

IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

In Case C-83/14

REQUEST for a Preliminary Ruling Made by the Administrativen Sad Sofia-Grad (Bulgaria)

CEZ Razpredelenie Bulgaria AD (Applicant)

v

Komisa za Zashtita ot Diskriminatsia (Defendant)

v

Komisa za Energiyno I Vodno Regulirane (other party)

v

Anelia Georgieva Nikolova, in business as the shopkeeper 'Anelia Nikolova-Rosa' (other party)

WRITTEN OBSERVATIONS OF ANELIA GEORGIEVA NIKOLOVA

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INTRODUCTION

1. The *Administrativen sad Sofia-grad* (“*Administrativen sad*”) set out the facts of the case as it understood them in its order dated 5 February 2014 (“Order of 5.2.14”).
2. At paragraphs 38 and 41 of Order of 5.2.14, the *Administrativen sad* states that Ms Nikolova identifies as Roma. Ms Nikolova disagrees with this statement: she is of Bulgarian origin. She neither self-identifies nor is identified as Roma. The Court should take this into account when giving its reply to the questions, to help the *Administrativen sad* with its judgment on the case.
3. As the *Administrativen sad* notes, the Court of Justice has not yet determined questions of discrimination based on Roma origin in the provision of services (Order of 5.2.14, para. 32). The attention of the Court is therefore drawn to the following.
4. According to the Human Rights Commissioner of the Council of Europe,

“The Roma and related minority communities constitute Europe’s largest and most vulnerable minority, conservatively estimated at around 10 million people living throughout the Council of Europe area. Roma are present in nearly all member states. Most Roma live in central, eastern and south-eastern Europe, Russia, Turkey and Spain, with large communities also in France, Italy and Germany. The origins of many of them can be traced back to the Indian subcontinent from where their ancestors left, most likely around the 10th century. The Roma in Europe are a very diverse group in terms of religion, language, occupation, economic situation and way of living; today the vast majority of Roma and related groups are sedentary. Dozens of Romani language dialects are spoken throughout Europe, and a number of groups frequently affiliated or associated with Roma also speak other European minority languages.”¹
5. According to a 2011 survey by the European Union Fundamental Rights Agency,

“Roma – Europe’s largest minority of 10-12 million people – are victims of racism, discrimination and social exclusion. Of those surveyed in this report, one in three is unemployed, 20% are not covered by health insurance, and 90% are living below the poverty [line]. Many face prejudice, intolerance, discrimination and social

¹ Commissioner for Human Rights, “Human rights of Roma and Travellers in Europe”, October 2012, p. 31.

exclusion in their daily lives. They are marginalised and mostly live in extremely poor socio-economic conditions.”²

6. According to the Council, “despite efforts at national, European and international level to advance Roma inclusion, many Roma still face deep poverty, profound social exclusion, barriers in exercising fundamental rights, and discrimination, which often means limited access to quality education, jobs and services, low income levels, sub-standard housing conditions, poor health and lower life expectancy.”³

7. According to a 2013 study by the Open Society Justice Initiative of the implementation of Council Directive 2000/43 in nine Member States including Bulgaria,

“Roma are generally reported to experience the most serious discrimination on the ground of racial or ethnic origin. Prejudices and stereotypes about Roma are deeply rooted in societies and embedded in state institutions as well as public attitudes and behaviour. There is a clear connection between the observed problems which Roma encounter in accessing the labour market, the education system, the health care system, the housing sector and access to other goods and services. A vicious cycle becomes evident from the reports: segregation and inequality in a certain sectors of life (such as housing) leads to segregation and inequality in the other sectors (such as employment, education, healthcare and access to other goods and services).”⁴

8. The European Court of Human Rights (“ECtHR”) Grand Chamber in *D.H. v Czech Republic*⁵ “note[d] that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly’s Recommendation No. 1203 (1993) on Gypsies in Europe, and point 4 of its Recommendation no. 1557 (2002) on the legal situation of Roma in Europe). As the Court has noted in previous cases,⁶ they therefore require special protection.” The ECtHR held that the Czech Republic had

² European Union Agency for Fundamental Rights “The situation of Roma in 11 EU Member States: survey results at a glance”, 2012, p.3.

³ Council of the European Union, “Council conclusions on an EU Framework for National Roma Integration Strategies up to 2020”, 19.5.11., para. 10.

⁴ Open Society Justice Initiative, “The Race Equality Directive: A Shadow Report”, 2013, p. 14.

<http://www.opensocietyfoundations.org/reports/race-equality-directive-shadow-report>

⁵ *D.H. v Czech Republic*, ECtHR [GC], Grand Chamber Judgment of 13 November 2007, para. 182, internal citations omitted. Followed in *Orsus v Croatia* [GC] Grand Chamber Judgment of 16 March 2010, para. 147.

⁶ For the vulnerable position of Roma, see *Chapman v United Kingdom*, [GC], Grand Chamber Judgment of 18 January 2001, at para. 96; *Connors v United Kingdom*, Judgment of 27 May 2004, para. 84.

discriminated against Roma in the provision of education, and has upheld claims of unlawful discrimination against Roma in other fields.⁷

9. The European Committee of Social Rights has also upheld claims of discrimination against Roma under Article E of the European Social Charter.⁸
10. In 1999 the Open Society Institute conducted a detailed investigation of the factual situation now at issue in Bulgaria:⁹

“To prevent electricity theft, local utility companies have invested significant resources in installing special meters in Romani neighborhoods - but only in Romani neighborhoods. Utility workers relocated electrometers, the small boxes traditionally placed in houses on the outer wall near the entrance, to the electricity and telephone poles on the street. Almost all Romani houses received a new electrometer, locked inside a huge silver-metal box and attached to the pole two to five meters above the level of the street. Such a system makes it impossible for persons to modify the meters to reduce the fees.

In December 1999, the author observed Nicola Kochev and Nadezhda, two Romani neighborhoods in Sliven, where such “prevention” programs were developed. Both areas look like surrealist anti-robbery experiments. With the huge shining silver boxes in front of the houses and dozens of cables hanging down, the appearance of these Romani streets is dramatically different from the look of a non-Romani neighborhood. The inhabitants say that they feel as if the companies are treating them like criminals.

“This is a public humiliation campaign against the Roma, not an electricity saving campaign,” a resident of Nicola Kochev said. “I have lived here for 30 years. I’ve always had a good job, and I still have it. My electrometer was placed on the outside wall of my house, near the entrance door. I never stole electricity. I paid my bills on time. **One day the electric company came and, without even notifying me or**

⁷ *Cobzaru v Romania*, Judgment of 26 July 2007, para. 98 (discriminatory attitude of prosecutors), *Moldovan v Romania (No.2)*, Judgment of 12 July 2005, para. 132, (discriminatory attitude of authorities and courts).

⁸ Article E: “*The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.*”, see *European Roma Rights Centre v Italy*, Decision on the Merits, 7 December 2005 (27/2004), paras. 41-42, 45-46; *European Roma Rights Centre v France*, Decision on the Merits, (51/2008) 19 October 2009, paras. 79-85, 89, 99-105.

⁹ Open Society Institute, “On the Margins: Roma and Public Services in Romania, Bulgaria, and Macedonia”, Ina Zoon, 2001, pp. 138-9. <http://www.opensocietyfoundations.org/reports/margins-roma-and-public-services-romania-bulgaria-and-macedonia>

asking my permission, placed this huge box in front of my windows. Anybody passing on the street would think: ‘This is a thief’s house. He was caught stealing electricity.’ After a lifetime of work, I am treated like a criminal just because I am a Romani man. I feel deeply humiliated. I feel bitter and furious. I look around, see hundreds of silver boxes filling up the neighborhood, and I feel powerless. The whole Bulgarian society is against us.

Identical situations reportedly exist in other areas, such as in the Romani neighborhoods in Vidin and in Kusharnik and Ogosta (Montana). Vesselin Lakov, project coordinator of the Human Rights Project in Montana, said: “Last year, the electric company introduced streetlights. At the same time, the company placed electrometers on the posts five meters above the ground, in front of each Romani house.” As in Sliven, the electrometers are in locked, highly visible, silver boxes. As in Sliven, they exist only in the Romani community. The Human Rights Project protested against this differentiated treatment. **The director of the local electric company answered that electrometers are located in the streets only in Romani neighborhoods “to prevent Gypsies from stealing electricity.”** In Lom, utility workers have already installed electrometers in the four mahalas [districts] in which Roma live, and nowhere else in the city.” (emphasis added).

SUBMISSIONS

Question 1

Is the expression “ethnic origin” used in Council Directive 2000/43/EC and in the Charter of Fundamental Rights of the European Union (‘CFREU’) to be interpreted as covering a homogeneous group of Bulgarian citizens of Roma origin such as those living in the “Gizdova mahala” district of the town of Dupnitsa?

11. Ms. Nikolova proposes the following reply, for the reasons which follow:
 - (i) **European Union law, more particularly, the principle of equal treatment and the prohibition of discrimination based on racial or ethnic origin, as given expression by Article 21(1) of the Charter of Fundamental Rights of the European Union and by Council Directive 2000/43/EC, prohibits all discrimination based on Roma racial or ethnic origin including such discrimination affecting persons of other racial or ethnic origins.**

(ii) Discrimination is based on racial or ethnic origin when it is based on actual, perceived or assumed racial or ethnic origin.

12. It appears from the Order of 5.2.14 that the *Administrativen sad* asks Question 1 because it wishes to clarify three matters, in the context of treatment of a district densely populated by Roma people:
 - (i) application of Article 21(1) CFREU: Order of 5.2.14, paras. 34-35;
 - (ii) the characterisation of the alleged grounds which have been regarded by the Bulgarian courts variously as national origin (*narodnost*), personal status and ethnicity: Order of 5.2.14, paras. 36-38;
 - (iii) whether the principle of equal treatment (a) protects particular groups of persons or (b) prohibits discrimination based on particular grounds: Order of 5.2.14, paras. 39-40.
13. **The prohibition of discrimination based on racial or ethnic origin is a general principle of European Union law, as an aspect of the principle of equal treatment.** The Court has already so held in C-391/09 *Runevič-Vardyn* [2011] ECR- I-03787, para. 43.
14. As the Court there recalled, that principle is recognised by Article 21(1) CFREU by which “Any discrimination based on any ground such as sex, **race, colour, ethnic or social origin**, genetic features, language, religion or belief, political or any other opinion, **membership of a national minority**, property, birth, disability, age or sexual orientation shall be prohibited.” (emphasis added).
15. The principle of non-discrimination is given specific effect by Directive 2000/43 which “prohibits direct or indirect discrimination based on racial or ethnic origin” (Article 2(1)). It follows that “the scope of that directive cannot be defined restrictively.” *Runevič-Vardyn*, para. 43.
16. **The concept of “discrimination based on racial or ethnic origin” must be given an inclusive interpretation consistent with international law.**
17. An inclusive interpretation is supported by ECtHR jurisprudence on the application of Article 14 ECHR. In *Timishev*, the ECtHR held:

“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.”¹⁰

18. The phrase “racial or ethnic origin” is a compound one intended to ensure that the prohibition on discrimination has broad effect. The concept of “discrimination based on racial or ethnic origin” is not to be broken up into separate consideration of the phrases “racial origin” and “ethnic origin”. According to recital 6 to Directive 2000/43: “The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories.”
19. This inclusive approach is supported by the texts to which recital 3 to Directive 2000/43 refers (“The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by [various international conventions] to which all Member States are signatories”). These conventions include to the International Convention on the Elimination of all forms of Racial Discrimination. Article 1(1) of this Convention provides:

“In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”
20. The Explanations Relating to CFREU state, in relation to Article 21 CFREU:

“Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.”

Recital 3 also refers to the European Convention on Human Rights (“ECHR”). Article 14 ECHR provides: “The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”)

¹⁰ *Timishev v. Russia*, ECtHR, Judgment of 13 December 2005, para. 55, reiterated in *Sejdić and Finci v. Bosnia and Herzegovina*, ECtHR [GC] Grand Chamber Judgment of 27 December 2009, para. 43.

21. Guided by Article 21 CFREU and by the provisions of international law referred to, the European Union law concept of “discrimination based on racial or ethnic origin” must be interpreted to include discrimination based on race, colour, descent, national or ethnic origin and membership of a national minority.
22. Directive 2000/43 is transposed into Bulgarian law by the Protection Against Discrimination Act (“ZZD”). Article 4(1) ZZD prohibits discrimination based on “*rasa [race], narodnost [national origin], etnicheska prinadlezhnost [ethnic origin], . . . grazhdanstvo [citizenship], proizvod [origin], . . . lichno ili obshtestveno polozhenie [personal or social status]*”. For the reasons at paras. 13-21 above, EU law requires references in such a law to discrimination based on race, national origin or ethnic origin to be interpreted as encompassing discrimination based on racial or ethnic origin. The concept of “national origin” (*narodnost*) is distinct from that of citizenship (*grazhdanstvo*). By virtue of Article 3(2), Directive 2000/43 does not “cover difference of treatment based on citizenship”.
23. **Discrimination based on Roma origin is discrimination based on racial or ethnic origin.** This is manifestly correct on the true interpretation of the concept of “discrimination based on racial or ethnic origin”. This has been consistently recognised by the ECtHR (see cases cited at para. 8 above), by the Union institutions responsible for addressing this discrimination (see paras. 5-6 above), by the Human Rights Commissioner of the Council of Europe (see para. 4 above) and by civil society research (see paras. 7 and 9 above).
24. Discrimination based on racial or ethnic origin is prohibited regardless of the actual or apparent racial or ethnic origin of the person affected. The subject of the prohibition is discriminatory acts or practices. The prohibition applies where these are based on racial or ethnic origin, not only where they are in fact directed at persons of a particular racial or ethnic origin. The national court refers to two important judgments of this Court (Order of 5.2.14, paras. 39, 40). In C-303/06 *Coleman* [2008] I-05603, the Court held that “Directive 2000/78, which seeks to combat all forms of discrimination on grounds of disability in the field of employment and occupation, applies not to a particular category of person but by reference to the grounds mentioned in Article 1.” (para. 50). Directive 2000/43 has an object and purpose of the same nature and is expressed in the same terms: it should be given the same interpretation. In C-54/07 *Feryn* [2008] I-

05187, the Court held that the prohibition applies even where there is no identifiable victim (paras. 23-25).

25. It follows that:

- (i) a practice is based on racial or ethnic origin when it is based on actual, perceived or assumed racial or ethnic origin;
- (ii) a practice based on the racial or ethnic origin of persons in a district is prohibited by the principle of equality even though it affects all persons within that district irrespective of their own racial or ethnic origin;
- (iii) any persons affected by such a practice are entitled to “consider themselves wronged because the principle of equal treatment has not been applied to them” (Article 8(1) Directive 2000/43).

Questions 2 - 4

2. Does the expression “comparable situation” within the meaning of Article 2(2)(a) of Directive 2000/43/EC apply to the circumstances of the present case, in which the commercial measuring instruments are positioned in Roma districts of the town at a height of between 6 and 7 metres whereas in other districts not densely populated by Roma they are generally positioned lower than 2 metres above ground?

3. Is Article 2(2)(a) of Directive 2000/43 to be interpreted so that the positioning of commercial measuring instruments in Roma districts of town at a height of between 6 and 7 metres constitutes less favourable treatment of the population of Roma origin compared to the population of other ethnic origin?

4. On the assumption that there has been less favourable treatment, does that treatment, pursuant to the abovementioned provision, result in the circumstances of the main case in whole or in part from the fact that it affects the Roma ethnic group?

26. Questions 2-4 concern direct discrimination. Ms Nikolova addresses them together. She proposes the following replies, for the reasons which follow:

- (i) For the purposes of Directive 2000/43, Article 2(2)(a), a practice of placing electricity meters at a height of between 6 and 7 metres in a certain district is, manifestly, to treat the electricity users and residents of that district less favourably than those of districts in which the meters are placed at a height of less than 2 metres.**

(ii) Evidence of facts, as established by the national court, that the district in question is densely populated by people who share a particular racial or ethnic origin which is different to that of people in other districts, or is perceived as being such a district, for example “a Roma district”, gives rise to the presumption, under Article 8(1) Directive 2000/43, that there has been direct discrimination based on racial or ethnic origin.

(iii) The less favourable treatment in question constitutes direct discrimination within the meaning of Directive 2000/43, Article 2(2)(a), in relation to supply of services available to the public, where the district is chosen for this treatment based on the racial or ethnic origin of persons in that district.

(iv) The national court was entitled to conclude that the respondent had failed to prove that there had been no direct discrimination based on racial or ethnic origin.

27. Considered together, Questions 2-4 raise the following issues:

(i) Does the positioning of the electricity meters constitute less favourable treatment of the electricity users and residents of the *Gizdova mahala*?

(ii) In what circumstances does this constitute direct discrimination based on racial or ethnic origin?

(iii) How should the national court approach the determination of whether such a factual situation exists, including whether the burden of proof has shifted and whether discrimination may be found?

28. **The positioning of the electricity meters constitutes less favourable treatment.** Ms Nikolova recognises that evaluation of the evidence and facts is a matter for the national court and that the role of the Court of Justice is to provide a helpful interpretation of the law. In this case, the proper application of the law only permits of one conclusion.

29. The position of the electricity meters is manifestly treatment of the electricity users and residents of the *Gizdova mahala* which is less favourable than that of those of other districts. Electricity users were not permitted by ChEZ Raspredelenie Bulgaria AD (“CRB”) to choose their meter position, for example, because they wished to have easy access or, by contrast, to prevent interference. CRB imposed the meter position upon them. The meter position has two effects. First, as was pointed out by Advocate-

General Kokott in her Opinion in C-394/11 *Belov* [2013] I-0000, para. 99, the meter position makes it either impossible or very difficult to make a visual check on the meter. This must be compared with the position of Bulgarian electricity users in other districts, who may make a visual check with ease. This constitutes differential treatment of the electricity user. Second, the meter position makes a highly visible “statement” that the persons in *Gizdova mahala* are not trusted by the CRB to have a readily accessible meter: see para. 9 above. They are publicly stigmatized as dishonest by comparison with persons in other districts. This stigmatizing effect would persist even if CRB made arrangements to facilitate ready inspection of such meters. This is less favourable treatment of the residents of the *Gizdova mahala*.

30. **Evidence that the practice is applied only to districts densely populated by people who share a particular racial or ethnic origin gives rise to the presumption of direct discrimination.** The national court found as fact that the practice is applied only to “Roma neighbourhoods”: Order of 5.2.14, para. 19. This fact manifestly gives rise to a presumption of direct discrimination based on racial or ethnic origin.
31. As to the assessment of such facts, it should be noted that the national court did not have statistical evidence of the racial or ethnic origin of residents which related in particular to the *Gizdova mahala*, only that relating to Dupnitsa as a whole: Order of 5.2.14, para. 17. The national court also states that “When searching in Internet sources ‘Gizdova Mahala’ district is presented as a Roma district, including the largest Roma district in Dupnitsa” and refers to the opinion of both a witness for CRB and of Ms Nikolova that this is the case: Order of 5.2.14, paras. 18, 21, 25. The Court’s reply to the question should clarify that the national court’s approach was legitimate. In C-81/12 *Asociația ACCEPT* [2013] I-0000, the Court recognised that for an assessment of discrimination prohibited by Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation “the perception of the public or social groups concerned may be relevant for the overall assessment of the statements at issue in the main proceedings” (para. 51). That reasoning is equally applicable to this assessment under Directive 2000/43.
32. Where a Roma district is chosen for such treatment based on racial or ethnic origin, it is not material that this treatment affects persons in the district who do not share that racial or ethnic origin: see paras. 24-25 above. For example, that Ms Nikolova, a person

not of Roma racial or ethnic origin, is also affected by such a measure does not deprive it of its discriminatory character.

33. **This practice amounts to direct discrimination where its application to a district is based on racial or ethnic origin.** This is essential to the principle of equal treatment. Just as this principle prohibits subjecting a particular individual or individuals to less favourable treatment based upon their racial or ethnic origin, so it prohibits singling out particular districts based upon racial or ethnic origin and prohibits subjecting persons to less favourable treatment because of their residence or use of electricity in that district.
34. **The national court was entitled to conclude that CRB had not disproved direct discrimination.** CRB presented evidence of irregular connection to electricity meters, in the *Gizdova mahala*: Order of 5.2.14, para. 21. CRB presented no evidence to prove that their decision to apply the practice only to Roma districts, including the *Gizdova mahala*, was based exclusively upon considerations other than racial or ethnic origin. The national court was therefore entitled to conclude that the practice was based on racial or ethnic origin.

Question 5

Under Directive 2000/43 is a national provision such as Paragraph 1(7) of the Supplementary Provisions of the Zakon za zashtita ot diskriminatsia (Law on Protection against discrimination; “ZZD”) — according to which any measure, action or failure to act which directly or indirectly affects rights or legitimate interests constitutes “unfavourable treatment” — permissible?

35. Ms Nikolova proposes the following reply, for the reasons which follow:

The EU law prohibition of discrimination based on racial or ethnic origin as given specific effect by Directive 2000/43 precludes national rules limiting that prohibition to situations of an infringement of rights or interests defined in law. The national court must interpret national law in this regard in conformity with that principle and, if that is not possible, it is obliged to disapply national legislation which is contrary to that principle.

36. On this question, Ms Nikolova respectfully agrees with, and adopts, the reasoning of Advocate-General Kokott in her Opinion in *Belov* at paras. 68-83.

Question 6-8

6. (a) *Is the expression “apparently neutral practice” within the meaning of Article 2(2)(b) of Directive 2000/43 applicable to the practice of the CEZ Razpredelenie Bulgaria AD of positioning commercial measuring instruments at a height of between 6 and 7 metres?*

(b) *How should the phrase “apparently neutral” be interpreted — as meaning that the practice is obviously neutral or that it only seems neutral, at first glance?*

7. (a) *For a finding that there has been indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43, is it necessary that the neutral practice places persons in a particularly less favourable position on the ground of racial or ethnic origin, or is it sufficient that that practice affects only persons of a specific ethnic origin?*

(b) *In that context, under Article 2(2)(b) of Directive 2000/43 is a national provision such as Article 4(3) ZZD — according to which there is indirect discrimination where a person is placed in a more unfavourable position because of the characteristics set out in Article 2(1) (including ethnic origin) — permissible?*

8. (a) *How should the expression “put ... at a particular disadvantage” within the meaning of Article 2(2)(b) of Directive 2000/43 be interpreted?*

(b) *Does it correspond to the expression ‘less favourable treatment’ used in Article 2(2)(a) of Directive 2000/43, or does it cover only particularly serious and obvious cases of unequal treatment?*

(c) *Does the practice described in the present case amount to particularly unfavourable treatment?*

(d) *If there has been no particularly serious and obvious case of putting someone in an unfavourable position, is that sufficient to conclude that there has been no indirect discrimination (without examining whether the practice in question is justified, appropriate and necessary in view of attaining a legitimate aim)?*

37. Questions 6-8 concern indirect discrimination. Ms Nikolova addresses them together. She proposes the following replies, for the reasons which follow:

For the purposes of Directive 2000/43/EC, Article 2(2)(b)

Any provision, criterion or practice which does not constitute direct discrimination is one which is apparently neutral.

- (i) The term “particular disadvantage” refers to any disadvantage to which the persons of one racial or ethnic origin are put as compared to persons of a different racial or ethnic origin and constitutes indirect discrimination unless it is objectively justified.**
- (ii) A practice of placing electricity meters at a height of between 6 and 7 metres in a certain district puts electricity users and residents of that district at a particular disadvantage compared with those of districts in which the meters are placed at a height of less than 2 metres;**
- (iii) Where the district in question is densely populated by people who share a particular racial or ethnic origin which is different to that of people in other districts or is perceived as being such a district, for example ‘a Roma district’, and this practice is proved not to constitute direct discrimination, it constitutes indirect discrimination in relation to supply of services available to the public unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.**

38. **The phrase “apparently neutral” refers to any measure which is not direct discrimination based on racial or ethnic origin.** The purpose of Article 2(2)(b) Directive 2000/43 is to ensure the effective prohibition on discrimination based on racial or ethnic origin by applying it to provisions, criteria and practices, which in fact subject a group of persons who share a racial or ethnic origin to unjustified disadvantage as compared to others, even though expressed, applied or operated without regard to racial or ethnic origin.
39. It follows that Article 2(2)(b) must be capable of applying to any provision, criteria or practice which is not directly discriminatory. The phrase “apparently neutral” is not a limiting condition. The phrase is intended to encompass all measures which are not directly discriminatory. As the national court pointed out (Order of 5.2.14, para. 46), a restrictive interpretation of this phrase would limit the application of the principle.

40. The word “particular” in Article 2(2)(b) does not indicate a threshold of seriousness or obviousness of the disadvantage in question. It would be contrary to the principle of equality to interpret Directive 2000/43 as limiting the prohibition on indirect discrimination to disadvantages of a particular degree of seriousness or obviousness. The word “particular” refers to the disadvantage to which the persons of one racial or ethnic origin are put as compared to persons of a different racial or ethnic origin. The word is used to mean “distinct” or “discrete”.
41. The seriousness of the disadvantage is therefore irrelevant to whether objective justification of the measure is required. But the seriousness of the disadvantage is relevant when considering if the measure is objectively justified. A neutral practice which inadvertently puts persons of a particular racial or ethnic origin at a minor disadvantage as compared to other persons is, as a rule, less difficult to justify objectively than one putting such persons at a greater disadvantage.
42. **The meter positioning puts the electricity users and residents of the *Gizdova mahala* at a disadvantage as compared to those of other districts.** The Court is referred to paras. 27-28 above. These observations on direct discrimination apply by analogy to indirect discrimination. For the reasons that the meter positioning constitutes “less favourable treatment” of those persons (than comparable persons in other districts), so it puts those persons “at a particular disadvantage” (as compared with those of other districts).
43. **If the practice were found by the national court not to be direct discrimination, it is nevertheless indirect discrimination unless it is objectively justified.** As stated at para. 34 above, the national court was entitled to conclude that CRB had not disproved that the meter positioning practice constituted direct discrimination. In the event that CRB were to discharge this burden, the question would arise whether the practice constituted indirect discrimination requiring objective justification. The finding of the national court that the practice is applied only to Roma neighbourhoods (see para. 30 above) manifestly means that the practice is indirect discrimination requiring objective justification (see, below, proposed reply to Question 10).

Question 9

Are national provisions such as Article 4(2) and (3) ZZD — which for direct discrimination require “unfavourable treatment” and for indirect discrimination

require “placing in a more unfavourable position” but which do not, unlike the directive, make a distinction according to the degree of seriousness of the unfavourable treatment concerned — permissible under Article 2(2)(a) and (b) of Directive 2000/43?

44. Ms Nikolova proposes the following reply, for the reasons which follow:

Provisions of national law such as Article 4(2) and (3) ZZD which do not limit the application of the principle of equal treatment according to the degree of seriousness of the treatment or disadvantage concerned are not precluded by the principle of the prohibition of discrimination based on racial or ethnic origin nor by Directive 2000/43.

45. Such a limitation would be inconsistent with the principle and with the text of Directive 2000/43. As regards Article 4(3) ZZD which transposes Article 2(2)(b) Directive 2000/43, reference should be made to para. 40 above for submissions on the meaning of “particular”. Article 4(2) ZZD transposes Article 2(2)(a) Directive 2000/43. That provision applies to treatment which is “less favourable”. It does not state a threshold that the treatment be “substantially” or “obviously” “less favourable”.

Question 10

(a) Is Article 2(2)(b) of Directive 2000/43 to be interpreted as meaning that the practice of the CEZ Razpredelenie Bulgaria AD in question in relation to the security of the electricity network and the correct recording of electricity consumption is objectively justified?

(b) Is this practice also appropriate in the light of the obligation of CEZ Razpredelenie Bulgaria AD to grant consumers free access to the electricity meter readings?

(c) Is that practice necessary when, according to media publications, there are other technically and financially feasible means of securing the commercial measuring instruments?

46. Ms Nikolova proposes the following reply, for the reasons which follow:

The national court has the responsibility to determine, under Article 2(2)(b) Directive 2000/43, whether an apparently neutral practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Such objective justification is not possible for a practice which, by reason that it significantly promotes racist assumptions, is

fundamentally incompatible with the founding values of the EU expressed in Article 2 TEU.

47. Before the national court, CRB argued that the practice was adopted for the protection of life, health and property interests of the electricity users of the *Gizdova mahala* (Order of 5.2.14, para. 27). Under Article 2(2)(b) Directive 2000/43, the national court must first determine whether those aims were legitimate. Ms Nikolova agrees that “[p]reventing and combatting fraud and abuse and ensuring the security and quality of the energy supply in the Member States are legitimate aims recognised by EU law.”¹¹
48. The national court must therefore determine whether CRB has shown that the means adopted in this case of achieving those aims was both “appropriate and necessary”.
49. As to “appropriateness” of the practice, it should be noted that CRB adopted the practice in 1999. CRB should therefore be able to provide evidence to allow the national court to determine whether the practice has, in fact, prevented and combatted fraud and abuse, and helped ensure the security and quality of the energy supply.
50. As to ‘necessary’, the national court must determine, first, whether CRB has shown that “no other, equally suitable measures can be taken to achieve those aims, at financially reasonable cost, which would have less detrimental effects on the population in the districts concerned.”¹² In this regard, the national court is entitled to take into account the measures adopted as regards other districts to achieve the aims in question and media reports of other available means of meter security.
51. Secondly, the national court must determine whether CRB has shown that the measures taken do not produce **undue adverse effects on electricity users and the residents of the district concerned**.
52. When making such an assessment, the national court must take into account that EU law requires electricity providers to protect the interests of electricity users in access to their meters: see *Belov* Opinion, paras. 10-13.
53. Finally, it is crucial to consider the stigmatizing effects of the practice (see para. 30 above). This stigmatization is of an especially harmful nature: it is “collective” and “compulsory”. The practice relates only to “Roma districts”. It is therefore inextricably connected with the actual or perceived racial or ethnic origin of the residents of such a

¹¹ A-G Kokott, *Belov* Opinion, para. 102.

¹² A-G Kokott, *Belov* Opinion para. 125(6).

district. The practice applies by compulsion to all the electricity users of the district. There is no evidence that users were offered or invited to propose alternative solutions of a district-wide or individual nature, or given the opportunity to explain why they should individually be exempt from the measure.

54. Even if CRB were to prove that it selected the districts in question exclusively upon considerations other than racial or ethnic origin (see para. 35 above), it would remain the case that the collective, public, stigmatizing nature of the measure chosen inevitably promotes racist assumptions about the Roma community. Moreover, the important role played by a national supplier of electricity means that such a practice promotes the idea that important actors in Bulgarian society agree with those racist assumptions. The practice strengthens the apparent legitimacy of such assumptions.
55. Such stigmatization also harms the self-image of Roma people. It “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹³
56. As Article 2 TEU states, the founding values of the EU include:
“respect for human dignity, freedom, democracy, equality, . . . and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity . . . prevail.”
57. In Council Framework Decision 2008/913/JHA, the Council recognised that “Racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States.”¹⁴
58. A practice adopted for completely neutral reasons which nevertheless so significantly promotes such harmful racist assumptions about Roma people is fundamentally incompatible with founding principles of the EU. A practice which is fundamentally incompatible with those founding principles is incapable of justification under Article 2(2)(b) Directive 2000/43.

¹³ To adopt the language used for the effects of segregated education by the United States Supreme Court in *Brown v Board of Education*, 347 US 483 (1954), p. 494

¹⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, recital (1).

PROPOSED REPLIES

59. Ms Nikolova proposes the following replies to the questions of the *Administrativen sad*:

Question 1

- (i) European Union law, more particularly, the principle of equal treatment and the prohibition of discrimination based on racial or ethnic origin, as given expression by Article 21(1) of the Charter of Fundamental Rights of the European Union and by Council Directive 2000/43/EC, prohibits all discrimination based on Roma racial or ethnic origin including such discrimination affecting persons of other racial or ethnic origins.**
- (ii) Discrimination is based on racial or ethnic origin when it is based on actual, perceived or assumed racial or ethnic origin.**

Questions 2-4

- (i) For the purposes of Directive 2000/43, article 2(2)(a), a practice of placing electricity meters at a height of between 6 and 7 metres in a certain district is, manifestly, to treat the electricity users and residents of that district less favourably than those of districts in which the meters are placed at a height of less than 2 metres.**
- (ii) Evidence of facts, as established by the national court, that the district in question is densely populated by people who share a particular racial or ethnic origin which is different to that of people in other districts, or is perceived as being such a district, for example “a Roma district”, gives rise to the presumption, under Article 8(1) Directive 2000/43, that there has been direct discrimination based on racial or ethnic origin.**
- (iii) The less favourable treatment in question constitutes direct discrimination within the meaning of Directive 2000/43, article 2(2)(a), in relation to supply of services available to the public where the district is chosen for this treatment based on the racial or ethnic origin of persons in that district.**
- (iv) The national court was entitled to conclude that the respondent had failed to prove that there had been no direct discrimination based on racial or ethnic origin.**

Question 5

The EU law prohibition of discrimination based on racial or ethnic origin as given specific effect by Directive 2000/43 precludes national rules limiting that prohibition to situations of an infringement of rights or interests defined in law. The national court must interpret national law in this regard in conformity with that principle and, if that is not possible, it is obliged to disapply national legislation which is contrary to that principle.

Questions 6-8

For the purposes of Directive 2000/43/EC, article 2(2)(b)

- (i) Any provision, criterion or practice which does not constitute direct discrimination is one which is apparently neutral.
- (ii) The term “particular disadvantage” refers to any disadvantage to which the persons of one racial or ethnic origin are put as compared to persons of a different racial or ethnic origin and constitutes indirect discrimination unless it is objectively justified.
- (iii) A practice of placing electricity meters at a height of between 6 and 7 metres in a certain district puts electricity users and residents of that district at a particular disadvantage compared with those of districts in which the meters are placed at a height of less than 2 metres;
- (iv) Where the district in question is densely populated by people who share a particular racial or ethnic origin which is different to that of people in other districts or is perceived as being such a district, for example “a Roma district”, and this practice is proved not to constitute direct discrimination, it constitutes indirect discrimination in relation to supply of services available to the public unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Question 9

Provisions of national law such as Article 4(2) and (3) ZZD which do not limit the application of the principle of equal treatment according to the degree of seriousness of the treatment or disadvantage concerned are not precluded by the

principle of the prohibition of discrimination based on racial or ethnic origin nor by Directive 2000/43.

Question 10

The national court has the responsibility to determine, under Article 2(2)(b) Directive 2000/43, whether an apparently neutral practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Such objective justification is not possible for a practice which, by reason that it significantly promotes racist assumptions, is fundamentally incompatible with the founding values of the EU expressed in Article 2 TEU.

Mr. Simon Cox of the Bar of England and Wales

Mr. Maxim Ferschtman of the Amsterdam Bar in the Netherlands

Mr. Yonko Grozev of the Sofia Bar in Bulgaria

5 June 2014