

“DISCRIMINATION BY ASSOCIATION” - BETWEEN JURISPRUDENTIAL CONSECRATION AT EUROPEAN LEVEL AND LEGISLATIVE DESIRE IN ROMANIA. SOME CONSIDERATIONS

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Abstract

Discrimination by association is a concept that, while not expressly regulated by the European Union law, has been enshrined in the case law of the Court of Justice of the European Union. It allows the extension of the legal protection provided by the anti-discrimination legislation of the European Union to persons who, although they do not belong to the protected categories due to the reasons of discrimination envisaged (racial and ethnic origin, religion or belief, disability, age and sexual orientation), undergo less favorable treatment or certain disadvantages as a result of the links ("association") with a protected category.

In Romania, discrimination by association is not consecrated at the legislative level, but in recent years two legislative initiatives (still unfinished) have been promoted in order to regulate it.

In this context, the article aims to analyze the scope of discrimination by association, starting from the European legal framework in the field of non-discrimination and from the interpretative case law of the Court of Justice of the European Union. The main landmarks of the Court's case law and its possible implications at national level are identified. At the same time, by making a brief inroad into domestic law in combating discrimination, the paper concludes that, although there are certain obstacles, national law can be interpreted to include discrimination by association. Therefore, although a legislative consecration of discrimination by association is preferable, it should be done with a degree of caution given the possible implications and persistence of certain ambiguities in the relevant European case law.

Keywords: *direct discrimination, indirect discrimination, discrimination by association, European Union law, anti-discrimination law*

1. Introduction

The right to equality and to protection against discrimination for all is a universal right recognized by the main international instruments for the protection

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of human rights and the values on which this equality is based are human dignity and personal autonomy².

At the specific level of the European Union (“EU”), according to Article 2 of the Treaty on European Union (“TEU”)³ the Union is founded on a number of values as well respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are “common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Article 21 (1) of the Charter of Fundamental Rights of the European Union (“CFREU” or “Charte”)⁴ enshrines the principle of non-discrimination as a general principle of Union law⁵.

Combating social exclusion and discrimination is at the same time an EU objective (Article 3(3) TEU), in order to achieve this objective the Union may adopt, pursuant to Article 19 (1) of the Treaty on the Functioning of the European Union (“TFEU”) “appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

On the other hand, Article 10 of the TFEU requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities.

In implementation of Art. 19 (1) TFEU (ex-Art. 13 of the Treaty Establishing the European Community, “TEC”), in 2000 two directives were adopted which provide a global framework at EU level in the field of combating discrimination⁶: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“Racial Equality Directive”)⁷ and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

² For an analysis of this relationship, see Opinion of Advocate General Maduro delivered on 31 January 2008 in *Coleman*, C-303/06, EU:C:2008:61, paras 8-11.

³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C 202, 7.6.2016, p. 1.

⁴ Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, pp. 389-405.

⁵ CJEU, Judgment of 12 Mai 2011, *Runevič Vardyn and Wardyn*, C- 391/09, EU:C:2011:291, para 43.

⁶ Thus completing the measures against sex discrimination, adopted pursuant to Art. 157 TFEU (ex. Art. 141 TEC) which have been in place much longer (Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion and Working Conditions, recast in Council Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, OJ L 204/23). For an overview of the scope, evolution and effectiveness of EU non-discrimination law, see L. S. Rossi, F. Casolari (eds.), *The Principle of Equality in EU Law*, Springer International Publishing, 2017; S. Fredman, *Discrimination Law*, Oxford University Press, Oxford, 2011.

⁷ OJ L 180 of 19.7.2000, p. 22.

("Employment Equality Directive")⁸. Through them is prohibited discrimination on the basis of race or ethnic origin (Directive 2000/43/CE) and religion or belief, disability, age and sexual orientation (Directive 2000/78/CE), aiming to ensure the protection of citizens in areas such as employment and access to vocational training (both directives); education, social protection and health care, access to and supply of goods and services, including housing (Directive 2000/43/CE)⁹.

Both directives prohibit various forms of discrimination, similarly defined: direct and indirect discrimination, harassment, instruction to discriminate and victimisation, and calls on Member States to provide for effective sanctions and remedies.

Despite the many difficulties most Member States have encountered in transposing the two Directives¹⁰ and the large number of infringement procedures initiated in this regard¹¹, in 2014, the Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("Racial Equality Directive") and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("Employment Equality Directive")¹², the Commission concluded that until that moment "all the Member States have taken the necessary measures to transpose the two Directives into their respective domestic legal orders" and that "the Member States' administrative and judicial authorities, as well as their equality bodies, are now in the front line for systematically providing full protection to every individual on the ground".

If the developments are obvious, various independent assessments of the application of the European legal framework in the field of non-discrimination highlight the persistence of certain legislative ambiguities at national level (sometimes due to the ambiguities existing in the text of the directives) and of inconsistent practices of the national courts and bodies promoting equality¹³. At

⁸ OJ L 303 of 2.12.2000, p. 16.

⁹ There is a Proposal from the European Commission from 2008 (COM (2008) 426) to extend the protection against discrimination on the grounds covered by Directive 2000/78/EC to all areas covered by Directive 2000/43/EC.

¹⁰ In the case of Romania, the two directives were transposed into the Governmental Ordinance no. 137/2000 regarding the prevention and the punishment of all forms of discrimination (subsequently amended several times to improve the transposition of the directives), republished in 2014 (Official Journal of Romania, Part I, no. 166 of 7 March 2014).

¹¹ For Romania, see the letter of the European Commission for delaying the Romanian authorities [no. C (2012) 3996 final], issued on June 22, 2012 in Case 2012/2099, for failure to fulfill the obligation of Member State of the European Union for the correct and complete transposition of Directive 2000/43 / EC.

¹² COM (2014) 2 final.

¹³ See, for example, I. Chopin, C. Conte, E. Chambrier, *A comparative analysis of non-discrimination law in Europe - 2018*, European network of legal experts in gender equality and non-discrimination, on behalf of the European Commission, Luxembourg: Publications Office of the

the same time, the dynamic and sometimes extensive interpretation of the text of the directives by the Court of Justice of the European Union (“CJEU”), influencing the whole understanding of the national legal provisions in the Member States, raises difficulties of adaptation for the domestic courts and national authorities in the field. As we will highlight in the following, such an interpretation, with important consequences at national level, concerns the personal scope of the directives.

2. Including “discrimination by association” in the scope of European anti-discrimination law - a jurisprudential construction

Until relatively recently, the general conception was that the protection provided by the anti-discrimination legislation concerns the persons who personally have the protected characteristics (to which the established criteria of discrimination apply). However, the question arises whether an individual can bring a discrimination claim based not on a characteristic of their own but on a characteristic of another person. For example, a person is not accepted in a restaurant because he is accompanied by another person belonging to a certain ethnic group or a worker is treated less favorably by the manager because he campaigned to help the rights of LGBT people.

In some legal systems, especially in the practice of national bodies for equality, the possibility of challenging such measures was accepted in relation to certain grounds of discrimination, by using the term “discrimination by association” or “transferred discrimination”¹⁴. This form of discrimination occurs when a person who is associated with another person is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation¹⁵. The doctrine also qualifies as “discrimination in triangular relationships”, considering that it exists “if six criteria are met: (1) a party allegedly discriminates based on one or more ‘suspect classifications’; (2) the injured party is subject to that discrimination; but (3) does not carry the characteristic that may not be discriminated against upon which the act was based; and (4) a third person; (5) actually holding the characteristic at issue; and (6) with whom the injured party is associated”¹⁶.

European Union, 2018. On Romania, see R. Iordache, *Country report on non-discrimination - Romania 2018*, European network of legal experts in gender equality and non-discrimination, available at <https://publications.europa.eu/en/publication-detail/-/publication/0308062a-d34d-11e8-9424-01aa75ed71a1>.

¹⁴ For an application of these concepts in the UK, see S. Forshaw, M. Pilgerstorfer, *Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination*, *King's Law Journal*, Volume 19, Issue 2, 2008, pp. 265–292; Simon Honeyball, *Discrimination by Association*, *4 Web JCLI*, 2007, available at <http://webjcli.ncl.ac.uk/2007/issue4/honeyball4.html>.

¹⁵ See C. Karagiorgi, *The concept of discrimination by association and its application in the EU Member States*, *European anti-discrimination law review*, issue 18, 2014, pp. 25–36.

¹⁶ M. Gruenberger, *The Principle of Equal Treatment in Triangular Relationships*, Working Papers, November 2009, pp. 54–55, available at www.uni-koeln.de/jur-fak/bhgg/personen/gruenberger/

Although neither EU primary law nor anti-discrimination directives expressly prohibit discrimination by association¹⁷, some authors have appreciated that the directives could be interpreted as including in their scope this form of discrimination¹⁸.

The CJEU confirmed this in the 2008 judgment in *Coleman's* case¹⁹, regarding the interpretation of Directive 2000/78/EC, in which it enshrined discrimination by association in the context of direct discrimination and harassment based on disability. The Court held that, in certain circumstances, discrimination on grounds of disability could include discrimination based on the applicant's association, which does not present a disability, with a person with a disability. The protection provided by the directive thus covers the situation of the mother of a child with a disability, a victim of harassment and discrimination in the workplace, to the extent that the problems were caused by the fact that the mother needed extra free time to take care of the child.

The justification for including discrimination by association in the scope of the directive is explained at large by the Advocate General in *Coleman*, which shows that "[...] directly targeting a person who has a particular characteristic is not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications"²⁰. Accordingly, he considers 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"²¹.

According to the subsequent assessment of the European Commission, "this reasoning appears to be general in nature and applicable also to the other grounds of discrimination covered by the two Directives"²². In the doctrine, however, it was

Gruenberger_Triangular_Relations.pdf. See also the examples in L. Waddington, *Protection for Family and Friends: Addressing Discrimination by Association*, European Anti-discrimination law review, vol. 5, 2007, p. 14.

¹⁷ Such a prohibition is set in the consolidated text of the Proposal for a Council Directive on implementing the principle of equal treatment outside the labour market, irrespective of age, disability, sexual orientation or religious belief (COM(2008)0426), not yet adopted.

¹⁸ D. Schiek, L. Waddington, M. Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non Discrimination Law*, Hart Publishing, 2007, pp. 169-170.

¹⁹ Judgment of 17 July 2008, *Coleman*, C-303/06, EU:C:2008:415.

²⁰ Opinion of Advocate General Maduro delivered on 31 January 2008 in *Coleman* (C-303/06), EU:C:2008:61, para 12.

²¹ *Ibid.*, paras 18-19.

²² European Commission, Report from the Commission to the European Parliament and the Council - Joint Report on the application of Council Directive (...), COM (2014) 2 final, p. 10.

noted that, even though the reasoning of the Court “clearly suggests” that discrimination by association “applies to all the types of discrimination proscribed by EU law”, this needs to be confirmed by the Court²³.

The Court of Justice’s decision from 16 July 2015 in the *CHEZ* case²⁴ regarding the interpretation of Directive 2000/43/CE extends the concept of discrimination by association beyond its initial confines established in *Coleman*, to include indirect discrimination by association. Making a clearer demarcation line between direct discrimination and indirect discrimination, an issue that has posed many problems in the practice of national courts²⁵, the Court ruled against the prohibition of (indirect) discrimination under the directive, of a person who, although not of a certain ethnic origin himself/herself, is put at a particular disadvantage compared with other persons because he/she is associated with a member of a certain ethnic community.

In this case, the situation concerned the practice of a Bulgarian electricity company, which started several years ago, to install electricity meters, in a neighborhood predominantly occupied by Roma, at a height inaccessible to users (6-7 meters), while in other neighborhoods of the same city the meters were installed at a normal height. The applicant in the main case, a Bulgarian national who owned a grocery store in the neighborhood, mainly inhabited by people of Roma origin, even though she was not of Roma origin, also considered herself a victim of discrimination due to the incriminated practice of the electricity company. With regard to this practice, the CJEU had the opportunity to rule on the *Belov* case²⁶, but was hindered by the lack of “court” status within the meaning of Article 267 TFEU of the national body which transmitted the request for a preliminary ruling (the Bulgarian national anti-discrimination body).

Although an analysis of the case law of the European Court of Human Rights (ECtHR) is not considered, far exceeding the scope of this brief article, we only recall that, in 2017, in *Škorjanec v. Croatia*²⁷, the ECtHR confirmed that Article 14 of the European Convention on Human Rights covers discrimination by association. In this case, the applicant and her partner who is Roma, had been physically assaulted and verbally insulted on a racial basis. During the investigation, the Croatian authorities determined that only the applicant’s partner had been a victim of a hate crime as the applicant herself isn’t of Roma origin. Specifying that “the

However, some commentators expressed doubts in this regard - see L. Waddington, *Case C-303/06, S. Coleman v. Attridge Law and Steve Law, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008*, *Common Market Law Review*, Volume 46, Issue 2/2009, p. 672.

²³ E. Ellis, P. Watson, *EU Anti-Discrimination Law*, Oxford University Press, 2012, p. 147.

²⁴ Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, EU:C:2015:480.

²⁵ European Commission, Report from the Commission to the European Parliament and the Council - Joint Report on the application of Council Directive (...), COM (2014) 2 final, p. 3.

²⁶ Judgment of 31 January 2013, *Belov*, C-394/11, EU:C:2012:585.

²⁷ ECtHR, *Škorjanec v Croatia*, No. 25536/14 of 28 March 2017.

State authorities are required to take all reasonable action to ascertain whether there were racist motives and to establish whether feelings of hatred or prejudices based on a person's ethnic origin played a role in the events", the Court noted in particular that this obligation "concerns not only acts of violence based on a victim's actual or perceived personal status or characteristics but also acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic." (§53-56)

3. The main benchmarks of the CJEU case law on discrimination by association

a) Referred grounds

In *Coleman* the Court holds discrimination by association based on disability, but indirectly accepting that it could also be applied to the other grounds protected by Employment Equality Directive (religion or belief, age and sexual orientation): the principle of equal treatment enshrined in the directive in the area of employment and occupation "applies not to a particular category of person but by reference to the grounds mentioned in Article 1"²⁸. However, it has been doubted in the doctrine that the CJEU had established the concept of discrimination by association as a general principle in European anti-discrimination law²⁹.

In *CHEZ* the Court has explicitly confirmed that the concept of discrimination by association came within the scope of the Racial Equality Directive, in accordance with the opinion of the Advocate General who claimed that the two directives are "substantively similar" in their definitions of discrimination³⁰. The Court noted that the scope of the directive cannot be interpreted restrictively, the protection afforded by it should be aimed at "all persons", in accordance with the task of the Union under Article 19 TFEU (ex Article 13 TEC), which is the legal basis for the adoption of the Directive, to combat "any discrimination" and with article 21 of the Charter, which enshrines "the principle of non-discrimination", "to which the directive gives specific expression in the substantive fields that it covers"³¹.

This argument of the Court, as well as the fact that between the European anti-discrimination directives there is a great similarity in wording, structure and purpose³², which should be interpreted uniformly have determined the literature

²⁸ Judgment *Coleman*, para 38.

²⁹ T. Connor, *Discrimination by Association: A Step in the Right Direction*, Journal of Social Welfare & Family Law, Volume 32, Issue 1/ 2010, pp. 63-64; L. Waddington, *op. cit.*, pp. 665-681; E. Ellis, P. Watson, *op. cit.*, p. 147.

³⁰ Opinion of AG Kokott in *CHEZ*, para 56.

³¹ Judgment *CHEZ*, paras 57-58.

³² Tim Connor, *op. cit.*, pp. 64-68.

to appreciate that discrimination by association is a general concept, prohibited in all situations and on all grounds and both for direct and indirect discrimination³³.

An express confirmation in this regard would be adopting the Horizontal Directive Proposal (COM(2008)0426), which has been in negotiations for almost ten years. In its legislative resolution on the Commission’s proposal, the European Parliament suggested the introduction of discrimination by association, both in the definition of direct and indirect discrimination³⁴.

b) Degree of association

The analyzes carried out at European level show that, where discrimination by association is explicitly covered in national legislation, the nature the association or degree of proximity required between the victim of the discriminatory act and the person possessing the protected characteristic it is an aspect that is not defined, being at the national courts’ discretion to assess the association³⁵. The CJEU provides a number of guidelines to national courts.

In *Coleman* the person affected by the discriminatory measure and the person possessing the protected characteristic had a *close personal relationship* (mother-son relationship, the latter depending on the care provided by the mother). The commenters of the decision appreciated that this should not be interpreted as imposing the existence in all cases of a strong personal connection, in context of the burden of proof being considered to be sufficient “any association which that employee has with a disabled person”.³⁶

In *CHEZ* the Court applies the concept of discrimination by association (without using this term textually) in the situation where *only link* between the person affected by the discriminatory measure and the Roma people is the location of her grocery in a neighborhood that is predominantly inhabited by people of Roma origin. The Court says that the requirement of equal treatment, “applies not to a particular category of person but by reference to the grounds mentioned ... so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds”³⁷.

³³ S. Benedi Lahuerta, *Ethnic discrimination, discrimination by association and the Roma community: CHEZ*, Common Market Law Review, 53 (3), 2016, p. 818; M. Duggan, *Expanding the frontiers of indirect discrimination: disadvantage and associative discrimination*, Littleton Chambers - Littleton Silks Forum, 7 iun. 2016, p. 14, available at <http://www.littletonchambers.com/lib/comment-pdf/md%20the%20frontiers%20of%20indirect%20discrimination%20070616.pdf>.

³⁴ European Parliament Legislative Resolution of 2 April 2009 on the Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation COM(2008)0426 - C6-0291/2008 - 2008/0140(CNS), OJ C 137 E/68, 2010, Amendment 38.

³⁵ C. Karagiorgi, *op. cit.*, p. 33.

³⁶ M. Gruenberger, *op. cit.*, p. 57 (with reference to Judgment *Coleman*, para 55).

³⁷ Judgment *CHEZ*, para 56.

From this point of view, the Court follows its own judgment in *Feryn*³⁸, in which he established that the existence of (direct) discrimination does not require an identifiable complainant claiming³⁹ and the refusal to employ immigrants constitutes racial or ethnic discrimination within the meaning of the Racial Equality Directive. Consequently, even potential applicants are protected by the principle of racial nondiscrimination⁴⁰.

The arguments used by Advocate General in her opinion in *CHEZ* to propose a broadest approach to this aspect raises a series of question marks regarding the limits of invoking the association with a protected category. Thus, it notes that discrimination by association was aimed at "first and foremost, by those who are in a close personal relationship with a person possessing one of the [protected] characteristics"⁴¹. At the same time, she adds that "*the existence of such a personal link is certainly not the only conceivable criterion for regarding a person as suffering 'discrimination by association'. The fact that the measure at issue is discriminatory by association may be inherent in the measure itself, in particular where that measure is liable, because of its wholesale and collective character, to affect not only the person possessing one of the characteristics mentioned in Article 21 of the Charter of Fundamental Rights and in the anti-discrimination directives, but also – as a kind of 'collateral damage' – includes other persons*"⁴².

The Court's solution, which, although using other language, supports this extensive interpretation of the sphere of subjects who can invoke discrimination by association, not imposing a certain degree of connection with the holder of one of the protected characteristics, opens the way to the most diverse types of situations in which it can discrimination by association shall be invoked⁴³, situations that exceed the typology of those in the *Coleman* and *CHEZ* cases and will most likely generate additional preliminary references to the CJEU.

c) The distinction between direct and indirect discrimination

The definition of direct and indirect discrimination contained in European anti-discrimination legislation is a uniform one. So, 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 any of those grounds

³⁸ Judgment of 10 July 2008, *Feryn*, Case C-54/07, EU:C:2008:397.

³⁹ Judgment *Feryn*, para 25.

⁴⁰ See A. Eriksson, *European Court of Justice: Broadening the scope of European nondiscrimination law*, *International Journal of Constitutional Law*, Volume 7, Issue 4, 2009, pp. 746-749.

⁴¹ Opinion of AG Kokott in *CHEZ*, para 57.

⁴² *Ibid.*, para 58.

⁴³ For examples in this regard, see C. McCrudden, *The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?* *European Equality Law Review*, Issue 1/2016, pp. 9-10; See also F. Cranmer, *Discrimination, equal treatment, electricity and collateral damage: CHEZ Razpredelenie Bulgaria*, in *Law & Religion UK*, 9 September 2015, available at <https://www.lawandreligionuk.com/2015/09/09/discrimination-equal-treatment-electricity-and-collateral-damage-chez-razpredelenie-bulgaria/>

protected by the particular directive⁴⁴. Regarding indirect discrimination, this “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having [any of the protected characteristics] 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”⁴⁵.

Without establish itself explicitly whether the practices in question constitute direct or indirect discrimination, the Court explores in its case-law on discrimination by association a number of issues not covered previously of the definitions of direct and indirect discrimination, giving national courts grid detailed analysis of distinction of these. The practical relevance of the Court's guidelines is evident given, on the one hand, the difficulties of interpreting in the domestic context the definitions in the directives ⁴⁶ and, on the other, the importance, from the perspectives of evidence (reversal of the burden of proof) of a correct qualification of the discriminatory measures as direct or indirect discrimination (except for certain specific circumstances, direct discrimination cannot be “justified”, whereas indirect discrimination incorporates an idea of justification into the concept itself⁴⁷).

First, the Court proposes to the national courts a methodological approach, in the sense of first analyzing whether the discriminatory practice relied on fulfills all the conditions of direct discrimination and, if, for some reason, direct discrimination could not be retained, to consider whether it has the necessary characteristics to constitute indirect discrimination⁴⁸.

Regarding the concept of direct discrimination⁴⁹, the existence of direct discrimination implies the fulfillment of three cumulative conditions⁵⁰:

(i) the contested practice or measure it has been implemented and/or maintained on the basis of the protected grounds. The practice or measure does not necessarily need to refer explicitly to one of the protected grounds. It is sufficient that is based on another factor that is inseparably linked to a protected ground⁵¹. For example, in the case of discrimination on the basis of ethnic origin, the factors

⁴⁴ Article 2(2)(a) of Directive 2000/43 and Directive 2000/78.

⁴⁵ Article 2(2)(b) of Directive 2000/43 and Directive 2000/78.

⁴⁶ See European Commission, Joint Report on the application of Council Directive, (COM/2014/02 final), point 4.1.

⁴⁷ C. McCrudden, *op. cit.*, p. 6.

⁴⁸ Judgment *CHEZ*, para 105.

⁴⁹ The concept of direct discrimination was applied in *Coleman*, the Court also suggesting in *CHEZ* that the practice in question could, under certain conditions to be analyzed by the referring court, direct discrimination (Judgment *CHEZ*, para 80).

⁵⁰ R. Grozev, *A Landmark Judgment of the Court of Justice of the EU – New Conceptual Contributions to the Legal Combat against Ethnic Discrimination*, *The Equal Rights Review*, vol. 15, 2015, p. 177.

⁵¹ European Union Agency for Fundamental Rights (FRA) and Council of Europe, *Handbook on European non-discrimination law*, 2018 edition, p. 50.

that should be taken into account in order to ascertain the existence of direct discrimination are⁵²: that the contested practice existed in places with a high concentration of representatives of certain racial or ethnic origin; justifications of the practice denoting that this is based on ethnic stereotypes or prejudices; lack of evidence suggesting any other plausible reason for applying the practice; the imposed, generalized and lasting character of the practice.

(ii) the practice or measure determine a certain negative result (affect the interests of the persons concerned; it has an offensive and stigmatizing character⁵³).

(iii) the situation of those affected is less favourable than that of others in a "comparable" situation. In this regard, it is necessary to identify a suitable "comparator": that is, a person in materially similar circumstances, with the main difference between the two persons being the "protected ground"⁵⁴. In *CHEZ*, the Court identified an extremely broad comparator⁵⁵: although it is 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, any electricity consumer supplied by the same distributor within an urban area is in a "comparable situation"⁵⁶.

Regarding indirect discrimination, a concept whose complexity has been widely emphasized in the doctrine⁵⁷, the Court brings a number of clarifications of its definition that allow a clearer differentiation in relation to direct discrimination:

(i) the term "apparently neutral provision" in the definition of indirect discrimination does not refer to a practice that is "manifestly" neutral, but one that is "ostensibly" neutral or "at first glance"⁵⁸ or, more clearly, that the practice is formulated "by reference to other criteria not related to the protected characteristic"⁵⁹.

(ii) if the contested measure was introduced *by reason of* the protected ground (those affected were targeted on the basis of their protected characteristic), it amounts to direct discrimination, not to indirect discrimination⁶⁰. The indirect discrimination does not require showing that the contested practice is motivated by the protected ground. For finding indirect discrimination the contested measure, although using neutral criteria not based on the protected characteristic,

⁵² Judgment *CHEZ*, paras 81-84.

⁵³ *Ibid.*, para 87.

⁵⁴ FRA, *Handbook on European non-discrimination law, 2018 edition*, pp. 44-45.

⁵⁵ *Rossen Grozev, op. cit.*, p. 179.

⁵⁶ Judgment *CHEZ*, para 90.

⁵⁷ See H. Collins, T. Khaitan, "Indirect Discrimination Law: Controversies and Critical Questions", in H. Collins, T. Khaitan (eds.), *Foundations of Indirect Discrimination Law*, Hart Publishing, Oxford and Portland, Oregon, 2018, pp. 1-30.

⁵⁸ Judgment *CHEZ*, para 93.

⁵⁹ *Ibid.*, para 94.

⁶⁰ *Ibid.*, para 95.

it has the effect of placing particularly persons possessing that characteristic at a disadvantage⁶¹.

(iii) the term “put (...) at a particular disadvantage” it must be interpreted as not imposing a “particular degree of seriousness” regarding the special disadvantageous situation⁶². In other words, is not required to exceed the intensity of the effects produced by the “less favourable treatment” in direct discrimination⁶³. Particular disadvantage exists, however, when, as a result of the measure in question, persons with a protected characteristic are affected in particular⁶⁴ or “more adversely”⁶⁵.

Although the analysis of “objective justification”, a condition which is subject to the finding of indirect discrimination, falls to the national court, it must take into account a few additional indications offered by the CJEU to decide whether the practice or measure challenged pursues genuinely legitimate aims and the means of achieving these aims are appropriate and necessary⁶⁶: verifying the existence of adequate and less restrictive alternative measures to achieve the goals; the disadvantages caused by these otherwise appropriate and necessary means should be proportionately compensated by the advantages associated with the aim pursued; the proportionality of the measure, which must be established at the time of contesting the measure and not its imposition, must take into account the humiliating or stigmatizing effect of the measure and the legitimate interests of those affected by it⁶⁷.

4. Implications at national level

The main effect of the jurisprudential consecration of discrimination by association, both in the form of direct and indirect discrimination, is the fact that, beyond confirming that it falls within the scope of the directives, it requires the Member States to allow in their national law thus of requests for it to be considered as correctly implementing the directives⁶⁸. Thus, a national provision that required that indirect discrimination was “on the basis of” one of the protected

⁶¹ *Ibid.*, para 96.

⁶² *Ibid.*, paras 99-102.

⁶³ Rossen Grozev, *op. cit.*, p. 176.

⁶⁴ Judgment *CHEZ*, para 100.

⁶⁵ Opinion of AG Kokott in *CHEZ*, para 93. This suggests that “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”.

⁶⁶ Unusually, in *CHEZ* the Court itself gives a verdict from this point of view, showing that “it seems that it necessarily follows from the taking into account of all the foregoing criteria that the practice at issue cannot be justified within the meaning of Article 2(2)(b) of Directive 2000/43 since the disadvantages caused by the practice appear disproportionate to the objectives pursued” (para 127).

⁶⁷ Judgment *CHEZ*, paras 112-128.

⁶⁸ Christopher McCrudden, *op. cit.*, p. 12.

characteristics, which was interpreted as requiring a causal link between the contested practice and the protected ground is contrary to EU law⁶⁹.

A practical implication of the broad interpretation of the personal scope of the anti-discrimination directives is that the scope of the persons to whom, according to national laws, they should be allowed to make complaints of indirect discrimination is significantly extended, to include persons who, although they do not belong to a protected group, they suffer from what the doctrine calls "indirect indirect discrimination"⁷⁰ or "collateral damage" with the protected group primarily affected. In this sense, discrimination by association could receive a particular application in certain very dynamic fields such as the online environment, as regards "affinity profiling" in online behavioural advertisement, as a means of counteracting a pervasive online advertising practices.⁷¹

Finally, the doctrine notes that the Court's interpretation could have implications in terms of contesting various institutional or structural discrimination, favoring collective addressing complaints⁷². Thus, the very wide interpretation of the EU anti-discrimination law in the CHEZ is seen by several commentators as representing a response of the Court to the particular situation of the protected group in question (the Roma community), still subjected in many Member States to practices with stigmatizing effects, offensive and humiliating⁷³. Sometimes even ignoring legal consistency⁷⁴, the Court shall make a contribution to the EU efforts to address Roma exclusion through judicial mechanisms of collective vigilance⁷⁵ to be added to individual actions. In this regard, "the fact that several complainants' claims can be joined in a class action may contribute to prove the discriminatory nature of the conduct and shift the focus from its individual to its collective dimension"⁷⁶. Some authors, however, believe that the

⁶⁹ Judgment CHEZ, para 97.

⁷⁰ C. McCrudden, *op. cit.*, p. 12.

⁷¹ S. Wachter, *Affinity Profiling and Discrimination by Association in Online Behavioural Advertising*, Oxford Internet Institute, May 15, 2019, available at SSRN: <https://ssrn.com/abstract=3388639>. According to her, the concept of "affinity profiling" consists in grouping people according to their assumed interests rather than solely on their personal traits (e.g. ethnicity, sexual orientation). The discrimination that affinity profiling could give rise to is differential pricing or exclusion from goods and services or jobs. Discrimination by association would help to overcome the argument that inferring one's "affinity for" and "membership in" a protected group are strictly unrelated.

⁷² For a detailed analysis, see S. Benedi Lahuerta, *op. cit.*, pp. 814-817.

⁷³ C. McCrudden, *op. cit.*, p. 16; S. Benedi Lahuerta, *op. cit.*, p. 816.

⁷⁴ F. Cranmer, *Discrimination, equal treatment, electricity and collateral damage: CHEZ Razpredelenie Bulgaria*, in *Law & Religion UK*, 9 September 2015, available at <https://www.lawandreligionuk.com/2015/09/09/discrimination-equal-treatment-electricity-and-collateral-damage-chez-razpredelenie-bulgaria>; Christopher McCrudden, *op. cit.*, p. 16.

⁷⁵ For arguments regarding the need for such a mechanism at EU level, see also M. Dawson, E. Muir, *Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma*, *Common Market Law Review* 48(3), 2011, p. 754.

⁷⁶ S. Benedi Lahuerta, *op. cit.*, p. 817.

Court's interpretation undermines the conceptual basis of indirect discrimination without bringing any real benefits to the protected groups because, opening the way to challenge structural discrimination especially through actions of the members of groups which are only tangentially affected by the structural discrimination, there is the possibility that the voices of the groups primarily affected will be more marginalised than if they had been the primary litigants⁷⁷.

5. Discrimination by association in the Romanian legal context

Although there is no agreed definition under international or EU law for discrimination by association, especially after the emergence of the case law of the CJEU, several countries prohibit discrimination by association in their national law⁷⁸, while in others, as in the case of Romania, the anti-discrimination law neither stipulates nor expressly prohibits this form of discrimination.

Therefore, the European Commission against Racism and Intolerance of the Council of Europe (ECRI), in the *General Policy Recommendation no. 7* regarding the national legislation on combating racism and racial discrimination⁷⁹ called on national governments to establish at the legislative level, among others, "discrimination by association" which, according to her, "occurs when a person is discriminated against on the basis of his or her association or contacts with one or more persons designated by one of the enumerated grounds"⁸⁰. Also, in the ECRI Report on Romania of 2014⁸¹ it is noted that the "anti-discrimination law" does not contain provisions regarding discrimination by association, the announced intention to discriminate, incite and assist another person in the process of discrimination, contrary to what she recommends in the General Policy Recommendation no. 7, promptly suggesting to the Romanian authorities to prohibit this form of discrimination (paragraph 44). However, in the latest ECRI report on Romania (2019)⁸², it notes that, compared to the previous recommendation, "the authorities informed the Commission that discrimination by association is applicable through the legislation based on the case law of the European Court of Justice (ECJ)"⁸³. ECRI confirms this and, as a result, the report no longer contains recommendations in this regard.

⁷⁷ C. McCrudden, *op. cit.*, p. 14; R. Crasnow, S. McKinley, *Indirect discrimination by association: a regressive step?* Cloisters - Discrimination and Equality, 30 March 2015, available at <https://www.cloisters.com/the-cjeu-judgment-in-chez-indirect-discrimination-by-association/>

⁷⁸ I. Chopin, C. Conte, E. Chambrier, *A comparative analysis of non-discrimination law in Europe – 2018*, pp. 44-46. Nevertheless, this prohibition does not always extend to all grounds covered by the national non-discrimination legislation.

⁷⁹ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 december 2002 and amended on 7 december 2017, CRI(2003)8 REV.

⁸⁰ *Ibid.*, paragraph III.6.

⁸¹ *ECRI Report on Romania* (fourth monitoring cycle), adopted on 19 March 2014, (CRI(2014)19).

⁸² *ECRI Report on Romania* (fifth monitoring cycle), adopted on 3 April 2019, CRI(2019)20.

⁸³ *Ibid.*, paragraph 7.

It is worth noting that in Romania, although there has been no genuine scientific debate on this concept and no consistent concern of civil society, two legislative initiatives have been promoted in recent years, which consider, *inter alia*, the regulation of discrimination by association. One of these aims at amending and supplementing Government Ordinance no. 137/2000 regarding the prevention and the punishment of all forms of discrimination⁸⁴, and the second amendment and completion of Law no. 53/2003 regarding the Labor Code⁸⁵. In both cases, the legislative proposals were rejected by the Senate, as the first chamber notified, being in the legislative procedure in the Chamber of Deputies.

Referring only to the definition of discrimination by association proposed by the initiators to be introduced in Ordinance 137/2000, I appreciate that it is deficient in many ways and its adoption in this form would rather create confusion. Thus, "[B]y discrimination by association is understood any distinction, exclusion, restriction or preference provided in art. 2 paragraphs (1) directed against a person associated with a person liable to be discriminated against for any of the grounds provided in par. (1)".⁸⁶

Beyond the lack of clarity and logic of the wording, it does not contain the idea of prohibition and / the sanctioning regime. In addition, although placed in the economy of the text of the Ordinance after indirect discrimination (Article 2 (3)), in the form of a new paragraph (3¹) of Article 2, to which the definition of indirect discrimination is to be referred, the actual definition of discrimination by association contains only references to "distinction, exclusion, restriction or preference", specific to direct discrimination, not including "provisions, criteria or practices apparently neutral" (indirect discrimination).

Although a legislative consecration of discrimination by association is preferable⁸⁷, the legal vacuums in national laws can be solved by the interpretation given by national courts⁸⁸, otherwise possible given the broad definition of discrimination provided by Article 2 of Ordinance 137/2000 and European jurisprudence⁸⁹.

⁸⁴ Pl-x nr. 501/2015.

⁸⁵ Pl-x nr. 718/2018.

⁸⁶ Pl-x nr. 501/2015.

⁸⁷ From this point of view we agree with the opinion of the Legislative Council (available at <http://www.cdep.ro/proiecte/2018/700/10/8/cl947.pdf>) who consider that the aspects of novelty or clarification of the meaning of terms / expressions should be included in the framework regulation in this matter, respectively the Ordinance 137/2000.

⁸⁸ In many Member States the courts have interpreted national law to cover discrimination by association. For examples in this regard, see I. Chopin, C. Conte, E. Chambrier, *op. cit.*, pp. 44-46. See also FRA, *Handbook on European non-discrimination law, 2018 edition*, p. 52. Nevertheless, such developments are on a case-by-case basis and, hence, refer solely to the grounds mentioned in the case at hand.

⁸⁹ For a similar point of view, see also R. Iordache, *Country report on non-discrimination - Romania 2018*, p. 41.

Thus, in accordance with Article 2 (1) of the Ordinance, is understood to mean discrimination “any difference, exclusion, restriction or preference *based on* race, nationality, ethnic origin, language, religion, social status, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV-positive status, belonging to a disadvantaged group or *any other criterion*, aiming to or resulting in a restriction or prevention of the equal recognition, use or exercise of human rights and fundamental freedoms or rights recognized by law, in the political, economic, social and cultural field or in any other fields of public life” (*our emphasis*). Definitions of other forms of discrimination retained⁹⁰ reflect quite accurately the terms used in the directives, the emphasis being placed on the ground of the discriminatory act and not on whether the person who suffers discrimination possesses the protected characteristic him/herself.

However, the national regulation in question contains some formulations that may give rise to different interpretations in practice. Based on the CJEU case law on discrimination by association we will refer to only two of them⁹¹. Thus, a first aspect concerns the definition of direct discrimination as any “difference, exclusion, restriction or preference *based on* [protected ground]” of “human rights and fundamental freedoms or rights recognized by law”. In *CHEZ* the Court held that affect the interests of the persons concerned and offensive and stigmatizing character of the practice are sufficient to find the treatment less favorable in the sense of the definition of direct discrimination in the directive⁹². As such, the prohibition of less favorable treatment should not be limited to the express rights provided, but should also cover the legitimate interests of the person concerned.

At the same time, regarding indirect discrimination, the CJEU has established that a national provision that requires that indirect discrimination was “on the basis of” one of the protected characteristics, which was interpreted as requiring a causal link between the contested practice and the protected ground, is contrary to EU law⁹³. In the foreign doctrine it was considered that such a contradiction with EU law would also concern the anti-discrimination legislation in Romania⁹⁴, with reference to Article 2 (3) of Ordinance 137/2000, which also requires that

⁹⁰ Instructions to discriminate (Article 2(2)), indirect discrimination (Article 2(3)), harassment (Article 2(5)), victimisation (Article 2(7)).

⁹¹ For several aspects considered controversial of the anti-discrimination legislation in Romania, see R. Iordache, *Country report on non-discrimination - Romania 2018*, especially pp. 121-124. See also E.-L. Baciuc, T.-A. Lazar, *Between equality and discrimination: disabled persons in Romania*, Transylvanian Review of Administrative Sciences, no. 51 E/2017, pp. 5-19.

⁹² Advocate General Kokott in her Opinion in *Belov* (C-394/11) also shows that “neither form of discrimination requires an infringement of rights or interests defined in law according to the wording of Directive 2000/43. The only material factor is that there is less favourable treatment or a disadvantage, irrespective of the object of that treatment or disadvantage, whether rights or interests are infringed and, if so, which rights or interests. What is more, according to the Court’s case-law, discrimination is not even dependent on a specific victim of discrimination” (para 71).

⁹³ Judgment *CHEZ*, para 97.

⁹⁴ Sara Benedi Lahuerta, *op. cit.*, p. 811.

disadvantage is "on grounds of" one of the protected characteristics⁹⁵. However, we consider that it is not very clear from the provision in question that it would require that the provision or practice in question be motivated by the protected ground, especially since Article 2 (4) of the Ordinance also prohibits "any active or passive behavior that, by the effects that it generates, favors or disadvantages unjustifiably or subjects to an unfair or degrading treatment a person, a group of persons or a community vis-à-vis other persons, groups of persons or communities".

The role of the national courts is crucial from this point of view, since in the cases in which it has approached the problem of discrimination by association (preliminary references), the CJEU has not decided itself whether, based on the facts relied on in the pending case, there is a form of direct or indirect discrimination. The only one, who can decide this, after a further investigation of the facts and assisted by detailed guidance provided by the preliminary ruling of the CJEU, is the national court⁹⁶. In this respect, according to settled case law, 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 law⁹⁷.

Thus, the courts must apply the rules established by the CJEU case law and conduct a careful analysis of the reasoning behind the less favorable treatment, seeking evidence that the protected criterion is the cause of such treatment, directly or indirectly⁹⁸.

However, as evidenced in the various analyzes performed⁹⁹, at least so far the practice of the national courts in Romania is not consistent. An explanation could also be the fact that, although the CJEU's interpretation of the rules of European law is obligatory for national courts, and the Court has repeatedly stated that not only does it itself have the power not to apply an EU provision, but also all the national courts of the EU, regarding the national provisions¹⁰⁰, the Romanian Constitutional Court limited the mandates of the civil courts in relation to

⁹⁵ Article 2 (3): "They are discriminatory, according to the present ordinance, the provisions, criteria or practices apparently neutral which disadvantage certain persons, on the basis of the criteria provided in par. (1), unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary".

⁹⁶ Including here not only the courts, but also the National Council for Combating Discrimination, as a quasi-judicial body.

⁹⁷ Judgment of 6 March 2007, *Placanica and Others*, C-338/04, C-359/04 and C-360/04, EU:C:2007:133, para 36; M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, Second edition, Oxford University Press, 2014, pp. 412 -413.

⁹⁸ FRA, *Handbook on European non-discrimination law*, 2018 edition, p. 51.

⁹⁹ See R. Iordache, *Country report on non-discrimination - Romania 2018*, p. 41. See also explanatory memorandum of the initiators of the proposal to introduce discrimination by association in Ordinance 137/2000 (PI-x nr. 501/2015), available at <http://www.cdep.ro/proiecte/2015/500/00/1/em624.pdf>.

¹⁰⁰ Judgment of 19 April 2016, *Dansk Industri*, C-441/14, EU:C:2016:278.

discrimination generated by legislative norms. According to the Constitutional Court, "the provisions of the Government Ordinance no.137/2000 regarding the prevention and the punishment of all forms of discrimination are unconstitutional insofar as it is clear from them that the courts have the authority to nullify or to refuse the application of normative acts with the power of law, considering them to be discriminatory, and to replace them with norms created by judicial means or with provisions included in other normative acts"¹⁰¹.

Although during court proceedings any party can ask for the case to be brought before the Constitutional Court to assess the unconstitutionality of legal provisions¹⁰², the national court may also use the preliminary reference procedure before the CJEU¹⁰³, this restriction of the applicability of the general anti-discrimination legislation can be considered to be at the origin of a certain judicial tension in the application and interpretation of the law¹⁰⁴ and of a state of confusion¹⁰⁵.

¹⁰¹ Romanian Constitutional Court decision no. 1325/2008 regarding the admission of the exception of unconstitutionality of the provisions of the Government Ordinance no. 137/2000 regarding the prevention and the punishment of all forms of discrimination (OJ I no. 872/2008). The Constitutional Court has ruled in the same sense by decisions 818-821/2008, as well as by decision 997/2008, which also limits the mandate of the National Council for Combating Discrimination.

¹⁰² However, the success of such an approach is questionable given the restrictive conditions set by the Constitutional Court for the use of a European law norm in the context of constitutionality control (clarity and precision of the norm and constitutional relevance), in relation to the fulfillment of which "it remains to the discretion of the Constitutional Court to apply, within the framework of constitutionality control, the judgments of the Court of Justice of the European Union or the formulation by itself of preliminary questions in order to establish the content of the European norm (Decision no. 668/2011, OJ I no. 487 of 8 July 2011). For an example where the Constitutional Court has reconsidered its own case law by referring also to the CJEU case law, see Decision no.1237 of 6 October 2010 (equalizing the retirement age between men and women).

¹⁰³ In *Agafitei* (C-310/10, judgment of 7 July 2011), the preliminary reference essentially concerned the interpretative decisions of the Constitutional Court regarding the anti-discrimination legislation, previously invoked. The CJEU concluded that the reference was inadmissible, on the basis that discrimination on socio-professional grounds fell outside the scope of Directives 2000/43 and 2000/78. It has proved extremely cautious in its approach, referring to the "division of powers between the Union and its Member States" and refusing to examine whether another linking factor allows the difference of treatment to be included in the scope of EU law.

¹⁰⁴ For various examples of this phenomenon, see D. M. Șandru, *Deplasarea echilibrului puterilor prin aderarea la Uniunea Europeană: efectele trimiterilor preliminare formulate de instanțe din România*, Romanian Journal of European Law, no. 4/2018, pp. 42-52.

¹⁰⁵ The issue was raised as a legal issue during a meeting of the presidents of the civil sections of the High Court of Cassation and Justice and the courts of appeal, from June 2016, being asked the point of view of the National Institute of Magistracy. He was of the opinion that the decisions of the Constitutional Court require a differentiated analysis, as the litigation in which the problem of discrimination was raised falls within the scope of European Union law or is a purely internal one (considering that national laws contain grounds for discrimination that do not are included in the directives). Accordingly, "in disputes falling within the scope of Directives 2000/78 / EC and 2000/43 / EC, the national court has an obligation to ensure the full effect of their provisions,

At the same time, as regards the national equality body, the National Council on Combating Discrimination (NCCD), it does not have standing to bring cases for constitutional review before the Constitutional Court and, in accordance with the judgment of the CJEU in *Belov*¹⁰⁶, it cannot even refer questions to the Luxembourg Court for a preliminary ruling.

Conclusions

The equality law has expanded exponentially over the last ten years and case law on discrimination by association represents only one facet of this phenomenon.

The recent interpretation by the CJEU of the anti-discrimination law of the European Union allows the extension of the protection offered by EU law to legal situations that did not previously fall within the scope of the directives. The justification for this extensive interpretation is made by reference to the objectives set out in the recitals of the directives - democratic and tolerant societies allowing the participation of all persons irrespective of protected grounds and, to this end, *any* direct or indirect discrimination based on protected grounds as regards the areas covered by the directives should be prohibited; ensuring a common high level of protection against discrimination in all member states. At the same time, the general principle of non-discrimination enshrined in Article 21 of the CFREU is invoked against the background. All this can lead to the idea of complete inclusion of discrimination by association in the definition of discrimination, both direct and indirect, in all situations and on all grounds.

If this is the meaning that should be given to the Court's approach, then the national courts must apply the national anti-discrimination legislation in the matters and on protected ground covered by the directives in accordance with this interpretation and, if that is not possible, "it is obliged not to apply national legislation which is contrary to the prohibition of discrimination established as a fundamental right"¹⁰⁷. At the same time, in order to ensure compliance with Union law, national legislators should eliminate any restrictions in the legislation that would prevent the formulation of complaints related to discrimination by association.

In this context, the legislative initiatives promoted in Romania for the regulation of discrimination by association seem to have a strong support in EU

removing the application of discriminatory national law rules, contrary to European Union law", the respective decisions of the Constitutional Court not influencing the obligations incumbent on the Romanian judges, as EU judges - see *The minute of the meeting* at the address http://www.inm-lex.ro/fisiere/d_1713/Minuta%20intalnire%20presedinti%20sectii%20civile%20Bacau%20iunie%202016.pdf.

¹⁰⁶ Judgment of 31 January 2013, *Belov*, C-394/11, EU:C:2012:585, in which the CJEU considered that such a body does not have the character of a "court" within the meaning of Article 267 TFEU.

¹⁰⁷ Opinion of Advocate General Kokott delivered on 20 September 2012 in *Belov* (C-394/11, EU:C:2012:585), para 83.

law, representing, from a more general perspective, a normal evolution, a connection to the European significance of the principle of non-discrimination, many Member States adopting at the legislative level in the last years explicit prohibitions of discrimination by association.

However, we consider that, from the relevant European jurisprudence, it is not very clear how far the Romanian legislator should go with the regulation of discrimination by association. While a too narrow consecration of the concept would not meet the imperatives of EU law, too broad a definition could open a genuine "Pandora's Box", leading rather to dilution than to strengthening the protection of groups or people most prone to discrimination. This is all the more so since the Romanian anti-discrimination legislation contains a number of grounds of discrimination not provided for in the directives.

Thus, the CJEU analyzed the discrimination by association only in the case of disability and ethnic origin so that, especially with regard to the latter protected ground, to carry out an extensive interpretation of the text of the directives. However, this case law cannot be taken as an isolated case and it must be set in the wider context of the Court's recent jurisprudence as a whole, which is proving more reluctant with regard to, for example, discrimination on grounds of religion and belief¹⁰⁸, which leads to the idea of a "hierarchy of discrimination grounds"¹⁰⁹. In these circumstances, certain signs of doubt remain whether exactly the same protection against discrimination by association should be granted in relation to other protected grounds and how certain reasonings of the Court might be applied (such as, for example, those relating to stigma and humiliation) in different contexts¹¹⁰.

Until the express consecration in Romania and even in the presence of such consecration, the crucial role in ensuring the protection against discrimination by association is the responsibility of the national courts and the National Council for Combating Discrimination, the comparative analyzes carried out at European level showing that, rather than the lack of legislation, its application and interpretation raises problems¹¹¹. We appreciate that even in the current formulation of national anti-discrimination legislation, using the instructions provided by the CJEU, the practices or measures directed against a person because of his association with a protected category can be included in the scope of national law. At least the broadest interpretation of the concept of discrimination by association, given the CJEU in *CHEZ* remains to be confirmed. At the same time, it is necessary to further

¹⁰⁸ See, for example, Judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2016:382.

¹⁰⁹ See E. Howard, *EU anti-discrimination law: has the CJEU stopped moving forward?* *International Journal of Discrimination and the Law*, 18 (2-3), 2018, pp. 60-81.

¹¹⁰ C. McCrudden, *op. cit.*, pp. 16-17.

¹¹¹ I. Chopin, C. Conte, E. Chambrier, *op. cit.*, p. 144.

develop this concept in EU law, either through further clarifications of the Court or by explicit regulation in a revised version of the anti-discrimination directives.

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