

JUDGMENT OF THE COURT (Third Chamber)

25 April 2013 (*)

(Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Articles 2(2)(a), 10(1) and 17 – Prohibition of discrimination on grounds of sexual orientation – Concept of ‘facts from which it may be presumed that there has been discrimination’ – Modified burden of proof – Effective, proportionate and dissuasive sanctions – Person presenting himself and being perceived by public opinion as playing a leading role in a professional football club – Public statements ruling out the recruitment of a footballer presented as being homosexual)

In Case C-81/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea de Apel București (Romania), made by decision of 12 October 2011, received at the Court on 14 February 2012, in the proceedings

Asociația ACCEPT

v

Consiliul Național pentru Combaterea Discriminării,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, V. Skouris, President of the Court, acting as Judge in the Third Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 23 January 2013,

after considering the observations submitted on behalf of:

- Asociația ACCEPT, by R.-I. Ionescu, avocat,
- the Consiliul Național pentru Combaterea Discriminării, by C. Asztalos, C. Nuică and C. Vlad, acting as Agents,
- the Romanian Government, by R.H. Radu, E. Gane and A. Voicu, acting as Agents,
- the European Commission, by J. Enegren and C. Gheorghiu, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2(2)(a), 10(1) and 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
- 2 The reference has been made in proceedings between Asociația ACCEPT ('Accept') and the Consiliul Național pentru Combaterea Discriminării (National Council for Combatting Discrimination) ('CNCD'), concerning its decision partially dismissing a complaint lodged following public statements, made by a person who presents himself as and is considered by public opinion to play a leading role in a professional football club, ruling out the recruitment by that club of a footballer presented as being a homosexual.

Legal context

European Union law

- 3 According to Article 1 of Directive 2000/78, that directive's 'purpose is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.
- 4 Recitals 15, 28, 31 and 35 of that directive are worded as follows:

'(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice ...

...

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. ...

...

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.

...

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.'
- 5 Entitled 'Concept of discrimination', Article 2(1) to (3) provides:
 1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
 2. For the purposes of paragraph 1:

- (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

6 Article 3(1) of Directive 2000/78 is worded as follows:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy ...

...'

7 Article 8(1) of Directive 2000/78 states that 'the Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive'.

8 Under Article 9 of that directive:

'1. Member States shall ensure that judicial and/or administrative procedures ... for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them ...

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.'

9 Article 10 of that directive, entitled 'Burden of proof', provides in subparagraphs 1 to 4:

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

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).'

10 Article 17 of Directive 2000/78 provides:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive ...'

Romanian law

11 Government Decree No 137 of 31 August 2000 on the prevention and suppression of all forms of discrimination, as amended and subsequently supplemented, in particular by Law No 324 of 14 July 2006, and republished on 8 February 2007 (*Monitorul Oficial al Romăniei*, Part I, No 99, of 8 February 2007 ('GD No 137/2000'), is intended to transpose, inter alia, Directive 2000/78.

12 According to Article 2(11) of GD No 137/2000, discrimination gives rise to civil liability, administrative offences or criminal offences, as the case may be, under the conditions laid down by law.

13 Under Article 5 of GD No 137/2000 making the participation of a person in an economic activity dependent on his sexual orientation is classified as an administrative offence.

14 Article 7(1) of GD No 137/2000 provides that the refusal by a natural or legal person to employ a person by reason, in particular, of his sexual orientation, with the exception of cases provided by law constitutes an administrative offence.

15 Article 15 of GD No 137/2000 provides:

'Any conduct intended to violate the dignity of or to create an intimidating, hostile, degrading, humiliating or offensive environment with respect to a person, group of persons or a community by reason of their sexual orientation shall constitute an administrative offence ... if the facts do not fall within the scope of criminal law.'

16 Under Article 20 of GD No 137/2000:

'(1) A person who considers that he has suffered discrimination may make a complaint to the [CNCD] within one year from the date on which the facts occurred or the date from which he could have been aware that they had occurred.

(2) The [CNCD] shall decide the application by decision of the Director of the Board ...

...

(6) The person concerned is required to prove the existence of the facts from which the existence of direct or indirect discrimination may be presumed, while the person against whom a complaint has been lodged has the burden of proving that the facts do not constitute such discrimination. ...

(7) The Director of the Board shall give a decision on the claim within 90 days of the date on which it is lodged and [that decision] shall include ... the methods of payment of the fine, ...
...'

17 Article 26(1) and (2) of GD No 137/2000 states:

'(1) The administrative offence provided for in Articles ... 5 to 8 ... and 15 shall be sanctioned by a fine of RON 400 to 4 000 if the discrimination targets a natural person, or a fine of RON 600 to 8 000 if the discrimination is directed against a group of persons or a community.

(2) Sanctions may also be applied to legal persons. ...'

18 Article 27(1) of GD No 137/2000 provides:

'Persons who considers themselves the victim of discrimination may seek before the court compensation and the restoration of the status quo ante or the elimination of the situation to which the discrimination gave rise, in accordance with the provisions of general law. To make such a claim it is not necessary to lodge a complaint before the [CNCD] ...'

19 Article 28(1) of GD No 137/2000 is worded as follows:

'Non-governmental organisations whose aim is to protect human rights or who have a legitimate interest in combatting discrimination have locus standi where there is discrimination in their sphere of activity and which is detrimental to a community or group of persons.'

20 Article 5(2) of Governmental Decree No 2 of 12 July 2001 on the legal regime for sanctions, amended and subsequently supplemented (*Monitorul Oficial al României*, Part I, No 410 of 25 July 2001) ('GD No 2/2001'), provides:

'Administrative offences shall be punishable principally by: (a) a warning; (b) a fine; (c) community service.'

21 Under Article 7(1) of GD No 2/2001, a 'warning is a communication orally or in writing to the person responsible for committing the administrative offence regarding the social undesirability of the acts which took place together with a recommendation to comply with the law'.

22 Under Article 13(1) of GD No 2/2001, the limitation period for imposing a fine for administrative offences is six months from the date on which the events took place.

23 Article 13(4) of GD No 2/2001 provides for the possibility, by means of special laws, to lay down other limitation periods for imposing penalties for administrative offences.

The dispute in the main proceedings and the questions referred for a preliminary ruling

24 On 3 March 2010, Accept, a non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights lodged a complaint against Mr Becali and SC Fotbal Club Steaua București SA ('FC Steaua'), claiming that the principle of equal treatment had been breached in recruitment matters.

- 25 In support of its complaint, Accept maintained that, in an interview concerning the possible transfer of a professional footballer, X, and the supposed sexual orientation of that player, Mr Becali had made statements, on 13 February 2010, the content of which is reproduced in the first question in this request for a preliminary ruling. It emerges from those statements that, in particular, rather than hiring a footballer presented as being homosexual, Mr Becali would have preferred to hire a player from the junior team. According to Accept, the journalists' suppositions – which Mr Becali made his own – that X was homosexual prevented the conclusion of a contract of employment with that player.
- 26 Accept submitted that Mr Becali directly discriminated on grounds of sexual orientation, breaching the principle of equal treatment in employment and violating the dignity of homosexuals.
- 27 As regards the other defendant before the CNCD, FC Steaua, Accept claimed that despite the fact that Mr Becali's statements were broadcast in the media the football club never distanced itself from them. To the contrary, FC Steaua's lawyer was said to have confirmed that that policy had been adopted at club level for hiring players because 'the team is a family' and the presence of a homosexual on the team 'would create tensions in the team and among spectators'. Furthermore, in Accept's view, when Mr Becali made the statements at issue he was still a shareholder in FC Steaua.
- 28 By decision of 13 October 2010, the CNCD held, in particular, that the circumstances at issue in the main proceedings did not fall within the scope of a possible employment relationship. It considered that Mr Becali's statements could not be regarded as emanating from an employer, its legal representative, or a person responsible for recruitment, notwithstanding the fact that Mr Becali, when he made those statements, was a shareholder of FC Steaua.
- 29 However, the CNCD held that Mr Becali's statements constituted discrimination in the form of harassment. Therefore, the penalty imposed on him was a warning, the only penalty possible in accordance with Article 13(1) of GD No 2/2001, since the CNCD's decision was given more than six months after the date on which the relevant facts occurred.
- 30 Accept brought an action before the referring court against that decision, seeking, in essence, its annulment, as well as a declaration that the relevant facts fall within the scope of employment matters and that it may be assumed from proven facts that there has been discrimination and, finally, the imposition of a fine instead of a warning.
- 31 The referring court considers that the judgment in Case C-54/07 *Feryn* [2008] ECR I-5187 does not provide it with sufficient clarification where the discriminatory statements come from a person who, in law, cannot bind the company which recruits employees, but who, given his close links with that company, may exert a decisive influence on its decision or, at least, may be perceived as being capable of exerting a decisive influence on that decision.
- 32 The referring court considers, in any event, that the relationship between FC Steaua and Mr Becali is atypical. As a matter of law, the latter sold his shares in FC Steaua on 8 February 2010, that sale being entered in the register of companies on 23 February 2010, while the discriminatory statements were made on 13 February 2010. Yet it is apparent from the file before the Court that, in Romanian law, the sale of shares may be relied on against third parties only from the date on which it was made public by means of its entry in the register of companies. According to the referring court, after selling his shares, Mr Becali did not change his attitude in his public appearances and continued to describe himself as FC Steaua's 'banker'. In those circumstances, at least in the mind of the public, he maintained the same relationship he had with FC Steaua as before the sale of his shares.

33 Furthermore, the referring court wonders, in essence, whether, in the context of the modified burden of proof laid down in Article 10 of Directive 2000/78, the requirement for a professional football club to prove the absence of discrimination on grounds of sexual orientation might be impossible to satisfy in practice, since proving that such a club hired players without taking account of their sexual orientation might, according to that court, interfere with the right to privacy.

34 That court also observes that, under Article 13(1) of GD No 2/2001, whatever the gravity of any discrimination found by the CNCD, where it adopts a decision after the expiry of the limitation period of six months from the date on which the relevant facts occurred, it is unable to impose a fine, but may only give a warning, within the meaning of Article 7(1) of GD No 2/2001, for which there is no limitation period.

35 In those circumstances the Curtea de Apel București decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Do the provisions of Article 2(2)(a) of [Directive 2000/78] apply where a shareholder of a football club who presents himself as, and is considered in the mass media as, playing the leading role (or “patron”) of that football club makes a statement to the mass media in the following terms:

“Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Obviously people will talk, but how could anyone write something like that and, what’s more, put it on the front page ... Maybe he’s [the football player X] not a homosexual ... But what if he is? I said to an uncle of mine who didn’t believe in Satan or in Christ. I said to him: “Let’s say God doesn’t exist. But suppose he does? What do you lose by taking communion? Wouldn’t it be good to go to Heaven?” He said I was right. A month before he died he took communion. May God forgive him. There’s no room for gays in my family and [FC Steaua] is my family. It would be better to play with a junior rather than someone who was gay. No one can force me to work with anyone. I have rights just as they do and I have the right to work with whomever I choose.”

“Not even if I had to close [FC Steaua] down would I accept a homosexual on the team. Maybe he’s not a homosexual. But what if he is? There’s no room for gays in my family, and [FC Steaua] is my family. Rather than having a homosexual on the side it would be better to have a junior player. This isn’t discrimination: no one can force me to work with anyone. I have rights just as they do and I have the right to work with whoever I choose. Even if God told me in a dream that it was 100 percent certain that X wasn’t a homosexual I still wouldn’t take him. Too much has been written in the papers about his being a homosexual. Even if [player X’s current club] gave him to me for free I wouldn’t have him! He could be the biggest troublemaker, the biggest drinker ... but if he’s a homosexual I don’t want to know about him.”

(2) To what extent may the abovementioned statements be regarded as “facts from which it may be presumed that there has been direct or indirect discrimination” within the meaning of Article 10(1) of Directive 2000/78 ... as regards the defendant [FC Steaua]?

(3) To what extent would there be probatio diabolica if the burden of proof referred to in Article 10(1) of [Directive 2000/78] were to be reversed in this case and the defendant [FC Steaua] were required to demonstrate that there has been no breach of the principle of equal treatment and, in particular, that recruitment is unconnected with sexual orientation?

(4) Does the fact that it is not possible to impose a fine in cases of discrimination after the expiry of the limitation period of six months from the date of the relevant fact, laid down

in Article 13(1) of [GD No 2/200]1 on the legal regime for sanctions, conflict with Article 17 of [Directive 2000/78] given that sanctions, in cases of discrimination, must be effective, proportionate and dissuasive?’

Consideration of the questions referred

Preliminary considerations

- 36 It is apparent from the case-law of the Court that direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 does not mean that there must be an identifiable complainant who claims to have been the victim of such discrimination (see, with regard to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), *Feryn*, paragraphs 23 to 25).
- 37 Furthermore, taking account, in particular, of Article 8(1) of Directive 2000/78, Article 9(2) of that directive in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant (see also *Feryn*, paragraph 27).
- 38 Where a Member State provides for such a right, it follows from a combined reading of Articles 8(1), 9(2) and 10(1), (2) and (4) of Directive 2000/78 that that directive does not preclude the modification of the burden of proof, as provided for in Article 10(1), in situations in which such an association brings proceedings without acting on behalf of or in support of a specific complainant or with the latter’s approval. In the present case, it follows from the very wording of the second and third questions that, in the view of the referring court, the modified burden of proof laid down in Article 10(1) of that directive is, where appropriate and subject to the answers provided by the Court to those questions, capable of applying in the dispute in the main proceedings.
- 39 It is not disputed before the Court that Accept is an association of the kind referred to in Article 9(2) of Directive 2000/78, that Article 28(1) of GD No 137/2000 provides for the possibility of bringing legal or administrative proceedings to enforce the obligations arising under that directive without acting in the name of a specific complainant, or that Accept may be regarded as a ‘person concerned’ within the meaning of Article 20(6) of GD No 137/2000.

The first and second questions

- 40 The first two questions seek to determine, in essence, whether Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’ as regards a professional football club, even though the statements at issue come from a person presenting himself and being perceived in the media and by the public as playing a leading role in that club, without, however, necessarily having the legal capacity to bind it or to represent it in recruitment matters.
- 41 It should be noted at the outset that, in proceedings brought pursuant to Article 267 TFEU, the Court has no jurisdiction to give a ruling on the facts in an individual case or to apply the rules which it has interpreted to national measures or situations, since those questions are matters for the exclusive jurisdiction of the national court (Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 69 and the case-law cited). Thus, it is

not for the Court to take a view on whether the facts on which the dispute in the main proceedings is based, such as those set out in the order for reference, establish discrimination on grounds of sexual orientation.

- 42 As is clear in particular from recital 15 in the preamble to Directive 2000/78, the assessment of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice (see Case C-415/10 *Meister* [2012] ECR I-0000, paragraph 37). In accordance with the mechanism laid down in Article 10(1) thereof, if such facts are established, it is for the respondent to prove that there has been no breach of the principle of equal treatment within the meaning of Article 2(1).
- 43 That said, the Court may provide the national court with all guidance on the interpretation of EU law that could be useful for its decision (see, in particular, *Feryn*, paragraph 19 and the case-law cited, as well as Case C-163/10 *Patriciello* [2011] ECR I-0000, paragraph 21).
- 44 In that connection, it follows from Articles 1 and 3(1)(a) of Directive 2000/78 that that directive applies in circumstances, such as those from which the dispute in the main proceedings arises, that involve, in employment and occupation, statements concerning 'conditions for access to employment ... including ... recruitment conditions'.
- 45 It is irrelevant in that regard that, as was stressed in the main proceedings, the system of recruitment of professional footballers is not based on a public tender or direct negotiation following a selection procedure requiring the submission of applications and pre-selection of players having regard to their interest for the employer. Indeed, it is clear from well-established case-law that, having regard to the objectives of the European Union, sport is subject to European Union law to the extent that it constitutes an economic activity (see, in particular, Case 13/76 *Donà* [1976] ECR 1333, paragraph 12, and Case C-325/08 *Olympique Lyonnais* [2010] ECR I-2177, paragraph 27). That is the case as regards the activities of professional or semi-professional footballers where they are in gainful employment or provide a remunerated service (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 73).
- 46 As the referring court, in substance, points out, in the specific dispute which gave rise to the judgment in *Feryn*, at issue were statements by one of the directors of Feryn NV who, as is apparent in particular from the formulation of the questions referred for a preliminary ruling in the case which gave rise to that judgment, had legal capacity to determine the recruitment policy of that company (see *Feryn*, paragraphs 2, 16, 18 and 20).
- 47 However, *Feryn* does not suggest that, in order to establish the existence of 'facts from which it may be presumed that there has been ... discrimination', in accordance with Article 10(1) of Directive 2000/78, the person who made the statements concerning the recruitment policy of a particular entity must necessarily have legal capacity directly to define that policy or to bind or represent that entity in recruitment matters.
- 48 The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar to establishing, with respect to that defendant, the existence of 'facts from which it may be presumed that there has been ... discrimination' within the meaning of Article 10(1) of that directive.
- 49 It follows that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.

- 50 In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.
- 51 In that connection, it should be recalled that 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 (see, to that effect, Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraphs 55 to 58).
- 52 Furthermore, contrary to the CNCD's assertions in both its written and oral submissions to the Court, the fact that a professional football club such as that at issue in the main proceedings might not have started any negotiations with a view to recruiting a player presented as being homosexual does not preclude the possibility of establishing facts from which it may be inferred that that club has been guilty of discrimination.
- 53 In light of the foregoing, the answer to the first and second questions is that Articles 2(2) and 10(1) of Directive 2000/78 must be interpreted as meaning that facts such as those from which the dispute in the main proceedings arises are capable of amounting to 'facts from which it may be presumed that there has been ... discrimination' as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.

The third question

- 54 By its third question, the referring court asks, in essence, whether, if facts such as those from which the dispute in the main proceedings arises were considered to be 'facts from which it may be presumed that there has been direct or indirect discrimination' based on sexual orientation in the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.
- 55 In that connection, it is apparent from the case-law of the Court that, where facts from which it may be inferred that there has been discrimination within the meaning of that directive have been established, the effective application of the principle of equal treatment then requires that the burden of proof should fall on the defendants concerned, who must prove that there has been no breach of that principle (see, to that effect, Case C-303/06 *Coleman* [2008] ECR I-5603, paragraph 54).
- 56 In that context, defendants may refute the existence of such a breach before the competent national bodies or courts by establishing, by any legally permissible means, inter alia, that their recruitment policy is based on factors unrelated to any discrimination on grounds of sexual orientation.
- 57 In order to rebut the non-conclusive presumption that may arise under the application of Article 10(1) of Directive 2000/78, it is unnecessary for a defendant to prove that persons of a particular sexual orientation have been recruited in the past, since such a requirement is indeed apt, in certain circumstances, to interfere with the right to privacy.
- 58 In the overall assessment carried out by the national body or court hearing the matter, a prima facie case of discrimination on grounds of sexual orientation may be refuted with a body of consistent evidence. As Accept has, in essence, submitted, such a body of evidence

might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.

- 59 Having regard to the foregoing, the answer to the third question is that Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be ‘facts from which it may be presumed that there has been ... discrimination’ based on sexual orientation in the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.

The fourth question

- 60 By its fourth question, the referring court asks, in essence, whether Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred.
- 61 Article 17 of Directive 2000/78 confers on Member States responsibility for determining the rules on sanctions applicable to infringements of the national provisions adopted pursuant to that directive and for taking all measures necessary to ensure that they are applied. Although it does not call for the adoption of specific sanctions, that article requires that the sanctions applicable to infringements of national provisions adopted to implement that directive must be effective, proportional and dissuasive.
- 62 In proceedings in which an association empowered by law to that effect seeks a finding of discrimination, within the meaning of Article 2(2) of Directive 2000/78, and the imposition of a sanction, the sanctions that Article 17 of Directive 2000/78 requires to be laid down in national law must also be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim (see, by analogy, *Feryn*, paragraphs 38 and 40).
- 63 It follows that the rules on sanctions put in place in order to transpose Article 17 of Directive 2000/78 into the national law of a Member State must in particular ensure, in parallel with measures taken to implement Article 9 of that directive, real and effective legal protection of the rights deriving from it (see, by analogy, in particular, Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraphs 24, 39 and 40). The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect (see, to that effect, in particular, Case C-383/92 *Commission v United Kingdom* [1994] ECR I-2479, paragraph 42, and *Draehmpaehl*, paragraph 40), while respecting the general principle of proportionality (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraphs 87 and 88, and Case C-430/05 *Nttonik and Pikoulas* [2007] ECR I-5835, paragraph 53).
- 64 In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.
- 65 In the present case, it is apparent from the file before the Court that the limitation period of six months laid down in Article 13(1) of GD No 2/2001 starts to run from the date on which the relevant facts occurred, while the limitation period for bringing action laid down in Article 20 of GD No 137/2000, which is one year, starts to run at the same time. It follows that it is

possible for a complainant to bring an action before the CNCD for discrimination within the meaning of Directive 2000/78 between 6 and 12 months after the facts on which that complaint is based occurred even though, according to the interpretation of national law favoured by the CNCD, the sanction provided for in Article 26(1) of GD No 137/2000 is no longer available. In any event, it emerges from the observations submitted to the Court that, even where a complaint is lodged well before the expiry of that six-month period, and notwithstanding the provisions of Article 20(7) of GD No 137/2000, a decision of the CNCD concerning an allegation of discrimination on grounds of sexual orientation might not be delivered until after the expiry of that six-month limitation period.

- 66 In such situations, as can be seen in particular from paragraphs 17, 21 and 34 of the present judgment, the CNCD's practice, whatever the seriousness of discrimination found, is not to impose the fine provided for by GD No 137/2000, which is intended in particular to transpose Directive 2000/78, but to apply a non-pecuniary sanction, laid down by general provisions of national law, consisting, essentially, in a verbal or written warning together with a 'recommendation to comply with the law'.
- 67 It is for the referring court to ascertain in particular whether, in circumstances such as those set out in the preceding paragraph, those with legal standing to bring proceedings might be so reluctant to assert their rights under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive (see, by analogy, *Draehmpaehl*, paragraph 40). Regarding the dissuasive effect of the sanction, the referring court may also take account, where appropriate, of any repeat offences of the defendant concerned.
- 68 It is true that the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic (see, to that effect, *Feryn*, paragraph 39), particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages.
- 69 However, in the present case it is for the referring court to ascertain whether a sanction such as a simple warning is appropriate for a situation such as that at issue in the main proceedings (see, by analogy Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 25). In that connection, the mere existence of an action for damages under Article 27 of GD No 137/2000, for which the limitation period for bringing proceedings is three years, cannot, as such, make good any shortcomings, in terms of effectiveness, proportionality or dissuasiveness of the sanction, that might be identified by that court with regard to the situation set out in paragraph 66 of the present judgment. As Accept maintained at the hearing before the Court, where an association of the type referred to in Article 9(2) of Directive 2000/78 does not act on behalf of specific victims of discrimination, it could be difficult to prove the existence of harm suffered by such an association for the purpose of the relevant rules of national law.
- 70 Furthermore, if it were the case that, as Accept argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of that directive.
- 71 In any event, it should be recalled that, according to settled case-law, where a situation falls within the scope of a directive, national courts are obliged, when applying national law, to interpret the latter as far as possible in light of the wording and the purpose of the directive concerned in order to achieve the result envisaged by it (see, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraphs 26 and 28; Case

C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 73; and Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, paragraphs 45 and 46).

72 Thus, if the issue arose, it would be for the national court to determine in the dispute in the main proceedings in particular whether, as Accept suggests, Article 26(1) of GD No 137/2000 may be interpreted as meaning that the six-month limitation period laid down in Article 13(1) of GD No 2/2001 does not apply to the sanctions laid down in Article 26(1) thereof.

73 Having regard to the foregoing considerations, the answer to the fourth question is that Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

Costs

74 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Articles 2(2) and 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that facts such as those from which the dispute in the main proceedings are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’ as regards a professional football club, even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.**
2. **Article 10(1) of Directive 2000/78 must be interpreted as meaning that, if facts such as those from which the dispute in the main proceedings arises were considered to be ‘facts from which it may be presumed that there has been direct or indirect discrimination’ based on sexual orientation during the recruitment of players by a professional football club, the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.**
3. **Article 17 of Directive 2000/78 must be interpreted as meaning that it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible**

only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive. It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

[Signatures]

* Language of the case: Romanian.