

Discrimination based on religion or belief in the EU legal framework

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Employment, religion and belief are three words, which have been attracting attention in the recent decades. A number of legal acts, studies and conferences was devoted to a better understanding of all dimension connected to these issues. As a recent Eurobarometer survey recorded, 42% of Europeans felt that discrimination on grounds of religion or belief is widespread.¹ The European Community employment law attempts to accommodate the religious and ideological aspect by addressing both individual religious freedom as well as its collective dimension. The subject matter has been already extensively covered by the literature², as there have been many legal challenges related to the interpretation of the wording of the Directive as well as its implementation. This text is attempted to give a general overview of the Community legislation prohibiting discrimination based on religion or belief in employment and occupation. Obviously in such format no exhaustive approach to the subject is possible.

EU LEGAL FRAMEWORK PROHIBITING DISCRIMINATION BASED ON RELIGION OR BELIEF IN EMPLOYMENT – GENERAL REMARKS

The European Union legal framework concerning prohibition of discrimination based on religion or belief in the area of employment is based on Article 13 of the Treaty establishing the European Community (EC Treaty), which authorises Council to adopt measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.³ Article 13 TEC does not prohibit discrimination *per se*, but it only authorises the Council to take action against such

¹ Special Eurobarometer 296, Discrimination in the European Union: Perceptions, Experiences and Attitudes, July 2008, p. 14.

² For further reading see Critical review of academic literature relating to the EU directives to combat discrimination, ed. Mark Bell, S. Kjellstrand, European Commission, Directorate-General for Employment and Social Affairs, July 2004.

³ According to this provision the Council acts unanimously on a proposal from the Commission and after consulting the European Parliament.

discrimination.⁴ Article 13 TEC allows the EU institutions to act within the areas in which the Community already has competence by virtue of other Treaty provisions. It therefore does not allow the institutions to legislate on non-discrimination in areas where member states remain competent.

The explicit prohibition of discrimination based on *inter alia* religion or belief has been expressed in Article 21 of the Charter of Fundamental Rights.⁵ This general prohibition of non-discrimination is addressed to the EU institutions and bodies and to the member states, when they implement Community law (Article 51). Article 21 of the Charter prohibits discrimination on a wider number of grounds than Article 13 TEC, as it additionally covers colour social origin, genetic features, language, political or any other opinion, membership of a national minority, property, and birth.

In a recent decade the area in the remit of Article 13 of the TEC has been a subject to a rather dynamic legislative developments followed by the often progressive jurisprudence of the European Court of Justice (hereinafter ECJ). In 2000 two Directives were adopted: the so called Race Equality Directive⁶ and Employment Equality Directive⁷. They both have a similar format and introduced minimal standards of equal treatment in all aspects of employment (Employment Directive) and beyond, in areas such as social protection, health care, education and access to goods and services, including housing as regards ethnic origin or race (Race Directive). However, it is the Employment Equality Directive, which is of direct interest of the ecclesiastical law, as it explicitly prohibits discrimination based on religion or belief in employment and provides for a specific legal framework for churches and organisations the ethos of which is based on religion or belief when they act as employers. The legal composition of the Directive is twofold. On one hand it accommodates the respect for the individual religious freedom and on the other hand it takes into account the collective dimension of religious freedom by allowing for a difference of treatment, which is not deemed discrimination when it is applied by religious organizations. This difference of treatment is incorporated in the provisions relating to genuine occupational requirements.

⁴ Differently from Article 12 TEC, which explicitly prohibits discrimination based on nationality and Article 3 (2) TEC, which to a limited extent prohibits discrimination based on sex.

⁵ The European Union Charter of Fundamental Rights was first proclaimed at the Nice European Council on 7 December 2001 and later incorporated in the Treaty of Lisbon, thereby acquiring a legally binding force (yet to be ratified).

⁶ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19.7.2000.

⁷ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2.12.2000.

PURPOSE AND SCOPE OF THE DIRECTIVE

The scope of the Directive encompasses both public and private sector, including public bodies and it refers to broad range of issues related to access to employment and occupation, working conditions, promotions and dismissals, membership in workers' organisations, vocational training and others (Article 3 (1)). Some member states⁸ while transposing both Equality Directives have extended the prohibition of discrimination based on religion or belief beyond the area of employment, for example to housing, education and access to social services. For example in the UK Equality Act 2006 includes religious discrimination in e.g. housing, access to services, and education; Belgian law prohibits discrimination on all grounds not only in employment but also in access to and participation in public and social activities; and the Finnish law forbids discrimination in education based on e.g. religion or belief.⁹

Applicability of the Directive was explicitly excluded in relation to differences of treatment based on nationality, payments of any kind made by state schemes or similar, and armed forces. In paragraph 14 and 22 of the preamble the Directive stipulates that it shall be without prejudice to national law laying down retirement ages and respectively to marital status and the benefits dependent thereon. Interestingly recent jurisprudence of the ECJ suggests that the wording stipulating that a directive "is without prejudice" to a specific area of law does not mean that this directive does not apply to the area concerned. It rather indicates that the Member States retain their right to legislate in those areas, but are obliged to exercise it in conformity with the directive in question. This reading of the term "without prejudice" can be inferred from several judgements of the ECJ, such as cases: Félix Palacios de la Villa¹⁰, Age Concern England¹¹, and Tadao Maruko¹². Such an explicit expansion of the scope of the application of the Directive points to the dynamic and very progressive reading not only the text of the Directive itself but also legal terms used in general in the Community legislation.¹³

⁸ A comprehensive overview of countries which adopted the non-discrimination legislation in relation to religion or belief outside the area of employment can be found in: Commission Staff Working Document of 2.07.2008 accompanying the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment, SEC(2008) 2180, p. 65-70. See also Study on discrimination on grounds of religion and belief, age, disability and sexual orientation outside of employment, Report to the European Commission, *EPEC GHK Consulting*, June 2008.

⁹ ENAR, European Network against Racism, Religious Discrimination and Legal Protection in the European Union, Fact Sheet N°34, October 2007, p. 19.

¹⁰ Case C-411/05, Félix Palacios de la Villa v. Cortefiel Servicios SA, judgement of 16 October 2007, [PARA 44].

¹¹ Case C-388/07, The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, judgement of 5 March 2009, [PARA 25]

¹² Case C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, judgement of 1 April 2008, [PARA. 59].

¹³ See Comment by R.Herzog and L. Gerken, Stop the European Court of Justice, *Euobserver* 10.09.2008.

Apart from religion or belief the Directive also prohibits discrimination based on age, disability and sexual orientation. Discrimination based on religion or belief is essentially different from discrimination based on race or ethnic origin, sex, age or disability. Unlike the latter grounds, which are objective, external and physical characteristics of a human being, religion or belief are internal and subjective grounds as they are closely linked to a person's values and ideas. In this context placing exactly the same measures aimed at prohibiting discrimination based on disability or age together with discrimination based on religion or belief in one legal instrument might in some cases amount to interpretative difficulties as well as distort the implementation of the provisions.

KEY CONCEPTS – RELIGION OR BELIEF

The Employment Equality Directive does not define any of the discrimination grounds, nor it refers to the laws of the member states for the definition of these concepts. The absence of definitions signifies a reflection of diversified national approaches to the issue. Moreover, the current religious pluriformity not only has complicated the legal delimitation of what counts as religion and religious freedom but it also complicated the question of its limits.¹⁴ The internal legislation of the member states in principle does not provide for definition of religion, although in several of them there are, albeit non-binding, definitions contained in interpretative sources¹⁵ or in jurisprudence¹⁶.

Despite the lack of a definition of age or disability, there is a general and common understanding of these notions, i.e. an average reasonable person is able to determine these characteristics, although also in this regard practical problems appear.¹⁷ The definition of religion or belief seems much more challenging.¹⁸ On one hand a lack of a definition allows for a more inclusive understanding of religion, thereby reducing a risk of outdated concepts. However, on the other hand such a lack increases the risk of inconsistent treatment.¹⁹ In between these two arguments, the ECJ, in case *Chacón Navas* referring to disability, spoke

¹⁴ B. P. Vermeulen, *Freedom of religion in Western Europe: Past and Present*, in: *Freedom of religion: a precious human right, A survey of advantages and drawbacks*, ed. Jonneke M.M. Naber, 2000, p. 24.

¹⁵ E.g. in Austria such definition is contained in the explanatory notes to Federal Law on the Status of Religious Confessional Communities.

¹⁶ In Germany a definition is contained in the interpretation of the guarantee of freedom of religion by the Federal German Constitutional Court; also Dutch jurisprudence distinguishes between religion and belief.

¹⁷ Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, judgement of 11 July 2006, [2006] ECR I-6467.

¹⁸ According to the European Court of Human Rights religious belief, in a non-theistic sense including atheism and agnosticism, is protected by Article 9 of the Convention (*Kokkinakis v Greece* (1994) 17 EHRR 397, Ct.). According to the Court a metaphysical element is not required, however, as ethical or philosophical convictions such as opposition to abortion (*Knudsen v Norway* (1986) 8 EHRR 45, Cm.), pacifism (*Le Cour Grandmaison and Fritz v France* (1989) 11 EHRR 46, Ct.), or veganism (*H v United Kingdom* (1993) 16 EHRR CD44, Cm.) are also protected (cp. Frame, 1992).

¹⁹ Lucy Vickers, *Religion and Belief Discrimination in Employment – the EU law*, Report for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, 2006, p. 28.

in favour of autonomous and uniform interpretation throughout the Community of the concepts contained in the Directive, and not submitting them to national discretion. The Court's reasoning in that case would seem equally applicable to the other grounds.

The distinction between religion and belief does not seem to be of the major importance in the Directive. However, it is not contested that the term belief is of a broader nature than religion, i.e. religion is included in the understanding of belief. The jurisprudence of the European Court of Human Rights suggests that beliefs, to be protected, must be distinguishable from mere opinion, and attain a certain level of cogency, seriousness, cohesion and importance.²⁰ Nevertheless, the emphasis upon the seriousness and importance of the belief to the individual may be justifiable, requirements of cogency and cohesion are much more problematic.²¹ There are also concerns whether, in the meaning of belief also political belief or non-belief are included.²²

Within the Employment Equality and Race Equality Directives a clear distinction is drawn between religion and belief, and race and ethnic origin, with the Race Equality Directive being more extensive in scope than the Employment Equality Directive. Nevertheless, the distinction between race and ethnicity on one hand, and religion on the other is not always clear. Additionally, nationality becomes a complicating factor as many Muslim, Sikh, Hindu and other religious minority communities are composed of third country nationals. The delimitation of religion and belief in some cases prove problematic, in particular where it can be linked to ethnicity, either because a religious group is considered to have an ethnic character, or because members of a religion belong predominantly to particular ethnic groups (e.g. Jewish).²³ Therefore it is particularly difficult to differentiate discrimination on the basis of ethnicity or race, and sometimes nationality, from that based on the ground of religion or belief.

KEY CONCEPTS – DEFINITION OF DISCRIMINATION

Discrimination occurs when disadvantageous differential treatment is unjustified and when it is based on a criterion, which the law prohibits from use in the making of legal distinctions.²⁴ It means that not all distinctions are prohibited, and not all of them

²⁰ *Campbell v Cosans* (1982) 4 EHRR 293, Ct.

²¹ See Peter W. Edge, *Religious rights and choice under the European Convention on Human Rights*, *Web Journal of Current Legal Issues*, 2000, nr 3.

²² Lucy Vickers, *Religion and Belief Discrimination in Employment*, *ibidem*, p. 30.

²³ For example, the UK House of Lords has considered that religion can be an element in defining ethnicity: in the *Mandla* case, the Sikh community, while being based on a particular religion, was defined as an 'ethnic group' for the purpose of the Race Relations Act (*Mandla v. Dowell Lee* [1983] 2 AC 548). See also ECRI general policy recommendation no. 7 on national legislation to combat racism and racial discrimination, CRI (2002) 41, 13 December 2002.

²⁴ Michel Miné, *Concepts of direct and indirect discrimination*, Revised text of a presentation delivered at the conference on "The Fight Against Discrimination. New Directives of 2000 Concerning Equality", 31 March to 1 April, Trier, p. 1.

amount to discrimination. A distinction or difference in treatment does not amount to discrimination unless it is unlawful²⁵. The understanding of the notion of equal treatment and non-discrimination is crucial for determining conducts as discriminatory. It is also crucial for understanding when a conduct, despite its potentially discriminatory features, is legally permissible.

Neither equal treatment nor non-discrimination have been defined by the EC Treaty, despite the existence of numerous provisions in the Treaty that provide for the principle of equal treatment with regard to specific matters.²⁶ This terminological void has been filled by the ECJ, which held that principle of equality is one of the general principles of Community law and as such is implemented by the member states into their national legislation. According to the ECJ the principle of non-discrimination and principle of equal treatment are “two labels for a single general principle of Community law”.²⁷ This principle precludes comparable situations from being treated differently, and different situations from being treated in the same way,²⁸ unless the treatment is objectively justified.²⁹

The ECJ has so far not dealt with the question of discrimination based on religion or belief. However, in 1976, i.e. before Article 13 TEC, the Employment Equality Directive and the Charter of Fundamental Rights were adopted, the Court³⁰ found that in the context of a particular situation, which gave ground to that judicial proceeding, the principle of equal treatment should have taken precedence over freedom of religion. To date this judgment has been highly contested.

The definitions contained in the Employment Equality Directive are a result of a longstanding jurisprudence of the Court, predominantly that dealing with the cases involving discrimination based on sex.³¹ The Directive contains four indications of what discrimination is. These are direct and indirect discrimination, harassment, and instruction to discriminate (as no specific considerations refer to religion or belief this article will not deal with the question of instruction to discriminate).

²⁵ D. Lochak, “Reflections on the Concept of Discrimination”, A. Lester, “British Anti-discrimination Legislation”, *Droit social*, Paris, 1987, p. 778 and p. 791.

²⁶ *Frilli v Belgium*, Case 1/72 [1972] ECR 457 para 19; *Isoglucose Cases*, [1978] ECR 2037 para 26.

²⁷ *Case Chemi-Con*, C-422/02, par. 33.

²⁸ *Sermide SpA v Cassa Conguaglio Zucchero and others*, Case 106/83, 1984 ECR 4209, para 28, See also, Opinion of Mr Advocate General Van Gerven delivered on 15 September 1993, *Koinopraxia Enoseon Georgikon Synetairismon Diacheir iseos Enchorion Proionton Syn. PE (KYDEP) v Council of the European Union and Commission of the European Communities*, Case C-146/91, 1994 ECR I-4199.

²⁹ See Case C-189/01 *Jippes and Others* 2001 ECR I-5689, paragraph 129, and Case C-149/96 *Portugal v Council* 1999 ECR I-8395, paragraph 91.

³⁰ *Case C-130/75 Prais vs. Council*.

³¹ See more on the subject M. Bell, *Emerging rights of social citizenship? Discrimination on grounds of Nationality and Gender*, in: *Anti-Discrimination Law and the European Union*, 2002, pp. 32-53.

DIRECT DISCRIMINATION

Direct discrimination occurs when one person is treated less favourably than others because it follows, is perceived to follow or does not follow any or particular religion or belief, as well as is associated with a person of a particular religion or belief. For example Christian employer refuses to employ Muslim but instead employs Christian who has lesser qualifications, or an atheist employer refuses to employ a man because he thinks he is Muslim.

Direct discrimination, defined in Article 2 (2a), assumes that the treatment was explicit and intentional. However, since it is rather difficult to prove that the treatment was intentional, instead the effects produced by differential treatment, rather than the intention are emphasised. For discrimination to be established it is sufficient to prove disadvantageous treatment in relation to a prohibited criterion. Usually it involves determining whether persons in question would have received the same treatment if such a criterion had not applied to them. This does not mean that comparisons should be limited to identical situations, which rarely ever occur. Instead, reference should be made to situations that are comparable and it can involve both a comparison *in concreto*, and a comparison *in abstracto* involving hypothetical persons.³²

The definition of direct discrimination is based on a comparative model. However, no provision of the Directive clarifies from whose perspective the comparison should be done. Less favourable treatment might be apparent when a religious claimant is compared to that of no religion. But when a claimant of a particular religion is compared to that of a different religion the less favourable treatment might be less apparent.³³ The concept of direct discrimination does not allow for any general justification of exception or difference of treatment, unless there are specific explicit justification clauses, such as e.g. genuine occupational requirements.³⁴

Although the Directive itself does not explicitly say so, it has been pointed that the prohibition of direct discrimination is not just reduced to a particular religion or belief, but extends to cover also assumption about a person's religion, even if this assumption is mistaken, as well as discrimination based on association of a victim with a person of particular religion or belief.³⁵ The ECJ in a recent judgement (case Coleman³⁶) stated that the principle of equal treatment enshrined in the Directive applies not to a particular category of person, but by reference to all grounds it covers. It held that Directive 2000/78 must be interpreted as meaning that the prohibition of direct discrimination and

³² Michel Miné, *ibidem*, p. 6.

³³ Lucy Vickers, *Religion and Belief Discrimination in Employment*, *ibidem*, p. 14.

³⁴ *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, C-177/88 [1990] ECR I-3941.

³⁵ In some Member States the question of discrimination by association has been explicitly brought within the scope of national legislation. See Lisa Waddington, *Protection for Family and Friends: Addressing Discrimination by Association*, *Anti-Discrimination Law Review*, issue 5, 2007, pp. 13-21.

³⁶ Judgement of 17 July 2008 in Case C-303/06 *S. Coleman v Attridge Law*, para 38.

harassment is not limited only to people who are themselves disabled, but also but also covers those these employees who suffer discrimination in the field of employment because they are associated with a disabled person, e.g. they are primary care takers of their disabled children. In the case *Feryn*³⁷ the ECJ further extended the understanding of direct discrimination by shifting away from a comparison of a concrete person in a concrete situation to an abstract situation by stating that direct discrimination also occurs when no identifiable individual was discriminated against but potentially could have been. The ECJ stated that ‘public statements by which an employer lets it be known that it does not recruit employees of a particular origin constitute direct discrimination [...] such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.’ In *Chacón Navas* the ECJ also underlined that nothing in the Directive indicates that the principle of equal treatment and the scope *ratione personae* of that Directive must be interpreted strictly with regard to those grounds. Additionally, in view of the ECJ, the personal scope of the Directive covers not only an employee, or a prospective employee, but also a person with whom the employee is in a relationship. In the *Maruko* case, the ECJ deemed as discriminatory refusal of the survivor’s benefit after his life partner of a deceased employee, who himself was not even in an employment relationship.

In all of these cases a shift from a ‘victim’ approach to a ‘ground’ approach becomes strikingly apparent and it is no longer important who was discriminated against or whether there was a concrete victim of discrimination. Such far-reaching loosening of the condition of applicability of the Directive might amount to further progressive reading of the Directive by the Court in cases pertaining to religion or belief.

INDIRECT DISCRIMINATION

The structure of indirect discrimination is more complex. This concept has been shaped by the jurisprudence of the ECJ.³⁸ The Directive in Article 2 (2b) provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.³⁹ According to this concept job requirements should be

³⁷ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, judgement of 10.07.2008.

³⁸ As early as case 96/80 *Jenkins v Kingsgate (Clothing Productions) Limited* [1981] ECR 911 and Case 170/84 *Bilka Kaufhaus GMBH v Weber von Hartz* [1986] ECR 1607. See also C. Tobler, *Limits and potential of the concept of indirect discrimination*, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, September 2008.

³⁹ See further: M. Finlay, *Indirect discrimination and the Article 13 Directives*, in: *Equality in diversity, The new Equality Directives*, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, pp. 135-147.

appropriate for the job in question and should prevent the imposition of unnecessary requirements that have disproportionate impact on a person of a particular religion or belief. In contrast to direct discrimination, indirect discrimination will not be unlawful if it can be justified. To justify it, an employer must show that there is a legitimate aim, and that the practice is proportionate to that aim, i.e. necessary and there are no alternative means available.

Another aspect of indirect discrimination needs to be considered, i.e. a question whether the employer has a duty to accommodate religious beliefs in terms of dress codes, holiday times, dietary requirements, etc. The Employment Equality Directive envisages a duty of reasonable accommodation only with regard to disability. However, lack of certain accommodations to adjust to certain religion of employees could be perceived as indirect discrimination based on religion or belief.⁴⁰ The Directive does not require from the employers a provision of time and facilities for religious or belief observance, such as changing break times in order to accommodate fasting, or in laying down rules on dress, uniform etc. in the workplace. Employers are, nevertheless, required to consider whether their codes, policies, rules and procedures indirectly discriminate against staff of particular religions or beliefs and if so whether reasonable changes might be made.⁴¹

HARASSMENT

Harassment is deemed a form of discrimination when unwanted conduct related to religion or belief takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment (negative environment – *J.L.*).⁴² In comparison to direct or indirect discrimination there is a substantial difference, as harassment neither requires less favourable treatment, nor comparison to a situation of other person; the only question is whether dignity has been violated and a negative environment was created. There are no further indications what constitutes violation of dignity or what a hostile or offensive environment is. Unlike in the case of indirect discrimination, the Directive does not give any opportunities to justify an established case of harassment.⁴³ The unwanted conduct can be either verbal or non-verbal and it may involve nicknames, teasing, name

⁴⁰ M.F. Fernández López, F.J. Calvo Gallego, Directive 2000/78/EC and the prohibition of discrimination based on religion.

⁴¹ Mahmut Yavasi, Elimination of religious discrimination at workplace in the EU with particular reference to the UK, Review of International Law and Politics (RILP), vol.3, No 10, 2007, pp. 115-128.

⁴² I. Bacik, Harassment, in: Equality in diversity, The new Equality Directives, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, pp. 151-176.

⁴³ R. Holtmaat, Discrimination based on religion, Case study on the exclusion based on religion, Conference: Fight against discrimination, The race and framework employment directives, ERA – Trier, 4-6 March 2004, p. 6.

calling or other behaviour that may not be intended to be malicious, but nevertheless is upsetting.⁴⁴ The lack of relevant definitions does not seem too problematic when looking at harassment based on sexual orientation, as many parallels can be drawn with harassment based on sex. In case of harassment based on religion or belief situation becomes more complicated as no case law exists. Additionally, a more complex consideration refers to the fact that in population there is a general illiteracy as regards religions and beliefs.⁴⁵ Therefore, when religion is at stake quite often a conduct might be deemed discrimination, not because it was intended to be offensive, but because there was a general lack of knowledge of what kind of behaviour might violate someone's dignity or create a negative environment. Furthermore what is offending and humiliating for one religion might not be of such kind for another religion. In case of minority religions this consideration is evident. Although in case of well-known religions the consideration might be of a lesser importance, other considerations appear, such as measuring the harassment in objective and not subjective terms. It is also not entirely clear how the objective characteristics should be determined. Religion or belief are internal and subjective grounds as they are closely linked to a person's values and ideas and these cannot be objectively measured.

On the other side of harassment based on religion or belief a question of freedom of speech and freedom of religion are situated. It has been indicated that the different nature of religious harassment should amount to warranting it a different treatment, especially taking into account the role of intention and the person who judges whether discrimination took place.⁴⁶ In consequence using the same rules for religious harassment and other grounds of harassment might be problematic. Unless harassment provisions are very carefully drafted they can punish or inhibit the free expression of opinion.⁴⁷ This danger is more likely in relation to discrimination on grounds of religion than with sex or age discrimination, because some people as controversial, offensive or threatening may take religious views. The potential interference with freedom of speech arises because people may feel inhibited from saying something if they fear that a person may perceive it is a violation of their dignity or is creating an offensive environment. The potential interference with freedom of religion and belief arises because explanations of sincerely held doctrinal beliefs might be perceived as violating a person's dignity or creating an offensive environment.⁴⁸ The right to manifest religious belief by worship, teaching,

⁴⁴ Mahmut Yavasi, *ibidem*, p. 39.

⁴⁵ The Parliamentary Assembly of the Council of Europe in a Recommendation 1720 (2005) on Education and religion, text adopted on 4 October 2005 (27th Sitting), expressed that "A good general knowledge of religions and the resulting sense of tolerance are essential to the exercise of democratic citizenship."

⁴⁶ T.M. Dworkin and E.R. Peirce, *Is religious harassment 'More Equal'?*, 26 *Seton Hall Review* 44, 1995.

⁴⁷ Para. 42 of the judgement of the High Court of Justice in Northern Ireland, Queen's Bench Division (Ref: WEAC5888).

⁴⁸ Paragraph 57 of the House of Lords and House of Commons Joint Committee on Human Rights in their sixth report of Session 2006-07 on Legislative Scrutiny: Sexual Orientation Regulations, which was ordered to be printed on 26 February 2007.

practice and observance must be considered in the light of Article 10, as the protection of opinions and the freedom to express must be one of the objectives of the freedom to manifest religious belief. Freedom of expression under Article 10 extends not only to information and ideas with which the audience would agree but also to information and ideas that would offend shock or disturb the audience.⁴⁹ Harassment might violate person's dignity or put him/her in an unwanted environment but as such does not restrict freedom of belief and the person can still believe or maintain the right to directly manifest or practise religion⁵⁰. Although the victim of religious harassment remains free to believe or to practice her religion, the enjoyment of these rights becomes hampered.

Faced with a risk of this kind prudent employers might decide and advise their employees against any conversation touching on controversial religious beliefs. In other words the existence of harassment provisions can have what free speech scholars call a 'chilling effect' – encouraging self-censorship. Furthermore where the law is vague the chilling effect is greater, since no one can be clear in advance where the boundaries may lie.⁵¹

EXCEPTION FROM THE PRINCIPLE OF EQUAL TREATMENT FOR RELIGIOUS ORGANISATIONS

The Directive provides an explicit and specific exception⁵² to the principle of equal treatment by referring to genuine occupational requirements.⁵³ The legal construction of this provision is similar to that concerning indirect discrimination, i.e. the exception needs to be justified by a legitimate aim, be necessary and proportionate. The Directive in fact distinguishes between two kinds of exceptions.

In Article 4 (1) it provides for a narrower but general exception based on genuine occupational requirements. This provision is applicable to all employers and all grounds of discrimination, therefore also to religion or belief. In this case a difference of treatment which is based on religion or belief shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining

⁴⁹ Paragraph 1 of the Resolution of the Parliamentary Assembly of the Council of Europe of 28 June 2006, Nr 1510 (2006), Freedom of expression and respect for religious beliefs.

⁵⁰ Lucy Vickers, Is all harassment equal? The case of religious harassment, *Cambridge Law Journal*, 65(3), November 2006, 584.

⁵¹ I. Leigh, Harassment, Why this is an important issue, Conference on EU Goods and Services Directive, A threat to religious freedom, organized by the Christian Institute, London, 23.10.2008.

⁵² It is not entirely clear whether Article 4 provides for an 'exception' or 'exemption'. See I. Leigh, Clashing rights, exemptions and opt-outs: religious liberty and 'homophobia', in: *Law and Religion, Current Legal Issues 2001*, vol. 4, p. 263; J. Rivers, Law, gender and gender equality, *Ecclesiastical Law Journal*, 2007, vol. 9, p. 42.

⁵³ An in-depth analysis of the exceptions provided in Article 4 can be found in M.F. Fernández López, F.J. Calvo Gallego, *ibidem*.

occupational requirement, provided that the objective is legitimate and the requirement is proportionate. This exception applies only when it is possible to prove a relation between the job in question and the required characteristics. Very often and for many occupations it cannot be realistically claimed that being of a particular religion or particular belief is a determining occupational requirement. According to Article 4 (1) difference in treatment based on religion or belief would not be deemed discriminatory when those employed in religious service are involved in teaching of religion or in religious observance.⁵⁴

In Article 4 (2) the Directive makes a specific reference to the professional activities of churches and other public or private organisations the ethos of which is based on religion or belief. In such case the criterion of religion or belief may serve as the basis for differential treatment if such a criterion is considered to be a genuine, legitimate, and justified occupational requirement. Article 4 (2), however, does not establish a general exemption and provides that the differences of treatment, which could be justified by referring to a genuine, legitimate and justified occupational requirement, will depend on the context or the nature of the job. However, in this case the difference in treatment will be permitted where by reason of the nature of these activities or the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. Contrary to Article 4 (1) this requirement does not have to be determining, though it must be legitimate and justified, as well as genuine and occupational. It will be also necessary to consider the nature of the work and the context in which it is carried out. Article 4 (2) does not require proof of the need to discriminate against a person on grounds of religion in order to maintain or prevent the undermining of the organization's ethos, but simply proof that their religion or belief is a genuine, legitimate and justified occupational requirement having regard to that ethos. The Directive however does not clarify the concept of occupational requirement in justifying discrimination on grounds of religion. It is debatable whether the application of Article 4 (2) also extends to private businesses either owned or comprised of persons of a particular faith group.⁵⁵

Another dimension of the exception is provided in the second part of Article 4 (2), which allows churches, and other faith based organisations to require individuals working for them to act in good faith and with loyalty to the organisation's ethos. Limited permission was given for conditions concerning lifestyles, which concern obligations put on individuals to act in good faith and with loyalty to the organisation's ethos. In justifying discrimination on grounds of religion as an occupational requirement it will be necessary to show that a person's religion is a determining factor in their ability to

⁵⁴ L. Vickers, *Religion and Belief Discrimination in Employment*, *ibidem*, p. 56.

⁵⁵ The answer would depend on whether the reason to establish business was predominantly due to carry out business profession, just as any non-religious business enterprise or whether the shared religious commitment of participants was considered fundamental. Ian Leigh, *Clashing rights, exemptions, and opt-outs: religious liberty and 'homophobia'*, *ibidem*, p. 270.

discharge the duties of the job, rather than simply showing the employer's perception that such religion or belief is fitting in the light of the organisation's ethos.⁵⁶ Therefore a Christian school might find it difficult to argue that that it is a determining requirement that a math teacher is a Christian, but might find it easier to argue that it is a legitimate and justified requirement in order to maintain and promote the ethos of the school.⁵⁷ However the legally permissible difference in treatment based on person's religion or belief must not justify discrimination on any another ground, such as gender, racial origin, disability, etc.

There are already cases pending (admissibility procedure) before the European Court of Human Rights, concerning the loyalty obligations within the labour laws of the churches, e.g. a musician of the Catholic Church⁵⁸ and an employee of the Mormon Church⁵⁹ were dismissed when the employer became aware of the fact that they, despite being married, were involved in an extra-marital relationship, and a nursery teacher in a Protestant kindergarten, who was dismissed on grounds of a violation of her loyalty obligations towards the Protestant Church.⁶⁰ It is not excluded that in the near future similar cases will be submitted in the proceedings before the ECJ. As the so far jurisprudence of the ECJ shows, the interpretation of Article 4 might be given a completely new dimension.

Member states may maintain legislation that allows for difference in treatment or they may adopt legislation to incorporate the existing practices, but they may not allow for new provisions in this area. The difference of treatment shall be implemented taking account of member states' constitutional provisions and principles, as well as the general principles of Community law.

Some countries, e.g. Ireland, Austria, Greece, Netherlands, Italy, the UK, and Germany have provided exceptions which go beyond the strict terms of the Directive or which remain ambiguous. Some of these exceptions are particularly wide, creating a broad area where the prohibition of discrimination is not applied. Controversies have arisen about the extent of these exceptions: while on the one hand they could be said to breach the principle of equality, on the other they aim to protect other fundamental rights, i.e. religious freedom and the freedom of churches to organise themselves and to act consistently with their faith and principles.⁶¹ For example German legislation was considered too broad, because it states that a difference of treatment in employment and occupation on the grounds of religion is permitted, *inter alia*, where a particular religion

⁵⁶ M. Bolger, Discrimination on grounds of religion, in: Equality in diversity, The new Equality Directives, ed. C. Costello & E. Barry, Irish Centre for European Law, 2003, p. 384.

⁵⁷ P. Beaumont, Christian perspectives on the law, what makes them distinctive?, in: Law and Religion, Current Legal Issues 2001, vol. 4, p. 538.

⁵⁸ Schüth v. Germany, application no.1620/03.

⁵⁹ Obst v. Germany, application no. 425/03.

⁶⁰ Siebenhaar v. Germany application no.18136/02.

⁶¹ ENAR, European Network against Racism, Religious Discrimination and Legal Protection in the European Union, *ibidem*, p. 19.

constitutes a justified occupational requirement in view of the *raison d'être* of the religious community or association in accordance with its right to self-determination. The European Commission in a first stage of infringement proceeding argued, that such a requirement must be proportional to the activity and that the ethos of an organisation plays a role with regard to determining an occupational requirement under Article 4 (2) of the Directive. However, it cannot be the only criterion, and must be modified in order take account of the nature of the activities and the context in which they are carried out.

Some member states have chosen not to include any 'Article 4(2) exception', and some, such as Czech Republic, France, Portugal, Finland, Sweden, Estonia, Lithuania, decided not to provide in their laws for such exception, though there may be special regulations governing some recruitments by religious institutions.

CONCLUSIONS

In order to become effective the Employment Equality Directive had to be transposed into national legislation by 2 December 2003 by the 15 "old" member states and by 1 May 2004 by the 10 "new" member states, and by 1 January 2007 by Romania and Bulgaria. In course of 2008 the European Commission, holding responsibility for the implementation of the directives, took steps in the infringement proceedings against practically all member states. Though the proceedings are on different stages, a common denominator can be found, the main problem being the definitions of discrimination, i.e. understanding what constitutes discrimination. This leads to a principal question to what extent the Commission's vision of non-discrimination corresponds with that held in the member states. Member states choose their ways to implement the provisions of the directives into their national law. They have to take into account the expectations of their citizens, which are not always in line with the progressive reading of the provisions by the European institutions. Maybe in case of non-discrimination the 'one size fits all' solution is simply not a right concept?