

# A Landmark Judgment of the Court of Justice of the EU – New Conceptual Contributions to the Legal Combat against Ethnic Discrimination

Rossen Grozev<sup>1</sup>

## Introduction

On 16 July 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*.<sup>2</sup> The importance of this judgment, delivered by the Grand Chamber, can hardly be overestimated. The curious factual background will certainly mean that the case will be remembered by future generations of European Union (EU) law students. However, the odd situation addressed by the judgment is only the starting point. The judgment offers new perspectives on the interpretation of Directive 2000/43/EC<sup>3</sup> in at least four areas: i) outlining the Directive's personal scope of application; ii) clarifying certain aspects of its material scope; iii) bringing new perspectives to the perennial dilemma of distinguishing between direct and indirect discrimination; and iv) detecting problems with the conformity of several national legal provisions with EU anti-discrimination law. These aspects of the judgment will be examined below after a brief introduction to the factual background of the case.

## 1. Factual Framework

In the course of national judicial proceedings, a Bulgarian court decided to use the opportunity provided by the preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to pose a number of questions to the CJEU through a preliminary ruling request. The case pending before the national court concerned

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1 Rossen Grozev is an official of the European Commission, working as a Legal Officer in the Directorate General for Justice and Consumers. The views expressed in this article do not engage in any way the European Commission. The author owes his gratitude to Mr Álvaro Oliveira and Mr Vitalijus Novikovas for their insightful observations on Case C-83/14, which were a constant source of inspiration. Any eventual errors and omissions in the present text are the author's own responsibility.

2 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, 16 July 2015.

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

the practice of placing electricity meters used for the commercial measurement of electricity consumption at a height of 7m in the predominantly Roma-populated urban district Gizdova Mahala in the town of Dupnitsa, making it impossible for people living in that district to read them, while meters were positioned lower than 2m above ground in non-Roma districts. This practice, according to the company that was using it – one of the largest electricity companies in Bulgaria (CHEZ Razpredelenie Bulgaria AD) – was necessary because of the large number of instances of tampering with the commercial measuring instruments and of unlawful connections to the electricity network in the district. A local shopkeeper (Ms Nikolova), who lived in the district and was unable to check her electricity consumption herself, issued legal proceedings, which eventually reached the Sofia Administrative Court and prompted the national judge to refer a long list of 10 questions to the CJEU for preliminary ruling. These 10 questions can be summarised as follows:

1. Could the expression “ethnic origin” used in Directive 2000/43/EC be interpreted as covering a homogeneous group of Bulgarian citizens of Roma origin such as those living in a district of the town of Dupnitsa?;
2. Was the practice at issue a form of direct or indirect discrimination within the meaning of Article 2(2)(a) and (b) of Directive 2000/43/EC?; and
3. Was Article 2(2)(b) of Directive 2000/43 – defining indirect discrimination – to be interpreted as meaning that the practice of the electricity company in relation to the security of the electricity network and the correct recording of electricity consumption was objectively justified? Was that practice necessary when there were other technically and financially feasible means of securing the commercial measuring instruments?

Unlike the similar *Belov* case,<sup>4</sup> where the CJEU declared the referral for preliminary ruling inadmissible since it was made by a national equality body which was not considered a court of law capable of referring questions for preliminary rulings (in accordance with Article 267 TFEU), in *CHEZ* there was no doubt whatsoever about the judicial nature of the referring national court and the request was declared admissible.

## 2. Personal Scope of Directive 2000/43/EC

### a. *The Scope of the Term “Ethnic Origin”*

Firstly, the referring court asked whether the term “ethnic origin” used in Directive 2000/43/EC should be interpreted as covering a homogenous group of Bulgarians of Roma origin such as those living in a particular district of the town Dupnitsa. The CJEU gave a positive answer and this in itself is not surprising. The more astonishing fact is that *CHEZ* was actually the first ever case to be decided by the CJEU on discrimination against Roma people – the largest ethnic minority in the EU.

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<sup>4</sup> *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others*, C394/11, 31 January 2013.

It is noteworthy that Directive 2000/43/EC does not define the concepts of racial or ethnic origin. It is left to member states to decide whether they should define these concepts in their national law and in what way. However, taking into account the crucial importance of the interpretation of the term “ethnic origin” for delimiting the very scope of application of the Directive, an independent interpretation is needed and the substance of this notion should not be left exclusively within the discretion of member states. In principle, the term should be given a broad reading, since a narrow interpretation of “ethnic origin” would restrict the application of the Directive and thus decrease the level of protection against discrimination, endangering the aims, and the effectiveness, of the Directive.<sup>5</sup>

Even without an in-depth inquiry, the expression “ethnic origin” used in Directive 2000/43/EC should be interpreted as covering a homogeneous group of Bulgarians of Roma origin such as those living in the Gizdova Mahala district, having in mind the general recognition of Roma as an ethnic group. Whether they are referred to as Gens du voyage, Travellers, Sinti, etc., these people have similar cultural features and are treated in many international documents as belonging to the “Roma” ethnicity, this term being employed as a useful generalisation. Several policy and legal instruments adopted by the EU regarding Roma consider that they are an ethnic group<sup>6</sup> and are thus covered by Directive 2000/43/EC.

The referring court pointed out that most of the population of the Gizdova Mahala district consisted of people of Roma origin, constituting a group with a common ethnic origin. The European Court of Human Rights (ECtHR) has already had the occasion to interpret the concepts of ethnicity and race in the context of applying the Article 14 right to non-discrimination of the European Convention on Human Rights. The ECtHR concluded that:

*Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.<sup>7</sup>*

There was a general agreement by the intervening parties in *CHEZ* that, in the absence of a definition of “racial or ethnic origin” in Directive 2000/43/EC, the ECtHR definitions could serve as a point of reference for interpretation of the Directive. However, the CJEU did not make a definitive comment in this respect. Instead it stated that the concept of “discrimination on the grounds of ethnic origin” for the purpose of Directive 2000/43/EC must be interpreted as applicable

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5 *Firma Feryn*, C-54/07, 12 March 2008, decision of the Advocate General, Para 15.

6 See, for example, Council Recommendation of 9 December 2013 on effective Roma integration measures in the Member States.

7 *Timishev v Russia*, App. No. 55762/00 and 55974/00, 13 December 2005, Para 55.

to the circumstances of the case.<sup>8</sup> It is regrettable that the CJEU only concluded *ad hoc* that the particular factual background was covered by the notion of “discrimination on the grounds of ethnic origin”, without going a step further by formulating some general criteria to be applied to determine whether ethnic discrimination could be found to exist. That said, the CJEU’s approach has the advantage of not restricting or pre-determining the development of any future jurisprudence on the thorny issue of less favourable treatment based on ethnic origin.

### ***b. Discrimination by Association***

The question concerning the personal scope of Directive 2000/43/EC, and in particular whether “ethnic origin” covers a homogeneous group of persons of Roma origin, was not facilitated by an unexpected twist in the development of the case while pending before the CJEU. Quite importantly, in her submissions to the CJEU, the immediate plaintiff in the initial national proceedings, Ms Nikolova, rejected the national court’s assessment that she was of Roma origin. Instead, she declared that she neither self-identified nor was identified as Roma.

Directive 2000/43/EC does not appear to require that the alleged victim possess the protected characteristic. If it were to be interpreted otherwise it would only privilege a certain category of human beings with protection from discrimination. Moreover, if direct discrimination was to be detected in this particular case, any unfavourable treatment on the grounds of presumed origin or by association would not be covered by the general prohibition.

More specifically, the case had to be dealt with as covered by Directive 2000/43/EC. Both systematically and logically, the Directive should be construed as implying that Ms Nikolova may have suffered discriminatory treatment connected to ethnic origin, although she herself is not Roma. Indeed, it was the Roma ethnic origin of the majority of the population of the district where she conducted her business activities which led to her less favourable treatment.

There is a precedent for the conclusion that discrimination by association is covered by the Directive and this was relied upon by the European Commission in its submission to the CJEU. In *Coleman v Attridge Law*,<sup>9</sup> the CJEU ruled that although the person subjected to direct discrimination on grounds of disability was not herself disabled, the fact remained that it was the disability which, according to Ms Coleman, was the ground for the less favourable treatment which she claimed to have suffered. The Court pointed out that Directive 2000/78/EC,<sup>10</sup> which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applied “not to a particular category of persons but by reference to the grounds mentioned in Article 1”.<sup>11</sup>

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8 See above, note 2, Para 60.

9 *S. Coleman v Attridge Law and Steve Law*, C-303/06, 17 July 2008.

10 See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

11 See above, note 9, Para 50.

Similarly, in *CHEZ*, Ms Nikolova was a victim of discrimination by her association with Roma people. She experienced treatment which was less favourable as compared to that of people living in other districts without a majority Roma population, precisely because she tried to develop her business in a predominantly Roma quarter. As in Directive 2000/78/EC, Directive 2000/43/EC provides, in its Recital 13, that “any direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by this Directive should be prohibited throughout the Community”.

Therefore, by applying the reasoning of the CJEU in *Coleman* to *CHEZ*, it could also be maintained that the principle of equal treatment enshrined in Directive 2000/43/EC applied not to a particular category of persons but by reference to the ground of racial or ethnic origin in general. A narrow interpretation of the notion of discrimination “on grounds of racial or ethnic origin” as referring to a person who possessed the racial or ethnic origin which was the basis for the discrimination would restrict the field of the Directive’s application and weaken the positive effect which had been envisaged by the EU legislature in its drafting.<sup>12</sup>

In this respect, it was suggested by one of the intervening parties in *CHEZ* that the analysis of Advocate General Poiares Maduro in his Opinion in *Coleman* could be relied on by analogy. Advocate General Maduro explained the mechanics of Directive 2000/78/EC, observing that:

*[W]hat determines whether the employer’s conduct is acceptable or not, and triggers the law’s intervention, is the ground of discrimination relied on by the employer in each case.*<sup>13</sup>

Therefore:

*As soon as we have ascertained that the basis for the employer’s conduct is one of the prohibited grounds then we enter the realm of unlawful discrimination.*<sup>14</sup>

According to Maduro:

*[T]he Directive performs an exclusionary function, since it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another.*<sup>15</sup>

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12 See also by analogy the remarks of the Advocate General Maduro in *Firma Feryn*, C54/07, 12 March 2008, Para 15, on the interpretation of Directive 2000/43/EC and its application to cases where it is difficult to identify concrete victims.

13 *S. Coleman v Attridge Law and Steve Law*, C-303/06, 31 January 2008, decision of the Advocate General, Para 16.

14 *Ibid.*, Para 17.

15 *Ibid.*, Para 18.

On this basis, he concluded that:

*[I]ncluding discrimination by association in the scope of the prohibition of direct discrimination and harassment is the natural consequence of the exclusionary mechanism through which the prohibition of this type of discrimination operates.<sup>16</sup>*

In any event, in the *CHEZ* proceedings, one of the intervening parties emphasised that, as in *Coleman*, the fact that the plaintiff *may* have been a victim of discrimination based on a prohibited ground did not mean that she was *actually* a victim of such discrimination, so the matter could be resolved without prejudicing the outcome of the case at issue.

To summarise, the self-identification of Ms Nikolova as non-Roma could not be considered as a relevant factor in deciding whether Directive 2000/43/EC could be relied upon. On the basis of the *Coleman* jurisprudence, although Ms Nikolova did not possess the protected characteristic, she was entitled to avail herself of the protection against discrimination on the protected ground, since she was living in a predominantly Roma neighbourhood and, therefore, was also subjected to the contested practice. The CJEU accepted this line of reasoning and, accepting that Ms Nikolova was not of Roma origin, declared that it was the Roma origin of most of the other inhabitants of the district in which she carried on her business that constituted the basis for the discrimination she allegedly faced.<sup>17</sup>

### 3. Material Scope of Directive 2000/43/EC

#### a. *The Notion of “Apparently Neutral Provision, Criterion or Practice” (Article 2(2)(b) of Directive 2000/43/EC)*

Through its question No. 6, the referring court sought clarity on the interpretation of the notion of “apparently neutral practice” in the definition of indirect discrimination in the Directive. It questioned whether such a notion meant that a certain practice must be “obviously neutral” or that it “only seems neutral, at first glance”. Prior to *CHEZ*, this aspect of the definition had not been interpreted by the CJEU, so its findings in *CHEZ* represent a conceptual advancement in the understanding of the EU anti-discrimination directives.

In general terms, indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons having a particular characteristic at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>18</sup> The traditional perception of an “apparently neutral” measure in the context of indi-

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<sup>16</sup> *Ibid.*, Paras 18 and 19.

<sup>17</sup> See above, note 2, Para 59.

<sup>18</sup> According to the exact wording of Article 2(2)(b) of Directive 2000/43/EC, indirect discrimination is considered as having taken place when “an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons”.

rect discrimination is a measure which, albeit formulated in neutral terms (i.e. by reference to other criteria not related to the protected characteristic) nevertheless leads to the result that persons possessing that characteristic are put at a disadvantage.<sup>19</sup>

With the *CHEZ* judgment, the CJEU added a new hermeneutic perspective to the “neutrality” notion. The concept of indirect discrimination is based on the perception that some provision, criterion or practice, which at first sight would appear neutral (i.e. not introduced in connection with a protected characteristic) is actually not neutral because the effects it produces on different groups of persons are deeply diverging.

One possible approach in interpreting the notion of “apparently neutral provision, criterion or practice” is for the national court to turn towards analysis of the constituent aspects of indirect discrimination, if a conclusion has been reached that direct discrimination could not be proved. In applying this “fall-back” solution, it would seem without real importance whether a certain practice is “obviously neutral” or “only seems neutral, at first glance”. What actually counts is that all the elements defining direct discrimination cannot be assembled and that all remaining requirements for finding indirect discrimination are in place.

The CJEU in its judgment preferred a different analytical approach – namely, to interpret directly the notion of “apparently neutral practice”, choosing between a practice whose neutrality is particularly “obvious” and a practice that is neutral “ostensibly” or “at first glance”. In this respect the Opinion of Advocate General Kokott was particularly helpful.<sup>20</sup> The Advocate General concluded that the term “apparently” in Article 2(2)(b) of Directive 2000/43/EC must be understood as referring to an *ostensibly* or *prima facie* neutral measure. The term is not restricted to provisions or practices which are only manifestly neutral. Otherwise, an absurd situation could occur, preventing any finding of indirect discrimination if the contested practice or measure proves to be less neutral than it might seem during its initial assessment.

Following this line of reasoning, the CJEU preferred to understand the notion of “apparently neutral practice” as a practice that is neutral “ostensibly” or “at first glance”. In addition to the fact that such an understanding corresponded to the most natural meaning of the term used, that perception was deemed by the Court as required in light of its established jurisprudence on the concept of indirect discrimination, according to which, unlike direct discrimination, indirect discrimination might be the consequence of a measure which, although neutrally formulated (i.e. by reference to other criteria not related to a protected characteristic), nevertheless produces the result that mainly individuals possessing that characteristic find themselves in a disadvantageous position.<sup>21</sup>

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19 See *Z. v A Government department and The Board of management of a community school*, C-363/12, 18 March 2014, Para 53 and the case-law cited therein.

20 *CHEZ Razpredelenie*, C-83/14, 12 March 2005, decision of the Advocate General, Para 92.

21 See above, note 2, Paras 93–94.

**b. The Notion of “Particular Disadvantage” and the Intensity of the Negative Effect of “Less Favourable Treatment” (Direct Discrimination) and “Particular Disadvantage” (Indirect Discrimination)**

One very interesting and previously relatively unexplored aspect of the definitions of direct and indirect discrimination is whether a material difference exists between the concepts of “less favourable treatment” and “particular disadvantage”, specifically whether there is a difference between the intensity of the negative effect required for “less favourable treatment” (used for defining direct discrimination) and that required for “particular disadvantage” (an element of the definition of indirect discrimination).<sup>22</sup>

The CJEU was prompted to provide its interpretation on this issue by a question of the referring court in *CHEZ* relating to the conformity of certain national provisions with Directive 2000/43/EC. The national provisions required “less favourable treatment” for direct discrimination and “placing in a less favourable position” for indirect discrimination. The uncertainty of the Bulgarian judge was caused by the fact that the national legal rules did not, unlike the directive, “make a distinction according to the degree of seriousness of the unfavourable treatment concerned”.<sup>23</sup>

The perception that the EU legislator intended to incorporate such a difference in the legal constructions of direct and indirect discrimination is not without justification. Indeed, given that in the case of indirect discrimination the negative effect is caused by a provision, criterion or practice adopted for some other reason, and not explicitly on the grounds of the protected characteristic (which, in the context of direct discrimination, deserves harsh and automatic condemnation even without producing particularly nefarious results), it could be expected that more severe consequences need to be demonstrated for a case of indirect discrimination to be established, than for a case of direct discrimination to be established.

The CJEU disagreed with this viewpoint, perhaps prompted to a certain extent by the majority of submissions in the case and by the position of the Advocate General.

Indeed, there seems to be no substantial difference between the concepts of “less favourable treatment” and “particular disadvantage.” One possible explanation for the different wordings is that they are connected to the need to distinguish the definitions terminologically, in order to avoid blurring the notions of direct and indirect discrimination. The finding of direct discrimination presupposes that one individual is treated less favourably because of his or her ethnic origin. On the other hand, in order to prove indirect discrimination, a group of individuals should be found to be at a disadvantage “compared with other persons”. The only mandatory distinction seems to be that the disadvantage should concern a group of persons who share a characteristic and not a single person. Otherwise, the strength of the effects of

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22 See above, note 3, Article 2(2)(a) and (b).

23 See above, note 2, Para 37.

the “particular disadvantage” is not required to exceed the intensity of the effects produced by the “less favourable treatment” in direct discrimination. It was suggested that the CJEU does not need to determine whether or not there is any legally significant difference in the required degree of “unfavourable treatment” or “disadvantage” between the concepts of direct and indirect discrimination.

Advocate General Kokott observed that the expression “put (...) at a particular disadvantage” in Directive 2000/43/EC should not be mistakenly conceived to mean that only particularly serious inconveniences for members of an ethnic group could amount to indirect discrimination. On the contrary, this wording means that indirect discrimination exists where an apparently neutral provision, criterion or practice affects certain individuals (representatives of a particular ethnic group) more harshly than others. The severity of the disadvantage could, however, eventually matter in terms of justification for the measure: if the inconvenience caused is particularly serious, the eventual justification should meet stricter standards.<sup>24</sup>

The CJEU agreed with the Advocate General and developed this line of reasoning, accepting that the expression “particular disadvantage” employed in Article 2(2)(b), together with the other elements of the definition, does not mean that such a circumstance can exist solely when there is an especially noteworthy, evident and extreme instance of disparity. This condition must be considered met if individuals of a certain ethnic origin are hindered as a result of the measure.<sup>25</sup>

The Court stated that this understanding stemmed from its jurisprudence, which interprets indirect discrimination as emerging when a national measure, even with neutral wording, is detrimental for “considerably more” or “far more” individuals having the protected characteristic than for individuals without it.<sup>26</sup> Such a reading, the Court went on, is more compatible with the aims of the EU legislator than an understanding which would imply that “only serious, obvious and particularly significant cases of inequality fall within Article 2(2)(b) of Directive 2000/43”.<sup>27</sup>

#### **4. Distinguishing between Direct and Indirect Discrimination**

The definitions of direct and indirect discrimination contained in Article 2(2)(a) and (b) of Directive 2000/43 are the starting point of any discussion:

*(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;*

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24 See above, note 20, Para 93.

25 See above, note 2, Para 99.

26 See in particular, above note 19, Para 53 and the case-law cited therein; and *Cachaldora Fernández*, C-527/13, 14 April 2015, Para 28 and the case-law cited therein.

27 See above, note 2, Paras 101–102.

*(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*

In a preliminary ruling such as *CHEZ*, it is not the task of the CJEU to determine whether, on the basis of the facts of the case, a form of direct or indirect discrimination has occurred. It is only the national court, following further investigation of the facts and assisted by the guidance provided by the preliminary ruling of the CJEU, which can make this determination. However, in its judgment in *CHEZ*, the CJEU analysed the notions of direct and indirect discrimination in the light of the facts of the case and came to rather unambiguous conclusions, albeit abstaining from directly determining the issue.

#### **a. The Elevated Electricity Meters as a Form of Direct Discrimination?**

Three cumulative conditions must be found to exist in order to conclude that direct discrimination has taken place in the case of the elevated electricity meters in the Roma neighbourhoods: the situation has been created and maintained on the basis of the ethnic origin of the concerned population; the situation amounts to a certain negative result; and the situation of those affected is less favourable than that of others in a “comparable” situation.

##### *i. Grounds of Ethnic Origin*

It is not difficult to imagine that the basic defence of the electricity company against the accusation of direct discrimination was to deny that the specific positioning of the electricity meters in the Roma neighbourhood was due to the ethnic origin of its inhabitants. Instead, CHEZ maintained that this practice – far from intending to discriminate – was designed exclusively to prevent illegal tampering with the electricity meters and unauthorised connection to the electricity distribution network. Naturally, it will be for the referring national court to decide whether the real reason was the ethnic origin of the majority of the electricity consumers or something else. The CJEU, however, gave several quite explicit signs of how it viewed the situation.

Firstly, the Court noted that it was widely accepted and not contested by CHEZ that the company had introduced the disputed practice only in urban districts known to be inhabited predominantly by people of Roma origin.<sup>28</sup> Secondly, the company’s position was not reinforced by its own frequent assertions in similar cases before the Bulgarian equality body that in its view the illegal tampering and connections to the distribution network were mostly carried out by Roma. The CJEU observed that such a standpoint could actually imply that the contested practice is based on prejudices and ethnic stereotyping.<sup>29</sup> Thirdly, the CJEU noted that, despite requests from the

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<sup>28</sup> *Ibid.*, Para 31.

<sup>29</sup> *Ibid.*, Para 82.

referring Bulgarian court, CHEZ was unable to produce evidence of the alleged damage, meter tampering and unlawful connections, claiming only that they were common knowledge.<sup>30</sup>

Finally, the CJEU invited the referring court to keep in mind the compulsory, widespread and lasting nature of the disputed practice, when assessing the real reasons for it. In fact, the practice had been applied indiscriminately to all persons living in the district, regardless of whether their individual meters had been manipulated, whether these citizens were responsible themselves for unauthorised connections or whether the real identity of the perpetrators had ever been discovered. In addition, this measure was still in place almost 25 years after its introduction. These findings in their entirety implied a generalised perception that all individuals living in a predominantly Roma-populated district could be involved in illegal activities with regard to electricity consumption.<sup>31</sup>

The interpretative tools applied by the CJEU provide quite instructive factors for the referring court to take into account in any future cases in which it is required to determine whether the reason for a certain practice was the ethnic (or racial) origin of its targets: the factual finding that the contested practice existed in places with a high concentration of representatives of certain racial or ethnic origin; justifications of the practice which smack of ethnic stereotypes or prejudices; lack of evidence suggesting any other plausible reason for applying the practice; and the compulsory, widespread and lasting nature of the practice.

#### *ii. Less Favourable Treatment*

The second element required for a finding of direct discrimination under Directive 2000/43/EC is the finding of effects unfavourable to the interests of the persons concerned. According to the CJEU, it was irrefutable that the act of putting electricity meters on poles 7m high amounted to unfavourable treatment of the occupants of the relevant urban area, taking into account not only the troublesome procedure for them to control their electricity meters, but also the humiliating and stigmatising character of the disputed measure.<sup>32</sup>

#### *iii. Comparable Situation*

Finding a comparable situation in which the electricity company's practice is more favourable is crucial in order to determine whether direct discrimination existed in the case at issue. The CJEU considered that the referring court may have been perplexed by the fact that it was both true that not all inhabitants of the affected district were Roma and that Roma living outside the affected district were not suffering the less favourable treatment in question. The CJEU recalled that in determining the comparability of situations in the context of applying the equal treatment principle, all aspects of the juxtaposed situations should be taken into consideration.<sup>33</sup>

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30 *Ibid.*, Para 83.

31 *Ibid.*, Paras 81–84.

32 *Ibid.*, Para 87.

33 See, in particular, *Arcelor Atlantique et Lorraine and Others*, C-127/07, 16 December 2008, Para 25.

By adopting this approach, the CJEU identified an extremely broad comparator in the case. It held that, as a matter of principle, all final electricity consumers who lived in an urban area and were supplied by the same company should be considered as being in a comparable situation.<sup>34</sup>

This expansive choice of comparator almost predetermines the outcome of the case. The electricity company may have rebutted the claim of direct discrimination if another comparator had been identified. For example, it could have identified as comparators people living in other areas where cases of illegal tampering with the electricity meters and unauthorised connection to the distribution network are abnormally numerous (be they areas inhabited by persons of Roma origin or not). However, such a choice of comparator would have presupposed capability – and probably willingness – on the part of the electricity company to present strongly convincing statistical and technical data proving that electricity meters are put at height of 7m only in areas with high frequency of illegal interventions with the electricity meters and/or the distribution networks. The electricity company had not presented such evidence at any point in the proceedings.

The electricity company made a number of contentions. It claimed that the disputed measure has been introduced as a reaction to concrete problems faced by it on the ground: attempts of illegal interference with electricity meters, as well as attacks against its technical staff. Further, the measure had already been in place when the electricity company was privatised. In addition, there were a combination of negative factors in the relevant neighbourhoods, e.g. illegal construction, poverty and social exclusion. CHEZ maintained that it did not have at its disposal any statistical data on the ethnic origin of the concerned population. The contested measure could not be appealed against by individuals because they were not taken as a reaction to an individual situation. The individual decisions were the responsibility of CHEZ's technicians, who acted without consulting the payment data but in response to the information they possessed regarding “non-technical losses” of electricity. The disputed measure was presented as a reaction to a phenomenon observed on the ground, the logic behind the measure being that it simply rendered more difficult the attempt to steal electricity.

In the light of such unconvincing statements, it seems quite unlikely that the electricity company will be ready to change its defensive tactics by presenting more convincing proofs before the national court which is to finalise the case after the CJEU's preliminary ruling.

#### *iv. Reversal of the Burden of Proof*

Article 8(1) of Directive 2000/43/EC<sup>35</sup> makes clear the burden of proof to be applied by the national court when determining whether the measure amounts to direct discrimination.

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34 See above, note 2, Para 90.

35 “Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

Since it is for the referring Bulgarian court to examine the facts of the case, it is also for the same court to determine whether the plaintiff has established before it (or, previously, before the Bulgarian equality body) facts from which it may be presumed that there was direct discrimination. If this is found to be the case, the respondent must then prove that there has been no breach of the principle of equal treatment.

The evidence already adduced in earlier proceedings indicates that there is strong reason to suspect ethnic discrimination on the part of the electricity company. As the CJEU rightly points out, in the event that the national court finds a presumption of discrimination to exist, the reasonable recourse to the equal treatment principle demands that the burden of proof shifts to the electricity company. This would require CHEZ to prove that the practice has been introduced and maintained due to some objective, non-discriminatory reason which is not connected with the predominant ethnic origin of those inhabiting the district(s) where the measure still exists.<sup>36</sup>

### ***b. The Elevated Electricity Meters as a Form of Indirect Discrimination?***

#### *i. Indirect Discrimination as a Fall-Back Solution*

It should be recalled that, according to the dichotomy established by Directive 2000/43/EC, in principle discrimination is either direct or indirect (except for cases of harassment). Accordingly, a methodical and reasonable approach would be to analyse whether the electricity company has indirectly discriminated only if, for some reason, direct discrimination could not be regarded as having taken place. In *CHEZ*, the CJEU seems to indicate that this would be the logical approach for the national court to take in making its final determination on the facts.<sup>37</sup>

#### *ii. Possibility and Conditions for Objective Justification*

According to one of the basic tenets of EU anti-discrimination law, the possibility for objective justification exists, in principle, only in cases of indirect discrimination.<sup>38</sup> An indirectly discriminatory practice can be justified only if it pursues genuinely legitimate aims and the means of achieving these aims are appropriate and necessary.

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36 See above, note 2, Para. 85.

37 *Ibid.*, Para 105.

38 A rare exception to this principle is Article 6(1) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which stipulates that member states may provide that differences in treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It has been rightly pointed out in the legal theory that this is not the same test as for objective justification of indirect discrimination under Article 2(2)(b) of Directive 2000/78/EC, since under Article 6(1) of the same Directive could be justified not only indirect, but even direct discrimination. See Barnard C., *EU Employment Law*, Fourth Edition, Oxford University Press, 2012, p. 371.

### *Legitimate Aims*

The electricity company in *CHEZ* argued that the contested practice has been introduced in order to respond to and prevent illegal damage to and tampering with electricity meters, and unauthorised connections to the distribution electricity network, which had resulted in huge “non-technical losses of electricity” in the relevant district. In addition, it argued that the measure was aimed at preserving the health of the consumers in the district (who could injure themselves while tampering with the network) and maintaining the integrity of the whole electricity supply system.

Both the Advocate General and the CJEU agreed that, considered as a whole, such aims constituted legitimate aims recognised by EU law.<sup>39</sup> Of course, the CJEU was answering the question in order to assist the national court only if the latter concluded that these were the real aims of the company as a matter of fact. The CJEU itself did not determine the question of facts but provided strong indications that it did not believe these were the facts.

### *Appropriateness*

As to the appropriateness of the adopted measure, the CJEU accepted the interpretation of the Advocate General<sup>40</sup> that the measure could be regarded as capable of effectively counteracting illegal practices involving manipulation of individual measuring devices and interference with the distribution infrastructure, so – for the needs of the objective justification test – the measure could be recognised as appropriate in achieving the aims already assessed as legitimate.<sup>41</sup>

### *Necessity*

In its assessment of the necessity of *CHEZ*'s practice, the CJEU seemed strongly influenced by the submission that when evaluating the proportionality of the contested measure, the practice of the other electricity companies active in Bulgaria should also be taken into account. The information provided by the Bulgarian equality body was that these other enterprises had abandoned the practice, choosing other means for combating illegal interventions and connections, and had installed individual measuring devices at a height not exceeding 1.5–2m.<sup>42</sup> Accordingly, the national court will need to consider the existence of different and not so stringent measures and whether they are capable of achieving the objectives declared by *CHEZ*. If it finds that alternate measures are so capable, the national court is expected to

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39 See above, note 2, Paras 113–114.

40 See above, note 20, Paras 121–124.

41 See above, note 2, Para 119.

42 For example, installing controlling electricity meters in consumers' premises, or measures for enhanced physical protection of the measuring devices, combined with remote reading of the electricity meters.

declare that the means chosen by the electricity company cannot be deemed necessary in the sense of Article 2(2)(b) of Directive 2000/43/EC.<sup>43</sup>

iii. *The “Broader” Proportionality Test Adopted By the CJEU*

It appears that an additional, or at least broader, proportionality test has been embraced over time by the CJEU;<sup>44</sup> it requires not only that the means of reaching a certain aim should be appropriate and necessary for achieving that aim but, in addition, the disadvantages caused by these otherwise appropriate and necessary means should be proportionately compensated by the advantages associated with the aim pursued. Such an approach undoubtedly enlarges the scope of application of the proportionality principle by requiring a consideration of the possible negative effects of the measures taken to achieve a legitimate aim as weighed against the eventual positive aspects of the aim. This element of the proportionality test was explained by Advocate General Kokott in her Opinion for the *Belov* case,<sup>45</sup> where the factual background was virtually the same as that in *CHEZ*. The Advocate General underlined that according to the principle of proportionality, measures which negatively encroach on a right defended by EU law – in the discussed case, the prohibition of discrimination based on ethnic origin – must not cause disadvantages for the individual which are disproportionate to the aims pursued.<sup>46</sup> It is hardly surprising that the electricity company vigorously opposed that this final step was part of the proportionality test rightly understood and instead submitted that there were judgments of the CJEU (for example, the judgment *Kachelmann*<sup>47</sup>) where a lighter standard for proving proportionality in discrimination cases had been applied.

After considering this point, the CJEU recommended that a three stage analysis be adopted by the national court to determine whether the disadvantages associated with the contested measure were proportionate to the envisaged aims and whether the measure at issue unduly prejudiced the legitimate interests of those living in the affected district:

- Assess the legitimate interests of final consumers in enjoying access to the electricity distribution service under conditions free of offensive or stigmatising effects;
- Take into account “the binding, widespread and long-standing nature” of the contested measure and the fact that it does not provide for drawing any distinction between those inhabitants of the predominantly Roma district who could be blamed for certain unauthorised actions and those who are innocent of such conduct; and

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43 See above, note 2, Paras 120–122.

44 See *Ingeniørforeningen i Danmark*, C-499/08, 12 October 2010, Paras 32 and 47; and *Nelson and Others*, C-581/10 and C-629/10, 23 October 2012, Para 76 *et seq.*

45 See above, note 4.

46 See *Tempelman and van Schaijk*, C96/03 and C97/03, 10 March 2005, Para 47; and *ERG and Others*, C379/08 and C380/08, 9 March 2010, Para 86.

47 *Bärbel Kachelmann v Bankhaus Hermann Lampe KG*, C-322/98, 26 September 2000.

- Consider the legitimate interest of the final electricity consumers in being able to verify and control their consumption on effective and regular basis (a right explicitly guaranteed by EU legislation<sup>48</sup>).<sup>49</sup>

It could well be that this more encompassing proportionality test would almost certainly be failed by the electricity company, although that is for the national court to decide. The CJEU seemed to accept the argument that the proportionality of the measure concerned has to be assessed at the time of determination rather than at the time, possibly 25 years ago, when the measure was first introduced.

Not surprisingly, CHEZ strongly opposed the view that the stigmatising effect of a certain measure should be taken into account when assessing the proportionality of this measure. In its judgment in *CHEZ*, while instructing the national court to be particularly demanding in applying the proportionality test in its broader dimension if the practice at issue is determined as having stigmatising effects on the Roma people involved, the CJEU does not go as far as to say that if a measure has a stigmatising effect, it should *never* be capable of objective justification.

Nevertheless, the message of the CJEU remains forceful and uncompromising. The proportionality conditions would not be satisfied if the national court found either that other appropriate and less restrictive means to achieve those aims existed, or that, in the absence of such other means, the contested measure excessively prejudiced the legitimate interest of the final electricity consumers inhabiting the district concerned in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.

## 5. Problems of Conformity of National Legal Provisions with EU Anti-Discrimination Law

Last, but not least, the CJEU questioned the conformity of two provisions of the Bulgarian Law on Protection against Discrimination (*Zakon za zashtita ot diskriminatsia*) (ZZD) with Directive 2000/43/EC. These provisions define key concepts of the anti-discrimination law. Although these issues are specific to the Bulgarian legislation, it may be that there are similar problems with the wording in national anti-discrimination laws in other member states.

### a. *Indirect Discrimination on the Basis of a Protected Characteristic?*

Article 4(3) of the ZZD provides:

*(3) Indirect discrimination shall be taken to occur where, on the basis of characteristics mentioned in paragraph 1, one person is placed in a less favourable*

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48 See Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, in particular Article 3(3) and (7), as well as paragraph 1(h) and (i) of Annex I thereof.

49 See above, note 2, Paras 124–126.

*position compared with other persons by an apparently neutral provision, criterion or practice, unless that provision, criterion or practice is objectively justified having regard to a legitimate aim and the means of achieving that aim are appropriate and necessary. (emphasis added)*

However, Article 2(2)(b) of Directive 2000/43/EC establishes that:

*(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice **would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (emphasis added)*

These two provisions defining indirect discrimination are obviously worded in a different way. While Directive 2000/43/EC is interested only in whether an individual belonging to a certain race or ethnicity suffers a particular disadvantage, the Bulgarian legal provision demands that a person be placed in a less favourable position because of his/her racial or ethnic origin.

This discrepancy may produce outcomes incompatible with the Directive and the Bulgarian law is therefore not in conformity with it. The fact of treating a certain person unfavourably because of his or her racial or ethnic origin is an instrumental aspect of the definition of direct discrimination, which does not provide for any justification.<sup>50</sup> The Bulgarian legal definition of indirect discrimination, by requiring a person to be treated less favourably on the grounds of racial or ethnic characteristics (among others), decreases the level of protection against discrimination envisaged by Directive 2000/43/EC in two respects.

On the one hand, it suffices for finding indirect discrimination under the Directive that individuals of certain racial or ethnic origin are placed at a particular disadvantage. The exact ground or the possible explanation for less favourable treatment of these persons is immaterial. As Advocate General Maduro articulated, in situations involving indirect discrimination the intentions of the discriminator and the reasons she or he has to act or not to act are irrelevant.<sup>51</sup> This is the main advantage of having a notion of indirect discrimination – the only thing that matters is that a measure has negative and unwarranted effects on a group of people sharing common characteristics.

On the other hand, the definition of indirect discrimination in Article 4(3) of the ZZD virtually coincides with the concept of direct discrimination under Directive 2000/43/EC (“on the ba-

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50 Article 2(2)(a) of Directive 2000/43/EC establishes that: “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”.

51 See above, note 13, Para 19.

sis of characteristics” – “on grounds of racial or ethnic origin”) but opens the door to general justification which, quite logically, is absent from the definition of direct discrimination under Article 2(2)(a) of the Directive. While Article 4(2) of the ZZD correctly prohibits direct discrimination without justification, Article 4(3) of the ZZD is formulated in such a way as to leave open the question whether direct discrimination based on race or ethnicity could be justified.

To summarise, the definition of indirect discrimination in Article 4(3) of the ZZD appears not to conform with the definition of indirect discrimination contained in Article 2(2)(b) of Directive 2000/43/EC.

This line of reasoning was supported by the findings of the CJEU in its *CHEZ* judgment. Although the CJEU has no jurisdiction to pronounce directly on the conformity of national rules with EU law in its preliminary rulings, the CJEU does have jurisdiction to provide the national court with guidance as to the interpretation of EU law necessary to enable the national court to rule on the compatibility of national legal provisions with EU law.<sup>52</sup> The position expressed by the CJEU on Article 4(3) of the ZZD – as well as on Paragraph 1(7) of the Supplementary Provisions of the ZZD – was sufficiently unambiguous as to relieve the referring court and the Bulgarian authorities of any doubts about the incompatibility of the two Bulgarian provisions with Directive 2000/43/EC.

In discussing Article 4(3) of the ZZD, the CJEU reiterated that whenever it appears that a particular provision, criterion or practice determining unequal treatment has been adopted for reasons rooted in racial or ethnic origin, that measure must be classified as “direct discrimination” as understood in Article 2(2)(a) of Directive 2000/43/EC.<sup>53</sup>

The CJEU further stressed the contrast with the concept of indirect discrimination, which does not contain a mandatory condition requiring the measure to be adopted on racially or ethnically motivated grounds. As evidenced by the existing jurisprudence,<sup>54</sup> any measure will be caught by Article 2(2)(b) of Directive 2000/43/EC, if the measure in question puts persons bearing a protected characteristic at a disadvantage, even if that is not the measure’s *raison d’être* and the measure uses neutral criteria.<sup>55</sup>

In this context, the CJEU concluded that Article 2(2)(b) of Directive 2000/43 must be understood as contrary to a national provision such as Article 4(3) of the ZZD.<sup>56</sup>

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52 See *Placanica and Others*, C-338/04, C359/04 and C360/04, 6 March 2007, Para. 36 and the case-law cited therein.

53 See above, note 2, Para 95.

54 See above, note 19, Para 53 and the case-law cited therein.

55 See above, note 2, Para 96.

56 *Ibid.*, Para 97.

**b. “Unfavourable Treatment” as Directly or Indirectly Prejudicing “Rights or Legitimate Interests”?**

In one of its questions to the CJEU, the referring court sought to establish whether Paragraph 1(7) of the Supplementary Provisions of the ZZD, which defines “unfavourable treatment” as any act which directly or indirectly prejudices “rights or legitimate interests”, was in accordance with Directive 2000/43, or whether discrimination could be detected not only when rights or legitimate interests are infringed (as seemed to result from the national provision under discussion).

The latter of these two alternatives is correct as was clearly explained by Advocate General Kokott in her Opinion in *Belov*.<sup>57</sup> The Advocate General stated that behaviour giving rise to direct or indirect discrimination in the sense of Directive 2000/43/EC was not necessarily linked to an infringement of “rights and interests defined in law” – instead, it sufficed for such behaviour to result in less favourable treatment of persons because of their race or ethnic origin (the concept of direct discrimination) or to be capable of placing individuals belonging to certain race or ethnicity in a particular disadvantage with regard to other people (the notion of indirect discrimination). Advocate General Kokott considered national legal provisions which treated the infringement of “rights and interests defined in law” as a mandatory pre-condition for finding the existence of discrimination to be incompatible with Directive 2000/43/EC. In this context, the Advocate General noted that it was a duty of the national court to interpret any domestic rule in conformity with the EU *acquis* and, if such interpretation proved impossible because of a deep contradiction between the national and the relevant EU legal provision, not to apply the national rule.<sup>58</sup> She noted that this was particularly true when the national rule conflicted with the right to equal treatment as a fundamental right.<sup>59</sup> Of course, one possible question in the context of such logic is whether the notion “rights and interests defined in law”, employed in Advocate General Kokott’s analysis, is synonymous with “rights or legitimate interests” – the expression used by the Bulgarian legislator in the contested provision.

Probably in order to avoid such terminological subtleties, the CJEU in *CHEZ* seemed to choose a slightly different approach, albeit leading to the same result. The basic argument of the CJEU concentrated on the risk of restricting the level of protection against discrimination laid down in Article 2(2)(a) and (b) of the Directive.

This viewpoint is convincingly developed in the *CHEZ* judgment. The CJEU preferred to base its analysis on several parts of Directive 2000/43/EC, starting with Recitals 12 and 13, according to which among the Directive’s main objectives is that of ensuring the development of demo-

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57 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others*, C394/11, 20 September 2012, decision of the Advocate General.

58 *Ibid.*, Para 83.

59 *Ibid.*

cratic and tolerant societies allowing the participation of all persons irrespective of racial or ethnic origin and, to this end, *any* direct or indirect discrimination based on racial or ethnic origin as regards the areas covered by the Directive should be prohibited. Article 2(1) is framed in similarly expansive terms, stipulating that for the purposes of the Directive the principle of equal treatment shall mean that there shall be *no* direct or indirect discrimination based on racial or ethnic origin. The CJEU also noted that Recital 28 formulates another important objective of the Directive, namely to ensure a common high level of protection against discrimination in all member states. As a result, the CJEU underlined that the scope of Directive 2000/43/EC could not be defined restrictively. With these things in mind, the CJEU stated that a national provision such as Paragraph 1(7) of the Supplementary Provisions of the ZZD introduces a condition which does not stem from those provisions of the Directive and which, therefore, is capable of restricting the scope of protection that the Directive guarantees.<sup>60</sup>

There could be disagreements with the CJEU's categorical conclusion that the Directive is incompatible with a national legal provision defining unfavourable treatment as treatment which prejudices rights or legitimate interests, following the assumption that the contested provision limits the scope of application of the Directive which prohibits "any" discrimination. An argument was advanced<sup>61</sup> that within the Bulgarian legal system the expression "rights and legitimate interests" covers any activity and it could be hard to see what would remain outside this definition.

Nevertheless, the unambiguous finding of the CJEU in its highly representative and authoritative composition (the Grand Chamber) not only supports the conclusion that Paragraph 1(7) of the Supplementary Provisions of the ZZD is incompatible with Directive 2000/43/EC, but also – and more importantly – appears to send a clear message that the same fate would befall any national provision which could raise a reasonable doubt that the level of protection against discrimination fixed in Article 2(2)(a)–(b) of the Directive has been restricted.

## Conclusion

With its landmark judgment in *CHEZ*, the CJEU has made major contributions to the interpretation of Directive 2000/43/EC. The Grand Chamber of this highest EU jurisdiction outlined the personal scope of application of the Directive, explained important elements of its material scope, produced insightful guidance as to the distinction between direct and indirect discrimination and identified problems with the conformity of several national legal provisions with the EU anti-discrimination law. This judgment should be welcomed as a further decisive step in clarifying the principle of equal treatment of persons irrespective of their ethnic origin.

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60 See above, note 2, Paras 65–68.

61 Ilieva, M., "CJEU Ruling – Inaccessible electricity meters in Roma districts", *European network of legal experts in gender equality and non-discrimination*, 30 July 2015, available at: [http://www.equalitylaw.eu/index.php?option=com\\_edocman&task=document.viewdoc&id=2911&Itemid=295](http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2911&Itemid=295).