G. B. or that, as employer, practiced a discrimination policy based on the criterion of sexual orientation.

Such declarations have been given in the context of a journalistic demarche, when it was the author of the interview who approached the issue of sexual orientation of such player, not the defendant G. B.. Such declarations expressed a personal position of defendant, being included in a context associated to his religious faith and they were not appropriated by the football club.

As for the notoriety provided by the capacity of „manager" of the defendant G. B., based on the writs attached to the file of the case, it does not result that he was holding, on the date of such declarations, the capacity of legal representative of the football club. According to the writ issued by the trade register (pages 59-60 in the file), G. B. assigns the shares held in number of 858, to the named G. C., who appears with a number of 1848 shares.

⁹ See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

Consequently, the defendant G. B. was not holding a position or a quality which could provide him the legal authority to take decisions in the Football Club S. Bucharest S.A. or to involve the sport club in relations with third parties, including related to the recruitment/employment policy.

With respect to CJUE jurisprudence claimed by the plaintiff, despite this case, it is noticed that in Feryin case C-54/07, the active subject of declarations holds not only the capacity of representative but also the position of manager of the company, which would question the existence of an exercise of authority in terms of the role accomplished by subject as employer¹⁰.

Also, in Bossman case C-414/93, the issue submitted to analysis is an express rule passed on the level of football associations, by which it is imposed a clause formulated *sine qua non* based on a nationality criterion.

On those grounds, CNCD correctly included the claimed issues beyond the incidence of a potential labour report, circumscribed to the hypotheses of legal norms instituted by art. 5 and art. 7 of O.G. no. 137/2000.

As for the action having as object the annulment of pct. 3 of resolution no. 276/13.10.2010, by which CNCD ordered the sanctioning of the defendant G. B. with warning, the court considers it unsubstantiated.

By CJUE resolution passed in the case C-81/12, it is confirmed the legal value of the warning sanction in terms of accomplishing the exigency of effectiveness, proportionality and dissuasive nature, the national court being competent to check if this sanction is proper in the dispute subject to the case submitted to judgement.

In the case, considering the circumstances in fact considered in the challenged resolution, the court considers that CNCD performed a correct individualisation of a contraventional sanction.

Thus, the contraventional sanction of warning was applied distinctly of the issue of prescription of application of fine sanction (Law no. 189/2013 amended O.G. no. 137/2000, by introducing art. 26 a par. 2^A1), the defendant authority considering upon the application of sanction the circumstance of committing the fact, respectively, in the context of a purely journalistic demarche, the declaration being challenged by a journalist with the obvious scope of obtaining the particular position of the individual interviewed, correlatively to exercising the right to free expression, opposite to a subject in abstract relation to the labour field, as well as the absence of subsequent effects, by non-materialisation of an effective refusal on employment, based on discriminatory criteria.

The public character of declarations cannot be regarded as an aggravating circumstance in determining the sanction and it was considered by CNCD in individualising the sanction, with the other circumstances above mentioned leading to the conclusion that contraventional sanction of warning corresponds to the requirements of effectiveness, proportionality and dissuasive nature of juridical coercion in the field.

For the recitals presented, considering the disposals of art. 1 and art. 18 of Law no. 554/2004, the Bucharest Court of Appeal rejected the action as unsubstantiated.

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¹⁰ See Civil Judgement No. 4180/ 23.12.2013, Bucharest Court of Appeal.

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