Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*

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1. Introduction

The Race Equality Directive (RED)[1] has now been in force for 15 years, but the European Court of Justice (ECJ) has only received four preliminary reference requests from national courts. This number is strikingly low, especially compared to the numerous cases which have reached the court regarding other discrimination grounds[2] protected under Framework Employment Directive (FED),[3] passed only few months after the RED. Whilst in the first of these cases, *Firma Feryn*,[4] the ECJ had to consider how the concept of 'direct discrimination' ought to be interpreted, in the two following cases it did not have to rule on the RED substantive provisions: in *Meister*[5] the preliminary reference only concerned the procedural provisions, and in *Belov*[6] a preliminary reference concerning Roma discrimination was rejected on admissibility grounds. In this fourth preliminary reference on the RED, *Chez*,[7] the ECJ has only ruled on the interpretation of the substantive provisions of the RED for second time.

This judgment is also significant for some other reasons. Although the Roma are the largest ethnic minority in the EU, this is the first time that the ECJ considers the discrimination suffered by this group on the substance. Furthermore, the impact of this judgment may go well beyond the boundaries of ethnic discrimination because it clarifies the distinction between direct and indirect discrimination and it extends the concept of discrimination by association beyond its (apparent) initial confines, established in *Coleman*.[8]

For ECJ standards, the judgment is fairly long. Due to space constraints, this contribution will only focus on the issues that bring new developments to EU equality law and that can have more significance in shaping this area of law in the future. Thus, from the ten questions that the national court referred to the ECJ, this piece considers the clarification of the concept of 'ethnic origin', the distinction direct and indirect discrimination, the extension of the concept of discrimination by association, and the collective dimension of the claim in the context of the EU approach to address the discrimination suffered by the Roma community.

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[1] Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

[2] Especially on age discrimination (eg Cases C-416/13, *Vital Pérez v Ayuntamiento de Oviedo,* ECLI:EU:C:2014:2371; C-447/09, *Prigge v Deutsche Lufthansa* AG, ECLI:EU:C:2011:573; C-555/07, *Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2010:21; C-411/05, *Palacios de la Villa v Cortefiel Servicios*, ECLI:EU:C:2007:604; C-144/04, *Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709) and disability discrimination (eg Cases C-354/13, *FOA v Kommunernes Landsforening*, ECLI:EU:C:2014:2463; C-476/11, *HK Danmark v Experian A/S*, ECLI:EU:C:2013:590; C-303/06, *Coleman v Attridge Law and Steve Law, ECLI:EU:C:2008:415*; C-13/05, *Chacón Navas v Eurest Colectividades*, ECLI:EU:C:2005:709).

[3] Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[4] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397.

[5] Case C-415/10, *Meister v Speech Design Carrier Systems GmbH*, ECLI:EU:C:2012:217.

[6] Case C-394/11, *Belov v CHEZ Elektro Balgaria AD*, ECLI:EU:C:2013:48.

[7] Case C-83-14, *CHEZ Razpredeleine Bulgaria AD v Komisia za zashtita ot discriminatsia*, ECLI:EU:C:2015:480.

[8] Case C-303/06, *Coleman*.

2. Background of the dispute

The claimant, Ms Nikolova, runs a food shop in 'Gizdova mahala', the largest Roma district of the Bulgarian town on Dupnitsa.[9] However, she is not of Roma origin herself, but rather of 'Bulgarian ethnic origin'.[10] In 1999 and 2000 the electricity provider, CHEZ Razpredelenie Bulgaria AD (hereinafter, 'CHEZ') supplied electricity meters for consumers in that district, but instead of placing them at the usual height of 1.70 meters, they attached them at the power poles of the overhead electricity network, at a height of six to seven meters.[11] CHEZ *only* implemented that practice in districts with predominant numbers of Roma population, and argued that it was meant to prevent – the allegedly frequent– manipulation of meters and illegal connections to the network.[12]

In 2008 Ms Nikolova lodged a complaint before the Bulgarian Commission for Protection against Discrimination (*Komisia za zashtita ot discriminatisa*, hereinafter, 'KZD') because this practice made it almost impossible for her to check her energy consumption. She argued that it was a discriminatory practice because it was only implemented in 'Roma districts'. The KZD established that the practice amounted to *indirect* nationality discrimination, but after an appeal to the Supreme Administrative Court the matter was referred back to the KZD to reconsider whether 'nationality' was the right discrimination ground. This time the KZD ruled that the practice amounted to *direct* discrimination on grounds of Ms Nikolova's 'personal situation'. Yet, following an appeal from CHEZ, the Administrative Court of Sofia sustained that the relevant discrimination ground was 'ethnic origin' because the practice at stake was triggered by 'the common Roma "ethnic origin" of most of the inhabitants of the "Gizdova mahala" district'.[13]

The Administrative Court of Sofia (ie the referring court) referred to the ECJ ten questions that the latter summarized in five, namely:

1. Whether the expression 'ethnic origin' covered 'a compact group of Bulgarian citizens of Roma origin' like those living in 'Roma districts'.

2. Whether a national provision defining 'unfavourable treatment' as 'any act, action or omission which directly or indirectly prejudices rights or legitimate interests' is compatible with the RED.

3. Within the concept of 'direct discrimination', whether citizens living in 'Roma districts' and 'non-Roma districts' are in comparable situations, and in that case, if the practice at stake constitutes less favourable treatment of Roma population.

4. Within the concept of 'indirect discrimination', how should the expressions 'apparently neutral practice' and 'put persons of a racial or ethnic origin at a particular disadvantage compared with other persons' in Article 2(2)(b) of the RED be interpreted, and whether the practice at stake could amount to indirect discrimination on grounds of ethnic origin.

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[9] ibid, paras 21, 31.
[10] ibid, para 49.
[11] ibid, para 22.
[12] Case C-83-14, *CHEZ*, Opinion of AG Kokott, ECLI:EU:C:2015:170, para 21.
[13] Case C-83-14, *CHEZ*, para 29.

5. If the practice amounts to indirect discrimination, whether it could be objectively justified by reason of 'ensuring the security of the electricity transmission network and the due recording of electricity consumption'.

3. Advocate General Kokott's Opinion

Advocate General (AG) Kokott gave a very detailed opinion, largely relying on her prior opinion in the *Belov* case.[14] After a preliminary analysis, where she concluded that both the contested practice and the situation of Ms Nikolova fell within the scope of the RED, her opinion focused on the discussion of the concepts of direct and indirect discrimination. The Administrative Court of Sofia seemed inclined to categorize the practice at stake as *direct* discrimination, whereas in *Belov* AG Kokott had suggested that it amounted to *indirect* discrimination.[15]

AG Kokott made a clear distinction between the two concepts, explaining that a measure is *directly* discriminatory when: a) it is 'ethnically motivated', or b) the measure is neutral on its face but it only affects persons bearing a protected characteristic.[16] In contrast, *indirect* discrimination arises when an ostensibly neutral provision, criterion or practice affects more adversely people bearing the protected characteristic (and the adverse effect does not need to be particularly serious).[17]

In applying these definitions to this case, Kokott argued that there were 'no specific indications […] to suggest that the contested practice was chosen *specifically on the basis of* the ethnic origin of the inhabitants of Gizdova mahala' or that it was 'inseparably linked to their ethnic origin', so it could not amount to the first type of direct discrimination.[18] Moreover, the case did not fall within the scope of the second type of direct discrimination either because the practice affects *everyone* who lives in the district, be their ethnic origin Roma or not.[19] In contrast, Kokott found that given that the practice was only implemented in Roma districts, it was 'evident' that Roma were put 'at a particular disadvantage' compared to people living outside the district because it rendered consumption monitoring 'excessively difficult' and it could also have a 'stigmatizing effect'.[20] Hence, it amounted to indirect discrimination.

Nevertheless, there was an additional hurdle to accept that the claimant's situation fell within the scope of indirect discrimination, namely, that she was not a Roma herself. AG Kokott overcome this obstacle relying on the concept of 'discrimination by association'. Whilst the ECJ had so far only applied that notion to direct disability discrimination,[21] Kokott argued that it could also apply to other grounds and to indirect discrimination. Regarding its application to ethnic discrimination, she emphasized that article 21 of the Charter of Fundamental Rights and the RED do not restrict their application to persons who are discriminated against on the basis of 'their *own*' ethnic origin.[22] Furthermore, the FED and the RED are both an expression of the general principle of equal treatment and they are 'substantively similar' in their definitions of discrimination.[23] Hence, if discrimination by association falls within the scope of the FED, as established in *Coleman*, it should also fall within the scope of the RED.

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[14] Opinion of AG Kokott in Case C-394/11, *Belov*, ECLI:EU:C:2012:585.
[15] ibid, para 99.
[16] Opinion of AG Kokott in Case C-83/14, *CHEZ*, ECLI:EU:C:2015:170 (hereinafter 'Opinion'), para 82.
[17] ibid, para 92-93.
[18] ibid, para 82.
[19] ibid, ara 85.
[20] ibid, paras 94-95.
[21] Case C-303/06, *Coleman*.
[22] Opinion, para 53.
[23] ibid, para 56.

Concerning the application of discrimination by association to cases of indirect discrimination, Kokott pointed that the latter concept, as defined in article 2(2)(b) of the RED, does not contain any 'structural features' suggesting that discrimination by association should be excluded from its scope.[24] In addition, Kokott relied on a normative argument: it would be unfair to accept that discrimination by association is prohibited for direct discrimination but it is not for indirect discrimination, and she illustrated this with an example which demonstrates that the effects of both types of discrimination may be very similar and the classification between direct or indirect discrimination may sometimes be just a matter of subtle differences in the way the policy is framed.[25] The example was based on a fictitious company providing nursery places for its employees as a social advantage. If only male employees were granted nursery places, that would amount to *direct* sex discrimination. In contrast, if only full-time time employees were entitled to nursery places, the policy would constitute *indirect* sex discrimination because part-time employees are more likely to be women. Kokott argues that, in both cases, the children of the relevant employees would suffer discrimination by association, so in practice, '[i]t makes no real difference, with regard to the children, that in the first case there is direct discrimination and in the second case 'merely' indirect discrimination'.[26]

Having established that the contested practice amounted to indirect discrimination by association, the AG finally considered whether it could be justified. Kokott accepted that the measure pursues a legitimate aim, namely, protecting consumers' health and preventing fraud, and that it can be seen as suitable to achieve that aim. However, what seemed more contentious was that that aim could not be achieved through less restrictive means. Kokott noted the existence of a ' "new type of electricity meter" with the possibility of automatic meter-reading' which 'signals attempts at tampering'.[27] In addition, the practice could have adverse effects on the Roma population due to its stigmatizing effects and the fact that it hinders customers' rights to monitor energy consumption.[28] Finally, Kokott also suggested that the contested practice could jeopardize the objectives of Directives 2006/32 and 2009/72,1 which emphasize the need to regularly inform consumers about their energy consumption. Against this background, whilst the AG did not reach a definitive conclusion, it would be certainly difficult to find that the practice was justified.

4. The Judgment

Unlike in *Firma Feryn*,[29] in this case the ECJ had to start by clarifying the interpretation of 'ethnic origin' to answer one of the questions of the national court. Relying on the case law of the European Court of Human Rights (ECtHR), the Court explained that the root of the concept of ethnicity is 'the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds',[30] and that the Roma can be considered an ethnic group. The problem in this case was that the claimant herself was not of Roma origin, although her shop was located in a 'Roma district'. However, the ECJ overcame this hurdle by arguing that neither the definition of direct discrimination nor that of indirect discrimination expressly require that the claimants possess the protected characteristic *themselves*.[31] Furthermore, the RED, as an expression of the principle of equal treatment, applies 'not to a particular *category* of person but by reference to the

[24] ibid, para 105.
[25] ibid, paras 106-108.
[26] ibid, para 107.
[27] ibid, para 128.
[28] ibid, paras 132-138.
[29] Case C-54/07, *Firma Feryn*.
[30] Case C-83/14, *CHEZ*, para 46.
[31] ibid, paras 53-54.

[protected] *grounds*',[32] which is further supported by the fact that recital 16 and article 3(1) establish that it applies to 'all' persons.

The ECJ continued by discussing whether the practice at stake could amount to direct discrimination. The Court began by pointing out that to establish a *prima facie* case of direct discrimination 'it is sufficient' that ethnic origin was the trigger factor for adopting the contested practice.[33] Whilst it is for national courts to assess whether the practice at hand amounts to direct discrimination, the ECJ gave some guidance as to the matters that ought to be taken into account, namely: a) that the practice developed by CHEZ was *only* implemented in 'Roma districts'; b) that CHEZ had argued in prior similar cases before the KZD that electricity meters were tampered 'mainly by Bulgarian nationals of Roma origin', which denotes that the practice is based on ethnic stereotypes; c) that CHEZ failed to produce evidence of the existence of unlawful connections; and d) that the practice has been applied indiscriminately for almost 25 years to anyone living in the affected districts, whether they had tampered the meters or not.[34] The Court also noted that any electricity consumer supplied by the same distributor within a urban area is in a 'comparable situation'[35] and that consumers in 'Roma districts' had been treated less favourably because the contested practice is 'offensive and stigmatizing' and it renders monitoring of consumption almost impossible.[36] Hence, the Court concluded that, if the national court finds that the measure at stake was introduced due to the ethnic origin of the residents of the concerned district, it would amount to direct discrimination.

The ECJ then considered whether the contested practice could also amount to indirect discrimination, in the event that the national court decides that it does not constitute direct discrimination. The Court began by clarifying three aspects of the definition of indirect discrimination. Firstly, it confirmed that 'apparently neutral practice' means 'ostensibly' neutral or 'at first glance',[37] or more simply put, that the practice is formulated 'by reference to other criteria not related to the protected characteristic'.[38] The Court continued by addressing the issue of whether, to establish indirect discrimination, it is necessary that the victim is treated less favourably *because of* the protected ground. The ECJ explained that when a difference in treatment is introduced *by reason of* the protected ground, it amounts to *direct* discrimination, not to *indirect* discrimination. Indeed, the RED's definition of *indirect* discrimination only requires that the measures have the *effect* of putting persons of a certain ethnic origin at disadvantage.[39] On this basis, a Bulgarian provision establishing that measures amounting to *indirect* discrimination had to be introduced *by reason of* the protected ground[40] was held to be contrary to EU law. Finally, the Court clarified that the concept of 'particular disadvantage' should be purportedly interpreted, and therefore, 'no particular degree of seriousness is required'.[41] In the light of this interpretation of the notion of indirect discrimination, the ECJ concluded that, if the referring court considers that the contested practice does not amount to direct discrimination, it can be deemed to constitute indirect discrimination.[42]

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[32] ibid, paras 56 (emphasis added).
[33] ibid, para 76.
[34] ibid, paras 81-84.
[35] ibid, para 89.
[36] ibid, para 87.
[37] ibid, paras 93.
[38] ibid, para 94.
[39] Art 2(2)(a) RED.
[40] Art 4(3) of the Law on protection against discrimination (Zkon za zashtita ot diskriminatsia, hereinafter 'ZZD').
[41] Case C-83/14, *CHEZ*, para 103.
[42] ibid, paras 105-108.

In a final stage, the Court reflected on whether, assuming that the national court finds that the measure is indirectly discriminatory, it could be objectively justified. The Court started by recognizing that preventing fraud and protecting consumers are legitimate aims, but noting at the same time that the contested practice was introduced 25 years ago, so, to rely on those aims, CHEZ ought to prove that 'a major risk' of tampering still exists nowadays.[43] If that were the case, the Court found the measure appropriate to attain those objectives but it was rather skeptical about its necessity. Whilst it is for the national court to establish whether there are less restrictive means to achieve the above-mentioned purposes, the ECJ stressed that other electricity providers are now relying on alternative techniques to prevent tampering, which allow placing the meters at a normal height.[44] The Court also emphasized that the contested practice was disproportionate due to, *inter alia*, its 'offensive and stigmatizing effect' and its 'binding, widespread and long-standing nature'.[45] Finally, whereas in other instances the ECJ leaves the national court a wide margin of appreciation, in this case, the ECJ concluded that 'it necessarily follows from the taking into account of all the foregoing criteria that the practice at issue *cannot* be justified'.[46]

5. Analysis

This judgment is remarkable for several reasons. Firstly, it clarifies the meaning of 'ethnic origin', which had not been defined in the RED. Secondly, the Court helpfully explained some aspects of the definitions of direct and indirect discrimination, and more importantly, the difference between the two. Thirdly, it establishes that the concept of discrimination by association does not only extend to direct discrimination and disability, but also to indirect discrimination and other protected grounds. And finally, the factual background of the judgment demonstrates that whilst the case arose out of an *individual* discrimination claim, the nature of the discriminatory practice at stake is actually *collective*, ie it concerns all the inhabitants of the affected 'Roma districts'. Each of these issues is addressed in turn in the next sections.

5.1. The concept of 'ethnic origin'

During the negotiation of the RED, the use of the terms 'race' or 'racial origin' was controversial because some MS considered that it amounted to impliedly accept racist theories.[47] In this context, introducing a definition of 'racial or ethnic origin' in the text of the Directive was avoided altogether, probably because it would have been too difficult to reach an agreement on its exact wording. Interestingly, in *Firma Feryn*,[48] the Court did not explicitly define the expression 'racial or ethnic origin', but it seemingly took a broad approach to its interpretation. Even though the RED excludes nationality discrimination from its scope,[49] the ECJ accepted that the RED could be applied to a discriminatory statement which related to the *nationality* (Moroccan)[50] of potential employees, without

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[43] ibid, paras 113-116.
[44] ibid, para 121.
[45] ibid, paras 124-125.
[46] ibid, para 127 (emphasis added).
[47] To solve this problem, recital 6 was introduced; see Tyson, "The Negotiation of the European Community Directive on Racial Discrimination" 3 European Journal of Migration and Law (2001), 199, at 201-202.
[48] Case C-54/07, *Firma Feryn*.
[49] Recital 13 states that the 'prohibition of discrimination should also apply to nationals of third countries, *but does not cover differences of treatment based on nationality* and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation'. Similarly, article 3(2) establishes that '[t]his Directive *does not cover difference of treatment based on nationality* and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned'.
[50] Opinion of AG Poiares Maduro in Case C-54/07, *Firma Feryn*, ECLI:EU:C:2008:155, para 3.

even considering that it could fall outside the scope of the Directive. In contrast, in *Kamberaj*, the ECJ held that the RED was not applicable to a third-country national who, despite being a long-term resident, had his request for a housing benefit rejected on the ground that he was *not a national* from that MS.[51] However, the present case has clarified that 'ethnicity' should be understood as referring to 'societal groups marked in particular by *common nationality*, religious faith, language, cultural and traditional origins and backgrounds'.[52] Whilst the concept of 'nationality' is not exactly the same as the notion of 'national origin' of an ethnic community, it is clear that there is some overlap between both ideas.[53] So how can these three cases be reconciled? The reference to the Moroccan nationality of applicants in *Firma Feryn* could be understood as an allusion to their country of birth or 'ethnic background', that is, to stress their immigrant or cultural origin, but not necessarily their citizenship or legal status as foreigners.[54] Conversely, in *Kamberaj* the differential treatment was purely based on legal nationality or citizenship. Therefore, the definition of ethnicity in *CHEZ* seems to be in line with *Firma Feryn*, as it acknowledges that nationality understood as 'national origin' linked to ethnic origin falls within the scope of the RED. At the same time, *CHEZ* does not overrule *Kamberaj*, as the definition of 'ethnicity' could hardly be read as referring to legal nationality or citizenship, especially as regards immigration, border control, and national provisions conferring different rights to non-EU citizens according to their 'legal status'.[55]

Another interesting element of this definition of 'ethnicity' is the reference to the 'religious faith' of the purported ethnic group. This reference does not come as a surprise as it is based on case law of the ECtHR,[56] which indeed highlights the overlap between the concepts of 'ethnicity' and 'religion'.[57] Since the EU Charter of Fundamental Rights acquired a binding status in 2009, the ECJ has tended to refer to the Charter instead of referring to the European Convention of Human Rights (ECHR) and has increasingly avoided drawing from the ECtHR case law to interpret the Charter.[58] This can be read as an attempt to preserve the EU's autonomy as regards the interpretation of the Charter.[59] However, *CHEZ* may suggest that the ECJ is still willing to refer to the ECtHR case law to interpret both secondary legislation (ie the RED) and the Charter (ie article 21) in areas where there is settled ECtHR jurisprudence and departing from it would create anomalous disparities between the approaches of the two courts. On the other hand, the fact that *CHEZ* acknowledges the link between ethnicity and religion increases legal certainty and it opens the door for applying the RED to religious groups which are also ethnic groups, such as Sikhs and Jews, in situations covered by the RED but excluded from FED, ie in education or in the access to goods and services.

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[51] Case C-571/10, *Kamberaj v IPES*, ECLI:EU:C:2012:233.
[52] Case C-83-14, *CHEZ*, para 46.
[53] Gerards, "Discrimination Grounds" in Schiek, Waddington and Bell (Eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart, 2007) pp. 56-57, 64-65.
[54] See AG Opinion in Case C-54/07, *Firma Feryn*, op. cit. *supra* note 50, para 4.
[55] Art 3(2) RED.
[56] ECtHR, *Nachova v Bulgaria*, Appl. Nos. 43577/98 and 43579/98, judgment of 6 July 2005; ECtHR, *Sejdić and Finci v Bosnia Herzegovina*, Appl. Nos. 27996/06 and 34836/06, judgment of 22 December 2009, para 43. See also ECtHR, *Timishev v Russia*, Appl. Nos. 55762/00 and 55974/00, judgment of13 December 2005, para 55.
[57] Other international bodies have also included a reference to a religious element in the definition of 'ethnicity' or 'ethnic origin', such as the European Commission against Racism and Intolerance, ECRI General Policy Recommendation No 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, CRI (2003) 8.
[58] De Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Right Adjudicator?" 20 Maastricht Journal of European and Comparative Law (2013), 168, at 174-176.
[59] ibid 172.

5.2. Direct or indirect discrimination?

The ECJ's judgment in *CHEZ* stresses several times the key difference between direct and indirect discrimination. Whereas the former is deemed to occur when someone is treated less favourably *because of* the protected characteristic, for a finding of indirect discrimination it is enough that the contested practice has the *effect* of putting the relevant persons at disadvantage. Whilst this may seem obvious to discrimination scholars,[60] it is helpful that the Court has highlighted this difference because the notion of indirect discrimination is not always easy to grasp for national legislatures and courts. Indeed, the Commission recently noted that '[t]he concept of indirect discrimination is complex and many Member States had initial difficulties in transposing it correctly. It is now enshrined in law, but its application in practice remains a challenge.'[61] In the present case, the Court found that article 4(3) of the ZZD was contrary to EU law because it required that indirect discrimination was 'on the basis of' one of the protected characteristics, which was interpreted as requiring a causal link between the contested practice and the protected ground. However, Bulgaria is not the only MS having transposed incorrectly the concept of indirect discrimination. In Romania, the relevant provision also requires that disadvantage is 'on grounds of' one of the protected characteristics,[62] and in the UK a recent ruling of the Court of Appeal established that the claimants have to prove the 'reason why' they have been disadvantaged on the basis of the protected ground.[63] In this context, the Courts' clarifications in *CHEZ* may contribute to bring national legislation and case law more in line with the EU concept of indirect discrimination.

On the other hand, *CHEZ* also shows that the distinction between direct and indirect discrimination is not always evident. Whilst the referring court seemed to believe that the contested practice amounted to *direct* discrimination, AG Kokott argued that it constituted *indirect* discrimination.[64] Indeed, there might be cases where a given practice could be considered to amount to direct discrimination because it was adopted *on grounds of* the protected characteristic and, at the same time, it could be indirectly discriminatory because it has the *effect* of putting persons bearing the protected grounds at disadvantage. As the Court advocated in *CHEZ*, in those situations the finding of direct discrimination should be preferred[65] but there must be *enough evidence* to demonstrate that discrimination was *due to* the protected ground. Hence, in these situations establishing direct or indirect discrimination will essentially be a matter or proof.

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[60] See eg Ambrus, Busstra and Henrard, "The Racial Equality Directive and Effective Protection against Discrimination: Mismatches between the Substantive law and its Application" 3 Erasmus Law Review (2010), 165.

[61] Commission (EU), Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation COM/2014/02 final, at 4.1.

[62] Art 2(3) of Romanian Law 324/2006 for the amendment of the Government Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, as translated in Iordache, *Romania Country Report on measures to combat discrimination. Directives 2000/43/EC and 2000/78/EC* (Migration Policy Group, 2014) 37.

[63] *Essop v Home Office* [2015] EWCA Civ 609; [2015] ICR 1063 [57]-[58]. In Denmark and Slovenia the concept of indirect discrimination is also narrower than under EU law, see Chopin and Germaine-Sahl, *Developing Anti-Discrimination Law in Europe. The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Publication Office of the European Union, 2013) p. 47.

[64] As in her Opinion in Case C-394/11, *Below*.

[65] The reason being that the measure at stake would not be neutral, as indirect discrimination requires, and therefore, it should not be possible to justify it, see further Ambrus, Busstra and Henrard, op.cit. *supra* note 60, 172.

But what is *enough* evidence to establish direct discrimination? In *CHEZ*, AG Kokott seemed to place a high threshold on the claimant to shift the burden of proof to the respondent:

> it would appear that there is not sufficient evidence of direct discrimination in the present case. The mere fact that the contested practice occurs *de facto* only in districts inhabited predominantly by Roma […] is not sufficient, in my view, for a reversal of the burden of proof.[66]

In contrast, the ECJ's assertion that:

> [i]n various cases that were brought before the KZD, [CHEZ] asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals *of Roma origin*. Such assertions could in fact suggest that the practice at issue *is based on* ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds[67]

arguably denotes that a lower level of evidence is required to shift the *onus probandi* to the respondent. *CHEZ* did not overtly recognize that the contested practice was *only* introduced in 'Roma districts' *because* persons of Roma origin were considered to be the ones who tampered electricity meters, but the ECJ impliedly acknowledges that there was enough evidence to believe that that was the *reason why* that measure was only implemented in 'Roma districts'.[68] Nevertheless, the ECJ did not take a definitive position on the type of discrimination which was at stake because –it argued– it is for the national court to assess whether there is 'sufficient evidence' for a finding of direct discrimination.[69]

Overall, in *CHEZ*, the ECJ has addressed some earlier criticisms that it should provide more substantive guidance on what constitutes direct and indirect discrimination.[70] However, the Court was reluctant to confirm that the contested practice amounted to direct discrimination on the facts, although there was probably enough evidence to conclude that it was motivated by racial bias. The ECJ may have adopted this cautious approach to avoid being criticized for overstepping the powers of national courts. However, considering the practical difficulties that claimants tend to encounter to shift the burden of proof to the respondent at national level,[71] the ECJ may have missed a unique opportunity to provide a more explicit guidance to national courts as to the amount of evidence that suffices to establish a *prima facie* case of direct discrimination, or in other words, to shift the burden of proof to respondent.

5.3. The scope of discrimination by association

As it is known, at EU level, the concept of discrimination by association was first recognized in *Coleman*,[72] a case where a mother was directly discriminated against, not on account of her *own* personal characteristics, but because she was the primary carer of her disabled child. Given that *Coleman* concerned direct disability discrimination by association, some commentators expressed doubts on whether, under EU law, discrimination by association was prohibited 'in all situations, on all grounds, and for all forms of discrimination'.[73] Indeed, the ruling in *Coleman* could be read narrowly to interpret that discrimination by association only applies when there is a close connection between the victim of discrimination and the person who bears the protected characteristic, as it was the case

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[66] Opinion, para 87.
[67] Case C-83/14, *CHEZ*, para 82 (emphasis added).
[68] ibid, para 78. In this regard, the ECJ also recalled that 'a refusal of disclosure by the respondent' should not compromise the attainment of the objectives of the RED (see Case-415/10, *Meister,* paras 36, 40).
[69] Case C-83/14, *CHEZ*, para 80.
[70] Möschel, "Race discrimination and access to the European Court of Justice: Belov" (2013) 50 CMLRev 1433, at 1447.
[71] See eg Farkas and Farrell, *Reversing the burden of proof: Practical dilemmas at the European and national level* (Publications Office of the European Union, 2015) pp. 73-80.
[72] Case C-303/06, *Coleman*.
[73] Waddington, *"Case C-303/06, S Coleman and Attridge and Steve Law"* 46 CMLRev (2009), 665, at 672.

in *Coleman*.[74] Furthermore, according to Waddington, the judgment in *Grant*[75] could suggest that discrimination by association does not apply to other protected grounds.[76] The case concerned a homosexual employee who was denied a travel concession for her same sex partner, whereas unmarried heterosexual employees were granted such allowance for their partners. Although the case predates *Coleman* and the FED, Waddington argues that the claimant could have been considered to be a victim of direct discrimination by association on the ground of the sex of her partner, but the fact the ECJ did not take this approach could indicate that the concept does not apply to sex discrimination.[77] The purpose of this section is to analyse whether *CHEZ* has dispelled the above mentioned doubts and whether it has extended the concept of discrimination by association beyond the boundaries of *Coleman*.

Regarding the differences between the factual situation in *CHEZ* and *Coleman*, ie the fact that in the present case the applicant did not have a personal relationship with someone possessing the protected characteristic, the ECJ completely ignored that difference and directly applied the concept of discrimination by association to Ms Nikolova. In contrast, AG Kokott addressed the issue, arguing that a 'close personal relationship' with someone bearing the protected characteristic is not strictly necessary to fall within the scope of discrimination by association.[78] According to Kokott, measures which, due to their 'wholesale and collective character', affect people not bearing the protected characteristic as a 'collateral damage' can also amount to discrimination by association.[79] Hence, whether directly or indirectly, both the AG and the ECJ accepted to extend the concept of discrimination by association to this situation. Interestingly, though, the conduct in *CHEZ* seems closer to the concept of 'discrimination by perception', which affects those who are *perceived* to belong to a particular group,[80] than to a narrowly defined concept of discrimination by association. Thus, whilst some academics[81] and jurisdictions[82] distinguish discrimination by perception from discrimination by association, *CHEZ* suggests that the EU concept of discrimination by association *includes* discrimination by perception.

Concerning the application of discrimination by association to discrimination grounds other than disability, the ECJ's reasoning in *Coleman* already insinuated that it could also be applied to the other grounds protected under the FED. Indeed, the Court argued that '[t]he principle of equal treatment enshrined in the directive in [the area of employment and occupation] applies not to a particular category of person but by reference to the *grounds mentioned in Article 1*'.[83] As AG Kokott noted in her opinion in *CHEZ*, the RED and the FED are 'substantively similar',[84] so relying on *Coleman* it seemed already possible to assume that the concept of discrimination by association came within the scope of the RED by analogy. In this regard, *CHEZ* has simply explicitly confirmed this.

Hence, what is a true novelty in the *CHEZ* judgment is the ECJ's ruling that discrimination by association can be found to exist not only in the context of *direct* discrimination, but also in that of

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[74] ibid.
[75] Case C-249/96, *Grant v South-West Trains*, ECLI:EU:C:1998:63.
[76] Waddington, op.cit. *supra* note 73, 673.
[77] ibid.
[78] Opinion, paras 57-58.
[79] ibid, paras 58-60.
[80] *Timishev*, op.cit. *supra* note 80, para 54. In this case, Ms Nikolova was *perceived* to be a Roma because her shop is located in a 'Roma district'.
[81] Gerards, op.cit. *supra* note 53, 163-170.
[82] In Ireland, a conduct can be held to be discriminatory both when a person is treated less favourable on the basis of a protected ground being '*imputed* to the person concerned' and when 'a person who is *associated* with another person is treated, by virtue of that association, less favourably', Employment Equality Act 1998-2015, ss 6(1)(a)(iv) and 6(1)(b)(i) and Equal Status Act 2000-2015, ss 3(1)(a)(iv) and 3(1)(b)(i).
[83] Case C-303/06, *Coleman*, para 38.
[84] Opinion, para 56.

indirect discrimination. Nevertheless, the Court had difficulties in coming to that conclusion relying only on a textual interpretation. It noted first that although most language versions of the RED define direct discrimination as being treated less favourably '*on grounds of* racial or ethnic origin', few language versions refer to the treatment suffered by a person 'because of "his" racial or ethnic origin'.[85] However, the definition of direct discrimination in the RED and the FED is identical, and this was not found to be a problem in *Coleman*. Admittedly, then, the real hurdle was the definition of indirect discrimination,[86] which refers to putting at disadvantage 'persons *of a* racial or ethnic origin'. As opposed to the impersonal expression 'on grounds of' found in the direct discrimination definition, the wording of the indirect discrimination definition seems to require that the victim *herself* bears the protected characteristic. Therefore, the Court had to rely on a purposive interpretation of the principle of equal treatment to overcome this limitation. It noted that the scope of the RED cannot be interpreted restrictively because it is deemed to apply to 'all persons'[87] and it is a 'specific expression' of the general 'principle of non-discrimination on grounds of race and ethnic origin enshrined in article 21 of the Charter'.[88] Relying on these arguments, the Court found that the concept of discrimination by association falls under the scope of the RED, even for indirect discrimination situations.

It is submitted that, despite the textual difficulties, the ECJ came to the right conclusion.[89] As its reasoning suggests, the principle of equal treatment, to which the RED gives expression, is based on the same logic whether it applies in the context of direct or indirect discrimination, namely, that persons should not be discriminated against '*on the grounds of* ethnic origin'.[90] As AG Kokott illustrated in her opinion with two examples[91] and the *CHEZ* case itself demonstrates, the difference between the concepts of direct and indirect discrimination may sometimes be drawn by a fine line. Under both forms of discrimination, the consequences suffered by the victims can be equally deplorable and will amount to a breach of the principle of equal treatment.[92] Therefore, it seems 'fair'[93] to conclude that discrimination by association should be outlawed both as regards direct and indirect discrimination.

5.4. The Roma community and the collective dimension of the claim

This case is also interesting because, like *Belov*, it brings attention to a discriminatory conduct that is not a one-off incident: it affects a whole group of people, ie all those who live in the so-called 'Roma districts'. As AG Kokott noted in her opinion:

> The case does ultimately stem from a complaint lodged by one individual; however, the centre of interest is the wholesale and collective character of measures which affect an entire community and are liable to stigmatize all the members of that community and their social environment.[94]

Indeed, it seems that the contested practice, which presumably affects a vast amount of persons, has been challenged by several individuals, including Mr Belov and Ms Nikolova, but it has nevertheless been in place for almost 25 years. This highlights, once more, that the individual and remedial

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[85] Case C-83/14, *CHEZ*, para 53.
[86] But cf with Opinion, para 105.
[87] Case C-83/14, *CHEZ*, para 57.
[88] ibid, para 58.
[89] See similarly Waddington, op. cit. *supra* note 73, 676.
[90] Case C-83/14, *CHEZ*, para 60.
[91] Opinion, paras 107-106.
[92] Although in indirect discrimination cases, if the respondent provides a valid objective justification, the conduct or practice will be lawful.
[93] Opinion, para 106.
[94] ibid, para 1.

enforcement model in which EU equality law is predominantly founded[95] has a limited potential to address systemic discrimination effectively.

In this regard, Dawson and Muir have argued that an effective enforcement of EU equality law requires not only *individual* vigilance, but also institutional and collective vigilance.[96] At EU level, *institutional* vigilance is partly achieved through infringement actions.[97] For example, in September 2014 the Commission initiated infringement proceedings against the Czech Republic on the basis that segregation of Roma children in special schools is a breach of EU equality law.[98] Whilst this practice was already found to be discriminatory by the ECtHR in 2007,[99] it seems that the EU infringement action may have prompted the Czech Republic to address the matter more thoroughly.[100]

In addition, in the last years the EU has developed several forms of *collective* vigilance that are mainly based on *non-judicial* mechanisms (eg providing financial support to vulnerable communities, monitoring their situation, raising awareness about discrimination and mainstreaming discrimination policies into other areas).[101] After the 2004 and 2007 accessions, whereby countries with large Roma communities joined the EU, these collective vigilance strategies have increasingly target the Roma. For instance, the June 2009 Council Conclusions adopted the Ten Basic Principles for Roma Inclusion,[102] which were followed by a Communication on the social and economic integration of the Roma in Europe,[103] and more recently, by the EU Framework for National Roma Integration[104] and the Recommendation on effective Roma integration measures.[105] The Framework established Roma integration goals in four areas (education, employment, healthcare and housing) and invited MS to develop National Roma Integration Strategies, which are monitored by the Commission.[106] Whilst these measures can be praised for seeking to address the exclusion and systemic discrimination suffered by Roma, they have been also criticized for over relying on 'new governance methods', like the Open Method of Coordination,[107] for not establishing quantifiable targets and not being

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[95] See eg McCrudden, "International and European Norms Regarding National Legal Remedies for Racial Inequality" in Fredman (Ed), *Discrimination and Human Rights. The Case of Racism* (OUP, 2001) 252, pp. 294-295.
[96] Dawson and Muir, "Individual, institutional and collective vigilance in protecting Roma in protecting fundamental rights in the EU: Lessons from the Roma", 48 CMLRev (2011), 751, at 754.
[97] Art 258 TFEU; ibid 757-765.
[98] Commission (EU), Infringement No 20142174, Non-conformity with Directive 2000/43/EC on Racial Equality - Discrimination of Roma children in education, formal notice issued on 25 September 2014. A similar action has also been initiated against Slovakia, see Infringement No 20142174, Non-conformity with Directive 2000/43/EC on Racial Equality - Discrimination of Roma children in education, formal notice issued on 29 April 2015.
[99] ECtHR, *D.H. v. the Czech Republic*, Appl. No. 57325/00, judgment of 13 November 2007.
[100] Amnesty International, *Must try harder. Ethnic discrimination of Romani children in Czech schools* (Amnesty International, 2015) at 8, 17-18.
[101] Dawson and Muir, op. cit. *supra* note 96, 766-772.
[102] Council (EU), Conclusions on the Inclusion of the Roma (Luxembourg, 8 June 2009).
[103] COM(2010)133 final.
[104] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, An EU Framework for National Roma Integration Strategies up to 2020, COM(2011) 173 final.
[105] Council (EU), Recommendation of 9 December 2013 on effective Roma integration measures in the Member States [2013] OJ C 378/1.
[106] See eg Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, National Roma Integration Strategies: a first step in the implementation of the EU Framework, COM/2012/0226 final.
[107] Dawson and Muir, op. cit. *supra* note 96, 769-770.

comprehensive,[108] and for not putting more emphasis on desegregation.[109] In this regard, the claims in *Belov* and *CHEZ* provide anecdotal evidence on the need to address housing segregation more effectively to avoid the stigmatization of the Roma community and the emergence of collective discrimination. Indeed, in both cases, the contested practice was *only* implemented in 'Roma districts' on the basis of ethnic prejudices, ie the presumption that 'unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin'.[110]

Despite these EU efforts to address Roma exclusion through *non-judicial* collective mechanisms, collective *judicial* vigilance strategies to address group discrimination remain underdeveloped. The RED only requires that *victims* ('all persons who consider themselves wronged by failure to apply the principle of equal treatment to them')[111] have access to judicial and/or administrative procedures. Although it also establishes that legal entities with a legitimate interest should be entitled to act 'on behalf *or* in support' of the complainant,[112] MS can comply with this provision by simply allowing legal entities to help and advise victims. Yet, as *Belov* and *CHEZ* demonstrate, *collective* vigilance mechanisms based on non-judicial strategies will not always be effective, and *individual* litigation is not entirely appropriate to address systemic discrimination based on prejudices against a whole *group*, although it may materialise in episodic discrimination events.

In view of addressing systemic discrimination against the Roma community, collective judicial mechanisms (broadly understood), such as allowing legal entities to represent victims, actions in the public interest (*actio popularis)*[113] or class actions,[114] seem a desirable 'companion' of individual litigation for several reasons. Firstly, considering that Roma are often not aware of discrimination legislation or are not acquainted with organisations that can help them report discrimination,[115] allowing interest organisations to initiate judicial proceedings without having to identify a victim can bring to the surface discriminatory policies and practices that would otherwise remain unreported. Indeed, it was only because this is possible in Belgium that the *Firma Feryn* case reached Belgium courts, and eventually, the ECJ.[116] Similarly, the European Roma Rights Centre has been successful in a number of *actio popularis* complaints[117] on housing discrimination against Roma and Travellers based on the European Social Charter.[118] These complaints were not founded on the discrimination suffered by a particular victim, but rather on the 'segregationist' nature of certain public policies and practices affecting a whole ethnic group. Had the European Social Charter not allowed *actio popularis*,

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[108] European Roma Policy Coalition, Public statement on the EC Communication reporting on the implementation of the EU Framework for NRIS; and on the EU Summit (4 April 2014) <http://enar-eu.org/ERPC-public-statement-on-the-EC> (last visited 25 Feb. 2016).
[109] Chopin, Do and Farkas, *Promoting the implementation of European Union equality and non-discrimination standards in the programming and implementation of structural funds with respect to Roma* (Migration Policy Group, 2013) pp. 47-48.
[110] Case C-83-14, *CHEZ*, para 82.
[111] Art. 7(1) RED.
[112] Art. 7(2) RED.
[113] See further Farkas, "Limited Enforcement Possibilities under European Anti-Discrimination Legislation – A Case Study of Procedural Novelties: *Actio Popularis* Action in Hungary" 3 Erasmus Law Review (2010), 181.
[114] See further Farkas, "Collective actions under European anti-discrimination law" [2014] European Anti-discrimination Law Review 25.
[115] FRA, *Discrimination against and living conditions of Roma women in 11 EU Member States* (Publications Office of the EU, 2014) pp. 37-39.
[116] Case C-54/07, *Firma Feryn*.
[117] This is possible on the basis of the Additional Protocol to the European Social Charter, Providing for a system of collective complaints, CETS No. 158 (9 November 1995), Art. 7(2).
[118] ECSR, *ERRC v Bulgaria*, Collective Complaint 31/2005; ECSR, *ERRC v Italy*, Collective Complaint 27/2004; ECSR, *ERRC v Greece*, Collective Complaint 15/2003; ECSR, *ERRC v France*, Collective Complaint No 51/2008; ECSR, *ERRC v Portugal*, Collective Complaint No 61/2010; ECSR, *ERRC v Ireland*, Collective Complaint No. 100/2013 (pending).

bringing these claims before the European Committee of Social Rights (ECSR) might not have been possible.

Secondly, even if there are identifiable victims, they are often deterred of reporting discrimination due to, *inter alia*, the social and financial costs involved,[119] but if the victim is represented by an interest organisation these problems can arguably be alleviated. On the one hand, the victim may feel less exposed and having the explicit support of an organisation may reduce the chances to suffer retaliation. On the other hand, the interest organisation may cover the costs of litigation, partially or totally.

Finally, the fact that several complainants' claims can be joined in a class action may contribute to prove the discriminatory nature of the conduct and shift the focus from its individual to its collective dimension. Arguably, this was one of the success factors in the *Ostrava* case,[120] where 18 Roma families who brought a joint claim[121] were successful in proving before the ECtHR that the Czech Republic practice to put Roma children in special schools was discriminatory. Whilst the ECHR does not allow class actions or *actio popularis*,[122] the ECtHR actually acknowledged the collective element of the claim by stating that national legislation 'had a disproportionately prejudicial effect *on the Roma community*' and it did not consider it necessary to examine the applicants' individual cases.[123]

On the whole, whilst the EU has developed individual, institutional and non-judicial collective strategies to address the exclusion suffered by Roma, there seems to be a divide between Roma integration *policies* and the *judicial* mechanisms to address discrimination on a collective basis, when integration policies fail. *Belov* and *CHEZ* are good examples of *individual* claimants trying to enforce their rights in a *collective* discrimination context, which perhaps, could have been better addressed through a collective claim.

6. Conclusion

CHEZ is a remarkable judgment, which arguably pushes the boundaries of EU equality law beyond its previous confines. Within the field of ethnic discrimination, its significance lies in providing a broad definition of ethnicity, which clarifies the scope of the RED and admittedly confirms that it can apply to *some* cases of nationality discrimination. Furthermore, it opens the door to enable some ethnic groups, like Sikhs and Jews, to rely on the RED in situations not covered by the FED.

The judgment also offers some explanations on the conceptual differences between direct and indirect discrimination, and the amount of evidence that is required to shift the burden of proof to the respondent in either case. In view of the confusion that the concept of indirect discrimination still creates at national level, the clarification that indirect discrimination *does not* require to show that the contested practice is motivated by the protected ground is particularly welcome. Nevertheless, the ECJ was not 'brave' enough to clearly state whether the policy at stake amounted to direct or indirect discrimination.

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[119] FRA, *The Racial Equality Directive. Application and Challenges* (Publications Office of the EU, 2011) pp. 38, 42.
[120] *D.H. v. the Czech Republic*, op. cit. *supra* note 99. In the field of education, see also ECtHR, *Sampanis v Greece,* Appl. No. 32526/05, judgment of 5 June 2008; ECtHR, *Oršuš v Croatia,* Appl. No. 15766/03, judgment of 16 March 2010; ECtHR, *Horváth and Kiss v Hungary,* Appl. No. 11146/11, judgment of 29 January 2013 and ECtHR, *Lavida v Greece,* Appl. No. 7973/10, judgment of 30 May 2013; and in the field of housing, see ECtHR, *Yordanova v Bulgaria*, Appl No. 25446/06, judgment of 24 April 2012; ECtHR, *Winterstein v France*, Appl No. 27013/07, judgment of 17 October 2013.
[121] With the support of the European Roma Rights Centre.
[122] Art 34 ECHR.
[123] ibid, para 209; see also *Oršuš v Croatia,* op. cit. *supra* note 120, paras 147-148.

However, the novelty that is probably more significant is the finding that discrimination by association falls within the scope of both the FED and the RED, and both for direct and indirect discrimination. As discussed earlier, this conclusion seems coherent with a purposive interpretation of the Directives, in the light of the principle of equal treatment to which they give expression. Considering that most MS' legislation does not expressly prohibit discrimination by association,[124] this ruling also provides a welcome guidance for national courts.

Finally, the relevance of *CHEZ* goes beyond the mere legal technicalities. In the last decade the EU has developed different legal and policy initiatives to address the long-lasting discrimination against the Roma.[125] Nevertheless, whilst in recent years an increasing number of cases concerning Roma discrimination have reached the ECtHR and the ECSR,[126] only two have reached the ECJ, and only *CHEZ* has been successful. This case is thus also welcome in terms of the EU wider strategy to fight discrimination against Roma, as a means for visibilizing their situation. However, *CHEZ* also raises questions as to how EU and national law could better facilitate the collective enforcement of Roma rights to equal treatment through judicial procedures.

[124] Chopin and Germaine-Sahl, *Developing Anti-Discrimination Law in Europe. The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Publication Office of the European Union, 2013) pp. 39-40.
[125] See eg Guy and Bedard (eds), *Improving the tools for the social inclusion and non-discrimination of Roma in the EU* (European Commission 2010); Dawson and Muir, op. cit. *supra* note 96, 751.
[126] eg op. cit. *supra* notes 118, 120.