Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 20 September 2012[1]

Case C-394/11

Valeri Hariev Belov

(Reference for a preliminary ruling from the Komisia za zashtita ot diskriminatsia, Bulgaria)

(Admissibility of the reference for a preliminary ruling — 'Court or tribunal of a Member State' within the meaning of Article 267 TFEU — Directive 2000/43/EC — Principle of equal treatment of persons irrespective of racial or ethnic origin — Indirect discrimination — Districts inhabited primarily by people belonging to the Roma community — Placing of electricity meters at a height inaccessible for consumers — Justification — Combatting fraud and abuse — Directives 2006/32/EC and 2009/72/EC — Possibility for each consumer to read individual electricity consumption)

I – Introduction

1. Is it discriminatory if, in districts which are inhabited predominantly by a certain ethnic group, electricity meters are suspended much higher than elsewhere? This is essentially the question with which the Court must deal in the present case on a reference from the Bulgarian Commission for Protection against Discrimination (KZD).[2] It gives the Court an opportunity to refine its case-law on the 'anti-discrimination directives' – in the present case Directive 2000/43/EC[3] [4] – and to address, for the first time, the issue of indirect discrimination based on ethnic origin and the possible justifications for such discrimination. In addition, the Court will have to clarify, as a preliminary issue, whether the KZD actually has the power to refer questions to it for a preliminary ruling under Article 267 TFEU.

2. The reason for the dispute is the practice in two districts of the Bulgarian city of Montana, of attaching electricity meters to electricity poles at a height of 7 m, whilst elsewhere electricity meters are installed at a maximum height of 1.70 m, such that they are accessible for consumers. The districts in question are inhabited primarily by people belonging to the Roma community,[5] and the question therefore arises whether this practice constitutes discrimination based on ethnic origin.

1 — Original language: German.

2 — Komisia za zashtita ot diskriminatsi.

3 — 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).

4 — The anti-discrimination directives also include 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), Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37) and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

5 — The term 'Roma' is used as an umbrella which includes groups of people who have more or less similar cultural characteristics (such as Roma, Sinti, Gypsies, Travellers, Kale, 'Gens du voyage'), whether sedentary or not; see, in particular the Communication of the European Commission of 5 April 2011, 'An EU Framework for National Roma Integration Strategies up to 2020' (COM(2011) 173 final) and the Communication of the European Commission of 21 May 2012, 'National Roma Integration Strategies: a first step in the implementation of the EU Framework' (COM(2012) 226 final), footnote 1 in each document.

3. In view of the fact that the alleged discrimination concerns Roma, the present case is particularly sensitive. In recent years, the situation of Roma, as Europe's largest minority group, has increasingly become the centre of public attention. Many of the estimated 10-12 million Roma in Europe face prejudice, intolerance, discrimination and social exclusion in their daily lives. They are often marginalised and live in very poor socio-economic conditions.[6] The social and economic integration of Roma is therefore one of the stated objectives of the European Union and of the Republic of Bulgaria.[7] The European Court of Human Rights has also been required on several occasions to deal with cases of discrimination against Roma.[8]

II – Legislative framework

A – *EU law*

4. The framework for this case in EU law is formed by Directive 2000/43/EC. Reference should also be made to Directives 2006/32/EC[9] and 2009/72/EC,[10] which contain rules on the internal market in electricity and on energy end-use efficiency.

1. Directive 2000/43

5. Article 2 of Directive 2000/43 includes this following definition:

'1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

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 grounds of racial or ethnic origin;

(b) 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.

…'

6 — See the Commission Communication of 5 April 2011, cited in footnote 5, p. 2.

7 — See again the Communications of the European Commission of 5 April 2011 and of 21 May 2012 (cited in footnote 5) and the Bulgarian measures mentioned in the order for reference, such as the Framework Programme for the integration of Roma into Bulgarian society, the National Programme for the improvement of living conditions for Roma in Bulgaria, and the National Action Plan as part of the 'Decade of Roma Inclusion 2005-2015' initiative.

8 — See, for example, the judgments of the European Court of Human Rights (Grand Chamber) D. H. and Others/Czech Republic of 13 November 2007 (Application No 57325/00, *Reports of Judgments and Decisions* 2007-IV) and Oršuš and Others/Croatia of 16 March 2010 (Application No 15766/03, not yet published in the *Reports of Judgments and Decisions*).

9 — Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC (OJ 2006 L 114, p. 64).

10 — Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

6. Article 3 defines the scope of Directive 2000/43 as follows:

‘1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(h) access to and supply of goods and services which are available to the public, including housing.

…’

7. Article 7 of Directive 2000/43, which lays down provisions concerning defence of rights, stipulates, in paragraph 1:

‘Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation 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, even after the relationship in which the discrimination is alleged to have occurred has ended.’

8. Article 8(1) of Directive 2000/43, which concerns burden of proof, provides:

‘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.’

9. Lastly, mention should be made of Article 13 of Directive 2000/43, which concerns bodies for the promotion of equal treatment:

‘1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights.

2. Member States shall ensure that the competences of these bodies include:

— without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

— conducting independent surveys concerning discrimination,

— publishing independent reports and making recommendations on any issue relating to such discrimination.’

2. The directives on the internal market in electricity and on energy end-use efficiency

10. Directive 2006/32 seeks to increase energy end-use efficiency in the Member States through various measures, including energy efficiency improvement measures to final consumers. Recital 29 reads as follows:

'In order to enable final consumers to make better-informed decisions as regards their individual energy consumption, they should be provided with a reasonable amount of information thereon and with other relevant information … In addition, consumers should be actively encouraged to check their own meter readings regularly.'

11. In addition, Article 13(1) of Directive 2006/32 provides:

'Member States shall ensure that, in so far as it is technically possible, financially reasonable and proportionate in relation to the potential energy savings, final customers for electricity, natural gas, district heating and/or cooling and domestic hot water are provided with competitively priced individual meters that accurately reflect the final customer's actual energy consumption and that provide information on actual time of use.

…'

12. Directive 2009/72 contains common rules for the generation, transmission, distribution and supply of electricity and lays down the rules relating to the organisation and functioning of the electricity sector.[11] Under Article 3(7) of that directive, Member States must 'take appropriate measures to protect final customers', which, as regards household customers at least, include those measures set out in Annex I to the directive.

13. According to Annex I(1) of Directive 2009/72, which is entitled 'Measures on consumer protection', 'the measures referred to in Article 3 [of the directive] are to ensure that customers

…

(h) have at their disposal their consumption data …; [and]

(i) are properly informed of actual electricity consumption and costs frequently enough to enable them to regulate their own electricity consumption. That information shall be given by using a sufficient time frame, which takes account of the capability of customer's metering equipment and the electricity product in question. Due account shall be taken of the cost-efficiency of such measures. No additional costs shall be charged to the consumer for that service;

…'

11 — Directive 2009/72, which was to be implemented by 3 March 2011, repealed and replaced Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37). I will therefore refer hereinafter solely to the provisions of Directive 2009/72 and not to the provisions of Directive 2003/54 cited by the KZD.

B – *Bulgarian law*

14. As a measure to transpose a number of directives and other acts of the European Union, including Directive 2000/43, the Law on protection against discrimination [12] (ZZD) was adopted in Bulgaria, containing, in addition to provisions on the prohibition of discrimination, rules governing the Commission for Protection against Discrimination (KZD). The order for reference also mentions a number of other rules in national law, such as the Law on the energy industry, the Regulation on the connection of electricity producers and consumers to electricity transmission and distribution networks and the General Conditions of Sale of the electricity supply and distribution companies.

III – Facts and main proceedings

15. The main proceedings stem from a complaint made by Mr Belov to the KZD. Mr Belov lives in the Bulgarian city of Montana, or more precisely in one of two districts of that city which, according to the order for reference, are known as 'Roma districts' because they are inhabited predominantly by Roma.

16. Electricity is supplied to the municipality of Montana by ChEZ Elektro Balgaria AD (CEB) and distributed by ChEZ Raspredelenie Balgaria AD (CRB), each under the supervision of the State Energy and Water Regulation Commission [13] (DKEVR). Throughout the municipality of Montana there are electricity meters which are the property of CRB.

17. In 1998 and 1999 the electricity meters were attached to electricity poles at a height of 7 m in the two Roma districts of 'Ogosta' and 'Kosharnik' in the municipality of Montana and in a number of other cities in the country. Outside these districts the electricity meters are placed at a height of up to 1.70 m, usually in the consumer's home, on the outside walls of the building or on surrounding fences.

18. To allow consumers at least to make an indirect visual check of electricity meters placed at a height of 7 m, in its General Conditions, CRB undertook to make available, free of charge and within three days of a written request by the consumer, a special vehicle with a lifting platform, using which CRB employees are able to read the electricity meters. However, this offer has not been taken up by any consumers so far. The other option available to the consumer is to have an inspection meter installed in his home, for which a fee has to be paid. There is no other possibility for consumers to make a visual check in these districts.

19. In the complaint procedure before the KZD, Mr Belov contends that placing the electricity meters at a height of 7 m discriminates against him on the basis of his ethnic origin. At the same time, he claims that all people of ethnic Roma origin in the two districts concerned are subject to discrimination on grounds of ethnicity.

20. Mr Belov's complaint is directed against CEB. CRB, the legal representatives and boards of management of each undertaking and the DKEVR were admitted by the KZD as joined parties in the main proceedings.

12 — Zakon za zashtita ot diskriminatstia.

13 — Darzhavna Komisia po energiyno i vodno regulirane.

IV – Reference for a preliminary ruling and procedure before the Court

21. In the main proceedings, the KZD has made reference to the Court for a preliminary ruling on the following questions:

‘(1) Does the case to be considered fall within the scope of Directive 2000/43/EC (here with respect to Article 3(1)(h))?

(2) What is meant by “treated less favourably” within the meaning of Article 2(2)(a) of Directive 2000/43 and by [the words] “put persons of a racial or ethnic origin at a particular disadvantage” within the meaning of Article 2(2)(b) of Directive 2000/43:

2.1. For less favourable treatment to qualify as direct discrimination, is it absolutely essential for the treatment to be more unfavourable and for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood as any form of behaviour (relationship) in the wider sense of the word which is less advantageous than behaviour in a similar situation?

2.2. For the fact of being put in a particular unfavourable situation to qualify as indirect discrimination, is it also necessary for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood in the wider sense as any form of being placed in a particular unfavourable/disadvantageous situation?

(3) Depending on the answer to the second question:

If, for direct or indirect discrimination within the meaning of Article 2(2)(a) and (b) of Directive 2000/43 to be deemed to have occurred, it is necessary for the less favourable treatment or the fact of being put in a particular unfavourable situation to infringe, directly or indirectly, a right or interest defined in law,

3.1. do the provisions of Article 38 of the Charter of Fundamental Rights of the European Union, Directive 2006/32/EC (Recital 29, Article 1 and Article 13(1)), Directive 2003/54/EC (Article 3(5)) and Directive 2009/72/EC (Article 3(7)) define, to the benefit of the final consumer of electricity, a right or interest entitling him to check meter readings regularly and capable of being relied on before the national courts in proceedings such as the main proceedings,

and

3.2. is national legislation and/or administrative practice approved by the State energy regulatory authority granting a distribution undertaking the freedom to install electricity meters in places to which it is difficult or impossible to gain access, preventing consumers from checking and monitoring meter readings, compatible with those provisions?

(4) Depending on the answer to the second question:

If, for direct or indirect discrimination to be deemed to have occurred, it is not absolutely necessary for a right or interest defined in law to have been directly or indirectly infringed,

4.1. is, pursuant to Article 2(2)(a) and (b) of Directive 2000/43, national legislation or case-law, as at issue in the main proceedings, admissible if it requires, for discrimination to be deemed to have occurred, that the more unfavourable treatment and the fact of being put in a more unfavourable position infringe, directly or indirectly, rights or interests defined in law?

4.2. if they are not admissible, is the national court then obliged not to apply them and to refer to the definitions given in the directive?

(5) Is Article 8(1) of Directive 2000/43 to be interpreted

5.1. as meaning that it requires the victim to establish facts which impose an unambiguous, incontestable and certain conclusion or inference that direct or indirect discrimination has occurred, or is it sufficient for the facts to justify only an assumption/presumption of such discrimination?

5.2. Do the facts that

(a) only in the two parts of the city known as Roma districts are electricity meters attached to electricity poles in the streets at a height at which consumers cannot read them, with known exceptions in some parts of those two urban districts, and

(b) in all other districts of the city the electricity meters are placed at a different height (up to 1.7 m) at which they can be read, usually in the consumer's home, on the outside of the building or on surrounding fences,

lead to a shift in the burden of proof to the defendant?

5.3. Do the facts that

(a) not only Roma but also people of a different ethnic origin live in the two parts of the city known as Roma districts and/or

(b) accordingly, not all the inhabitants of those two districts actually regard themselves as Roma, and/or

(c) the reasons for placing the electricity meters in those two urban districts at a height of 7 m are described by the distribution undertaking as being generally known,

preclude a shift in the burden of proof to the defendant?

(6) Depending on the answer to Question 5:

6.1. If Article 8(1) of Directive 2000/43 is to be interpreted as meaning that an assumption/presumption of the occurrence of discrimination is necessary and if the aforementioned facts lead to a shift in the burden of proof to the defendant, what form of discrimination can be presumed from those facts – direct or indirect discrimination and/or harassment?

6.2. Do the provisions of Directive 2000/43 enable direct discrimination and/or harassment to be justified by the pursuit of a legal objective by necessary and suitable means?

6.3. In view of the legal objectives which the distribution undertaking emphasises it is pursuing, can the measure taken in the two urban districts be justified in a situation in which

(a) the measure is taken because of the increasing incidence of unpaid bills in the two urban districts and the frequent offences committed by consumers which impair or threaten the safety, quality and continuous and secure operation of the electrical installations

and

the measure is taken across the board, irrespective of whether the individual consumer pays his bills for the distribution and supply of electricity and whether the individual consumer has been found to have committed any offence (manipulation of meter readings, illegal connection and/or extraction and/or consumption of electricity without payment, or any other interference with the network which impairs or threatens its safe, high-quality, continuous and secure operation);

(b) provision is made in legislation and the General Conditions of the Contract on Distribution ("Distribution Contract") for liability for any similar offence in civil, administrative and criminal law;

(c) the clause contained in Article 27(2) of the General Conditions of the Distribution Contract – whereby the distribution undertaking gives an assurance that, if explicitly requested by a consumer in writing, it will enable him to make a visual check of the meter readings – does not in fact enable the consumer to check the readings personally and regularly;

(d) it is possible for an inspection meter to be installed in the consumer's home at his explicit written request, although a fee is payable;

(e) the measure is a distinctive and visible reference to the dishonesty of the consumer in one or other form in view of what the distribution undertaking refers to as the generally known reasons for the measure being taken;

(f) other technical methods and means can be used to protect electricity meters against interference;

(g) the legal representative of the distribution undertaking claims that a similar measure taken in a Roma district of another city was in fact unable to prevent interference;

(h) it is not assumed that an electrical installation in one of these urban districts, a transformer station, will need to undergo measures similar to those taken to protect electricity meters?'

22. CEB and CRB,[14] the Bulgarian Government and the European Commission submitted written observations and presented oral argument in the proceedings before the Court. Mr Belov was represented before the Court at the hearing held on 11 July 2012.

V – Legal assessment

A – *Admissibility of the reference for a preliminary ruling*

23. Some of the parties question the admissibility of the present reference for a preliminary ruling. In the main, these parties claim that the KZD does not have the status of a court or tribunal. In addition, they argue in passing that some of the questions referred to the Court are hypothetical.

14 — CEB and CRB were jointly represented before the Court and submitted written observations and presented oral argument jointly.

1. Right to refer questions for a preliminary ruling for the KZD

24. In view of the large number of independent authorities which have been established in the Member States in recent years – not least in order to implement EU legislation – it is no surprise that the Court has repeatedly been faced with the question whether such bodies may make references for a preliminary ruling. [15]

25. In order to establish the right of an independent authority like the KZD to refer questions for a preliminary ruling, it must be examined whether that institution may be regarded as a 'court or tribunal of a Member State' within the meaning of Article 267 TFEU. Whilst the European Commission and the Bulgarian Government consider this to be the case, CEB and CRB take the opposite view.

26. According to the Court's settled case-law, assessing the right to refer questions for a preliminary ruling is a question governed by EU law alone. The question whether the body making a reference is a court or tribunal for the purposes of Article 267 TFEU is determined on the basis of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. [16] Furthermore, national bodies may refer a question to the Court only if there is a case pending before them and if they are called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. [17] It must therefore be examined below, with reference to the specific rules governing the procedure and the structure of the KZD, whether those criteria are satisfied.

27. It should be stated in this connection that the status of the KZD as a court or tribunal cannot simply be accepted with reference to its mandate under EU law as a body created to promote equal treatment and to defend the rights of victims of discrimination (Articles 7 and 13 of Directive 2000/43). The defence of rights required by Directive 2000/43 concerns 'judicial and/or administrative procedures' (Article 7(1) of Directive 2000/43) and is not necessarily therefore obtained only before courts or tribunals. Consequently, it is necessary to examine in detail whether the KZD fulfils the conditions which EU law imposes on the courts or tribunals of the Member States under Article 267 TFEU.

28. No problems are raised by the questions whether the KZD is established by law, whether it is permanent and whether it applies rules of law. [18] The criterion of *inter partes* procedure is also satisfied in the case of the KZD. [19] On the other hand, the independence of the KZD, the compulsory character of its jurisdiction and the judicial nature of its decisions are fiercely disputed in the present case.

15 — See, inter alia, Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539; Case C-53/03 *Syfait and Others* ('*Syfait*') [2005] ECR I-4609, paragraph 29; Case C-195/06 *Österreichischer Rundfunk* [2007] ECR I-8817; Case C-517/09 *RTL Belgium* [2010] ECR I-14093; and, most recently, the Opinion of Advocate General Jääskinen of 7 June 2012 in Case C-136/11 *Westbahn Management*, points 26 to 30.

16 — See, inter alia, Case 61/65 *Vaassen-Göbbels* [1966] ECR 261; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33; *Syfait*, cited in footnote 15, paragraph 29; *Österreichischer Rundfunk*, cited in footnote 15, paragraph 19; *RTL Belgium*, cited in footnote 15, paragraph 36; and Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 37.

17 — See, inter alia, judgments in Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 25; *Syfait*, cited in footnote 15, paragraph 29; Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 25; and Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraphs 13 and 14; and orders in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4; Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4; Case C-192/98 *ANAS* [1999] ECR I-8583, paragraph 21; and Case C-344/09 *Bengtsson* [2011] ECR I-1999, paragraphs 18 and 19.

18 — See, with regard to the question whether the KZD is established by law, Article 40(1) of the ZZD and Articles 2 and 3 of the transitional and final provisions of the ZZD, with regard to the question whether it is permanent Article 48 of the ZZD and Article 5 of the KZD's Rules of Procedure, and with regard to the question whether it applies rules of law Article 47(1), (2) and (3) of the ZZD.

19 — Nevertheless, according to the Court's settled case-law, the criterion of an *inter partes* procedure is not an absolute criterion (see Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 12; *Dorsch Consult*, cited in footnote 16, paragraph 31; and *Standesamt Stadt Niebüll*, cited in footnote 17, paragraph 13).

a) Independence

29. According to settled case-law, there are two aspects to the concept of judicial independence: an external aspect and an internal aspect.

30. The external aspect of independence entails that the body taking the decision is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.[20] In the present case, there are no doubts as to the external independence of the members of the KZD's decision-making body. The rules on the independence of the judiciary in the Bulgarian Code of Civil Procedure apply to them *mutatis mutandis*.[21] They thus enjoy similar guarantees to judges at ordinary Bulgarian courts and tribunals.

31. The internal aspect of independence is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings.[22]

32. CEB and CRB take the view that the KZD is not objectively impartial.[23] As grounds they cite the structure of the KZD, in particular the link between the decision-making body within the KZD and the subordinate administrative machinery, and the functions performed by the KZD.

33. These objections are not very convincing, however.

34. From a functional point of view, there is a clear separation between the KZD's decision-making body and the administrative body subordinate to it. That administrative body can also produce legal opinions on matters of discrimination for the members of the Commission. It is not apparent from the information available to the Court, however, that the administrative body itself is involved in the decisions taken by the members of the Commission.[24] Legal assistance to presumed victims of discrimination, which is one of the functions of the KZD as an organ,[25] is also only granted by the administrative body, and not by the members of the Commission themselves. Furthermore, at the hearing the Bulgarian Government stated that advice and support is provided to victims of discrimination only outside the context of pending procedures. Consequently, neither the members of the Commission nor the administrative body are on the side of one of the parties in a pending complaint procedure. Rather, the members of the Commission take an objective and independent decision on infringements of the ZZD.[26]

35. The simple fact that the KZD was established as a body to foster equal treatment[27] does not mean that it would be automatically on the side of the victim and therefore partial. The KZD is required to monitor compliance with the legal provisions laid down in the ZZD. However, like a court, it performs this function as an objective and independent body which is required to find not only the existence, but also the possible non-existence of discrimination in a complaint procedure.

20 — Judgments in Case C-506/04 *Wilson* [2006] ECR I-8613, paragraphs 50 and 51, and *RTL Belgium*, cited in footnote 15, paragraph 39, and order in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 23; see also *Abrahamsson and Anderson*, cited in footnote 15, paragraph 34.

21 — See Article 61(3) of the ZZD, which refers to Articles 22 to 24 of the Bulgarian Code of Civil Procedure.

22 — *Wilson*, cited in footnote 20, paragraph 52, and *RTL Belgium*, cited in footnote 15, paragraph 40; see also *Abrahamsson and Anderson*, cited in footnote 15, paragraphs 34 to 37, and *Pilato*, cited in footnote 20, paragraph 24.

23 — With regard to the distinction between objective and subjective impartiality, see Case C-308/07 P *Koldo Gorostiaga Atxalandabaso* v *European Parliament* [2009] ECR I-1059, paragraph 46.

24 — In contrast with the situations in *Syfait* and *RTL Belgium* (both cited in footnote 15), in the case of the KZD there is no 'operational link' between the decision-making body and the subordinate administrative body. Unlike in *Syfait* and *RTL Belgium*, the members of the KZD do not decide on a proposal from the subordinate administrative body, but independently of it.

25 — See Article 47(9) of the ZZD.

26 — See Article 40(1) of the ZZD and the KZD's Statute and Rules of Procedure.

27 — See Articles 7 and 13 of Directive 2000/43.

36. Accordingly, the KZD is sufficiently independent to be regarded as a court or tribunal within the meaning of Article 267 TFEU.

b) Judicial activity

37. CEB and CRB also claim that the KZD does not perform a judicial activity. In their submission, the KDZ is not an organ of the judiciary, but an administrative authority. This is clear from the functions conferred on it and from the facts that the KZD appears as a party in any subsequent appeal against its own decisions,[28] that it can take action against cases of discrimination of its own motion,[29] that it can rescind its own decisions with the agreement of the parties and that proceedings before civil courts have precedence over procedures before the KZD.[30]

38. It should be noted, first of all, that the fact that the KZD performs certain administrative functions does not rule out its status as a court or tribunal *a priori*. The Court has ruled on several occasions that the question whether a body may refer a question to the Court falls to be determined on the basis of criteria relating both to the constitution of that body and to its function. On this basis, a single national body may be regarded partly as a court or tribunal and partly as an administrative authority, depending on whether it is performing judicial functions or functions of an administrative nature in a specific case.[31] It is therefore necessary to determine in what specific capacity the KZD is acting within the particular legal context in which it seeks a ruling from the Court in the present case.[32]

39. In this instance, the independent decision-making body of the KZD has made reference to the Court in a complaint procedure. In that procedure, the compatibility of the contested measures with the ZZD is being examined impartially at the request of a presumed victim of discrimination. That activity can therefore be regarded as judicial activity. The administrative functions performed in other situations by the administrative body which is subordinate to the members of the Commission, such as advice for victims or representation of the KZD in the higher court, are irrelevant to the assessment of the judicial nature of a complaint procedure like that in the present case.

40. Second, it is immaterial that the decision-making body of KZD can theoretically institute a procedure of its own motion.[33] In the present case at least, the KZD did not take action on its own initiative, but following a complaint from a presumed victim of discrimination. For the analysis of its right to refer questions for a preliminary ruling, no relevance is to be attributed to the fact that, when it is exercising powers other than those in the context of which the reference to the Court was made, the referring body falls to be classified as a court or tribunal within the meaning of Article 267 TFEU.[34]

41. Third, the fact that the KZD may join other parties to the complaint procedure before the members of the Commission also does not militate against its status as a court or tribunal. Rather, this is a process which is also perfectly common in proceedings before conventional administrative courts.[35]

28 — See Article 153(1) of the Bulgarian Code of Adminstrative Procedure.

29 — See Article 50(2) of the ZZD.

30 — Under Article 52(2) of the ZZD, the KZD does not institute a procedure if it finds that an appeal has already been lodged with a court in the same matter.

31 — Orders in *ANAS*, cited in footnote 17, paragraph 22, and Case C-440/98 *RAI* [1999] ECR I-8597, paragraph 13, concerning the Italian Court of Auditors (Corte dei conti). The legal situation is similar, for example, with regard to the German Amtsgerichte (local courts); see, on the one hand, *Längst*, cited in footnote 17, and, on the other, *Standesamt Stadt Niebüll*, cited in footnote 17, and the order in Case C-497/08 *Amiraike Berlin* [2010] ECR I-101.

32 — *ANAS*, cited in footnote 17, paragraph 23.

33 — See Article 50(2) of the ZZD; according to the European Commission at the hearing, only 1% of procedures before the KZD result from an *ex officio* investigation.

34 — See *ANAS*, cited in footnote 17, paragraph 23.

35 — See, for example, paragraph 65 of the German Code of Administrative Court Procedure.

42. Fourth, the rules on the relationship between the procedure before the KZD and proceedings before the Bulgarian civil courts likewise do not militate against the status of the KZD as a court or tribunal. Unlike CEB and CRB, I see those rules, which were discussed in detail at the hearing before the Court, as an argument for rather than against the KZD's right to refer questions for a preliminary ruling.

43. It is true that the KZD may not decide on a complaint if the same case is already pending before a Bulgarian civil court.[36] However, this is merely an expression of the general procedural principle of *lis pendens*, according to which judicial proceedings are not permissible if the same subject-matter is already *sub judice* elsewhere.[37] The fact that such a rule is also applicable to the KZD suggests that it is a court or tribunal within the meaning of Article 267 TFEU. If proceedings like the main proceedings were not of a judicial nature, it would not be necessary *a priori* to establish a rule on conflicting *lis pendens* before civil courts – a problem of *lis pendens* could not then occur in any case.

44. It is not clear, at least from the information available to the Court, that the KZD would forfeit its jurisdiction even as a result of *subsequently* instituted civil proceedings and that *lis pendens* before the KZD could therefore be 'worth less' than *lis pendens* before the civil courts. CEB and CRB have put forward arguments to this effect, but their submissions in this regard were still extremely vague, even when questioned at the hearing and, in particular, CEB and CRB were unable to cite a specifically relevant legal provision in support of their view. In the absence of indications to the contrary, it must be assumed that the rule of *lis pendens* is always applicable in the same manner, irrespective of whether in a specific case the matter was first referred to a Bulgarian civil court or to the KZD. This suggests that the KZD is a court or tribunal.

45. Lastly, the fact that the KZD can set aside or alter its own judgments, with the agreement of the parties,[38] also does not militate against its status as a court or tribunal. Administrative authorities can generally rescind their decisions without the agreement of the parties; according to the consistent information provided by the parties to the proceedings, that is also the situation in Bulgarian law. Judicial decisions, on the other hand, can normally be set aside until they become final in appeal proceedings, and after they become final only in very exceptional cases through the reopening of the proceedings. The fact that the KZD's decisions may apparently be altered under facilitated conditions may be regarded as an expression of the status of the KZD's decision-making body as a kind of 'hybrid' of a conventional administrative authority and a conventional court. However, the crucial factor is that the decisions of the KZD delivered in a complaint procedure may be altered only with the agreement of *both* parties. This possibility of altering judgments can thus ultimately be seen as an expression of a – broadly construed – dispositive principle in judicial proceedings.[39]

c) Compulsory jurisdiction

46. Furthermore, CEB and CRB claim that the complaint procedure before the KZD does not constitute a compulsory jurisdiction. They base that claim on Article 71 of the ZZD, which also offers the person concerned the option of recourse to a civil court in the case of discrimination. Since the referral to the KZD is therefore not the only possible legal remedy for taking action against discrimination, the criterion of compulsory jurisdiction is not satisfied.

36 — See Article 52(2) of the ZZD.

37 — See, from the case-law of the European Union courts, Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission* [2005] ECR I-10043, paragraph 64; and judgment of 9 June 2011 in Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya* v *Commission*, paragraph 58.

38 — See Article 62(2) of the ZZD.

39 — The dispositive principle, according to which it is for the parties to initiate, terminate and organise proceedings, applies in the (civil) procedural orders of many Member States and enables the parties, for example, to terminate legal proceedings without a judgment being delivered, by means of a settlement. The possibility of the parties jointly dispensing with a judgment even after it has been delivered is ultimately based on the same idea.

47. In *Dorsch Consult* the Court had to deal with, among other things, the concept of compulsory jurisdiction. In that judgment, it drew a distinction between 'compulsory' in the sense of an only way of obtaining legal protection and 'compulsory' in the sense of a binding, mandatory determination.[40] The Court was not required in that case clearly to establish that one or the other of these alternative interpretations was preferable, since the rulings of the institution concerned in that case were 'compulsory' in both senses. The present case therefore gives the Court an opportunity to clarify further its case-law on this point.

48. Like the European Commission in *Dorsch Consult*[41] and at the hearing in the present case, I also tend to understand 'compulsory' to mean only the binding character of the decisions of the referring body. If the existence of compulsory jurisdiction were rejected merely because there are alternative means of legal protection, strictly speaking even a conventional civil court could not request a preliminary ruling from the Court in a case like the present one, because there would also be an alternative means of legal protection to its proceedings, namely the complaint procedure before the KZD.[42] This would have the absurd consequence that neither of the Bulgarian organs which are responsible for hearing cases under the ZZD would have the power to refer to the Court questions on the interpretation of Directive 2000/43.

49. Consequently, the relevant factor can only reasonably be whether the parties must comply with a decision delivered by the KZD in the complaint procedure on a mandatory basis. That is the case here. As the Bulgarian Government states and as is also clear from Articles 69 and 82 of the ZZD, the decisions of the KZD become final, they are binding on the parties, and infringement of the decisions can be punished by a fine.

50. In summary, I therefore consider that the KZD should be regarded as a court or tribunal within the meaning of Article 267 TFEU in the case at issue.

2. The supposedly hypothetical nature of the questions referred

51. Lastly, CEB and CRB claim that the second and sixth questions are hypothetical in so far as they refer to direct discrimination and harassment. Since the present case concerns at most indirect discrimination, only the questions relating to that form of discrimination are admissible.

52. It is true that the contested measure cannot entail both direct and indirect discrimination. The KZD as the referring court must determine, with reference to the circumstances of the individual case and assessing all the facts, which form of discrimination has occurred. However, the KZD requests an interpretation of the respective form of discrimination in order to be able to establish which form exists in the present case. If the reference for a preliminary ruling were to be declared admissible only in respect of a single form of discrimination, the Court would prejudge the assessment of the facts by the KZD and possibly provide the KZD with an unsatisfactory answer.

53. In so far as individual questions or parts of questions should actually prove to be hypothetical or superfluous in the context of the legal assessment, however, I will not examine them in my proposed answer.

3. Interim conclusion

54. The reference for a preliminary ruling is therefore admissible in its entirety.

40 — *Dorsch Consult*, cited in footnote 16, paragraph 28 and 29.

41 — *Dorsch Consult*, cited in footnote 16, paragraph 27.

42 — In their written observations, CEB and CRB refer to a decision of the Varhoven administrativen sad of 27 October 2010, in which it stressed the equivalence of both alternatives. However, unlike the KZD, a civil court is able to award damages.

B – *Substantive assessment of the questions referred*

55. With its extremely detailed list of questions, the KZD is seeking information on the scope of the principle of equal treatment having regard to the ethnic origin of persons and the conditions in this regard for proving discrimination. Certain of the sub-questions raised by the KZD should be combined in answering this reference for a preliminary ruling.

1. Scope of Directive 2000/43 (first question)

56. By its first question, the KZD wishes to know whether a situation like the main proceedings falls within the scope of Directive 2000/43. Specifically, the KZD seeks an interpretation of Article 3(1)(h) of the directive, which concerns access to and supply of goods and services which are available to the public. The parties are in dispute as to whether this includes, in addition to electricity supply, the provision of electricity meters.

57. The Bulgarian Government, CEB and CRB advocate a strict interpretation of the scope of the directive. The European Union has no competence for rules regarding electricity meters. In their view, only the creation of an internal market in electricity and the improvement of the operation of that market fall within the scope of EU law. The provision of electricity meters is not a measure which is necessary to that end, with the result that the present case is not covered by the directive by virtue of the restriction, contained in the first sentence of Article 3(1) of Directive 2000/43, to situations 'within the limits of the powers conferred upon the [Union]'. Furthermore, free electricity meters are not a service within the meaning of the directive, since no payment is made. In addition, according to CEB and CRB, access to electricity meters cannot be treated in the same way as the supply of electricity. Article 3(1)(h) of Directive 2000/43 covers only electricity supply per se, but not the provision of electricity meters.

58. This argument does not hold.

59. It is not disputed that electricity supply per se, as a service under Article 3(1)(h) of Directive 2000/43, is one of the areas in which discrimination based on racial or ethnic origin is prohibited. It is also clear that CRB has provided its customers with electricity meters and that the electricity meters are therefore a *de facto* part of the general conditions under which consumers receive electricity in the present case.

60. However, it is precisely these general conditions that distinguish the service 'electricity supply' in the case at issue. Its individual components cannot be considered in isolation from one another. It cannot be convincingly claimed that only the electricity supply per se must be provided without discrimination and everything else, in particular the precise organisation of the conditions of supply, is not covered by the scope of the directive.

61. Imagine if a public transport company earmarked different seats on buses according to the gender, colour or ethnic origin of passengers. Even though all passengers were transported and thus undoubtedly benefited from the transport service as such, it would be obvious that the specific conditions under which they are transported are not equal.

62. The objective of Directive 2000/43 is to ensure protection against discrimination as effectively as possible and to achieve the highest possible level of protection. [43] The practical effectiveness of the principle of non-discrimination would be jeopardised if the protected areas were to be reduced just to their core. If a strict interpretation were given to the matters listed in Article 3 of the directive, this would reduce protection against discrimination to an absolute minimum, which would be incompatible with the abovementioned objective of the directive.

63. Ultimately, Directive 2000/43 is a particular expression of the general principle of equal treatment, which is one of the general principles of European Union law and is protected as a fundamental right under Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. For this reason too, its scope cannot be defined restrictively. [44]

64. Consequently, in a case like the present one, the scope of Directive 2000/43 covers not only the electricity supply per se, but also the conditions under which that electricity supply is provided, including the provision of electricity meters. [45]

65. It may not be objected that the electricity meters are used by consumers free of charge, whilst the directive relates only to services provided for consideration. In any case, electricity supply, as the principal object of the service contract, is provided for consideration, and it must be assumed that the costs of the electricity meters are included in the price of the electricity and are thus passed on to consumers indirectly in this way. As has already been explained above, the electricity supply and the provision of a meter cannot be separated. In particular, an electricity meter would be useless without a corresponding electricity supply. The electricity meter is not therefore a separate service, but part of the overall service 'electricity supply'.

66. Lastly, as regards the European Union's powers, to which the beginning of Article 3(1) of Directive 2000/43 makes reference, it is sufficient to note that the Union legislature is competent to regulate the internal market in electricity. [46] It has already exercised that power – without this having any decisive bearing – not least laying down rules on the provision of information to final customers on their electricity consumption, in which electricity meters are expressly mentioned. [47]

67. All in all, I therefore propose that the Court answer the first question to the effect that a situation like the main proceedings falls within the scope of Directive 2000/43.

2. No requirement of the infringement of rights or interests defined in law (second to fourth questions)

68. By its second and fourth questions, the KZD would like to know whether discrimination for the purposes of Directive 2000/43 exists only where rights or interests defined in law are infringed or whether discrimination can also be taken to exist irrespective of such infringements. Should the directive not require any infringement of rights or interests defined in law, the subsequent question arises whether national legislation which provides for such a requirement is compatible with the directive.

43 — See recital 28 in the preamble to Directive 2000/43, which states that the objective of the directive is '… ensuring a common high level of protection against discrimination in all the Member States …'.

44 — See Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, paragraph 43.

45 — See also CEB's General conditions, Article 3(2) of which provides that the electricity supply will be provided having regard, inter alia, to the principle of equal treatment and Article 10(1) of which stipulates that the electricity supply will be provided to every consumer in the area covered under equal conditions and without discrimination. CRB's General conditions also contain a provision in Article 3 concerning the electricity supply, which must be provided 'having regard to the principle of equality'.

46 — Articles 53(2) TFEU, 62 TFEU and 114 TFEU (formerly Articles 47(2) EC, 55 EC and 95 EC).

47 — Article 3(7) in conjunction with Annex I(1)(h) and (i) of Directive 2009/72, the first subparagraph of Article 13(1) and the last sentence of recital 29 in the preamble to Directive 2006/32.

69. The background to these questions is the fact that, according to the definition in Bulgarian law, or more precisely under Paragraph 1(7) of the Supplementary Provisions on the ZZD,[48] 'less favourable treatment' exists only where rights or interests defined in law are infringed directly or indirectly. CEB invokes that provision and argues that consumers have no entitlement to the installation of a free electricity meter. In the absence of an infringement of rights, discrimination cannot therefore be taken to exist.

70. The conditions for the existence of discrimination are laid down in Article 2(2) of Directive 2000/43. Under letter (a), direct discrimination is taken to occur 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. The underlying difference in treatment is thus linked directly to racial or ethnic origin. Under letter (b), on the other hand, indirect discrimination is 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'.

71. Neither form of discrimination requires an infringement of rights or interests defined in law according to the wording of Directive 2000/43. The only material factor is that there is less favourable treatment or a disadvantage, irrespective of the object of that treatment or disadvantage, whether rights or interests are infringed and, if so, which rights or interests. What is more, according to the Court's case-law, discrimination is not even dependent on a specific victim of discrimination.[49]

72. For discrimination to have occurred, it is therefore sufficient that a person or group of persons is treated less favourably than another is, has been or would be treated. The imposition of additional conditions not provided for in Directive 2000/43 is not compatible with the high level of protection desired by the Union legislature.

73. It must also be assumed that if Directive 2000/43 required an infringement of rights, it would have made express provision to that effect, as was done for example with regard to defence of rights in Article 7(1). Conversely, it can be inferred that any form of infringement of rights or interests is not required for the existence of discrimination.

74. Since Directive 2000/43 does not therefore require any infringement of rights or interests defined in law, it is immaterial whether consumers have an entitlement or a right to access free electricity meters, be it under national law or under EU law.

75. Accordingly, the subsequent question arises, however, whether national rules which make such infringement of rights or interests defined in law a requirement for the existence of discrimination are consistent with EU law.

76. This question must be answered in the negative. Directive 2000/43 seeks to lay down minimum requirements governing the application of the principle of equal treatment and the prevention of discrimination. It expressly gives the Member States the option of adopting or maintaining provisions which are more favourable for the persons concerned than those laid down in EU law.[50] None the less, national provisions which are less favourable for the persons concerned and which therefore fall short of the minimum requirements under EU law are incompatible with the directive. However, precisely this would be the result of the need for an infringement of rights or interests defined in law as an additional national requirement for the existence of discrimination.

48 — Dopalnitelni razporedbi.

49 — Case C-54/07 *Feryn* [2008] ECR I-5187, paragraph 25.

50 — See Article 6(1) and recital 25 in the preamble to Directive 2000/43.

77. With regard to the last part of the fourth question, by which the KZD would like to know how the national court should proceed in the event that the Bulgarian provisions are incompatible with Directive 2000/43, it is sufficient to make reference to the Court's settled case-law: as far as possible, in the main proceedings the national rules must be interpreted and applied in conformity with the directive. The national courts are therefore bound to interpret domestic law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.[51] They must do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying its interpretative methods, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.[52]

78. On the basis of the information available to the Court, there is nothing to suggest that it would not be possible in the main proceedings to interpret and apply the relevant rules of Bulgarian law, in particular those of the ZZD, in accordance with Directive 2000/43.

79. Should the KZD nevertheless conclude that it is not possible to interpret and apply Bulgarian law in conformity with the directive, it would have to be borne in mind that Mr Belov cannot derive rights vis-à-vis CEB and CRB directly from Directive 2000/43. A directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.[53]

80. However, the prohibition of discrimination based on racial and ethnic origin is a general principle of EU law, which is enshrined in primary law in Article 21 of the Charter of Fundamental Rights and is merely fleshed out in Directive 2000/43[54] – just like, for example, the prohibition of discrimination based on age or sexual orientation in Directive 2000/78[55] and unlike, for instance, the entitlement to paid annual leave.[56]

81. In legal relationships like that at issue, between consumers and providers of services of general interest, the principle of equal treatment is particularly important. In the same way as an employment relationship, such legal relationships are characterised by a structural imbalance between the parties.

82. At least in such a situation, it would seem to be justified to disapply, as between private individuals, national legislation which is contrary to the prohibition of discrimination established as a fundamental right, especially since in a case like the present one the private individual is not directly the party to whom the fundamental right is addressed, but the fundamental right is merely applied as a check on the legitimacy of domestic law.

83. In summary, the existence of direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/43 does not therefore require an infringement of rights or interests defined in law. Rather, any form of behaviour is sufficient in which one person is treated less favourably than another is treated on grounds of racial or ethnic origin or which could put persons of a racial or ethnic origin at a particular disadvantage compared with other persons. National rules which make the existence of

51 — Settled case-law; see, inter alia, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113; Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 98; Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 48; and Case C-282/10 *Dominguez* [2012] ECR, paragraph 24.

52 — See *Pfeiffer and Others* (paragraphs 115 to 119), *Impact* (paragraph 101) and *Dominguez* (paragraph 27), all cited in footnote 51; see also Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 28: 'in so far as it is given discretion to do so under national law'.

53 — Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; see also *Pfeiffer* (paragraph 108), *Kücükdeveci* (paragraph 46) and *Dominguez* (paragraph 37), all cited in footnote 51.

54 — See *Runevič-Vardyn and Wardyn*, cited in footnote 44, paragraph 43.

55 — The case-law on Directive 2000/78 is therefore readily transposable to Directive 2000/43; see Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 74 and 75; *Kücükdeveci*, cited in footnote 51, paragraphs 51 and 53; and Case C-147/08 *Römer* [2011] ECR I-3791, in particular paragraph 59.

56 — In *Dominguez* (cited in footnote 51), which concerned paid annual leave, the dispute did not concern an expression of the general principle of equal treatment under Article 21 of the Charter of Fundamental Rights, but a right which finds expression in Article 31(2) of the Charter of Fundamental Rights, in the chapter on 'Solidarity'.

discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43. The national court must interpret domestic law in this regard in conformity with EU law and, if that is not possible, it is obliged not to apply national legislation which is contrary to the prohibition of discrimination established as a fundamental right.

84. Accordingly, there is no need for a substantive examination of the third question.

3. Requirements governing proof and possible justification of discrimination (fifth and sixth questions)

85. The fifth and sixth questions concern, first, the burden of proof for the existence of discrimination, which is regulated in Article 8 of Directive 2000/43. Second, the KZD is essentially seeking to ascertain whether the placing of electricity meters in the two Roma districts, as described, constitutes discrimination within the meaning of the directive under the specific circumstances of the main proceedings and, if so, what form of discrimination, and whether possible discrimination is justified.

a) Reversal of the burden of proof (Article 8(1) of Directive 2000/43)

86. Article 8(1) of Directive 2000/43 provides that 'when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish … 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'.

87. In this connection, the KZD wishes to know the extent to which the facts established must allow a 'conclusion' that there has been discrimination or whether the mere presumption that there has been discrimination is sufficient. According to the KZD, there are differences between the different language versions of Directive 2000/43. The Bulgarian version requires the presentation of facts 'from which it can be concluded' that discrimination has occurred, whilst the German and English versions only require the 'assumption' or 'presumption' of discrimination. However, a 'conclusion' that there has been discrimination can only be drawn at a higher degree of certainty, compared with an 'assumption' or 'presumption'. In national practice the relevant provision has thus far been applied as a measure of proof in such a way that a particularly high degree of certainty is required. A degree of certainty is required which extends beyond the sphere of mere presumption and doubt and which approaches full proof of discrimination. The KZD therefore asks how high the degree of precision must be with which discrimination is to be demonstrated by the applicant.

88. The language versions of Article 8(1) of Directive 2000/43 which I have compared [57] all require only a 'presumption' that there has been discrimination, [58] and not a definite 'conclusion' that such discrimination exists. In addition, recital 21 in the preamble to the directive states that the burden of proof is reversed 'when there is a prima facie case of discrimination'. [59] Furthermore, in its observations the European Commission states that a mandatory requirement for a higher degree of certainty does not even follow from the Bulgarian version of Directive 2000/43, since that language version also requires only facts 'from which it *can* be concluded' that discrimination has occurred.

57 — See the German ('Tatsachen glaubhaft machen, die … vermuten lassen'), Greek ('προσάγει ... πραγματικά περιστατικά, από τα οποία τεκμαίρεται'), English ('establish … facts from which it may be presumed'), Spanish ('alegue … hechos que permitan presumir'), French ('établit … des faits qui permettent de présumer'), Italian ('espongono … fatti dai quali si può presumere'), Dutch ('feiten aanvoeren die … kunnen doen vermoeden'), Polish ('przedstawia... fakty, z których można domniemywać'), Portuguese ('apresentar … elementos de facto constitutivos da presunção') and Swedish ('lägger fram fakta som ger anledning att anta') versions of Article 8(1) of Directive 2000/43.

58 — See *Feryn*, cited in footnote 49, paragraph 30.

59 — Many other language versions of recital 21 in the preamble to Directive 2000/43 have similar wording: 'a prima facie case of discrimination' (English), 'Όταν πιθανολογείται διακριτική μεταχείριση' (Greek), 'una presunta discriminacion' (Spanish), 'une présomption de discrimination' (French), 'una presunzione di discriminazione' (Italian), 'domniemani[e] dyskryminacji' (Polish), 'presumível discriminação' (Portuguese) and 'ett prima facie-fall av diskriminering' (Swedish).

89. This is also consistent with the legal situation in cases of discrimination based on sex. With regard to Article 4(1) of Directive 97/80/EC,[60] which is almost identical with Article 8(1) of Directive 2000/43 – and with Article 10(1) of Directive 2000/78[61] – the Court has ruled that the burden of proof is reversed whenever there is a prima facie case of discrimination.[62]

90. This case-law can be applied without any problem to the provision at issue here.[63] Any other, stricter interpretation of Article 8(1) of Directive 2000/43 would jeopardise its practical effectiveness and mean that the rule on the reversal of the burden of proof would be practically redundant. Without such a reversal of the burden of proof, however, the normal rules on the burden of proof would be applicable with the result that anyone who believed that they were a victim of discrimination would be required to adduce and prove all the necessary facts which support their claim and indicate that discrimination has occurred with a sufficient degree of certainty.

91. Specifically to avoid such difficulties and to improve the situation of the potential victim of discrimination, however, the reversal of the burden of proof was introduced. It strengthens the position of the presumed victim. A national practice like that described by the KZD would be diametrically opposed to that purpose, since the requirement to adduce and prove facts which allow a definite conclusion as to discrimination ultimately corresponds to the normal distribution of the burden of proof. Article 8(1) of Directive 2000/43 would not then improve the procedural position of presumed victims of discrimination at all.

92. My understanding of Article 8(1) of Directive 2000/43 also does not constitute a breach of the principle of a fair hearing at the expense of CEB and CRB. Rather, with the rules on the reversal of the burden of proof in all the anti-discrimination directives, the legislature made a choice which maintained a fair balance between the interests of the victim of discrimination and the interests of the other party to the proceedings.[64] In particular, those rules do not completely remove the burden of proof from the presumed victim of discrimination, but merely modify it.

93. Certainly, the reversal of the burden of proof in the present case may mean that in the main proceedings CEB and CRB have to make submissions to justify a commercial decision, which may have been taken long ago, to install electricity meters in the Roma districts differently than is normal in Bulgaria. Such a burden of adducing evidence is only appropriate, however, since the relevant information comes from the sphere and the area of responsibility of precisely those undertakings or their legal predecessors. Furthermore, in the main proceedings the distribution undertaking described the reasons for the particular way in which the electricity meters were installed in the two districts concerned as being 'generally known',[65] so it should not find it difficult to make submission to justify those measures.

94. All in all, it is thus sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a prima facie case of discrimination.

60 — Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6).

61 — Case C-415/10 *Meister* [2012] ECR, paragraph 35; see also the Opinion of Advocate General Poiares Maduro in *Feryn*, cited in footnote 49, point 22.

62 — Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 74 in conjunction with paragraph 68; see also Case C-104/10 *Kelly* [2011] ECR I-6813, paragraph 30. See also previously – with regard to the legal situation before Directive 97/80 - Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 53: 'where there is a prima facie case of discrimination …'.

63 — See *Meister*, cited in footnote 61, paragraphs 34 to 40.

64 — See the Opinion of Advocate General Mengozzi in *Meister*, cited in footnote 61, point 22.

65 — See Question 5.3(c).

b) Form of discrimination (Article 2(2) of Directive 2000/43)

95. The KZD must itself assess whether circumstances like those described in the second part of the fifth question are likely to substantiate such a prima facie case of discrimination, since the establishment and assessment of the facts and the application of the law to the individual case are matters for it.[66] The Court may, however, provide the KZD with all the guidance it needs to facilitate its decision in the main proceedings.[67] In view of the doubts expressed by the KZD in this regard in the order for reference, and in the light of the strict case-law of the Bulgarian Supreme Administrative Court in similar cases, as described by the KZD, the Court should certainly provide such guidance, in which regard the following observations merit particular attention.

96. In the two districts of Montana known as Roma districts, electricity meters are, with the odd exception, attached to electricity poles at an inaccessible height of 7 m, whilst elsewhere electricity meters are installed at a height accessible for visual checks.

97. There are no specific indications either in the order for reference or in the observations submitted by the parties to the proceedings to suggest that the particular way in which electricity meters are attached in the two Roma districts was chosen *based on* the ethnic origin of the inhabitants of those districts or is connected with a factor which is inseparably linked to their ethnic origin. Rather, this measure affects consumers there, as far as can be seen, solely by reason of their status as local residents. Consequently, according to the available information, there are no indications of direct discrimination based on ethnic origin (Article 2(2)(a) of Directive 2000/43).

98. In the absence of specific indications, the practice of attaching electricity meters at a height of 7 m cannot be regarded as conduct 'related to [the] ethnic origin' of the inhabitants of the two Roma districts with the purpose or effect of violating their dignity and creating a humiliating living environment for them. Consequently, on the basis of the available information, 'harassment' within the meaning of Article 2(3) of Directive 2000/43 also cannot be taken to exist.

99. It is clear, however, that the two districts concerned are inhabited predominantly by people belonging to the Roma community.[68] Consequently, the practice of attaching electricity meters at a height of 7 m is liable, in principle, to affect members of that ethnic group in a particular way and to put them at a disadvantage, since it makes it virtually impossible or at least excessively difficult for them to make visual checks of the relevant electricity meters. Under these circumstances, it must be assumed that, in a case like the present one, there is a prima facie case of indirect discrimination based on ethnic origin (Article 2(2)(b) of Directive 2000/43).

66 — See recital 15 in the preamble to Directive 2000/43: '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.' This is consistent with settled case-law on the preliminary ruling procedure; see, inter alia, Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 30; Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 49; and *Kelly*, cited in footnote 62, paragraph 31.

67 — Settled case-law; see *Feryn*, cited in footnote 49, paragraph 19, and *MOTOE*, cited in footnote 66, paragraph 30; see also Case C-358/08 *Aventis Pasteur* [2009] ECR I-11305, paragraph 50, and Case C-163/10 *Patriciello* [2011] ECR I-7565, paragraph 21.

68 — In view of this situation, there is no need in the present case to examine more closely the circumstances mentioned in Question 5.3(a) and (b).

c) Justification (Article 2(2)(b) of Directive 2000/43)

100. In contrast with direct discrimination based on racial or ethnic origin, for which there is no justification in the absence of a provision to that effect in Directive 2000/43,[69] Article 2(2)(b) of Directive 2000/43 provides in relation to indirect discrimination that the provision, criterion or practice in question is lawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, i.e. proportionate.[70] This wording is consistent with the requirements generally recognised in EU law governing the justification of a direct difference of treatment.

i) Legitimate aim

101. It is clear from the reference for a preliminary ruling and from the written and oral observations made by CEB and CRB that the measure of installing electricity meters at a height of 7 m was taken because of a large number of unpaid electricity bills and in response to numerous cases of illegal interference with electricity supply infrastructure and manipulation and illegal electricity extraction in the districts concerned. The measure is intended to prevent future fraud and abuse and to help to ensure the quality of a financially reasonable electricity supply in the interest of all consumers.

102. Preventing 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.[71]

ii) Proportionality test

103. It must still be examined, however, whether it was proportionate to achieving those aims to attach electricity meters in the two districts concerned at a height of 7 m. Under Article 2(2)(b) of Directive 2000/43, this would require the measure to be 'appropriate and necessary' for achieving the legitimate aims pursued.

104. The fact that CEB and CRB claim that the reasons for the contested measure are 'generally known'[72] does not release those two undertakings from the obligation of proving that there has been no breach of the principle of equal treatment (Article 8(1) of Directive 2000/43). The degree to which motives for certain conduct by undertakings are known does not say anything about their justification, and in particular their proportionality.

– 'Appropriateness' (suitability) of the measure

105. A measure is 'appropriate' within the meaning of Article 2(2)(b) of Directive 2000/43 if it is suitable for achieving the legitimate aim pursued,[73] which means, in the present case, that the measure can actually prevent fraud and abuse and help to ensure the quality of the electricity supply.

69 — A difference in treatment of persons *on grounds of* racial or ethnic origin is possible only if those persons are not in a comparable situation (see Article 2(2)(a) of Directive 2000/43).

70 — See, with regard to age discrimination under Directive 2000/78, my Opinion in Case C-499/08 *Andersen* [2010] ECR I-9343, points 46 and 47.

71 — With regard to the combatting of fraud and abuse by national authorities, see Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraphs 68 and 69; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 35; and Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 38; with regard to ensuring the security and quality of the energy supply in the Member States, see Case 72/83 *Campus Oil* [1984] ECR 2727, paragraphs 34 and 35; Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, in particular paragraph 55, and Case C-543/08 *Commission* v *Portugal* [2010] ECR I-11241, paragraph 84.

72 — See Question 5.3(c).

73 — See, with regard to the justification of age discrimination within the meaning of Directive 2000/78, my Opinion in *Andersen*, cited in footnote 70, point 53. The final part of the first subparagraph of Directive 2000/78 has similar wording to Article 2(2)(b) of Directive 2000/43, and my arguments in *Andersen* are therefore applicable to the present case.

106. Manipulation and unauthorised electricity extraction are undoubtedly made more difficult if electricity meters and distribution boxes are placed at a height of 7 m, which is normally inaccessible for consumers. Furthermore, prevention of illegal interference with the electricity network by individuals tends to have a positive effect on electricity consumers in general, because this prevents damage to infrastructure and averts the threat of a general increase in electricity prices to compensate for such damage.

107. In the reference for a preliminary ruling it is nevertheless intimated that in a Roma district of another Bulgarian city illegal interference with the electricity supply could not in fact be prevented despite the application of similar measures to the one at issue.[74] Nevertheless, in their submissions to the Court, CEB and CRB state in this regard that the measures taken at least minimised illegal interference and for that reason they consider those measures to be successful on the whole.

108. It should be noted that the suitability of a measure must always be assessed having regard to the aim pursued by it. If, as here, a measure is in response to numerous cases of illegal interference with the electricity supply in a certain area, the suitability of that measure can hardly be made dependent on whether absolutely no cases of fraud or abuse and absolutely no impairment of the quality of the electricity supply occur in future. Instead, such a measure must be regarded as suitable for achieving its legitimate aims if it contributes to an appreciable reduction in the number of cases of illegal interference with the electricity supply. The KZD will have to examine whether that is the situation in the present case.

– Necessity

109. If it is assumed that the contested measure is suitable for preventing fraud and abuse and for ensuring the quality of the electricity supply, the further question arises whether it is also necessary for that purpose. A measure is necessary where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means. It must therefore be explored whether or not there were less restrictive means of preventing the manipulation of electricity meters and illegal electricity extraction in the districts in question.

110. First, the KZD mentions in this connection the possibility of attaching electricity meters at a normal height and protecting them against illegal interference by special technical measures.[75]

111. Such a course of action would undoubtedly be a less restrictive measure vis-à-vis electricity consumers in the districts concerned. In particular, it would ensure that all consumers there could continue to make a regular visual check of their electricity meters, as appears to be common elsewhere in Bulgaria.

112. It should be borne in mind, however, that making electricity meters secure by special technical measures would, in all likelihood, create considerable additional expenditure for the undertakings concerned, which would possibly have to be passed on to electricity consumers in general. This was pointed out several times not least by CEB and CRB in the procedure before the Court. Subject to a closer examination of this question by the KZD, merely making the electricity meters secure by special technical measures does not appear to be an equally suitable means of achieving the legitimate aims pursued. It cannot therefore be cited as an argument against the necessity of the contested measure applied at the time, i.e. placing electricity meters at a height of 7 m.

74 — See Question 6.3(g).

75 — See Question 6.3(f).

113. Second, the KZD states that CEB and CRB are free to act a posteriori against any damage to or abuse of electricity meters and infrastructure. In this regard, they may avail themselves of civil channels or the criminal prosecution authorities.

114. In this regard, CEB and CRB rightly point out that taking subsequent action against troublemakers often entails considerable uncertainty and expenditure, partly as a result of difficulties in providing proof and partly because of the expected delays and the inefficiency of the competent authorities and procedures. CEB and CRB also refer to the dangers to life and limb associated with the manipulation of electricity meters, which likewise could not be effectively averted by subsequent action. Subject to a closer examination of this question by the KZD, it cannot therefore be automatically assumed that mere subsequent recourse to civil or criminal measures would be an equally suitable means of achieving the legitimate aims pursued in the present case. [76]

115. Third, it would also be conceivable to attach at a greater height only those electricity meters on which manipulation has actually taken place. However, such a course of action would be associated with similar uncertainties to taking civil or criminal action in the case of illegal interference with the electricity supply. Consequently, subject to a closer examination by the KZD, this possibility likewise cannot be regarded as an equally suitable means of achieving the legitimate aims pursued.

116. As things stand at present, it therefore seems doubtful, at least, whether CEB and CRB could, at financially reasonable cost, have recourse to other, equally suitable means which had less detrimental effects on the population in the districts concerned.

– No undue adverse effects on the inhabitants of the districts concerned

117. If the measures taken prove to be suitable and necessary for achieving the legitimate aims pursued, it would still have to be examined whether they have undue adverse effects on the inhabitants of the districts concerned. [77] According to the principle of proportionality, measures which adversely affect a right guaranteed by EU law – here the prohibition of discrimination based on ethnic origin – must not cause disadvantages for the individual which are disproportionate to the aims pursued. [78] In other words the legitimate aim pursued must be reconciled as far as possible with the requirements of the principle of equal treatment and the right balance must be found between the different interests involved. [79]

118. It should be borne in mind, first of all, that placing electricity meters at a height of 7 m is a relatively drastic measure, which affects all inhabitants of the two districts in question wholesale ('across the board' [80]), even if they have not been guilty of any illegal interference with the electricity supply and have not accumulated any arrears. The impression may therefore be created that all or at least many of the inhabitants of the districts concerned are embroiled in fraudulent practices, manipulation or other irregularities in relation to their electricity supply, which may ultimately encourage a stigmatisation of the population in those areas. [81]

76 — See also Case C-110/05 *Commission* v *Italy* [2009] ECR I-519, paragraph 67; Case C-137/09 *Josemans* [2010] ECR I-13019, paragraph 82; and Case C-400/08 *Commission* v *Spain* [2011] ECR I-1915, paragraph 124, in which it is stated, in various contexts, that the competent national authorities cannot be denied the possibility of taking measures which are easily managed and supervised.

77 — See also, with regard to Directive 2000/78, Case C-499/08 *Andersen* [2010] ECR I-9343, paragraphs 41 to 48, in particular paragraph 47, and my Opinion in that case, cited in footnote 70, point 67.

78 — Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21; Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 47; and Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 86.

79 — See my Opinion in *Andersen*, cited in footnote 70, point 68.

80 — See Question 6.3(a).

81 — The KZD also makes similar remarks in its Question 6.4(e).

119. Furthermore – and irrespective of any stigmatisation of the local population – it should be borne in mind that in Directives 2006/32 and 2009/72 the Union legislature expressly stresses the consumers' interest in being regularly informed about their individual electricity consumption. In particular, consumers should be actively encouraged to check their own meter readings regularly.[82] It is contrary to this objective under EU law to equip homes with electricity meters, but to install them at a height of 7 m which is not accessible for visual checks.

120. Admittedly, CEB and CRB offer consumers in the areas concerned, in response to an individual request, a visual check by means of a lifting platform provided free of charge. It seems extremely doubtful, however, whether this comparatively expensive and laborious procedure can satisfy the abovementioned aim of EU law of encouraging consumers to check their own meter readings *regularly.*[83] [84] The use of a special vehicle with a lifting platform, which must be specifically requested before any use, would not realistically seem to be possible more than once or twice each year.

121. The KZD will have to examine, however, whether the offer by CEB and CRB to provide consumers, at their request, with an inspection meter in their home, for which a fee has to be paid,[85] can constitute adequate compensation for the inaccessibility of their normal electricity meters, which are attached at a height of 7 m. It should be borne in mind, in particular, that the payment of the fee for an inspection meter could deter many consumers from installing one.

122. EU law certainly does not require the Member States to provide every consumer with a free electricity meter (see in particular the first subparagraph of Article 13(1) of Directive 2006/32). However, in a supply area in which fraudulent practices and manipulation in connection with the electricity supply have often been identified in the past, consumers have a particular interest in being able to check and monitor their individual electricity consumption regularly.

123. Ultimately, it is for the KZD, in the light of all the circumstances of the present case, to assess carefully whether there is a risk of an ethnic group in the two districts concerned being stigmatised and whether the interests of the electricity consumers affected are taken duly into account.

iii) Interim conclusion

124. In summary, a measure like the one at issue in the present case may be justified if it prevents fraud and abuse and contributes to ensuring the quality of the electricity supply in the interest of all consumers, provided

— 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, and

— the measure taken does not produce undue adverse effects on the inhabitants of the districts concerned, due account being taken of the risk of an ethnic group being stigmatised and of the consumers' interest in monitoring their individual electricity consumption by means of a regular visual check of their electricity meters.

82 — Last sentence of recital 29 in the preamble to Directive 2006/32.

83 — Article 3(7) in conjunction with Annex I(1)(i) of Directive 2009/72 and the last sentence of recital 29 in the preamble to Directive 2006/32.

84 — These doubts are also expressed by the KZD in Question 6.3(c).

85 — Question 6.3(d).

VI – Conclusion

125. In the light of the foregoing considerations, I suggest that the Court answer the questions referred by the Komisia za zashtita ot diskriminatsia (KZD) as follows:

(1) A situation like the main proceedings falls within the scope of Directive 2000/43/EC.

(2) The existence of direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/43 does not require an infringement of rights or interests defined in law. Rather, any form of behaviour is sufficient in which one person is treated less favourably than another is treated on grounds of racial or ethnic origin or which could put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.

(3) National rules which make the existence of discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43. The national court must interpret domestic law in this regard in conformity with EU law and, if that is not possible, it is obliged not to apply national legislation which is contrary to the prohibition of discrimination, established as a fundamental right.

(4) It is sufficient for a reversal of the burden of proof under Article 8(1) of Directive 2000/43 that persons who consider themselves wronged because the principle of equal treatment has not been applied establish facts which substantiate a prima facie case of discrimination.

(5) If consumers are normally provided with free electricity meters which are installed in or on buildings, such that they are accessible for visual checks, whilst in districts inhabited primarily by people belonging to the Roma community such electricity meters are attached to electricity poles at an inaccessible height of 7 m, there is a prima facie case of indirect discrimination based on ethnic origin within the meaning of Article 2(2)(b) in conjunction with Article 8(1) of Directive 2000/43.

(6) Such a measure may be justified if it prevents fraud and abuse and contributes to ensuring the quality of the electricity supply in the interest of all consumers, provided

— 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, and

— the measure taken does not produce undue adverse effects on the inhabitants of the districts concerned, due account being taken of the risk of an ethnic group being stigmatised and of the consumers' interest in monitoring their individual electricity consumption by means of a regular visual check of their electricity meters.