

WHAT MEANS DISCRIMINATION IN A NORMAL SOCIETY WITH CLEAR RULES?

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Abstract

The concept of discrimination is relatively new which has already issued various interpretations and approaches. Discrimination manifests itself on various criteria such as gender, religion, race and others. We arrived in such a point that the idea of indirect discrimination was pointed out provided that certain act or deeds affect the person who may be discriminated. The present study intends to analyse the concept of discrimination, the persons affected by this kind of behaviour and how the legislation tries to correct the human conduct in order not to affect the dignity of individuals. All concepts from legislation are analysed under the precedent of the Romanian authority empowered to sanction the discrimination deeds. Also, we analyzed the issue of discrimination from the point of view of the Council for Combating Discrimination, the sole authority competent to pronounce on first instance if we face of an act or deed of discrimination nature which could affect human values that characterize an individual. The study starts from the presentation of general concepts as they are taken into account by the legislation, but also by the case-law of the National Council for Combating Discrimination or of the domestic or international courts. Starting from this general concept, we finally reached the particularization of certain specific situations of discrimination. Despite this, the analysis was always performed in relation to concepts clearly established, as we have shown, by the legislation or by the case-law.

Keywords: discrimination, rules of law, applicable legislation, CNCD, discriminated person.

1. Introduction - Presentation of Discrimination Concept

1.1. The defining elements of the concept of discrimination. Notion. Definition

Ab initio, we believe that we need to perform a brief analysis in terms of the terminology of word “discrimination”, for a better understanding of the situations it comprises.

In this respect, we hereby point out that, in accordance with the *Explanatory*

dictionary of the Romanian language¹, “to discriminate” means, *inter alia*:

- “to make a difference”;
- “to separate”;
- “to make a distinction”;
- “to pursue a policy by which a category of citizens of a state are deprived of certain rights on racial, ethnic origin, sexual grounds, etc.”.

Furthermore, the same source defines the term of “**discrimination**” as being:

- “the action of discrimination and its result”;
- “net difference, distinction made between several objects, ideas, etc.”;

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¹ See in this respect, <https://dexonline.ro/intrare/discrimina/17069>, site accessed on 10.02.2018.

• “policy by means of which a state or a category of citizens of a state are deprived of certain rights on the basis of illegitimate considerations”.

Therefore, given this first aspect, it can be concluded that the notion of “discrimination” implies unequal treatment, materialized in a distinction, differentiation between certain categories of objects/persons, a distinction which is performed based on specific criteria.

In what concerns second aspect, in terms of the normative definition of “**discrimination**”, we hereby state that both the national law maker², and the community law maker³ defined “**discrimination**” as representing “**different treatment applied to**

individuals in a comparable situation”. In other words, to discriminate means to make a *difference or distinction, to distinguish, reject or apply arbitrary or unequal treatment, in unjustified way, between two persons or situations in comparable positions*. Furthermore, differences, restrictions, exclusions or preferences related to an individual’s characteristics **are discriminatory if their purpose or effect is the reduction or exclusion of rights, opportunities or freedoms**.

In what concerns third aspect, any criterion according to which a person is treated differently may represent a criterion of discrimination; there can be **discrimination** when two or more persons

² See in this respect the provisions of art. 2 para. (1) of Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, republished in Official Journal, Part I no. 166 of March 7th, 2014 (hereinafter referred to as “*G.O. no. 137/2000*”), according to which: “[...] any distinction, exclusion, restriction or preference on the grounds of race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV, infection, affiliation to a disadvantaged category, as well as any other criteria of which scope or effect is the restriction, removing, recognition, use or performance, on an equal footing, of human rights and fundamental freedoms or of the rights recognized by the law, in the political, economic, social and cultural field or in other fields of public life”.

³ See in this respect the provisions of art. 2 para. (1) and (2) of Council Directive 2000/43/EC of June 29th, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in Official Journal of European Union no. 180 of July 19th, 2000 (hereinafter referred to as “*Directive no. 43/2000*”), according to which: (1) The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment. (2) For the purpose of para. (1): (a) direct discrimination: shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on grounds of race or ethnic origin; (b) indirect discrimination: shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons, unless the respective provision, criterion or practice is objectively justified, by a legitimate purpose and the means for reaching the respective purpose are appropriate and necessary. Furthermore, see the provisions of art. 2 para. (1) and (2) of Council Directive of November 27th, 2000 establishing a general framework for equal treatment in employment and occupation (2000/78/EC), published in Official Journal of the European Union no. 303 of December 2nd, 2000 (hereinafter referred to as “*Directive no. 78/2000*”), according to which: (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 favorably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons unless (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

are treated identically, despite the fact they are in different situations. These persons are treated identically due to the fact a specific characteristic that differentiates them from other categories is not taken into account.

From this perspective, if the differential treatment or the identical treatment has an objective justification does not represent discrimination, in which respect the national and community case-law appreciated unanimously that differential treatment becomes discriminatory when distinctions are made between analogous and comparable situations without being based on a reasonable and objective justification, as we are to detail below.

2. Content

2.1. National and International Case-Law Matters

The following were established in the judicial practice of the contentious constitutional court:

“the violation of the principle of equality and non-discrimination occurs **when different treatment is applied to equal cases, without any objective and reasonable grounds** or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means”⁴.

Therefore, the discrimination is not only an action or a conduct, but also the intention to promote social inequalities, by being a form of marginalization, therefore discrimination is related to different

categories of persons who are marginalized, isolated or unprivileged based on prohibited criteria.

In this respect, the following were stated in the case law of the European Court of Justice⁵: “the principle of equal treatment prohibits comparable situations to be treated differently and different situations to be treated identically”.

Furthermore, it was stated that *„the right to non-discrimination prohibits situations in which persons or groups of persons in a similar situation are treated differently, as well as situations in which persons or group of persons in different situations are treated identically”*⁶.

In the case law of the European Committee of Social Rights, **the notion of discrimination** was defined as representing: “the differential treatment applied to persons in comparable situations, difference which does not have a legitimate purpose and/or is not based on objective and reasonable grounds”.

Furthermore, the **non-discrimination principle** is provided both by the provisions of **art. 14 of the European Convention on Human Rights**, and by **Additional Protocol no. 12** which sanctions all forms of discrimination.

In this respect, the High Court of Cassation and Justice established the following in its constant judicial practice:

“The principle of non-discrimination is provided by all international treaties and documents on human rights protection. This principle entails the application of an equal treatment to all individuals who have equal rights. Drawn up this way, non-

⁴ See in this respect, Constitutional Court, Decision no. 82 of February 7th, 2012, published in Official Journal of Romania no. 250 of April 13th, 2012, available on <http://legislatie.just.ro/Public/DetaliiDocument/137137>, site accessed on 10.02.2018.

⁵ See in this respect, Case C-106/83, *Sermide SpA c. Cassa Conguaglio Zuccero* and others, available on: <http://curia.europa.eu/juris/celex.jsf?celex=61983CJ0106&lang1=en&lang2=RO&type=TEXT&ancre>, site accessed on 10.02.2018.

⁶ See in this respect, the Decision of the European Court of Human Rights, *Hoogendijk/the Netherlands (dec.)* (58641/00), January 6th, 2005.

discrimination principle appears as a modern and improved form of the principle regarding the equality of all individuals before the law. Furthermore, art. 7 of the Universal Declaration provides that all individuals are equal before the law and are entitled without any discrimination to equal protection of the law.

*As a legal matter, the right to non-discrimination, provided for by art. 14 of the European Convention on Human Rights, is a substantially subjective right. The text in question lists 13 non-discrimination grounds, but this list is not limited. **In other words, any form of discrimination shall be prohibited, regardless the criterion it is based on.***

The right to non-discrimination provided for by art. 14 of the European Convention on Human Rights does not have an independent existence in the system of European protection of the fundamental rights and freedoms established by the Convention, due to the fact it can only be claimed in connection to them. It can also emerge autonomously, meaning that, it may be violated in a given situation without a violation of the rights in connection to which it was found being ascertained. The ascertainment of a violation of these provisions can only be performed in connection with another right protected by the Convention and/or its additional protocols, and, as of April 1st, 2005, when Protocol no. 12 to the Convention on the general interdiction of any form of discrimination entered into force, in connection with any other right recognized in the national legislation of any contracting state.

By making a specific interpretation of the provisions of the Convention, its bodies concluded that to distinguish does not mean to discriminate, by noting the existence of situations the peculiarities of which require to be treated differently.

The difference in treatment becomes discrimination, under art. 14 of the Convention if state authorities introduce distinctions between analogous and comparable situations, without being based on a reasonable and objective justification⁷.

Therefore, discrimination does not operate in any situation, but entails the existence of a criterion of those provided by the law, therefore differentiation does not represent discrimination if there is an objective justification for this differentiation.

In the same respect, the Court of Appeal Bucharest noted in its constant judicial practice the following:

*„Not any differential treatment means discrimination; in order for unfair differential treatment to be ascertained, it is required to establish that **persons in analogous or comparable situations benefit from a preferential treatment**, and if such distinction between analogous or comparable situations occurs, **it must not find any objective or reasonable justification**”⁸.*

*Therefore, in order to find ourselves in a situation of discrimination, the differentiation, exclusion, restriction or preference has to be **based on one of the prohibited criteria provided by the law**, to be arbitrary. Furthermore, it is required that all the aforementioned refer to persons in*

⁷ See in this respect, Decision no. 2808/2015, pronounced by the High Court of Cassation and Justice, Division of Contentious Administrative and Fiscal. The whole material can be accessed by using site: <https://lege5.ro/App/Document/gi3diojrgq3q/decizia-no.-2808-2015-anulare-act-administrativ?d=18.09.2015&pid=250376975#p-250376975>, site accessed on 10.02.2018.

⁸ See in this respect, the Court of Appeal Bucharest, Division VIII civ. and mun. asig, Decision no. 562R/2010, quoted by Loredana-Manuela Muscalu, *Discriminarea în relațiile de muncă*, Hamagi Publishing House, Bucharest, 2015, p. 4.

comparable situations and their scope or effect is the restriction or removal of a right granted by the law.

Furthermore, the relevant doctrine in the field provided the following:

*„The differential treatment shall be deemed discriminatory if the operated distinction is objective and reasonable. The distinction is admissible if it has a legitimate purpose, by following, at the same time, the reasonable report of proportionality between the means used and the achieved aim. To say that differentiation is objective means that it does not have to be subjective and arbitrary. Reasonable nature of the differentiation is subject to the same logics and concerns to avoid arbitrary: this has to occur in certain limits, so that the operated differentiation cannot violate principle of equality by protecting the interests of the group in question. This is the application of the proportionality principle”.*⁹

Therefore, any time there is a reasonable and objective justification of the differential treatment, we cannot talk about a discrimination action.

In this respect, we hereby mention that the provisions of art. 2 para. (3) of Government Ordinance no. 137/2000 expressly establish that there is no discrimination if there is an objective justification of a certain behavior: [...] *„unless these provisions, criteria or practices are objectively justified by a legitimate purpose, and the methods of reaching the respective purpose are appropriate and necessary”.*

In connection to the notion of differential treatment, the High Court of Cassation and Justice noted the following:

„[...] the criterion based on which the differential treatment apply must be the determinant factor in the application of the differential treatment, meaning that this element is the cause of the discrimination deed.

In case of discrimination, the differential treatment is determined by the existence of a criterion, which entails a causality relation between claimed differential treatment and the criterion claimed in case of the person who considers himself/herself discriminated, and the scope or effect of the differential treatment must be the restriction or removal of the admission, use or exercise, under equality terms, of human fundamental rights and freedoms, or of the rights admitted by the law, in the political, economic, social and cultural area or in any other areas of public life¹⁰.”

Therefore, objective justification includes the existence of a legitimate purpose reached by appropriate and mandatory methods. In other words, objective and reasonable justification must follow a legitimate purpose, and the applied measures must be proportional to the purpose.

If differential treatment is on grounds of race, color or ethnic origin, the notion of objective and reasonable justification must be construed as strictly as possible. Therefore, in case *D.H. and others against Czech Republic*, the European Court of Human Rights (hereinafter referred to as “**ECtHR**”) established the following:

“The court was not convinced that the difference in treatment between Roma and non-Roma children was based on objective and reasonable justification and that there is

⁹ See in this respect, J.-F. Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, pp. 153-154, quoted by Loredana-Manuela Muscalu, *Discriminarea, op. cit.*, p. 7.

¹⁰ See in this respect, Decision no. 2808/2015, pronounced by the High Court of Cassation and Justice, Division of Contentious Administrative and Fiscal. The whole material can be accessed by using site: <https://lege5.ro/App/Document/gi3diojrgq3q/decizia-nr-2808-2015-anulare-act-administrativ?d=18.09.2015&pid=250376975#p-250376975>, site accessed on 10.02.2018.

a reasonable proportionality between the means used and the aim to be achieved. Therefore, the application of the relevant Czech legislation had, in fact, at that time, disproportionate prejudicial effects on the Roma community, and the plaintiffs, by being members of the respective community suffered the same discriminatory treatment”¹¹.

The national courts ruled in the same matter in their constant judicial practice, namely: “the legal differential treatment is admissible for different situations, when it is rationally and objectively justified”¹².

In conclusion, according to the national and community judicial practice, discrimination can operate only if it is determined by the existence of unjustified criterion/criteria, of those forbidden by the legislation, and not if there is a simple difference in treatment which is reasonably and objectively justified, at the same time requiring the existence of analogous and comparable situations in relation to which the differential treatment is to be assessed.

2.2. Features of the notion of discrimination. Classification of the forms of discrimination

2.2.1. Discrimination features

First of all, we consider necessary to carry out a brief analysis of the main features of the concept of discrimination, in order to show the absence of any discrimination action in the present case.

Therefore, the supreme court, by means of the interpretation of the provisions of Government Ordinance no. 137/2000, noted the following:

„[...] in order for an action to be qualified as a discrimination action, it **must meet the following conditions at the same time**:

- the existence of a differential treatment expressed by difference, exclusion, restriction or preference (**the existence of persons or situations in comparable situations**);
- the existence of a discrimination criterion according to art. 2 para. (1) of G.O. no. 137/2000 republished, **differential treatment is not objectively justified by a legitimate aim, and the means of achieving that aim are not appropriate and necessary**;
- **the aim or effect of the differential treatment is the restriction, removal of the acknowledgment, use or exercise, under equality terms, of a right established by the law.**

In other words, in order for a certain conduct to be considered discrimination, it is required to fulfill the following conditions:

- h) the difference in treatment of two or more persons in identical or comparable situations or the failure to treat differently certain different situations;
- i) the lack of objective and reasonable justification for differential treatment;
- j) the scope or the result of the differential treatment is the restriction or illegal refusal of the exercise of certain rights.

Therefore, as the Court of Appeal Bucharest noted, **not any difference in treatment means discrimination**, taking into account that, in order for unfair differential treatment to be ascertained, **it is required to establish that persons in analogous or**

¹¹ See in this respect, Decision ECtHR, *D.H. and others against Czech Republic*, November 13th, 2007 (Case no. 57325/00), available on: <https://jurisprudentacedo.com/D.H.-c.-Republicii-Cehe-Plasamentul-copiiilor-romi-in-scoli-speciale-incalcare.html>. In the same respect, see Decision ECtHR, *Sampanis and others against Greece*, June 5th, 2008, site accessed on 10.02.2018.

¹² See in this respect, Constitutional Court, Decision no. 168 of December 10th, 1998, published in Official Journal of Romania no. 77 of 22.02.1999, quoted by Loredana-Manuela Muscalu, *Discriminarea*, op. cit., p. 7.

comparable situations benefit from a preferential treatment, and if such distinction between analogous or comparable situations occurs, it does not find any objective or reasonable justification¹³.

In the same respect, opinions were expressed in legal specialized literature¹⁴, meaning that an action can be qualified as discrimination if it fulfills *certain conditions at the same time*, namely:

- **the existence of a differential treatment** applied to certain analogous situations or the omission to treat differently certain different, not comparable situations;
- differential treatment is expressed by **exclusion, difference, restriction or preference**;
- **the existence of a discrimination criterion provided by the law**;
- **the scope or effect** of the differential treatment has to be the restriction, removal of the acknowledgment, use or exercise, under equality terms, of a right provided by the law (exempli gratia: the violation of the right to work);
- differential treatment **is not objectively justified by a legitimate purpose**, and the means of reaching that aim **are not appropriate and necessary**.

Therefore, we hereby reaffirm that in order to ascertain the existence of an action of discrimination, the claimed actions must result in the *restriction or removal of a right provided by the law*. Not any abuse or violation of human fundamental rights and freedoms or of the rights provided by the law fall under the scope of the notion of discrimination.

2.2.2. Discrimination categories

From another point of view, we hereby state that, both from the perspective of the European Convention on Human Rights (hereinafter referred to as “*ECHR*”), and in what concerns the relevant European case law, several categories of discrimination are identified, namely: *direct discrimination* and *indirect discrimination, harassment and incitement to discrimination*.

○ In this respect, ECtHR uses the formulation that there must be “a difference in the treatment of persons in analogous or relevantly similar situations”, which is “based on an identifiable characteristic”¹⁵.

Therefore, “*direct discrimination*” occurs when¹⁶:

- *a person is applied unfavorable treatment* – this can be relatively easy to identify compared with indirect discrimination. Actual examples of unfavorable treatment expressing direct discrimination are, *inter alia*, the following:
 - refusal of entry to a restaurant or shop;
 - receiving a smaller pension or lower pay;
 - having a higher or lower retirement age;
 - being barred from a particular profession;
 - not being able to claim inheritance rights;
 - being excluded from the mainstream education system;
 - being deported;
 - not being permitted to wear religious symbols;

¹³ See in this respect, the Decisions of the Court of Appeal Bucharest, Division VIII civ. and mun. asig. decision no. 4463/R/2009, dec. no. 2295R/2009, dec. no. 1715R/2009, dec. no. 4204R/2009 and dec. no. 2020R/2009, quoted by Loredana-Manuela Muscalu, *Discriminarea, op. cit.*, p. 4.

¹⁴ See in this respect, Loredana-Manuela Muscalu, *Discriminarea, op. cit.*, pp. 4-5.

¹⁵ See in this respect, European Union Agency for Fundamental Rights, European Council, *Handbook on European non-discrimination law*, Imprimerie Centrale, 2010, p. 24.

¹⁶ *Ibidem*.

- being refused social security payments or having them revoked;
- unfavorable treatment is relevant by comparison with how other persons in a similar situation were or would be treated – this criterion is of the essence of a direct discrimination action, which is why it is inconceivable to retain discrimination in the absence of the fulfillment of such requirement. Therefore, providing a comparator is often a controversial issue, and sometimes neither the parties to the dispute nor the court explicitly discuss the comparator¹⁷. Despite this, it has been held that there is a clear exception to the rule of finding an appropriate “comparator”, in the context of the European Union law regarding employment, meaning that there is discrimination if the person concerned is treated differently because the respective person is pregnant. In such cases, it will be considered that there is direct discrimination on grounds of

sex and that there is no need to have a comparator¹⁸;

- the ground of this treatment is represented by an actual feature of them, which falls under the scope of the “protected ground” category – in detail, the “protected grounds” are exhaustive, representing the factor that practically leads to a different behavior towards a person in relation to other persons in similar situations, *id est*: sex, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief. We have to keep in mind that in order to talk about discrimination, it is required to exist a causality connection between less favorable treatment and “protected ground”¹⁹.

By summing up the above, it can be noted that direct discrimination is characterized by differential treatment, meaning that the following must be shown: alleged victim has been treated less favorably based on the possession of a characteristic falling under a “protected ground” and Less favorable treatment is determined through a comparison between

¹⁷ See in this respect, Decision of the European Court of Justice, *Allonby/Accrington & Rossendale College and others*, case C-256/01 [2004] RJ I-873, January 13th, 2004. In this case, the complainant, who worked for a college as a lecturer, did not have her contract renewed by the college. She then went to work for a company that supplied lecturers to educational establishments.

This company sent the complainant to work at her old college, performing the same duties as before, but paid her less than her college had done. She alleged discrimination on the basis of sex, saying that male lecturers working for the college were paid more. The ECJ held that male lecturers employed by the college were not in a comparable situation. This was because the college was not responsible for determining the level of pay for both the male lecturer who it employed directly and the complainant who was employed by an external company. They were therefore not in a sufficiently similar situation. In the same respect, see: Decision ECtHR, *Moustaquim/Belgium* (12313/86), February 18th, 1991; Decision ECtHR, *Luczak/Poland* (77782/01), November 27th, 2007; Decision ECtHR, *Gaygusuz/Austria* (17371/90), September 16th, 1996, quoted by the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 26.

¹⁸ See in this respect, Decision of the European Court of Justice, *Dekker/Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, case C-177/88 [1990] RJ I-3941, November 8th, 1990; Decision of the European Court of Justice, *Webb/EMO Air Cargo (UK) Ltd*, case C-32/93 [1994] RJ I-3567, July 14th, 1994, quoted by the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 28.

¹⁹ See in this respect, Decision of the European Court of Justice, *Maruko/Versorgungsanstalt der deutschen Bühnen*, case C-267/06 [2008] RJ I-1757, April 1st, 2008. See in this respect Decision ECtHR, *Aziz/Cipru* (69949/01), June 22nd, 2004.

the alleged victim and (iii) another person in a similar situation who does not possess the protected characteristic²⁰.

- In what concerns the second category of discrimination, the European legislation and case law note that discrimination can result not only from the application of different treatment to persons in similar situations, but also from the application of the same treatment to persons in different situations, the latter hypothesis being known as “*indirect discrimination*”.

Unlike direct discrimination, in case of indirect discrimination, the treatment is not the one that differs, but its effects, which will be felt differently by people with different characteristics. In this respect, Directive no. 43/2000 provides *expressis verbis*, in the content of art. 2 para. (2) letter (b) the following:

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

From the interpretation of the normative text quoted above, the conditions in which indirect discrimination occur are evident, namely:

- the existence of a neutral provision/criterion/practice – the particularity of this criterion is given

by the fact that the neutral provision/criterion/practice applies to all, not only to those subject to unequal treatment. *Exempli gratia*, in case *Schönheit*, the pensions of part-time employees were calculated using a different rate to that of full-time employees. This different rate was not based on the differences of the time spent in work. Thus, part-time employees received a smaller pension than full-time employees, even taking into account the different lengths of service, effectively meaning that part-time workers were being paid less. Despite the fact that this neutral rule on the calculation of pensions applied equally to all part-time workers, taking into account that around 88% of part-time workers were women, the effect of the rule was disproportionately negative for women as compared to men²¹.

- neutral provision/criterion/practice places a “protected group at a particular disadvantage” – this is defining by the fact that when considering statistical evidence that the protected group is disproportionately effected in a negative way by comparison to those in a similar situation, evidence is sought that a particularly large proportion of those negatively affected is made up of that “protected groups”²². *Exempli gratia*, Advocate General Léger, on the discrimination

²⁰ See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law*, *op. cit.*, p. 46.

²¹ See in this respect, the European Court of Justice, *Hilde Schönheit/Stadt Frankfurt am Main și Silvia Becker/Land Hessen*, related cases C-4/02 and C-5/02 [2003] RJ I-12575, October 23rd, 2003. Furthermore, see Decision ECtHR, *D.H. and others/Czech Republic* [GC] (57325/00), November 13th, 2007, item 79.

²² See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law*, *op. cit.*, p. 33.

on grounds of sex in case *Nolte*²³, referred to a number of previous cases, considering that: “*in order to be discriminatory, the measure must affect «a far greater number of women than men»*”²⁴ or “*a considerably lower percentage of men than women*”²⁵ or “*far more women than men*”²⁶.

- *the existence of a comparator – other groups in a similar situation* – similar to direct discrimination, the existence of a “*comparator*” is mandatory in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation.

*Given all the above, proving indirect discrimination requires an individual to provide evidence that, as group, those sharing their protected characteristic are subject to differential effects or impact, by comparison to those without this characteristic*²⁷.

- In what concerns the third form of discrimination, we hereby state that harassment, while treated separately under EU law, is a particular manifestation of direct

discrimination²⁸. This is contemplated by a detailed analysis performed in the next chapter of this study, in relation to the de facto situation claimed by petitioner Nicoleta Crenguța Ciocea.

- In what concerns instigation to discrimination, this is expressly provided both in the content of Directive no. 78/2000²⁹, and by the provisions of art. 2 para. (4) of Directive no. 43/2000³⁰.

3. Conclusions

Given all the aspects detailed in this section, especially with regard to the first two forms of discrimination, it is obvious that, regardless if the discrimination is direct or indirect, discrimination entails the fulfillment, at the same time, of several mandatory conditions, namely:

- differential treatment;
- the person subject to differential treatment or in relation to which the differential effect of a general treatment is materialized is part of a “protected group” and, last but not least,
- the absence of an objective

²³ See in this respect, the Opinion of Attorney general Léger of May 31st, 1995, items 57 and 58 in the Decision of the European Court of Justice, *Nolte/Landesversicherungsanstalt Hannover*, case C-317/93 [1995] RJ I-4625, December 14th, 1995.

²⁴ See in this respect, Decision of the European Court of Justice, *Rimmer-Kühn/FWW Spezial-Gebäudereinigung*, case 171/88 [1989] RJ 2743, July 13th, 1989.

²⁵ See in this respect, Decision of the European Court of Justice, *Kowalska/Freie und Hansestadt Hamburg*, case C-33/89 [1990] RJ I-2591, June 27th, 1990.

²⁶ See in this respect, Decision of the European Court of Justice, *De Weerd, fostă Roks, și alții/Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others*, case C-343/92 [1994] RJ I-571, February 24th, 1994.

²⁷ See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law*, *op. cit.*, p. 47.

²⁸ *Ibidem*.

²⁹ See in this respect, the provisions of art. 2 para. (4) of Directive no. 78/2000, according to which: “Any conduct which consists in ordering someone to practice a discrimination against certain individuals for any of the grounds referred to in art. 1 is deemed discrimination under para. (1)”.

³⁰ See in this respect, the provisions of art. 2 para. (4) of Directive no. 78/2000, according to which: “The instigation to discrimination against persons based on grounds of race or nationality is deemed discrimination for the purpose of first paragraph”.

justification or legitimate aim for different treatment/effect of a particular treatment;

- the existence of a comparator,

therefore, we cannot speak about discrimination in the absence of any of the aforementioned requirements.

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