Considerations Regarding the Contribution of the Court of Justice of the European Union in Clarifying the Content of Non Discrimination Concept

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Abstract: This paper aims at underlining the way in which the Court of Justice of the European Union contributes at the unitary application of the community law in the Union's member states, by clarifying the content of some concepts. Equality and non discrimination represent the fundamental idea of edification of a democratic society and one of the fundamental principles regulated in the Treaty on European Union and the Treaty establishing the European Community, in the form amended by the Lisbon Treaty and this is the reason why we have opted for analyzing only the contribution of the Court of Justice of the European Union in clarifying the concept of non discrimination. There are also assessments made regarding the collocation "positive discrimination", concluding that it is an inadequate locution and proposing variants to replace this collocation.

Keywords: non discrimination; jurisprudence; judge researcher; Court of Justice of the European Union

1. Introductive Considerations

The role of the Court of Justice of the European Union in the Unitary Application of the Community Law

The pattern of social organization named the European Union – uncompleted pattern, in permanent evolution- has determined the delineation of a new defining feature for the judge: as researcher. The statement refers to the contribution of the judge brought to the situations in which the regulation is not clear or is missing and when the interpretation of the principles of European community law or the correlated interpretation of several regulations is the sole instrument used in the Judgment making process. The legal truth contained in some Judgments of the Court of Justice of the European Union often contains prior conceptual clarifications, definitions or rephrased definitions. Such a state of facts has determined the phrasing in the literature (Alexandru et all., 2005, pp. 90-94) (Alexandru, 2008, pp. 229-234) of the opinion that "due to the incomplete nature of the written law, the jurisdiction of the Court of justice of the European Union has a

special signification especially in establishing principles of the European administrative law" exemplifying with the jurisprudence on uniform interpretation, the principle of autonomous interpretation and the principle of loyalty towards the community.

Regarding the principle of autonomous interpretation of the community law, the judges of the Court of Justice of the European Union have asserted, in Judgment no. 49/71 on February 1st 1972, at point no. 1 in the Summary[1] that the terms used in community law "must be uniformly interpreted and implemented throughout the community, except when an express or implemented reference is made to national law". Also, in Judgment no. 327/82[2], point 1 in the Summary, the Court held that "the need for a uniform application of community law and the principle of equality that the terms of a provision of community law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations" and that "however, where the community legislature incorporates into a regulation an implied reference to national customs and practices, it is not for the Court of Justice to give a uniform community definition of the terms used".

In what concerns the principle of autonomous interpretation, in Judgment no. 12/73[3], point 1 in the Summary, the court held that In the absence of any express reference to the laws or customs of a third country provision must be interpreted in relation to and in context of its own sources. Nevertheless, the Tribunal of First Instance, in the Judgment on December 18th 1992[4], in point 2 of the second thesis of the Summary, completed this assertion indicating that "*the terms of a provision of Community law which makes no express reference to the laws of member states for the purpose of determining its meaning and scope must normally be given an independent interpretation, which must take into account the context of the provision and the purpose of the relevant regulations. In the absence of an express reference to the laws of the member states, the application of community law, the*

[1] Judgment of the Court of 1 February 1972, Hagen OGH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Hessischer Verwaltungsgerichtshof - Germany. Marketing centres. Case 49-71, European Court reports 1972 Page 00023.

[2] Judgment of the Court (Fifth Chamber) of 18 January 1984. Reference for a preliminary ruling: College van Beroep voor het Bedrijfsleven – Netherlands. Export refunds for beef and veal - "thin flank". Case 327/82. European Court reports 1984, Page 00107.

[3] Judgment of the Court of 9 October 1973. Claus W. Muras v Hauptzollamt Hamburg Jonas. Reference for a preliminary ruling: Finanzgericht Hamburg - Germany. Case 12-73. European Court reports 1973, page 00963.

[4] Judgment of the Court of First Instance (Fourth Chamber) of 18 December 1992. José Miguel Díaz García v European Parliament. Officials - Dependent child allowance - Person treated as dependent child - Legal responsibility to maintain. Case T-43/90. European Court reports 1992, Page II-02619.

application of community law may sometimes necessitate a reference to the laws of the member states where the community court cannot identify in community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation".

Regarding the principle of loyalty towards the community, principle that has been expressly regulated in the Union's treaties, the Court held, in Judgment no. 48/71[1], point 1 in the Summary, that "*the attainment of the objectives of the community requires that the rules of community law established by the treaty itself or arising from procedures which it has instituted are fully applicable at the same time and with identical effects over the whole territory of the community without the member states being able to place any obstacles in the way*" and on point 2 in the Summary that "*the grant made by member states to the community of rights and powers in accordance with the provisions of the treaty involves a definitive limitation on their sovereign rights and no provisions whatsoever of national law may be invoked to override this limitation*." In what concerns the clarification of the concepts, the Court had important contributions in defining or refinement in defining some concepts of community law. For example, the "direct effect", "priority in community law", "direct applicability", "primacy of community law" (Manolache, 2001, pp. 17-41).

2. Aspects on the Content of the Concept of Discrimination and its Variety of Positive Discrimination

Non discrimination is a fundamental concept in the Treaty on European Union and the Treaty Establishing the European Community, both in the old form as well as in the form resulted after the comming into force of the Lisbon Treaty. Thus, in article 1a[2] of the Treaty on European Union it is underlined that "*the Union is based on the values: respecting human dignity, democracy, equality, lawful state, as well as respecting the human rights, here comprising the rights of the minorities. These values are common to the member states in a society characterized by pluralism, non discrimination, tolerance, justice, solidarity and equality between men and women*" while article 2, paragraph 3, second thesis mentions that the Union "*fights against social exclusion and discrimination and promotes justice and social protection, equality between men and women, solidarity between generations and protection of children's rights*".[3]

[1] Judgment of the Court of 13 July 1972. Commission of the European Communities v Italian Republic. Case 48-7. European Court reports 1972, Page 00529.
[2] Lisabon Treaty, Article 1, point 3.
[3] Lisabon Treaty, Article 1, point 4.

The Treaty Establishing the European Community, renamed the "Treaty on the functioning of the European Union"[1] by the Lisbon Treaty in article 5, third[2] states that: "*In defining and putting into practice of its policies and actions, the Union seeks to combat any discrimination based on sex, race or ethical origin, religion or beliefs, a handicap, age or sexual orientation*". Therefore, the social practice in the Union's member states should non discrimination have as fundamental value, including in what concerns equal opportunities in any domain. The social reality indicates a very different scene. After the positive discrimination pattern created in the United States of America and promoted the first time by the president John Fitzgerald Kennedy (Bachran, 2005, p. 137) under the name "affirmative action" in different states of the world and more and more in Europe, ways to breach the principle of equality have been created, under the pretext of the positive result of these breaches. Thus, in The United states of America (Gérard, 2010) beginning with the 70's positive discrimination was applied in education, regarding the access of public education institutions but starting with 1978- when the Supreme Court condemned the application of positive discrimination at the Faculty of Medicine at the University of California- positive discrimination was criticised and forbidden gradually in all public universities in California, Florida, the state of Washington, Michigan, Nebraska, Texas, Mississippi and Louisiana and on June 28th, 2007 the Supreme Court of the United States banned positive discrimination when going to American public schools. In Brazil, positive discrimination in higher education is applied since 1995 and starting with 2008, this phenomenon has spread (Gérard, 2010). In France, positive discrimination is applied both in education as well as in social policies. In the United Kingdom (Cambon, Vanlerberghe, Mével, 2008) positive discrimination is prohibited by law, starting with 1976, but in the social practice there are situations when the defining elements of positive discrimination are manifested when recruiting personnel. The historical conditions of South Africa have made necessary the practice of positive discrimination regarding the labour market concerning women and people with different handicaps (Rossouw, 2007).

Romania could not have been an exception from this tendency. In the social practice of the past twenty years, Romania has gradually asserted the concept of positive discrimination becoming a reality in legislation especially in education. In consequence, any responsible citizen asks the question: what is positive discrimination and how big is the social good that any citizen can feel so that a fundamental principle of community law and Romanian law can be breached, namely the principle of equality?

This "legal" type of breach of a lawful principle expressly regulated in the community law and in the Romanian law is defined as being "an assembly of

[1] Lisabon Treaty, Article 2, point 1.
[2] Lisabon Treaty, Article 2, point 18.

measures aiming at favouring some people belonging to categories whose members have suffered or would suffer from systematic discrimination"[1] The Explanatory Dictionary of Romanian Language states that "to discriminate = to separate, to distinguish, to differentiate" and "discrimination = the action of discriminating and its result. 1. Difference, distinction between several elements; 2. Policy by which a state or a category of citizens in a state are deprived from certain rights based on ungrounded considerations".

By analyzing the two definitions, it results that a positive connotation is being given to a concept with negative essence. In other words, legally, by special regulations, the elimination of the effects of discrimination or the prevention of the effects of potential discrimination is tried, but in order to give it an apparent legality, a positive objective is added, to underline that it is made with a noble purpose. In our opinion, such an approach is unacceptable, harmful and contravenes to the idea of democracy on which the principle of equality and no discrimination are based. We do not deny the necessity and utility of such a policy that could help solving some negative social phenomena, that sometimes are discriminatory in essence, but it is not allowed that they are named positive discrimination. Discrimination, irrespective of the purpose, cannot be other than negative because it expresses the breach of a fundamental principle on which the lawful and democratic state is based upon. There are countless ways to name this phenomenon of favouring some social categories, no matter the field: socio-economical, biological, cultural, racial etc. For example: actions of solidarity, actions of support, reparatory actions, even positive actions, if the original expression "affirmative action" is taken into consideration, that expresses in our opinion the concern of the American president who launched the concept for the fundamental values of a democratic state, including the principle of legality. Actually, the idea of defining the concept "affirmative action" was born as an additional instrument of materializing the principle of equality between human individuals, from a legal point of view.

In our opinion, the most appropriate expression to name the concern of the authorities in different states of the world to adopt measures aiming at favouring some people belonging to categories whose members have suffered or would suffer systematic discrimination, is the "counter discriminatory", because it expresses both the reparatory function of the measures as well as their preventive function, the positive character of these measures being more obvious and not in contradiction with the meaning of the term discrimination.

We assert that this type of approach is sustained by the rich judicial practice of the Court of Justice of the European Union in matters of equality and non discrimination, practice that is used to observe the constant concern of this

[1] http://fr.wikipedia

community institution in respecting the role of non discrimination as a fundamental value of the Union.

3. Reference Views regarding Non Discrimination Comprised in the Jurisprudence of the Court of Justice of the European Communities

In the matter of the principle of equality and non discrimination, the Court of Justice of The European Union had a rich practice in which the judge had the role of a researcher in law, especially since "*although in general the jurisprudence is not accepted as being a source of law in the continental judicial system, the jurisprudence of the Court of Justice is considered as being an essential source of law*" (Alexandru, 2005, p. 255).

The jurisprudence regarding non discrimination also puts value on the jurisprudence of the Court of Justice regarding community judicial order. For example, in the judgment from February 25th, 1969[1] at point no. 2 in the Summary, the Court held that „*in accordance with a principle common to the legal systems of the member states, the origins of which may be traced back to roman law, when legislation is amended, unless the legislature expresses a contrary intention, continuity of the legal system must be ensured*". Also, in the judgments on March 18th, 1980[2], point no. 2 in the Summary, the Court held that "a measure which has the features of a community decision or directive when viewed in the light of its objective and the institutional framework within which it has been drawn up cannot be described as an international agreement. Regarding the cession of rights, the Court decided that "*the assignment of rights is in principle possible under the laws of the member states and should therefore also be possible under the community law. The assignee of a right is subrogated to the right of action in the event of an infringement of that right.*"[3] The Court had to make appreciations regarding domains in which the regulation is incomplete, the views being used subsequently in matters of non-discrimination. For example, in the matter of competition regarding the validity of agreements concluded after the coming into force of

[1] Judgment of the Court of 25 February 1969. Johannes Gerhardus Klomp v Inspektie der Belastingen. Reference for a preliminary ruling: Gerechtshof 's-Gravenhage – Netherlands. Case 23-68. *European Court reports 1969*, Page 00043.

[2] Judgment of the Court of 18 March 1980. Commission of the European Communities v Italian Republic. Detergents. Case 91/79. *European Court reports 1980 Page 01099 ;* Judgment of the Court of 18 March 1980. Commission of the European Communities v Italian Republic. Maximum sulphur content of liquid fuels. Case 92/79. *European Court reports 1980*, Page 01115.

[3] Judgment of the Court (Fifth Chamber) of 13 November 1984. - Birra Wührer SpA and others v Council and Commission of the European Communities. - Maize gritz - Non-contractual liability. - Joined cases 256, 257, 265, 267/80, 5 and 51/81 and 282/82. *European Court reports 1984*, Page 03693.

Regulation no. 17/69, the Court decided[1] accordingly: "*notifications in accordance with the provisions of article 4 of regulation no. 17 in respect of agreements entered into after the application of article 85 by this regulation do not have suspensive effect*". The fact that in some cases the Court of Justice makes express reference to precedent decisions[2] is also of interest, as the Court is not obliged by this practice to always use the judicial precedence, it decided that the national tribunals can request a preliminary decision if they do not want to follow the decision given regarding a similar cause in an anterior cause and are free to use the preliminary decisions without consulting the Court.

The Court already had to solve many causes in which the non discrimination rule was invoked, regarding the judicial order in the community space as a new judicial order, from the objectives of the European Community and the community judicial instruments to the common market and other community actions and policies.

In what concerns the judicial order in the community space, the Court stated several times that this order is built on the reality that the member states of the European Union have agreed to renounce to some specific national attributes, defining for their statehood and transferring them to other super-state organisms and accepting that they will only be regained in exceptional conditions[3] so that the power transfer towards the community institutions is considered to be irreversible (Kapteyn, VerLoren van Themaat, 1990, p. 40) (Manolache, 2001, p. 49), deciding that „*in the exercise of their reserved powers, member states can derogate from the obligation imposed on them by the provisions of the Euroepan treaties only on the conditions laid down in the treaties themselves*". Starting from the fact that it cannot be admitted that the states renounce in different proportions at the mentioned attributes results in the fact that the principle of equal treatment has to be rigorously respected so that no state can be advantaged except for those that can accomplish an equitable balance of rights and obligations according to the provisions of the community judicial acts that have to be correctly applied. Therefore, the Court appreciated that[4] "*when the member states conferred powers on the community institutions, they agreed to a corresponding limitation in their sovereign rights. In accordance with the treaty the fiscal sphere is not*

[1] Judgment of the Court of 6 February 1973. SA Brasserie de Haecht v Wilkin-Janssen. Reference for a preliminary ruling: Tribunal de commerce de Liège – Belgium. Haecht II. Case 48-72. *European Court reports 1973*, Page 00077.

[2] Judgment of the Court of 26 February 1976. Società SADAM and others v Comitato Interministeriale dei Prezzi and others. Reference for a preliminary ruling: Tribunale amministrativo regionale del Lazio – Italy. Joined cases 88 to 90-75. *European Court reports 1976 Page 00323*.

[3] Judgment of the Court of 10 December 1969. - Commission of the European Communities v French Republic. - Joined cases 6 and 11-69. *European Court reports 1969*, Page 00523.

[4] Judgment of the Court of 13 December 1967. - Firma Max Neumann v Hauptzollamt Hof/Saale. - Reference for a preliminary ruling: Bundesfinanzhof - Germany. - Case 17-67. *European Court reports French edition*, Page 00571.

automatically excluded from those limitations". Regarding the exceptional situations in which the states can recover their prerogatives, the Court held that *Although it is true that if the Council fails to adopt measures falling within the exclusive competence of the European Communities, there can be no fundamental objection in certain cases to Member States' maintaining or introducing, pursuant to the duty to cooperate imposed on them by Article 5 of the Treaty, national measures designed to achieve Community objectives, no general principle can be inferred from that fact requiring the Member States to act in the place of the Council whenever it fails to adopt measures falling within its province"*. Also, two important causes have to be mentioned.[1]

Regarding the relation between the community law and the national law in the area of individual rights, the Court held that "*in the absence of community on this subject, it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from direct effect of community law, it being understood that such conditions cannot be less favorable that those relating to similar actions of domestic nature. The position would be different only if the conditions made impossible in practice to exercise the rights which the international courts are obliges to protect*[2]". In the conceptual clarifications within the practice, the Court held that "*a measure which ahs the features of a community decision or directive "a measure which has the features of a community decision or directive when viewed in the light of its objective and the institutional framework within which it has been drawn up cannot be described as an international agreement*"[3].

Given the fundamental objectives of the European Union (Manolache, 2001, pp. 60-62) that are promoting a harmonious, balanced and sustainable development of economic activities within the Union, promoting economic and social cohesion, a high level of using labor force and social protection, improving the life standards and life quality, promoting solidarity among the member states, equality between men and women, a high level of protection and environment improvement, the

[1] Judgment of the Court of 5 December 1989. - ORO Amsterdam Beheer BV and Concerto BV v Inspecteur der Omzetbelasting Amsterdam. - Reference for a preliminary ruling: Gerechtshof Amsterdam - Netherlands. - VAT - Resale of second-hand goods. - Case C-165/88. *European Court reports 1989*, Page 04081.

[2] Judgment of the Court of 16 December 1976. - Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland. - Reference for a preliminary ruling: Bundesverwaltungsgericht - Germany. - Case 33-76. *European Court reports 1976*, Page 01989.

[3] Judgment of the Court of 18 March 1980. - Commission of the European Communities v Italian Republic. - Detergents. - Case 91/79. *European Court reports 1980 Page 01099;* Judgment of the Court of 18 March 1980. - Commission of the European Communities v Italian Republic. - Maximum sulphur content of liquid fuels. - Case 92/79. *European Court reports 1980*, Page 01115.

principle of equality is tightly connected to the objectives of the European Union, a component of its content- equality between men and women- being one of them.

From the point of view of the jurisprudence, there are a few applications that deserve to be mentioned. It has been assessed that:

1) Maintaining some disparities in competition conditions, without involving a discrimination banned by the CECO Treaty is the necessary and inevitable condition of the partial character of the integration accomplished in this treaty[1];
2) Articles 4b and 65 in the CECO Treaty, each for its domain of application regulate different aspects of economic life but do not exclude or annul each other on the contrary, help in accomplishing the objectives of the Community, being complementary from this point of view;
   In some cases, their dispositions can cover facts justifying a concomitant and concurrent application or the mentioned articles[2];
3) The measures of the High Authority have to be considered in principle as discriminatory and, in consequence as banned by the CECO Treaty, those susceptible of considerably increasing the differences between the costs of production, except for the cases in which modification in production and if they determine sensitive disturbances in the competitive balance of the companies affected or, in other words, if they serve or lead to deforming competition in artificial and considerable manner[3];
4) The damage caused by discrimination can be considered to be a consequence that underlines discrimination, not being included in the definition of discrimination that entails in the first place that unequal conditions are provisioned for comparable situations[4];

This conclusion in the jurisprudence completed the content of the concept of discrimination underlining the fact that there can be prejudice not integrated in the concept but with the simple role as clue regarding a possible discrimination.

[1] Judgment of the Court of 23 April 1956. - Groupement des Industries Sidérurgiques Luxembourgeoises v High Authority of the European Coal and Steel Community. - Joined cases 7-54 and 9-54. *European Court reports French edition*, Page 00053.
[2] Judgment of the Court of 20 March 1957. - Mining undertakings of the Ruhr Basin being members of the Geitling selling agency for Ruhr coal, and the Geitling selling agency for Ruhr coal v High Authority of the European Coal and Steel Community. - Case 2-56. *European Court reports French edition*, Page 00009.
[3] Judgment of the Court of 10 May 1960. - Barbara Erzbergbau AG and others v High Authority of the European Coal and Steel Community. - Joined cases 3-58 to 18-58, 25-58 and 26-58. *European Court reports French edition*, Page 00369.
[4] Judgment of the Court of 17 July 1959. - Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community. - Joined cases 32/58 and 33/58. *European Court reports French edition*, Page 00275.

5) Regarding the content of the concept of discrimination in the community jurisprudence it has been stated[1] that the notion of comparability in the meaning of CECA Treaty is of objective order and under the risk (punishment) of making the interdiction of discrimination delusive, do not involve taking in consideration the subjective elements;
6) Regarding the protection of equality in accessing the sources of production and fighting against discriminatory practices[2] it has been assessed that disclosure of information regarding companies have to allow both freedom of access at the production sources of all users on the common market places in comparable conditions (article 3 of CECA Treaty) as well as the fight against discriminatory practices. There is therefore a link end between the principle of publicity and the one of non discrimination.

Also, the practice has concluded[3] that there can be obstacles in what concerns the free movement of products following the possible divergences between national legislations but these obstacles have to be accepted only as far as are recognized with the purpose of satisfying the mandatory requests regarding the efficiency of fiscal supervision, protection of public health, correctness of trading transactions and consumer's protection, meaning that *there has to be a general interest*. For example, in cause 120/78 the interdiction of access of alcoholic drinks with a minimum content of alcoholic on the German market was requested. The discrimination was considered as an obstacle to trading incompatible with article 30a28s CE while the treatment differences can be allowed in some cases, as the one in which the knowledge of national language is necessary for exerting some professions (Manolache, 2001, p. 30).

In cause 14/68 it has been stated that article 7 in the EEC Treaty, that bans every member state to differently apply their rights on nationality grounds of the interested does not refer to the possible differences of treatment and negative consequences that could follow for the people and companies subordinated to the Community jurisdiction, divergences existing between the legislations of different member states once they affect all the people falling under their application, according to objective criteria and without differentiation according to nationality. The same conclusion is seen in another cause[4] when it has been held that

[1] Judgment of the Court of 12 July 1962. - Acciaierie Ferriere e Fonderie di Modena v High Authority of the European Coal and Steel Community. - Case 16-61. *European Court reports French edition.* Page 00547.
[2] Cauza 27/84, Wirtschaftsvereinigung Eisen - und Stahlindustrie/Comission, hotărârea din 10 iulie 1985, Répertoire CECA.
[3] Cause 120/78, Rewe-Zentral AG against Bundesnonpolverwaltung für Branntwein, preliminary decision on February 20th, 1979, in Reports of cases before the Court of Justice, 1979, p. 649; Cause 14/68, Walt Wilhelm e.a/Bundeskartellant, judgment on February 13th,1969, Répertoire CEE/CE, Internet, quoted adress.
[4] Cause 1/78, Kenny decision on June, 28th, 1978, Répertoire CEE/CE, Internet, quoted adress.

forbidding every member state to apply their right, in the field of application of the treaty, on nationality grounds, articles 7 and 48 EEC do not refer to eventual differences of treatment that can result, depending on the state, from the divergences existent between national legislations, as long as they affect all the people falling under their incidence, being determined by objective criteria and without nationality difference.

Regarding the concept of discrimination, that, according to the principle of equality has to be avoided as much as possible, it has been stated that *it has to be sufficiently justified and not arbitrary* and the differences in situation, that are due to the natural phenomena that cannot be considered as being discriminatory in the meaning of the EC Treaty. Thus, in cause 52/79[1] the differences between the natural factors and the technical ones have been taken into considerations, regarding the television signals assuming that discrimination could be created through national rules that forbid television commercials through cable television from the foreign broadcasters due to the fact that their geographical situation allows them to broadcast their signals only in the natural reception area. It has been stated that discrimination "concerns only the differences in treatment that appear in the human activity and especially from the measures taken by public authorities, as discrimination. The Community has no obligation to take measures for eliminating the differences that represent the consequence if natural inequalities".

The materialization of the objectives for which the community space was designed and organised cannot be reached without *complying with the ban of discrimination on grounds of nationality*. The community jurisprudence in this matter is very rich.

In the first place, the difference between the *formal discrimination* and the *material discrimination* was made, indicating[2] that different treatment in different situations does not automatically lead to the existence of discrimination, an appearance of formal discrimination being able to correspond in fact to a lack of material discrimination. Also, the concept of *dissimulated discrimination* was taken into consideration, being asserted that the rule of equal treatment consecrated in the community law bans not only visible discriminations, based on nationality, but also any dissimulated form of discrimination that, by applying other criteria of differentiation, lead to the same result[3]. Regarding the *dissimulated discrimination*

[1] Judgment of the Court of 18 March 1980. - Procureur du Roi v Marc J.V.C. Debauve and others. - Reference for a preliminary ruling: Tribunal de première instance de Liège - Belgium. - Provision of services : Cable diffusion of television. - Case 52/79. *European Court reports 1980*, Page 00833.

[2] Judgment of the Court of 7 June 1966. - Société anonyme des laminoirs, hauts fourneaux, forges, fonderies et usines de la Providence and others v High Authority of the ECSC. Joined cases 29, 31, 36, 39 to 47, 50 and 51-63. *European Court reports French edition*, Page 00199.

[3] Judgment of the Court of 16 February 1978. - Commission of the European Communities v Ireland. - Sea fisheries. - Case 61/77. *European Court reports 1978*, Page 00417.

in other cause[1] it has been considered that article 7 in the EEC Treaty bans any discrimination on grounds of nationality in the domain of application of the treaty, including all the dissimulated forms of discrimination, that by applying other criteria of differentiation lead to the same result and that[2] the principle of equal treatment, whose particular expression is represented by articles 52 and 59 in CEE Treaty, bans all the dissimulated forms of discrimination that although result from the application of other criteria of differentiation, lead in fact at the same result. The interdiction of discrimination based on nationality in economic activities that have employment benefits character or remunerated service provision is extended to the category of employment or service provision without differentiation according to the exact nature of judicial connection in virtue of which these provisions are carried out.[3]

Regarding the *general- mandatory feature* of the rule of non discrimination in the community jurisprudence, it has been stated that this rule is applied to all judicial reports that can be localized within the Community, either in relation to the place they are established or in relation to the place they produce their effects[4]. Regarding the same cause, it has been asserted that the interdiction grounded on nationality does not refer to the structure of sport teams, in particular in national teams as the composition of the team being an issue specific to sports, this case being a particular one, the interdiction referring here to the economic activity. It has also been stated with the same occasion that the interdiction of discrimination is imposed not only regarding the action of public authorities but is equally extended to regulations of different nature, whose objective is to collectively regulate labour and service provision.

[1] Judgment of the Court of 29 October 1980. - Boussac Saint-Frères SA v Brigitte Gerstenmeier. - Reference for a preliminary ruling: Amtsgericht Berlin-Schöneberg - Germany. - Free movement of capital. - Case 22/80. *European Court reports 1980*, Page 03427.

[2] Judgment of the Court of 5 December 1989. - Commission of the European Communities v Italian Republic. - Failure of a Member State to fulfil its obligations - Public supply contracts in the data-processing sector - Undertakings partly or wholly in public ownership - National legislatrion not in compliance with obligations under Community law. - Case C-3/88. *European Court reports 1989*, Page 04035.

[3] Judgment of the Court of 12 December 1974. - B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo. - Reference for a preliminary ruling: Arrondissementsrechtbank Utrecht - Netherlands. - Case 36-74. *European Court reports 1974*, Page 01405.

[4] Judgment of the Court of 12 December 1974. - B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo. - Reference for a preliminary ruling: Arrondissementsrechtbank Utrecht - Netherlands. - Case 36-74. *European Court reports 1974*, Page 01405.

Later[1] in the matter of exceptions, another assessment was made. It has been concluded that is incompatible with articles 7 and, where necessary, 48 to 51 or 59 to 66 of CEE Treaty any regulation or national practice, even enacted by a sports organization that entitle the right to participate at football games only for the citizens of the member state (that was granted the right to participate) as professional or semi professionals players, at least as a regulation or practice that exclude foreign players from participating to these games is not involved, on economic grounds, depending on the specific character and frame of these games and concerning the sport itself. The task of qualifying the activity submitted to appreciation belongs to the judge, in taking into consideration articles 7, 48 and 59 EEC with an imperative character, in view of appreciating the validity and effects of dispositions inserted in the regulation of a sport organization.

In what concerns the *treatment equality as notion*, the practice contributed to the content of this concept by stating that[2] the general principle of equality and consequently, the ban of discrimination based on nationality grounds is nothing but a specific expression, is one of the fundamental principles of community law. This principle has the role of leading to the accomplishment of the objective that comparable situations are not treated differently at least as long as a differentiation based on objective reasons is not justified.

In the community jurisprudence it has been held[3] that the application, by a member state, of dispositions according to the community law, more rigorously than the ones applied in the same domain by other member states is not contrary to the principle of non discrimination consecrated in article 7 of EEC Treaty, as long as it is made equally towards any person falling under the jurisdiction of that state.

4. Conclusions

Analyzing the content of the concept of non discrimination, correlated to the principle of equality and the positive discrimination, our conclusion is that this wording is unacceptable and it is indicated to use the expression “counter discrimination” as this expresses more correctly and rigorously the objectives for

[1] Judgment of the Court of 14 July 1976. - Gaetano Donà v Mario Mantero. - Reference for a preliminary ruling: Giudice conciliatore di Rovigo - Italy. - Case 13-76. *European Court reports 1976*, Page 01333.

[2] Judgment of the Court of 8 October 1980. - Peter Überschär v Bundesversicherungsanstalt für Angestellte. - Reference for a preliminary ruling: Bundessozialgericht - Germany. - German voluntary insurance. - Case 810/79. *European Court reports 1980*, Page 02747.

[3] Judgment of the Court of 3 July 1979. - Criminal proceedings against J. van Dam en Zonen and others. - References for a preliminary ruling: Economische Politierechter, Arrondissementsrechtbank Rotterdam - Netherlands. - Biological resources of the sea. - Joined cases 185/78 to 204/78. *European Court reports 1979*, Page 02345

which the social practice names positive discrimination was created, which is eliminating the negative elements of some discriminations of wide spread and preventing discrimination of bigger proportions. Also, this expression does not enter in contradiction with the judicial norms consecrating the principle of equality and non discrimination but comes in completing them.

The analysis of the jurisprudence of the Court of Justice of the European Union results in the fact that it reflects the dynamic character of this pattern of social organization multi state because these regulation always fall behind the social relations and the judges of the Court frequently had to fulfil the role of researcher in community law and national law of each member state, the judgments contributing to filling the regulation gaps or clarifying the content of certain regulations.

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