



## NEWS REPORT

**Update of flash report nr:** 190-RO-8 from 29 December 2008  
**Date:** 31 August 2010  
**Expert:** Romanita Iordache  
**Title:** ECJ preliminary ruling referred by the Bacau Court of Appeal requesting an interpretation of Art. 15 of Directive 2000/43/EC and Art. 17 of Directive 2000/78/EC  
**Country:** Romania

### Context

**Issue at stake:** Need of interpretation of the decisions of the Romanian Constitutional Court ruling that the mandate of the courts to find and sanction discrimination when triggered by legislative acts is not constitutional as it clashes with the principle of separation of powers

**Ground of discrimination:** All

**Source:** Case C-310/10: Reference for a preliminary ruling from the Curtea de Apel Bacău (Romania) lodged on 29 June 2010 — Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others.

**Field:** All

### Content

**Case development:** Beginning with 2008, the Anti-discrimination Law came under heavy attack with complaints filed to the *Curtea Constituțională* [the Romanian Constitutional Court (RCC)] by defendants sanctioned for discrimination by the courts or by the National Council for Combating Discrimination (NCCD). The Constitutional Court declared unconstitutional the mandate of the NCCD in relation to examining and sanctioning complaints regarding legislative provisions which are deemed as triggering discrimination, among others, in Decision 997 of 7 October

2008,<sup>1</sup> Decisions 818, 819 and 820 of 3 July 2008,<sup>2</sup> Decision 1325 of 4 December 2008,<sup>3</sup> or, more recently, Decision 146 of 26 February 2010.<sup>4</sup> Most importantly, in Decision 1325 from 4 December 2008, the Romanian Ministry of Justice challenged the application of Article 27 of the Anti-discrimination Law by the courts which invoked the provisions of the Anti-discrimination Law when declaring legislative provisions as triggering discrimination in relation to salary related rights of the magistrates and when creating new norms to grant such rights based on the principle of equality. This practice was perceived as an infringement of the principle of separation of powers and the Constitutional Court decided that the provisions of the Anti-discrimination Law 'are unconstitutional as long as they are interpreted as implying that the courts are competent to nullify or refuse the enforcement of legal provisions adopted as laws, considering that they are discriminatory and replacing them with norms created by the judiciary or with provisions provided for in other norms.'

In its reference for a preliminary ruling, *Curtea de Apel Bacău*, tackles the legal nullity generated by the CCR rulings and asked:

1. *Do Article 15 of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ( 1 ) and Article 17 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ( 2 ) — both transposed into national law by OG*

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<sup>1</sup> Romania/*Curtea Constituțională*/Decision 997 from 7.10.2008 finding that the interpretation of Article 20 (3) of the Anti-discrimination Law, defining the mandate of the NCCD in relation to finding and sanctioning discrimination triggered by legislative provisions, is unconstitutional. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20.02.2009).

<sup>2</sup> Romania/*Curtea Constituțională*/Decisions 818, 819 and 820 from 3.07. 2008. In these three decisions, the Constitutional Court has concluded that the dispositions of Art. 1(2) letter e) and of Art. 27 of the Governmental Ordinance 137/2000 are unconstitutional, to the extent that they are understood as implying that the courts of law have the authority to nullify or to refuse the application of legal norms when considering that such norms are discriminatory. Based on the constitutional principle of separation of powers, the Constitutional Court emphasised the constitutionality of the Anti-discrimination Law but asserted that the enforcement of the Law by some courts is unconstitutional due to the fact that during its application, some courts decided to quash particular legal provisions deemed as discriminatory and replaced them with other norms, thus 'creating legal norms or substituting them with other norms of their choice.' Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true> (20.02.2009).

<sup>3</sup> Romania/*Curtea Constituțională*/Decision 1325 from 4.12.2009.

<sup>4</sup> Romania/*Curtea Constituțională*/Decision 146 from 26.02.2010.

*(Ordonanța Guvernului (Government legislative decree)) No 137/2000, as republished and amended — preclude national legislation or a judgment of the Curtea Constituțională (Constitutional Court) prohibiting the national judicial authorities from awarding to claimants who have been discriminated against the compensation for material and/or non-material damage which is considered appropriate in cases in which the compensation for the damage caused by discrimination relates to salary rights provided for by law and granted to a socio-professional category other than that to which the claimants belong (see, to that effect, judgments of the Curtea Constituțională No 1325 of 4 December 2008 and No 146 of 25 February 2010)?*

2. *If the answer to Question 1 is in the affirmative, are the national courts required to await the repeal or amendment of the provisions of national law — and/or a change in the case-law of the Curtea Constituțională — which are, ex hypothesi, contrary to the provisions of Community law, or are the courts required to apply Community law, as interpreted by the Court of Justice of the European Union, directly and immediately to the proceedings pending before them, declining to apply any provision of national law or any judgment of the Curtea Constituțională which is contrary to the provisions of Community law?*

**Internet link source and additional information:** <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:234:0027:0027:EN:PDF>