EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/30 The religious ethos and differences of treatment in employment on grounds of belief (EU)

The author discusses the recent ECJ judgments in the cases Egenberger and IR on religious discrimination.

Introduction

Discrimination is the differentiation of individuals based on legally prohibited criteria. Differentiation of the legal situation of certain employees or people applying for employment, selected by public authorities or employing entities, is a violation of the principle of equal treatment in employment. However, the principle of equal treatment is not violated when access to employment is restricted by churches, religious associations and organisations whose ethics are based on religion, creed or belief. By law, the unlawfulness of discrimination in employment is excluded when the legal criteria for differentiating the employed persons – religion, creed or belief – constitute a real and decisive occupational requirement imposed on the employee by the employer: in this case a church, religious association or organisation pursuing religious or ideological goals. In excluding the unlawfulness of the employer's conduct in employment relations, the legislature used a construct of lawful exception, consisting in the exclusion of unlawfulness applied in criminal law provisions. In the labour law system, lawful exception means that the 'perpetrator' committing an act which meets the characteristics of statutory types of conduct prohibited by law in labour relations acts in accordance with the law. The lawful exception to the prohibition of discrimination was introduced in Article 4 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[1] Following the UN regulations: the Universal Declaration of Human Rights of 10 December 1948,[2] UN Convention of 18 December 1979 on the elimination of all forms of discrimination against women,[3] UN Covenant on Civil and Political Rights[4] and UN Covenant on Economic, Social and Cultural Rights[5] of 16 December 1966, ILO Convention no. 111 of 25 June 1956 concerning Discrimination in Respect of

Employment and Occupation,[6] Treaties of the Council of Europe – the European Social Charter of 18 October 1961,[7] the European Social Charter (Revised) of 3 May 1996[8] and the European Convention on Human Rights (ECHR) of 4 November 1950, amended by protocols no. 3, 5, 8, 11, 14 and 15 and supplemented by protocol no. 2,[9] Directive 2000/78 recognised the right of all persons to equality before the law and protection against discrimination as a universal human right.[10]

Taking the above statement as a starting point for deliberations on the appropriateness of introducing in Article 4 of Directive 2000/78 (occupational requirements) an exception to the obligation to observe the principle of equal treatment in employment and employment relationships of certain persons and agreement to treat them differently from other employees, it is necessary to consider the reasons why the general principle of equal treatment and prohibition of discrimination in employment and work does not apply in some cases mentioned in recital 23[11] to this Directive. According to Article 4, in very limited circumstances, a difference of treatment may be justified on grounds of religion or belief, disability, age or sexual orientation. The exemption from the general obligation of employers to treat all workers equally and at the same time allow the legal differentiation of certain categories of persons mentioned in recital 23, justifies a legal analysis of the situation in which religion and belief can be recognised by EU and State legislative institutions in Europe as lawful criteria for employers to make decisions on matters relating to the lawful establishment and termination of employment relationships.

Autonomy of churches and religious associations and the EU principle of equality in employment

One of the fundamental values of the European Union is respect for cultural, religious and linguistic diversity (Article 22 of the Charter of Fundamental Rights of the European Union of 30 March 2010 – 'Charter' or 'CFREU').[14] The provision clearly states that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional. The above statement applies not only to State structures, but also to regional and local self-government. The TEU confirms that the EU institutions respect the essential functions of the Member States, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Unequal treatment based on belief is treated in the case law of the ECJ not as an exception to the prohibition of discrimination but as a direct discrimination in employment prohibited by Article 4(1) of Directive 2000/78. The accuracy of this argument is confirmed by two judgments issued by the Grand Chamber of the Court of Justice in 2018 in *Vera Egenberger – v*

– *Evangeliches Werk für Diakonie Und Entwicklung eV*[15] and *IR – v – JQ*.[16] These are the only rulings of the ECJ issued in cases relating to the exception to the EU prohibition of discrimination in employment, in matters relating to the establishment and termination of employment relationships.[17] In response to the questions referred by the German Federal Labour Court (*Bundesarbeitsgericht*) regarding the interpretation of Article 4(2) of Directive 2000/78, the Court ruled in the *Egenberger* case that:

where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by a national court.

The judicial authorities, competent to adjudicate in labour law matters, should establish whether the criteria set out in Article 4(2) of Directive 2000/78 constituting grounds for excluding the unlawfulness of conduct of the church-employer, were satisfied.
The genuine, legitimate and justified occupational requirement referred to in Article 4(2) of Directive 2000/78 means – according to the ECJ – a requirement that is necessary and objectively dictated, having regard to the ethos of the church concerned or is an absolute necessity having regard to the nature of the occupational activity of the church and the context in which it is carried out. The condition for establishing an employment relationship, formulated by the church as a potential employer, cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church. The considerations enabling the court to decide on the existence of the exception must comply with the principle of proportionality. When the national court is unable to interpret Article 4(1) of Directive 2000/78 in a way that makes it possible to apply the exception to the prohibition of discrimination on grounds of religion in a specific case, the judicial authority is obliged to ensure, within its jurisdiction, the effective legal protection for persons seeking equal treatment in employment by religious institutions and their organisations deriving from Article 21 CFREU. In particular, the national court should not apply any provisions of national law which are contrary to the prohibition of discrimination.
In its ruling in *IR– v – JQ* the ECJ, responding to the questions of the German Federal Constitutional Court in a case concerning the legal interpretation of Article 4(2) second subparagraph of Directive 2000/78 and German labour law (the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz – AGG*)) establishing in Section 1 an exception to the prohibition of discrimination in employment permitting an institution run by a church to treat workers differently on grounds of religion held that:

a church which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees.

An employee dismissed from work due to a violation of these rules has the right to an effective judicial review of the legitimacy and legality of the factual basis for the dismissal. The difference of treatment by the employer, depending on the affiliation or lack of affiliation to a religious community, may be considered consistent with the provisions of the mentioned Directive, only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, religion is a genuine, legitimate and justified occupational requirement in the light of that ethos. In the opinion of the ECJ, the assessment of religion as a criterion for excluding the prohibition of discrimination in employment relations should also be consistent with the principle of proportionality. Similarly as in the *Egenberger* case, the ECJ– by reference to Article 21 of the Charter of Fundamental Rights – ruled that a national court is obliged to provide the wronged persons with legal protection which individuals derive from the general principle prohibiting discrimination on grounds of religion.

Grounds for deliberations on the legitimacy and justification of an exception to the prohibition of discrimination in employment

Egenberger case

The subject of the dispute in this case was the refusal to employ an applicant as a representative of an association being an auxiliary organisation of the Protestant Church in Germany (*Evangelische Kirche in Deutschland*), involved in charitable and ecclesiastical activities aimed at achieving public benefit goals. The basic duty of the employee during the period of fixed-term employment was to prepare a report on Germany's compliance with the United Nations International Convention of 21 December 1965 on the Elimination of All Forms of Racial Discrimination.[18] The applicant claimed that she had the required professional qualifications to perform the job, but she was not employed because she '*did not belong to any denomination*'. She was not a member of the Protestant Church in Germany. She did not meet the condition clearly stated by the employer in the employment offer:

We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany – Arbeitsgemeinschaft Christlicher Kirchen in Deutschland] and identification with the diaconal mission.

he recruiting institution requested from the person applying for employment an appropriate statement demonstrating their loyalty to the religious institution. The religious organisation

invoked the provisions of Section 9(1) of the AGG as the lawful formulation of the terms of employment. In its opinion, it is a legal norm permitting different treatment by religious communities, institutions affiliated to them or associations which devote themselves to the communal nurture of a religion, of people of other denominations, on grounds of religion or belief. A necessary condition for the application of the above-mentioned exception in accordance with German law is to show that the justified occupational requirement was established by a given religion with reference to the employer's entitlement to exercise the right of autonomy of churches, religious associations and religious institutions and their organisations. According to the grammatical interpretation of Section 9(2) of the AGG, the prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious societies and institutions affiliated to them mentioned in subparagraph 1 to be able to require their employees to act in good faith and loyalty in accordance with their self-perception towards their employer – the Protestant Church.

The Basic Code of the Protestant Church in Germany (*Grundordnung der Evangelischen Kirche in Deutschland*) of 13 July 1948, as last amended by church law (*Kirchengesetz*) of 12 November 2013, authorises the Council of the Protestant Church to formulate requirements that must be met by persons seeking to take up and pursue a professional activity for this religious institution. Employment in the church and related organisations pursuing the aim of the service of the church is defined by the mission to bear witness to the Gospel in word and deed. Only where other suitable workers cannot be found, in terms of faith, among members of the religious community, the applicable laws provide for the possibility to hire workers who belong to another denomination or who do not belong to any denomination, for tasks which are not to be regarded as proclamation [of the Gospel], pastoral care, instruction or direction. A necessary condition is that their whole conduct in service and outside service must correspond to the responsibility which they have accepted as workers in the service of another church.

The agreements concluded by the EU Member States with the Holy See (concordat), guaranteeing the autonomy of churches, religious associations and other religious communities in matters relating to the formation of legal relations established with church institutions on the one hand, and on the other hand, the obligation of presentation by the persons applying for employment in church institutions of a strict identification with religious identity, loyalty and duty to act for the good of the church belongs to legal regulations based on a legal mechanism characteristic of the exception to the prohibition of discrimination in employment formulated in EU and national laws.[19] By referring a question for a preliminary ruling about whether the church – as an employer – can independently determine whether the qualifications listed by the candidate constitute, due to the nature of the occupational activities or the context in which they are carried out, a genuine, legitimate and justified

occupational requirement, taking into account ethics and loyalty, the German Federal Labour Court sought to determine whether Article 4(2) of Directive 2000/78 must be interpreted as meaning that a church, religious association or other organisation whose ethos is based on religion or belief intending to recruit an employee may itself determine authoritatively the occupational activities for which religion decides that by reason of the nature of the activity concerned or the context in which it is carried out, the genuine, legitimate and justified occupational requirement has regard to the ethos of the church as the employer.[20] The Directive not only aims to take into account the right of autonomy of churches and other religious associations and public or private organisations whose ethos is based on religion or belief, but it also serves to ensure a fair balance between the right of autonomy of churches, on the one hand, and, on the other hand, the right of workers to equal treatment in employment and not to be discriminated against on grounds of religion or belief, in situations where those two different and yet related rights may clash. For this reason, Article 4(2) of Directive 2000/78 sets out the criteria which must be taken into account by all employers, primarily by church employers, when deciding whether to refuse employment on grounds of religion or belief. Compliance with these criteria ensures a fair balance between those competing fundamental rights of the parties that could be or remain in an employment relationship. Therefore, in the event of a dispute between the person applying for a job and a potential employer – a church or a religious association, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority – a national court. This means that Member States cannot exclude or limit the control of compliance with the exception to the prohibition of discrimination in employment in national laws and practices of their application.

IR case

n this case, the dispute was about the legality of terminating the employment relationship with the head of the internal medicine department by the director of a Catholic hospital supervised by the archbishop of the Catholic Church in Cologne. The only reason for dismissal was the fact that the employee entered into a second civil marriage after a divorce without his first marriage having been annulled. According to the claimant, the employment relationship would not have been terminated if the employee dismissed from work was not a Catholic or was employed by an employer not subordinate to the Catholic Church in Germany. According to German law, there is no State church in Germany. The State authorities guarantee freedom of association to form religious societies. Each religious society shall organise and administer its affairs independently within the limits of the law that applies to all persons. The provisions applied to religious societies apply accordingly to associations whose purpose is to foster a philosophical belief.[21] Basic principles of service in the church allow the church employer to

entrust management tasks in an ecclesiastical institution only to a person of Catholic denomination.[22] Catholic employees are expected to recognise and observe the principles of Catholic doctrinal and moral teaching. Employees performing managerial duties shall conduct themselves in a manner consistent with the principles of Catholic doctrinal and moral teaching (Article 4(1) GrO 1993 – "duty of loyalty"). Non-Catholic Christian employees shall be expected to respect the truths and values of the Gospel and to contribute to giving them effect within the Catholic institution by which they are employed (Article 4(2) GrO 1993). Article 5 GrO 1993 gives examples of breaches of the duty of loyalty, such as entering into a marriage that is invalid according to the Church's teachings and its legal system (Article 5(2) second subparagraph GrO 1993). According to the regulation at the time, such conduct by employees occupying managerial posts rules out any possibility of continued employment (Article 5(3) of GrO 1993).[23] According to Canon 1085(2) of the Code of Canon Law (*Codex Iuris Canonici – CIC*)[24] "*it is not (…) permitted to contract another [marriage] before the nullity or dissolution of the prior marriage is established legitimately and certainly*".
The claimant brought an action against that dismissal. In his view, the dismissal was an infringement of the principle of equal treatment because in the case of a doctor of the Protestant faith or of no faith, employed as a head of department of a Catholic hospital, remarriage would not have had any consequences for their employment relationship. The defendant hospital asserted that by entering into a marriage that is invalid under Canon law, the claimant clearly infringed his obligations under his employment relationship with the Catholic institution.
The Federal Constitutional Court, referring a question to the ECJ, held that churches and religious societies could impose a gradation of the loyalty requirements of employees towards their employer – church or religious society – according to position and religious denomination. Confirmation of the above view by the ECJ would make it possible to maintain the existing, stabilised legal order (status quo) in the legislative and judicial sphere. The German national court referred a question to the ECJ as to whether the second subparagraph of Article 4(2) of Directive 2000/78 must be interpreted as meaning that it allows the Catholic Church to require that its employees of the same faith in managerial roles, employed by the employer subordinated to that church, display good faith and loyalty greater than that required of employees who belong to another faith or to none at all. The above question, formulated in the request for a preliminary ruling, seeks to set criteria for the conduct of certain employees in good faith and loyalty to the canons of their faith.
According to the opinion of the Advocate General Melchior Wathelet, presented to the ECJ on 31 May 2018 in the case *IR*,[25] the national court should independently assess the moral norms of the workplace run by the Catholic employer. In particular, the German court must determine whether the practice of the hospital managed by the Catholic organisation falls

within the doctrine of the Catholic Church. This can be determined by comparing the scope and type of health services provided by a private Catholic hospital with services provided by public hospitals in Germany. That determination must address ethical questions in the healthcare sphere that have particular importance in the doctrine of the Catholic Church, and in particular those concerning abortion,[26] euthanasia[27] and contraception.[28] After examining the above circumstances, if it was established that the hospital managed by the Catholic Church does not perform the above-mentioned medical treatments, the defendant in the IR case might be classified as a private organisation the ethos of which is based on religion within the meaning of Article 4(2) of Directive 2000/78.[29]
The defendant and the German Government considered that Directive 2000/78 is referring to national law as the sole criterion for determining the legality of a requirement for good faith and loyalty required by churches, religious societies and religious organisations and requirements to comply with the norms of that law. According to the hospital and the German State authorities, the legal basis for the above interpretation of Article 4(2) second subparagraph of Directive 2000/78, is the grammatical interpretation of the legal provision. The Article provides that:

Provided that its [directive's] provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

o support that argument, they relied on the previously mentioned recital 24 of Directive 2000/78 and on Declaration No. 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Treaty of Amsterdam. The wording of the second subparagraph of Article 4(2) of Directive 2000/78 precludes that interpretation because it expressly makes the right of churches and religious organisations to require that their employees display good faith and loyalty conditional upon compliance with all the provisions of Directive 2000/78 ("provided that its provisions are otherwise complied with"). Properly applied the Directive does not violate the right of churches and religious associations, entitled to differentiate the situation of employees in institutions and religious organisations, to differentiate their legal situation and allow different treatment on the grounds of religion or belief, because such differentiation does not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.[30] In light of the exception to the prohibition of discrimination in employment on grounds of religion, the conclusion depends on the objectively verifiable

existence of a direct link between the occupational requirement imposed by the employer and the activity of the employee concerned. Such a link may follow either from the nature of the activity, from how it is carried out by a member of the church or the religious society or else from the circumstances in which the activity is to be carried out.[31] According to the opinion of Advocate General Melchior Wathelet, issued in the *IR* case, there is no link between the applicant's professional activity and the concept of marriage defined by the doctrine and Canon law of the Catholic Church, which includes respect for the religious form of marriage and the sacred and indissoluble nature of the bonds of matrimony. The requirements set out in Canon 1085 and 1108 of the Code of Canon Law, referring to a validly concluded marriage, are – in the opinion of the Advocate General

in no way linked to the occupational activities of the hospital, namely the provision of healthcare services and patient care.[32]

he membership of the Catholic Church is not a required condition for the role of head of the internal medicine department. Therefore, there is no link between the religion of the employed and the administrative tasks for which they are responsible. In a hospital supervised by the authorities of the Catholic Church, there are also employees from other faiths who do not belong to any church or religious society. Moreover, there are also employees of no faith at all. There has never been any expectation, in particular on the part of the authorities of the Catholic Church, the management of the hospital supervised by the Church, colleagues of the applicant or patients, in matters concerning the religious affiliation of an employee holding any managerial role in the hospital. This applies also to a head of the hospital department. What is important for the interests of the hospital, persons employed in the hospital and patients is the qualifications and medical skills and – in the case of the head of the department – their abilities as a good administrator. Therefore religion cannot be classified as a genuine and justified occupational requirement for jobs linked to the provision of healthcare services. In the opinion of the Advocate General, the divorce and remarriage in a civil and not religious ceremony pose no risk, whether probable or substantial, of causing harm to the ethos of a Catholic institution or to the right of autonomy of the Catholic Church.[33]

The legal construct of the exception upholding the prohibition of discrimination

The specificity of the legal mechanism adopted by the EU legislature in Article 4(1) and (2) of Directive 2000/78 consists in upholding the prohibition of discrimination in spite of giving the Member States the right to regulate the difference in treatment on grounds of religion or philosophical belief of certain institutions for which the difference in treatment based on characteristics related to religion or philosophical belief does not constitute discrimination. A necessary condition to use the exception mechanism upholding the prohibition of

discrimination in employment, primarily in matters relating to the establishment and termination of employment relationships, is compliance by entities and persons applying national labour law with the criteria and conditions formulated in this legal norm and relevant national provisions implementing the rules of functioning of the model EU exception in the labour law systems of the EU Member States.

In light of the ethos of the church, religion or beliefs may constitute a genuine, legitimate and justified occupational requirement only by reason of the "nature" of the activity in question or the "context" in which it is carried out. The exception understood as the lawfulness of a difference of treatment applying the criteria prohibited by the national and EU legislature, is acceptable only in the case of the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned – work performed by the employee. In the reasoning of the *Egenberger* judgment, the Court gave an example of such a link: where the occupational activity involves taking part in the determination of the ethos of the church or organisation in question or contributing to its mission of proclamation, or else from the circumstances in which the activity is to be carried out, such as the need to ensure a credible presentation of the church, religious association or organisation to the outside world.[34] According to the above, Member States and their authorities should, in principle, refrain from assessing the ethos of a particular church, religious society or organisation associated with these communities.[35] However, they must guarantee to the citizens and persons lawfully residing in their territory that employers comply with the principle of equal treatment of employees. Although it is not for the national courts to rule on the ethos of the church as such on which the purported occupational requirement is founded, they are nevertheless called on to decide such issues on a case-by-case basis. They are competent to decide whether, in the light of the church's ethos, the three basic criteria and conditions for the legality of the exception mentioned in Article 4(2) of Directive 2000/78 have been met: "genuine", "legitimate" and "justified", upholding the prohibition of discrimination despite employment by the church, for certain types of work, of only those persons who belong to a particular religious community.

In Egenberger the Court explained that the "genuine" nature of religion as a necessary "occupational requirement" means that, in the mind of the legislature, professing the religion or belief on which the ethos of the church, religious society or organisation is founded must appear to everyone – because of the importance of the occupational activity in question – necessary for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy.

The purpose of the next criterion used by the EU legislature in Article 4(2) of Directive 2000/78 is to emphasise that the condition of "legitimacy" is, on the one hand to ensure, erga omnes, the basic nature of professing the religion or belief on which the ethos of the church is

founded and on the other hand, a guarantee that the work performed by the employee for the church employer will not be used by the latter to pursue an aim that has no connection with that ethos or to pursue goals that do not fall within the religious mission, which the church must proclaim and pursue.[36]

The third requirement formulated in the Directive – a "justified" link between the religion and the type of the activity or work – means that the church or other religious society or organisation imposing the requirement is obliged to show that the supposed risk of causing harm to the ethical or legal norms of the institution during activity or work by a person who is not a member of the religious community is probable or even substantial. For this reason, it is indeed necessary for the employing entity to benefit from the exception formulated in Article 4(2) of Directive 2000/78. In such a situation, the religious institution, benefiting from the exception excluding the unlawfulness of the activity consisting in the application of a legally prohibited criterion for differentiating candidates for employment or employees, is obliged to prove compliance with the principle of proportionality imposed on it by the EU legislature.

The exception to the prohibition of discrimination, enabling the religious community to use a legally prohibited denominational or philosophical criterion when churches or religious associations decide to employ or dismiss only members of a particular religious community, must comply with all general principles of EU law.[37] The competent national courts must ascertain whether the decision taken by the employer on the application of a religious criterion is appropriate and does not go beyond what is necessary for attaining the objective pursued.[38]

In light of Article 4(2) of Directive 2000/78 and the case law of the ECJ, the genuine, legitimate and justified occupational requirement means a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned – acting as the employer in a situation in which because of the nature of the occupational activity concerned and the circumstances in which it is carried out, it is necessary to make a decision about establishing or terminating an employment relationship. Because of the exception laid down in Article 4(2) of the Directive, such decisions cannot be considered by the national courts and the ECJ as incompatible with the provisions of labour law governing the obligation of equal treatment of employees, if due to the nature and/or conditions of performing a specific activity, there exist professional reasons in favour of such a decision to be made by a religious institution, related to ethos and the right of the church, acting as the employing entity, to exercise its autonomy.[39] The exercise of this right should be in compliance with the general EU principle of proportionality.[40]

The supervision over observance by churches, religious associations and other authorised religious institutions is the exclusive responsibility of the national judicial authorities. If it is established that those entities have violated the conditions for the application of the exception

to the prohibition of discrimination, such judicial authorities should refrain from adjudicating on the basis of applicable national laws which cannot be interpreted in accordance with the provisions included in Article 4(2) of Directive 2000/78. The EU jurisprudence is generally against the interpretation of national law that is *contra legem* in cases of non-compliance of the provisions of this law with the norms of EU law.[41] The obligation to interpret the national laws in accordance with EU standards may require a change in the national case law relating to provisions excluding the unlawfulness in relation to the prohibition of discrimination on grounds of religion or belief in EU Member States. Such provisions are in particular the legal norms excluding, due to the principle of the autonomy of churches and religious associations in the Member States, the control powers of national courts in matters concerning the assessment of the legality of the exception to the prohibition of discrimination. Directive 2000/78 alone does not formulate the legal basis for the obligations of EU Member States to comply with the principle of equal treatment in matters relating to employment and work, but only sets out a general framework for dealing with discrimination on grounds of religion or belief.[42]

Legal significance and the role of the Charter of Fundamental Rights of the European Union for the lawful exception to the prohibition of discrimination on grounds of religion or belief

Although the Charter of Fundamental Rights of the European Union does not extend the competences of the European Union defined in the TEU and TFEU, rights and freedoms set out in Article 20 ("Equality before the law"), Article 21 ("Non-discrimination") and Article 22 ("Cultural, religious and linguistic diversity") are important in matters relating to equal treatment in employment and non-discrimination on grounds of religion or belief. The Union recognises the rights, freedoms and principles set out in the CFREU. They are interpreted in accordance with the general provisions of Chapter VII, containing legal norms regulating the scope, rules for the interpretation of the provisions of the Charter and the level of protection of human rights and fundamental freedoms. Article 20 CFREU provides that equality before the law of every human being refers to equal treatment in respect of all rights and freedoms, such as, for example, protection in the event of an unjustified dismissal (Article 30 CFREU) or fair and just working conditions (Article 31 CFREU). The principle of equality before the law is one of the fundamental axiological values on which the EU is based.[43] At the same time, it is acceptable to differentiate individuals on the basis of legally prohibited criteria, including religion and belief, provided that it is objectively justified and based on reasonable grounds. In the *Egenberger* case,[44] for example, the ECJ accepted this differentiation. It believed that in interpreting the EU law the court should consider not only its wording and origin of the interpreted norm but also the objectives of the legislation of which it forms part and the social

and economic context in which the applied provision exists.[45]
The purpose of Directive 2000/78 is to provide a general framework to combat discrimination in matters of employment and in employment relationships, inter alia on grounds of religion and belief. The Directive therefore implements the general principle of non-discrimination, guaranteed in Article 21 CFREU. Article 9 of the Directive requires the EU Member States to establish judicial procedures for the effective enforcement of the above obligation. To this end, Directive 2000/78 liberalises legal remedies permitting the taking of evidence of discrimination. Article 10 of the Directive introduces derogation from the principle that the burden of proof rests with the party who derives legal consequences from the fact of discrimination. According to the above-mentioned provision, the apportionment of the burden of proof in cases of discrimination is fundamentally changed. Not the plaintiff but the defendant in the case of discrimination must prove that they violated the obligation of equal treatment. The plaintiff is only required to substantiate facts that would allow the presumption of occurrence of direct or indirect discrimination.
The wording of Article 4(2) of Directive 2000/78 is clear. This provision allows a church or other religious organisation to differentiate individuals on the basis of legally prohibited criteria only if, by reason of the nature of the activity or its context, religion or belief can be considered a legitimate and justified occupational requirement. To ensure that the principle of equality before the law laid down in Article 20 CFREU is respected, a direct control over the observance by church institutions of the rules laid down in Article 4(2) of Directive 2000/78 is exercised by independent and impartial courts. The transfer of control to an ecclesiastical institution or to an interested religious association is non-compliant with the *nemo iudex idoneus in propria causa* (*in re sua*) maxim.
In *Egenberger* and *IR*, the CFREU plays two roles. First of all, it makes it possible to transpose the provisions of Directive 2000/78 into the national law of the Federal Republic of Germany. Pursuant to Article 51(1) of the CFREU, its provisions apply – with due regard for the principle of subsidiarity – not only to the institutions and bodies of the European Union, but also to the States of that transnational organisation, to the extent that the States of that regional organisation apply EU law. In the last sentence of that provision, the duties of the authorities of such States were recalled – respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. The CFREU fulfils an executive role. It does not establish any new powers or tasks for the Union; it does not change the powers and tasks defined in the EU treaties (Article 1 § 2 CFREU). Second, it guarantees to a person involved in a dispute before the national court the right to effective protection of rights.[46] In matters referred to in this Article, the ECJ has applied the principles set out in the CFREU, stressing that the courts of the EU Member States are required to:

ensure that individuals who are discriminated against by the employer in their employment relationships due to religious beliefs are protected under Article 21 and 47 CFREU;47 and refrain from applying national law in the name of the general principle of respect for religious diversity (Article 22 CFREU) when they are unable to interpret that right in a manner consistent with Article 4(2) of Directive 2000/78.48

Directive 2000/78 establishes a general framework for equal employment. The lawful exception established in Article 4(2) of this Directive is based on legal guarantees addressed to churches and religious associations, under which all practitioners have the right to freedom of thought, conscience and religion. The exercise by interested parties of these rights is secured by: TFEU (Article 17), CFREU (Article 10) and ECHR (Article 9). The provisions of Article 4(2) of Directive 2000/78, strengthened by the aforementioned provisions of other European human rights instruments, allow achieving and maintaining a stable balance between the rights of churches and religious associations and individuals. It guarantees autonomy to churches and religious associations. And to individuals, equality before the law and freedom from discrimination in employment. Article 4(2) of Directive 2000/78 establishes the necessary criteria enabling national courts to ensure equality in disputes between a religious institution and an employee in conflict situations.

Final remarks

The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter and since the Treaty of Lisbon has the same legal force as the primary EU laws, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law, including labour law.[49] The national court, as the only competent judicial authority in matters relating to unequal treatment of employed persons, including those employed by religious and philosophical institutions, is called on to take into consideration the balance set out in Article 4(2) of Directive 2000/78 between the principle of autonomy of churches, religious associations, religious communities and philosophical organisations and the principle of equal treatment of individuals.[50]

Noten

1 Journal of Laws L 303, 2 December 2000, p. 16.

2 United Nations General Assembly Resolution 217 A (III), ST/HR/Rev. 4 (Vol. 1/Part 1).

3 United Nations General Assembly Resolution 34/180. UN Treaty Series, Vol. 1249, No. 20378, p. 13.

4 United Nations General Assembly Resolution 2200 A (XXI), UN Treaty Series, Vol. 999, p. 171.

5 UN Treaty Series, Vol. 993, p. 3.
6 International Labour Conventions and Recommendations Volume I 1919-1961, ILO, Geneva 1992, p. 702 ff.
7 European Social Charter. Collected Texts, 7th edition, Council of Europe, Strasbourg 2015, p. 9 ff.
8 Ibid., p. 38 ff.
9 Journal of Laws [Dz.U.] of 2015, item 763.
10 Fifth recital to Directive 2000/78.
11 "*In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief (...) constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.*"
12 Journal of Laws EU, C No. 83, p. 389.
13 Journal of Laws EU, C No. 83, p. 89.
14 Official Journal C No. 191, p. 1.
15 C-414/16, 17.4.2018, ECLI:EU:C:2018:257.
16 C-69/17,11.9.2018, ECLI:EU:C:2018:696.
17 For this reason, in the commentary on EU Directives in the field of labour law – EU Labour Law, ed. M. Schlachter, Kluwer Law International, AH Alphen aan den Rijn 2015 in part two – "Equality Directives", chapter II – C.O'Cinneide, K.Liu, 2000/78/EC: Framework Equality Directive, paragraph 2 – The 'Religious Ethos' Exception, p. 94-95, no ruling of the ECJ was referred to.
18 Resolution no. 2106A/NN. Journal of Laws [Dz.U.] of 1969, No. 25, item 187.
19 A controversial example of keeping the above-mentioned balance, are the concordats concluded by the Polish State with the Holy See in the interwar period and today in the period of the Third Polish Republic. The first concordat signed on 10 February 1925, ratified under the Act of 23 April 1925 (Journal of Laws [Dz.U.] of 1925, No. 72, item 501), in force until 22 September 1945, guaranteed the Catholic Church "*the free exercise of its spiritual power, as well as the freedom of administration and management of property matters in accordance with divine laws and canon law*" (article 1). The second concordat, currently in force (concluded on 28 July 1993, signed by the President of the Republic of Poland on 23 February 1998, Journal of Laws of 1998, No. 51, item 318) reaffirms that the State and the Catholic Church are, each in its own domain, independent and autonomous, and that they are fully committed to respecting this principle in all their mutual relations (article 1). In article 5 of the current Concordat the State guarantees to the Catholic Church, the free and public exercise of its mission, as well as the exercise of its jurisdiction, management and administration of its own affairs, in accordance with Canon Law. The State guarantees the right to establish and run institutes for the education and bringing-up of children, including preschools and schools of every kind, in

accordance with the provisions of Canon Law and according to the principles laid down by the respective civil laws (article 14(1)). The Concordat confirms the right of the Church to establish and freely manage higher educational establishments, including universities (article 15(1)). In matters relating to clergy and consecrated persons, the instruction of the Polish Episcopate Conference on the management of temporal goods of the Church, the chapter "Maintenance of clergy and consecrated persons" is obligatory. See: L. Świto, Charakter prawny posługi duszpasterskiej proboszczów i wikariuszy w parafiach rzymsko-katolickich w świetle prawa polskiego [*Legal nature of pastoral ministry of parish priests and vicars in Roman Catholic parishes in the light of Polish law*], Seminare, vol. 27/2010. As I mentioned at the beginning of this article, the exception to the prohibition of discrimination against lay persons was regulated – in conformity with Article 4(2) of Directive 2000/78 – in Article 183b Sections 1 and 4 of the Labour Code.

20 A judgment of the ECJ in Egenberger, § 42.

21 Article 137 of the Constitution of the German Reich (Verfassung des Deutschen Reichs) of 11 August 1919 adopted in Weimar (*Reichsgesetzblatt* 1919, s.1383), called the "Weimar constitution".

22 Article 3 of the Basic regulations on employment relationships in the service of the Church of 22 September 1993 (*Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse. Amtsblatt des Erzbimstus Köln* – GrO 1993, p. 222).

23 From 1 August 2015, the conclusion of a civil marriage that is invalid under the Canon law of the Catholic Church is a ground for dismissal only if it is objectively capable under the specific circumstances of creating a significant nuisance in the community of service or in the professional sphere and of negatively affecting the credibility of the Church (article 5(2) GrO 1993).

24 Promulgated by the Apostolic Constitution Sacrae disciplinae leges of Pope John Paul II, of 25 January 1983 (DC 1983, No. 1847, p. 244).

25 ECLI:EU:C:2018:363.

26 See: Catechism of the Catholic Church (Catechismus Catholicae Ecclesiae) adopted and proclaimed in the apostolic letter Laetamur Magnopere by Pope John Paul II on 15 August 1997, paragraphs 2270-2275. http://www.vatican.va/archive/ccc/index_fr.htm.

27 Ibid., paragraphs 2276-2279.

28 Ibid., paragraphs 2366-2372.

29 Opinion of the Advocate General of 31 May 2018 in case *IR*, C-68/17, § 48.

30 Opinion of the Advocate General of 31 May 2018 in case *IR*, C-68/17, § 52.

31 A judgment of the ECJ in *Egenberger*, C- 414/16, § 63.

32 Opinion of the Advocate General of 31 May 2018 in case *IR*, C-68/17, § 67.

33 Ibid., § 66-69. The Advocate General noted the dissonance between the rigour with which

the entity employing the head of the hospital department had decided to defend the purity of Catholic doctrine and the spirit of openness and conciliation towards Catholics who have divorced and remarried in a civil ceremony shown by the post-synodal apostolic exhortation "*Amoris Laetitia*" of 2016 by Pope Francis. Ibid., footnote 26.
34 Ibid., § 63.
35 Judgment of the European Court of Human Rights of 12 June 2014, *Fernandéz Martinez – v – Spain*, CE:ECHR:2014:0612JUD005603007, § 129.
36 Judgment of the ECJ in Egenberger, § 66.
37 Judgments of the Court of: 6 March 2014, Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo, C-206/13, ECLI:EU:C:2014:126,§ 34; 9 July2015 in K and A, C-153/14, ECLI: EU:C:2015:453, § 51.
38 Judgment of the Court in Egenberer, § 68.
39 Ibid., § 69.
40 Ibid., § 70.
41 Judgment of the Court (Grand Chamber) of 19 April 2016, Dansk Industri (DI), acting on behalf of Ajos A/S – v – Estate of Karsten Eigil Rasmussen, C-441/14, ECLI:EU:C:2016:278, § 31-32.
42 Judgment of the Court (Grand Chamber) of 10 May 2011, *Jürgen Römer – v – Freie und Hansestadt Hamburg*, C-147/08, ECLI:EU:C:2011:286, § 59.
43 M. Bell, Equality and the European Union Constitution, Industrial Law Journal, 2004 , Vol. 33, No.3, p. 244; EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter Of Fundamental Rights of the European Union, http://158.109.131.198/catedra/images/experts, p. 187.
44 C-414/16, § 45-48.
45 Judgment of the Court of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2015:433, § 30.
46 Judgment of the Court, 16 May 2017 r., Berlioz Investment Fund, C-682/15, EU:C:2017:373, § 50.
47 Egenberger, C-414/16, § 48 and § 3 of the operative part of the judgment.
48 IR, § 2 of the operative part of the judgment.
49 Judgment of the Court (Grand Chamber), 15 January 2014, *Association de médiation sociale – v – Union locale des syndicats CGT and Others*, C-176/12. ECLI:EU:C:2014:2, § 47; Judgments of the Court in: *Egenberger*, § 76 and IR, § 69.
50 Judgment of the Court (Grand Chamber) of 13 September 2011, *Reinhard Prigge and Others – v – Deutsche Lufthansa AG*, C-447/09, ECLI:EU:C:2011:573, § 52 ff.

Verdict at:

Case number: