

The Standing of National Equality Bodies before the European Union Court of Justice: the Implications of the *Belov* Judgment

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“Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

(Article 267 Treaty on the Functioning of the European Union)

This article aims to analyse and discuss the implications of the preliminary ruling of the Court of Justice of the European Union (CJEU), delivered on 31 January 2013 in response to a reference for a preliminary ruling by the Bulgarian national equality body, *Komisia za Zashtita ot Diskriminatsia* (Commission for Protection against Discrimination, KZD).² It argues that, by declaring the reference for a preliminary ruling by the KZD inadmissible, the CJEU has missed an important opportunity to interpret the EU’s Race Equality Directive³ and to further establish itself as a leading human rights court.

The article starts by summarising the preliminary ruling procedure, followed by an analysis of the judgment, in conjunction with the Opinion of Advocate General Kokott delivered in this case on 20 September 2012. Finally, it provides a view on the implications of the judgment and the steps which different actors and stakeholders could take with a view to reducing the potential negative effects of the judgment.

The Reference for a Preliminary Ruling

The KZD was set up pursuant to the EU’s Race Equality Directive.⁴ It has a predomi-

nantly quasi-judicial character⁵, with the power to issue legally binding decisions and to impose compulsory administrative measures.⁶ The powers and mandate of the KZD are set out in Article 47 of the Bulgarian Law on Protection against Discrimination (*Zakon za Zatschitita ot Diskriminatsia*).⁷ The KZD is acknowledged as a “B status” National Human Rights Institution in the UN system by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).⁸ According to the Statute of the ICC, the Sub-Committee on Accreditation (SCA) has the mandate to consider and review applications for accreditation and to make recommendations to the ICC Bureau members with regard to the compliance of applicant institutions with the Paris Principles. The SCA assesses compliance with the Paris Principles in law and in practice.⁹ In accordance with the Paris Principles and the ICC SCA Rules of Procedure, the classifications for accreditation used by the SCA are: “A status” (voting member, in compliance with the Paris Principles); “B status” (observer member, not fully in compliance with the Paris Principles or insufficient information provided to make a determination); and “C

status” (non-member, non-compliance with the Paris Principles).

The SCA considered the KZD’s application for accreditation in October 2011 and recommended that the KZD be accredited with “B status”. The SCA based its recommendation on the following facts:

- the KZD has a mandate to prevent and protect against discrimination, and to promote equality of opportunity but it does not have a mandate to protect and promote all human rights;
- the founding law of the KZD does not provide for the protection from legal liability for actions undertaken by Commissioners in their official capacity;
- the existing legislation does not provide a sufficiently clear, transparent and participatory selection process for the Commissioners of the KZD.¹⁰

The case giving rise to the reference for a preliminary ruling was initiated by Mr Belov, a person who describes himself as Roma. He lives in the Ogosta district of the Bulgarian city of Montana. The ChEZ Elektro Bulgaria AD (CEB), a company supplying energy, placed meters to measure electricity consumption at a height of 7m above the ground on posts situated on the outside of houses connected to the electricity network in certain districts of Montana which were commonly known to be inhabited primarily by members of the Roma community (in particular in the Ogosta and Kosharnik districts). Outside these districts, the electricity meters were placed at a maximum height of 1.7m, usually in the consumers’ homes, on the outside walls of the building or on surrounding fences.¹¹ Mr. Belov claims that this differential treatment constitutes

discrimination on the ground of racial or ethnic origin and turned to the KZD seeking remedy. ChEZ Razpredelenie Bulgaria AD (CRB), a company which owns the electricity distribution networks and the State Energy and Water Regulation Commission (DKEVR) were admitted as joined parties in the proceedings by the KZD.¹²

The KZD decided to stay the proceedings and make a reference to the CJEU for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). This Article enables a “court or tribunal” to request the Court to give a ruling on a question raised before it relating to EU law if the court or tribunal considers that a decision on the question is necessary to enable it to give a judgment.¹³ The reference in the present case sought an interpretation by the CJEU on material and procedural questions relating to the Race Equality Directive, including an interpretation of its provisions relating to indirect discrimination and the shift of the burden of proof.

The reference is highly relevant in its attempt to further clarify EU equal treatment legislation. It sought to determine the following questions:

1. Whether the case falls within the scope of the Race Equality Directive? (question 1)
2. Whether, as in the Bulgarian Law on Protection against Discrimination, the meaning of “treated less favourably” and “put persons (...) at a particular disadvantage” in Article 2(2)(a) and 2(2)(b) of the Race Equality Directive entails that the treatment has to also infringe, directly or indirectly, rights or interests explicitly defined in law? If the answer to this question is negative, whether the national court is obliged to disregard the national legislation? (questions 2-4)

3. Whether, according to Article 8(1) of the Race Equality Directive, the victim of discrimination has to establish facts that impose an unambiguous, incontestable and certain conclusion or whether it is sufficient if the facts justify an assumption or presumption of discrimination? (question 5)
4. Whether facts such as in the main proceedings can lead to a shift of the burden of proof? (question 5)
5. What form of discrimination could be presumed from facts such as in the main proceedings: direct or indirect discrimination and/or harassment? (question 6)
6. What factors could suffice to justify the measures applied by the defendant companies in the main proceedings? (question 6)

In retrospect, however, it is arguable that the key question raised by this case was one of admissibility, as in the past, according to data available to the author, none of the national equality bodies set up pursuant to the Race Equality Directive have attempted to refer a case to the CJEU for a preliminary ruling.¹⁴ It is important to clarify for the purposes of the forthcoming analysis that such a dilemma would not arise in the case of predominantly promotion type equality bodies, as their mandate and functions, in particular their lack of powers to formally decide on individual instances of discrimination, clarify beyond any doubt that they are not in a position to refer a case to the CJEU. Consequently, the following analysis is focused on, and relevant for, predominantly tribunal type (quasi-judicial) equality bodies only.

In light of their fundamentally different conclusions, it is interesting to compare the different arguments and conclusions of the Opinion of Advocate General Kokott

and the judgment of the CJEU on the question of admissibility.

The Status of a Court or Tribunal

The respondents in the domestic case (CEB and CRB) both claimed in their written submissions to the CJEU that the KZD does not have the status of a court or tribunal and therefore its reference to the CJEU for a preliminary ruling was inadmissible. The Bulgarian government and the European Commission both considered in their written submissions that the KZD qualifies as a court or tribunal for the purposes of Article 267 TFEU and therefore its reference to the CJEU was admissible.¹⁵

It is common ground in the Opinion of Advocate General Kokott and in the judgment, as well as a well-known principle developed by the CJEU in its case-law, that assessing the right of a body to refer a question for preliminary ruling is a question governed by EU law alone.¹⁶ A number of criteria are examined by the CJEU in this regard, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedures are *inter partes*, whether it applies rules of law and whether it is independent. In addition, a national court may refer a question to the Court only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.¹⁷

The Opinion of Advocate General Kokott notes that the KZD's mandate as an equality body under the Race Equality Directive does not justify an automatic acceptance of its status as a court or tribunal, as Article 7(1) of the Directive requires member states to ensure the defence of rights by way of "judicial and/or administrative procedures".¹⁸

The Advocate General also notes that deciding on a number of the criteria mentioned above does not pose any problems in the present case as it is not disputed that the KZD is established by law, is permanent, applies the rule of law or has an *inter partes* procedure.¹⁹

Thus, the Advocate General notes that the main dispute is centred on the issues of the independence of the KZD, the compulsory character of its jurisdiction and the judicial character of its decisions.²⁰

The Question of Judicial Character

The Court notes in its judgment that the KZD, as an equality body responsible for promoting equal treatment, has a number of powers and functions that are clearly not of a judicial character. However, this does not in itself decide its status because, according to the judgment, it is the particular functions which the KZD is required to exercise when a case is referred to it, which determine whether it is classified as a “court or tribunal” within the meaning of Article 267 TFEU.²¹

However, the Court notes that a number of factors, including those relied on by the CEB and the CRB, are capable of giving rise to doubts as to the judicial character of the KZD’s procedure. These factors are detailed below, together with the Advocate General’s assessment relating to the same factors.

First, the Court notes that according to Article 50 of the Bulgarian Law on Protection against Discrimination, proceedings before the KZD can be brought: (1) on the application of the person concerned; (2) on the initiative of the KZD; or (3) by complaints from natural and legal persons or state and local authority bodies. In the Court’s view, the main proceedings launched by Mr Belov were based both on paragraph 1 (as a per-

son directly concerned) and paragraph 3 (as he claims to act on behalf of other inhabitants concerned by the measure) of Article 50.²² However, the Court held that the KZD’s procedure is essentially similar regardless of whether it proceeds on a complaint, an application or its own initiative and the KZD has, *inter alia*, extensive powers of investigation in order to gather the evidence necessary to elucidate the facts concerned. Furthermore, the results to which those proceedings are intended to lead, whether initiated by an application, complaint or by the KZD’s own motion, are themselves similar, and are namely: an injunction to cease the discrimination found and an order for the persons responsible to pay fines.²³

The Advocate General adopts a different interpretation and claims that it is immaterial that the decision-making body of the KZD can theoretically proceed on its own initiative, as in the present case the KZD did not take action based on its own initiative, but proceeded based on the complaint of a presumed victim of discrimination. For the analysis of the question regarding whether the KZD can be classified in the present case as a “court or tribunal” within the meaning of Article 267 TFEU, it is not relevant that the KZD has other powers which it has not made use of.²⁴

Second, the Court notes that the KZD may, as it has done in the present case, join additional parties to the proceedings of its own motion, in particular where the KZD considers that those parties may have to answer for the discrimination alleged by the applicant/complainant and/or be liable to pay a fine on that basis.²⁵

The Advocate General in this respect holds that the fact that the KZD may join other parties to the complaint procedure before the

members of the Commission does not militate against accepting its status as a court or tribunal, since this procedural possibility is open to conventional administrative courts as well, such as the German Code of Administrative Court Procedure.²⁶

Third, the Court observes that the KZD has the status of defendant in front of the administrative court if its decision adopted after proceedings is appealed, as in the present case. Furthermore, if the decision is annulled by the administrative court, the KZD can appeal this decision to annul.²⁷

The Advocate General places the emphasis on determining the specific capacity in which the KZD is acting, in the particular legal context in which it is requesting a preliminary ruling. With reference to previous rulings, the Opinion states that a single national body may be regarded partly as a court or tribunal and partly as an administrative authority, depending on whether it is performing judicial functions or functions of an administrative nature in a specific case. The Advocate General recalls that in the present case the independent decision-making body of the KZD has made a reference to the Court in a complaint procedure, in which it delivers a decision following an impartial examination of the complaint. The administrative functions performed in other situations, such as providing advice to victims or representing the KZD in the higher courts are, the Advocate General argues, irrelevant in the present case and in deciding on admissibility.²⁸

Fourth, the Court notes that “it seems to follow from the Administrative Procedural Code”, that if an action is brought against a decision, the KZD can revoke its decision given in proceedings such as those at issue in the main proceedings, provided that the party to whom the decision is addressed is favourable.²⁹

The Advocate General also refers to the fact that the KZD can set aside or alter its own decisions. However, given the fact that this possibility is only open with the agreement of both parties, the Advocate General suggests that it does not militate against its status as a court or tribunal under Article 267. The Opinion compares this procedural feature of the KZD’s decisions with the fact that administrative authorities can generally rescind their decisions without the consent or agreement of the parties. Therefore, the Advocate General suggests, the KZD’s procedure can be regarded as a “hybrid” of a conventional administrative authority and a conventional court, as its decisions can only be altered with the consent of both parties. The Opinion suggests that this can be seen as an expression of the dispositive principle in judicial proceedings, according to which parties in such procedures have significant control over the proceedings and can, for example, terminate legal proceedings with a settlement beforehand, without a judgment being delivered.³⁰

The Court’s judgment summarises the above four factors (the possibility of the KZD to proceed on its own motion and its extensive investigative powers; the KZD’s power to join persons to the proceedings on its own initiative; the fact that the KZD is a defendant in court proceedings if its decision is appealed; and the possibility for the KZD to revoke its decisions under the circumstances detailed above) as substantiating the fact that the KZD’s decisions in proceedings on the basis of a complaint or application under Article 50 of the Law on Protection against Discrimination are similar in substance to an administrative decision and do not have a judicial nature within the meaning of the case-law of the Court on the interpretation of the phrase “court or tribunal” in Article 267 TFEU.³¹

Compulsory Jurisdiction

The Court notes that the Bulgarian Law on Protection against Discrimination put in place two alternative independent procedures enabling an alleged victim of discrimination to seek redress, since besides the administrative procedure before the KZD, they can also bring an action for ceasing discrimination and the payment of damages in front of the District Court.³²

Further, the Court argues that the KZD's decisions can be appealed to the administrative courts and those judgments further appealed to the Supreme Administrative Court. Therefore, according to the Court, these judicial appeals ensure the effectiveness of the preliminary ruling mechanism provided for in Article 267 TFEU and the uniform interpretation of European Union law.³³

Although it is not entirely clear what the Court intended by making these additional remarks, it is interesting to contrast its comments with the Advocate General's arguments relating to the question of compulsory jurisdiction. Referring to the *Dorsch Consult* case,³⁴ the Opinion recalls that the Court drew a distinction between "compulsory" in the sense of the only way of obtaining legal redress and "compulsory" in the sense of the binding determination of a case. Since the *Dorsch Consult* case did not go more into detail regarding the relevance and application of the two different interpretations, the Advocate General suggested that the *Belov* case offered the Court an opportunity to further clarify its case law on this point.³⁵ In the present case, both the European Commission and the Advocate General suggested that the Court should adopt the latter definition of compulsory jurisdiction, meaning only the binding character of the decisions. Following the other interpretation strictly, they argue,

would result in neither the KZD nor the district courts having compulsory jurisdiction and therefore the possibility to refer questions for a preliminary ruling to the CJEU.³⁶

A Simplified Analysis

Since, in the Court's view, the above-mentioned four factors relating to the judicial character of the KZD's decisions in cases similar to the main proceedings sufficed to establish that the KZD is not a "court or tribunal" within the meaning of Article 267 TFEU, the Court did not see the need to examine whether the other criteria for assessing whether a referring body is a "court or tribunal" were satisfied by the KZD in deciding that it did not have jurisdiction to rule on the referred questions.³⁷

In other words, the Court decided to focus exclusively on the judicial character of the KZD's procedure and decisions and saw no need to analyse the other factors when determining the status of the organisation as a "court or tribunal". As pointed out by the Advocate General, the Court in the last decade has had to decide on the admissibility of references for a preliminary ruling from a large number of newly set up independent authorities.³⁸ The depth of the analysis in those cases varies but it is notable that in some cases which were later found inadmissible, the Court decided to focus its analysis on only one or a few factors and did not provide its view on the remaining issues.

In the *RTL Belgium* case,³⁹ the Court restricted its analysis to the question of independence, later finding the reference inadmissible due to the fact that the Belgian Licensing and Control Authority of the Broadcasting Authority was not acting as a third party in relation to the interests at stake and, accordingly, did not possess the necessary impartiality with respect to alleged offenders.⁴⁰

In the *Syfait* case,⁴¹ the Court analysed the questions of independence and of judicial character. It found the reference inadmissible *inter alia* because there was an operational link between the Greek Epitropi Antagonismou, a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions.⁴² Furthermore, it also pointed out that the competition authorities of the member states are automatically relieved of their competence where the European Commission initiates its own proceedings and in such cases the proceedings initiated before that authority will not lead to a decision of a judicial nature.⁴³ It is worth pointing out that there is no reference in the judgment to the European Commission relieving the referring authority of its competence in the case.

By comparison, in the *Abrahamsson and Anderson* case,⁴⁴ the Court found the reference admissible based upon its analysis of the body as being established by law, permanent, independent, having an *inter partes* procedure and applying rules of law. It found that the Swedish Överklagandenämnden för Högskolan (Universities' Appeals Board), "although an administrative authority, is vested with judicial functions".⁴⁵

In the *Österreichischer Rundfunk* case,⁴⁶ the Court examined whether the Austrian Bundeskommunikationssenat (Federal Communications Board) was established by law, was independent, had compulsory jurisdiction and an *inter partes* procedure and whether it applied rules of law. It found the reference admissible, however it did not examine whether the Board's decisions were of a judicial nature.

In the *Westbahn Management* case,⁴⁷ the Court considered that the Austrian Schienen-Control Kommission (Rail Supervisory Commission) was a "court or tribunal" based on

the fact that it was established by law, permanent, independent, had compulsory jurisdiction and applied rules of law in *inter partes* procedures. It did not, however, examine specifically whether the Commission's decisions were of a judicial nature.

In the *Dorsch Consult* case,⁴⁸ the Court found the reference from the German Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board) admissible on the basis of it being established by law, permanent and independent and applying rules of law. It also noted, showing considerable flexibility, that the requirement that the procedures before the hearing body concerned must be *inter partes*, is not an absolute criterion.⁴⁹ Furthermore, it is noteworthy that the Court found that "in this particular instance, the Federal Supervisory Board exercised a judicial function", focusing strictly on the procedure in question.⁵⁰

Arguably then, if compared to some of the case law referred to above, in the *Belov* case, the Court may have made a "practical" decision in order to shorten the analysis of the case. However, this approach risks omitting the analysis of a number of important factors which, given their interconnected nature, could potentially result in a fundamentally different finding concerning the admissibility of the reference. By way of example, it could arguably prove very difficult or impossible in certain cases to determine the judicial character of the procedure before a body without conducting a careful analysis of its independence (including an analysis of the links between the decision-making body and the administrative body) and compulsory jurisdiction.

At first sight, the clear-cut and fundamental difference in the reasoning and the resulting conclusions between the Opinion of the

Advocate General and the judgment of the Court could seem puzzling. It becomes, however, easier to understand once we discover the essential difference in the process and the premise of the analyses. The Advocate General conducted her analysis carefully, segmenting the procedural and substantive rules relating to the decision-making body of the KZD and those relating to the administrative body within the organisation. She acknowledged that from a functional point of view, there is a clear separation between the KZD's decision-making body and the administrative body subordinate to it.⁵¹ On this premise, she confined her analysis to the procedural rules relevant to the case in question, those of the decision-making body, and went even further by disregarding the implications of Article 50(2) of the Bulgarian Law on Protection against Discrimination (starting a procedure on own initiative) as it was irrelevant in the case in question.

By contrast, the Court opted for a far less segmented analysis, taking into account provisions relating to the administrative body of the KZD and procedural rules such as Article 50(2) of the Bulgarian Law on Protection against Discrimination which had no concrete relevance in the present case. This stance taken by the Court should be contrasted with other judgments such as that in *Dorsch Consult*, which focused more clearly on concrete cases and concrete procedures, and disregarded other elements.

Other Factors

Given her Opinion's fundamentally different conclusion, it seems all the more important to also look at the Advocate General's findings regarding the other factors taken into account when proposing to deem the reference from the KZD admissible.

Although the Court focused mainly on the question of judicial character, it did not ex-

amine the question of the rules concerning the relationship between the KZD's procedure and the civil courts' procedure. The Advocate General suggests that the fact that the KZD may not decide on a complaint if the same case is already pending before a Bulgarian civil court is only an expression of the principle of *lis pendens* – excluding procedures if the same claim is already before another court. The Advocate General suggests that the fact that the *lis pendens* is applicable to the KZD's procedure is in fact supporting the view that it is a “court or tribunal”.⁵²

In her Opinion, the Advocate General also analyses the question of independence, arriving at the conclusion that the KZD is sufficiently independent to be regarded as a “court or tribunal” within the meaning of Article 267 TFEU.⁵³ The Advocate General recalls the Court's settled case-law concerning the existence of an external and an internal aspect of independence. The Opinion demonstrates that there is no doubt as to the KZD's external independence and protection against external influence and pressure, since members of the KZD's decision-making body enjoy similar guarantees to judges in ordinary Bulgarian courts and tribunals.⁵⁴

The Advocate General finds that the internal aspect of independence, linked to the question of impartiality, is also guaranteed given the clear separation between the KZD's decision-making body and the administrative body subordinate to it. Furthermore, advice and support to victims of discrimination even by the administrative body is only provided outside the context of pending procedures, consequently neither part of the KZD is on the side of one of the parties in a pending complaint procedure.⁵⁵

Based on the analysis of its independence, the judicial character of its decisions and its

compulsory jurisdiction, the Advocate General came to a conclusion which the Court did not share, opining that the KZD should be regarded as a “court or tribunal” within the meaning of Article 267 TFEU.⁵⁶

The Substantive Assessment by the Advocate General

Suggesting that the reference by the KZD should be deemed admissible, the Advocate General’s Opinion goes on to analyse and answer the specific substantive questions raised by the case. This analysis is highly relevant in its attempt to further define and interpret EU equal treatment legislation.

First, the Opinion proposes that, based on the objective of the Race Equality Directive and the existing EU competence in this field, the scope of the Race Equality Directive covers not only the electricity supply per se, but also the conditions under which that electricity supply is provided, including the provision of electricity meters.⁵⁷

Second, the Opinion examines the reference of CEB (the electricity supplier) to the Bulgarian legislation stipulating that less favourable treatment exists only where rights or interests defined in law are infringed directly or indirectly. CEB argued that consumers do not have a right to the installation of a free electricity meter and thus less favourable treatment and discrimination could not be taken to exist.⁵⁸ The Advocate General’s Opinion makes it clear that neither direct nor indirect discrimination require an infringement of rights or interests defined in law according to the Race Equality Directive, and that it is sufficient to establish that a person or group is treated less favourably than another is, has been or would be treated.⁵⁹ The Opinion goes on to state that consequently, such

national provisions that are less favourable for the persons concerned fall short of the minimum requirements under EU law and are incompatible with the Race Equality Directive.⁶⁰ She concludes that the national court must interpret domestic law in this regard in conformity with EU law and, in cases where this is not possible, the court should disapply national legislation which is contrary to the prohibition of discrimination established as a fundamental right and as a general principle of EU law.⁶¹

Third, the Opinion confirms that for a reversal of the burden of proof under the Race Equality Directive it is sufficient that persons who consider themselves wronged, because the principle of equal treatment has not been applied, establish facts which substantiate a *prima facie* case of discrimination.⁶² In doing so, the Advocate General compares other language versions with the Bulgarian version of Article 8(1) of the Race Equality Directive, the latter requiring the presentation of facts “from which it can be concluded” that discrimination has occurred. The Opinion states that a similar national practice would be in clear opposition to the objective and the practical effectiveness of the reversal of the burden of proof, rendering this rule practically redundant.⁶³

Fourth, the Opinion, though clarifying that the establishment and assessment of the facts and the application of the law is a matter for the KZD, gives useful guidance on the forms of discrimination. This seems especially useful in light of the doubts expressed by the KZD in its reference and in view of the strict case law of the Bulgarian Supreme Administrative Court in similar cases.⁶⁴ Based on the fact that the practice of the electricity supplier is likely, in practice, to negatively affect primarily Roma persons, the Advocate General states that there is a *prima facie* case of indirect discrimination based on ethnic origin.⁶⁵

Fifth, the Opinion examines the possible justification of indirect discrimination, providing useful guidance concerning the proportionality test required under Article 2(2)(b) of the Race Equality Directive. The Advocate General stipulates that preventing and combating fraud and abuse and ensuring the security and quality of the energy supply in member states can be recognised as legitimate aims.⁶⁶ The Opinion leaves it to the KZD to determine whether the measures applied by the defendants are in fact appropriate, i.e. whether they contribute to an “appreciable reduction” in the number of fraudulent and abusive interferences within the electricity network.⁶⁷ Examining the question of necessity, the Opinion states that the measures can only be justified if it is proven that the defendants could not, at financially reasonable cost, have recourse to other, equally suitable means which had less detrimental effects.⁶⁸ Finally, the Advocate General stipulates that the justification is only possible if the measure taken does not produce undue adverse effects on the inhabitants. In examining this, due account needs to be taken of the risk of an ethnic group being stigmatised and of the consumers’ interest in monitoring their individual electricity consumption by means of a regular visual check of their electricity meters.⁶⁹

Conclusions

The importance and relevance of the *Belov* case stems, on one hand, from the fact that this is the first reference for a preliminary ruling submitted to the CJEU by a national equality body set up on the basis of the EU Race Equality Directive. Thereby, it provided an opportunity to further clarify the Court’s case law relating to the interpretation of the status of “court or tribunal” within the meaning of Article 267 TFEU.

It is unfortunate that the Court decided not to conduct a sufficiently detailed analysis of all

the relevant factors relating to the KZD’s status and procedures. This choice is apparent when the judgment is compared to the more detailed analysis in the Opinion of the Advocate General, which resulted in the contrary finding that the KZD should be accepted as a “court or tribunal”. This article argues that the Court’s simplified test could have its drawbacks, mainly due to the interdependent and interconnected nature of some factors.

On the other hand the Court, with its restrictive analysis and decision, has arguably foregone a chance to further establish itself as a leading court for fundamental rights issues at EU level and has missed an important opportunity to interpret the EU Race Equality Directive. The Opinion of Advocate General Kokott usefully answers a number of key questions relating to the scope of the Race Equality Directive, the definition of discrimination, the reversal of the burden of proof, the different forms of discrimination, as well as the possible justifications and the applicable proportionality test for indirect discrimination. The number and scope of the questions in the reference, and the depth of the Advocate General’s analysis testifies to the need for further guidance from the Court on these issues.

It is noteworthy that the Race Equality Directive has so far been subject to only a handful of preliminary rulings.⁷⁰ This shortage of preliminary rulings (when compared to the Employment Framework Directive⁷¹) is more noteworthy in the light of the fact that, for example, cases of racial and ethnic discrimination significantly outnumber cases on all other grounds of discrimination, within the 250 or more important cases reported by the national experts of the EU Network of Legal Experts in the Non-discrimination Field between 2004 and 2010.⁷² Based on this, one cannot but suspect that, on the one hand, some domestic courts are rather reluctant to

request a preliminary ruling from the CJEU in the field of discrimination on the grounds of racial and ethnic origin and, on the other hand, a significant number of these cases may be decided by quasi-judicial equality bodies set up pursuant to the Race Equality Directive.⁷³ This gives even more importance to the work of quasi-judicial equality bodies and would, from the perspective of securing uniform interpretation of EU law, necessitate granting the possibility to these bodies to refer questions for a preliminary ruling to the CJEU. Seen in this light, it is obvious that one of the key drawbacks of the Court's decision is that, by setting a precedent, it might have a "chilling effect" on future references for a preliminary ruling from national equality bodies, even if their national legislation and role is somewhat different.

Finally, it is noteworthy and encouraging that in the *Belov* case, both the European Commission and the Bulgarian government considered that the KZD has the character of a "court or tribunal", and that the Court therefore has jurisdiction to give a ruling on the questions referred to it.⁷⁴ It remains to be seen what legislative changes the European Commission, the Bulgarian government and other governments of member states with quasi-judicial equality bodies could and will effectuate in order for these bodies to be considered by the CJEU as national courts or tribunals. It is suggested that a careful and deep analysis of

the *Belov* judgment will necessarily have to be the starting point for any such further action. In order to reach the objectives formulated in the Race Equality Directive, it appears crucial that the European institutions provide further support to national equality bodies, by enhancing and guaranteeing their legal situation including assurances for their independence and effectiveness. The European Commission could play an important role in this quest by proposing amendments to the EU Equal Treatment Directives ensuring detailed and legally binding standards for equality bodies, including assurances for organisational independence and, in the particular case of quasi-judicial equality bodies, ensuring the fulfilment of the criteria used by the CJEU in determining the admissibility of references for preliminary rulings. The European Commission will also have to play a central role in monitoring and enforcing the proper implementation of these amendments. At the same time, member states that decided to transpose the Race Equality Directive by setting up quasi-judicial bodies will have to analyse the substantive and procedural legal provisions pertaining to these bodies in order to ensure that, in instances similar to the *Belov* case, these national equality bodies are able to successfully refer a case to the Court. Although a failed first attempt, the *Belov* case can thus pave the way for future successful references, ensuring a better access to justice for victims of discrimination.

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2 Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others*, CJEU, 31 January 2013.

3 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

4 For the obligation of member states to set up a national equality body, see Article 13 of the Race Equality Directive. For the relevant Bulgarian legislation, see the Law on Protection against Discrimination (*Zakon za zashtita ot diskriminatsia*).

5 For a classification of national equality bodies as predominantly tribunal type (or quasi-judicial) and predominantly promotion type bodies, see Ammer, M., Crowley, N., Liegl, B., Holzleithner, E., Wladasch, K., Yesilkagit,

K., *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*, Human European Consultancy and Ludwig Boltzmann Institut für Menschenrechte (BIM), European Commission, 2010, pp. 43-44.

6 See Equinet European Network of Equality Bodies, *Overview*, available at: <http://www.equineteurope.org/-Bulgaria-%20>

7 Article 47 states that: "*The [KZD] shall:*

1. record infringements of this Law or other laws on equal treatment and shall determine the person responsible for the infringement and the person concerned; 2. order the prevention and cessation of the infringement and the re-establishment of the initial situation; 3. apply the sanctions provided for and adopt coercive administrative measures; 4. give binding instructions concerning compliance with this Law or with other laws on equal treatment; 5. bring actions against administrative acts adopted contrary to this Law or other laws on equal treatment; bring legal proceedings and intervene as an interested party in cases brought under this Law or other laws on equal treatment; 6. formulate proposals and recommendations to State and local authority bodies for the prevention of discriminatory practices and for the annulment of their acts adopted contrary to this Law or other laws on equal treatment; 7. keep a public record of its decisions in force and its binding instructions; 8. give advice as to whether draft legislative acts are consistent with the legislation on discrimination and recommend the adoption, repeal, amendment or supplementation of legislative acts; 9. provide independent assistance to victims of discrimination when they bring actions; 10. carry out independent studies on discrimination; 11. publish independent reports and make recommendations on any questions relating to discrimination; 12. exercise any other powers laid down in the legislation governing its organisation and its activity."

8 International Coordinating Committee of National Institutions for The Promotion and Protection of Human Rights, *Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union*, European Union Agency For Fundamental Rights, 2012, p. 99.

9 ICC Sub-Committee on Accreditation, *Report*, October 2011, p. 4, available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx>.

10 *Ibid.*, p. 8.

11 C-394/11, *Opinion of Advocate General Kokott*, 20 September 2012. See also above note 2, Para 17.

12 See above, note 2, Para 20.

13 Article 267 states that "[w]here such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

14 Equinet, *Influencing the law through legal proceedings: The powers and practices of equality bodies*, September 2010, p. 28.

15 See above, note 2, Para 37; see also above, note 11, Paras 23 and 25.

16 See above, note 2, Para 38; and above note 11, Para 26.

17 See above, note 2, Para 38.

18 See above, note 11, Para 27.

19 *Ibid.*, Para 28.

20 *Ibid.*

21 See above, note 2, Paras 40-42 and Para 45.

22 *Ibid.*, Paras 43-44.

23 *Ibid.*, Para 47.

24 See above, note 11, Para 40.

25 See above, note 2, Para 48.

26 See above, note 11, Para 41.

27 See above, note 2, Para 49.

28 See above, note 11, Paras 38-39.

29 See above, note 2, Para 50.

30 See above, note 11, Para 45.

31 See above, note 2, Para 51.

32 *Ibid.*, Para 53.

33 *Ibid.*, Para 52.

34 Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, CJEU, 17 September 1997.

35 See above, note 11, Para 47.

36 *Ibid.*, Para 48.

- 37 See above, note 2, Paras 54-55.
- 38 See above, note 11, Para 24 and the case law cited in its footnote 15.
- 39 Case C-517/09 *RTL Belgium SA*, CJEU, 22 December 2010.
- 40 *Ibid.*, Para 47.
- 41 Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEV*, CJE, 31 May 2005.
- 42 *Ibid.*, Para 33.
- 43 *Ibid.*, Para 36.
- 44 Case C-407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, CJEU, 6 July 2000.
- 45 *Ibid.*, Para 35.
- 46 Case C-195/06 *Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF)*, CJEU, 18 October 2007.
- 47 Case C-136/11 *Westbahn Management GmbH v ÖBB-Infrastruktur AG*, CJEU, 22 November 2012.
- 48 See above, note 34.
- 49 *Ibid.*, Para 31.
- 50 *Ibid.*, Para 37.
- 51 See above, note 11, Para 34.
- 52 *Ibid.*, Paras 42-44.
- 53 *Ibid.*, Para 36.
- 54 *Ibid.*, Paras 29-30.
- 55 *Ibid.*, Paras 31-35.
- 56 *Ibid.*, Para 50.
- 57 *Ibid.*, Paras 60-67.
- 58 *Ibid.*, Para 69.
- 59 *Ibid.*, Paras 71-72.
- 60 *Ibid.*, Paras 75-76.
- 61 *Ibid.*, Paras 80-83.
- 62 *Ibid.*, Para 94.
- 63 *Ibid.*, Paras 90-91.
- 64 *Ibid.*, Para 95.
- 65 *Ibid.*, Para 99.
- 66 *Ibid.*, Para 102.
- 67 *Ibid.*, Para 108.
- 68 *Ibid.*, Para 109. See also Para 116, where the Advocate General seems to suggest that, subject to further examination by the KZD, the measures can indeed be considered necessary.
- 69 *Ibid.*, Para 125.
- 70 See Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, CJEU, 24 April 2012; Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH*, CJEU, 19 April 2012; Case C-310/10 *Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others*, CJEU, 7 July 2011; Case C-391/09 *Malgożata Runevič-Vardyn and Lukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, CJEU, 12 May 2011; Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, CJEU, 10 July 2008; Case C-328/04 *Criminal Provedings v Attila Vajnai*, CJEU, 6 October 2005.
- 71 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- 72 Uyen Do, T., "A case odyssey into 10 years of anti-discrimination law", *European Anti-Discrimination Law Review*, No. 12, 2011, pp. 11-21.
- 73 See, by way of example, the number of case files opened each year by the Bulgarian KZD. In 2011 this exceeded 350 and showed an increase. The figures are available at: http://equineteurope.org/IMG//pdf/PROFILE_CPD_BG.pdf.
- 74 See above, note 2, Para 37.