European Parliament

Implementation of the Employment Equality Directive

The principle of non-discrimination on the basis of religion or belief

STUDY

EPRS | European Parliamentary Research Service

Ex-Post Impact Assessment Unit

PE 536.345 - January 2016

Study on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief

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This study has been written by Erica Howard of the School of Law, Middlesex University, at the request of the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

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LINGUISTIC VERSIONS
Original: EN

This document is available on the internet at: http://www.europarl.europa.eu/thinktank

Manuscript completed in January 2016. Brussels © European Union, 2016.

PE 536.345
ISBN 978-92-823-8471-8
Doi:10.2861/783216
QA-01-15-940-EN-N

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Executive summary

The 2000 Employment Equality Directive[1] imposed a duty on the EU Member States to provide protection against discrimination on the grounds – among others - of religion or belief in the areas of employment, occupation and vocational training. This study provides an overview of the provisions against religion or belief discrimination in the Directive and its implementation in the law of the Member States. It examines some of the legal issues linked to the protection against religion and belief discrimination, including the interpretation of key concepts, and the exceptions provided for in the Directive.

Religion or belief as a discrimination ground can give rise to specific problems, not only because religion or belief plays an important role in the lives of many people in Europe, but also because freedom of religion and belief is a fundamental human right guaranteed by the European Union Charter of Fundamental Rights (EUCFR) and many international and European human rights instruments. Moreover, these instruments contain a prohibition of discrimination on the ground of religion or belief. Therefore, the protection against religion and belief discrimination in the EU and in the Member States is provided in two different ways: through human rights law and through anti-discrimination law.

The Employment Equality Directive does not define the terms "religion" or "belief", but the Court of Justice of the European Union (CJEU) could find guidance – if needed - in the interpretation of these terms in the international human rights instruments, which are referred to in Recital 4 of the Preamble of the Directive. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) and the case law of the European Court of Human Rights under this Convention are particularly important because Article 10(1) EUCFR guarantees the freedom of thought, conscience and religion in the same terms as Article 9(1) ECHR, and because Article 52(3) EUCFR determines that, when rights in the Charter correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down in the Convention. Both instruments prohibit discrimination on a large number of grounds, including religion or belief.

The Employment Equality Directive prohibits direct religion or belief discrimination which cannot be justified except in certain circumstances provided for in the Directive itself. Indirect discrimination is also prohibited by the Directive, but this form of discrimination is not unlawful if it is objectively justified by a legitimate aim and the means used to achieve that aim are proportionate and necessary. The test for justification is analysed and this test can be said to include an implicit duty of reasonable accommodation of religion or belief requests in the workplace similar to the duty provided in Article 5 of the Employment Equality Directive for disabled people.

[1] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303/16. Hereafter referred as the Employment Equality Directive, or the Directive.

The Employment Equality Directive also prohibits harassment, instructions to discriminate and victimisation on the grounds of religion or belief. The possible tension between freedom of expression and harassment and third party harassment are also discussed.

This study examines the exceptions provided for in the Employment Equality Directive, including

- the general exception in Article 2(5),
- the exception for genuine occupational requirements in Article 4 and
- the exception in Article 7 for positive action.

The Directive contains an extra exception for genuine occupational requirements for organisations with a religious ethos and this has given rise to some problems with implementation. However, not all Member States have implemented this exception in their national laws.

In addition, two specific issues are briefly discussed:

- multiple discrimination, where someone is discriminated against on more than one discrimination ground at the same time, and
- the tensions that can exist between the right to freedom of religion and belief and the right not to be discriminated against on the grounds of religion or belief on the one hand and, on the other hand, the right to be free from sexual orientation discrimination, which is also prohibited not only by the Employment Equality Directive but also by the EUCFR and the ECHR.

Finally, the concepts of justification and proportionality play a very important role in both the Employment Equality Directive (under Article 2(5) and for indirect discrimination, positive action and genuine occupational requirements) and in human rights law (under Article 52(1) EUCFR and under Articles 9 and 14 ECHR). This means that all interests at stake must be considered and balanced against each other: a fair balance needs to be struck between the rights of the individual and the interests of the state, employer, service provider or the rights of others. The principle of proportionality has been used and interpreted by the CJEU in cases concerning gender discrimination, as will become clear in this study. This principle and its interpretation in previous cases can thus be used by the CJEU, but also by national courts, to balance a range of competing and sometimes conflicting rights. Moreover, the principle and the balancing of all interests involved that it entails, could also be used in the individual workplace to resolve possible conflict situations arising there.

Chapter 1 Introduction

The purpose of this study is to provide an overview of the provisions against religion or belief discrimination in EU law and their implementation in the law of the Member States. It concentrates on the Employment Equality Directive, the Directive that prohibits discrimination in the area of employment and occupation on the grounds of disability, religion and belief, age and sexual orientation.

The study discusses the definition of terms, the forms of discrimination prohibited and the exemptions provided for, including genuine occupational requirements and positive action. It will also examine some of the problematic issues in relation to religion and belief and make suggestions as to how problems in this area might be resolved.

As the EU Agency of Fundamental Rights (FRA) remarks, 'evidence gathered by FRA shows that discrimination remains part of the daily experience of too many Europeans'.[2] The Special Eurobarometer 393 on discrimination in the EU in 2012 shows that:

> "discrimination on grounds of religion or beliefs is more commonly perceived as rare or non-existent than widespread: 56% of Europeans think it is rare or non- existent (5% non-existent, 51% rare) and 39% that it is widespread. Five per cent "don't know".[3]

However, as the Special Barometer shows, there are very wide differences between countries:

> "Discrimination based on religion or beliefs is seen as most widespread in France (66%), followed by Belgium (60%), Sweden (58%), Denmark (54%), the Netherlands (51%) and the UK (50%). The survey shows that belonging to a religious minority is an important factor here, with 54% of these Europeans indicating that discrimination on the grounds of religion/beliefs is widespread in their country. At the other extreme of the scale, less than 15% of respondents in the Czech Republic and Latvia (both 10%), Slovakia (12%), Ireland and Bulgaria (both 13%) and Lithuania and Estonia (both 14%) say that discrimination on the basis of religion/belief is widespread in their countries".[4]

[2] EU Agency for Fundamental Rights Opinion – 1/2013: Opinion of the European Union Agency for Fundamental Rights on the Situation of Equality in the European Union 10 Years on from Initial Implementation of the Equality Directives, 2013, 3, < http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf

[3] Special Eurobarometer 393 on Discrimination in the EU in 2012, < http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf

[4] Ibid.

This study draws on the information provided by the European network of experts in gender equality and non-discrimination[5] in a number of reports which will be referenced in the footnotes. It also draws on information from a number of other sources.

I. Background

At the outset, it must be clearly stated that religion and belief as a ground for discrimination can be problematic because of the special role religion and belief plays in many people's lives. An Equinet report on this subject states that "nearly 87% of 26 EU Member States' population adhere to one of the three world religions: Christianity, Judaism and Islam".[6] Many states also have, as Vickers[7] writes:

> "strong commitments to the Christian church. To take just a few examples of the many ties between religion and state across the EU, the UK has an established church; the Irish Constitution makes express reference to being founded on Christianity; Finland levies church taxes and legislation provides autonomy to the Lutheran church; and Spain8 and Italy have strong ties with the Catholic church, regulated by treaties with the Holy See".

And, even in countries that have a strict separation between church and state – France, for example, mentions in Article 1 of its Constitution that it is a secular republic – the Christian churches have played and are still playing a major part in the daily life of the society. Another matter which complicates the protection against religion and belief discrimination in the EU and in the Member States is that this protection is provided in two different ways: through anti-discrimination law and through human rights law.

[5] Until December 2014, there were two networks: the European Network of Experts in the Non-discrimination Field – which periodically published the European Anti-discrimination Law Review - and the European Network of Legal Experts in the Field of Gender Equality – which periodically published the European Gender Equality Law Review - but these networks have now been joined to form a single network, the *European Network of Experts in Gender Equality and Non-discrimination*. They now publish a periodical publication called the *European Equality Law Review*. These publications have also been used for this study, especially for case law from the EU Member States.
[6] See: Equinet, Equality Law in Practice A Question of Faith: Religion and Belief in Europe, Equinet, Brussels, 2011, 7, < http://www.equineteurope.org/Equality-Law-in-Practice-Religion.
[7] L. Vickers, Religion and Belief Discrimination in Employment – the EU Law (European Network of Legal Experts in the Non-discrimination Field, 2006) European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 8, < http://ec.europa.**eu**/social/BlobServlet?docId=1689&langId=en
[8] In Spain, the Catholic church is recognised expressly in the Constitution.

II. Anti-discrimination law

Examining anti-discrimination measures in 2000, the EU adopted two Directives against discrimination: the Employment Equality Directive and the Race Directive,[9] covering racial or ethnic origin discrimination. Both Directives imposed a duty on Member States to enact legislation against these grounds of discrimination and, according to a report by the European Commission, "all 28 Member States have transposed the Directives".[10]
The Race Directive covers the area of employment, occupation and vocational training, social protection, including social security and healthcare, social advantages, education and the access to and supply of goods and services available to the public, including housing. However, the Employment Equality Directive only covers the area of employment, occupation and vocational training and does not go beyond this area. Racial or ethnic origin discrimination is, thus, prohibited in a much wider area than discrimination on the grounds of religion or belief and on the other grounds covered in the Employment Equality Directive.

There is a proposal from the Commission[11] to extend the material scope of the Employment Equality Directive to all the areas covered by the Race Directive, but this proposal has, to date, not been adopted and will therefore not be discussed in this study. Because, at present, the Employment Equality Directive only imposes a duty on Member States to have legislation against discrimination on the grounds of religion and belief in employment related areas, the focus of this study will be on that area. However, it must be noted that a number of Member States provide the same protection as the Race Directive does to some or all grounds covered by the Employment Equality Directive (Table 1).[12]

[9] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, OJ L 180/22. Hereafter referred to as the Race Directive.
[10] COM (2014) 2, Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation ('Employment Equality Directive'), 17 January 2014, 3, <http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf
[11] COM (2008) 426 Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons irrespective of Religion or Belief, Disability, Age or Sexual Orientation.
[12] See: I. Chopin and C. Germaine, Developing Anti-discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared, (European Network of Legal Experts in the Non-discrimination Field, 2015) European Commission, Directorate-General for Justice and Consumers, 70-71 < http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2014.pdf For the areas covered by each Member State for religion and belief discrimination see: A. McColgan, National Protection beyond the Two EU Anti-discrimination Directives The Grounds of Religion and Belief, Disability, Age and Sexual Orientation beyond Employment (European Network of Legal Experts in the Non-discrimination Field (2013) European Commission, Directorate-General for Justice), 80-81 < http://ec.europa.eu/justice/discrimination/files/final_beyond_employment_en.pdf

Table 1 Protection against religion or belief discrimination outside the area of employment, occupation and vocational training

	Protection beyond employment[13]	Areas covered
Austria	Yes, at federal or regional level	Social protection, social advantages, education, goods and services, housing
Belgium	Yes	Social protection, social advantages, education, goods and services, housing
Bulgaria	Yes	Social protection, social advantages, education, goods and services, housing
Croatia	Yes	Social protection, social advantages, education, goods and services, housing
Cyprus	Yes	Social protection, social advantages, education, goods and services, housing
Czech Republic	Yes	Social protection, social advantages, education, goods and services, housing
Denmark	Yes	Education, goods and services, housing
Estonia	Yes	Social protection, social advantages, education, goods and services, housing
Finland	Yes	Social protection, social advantages, education, goods and services, housing
France	Yes	Social advantages, goods and services, housing; social protection and education uncertain
Germany	Yes	Social protection, social advantages, education, goods and services, housing
Greece	No	
Hungary	Yes	Social protection, social advantages, education, goods and services, housing
Ireland	Yes	Social protection, education, goods and services, housing; social advantages uncertain
Italy	Yes	Social protection, social advantages, education, goods and services, housing
Latvia	Yes	Social protection, social advantages, education
Lithuania	Yes	Education, goods and services, housing
Luxembourg	Yes	Social protection, social advantages, education, goods and services, housing
Malta	Yes	Education and banking services
Netherlands	Yes	Social protection, social advantages, education, goods and services, housing
Poland	No	

[13] This information is based on McColgan, above note 12, 80-81.

	Protection beyond employment[13]	Areas covered
Portugal	Yes	Social protection, social advantages, education, goods and services, housing
Romania	Yes	Social protection, social advantages, education, goods and services, housing
Slovakia	Yes	Social protection, social advantages, education, goods and services, housing
Slovenia	Yes	Social protection, social advantages, education, goods and services
Spain	Yes	Social protection, social advantages, education
Sweden	Yes	Social protection, social advantages, education, goods and services, housing
United Kingdom	Yes	Social protection, social advantages, education, goods and services, housing

EU law thus prohibits discrimination on the grounds of religion or belief in employment, occupation and vocational guidance and training. The CJEU has given a wide interpretation to the concepts of employment, access to employment, dismissal and vocational guidance and training.[14] The CJEU has not decided any cases concerning religion or belief under the Employment Equality Directive, but it will get a chance to do so, as two preliminary references requesting clarification of parts of the Directive in relation to religion and belief have been made recently.[15]

III. Human rights law

If we turn to human rights measures, religion and belief as grounds for discrimination raise particular and complex issues because freedom of religion is a fundamental human right protected by all major global and European human rights instruments. Article 18 of the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948, Article 18(1) of the International Covenant on Civil and Political Rights 1966 (ICCPR), and Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) all guarantee freedom of thought, conscience and religion. All three state that this includes freedom to change one's religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance.

[14] Equinet, above note 6, 11.
[15] C-157/15 *Samira Achbita, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV*, preliminary reference 3 April 2015, < http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CN0157&from=EN and, C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*, preliminary reference 24 April 2015 , http://curia.europa.eu/juris/document/document.jsf?text=&docid=165123&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=341315

Within the EU, the Charter of Fundamental Rights of the European Union (EUCFR), which became binding in 2009 with the coming into force of the Treaty of Lisbon, also contains the right to freedom of thought, conscience and religion in its Article 10, which echoes Article 9(1) ECHR. The EU Guidelines on the promotion and protection of freedom of religion or belief reflect all the above mentioned international human rights standards.[16] These guidelines point out that "States have a duty to protect all persons within their jurisdiction from direct and indirect discrimination on grounds of religion or belief".[17] Recitals 4 and 6 of the Preamble to the Employment Equality Directive place the Directive clearly within this human rights framework as they refer to the international and European human rights instruments as well as the International Labour Organisations' Convention No 111 on Discrimination in Employment and the EU Community Charter of Fundamental Social Rights.
Especially the ECHR and the case law under this Convention should influence the interpretation of the Directive for a number of reasons. Firstly, all EU Member States have signed and ratified the Convention.[18] Secondly, Article 6(3) TEU determines that:

> "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

Thirdly, Article 52(3) of the EUCFR states that:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

For all these reasons, the ECHR and the case law of the European Court of Human Rights should play a role in the interpretation of the Employment Equality Directive.

The EUCFR also clearly shows the EU's commitment to equality and non-discrimination. It contains the fundamental human right to equality before the law and protection against discrimination. Article 20 states that 'everyone is equal before the law' and this is followed by Article 21, which states that:

> "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief,

[16] Council of the European Union, EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (adopted 24 June 2013) <
http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guidelines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_%28june_24_2013_fac%29.pdf
[17] Ibid, para 35.
[18] For more information on which Member States have signed and/or ratified a number of international Conventions, see Chopin and Germaine, above note 12, 144.

political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".

These human rights principles could be useful to supplement the protection against religious discrimination provided by the Employment Equality Directive, not only in the employment field but also, and especially, in a much wider field, as is clear from the EU Guidelines.[19]

So both EU anti-discrimination law and EU and European human rights law impose a duty on Member States to protect everyone against religion or belief discrimination. In addition to these, almost all Member States also have constitutional provisions on freedom of religion and belief and against (religion or belief) discrimination. Of the 28 Member States, only Denmark does not have a constitutional anti-discrimination provision, while the UK does not have a written Constitution (see Table 2).[20]

Table 2 Constitutional guarantees of freedom of religion and prohibitions of discrimination

	Constitutional guarantee of freedom of religion[21]	Constitutional prohibition of discrimination; religion explicitly mentioned
Austria	Not in Constitution, but Article 14 Basic Law on General Rights of Nationals contains guarantee of freedom of belief	Yes, article 7, religion
Belgium	Article 20, no forced religion	Articles 10 and 11 (general, no grounds mentioned)
Bulgaria	Article 13	Yes, Article 6, religion
Croatia	Article 40	Yes, Article 14, religion, political or other belief
Cyprus	Article 18	Article 18, religion
Czech Republic	No explicit guarantee, but ratified Human Rights Treaties apply (Article 10)	No explicit guarantee, but ratified Human Rights Treaties apply (Article 10)
Denmark	Section 70	
Estonia	Article 40, religion, Article 41, belief, opinions	Article 12, creed political or other persuasions
Finland	Section 11	Section 6, religion, conviction
France		Article 1, religion
Germany	Article 4	Article 3, faith, religious or political opinion

[19] Guidelines, above note 16, para 37, c.
[20] See Chopin and Germaine, above note 12, 148-154.
[21] The information in this table has been taken from the International Constitutional Law Project website < http://www.servat.unibe.ch/icl/index.html

	Constitutional guarantee of freedom of religion[21]	Constitutional prohibition of discrimination; religion explicitly mentioned
Greece	Article 13	Article 4, general, no specific grounds mentioned
Hungary	Article VII	Article XV, religion, political or other opinion
Ireland	Article 44	Article 40, general, no specific grounds mentioned
Italy	Article 9	Article 3, religion, political opinion
Latvia	Article 99	Article 91, general, no specific grounds mentioned
Lithuania	Article 26	Article 29, religion, conviction or opinion
Luxembourg	Article 19	Article 11, general, no specific grounds mentioned
Malta	Section 40	Section 45, political opinion, creed
Netherlands	Article 6	Article 1, religion, belief, political opinion
Poland	Article 53	Article 32, any reason whatsoever
Portugal	Article 41	Article 13, religion, political or ideological convictions
Romania	Article 29	Article 4, religion, opinion, political adherence
Slovakia	Article 24	Article 12, creed or religion, political or other belief
Slovenia	Article 41	Article 14, religion, political or other conviction
Spain	Article 16	Article14, religion, opinion
Sweden	Chapter 2, fundamental rights and freedoms, Article 1(6), freedom of worship	Article 15, prohibition of discrimination, some grounds mentioned, religion not mentioned
United Kingdom	No written constitution, Human Rights Act 1998 incorporated ECHR into British law	No written constitution, Human Rights Act 1998 incorporated ECHR into British law

Apart from the right to freedom of religion, other human rights or fundamental freedoms could also play a role in relation to religion and belief. The right to freedom of expression in Article 10 ECHR and Article 11 EUCFR, for example, includes religious expressions. The right to freedom of assembly (Articles 11 ECHR and 12 EUCFR) could also be important. So, although the focus of this study is on the Employment Equality Directive, human rights issues are likely to play a part in the implementation and in the interpretation of the religion and belief provisions of the Directive.

But human rights principles can not only support the interpretation of the Directive, they can also lead to tensions, for example between the right to freedom of religion and belief and the right to be free from religious, gender or sexual orientation discrimination. For

example, can a religious organisation refuse to employ anyone with a different religion or without a religion? Can they discriminate against women because they do not believe in gender equality or against homosexual people because they believe that homosexuality is against their religion? In this context, the provisions for genuine occupational requirements for organisations with a religious ethos will be discussed.

IV. Justification in human rights law

One more issue in relation to the right to freedom of religion and belief must be noted. According to Article 9 ECHR, the right to freedom of religion includes the right to freely manifest one's religion or belief. The right to manifest one's religion or belief, can, according to Article 9(2) ECHR, be restricted but only if the restriction is prescribed by law and is necessary in a democratic society for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others. The European Court of Human Rights, the Court tasked with overseeing the ECHR, has held that "necessary in a democratic society" means that the interference must fulfil a pressing social need and must be proportionate to the legitimate aim pursued.[22] This means that there must be a reasonable relationship of proportionality between the aim of the restriction and the means used to achieve that aim. This justification and proportionality test means that a balancing of all rights involved needs to take place. A similar justification and proportionality test can be found in Article 52(1) of the EUCFR and the Employment Equality Directive, for example for indirect discrimination, for genuine occupational requirements and for positive action. These will be discussed in this study.

[22] *Handyside v the United Kingdom,* App. No. 5493/72, 7 December 1976.

Chapter 2 Definitions

None of the international human rights instruments guaranteeing freedom of religion and belief provide a definition of these terms, and neither does the EUCFR or the Employment Equality Directive. None of the Member States has provided a comprehensive definition of "religion or belief" within their anti-discrimination legislation.[23] But:

> "in Hungary, Article 6 of the ASct CCVI of 2011 on the right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities stipulates that religious activities are linked to a world view directed towards the transcendental and showing a system of faith-based principles which are focused on the existence as a whole. It also embraces the entire human personality through specific requirements of conduct that do not offend morals and human dignity".[24]

Some Member States have given guidance through explanatory notes to legislation or through case law, like Belgium, France, Germany, the Netherlands and the UK.[25]

I. Religion or religious belief

For the interpretation of the terms "religion" and "belief" the Member States and the CJEU when called upon to decide on religion or belief discrimination under the Employment Equality Directive, could look at the international human rights instruments and the case law of the European Court of Human Rights under Article 9 ECHR for guidance. The above discussion of the importance of human rights within the Directive and the EUCFR suggests that they should do so. The UK's Equality Act 2010, for example, refers to this case law in its explanatory notes to Section 10, which does not give a definition and just determines that "religion means any religion and a reference to religion includes a reference to a lack of religion" and "belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief".

So what guidance can be gleaned from the international instruments? In General Comment 22 (on Article 18 ICCPR), the Human Rights Committee states that this article protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. It also states that the terms "religion" and "belief" are to be broadly construed and that Article 18 is not limited in its application to traditional religions or to

[23] See Chopin and Germaine, above note 12, 15.
[24] Ibid.
[25] Ibid, 17.

religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[26]

The terms have also been given a wide interpretation by the European Court of Human Rights. All traditional religions and beliefs are covered, but also beliefs such as Pacifism, Veganism, Atheism, the Church of Scientology, Druidism, Divine Light Zentrum and Krishna Consciousness.[27] But, the Court has held that the religion must have a clear structure and belief system.[28] If national courts in the Member States and the CJEU follow the ECHR interpretation, it would improve consistency in interpretation across the EU.

The case of *Campbell and Cosans* concerned the philosophical beliefs or convictions of parents that corporal punishment of children in school was wrong.[29] The European Court of Human Rights determined that a religious or philosophical conviction or belief, as mentioned in Article 9 and in Article 2 of Protocol 1,[30] must attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; not be incompatible with human dignity; not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour. On this basis, it held that the state had failed to respect the parents' philosophical convictions. [31]

The Austrian Supreme Court had to decide on a case where a high-ranking civil servant at the Federal Asylum Service had published a book about the Austrian asylum system. The author expressed strong negative views about asylum seekers in this book and his employer disciplined him. He complained that this constituted harassment on the grounds of belief. All previous courts rejected the claim, as did the Supreme Court. The Supreme Court defined the term 'belief' stating that

> "the generic term "belief" is closely related to the term "religion". However, it also serves as a collective term to describe other overarching concepts of life and the world and is furthermore used to indicate a personal and societal position with regard to how life is understood".[32]

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[26] Human Rights Committee, General Comment 22, The Right to Freedom of Thought, Conscience and Religion (on Art. 18), 1993, para. 2.

[27] Pacifism: *Arrowsmith v United Kingdom*, App. No. 7050/75, 12 October 1978; Veganism: *W v United Kingdom,* App. No. 18187/91, 10 February 1993; Atheism: *Angeleni v Sweden*, App. No. 10491/83, 3 December 1986: Church of Scientology: *X and Church of Scientology v Sweden*, App. No. 7805/77, 5 March 1977; Druidism: *Chappell v United Kingdom,* App. No. 12587/86, 30 March 1989; Divine Light Centrum: *Swami Omkarananda and the Divine Light Zentrum v Switzerland*, App. No. 8118/77, 19 March 1981; and, Krishna Consciousness. *ISKCON and Others v United Kingdom,* App. No. 20490/92, 8 March 1994.

[28] *X v United Kingdom,* App. No. 7992/77, 12 July 1978.

[29] *Campbell and Cosans v United Kingdom* App. Nos 7511/76 and 7743/76, 23 March 1983.

[30] Article 2 of Protocol 1 to the ECHR determines: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

[31] *Campbell and Cosans,* above note 29.

[32] See: European Anti-discrimination Law Review, 9 (December 2009), 46 and the internet link given there.

This seems to fit in with what the European Court of Human Rights has said in *Campbell and Cosans*.

II. Determining an individual's religion or belief

But can a court determine whether something is a manifestation of a religion or belief or whether a belief is seriously held and attains a level of cogency, seriousness, cohesion and importance and thus attracts protection under human rights and anti-discrimination laws? How religion or belief is manifested can vary between as well as within religious groups. For example, some Muslim women wear a headscarf, while others will wear a face-covering veil, and yet others will not cover their heads at all. Some Christians feel that they should wear a cross, others do not. And, what about the differences between denominations within a religion, like Protestants and Catholics within Christianity? A court should recognise that there can be many different ways in which an individual manifests his or her religion or belief and that such manifestations can lead to discrimination.

The European Court of Human Rights has held that

> "the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate".[33]

However, this can lead to problems in discrimination cases. For example, does a court accept the claimant's religion or belief, or can it examine whether he or she in fact genuinely holds that religion or belief? *Kosteski* suggests that, in an employment dispute, the employer can require a certain level of substantiation of the religion or belief.[34] However, the Court considered this as an exception, as it considered that:

> "while the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by Macedonian law which provided that Muslims could take holiday on particular days, including the Bayram festival in issue in the present case".

The Court did not find it unreasonable, in the context of employment:

> "that an employer may regard absence without permission or apparent justification as a disciplinary matter. Where the employee then seeks to

[33] *Manousakis and Others v Greece,* App. No. 18748/91, 26 September 1996; and, *Hasan and Chaush v Bulgaria,* App. No. 30985/96, 26 October 2000.
[34] *Kosteski v The Former Yugoslav Republic of Macedonia,* App. No. 55170/00, 13 July 2006, para 39.

> rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion".[35]

The European Court of Human Rights has also recognised that groups can become divided and it has determined, when that happens, that the role of the State "is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".[36]

In recent cases, the European Court of Human Rights has quite readily accepted that the wearing of a headscarf, face veil, cross, turban or other forms of dress is a manifestation of the individual claimant's religion or belief and has moved swiftly on to examine the justification and proportionality of alleged interferences with these manifestations.[37] In *Eweida and Others v United Kingdom,* for example, the European Court of Human Rights accepted that in order to establish that an act is a manifestation of religion or belief for the purposes of Article 9, the applicant does not have to establish that he or she acted in fulfilment of a duty mandated by the religion in question. It is sufficient to establish the existence of a sufficiently close and direct nexus between the act and the underlying belief.[38] As Vickers writes:

> "In the context of the [Employment Equality] Directive, the implication of this finding will be that many of the practices to which the Directive may apply … will be viewed as religious practices which are prima facie protected from direct and indirect discrimination".[39]

Based on the above, it would be good practice for the CJEU (and the national courts in the Member States) to accept that something is a manifestation of religion or belief and to only concern themselves with making sure that an assertion of religious belief is made in good faith. They should not assess the validity or correctness of a religion or belief.

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[35] Ibid.

[36] *Serif v Greece,* App. No. 38178/97, 14 March 2000, para 53.

[37] See for example: *Dahlab v Switzerland,* App. No. 42393/98, 15 February 2001 (headscarf); *Leyla Sahin v Turkey,* App. No 44774/98, 29 June 2004 (Chamber) and 10 November 2005 (Grand Chamber) (headscarf); *Phull v France*, App. No. 35753/03, 11 January 2005 (turban); *Ahmet Arslan and Others v Turkey,* App. No.41135/98, 23 February 2010 (turbans, distinctive trousers and tunics); *Eweida and Others v the United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10 and 59842/10, 15 January 2013 (small cross); and, *S.A.S. v France*, App. No. 43835/11, 1 July 2014, (Grand Chamber) (face veil).

[38] *Eweida and Others,* above note 37, para. 82.

[39] L. Vickers (2015), Religion and Belief Discrimination in Employment under the Employment Equality Directive: a Comparative Analysis, 1, *European Equality Law Review*, 227.

III. Political beliefs

Does the protection of the Employment Equality Directive extend to discrimination on the ground of political beliefs? Annex 2 to the Commission report on the application of the Race and Employment Equality Directives states that

> "the concept "belief" should be read in the context of "religion or belief". It refers to a belief or a philosophical conviction (like those of atheists or agnostics, for example), which does not need to be of a religious nature, but it does not cover political opinion. If the legislator wanted to cover political opinion, it would have stated so and referred to "political opinion" separately, as in Article 21 of the Charter of Fundamental Rights of the European Union".[40]

To support this, the Commission refers, in footnote 42, to the case law of the European Court of Human Rights as regards Article 9 ECHR which "tends to confirm that "belief" is meant to refer to belief of spiritual or philosophical nature".

But, looking at the grounds of discrimination for which protection is provided in the national laws of the EU Member States, many of these include political opinion, political affiliation, political conviction, political belief or political and other views as a protected ground. The legislation in Finland mentions "opinion" and the law in Lithuania covers "religion, beliefs or convictions", which both suggest that political beliefs are covered.[41] See, for a case example, a case from Slovenia, where an Administrative Court found that the Minister of Justice had discriminated against the claimant on the basis of political opinion. The claimant was not given the position of president of a District Court, although he could show that he was the better candidate for the position. He could also show, using media reports, that the Minister opposed him due to their political differences.[42]

Another example of a case where discrimination on the ground of political opinion was claimed can be found in a case from the Netherlands Institute for Human Rights, where a local councillor for the right wing Party for Freedom (PVV) posted a number of strongly worded twitter messages expressing Islamophobic opinions. The claimant was also a teacher of civil education in a Catholic high school providing education from a Catholic/inter-confessional perspective. The school board decided to suspend him after the twitter messages, because they considered that these messages were incompatible with his position and not consistent with the school's mission. The Netherlands Institute of Human Rights found discrimination on the ground of political opinion, although they

[40] Report: above note 10. Annexes: SWD(2014) 5 final. Annexes to the Joint Report on the Application of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC), accompanying the Document COM(2014) 2 final, under number 4, < http://ec.europa.eu/justice/discrimination/files/swd_2014_5_en.pdf
[41] Chopin and Germaine, above note 12, 11-13.
[42] See: European Anti-discrimination Law Review, 6/7 (October 2008) 118.

then went on to find that this fell under the exemption for employers with an ethos based on religion and thus was not unlawful.[43]

The Member States that do not appear to cover this in their anti-discrimination legislation are Austria, Greece Ireland, Italy, Romania, Sweden, and the UK.[44] The Austrian Supreme Court decision discussed above of the civil servant with the Federal Asylum Service confirms that political opinions are not covered in Austrian law. However, in the UK some recent Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) cases have seemed somewhat contradictory and some have suggested that political beliefs, if they also amount to philosophical beliefs, are covered by the protection against religious discrimination.[45] A belief in climate change was held, by the EAT, to be a protected belief,[46] and so was 'democratic socialism'.[47] However, Marxism was held not to be a philosophical belief.[48]

Table 3 Protection of political belief or conviction

	Religion or belief[49]	Political opinion
Austria	Religion, belief	No
Belgium	Religious or philosophical belief	political opinion
Bulgaria	Religion or faith, beliefs,	political affiliation
Croatia	Religion or other belief	political belief
Cyprus	Religion	Political or other conviction
Czech Republic	Religion, belief or other conviction	Political or other views
Denmark	Belief and religion	Political opinion
Estonia	Religion or other beliefs	Political opinion
Finland	Religion or belief	? opinion
France	Religion and religious convictions	Political convictions
Germany	Religion or belief, religious opinions	Political opinions
Greece	Religion or belief	No
Hungary	Religion or belief	Political or other opinion
Ireland	Religion	No
Italy	Religion or belief, religious	No

[43] See: European Anti-discrimination Law Review, 17 (November 2013) 72-73 and the internet link there. The religious ethos exemption will be discussed later on in this study.
[44] See: Chopin and Germaine, above note 12, 11-13.
[45] An Employment Tribunal (ET) judgment is not binding on other ETs. An Employment Appeal Tribunal (EAT) judgment is binding on all subsequent ET hearings. But the EAT judgment are not binding outside the tribunal system, which mean that they do not set binding legal precedent in civil proceedings, although civil courts are obliged to consider their findings.
[46] *Grainger Plc v Nicholson* [2010] IRLR 4.
[47] *Henderson v GMB* [2013] IRLR 451.
[48] *Kelly and Others v Unison*, No. 2203854/08, 22 December 2009 (ET).
[49] The information in this table is based on Chopin and Germaine, above note 12, 11-13.

	Religion or belief[49]	Political opinion
	beliefs and practices	
Latvia	Religious convictions/opinions	Political or other convictions/opinions
Lithuania	Religion, beliefs or convictions	? convictions
Luxembourg	Religion or belief	No
Malta	Creed, religious conviction, religion or belief	Political or other opinions
Netherlands	Religion and belief	Political opinion
Poland	Religion, belief	Political opinion
Portugal	Religion	Political or ideological convictions
Romania	Religion, beliefs	No
Slovakia	Religion or belief	Political or other opinion
Slovenia	Religion or belief	Political or other belief
Spain	Religion or belief, religious convictions and practices, ideology	Political ideas, ideology
Sweden	Religion and other belief	No
United Kingdom	Great Britain: religion/belief Northern Ireland: religion, belief	No Political belief

IV. Non-believers

As mentioned above, Section 10 of the UK Equality Act 2010 makes clear that "a reference to religion includes a reference to a lack of religion" and "a reference to belief includes a reference to a lack of belief''. This means that people who are discriminated against because they do not have a particular religion or belief or any religion or belief at all are also protected. An example of this type of discrimination can be found in a case from Northern Ireland, where a police officer was less favourably treated on grounds of him not being a member of the Masonic Order. It was held that membership of the Masonic Order was a religious belief for the purposes of the anti-discrimination legislation which prohibited religious discrimination in employment.[50]

But is this also true for the Employment Equality Directive? If the interpretation of the Directive follows the case law of the European Court of Human Rights, than the meaning of "religion or belief" in the Directive would cover atheism and other non-religious beliefs. But it is not clear whether it also covers discrimination because a person does not

[50] European Anti-discrimination Law Review, 5 (July 2007), 100. *Gibson v Police Authority of Northern Ireland* [2006] NIFET 00406_00 (24 May 2006).

have a (particular) religion or belief. Thien Uyen Do discusses 10 years of anti-discrimination law cases and reports that:

> "a number of claims challenging termination of contracts or refusals to examine job applications because of lack of membership of a specific church or association (such as the Masonic Order) have been brought to the attention of the national courts, which found direct discrimination".[51]

This suggests that discrimination on the ground of not having a (particular) religion or belief would also be covered but the only case referred to is the Northern Ireland case mentioned above. An interpretation of the Directive to cover the absence of a religion or belief as a discrimination ground would increase the protection provided and this would fit in with its spirit and its purpose of 'putting into effect in the Member States the principle of equal treatment'[52] and would avoid undermining 'the achievement of the objectives of the EC Treaty'.[53] It would therefore be good practice to include this in the coverage of the national anti-discrimination legislation. Not doing so could leave a large number of people without protection against religion or belief discrimination.

[51] European Anti-Discrimination Law Review, 12 (July 2011), 17.
[52] Article 1 Employment Equality Directive.
[53] Recital 11, Preamble, Employment Equality Directive.

Chapter 3 Prohibited Conduct

There are different forms of conduct prohibited under the Employment Equality Directive: direct and indirect discrimination (Article 2(2)); harassment (Article 2(3)); instruction to discriminate (Article 2(4)); and, victimisation (Article 11). The definition of these terms is the same for all grounds covered by EU anti-discrimination Directives.

Because the protection against discrimination on the ground of sex has been in place long before the Race and Employment Equality Directives were adopted, the interpretation given in that area by national courts and the CJEU will play a role here.[54] But, in this study, these forms of prohibited conduct will be examined specifically in relation to the ground of religion or belief.

I. Direct discrimination

1. Definition

Direct discrimination on the ground of religion or belief occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the ground of religion or belief.[55] An example would be an employer who does not want to employ anyone who is Muslim. Another example can be found in a case from Ireland. Here a teacher who finished her training and obtained her teaching certificate was offered a permanent post in a school, but the offer was later withdrawn following a phone call in which the candidate was asked whether her teaching certificate was a Catholic certificate, which it was not. The Irish Equality Officer concluded that the teacher was discriminated against on the ground of her religion or belief, because her religion was discussed at a school's management board and had influenced the decision to withdraw the job offer.[56] Although the Equality Officer did not specify that this was direct discrimination, it can be seen that it was, as the candidate concerned was treated less favourably (i.e. not given the job) because of her religion.

[54] The current Directives prohibiting gender discrimination are: Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37; and, Council Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23. Hereafter together referred to as the Gender Equality Directives.

[55] Article 2(2)(a) Employment Equality Directive.

[56] See: *McKeever v Board of Management Knocktemple National School and Minister for Education & Science,* DEC-E2010-189 < http://www.equalitytribunal.ie/en/Cases/2010/October/DEC-E2010-189-Full-Case-Report.html and European Anti-discrimination Law Review, 12 (July 2011), 62.

2. Discrimination by association and by assumption

The definition of direct discrimination in the Employment Equality Directive contains the words "on any of the grounds referred to in Article 1", so prohibits direct discrimination "on the ground of religion or belief". It does not state that this less favourable treatment must take place "on the ground of his or her religion or belief", so it is not limited to discrimination on the ground of the victim's religion or belief. The definition is broad enough to include both discrimination by association – where a person is discriminated against because of their association with a person with a particular religion or belief – and, discrimination by assumption – where someone is discriminated against because someone assumes that they have a certain religion or belief. An example of associative discrimination would be a Catholic person being turned down for a job in a Catholic school because they are married to a Jewish person. There is assumptive discrimination when someone discriminates against a person because they think they are Muslim, even if, in fact, they are not.

The CJEU has decided, in *Coleman v Attridge Law and Steve Law*,[57] that discrimination by association is prohibited by the Employment Equality Directive. In this case a woman suffered detriment at work because she had a disabled son. The CJEU held that

> "an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee" (para 51).

The CJEU concluded that:

> "Directive 2000/78, and, in particular, Articles 1 and 2(1) and (2)(a) thereof, must be interpreted as meaning that the prohibition of direct discrimination laid down by those provisions is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a)" (para 56).

Ms Coleman also claimed harassment on the ground of disability and the CJEU reached the same conclusion in relation to this claim, so harassment because of a person's association with someone with a protected characteristic is also covered by the Employment Equality Directive.

[57] C-303/06 *Coleman v Attridge Law and Steve Law,* ECLI:EU:C:2008:415. See on this also SWD(2014) 5 final, above note 40, under 2c.

The national anti-discrimination laws in the Member States do not always make explicit whether discrimination by association and by assumption are prohibited.[58] Ireland and Bulgaria are exceptions, as Section 6(1)(b) of the Irish Employment Equality Act 1998-2001 and Section 1.8, Additional Provisions to the Bulgarian Protection against Discrimination Act contain an express prohibition of both forms of discrimination. Article 1(3) of the Croatian Anti-discrimination Act prohibits discrimination based on misconception and, in the Czech Republic, assumptive discrimination is prohibited. In the UK, the explanatory notes to Section 13 of the Equality Act 2010 make clear that both assumptive and associative discrimination are covered, but this is not explicitly stated in the Act itself. Austrian legislation protects individuals who experience discrimination or harassment due to their close relationship with a person whose religion or belief constitutes a ground for discrimination or harassment. In Belgium, the Flemish Framework Decree of 10 July 2008 explicitly covers assumptive discrimination and, in a recent case, where someone was dismissed because they had a disabled child, the Labour Court of Leuven followed the CJEU decision in *Coleman* and held that the dismissal was directly discriminatory.[59]

The European Commission refers to the CJEU decision in *Coleman* about associative discrimination and states that "this reasoning appears to be general in nature and applicable also to other grounds of discrimination covered by the two Directives".[60] The Commission also considers that "the Directives also prohibit a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics".[61] So the Commission is clear that both forms of discrimination are prohibited for all grounds covered by the Employment Equality and Race Directives and thus, even if the national legislation against discrimination does not provide explicitly that both are covered, the Member States should interpret their national provisions as doing so.

The definition of direct discrimination in the Employment Equality Directive also appears to be wide enough to provide protection against discrimination on the ground of an employer's religion or belief because this would still be "on the ground of religion or belief".

3. Comparator

The definition of direct discrimination mentions less favourable treatment "than another is, has been or would be treated in a comparable situation" and this, therefore, requires a comparison to be made with another person. So, to be successful in a claim for religion or belief discrimination, a claimant needs to show that, because of religion or belief, they

[58] See: Chopin and Germaine, above note 12, 40-42 for the information on the Member States national laws.
[59] Judgment No. 12/1064/A of the Labour Court of Leuven of 10 December 2013. See on this: Chopin and Germaine, above note 12, 42.
[60] See: COM (2014), above note 10, 10.
[61] Ibid.

have been treated less favourably than a person without that religion or belief. This could be a person with another religion or belief or without any religion or belief.[62] But, when can two situations be said to be comparable? Establishing this has led to difficulties in sex discrimination cases.[63] The choice of comparator is important as it can determine the outcome of a case. The term "has been" indicates that a comparator from the past (for example a previous employee) can be used as comparator, while "would be" indicates that a hypothetical comparator can also be used.

The law in most Member States does provide for real or hypothetical comparators, with the exception of France, where "hypothetical comparison is not covered, in breach of the Directives" and Ireland, which does not provide "for a hypothetical comparator in employment cases".[64] In Poland, "the definition of direct discrimination given in the Labour Code is still erroneous with regard to the comparator" and, in Spain, "the law only refers to a "comparable situation", without determining whether past and hypothetical comparators are covered".[65]

4. Justifications

Bell writes that:

> "the EC anti-discrimination Directives, like most national legislation, do not expressly declare that direct discrimination cannot be justified. Rather this is implicit from the absence of any textual reference to justification (unlike indirect discrimination, where objective justification is specifically mentioned)".[66]

The Employment Equality Directive only allows for exceptions to the prohibition of direct discrimination in situations prescribed in the Directive itself, like for example, for genuine occupational requirements[67] or for positive action.[68] The Directive also contains, in Article 4(2), some wider exceptions for employers in organisations with an ethos based on religion or belief. The same Directive also provides, in Article 6(1), for justification of direct discrimination on the grounds of age and most Member States have permitted such justification in their national legislation.[69]

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[62] For problems in relation to comparators for (direct and indirect) religion or belief discrimination see: Vickers, above note 7, 14-15.
[63] For a recent case example, see: Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschafts-kammer Österreich,* ECLI:EU:C:2004:334.
[64] Chopin and Germaine, above note 12, 46.
[65] Ibid.
[66] M. Bell, Direct Discrimination, in D. Schiek, L. Waddington and M. Bell, (eds), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, Hart Publishing, Oxford/Portland, Oregon, 2007, 273.
[67] See; Article 4 Employment Equality Directive.
[68] See: Article 7 Employment Equality Directive.
[69] Chopin and Germaine, above note 12, 46.

Article 2(5) of the Employment Equality Directive also determines that

> "This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others".

These exceptions will all be discussed below. Apart from these exceptions, most Member States do not allow for general justification of direct discrimination but

> "in Hungary, a general objective justification for direct discrimination applies to the grounds covered in the Employment Equality Directive when the act is 'found by objective consideration to have a reasonable ground directly related to the relevant legal relationship'. However, it is unclear whether this exemption applies in the field of employment".[70]

This appears to be a breach of the EU anti-discrimination provisions.

It is also unlikely that the CJEU will allow for justification of direct (religion or belief) discrimination outside the exceptions provided for in the Employment Equality Directive because it has clearly rejected any general justification of direct sex discrimination in a number of cases.[71] There appears to be no reason why this should not also apply to indirect discrimination on the other grounds of discrimination covered by the Employment Equality and Race Directives and, as the CJEU is generally concerned with a uniform application of EU law,[72] it is to be expected that it will apply the same rule to all grounds of discrimination covered by EU law, including religion or belief.

II. Indirect discrimination

The concept of indirect discrimination originates in the United States, in the case of *Griggs v Duke Power.*[73] In this case, the Duke Power Company required all employees applying for other than the lowest paid jobs to score well in two separate aptitude tests and to have a high school leaving certificate, although these requirements were not directly related to the nature of the jobs. As Afro-Americans were less likely to pass the tests or have a high school certificate, they were almost fully excluded from the higher paid jobs. So, although the test appeared neutral and applicable in the same way to all employees, Afro-Americans were significantly disadvantaged. The US Supreme Court held that the

[70] Ibid, 47.
[71] For two recent examples see: C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* ECLI:EU:C:2010:703, para 41; C-614/11 *Niederösterreichische Landes-Landwirtschaftskammer v Kuso,* ECLI:EU:C:2013:544, paras 50 and 51.
[72] See: C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA,* ECLI:EU:C:1978:49, para. 14.
[73] *Griggs v Duke Power Co* 401 US 424 (1971).

prohibition of racial discrimination in the Civil Rights Act 1964 did include the situation where neutral practices, procedures or tests were discriminatory in operation. The Supreme Court held that this Act did prohibit an employment practice which excluded Afro-Americans and which could not be shown to be related to job performance.[74] Therefore, the US Supreme Court in this case established that the Civil Rights Act 1964 prohibited indirect discrimination. The US law on indirect discrimination developed and, in 1991, the concept was laid down in the Civil Rights Act 1991.[75]

This influenced the inclusion of indirect discrimination provisions in the British Sex Discrimination Act 1975 and Race Relations Act 1976 and this then influenced the development of the concept in the EU through the case law of the CJEU on equal pay rules and sex discrimination.[76] The concept was first laid down in EU law in 1997 in the Burden of Proof Directive[77] and then, in 2000, in the Employment Equality and Race Directives.[78]

1. Rationale for prohibiting indirect discrimination

But why was the concept of indirect discrimination developed? Tobler gives two reasons. Firstly, "the Court of Justice [CJEU] developed this concept [indirect discrimination] with the aim of enhancing the effectiveness of the prohibition of discrimination". [79] A good example is the US case of *Griggs v Duke Power* discussed above, which shows that, without the concept, facial neutral rules which put people with a protected characteristic at a disadvantage would not be considered discrimination and therefore these people would not be protected. Providing protection against indirect discrimination means that employers cannot use facial neutral rules to circumvent the prohibition of direct discrimination.

The second reason for introducing a concept of indirect discrimination, given by Tobler is that "the concept of indirect discrimination can be seen as a tool to make visible and challenge the underlying causes of discrimination, which are often of a structural nature".[80] This reason is linked to the aim of indirect discrimination, and anti-discrimination law more generally. A distinction can be made between formal and

[74] Ibid, 431.
[75] Civil Rights Act 1991, 105 Stat 1071, 42 USC 2000e-2(k)(1)(A)(i) and (ii).
[76] See: C-96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* ECLI:EU:C:1981:80, para 11; and, C-170/84 *Bilka Kaufhaus GMBH v Karin Weber von Hartz*, ECLI:EU:C:1986:204, para 36.
[77] Council Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Discrimination based on Sex, OJ L 14/6.
[78] For more information on this development see: E. Howard, Indirect Discrimination 15 Years on, *E-Journal of International and Comparative Labour Studies*, 4, 3, Sept/Oct 2015, http://www.adapt.it/EJCLS/index.php/ejcls_adapt/article/view/321.
[79] C. Tobler, Limits and Potential of the Concept of Indirect Discrimination, (European Network of Legal Experts in the Non-discrimination Field, 2008) European Commission, Directorate-General for Employment Social Affairs and Equal Opportunities, 24, < http://www.migpolgroup.com/public/docs/146.LimitsandPotentialoftheConceptofIndirectDiscrimination_EN_09.08.pdf
[80] Ibid.

substantive equality. Formal equality requires that like should be treated alike, that people in the same situation should be treated in the same way. This form of equality can be seen in the definition of direct discrimination in the EU Directives: less favourable treatment than someone else. But this does not recognise that people are often in different situations.

In contrast to this, substantive equality takes account of these material differences between individuals or groups and considers the reality of the position of disadvantage because of past and ongoing discrimination. It recognises that persons are discriminated against as members of a particular group (like, for example, ethnic minorities, religious groups, women or disabled persons) and that there are extra burdens and barriers to achieving equality for members of disadvantaged groups. Thus, legislation which is aiming to establish substantive equality, aims to compensate for the social inequalities and disadvantages suffered by certain groups and is more sensitive to group aspects of discrimination.

The prohibition of indirect discrimination takes account of the impact of neutral rules on a group of people sharing a protected characteristic. It recognises that an apparently neutral rule, which is applied to everyone equally, can put certain people at a particular disadvantage and should thus be avoided to achieve substantive equality.[81]

2. Definition

Article 2(2)(b) of the Employment Equality Directive determines 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 used to achieve that aim are proportionate and necessary".

Indirect religion or belief discrimination thus occurs where a neutral provision, criterion or practice, applicable to everyone, puts persons of a particular religion or belief at a disadvantage because they cannot, because of their religion or belief, follow the rule. A good example of such discrimination is where an employer prohibits employees to wear anything on their head. This rule is neutral and applies to all employees in the same way, but people who cover their head for religious reasons, like Muslim women who wear a headscarf, Jewish men who wear a skull cap and Sikh men who wear a turban, cannot comply with the rule. The rule will be indirectly discriminatory, unless it can be objectively justified, as discussed below.

[81] For more information on this see: Howard, above note 78 and the literature referred to there.

Another good example of indirect discrimination can be found in a case from Denmark. A Muslim woman who was studying to become a nutrition assistant had to stop her vocational training programme because the school would not exempt her from the requirement to taste pork. She had agreed to touch and prepare food made with pork, but refused to taste meals made with pork due to her religion. She argued that this did not interfere with her work because there would always be a colleague to taste pork dishes if necessary. The Board of Equal Treatment found that the requirement was incompatible with her religious beliefs, and that the school had not shown that it was necessary to complete her training. The Board thus found indirect discrimination on the ground of religion.[82] The requirement to taste pork was a neutral rule applicable to all students, but the student in question could not comply with the rule because of her religion. It was not justified because the requirement to taste pork was not necessary.

The EU Commission reports that "the concept of indirect discrimination is complex and many Member States had initial difficulties in transposing it correctly. It is now enshrined in law, but its application in practice remains a challenge".[83] It also states that, in some Member States, "concerns have been expressed about the lack of clarity or understanding of the concept in national courts," while other Member States have pointed out that there is no national case law interpreting the concept yet.[84]

The following case illustrates that there is, for example, confusion on the question whether bans on the wearing of an Islamic headscarf at work constitute direct or indirect discrimination. The Belgian Cour de Cassation has made a preliminary reference to the CJEU asking:

> "Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?"[85]

In a recent case, the CJEU has held that indirect discrimination by association is also covered by the EU Race Directive and thus, by analogy, by the Employment Equality Directive. In *CHEZ RB,*[86] an electricity company in Bulgaria put up electricity meters in residential areas, which were generally put at a height of about 1.7 metres, but, in neighbourhoods with predominantly Roma inhabitants, the meters were placed at a height of 6 or 7 metres. The reason given by the company was that this was to prevent

[82] See: Equal Treatment Board Decision no 213/2012 of 8 February 2012 as reported in European Anti-Discrimination Law Review, 15 (November 2012) 53 and 17 (November 2013), 54. See also the internet link there.
[83] COM (2014) 2, above note10, 8.
[84] Ibid. See also: Chopin and Germaine, above note 12, 49.
[85] C-157/15 *Samira Achbita,* above note 15.
[86] C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia*, ECLI:EU:C:2015:480.

tampering and unlawful connections to the electricity network. A shop keeper in one of these Roma neighbourhoods, Ms Nikolova, who was herself not of Roma ethnic origin, complained that she had been discriminated against on the ground of racial or ethnic origin because she suffered the same disadvantage as her Roma neighbours.

The CJEU held that

> "the concept of discrimination on the grounds of ethnic origin must be interpreted as being intended to apply … irrespective of whether that collective measure affects persons who have a certain ethnic origin or those who, without possessing that origin, suffer, together with the former, the less favourable treatment (direct discrimination) or particular disadvantage (indirect discrimination) resulting from that measure".[87]

The CJEU also held that the concept of "particular disadvantage"

> "does not refer to serious, obvious or particularly significant cases of inequality, but denotes that it is particularly persons of a given racial or ethnic origin who are at a disadvantage because of the provision, criterion or practice at issue".[88]

There does not appear to be any reason why the CJEU would not also apply this to religion or belief and the other grounds of discrimination covered by the Employment Equality Directive, as the Court, as mentioned before, always aims at applying EU law in a uniform manner.

3. Comparator

The definition of indirect discrimination in the Employment Equality Directive contains the words 'compared with other persons' and thus requires, like direct discrimination, a comparison to be made. But here, again, the definition mentions "would be" and thus a hypothetical comparator is allowed.

Chopin and Germaine write

> "the Directives envisage a comparison between the effect of a measure on persons of a particular ethnic origin etc. and its impact on other persons. National law varies in the comparison required".[89]

They then state that the definition of indirect discrimination in the UK, in Section 19 of the Equality Act 2010, requires evidence of disadvantage to the complainant himself or

[87] Ibid, para. 129, under 1.
[88] Ibid, para. 129, under 4.
[89] Chopin and Germaine, above note 12, 49.

herself and to the group to which he or she belongs.[90] In *Eweida v British Airways*, Eweida lost her claim for indirect discrimination in the British Court of Appeal, because there were no other British Airways employees who shared her belief that, as a devout Christian, she had to wear a small silver cross with her uniform.[91] In the recent case of *Essop*, there was statistical evidence that Black and ethnic minority employees and older employees working for the UK Border Agency were less likely to pass the Core Skills Assessment. Passing this assessment was a requirement for promotion. The British Court of Appeal held that it is "necessary in indirect discrimination claims for the claimant to show why the PCP [provision, criterion or practice] has disadvantaged the group and the individual claimant" and that "group disadvantage cannot be proved in the abstract".[92] The fact that Eweida succeeded in her claim at the European Court of Human Rights suggests "that the Directive (and UK domestic law) should be interpreted so as to enable indirect discrimination to apply to individual claimants".[93] The definition in the UK case law and its interpretation thus appears to be stricter than the definition in the EU Employment Equality and Race Directives.[94]

In Slovenia, Article 4, para 3 of the Act implementing the Principle of Equal Treatment, requires that the individual complainant is in an "equal or similar situation and conditions" to the comparator.[95]

Vickers discusses the difficulties with comparators for direct and indirect discrimination and writes that "the [Employment Equality] Directive does not provide clear answers to the question of who the correct comparator might be" and national implementing legislation generally does not address the question of comparators. She concludes that

> "it would seem that if the recitals clauses are to be respected, and the commitments to equality and respect for human rights contained within them are to be upheld, then once less favourable treatment can be shown in comparison with another group, the discrimination finding should be made, whether that comparison is with those of a majority religion, minority religion, established religion or no religion. The fact that the treatment may be similar to that of a third group should not prevent a finding of discrimination as between the two chosen groups".[96]

This seems to suggest that the CJEU and the national courts should, in cases of indirect discrimination, quite readily accept that there is comparability and then move on to scrutinise all the relevant issues in more detail to decide whether the provision, criterion or practice is objectively justified. "The benefit of such an approach to any applicant is that the burden of proof of justifying any discrimination will be on the respondent", as Vickers points out.[97]

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[90] Ibid. See: *Eweida v British Airways Plc* [2010] IRLR 322, recently confirmed by the Court of Appeal in *Home Office (UK Border Agency) v Essop and Others* [2015] EWCA Civ 609.
[91] *Eweida v British Airways Plc*, above note 90.
[92] *Essop*, above note 90, paras 57 and 59.
[93] Vickers, above note 39, 27.
[94] For this argument see: Howard, above note 78.
[95] Chopin and Germaine, above note 12, 49.
[96] Vickers, above note 7, 15.
[97] Ibid. On justification, see further below.

4. Provision, criterion or practice

This term does not seem to have caused any problems for the CJEU in indirect discrimination cases. It is not necessary to identify which of the three terms applies to a rule or differentiating fact which is challenged. This is confirmed in the Handbook on European Non-discrimination Law which states that "there must be some form of requirement that is applied to everybody".[98] The term "provision, criterion or practice" should thus be given a wide interpretation in the CJEU and the national courts in the Member States, because that would ensure that the Court can examine the case under objective justification where there is more room for considering a number of relevant issues, as will become clear below. This is indeed the path the CJEU seems to take in cases of indirect discrimination.

5. Justification

From the definition given above it is clear that indirect discrimination can be objectively justified if the provision, criterion or practice has a legitimate aim and the means used to achieve that aim are appropriate and necessary. The person applying the provision, criterion or practice must prove that it is justified.[99] In the example used above, of the trainee who did not want to taste pork because of her religion, the rule was held not to be necessary for successful completion of the training course she was on and thus it was held not to be justified. An example where a rule was held to be justified can be found in a case from the Netherlands, where the claimant worked as an education worker in a hospital. The hospital imposed new clothing requirements, including the wearing of short sleeves, after recommendations from a commission of experts following an outbreak of a bacterial infection. The claimant refused to wear short sleeves on the ground of her religious beliefs, as this is prohibited by the Islamic dress code she followed. The Rotterdam District Court held that the clothing requirements were indirectly discriminatory on the ground of religion, but they could be justified by the legitimate aim of preventing the risk of infection.[100]

In *Bilka Kaufhaus*, pension rights were only given to part-time employees where they had been in full-time employment with the company for 15 years out of a total of 20 years. This was challenged as sex discrimination, as many more women than men worked part-time and could not fulfil the requirement to qualify for pension rights. The CJEU held that there are three parts to the objective justification test for indirect sex discrimination: first of all, the means chosen must correspond to a real need; secondly they must be

[98] EU Fundamental Rights Agency and European Court of Human Rights, Council of Europe, *Handbook on European Non-discrimination Law,* Luxembourg, Publications Office of the European Union, 2011, 29 < http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf

[99] Ibid, 126.

[100] European Anti-discrimination Law Review, 19 (November 2014), 79 and the internet link provided there.

appropriate with a view to achieving the objective pursued; and, thirdly, they must be necessary to that end. [101]

The expression "must be necessary to that end" indicates that the justification test for indirect discrimination includes a consideration of the question whether there is an alternative, less far-reaching and less discriminatory way of achieving the aim pursued. If there is an alternative which affects the individual less, than that should be chosen and, if it is not chosen, then the rule will be held not to be justified. This is supported by case law from the CJEU, for example, in *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening*, a case concerning indirect disability discrimination and the duty to make reasonable accommodation, Advocate General Kokott stated that the provision, criterion or practice "must also be necessary, which is to say that the legitimate aim pursued must not be capable of being achieved by more moderate but equally appropriate means".[102] And in the same case, the CJEU considered that

> "it must be examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and do not go beyond what is necessary to achieve the aim pursued by the Danish legislature".[103]

And, in *Dansk Jurist*, which concerned age discrimination, Advocate General Kokott stated that "a measure is "necessary" where the legitimate aim pursued cannot be achieved by an equally suitable but more benign means".[104]

An example from two early indirect (race) discrimination cases from the UK can be used to illustrate this point.[105] These cases were decided before the EU had adopted the Race and Employment Equality Directives and before Britain had adopted any legislation against religion or belief discrimination. Both cases concern claims of indirect discrimination against Sikh people under the Race Relations Act 1976.[106] In both cases it was held that a rule against beards in a confectionery factory was objectively justified by hygiene and health and safety reasons. But would the same decision have been made under the justification test described above? The aim of the rule, to preserve hygiene and health in a factory making confectionery, was, undoubtedly, a legitimate aim. However, were the means used proportionate and necessary? There were alternative, less discriminatory measures that could have been used to achieve this legitimate aim as, in fact, both employers did not apply the rule in their other factories and allowed moustaches, whiskers or sideburns there. So, the prohibition of all facial hair was not

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[101] *Bilka Kaufhaus*, above, note 76, paras. 36-37.
[102] C-335/11 and C-337/11 *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening*, AG: ECLI:EU:C:2012:775, para 70.
[103] Ibid. CJEU: ECLI:EU:C:2013:222, para 77.
[104] C-546/11 *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet*, AG: ECLI:EU:C:2013:68, para 38.
[105] *Singh v Rowntree Mackintosh* [1979] ICR 554; *Panesar v Nestle Co Ltd* [1980] ICR 144
[106] The case was brought under race discrimination provisions, as Sikhs were considered to be an ethnic group and thus protected by those provisions. At that time, there was no provision against religion or belief discrimination.

necessary. Then, there was also an alternative, less discriminatory measure: the use of beard-masks.[107] It is thus unlikely that the rule would be considered justified under the EU Employment Equality and Race Directives as it does not fulfil the justification test set out above.

Similarly, many places where food is handled require employees to cover their head hair for hygiene reasons. This rule has a legitimate aim and would fulfil the above test as long as the employer would not require all employees to wear a specific type of hat: allowing turbans and headscarves that cover all hair would achieve the legitimate aim as well and would not discriminate against Sikh men or Muslim women.

6. Duty of reasonable accommodation

So, as mentioned above, the test for objective justification as laid down by the CJEU in *Bilka Kaufhaus*,[108] includes considering whether there are alternative, less discriminatory measures which could achieve the legitimate aim as well. This comes close to a duty to make reasonable accommodation as laid down for disabled people in Article 5 of the Employment Equality Directive. This Article imposes a duty on employers to

> "take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer".

However, EU law only imposes this duty in relation to disability. Such a duty could be useful for religion and belief as well, for example, when employees request time off or flexible working hours to perform religious duties or want to wear particular religious clothing or symbols at work. Some Member States do impose a duty of reasonable accommodation beyond disability. For example, in Bulgarian law, the duty also covers religion and age while in Croatia, Romania and Spain, religion as well as disability are covered. In France, Germany and Sweden a duty of reasonable accommodation for religion or belief (and, in Sweden also for race and ethnic origin and sexual orientation) can possibly be deduced from the case law. And, a duty of reasonable accommodation for religion or belief is laid down in law in the Vienna region of Austria and the Flemish region of Belgium.[109]

The following case from Slovenia can be used as an example of a case where the lack of accommodation was held to be indirectly discriminatory on the grounds of religion. The

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[107] See: M. Connolly, *Discrimination Law*, 2nd ed., London, Sweet and Maxwell, 2011, 194.
[108] *Bilka Kaufhaus*, above, note 76.
[109] See Chopin and Germaine, above note 12, 29-31; and, E. Bribosia and I. Rorive, Reasonable Accommodation beyond Disability in Europe? (European Network of Legal Experts in the Non-discrimination Field, 2013) European Commission, Directorate-General for Justice, 44-45, < http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_beyond_disability_in_europe_en.pdf

claimant worked for a company which offered hot and cold meals to employees, but both were often made with pork. As a Muslim, the claimant did not eat pork or pork products. The company also offered a monthly allowance for those employees who could produce a medical certificate which showed that they needed special food for health reasons and thus could not eat the food provided by the company. And, for Catholics, they also had a specially adapted menu on Friday. When the claimant requested the monthly allowance so he could buy food in accordance with his religion, this was refused as he did not produce a medical certificate. The Equality Body held that the provisions applied to all employees equally, but that the applicant was put in a less favourable position because of his religion. Muslims would have the option of eating food which was prohibited by their religion, or not to receive a meal or an appropriate allowance. Reasonable accommodation was already provided for a certain group of employees belonging to the Catholic religion, and the company should simply extend this rule to employees of different religions. The Equality Body thus found indirect discrimination.[110]

In Portugal, the Constitutional Court recently reached its conclusion in two cases involving employees who were working shifts. Both claimed that their shifts should take into account their necessary absences from work as required by their religious beliefs. The Court concluded that

> "the constitutional protection of religious freedom goes beyond the principles of freedom of religion and non-discrimination, by also requiring the creation of conditions for the effective implementation of the right to religious freedom, including measures of positive action and reasonable accommodation of working hours".[111]

It has been suggested that a duty of reasonable accommodation for all grounds of discrimination covered should be laid down in EU law and in the national law of European countries, subject to the proviso that this should not impose a disproportionate burden on employers or service providers,[112] but a discussion of this question goes beyond the subject of this study.[113]

[110] See European Anti-Discrimination Law Review, 8 (July 2009) 64-65 and the internet link there.
[111] See European Equality Law Review, 1 (2015) 140-141 and the internet link there.
[112] See, for example, Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2, under 6.1, point 2, https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66_5638; and, Equinet, Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination, Equinet, Brussels, 2008, at 8, < http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf
[113] For more information see: Bribosia and Rorive, above note 108; and, E. Howard, Reasonable Accommodation of Religion and other Discrimination Grounds in EU law, *European Law Review* 38, 3, 2013, 360-375.

III. Harassment

1. Definition

Harassment is a form of prohibited discrimination and occurs 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.[114] Examples would be making jokes about a person who prays before a meal or who does not drink for religious reasons.

The majority of EU Member States have adopted definitions of harassment which appear similar to the definition in the EU Employment Equality and Race Directives. However, in a number of Member States – Denmark, France, Hungary, the Netherlands, Slovakia and Sweden –"the definition does not explicitly require the conduct to be unwanted," while "in Spain, the terms "hostile" and "degrading" are not included in the national definition" and, "in Sweden, the definition does not require that the behaviour creates any specific type of environment, but only that it violates the dignity of the person." Romania defines harassment in different laws, "but none of the definitions provided are in complete compliance with the definition set out in the Directives".[115]

2. Subjective or objective test

There is no indication in the definition how to determine whether or not a person's dignity is violated or whether an environment is intimidating, hostile, degrading or offensive. Is this a subjective test, and is it sufficient that the claimant feels that his or her dignity is violated? Or is this an objective test, looking at whether a reasonable person in the position of claimant would feel that his or her dignity is violated. This can be especially problematic with regard to harassment on the grounds of religion and belief, because, as Vickers points out

> "not only are the terms "religion and belief" undefined, but there is a relative lack of shared understanding of the likely effects of certain behaviour on religious people. Members of the same religion will not all agree on what might cause offence". [116]

Several Member States have tried to clarify this in their national provisions. For example, the Anti-Discrimination Act in Slovakia defines "harassment" as

> "conduct which results in or may result in the creation of an intimidating, unfriendly, shameful, humiliating, degrading or offensive

[114] Article 2(3) Employment Equality Directive.
[115] The information on the Member States is based on Chopin and Germaine, above note 12, 52.
[116] Vickers, above note 7, 16.

> environment and which has or may have the purpose or effect of violating a freedom or human dignity".[117]

In Malta, the Equal Treatment of Persons Order states that

> "harassment refers to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material that any person can be subjected to". [118]

And, the law in Finland "provides a wider definition as it covers the violation of physical integrity in addition to the violation of dignity and includes not only individuals but also groups".[119]

In the UK, the Equality Act 2010 contains both a subjective and an objective element in the definition of harassment. Section 26(4) of this Act determines that

> "In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account; (a) the perception of B [the victim]; (b) the other circumstances of the case; and, (c) whether it is reasonable for the conduct to have that effect".

It is clear that (a) is subjective, while (c) adds an objective element.

3. Freedom of expression and harassment

The prohibition of religion or belief harassment might constitute an interference with the fundamental right to freedom of expression because an employee might not be able to express his or her opinions about religion or belief at work for fear of causing offence and creating an intimidating, hostile, degrading, humiliating or offensive environment. International human rights law has recognised that the right to freedom of expression "embraces even expression that may be regarded as deeply offensive".[120] And, according to the European Court of Human Rights, the right to freedom of expression applies

> "not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[121]

[117] Chopin and Germaine, above note 12, 53.
[118] Ibid.
[119] Ibid.
[120] Human Rights Committee, General Comment No. 34 (on Article 19 ICCPR) 2011, para. 11.
[121] *Handyside,* above note 22, para 49.

Moreover, the European Court of Human Rights has also held that

> "those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".[122]

So there clearly is no fundamental human right not to be offended and prohibiting religious expressions just because someone might be offended will be considered as an unjustified restriction of the freedom of expression.

On the other hand, the right to freedom of expression is not an absolute right. Under all human rights instruments it can be limited in certain circumstances. For example, Article 10(2) ECHR allows

> "formalities, conditions, restrictions or penalties when these are prescribed by law, necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Article 11 EUCFR guarantees freedom of expression and information and this can be restricted under Article 52(1). So, the right to freedom of expression can be limited for the protection of the rights of others, which includes the right to be free from discrimination and harassment. As mentioned before, this was also the case with the freedom to manifest your religion or belief. When interpreting the provisions of the Employment Equality Directive in relation to harassment and discrimination, a Court will need to find a balance between these competing rights.

4. Third party harassment

Another issue in relation to harassment is whether an employer can be liable when an employee is harassed by other employees or by a third party, for example, a customer. Some Member States have provided that employers can be held liable in varying degrees. For example, in Ireland, "employers and service providers are liable for harassment by employees and third parties such as tenants, clients and customers", while in the Netherlands, "colleagues cannot be held responsible for harassment whereas the employer or individuals acting on their behalf can be held liable".[123]

[122] *Otto Preminger Institute v Austria*, App. No. 13470/87, 20 September 1994, para 47.
[123] Chopin and Germaine, above note 12, 54.

Other Member States have imposed a duty on employers to take action to prevent and redress harassment in the work place. For example, Section 12.4 of the German General Equal Treatment Act 2006 "places employers under a legal duty to prevent discrimination occurring in the workplace. This includes a duty to protect employees from discrimination by third parties".[124] And, Croatian law imposes a duty on employers "to protect employees' dignity against the conduct of superiors, co-workers and third persons in connection with the work performed, if this conduct is unwanted and contrary to special regulations".[125]

IV. Instruction to discriminate

Article 2(4) of the Employment Equality Directive determines that an instruction to discriminate shall be deemed to be discrimination. However, the Directive does not provide a definition of what an "instruction to discriminate" means. The Handbook on European Anti-discrimination Law states that

> "In order to be of any worth in combating discriminatory practices, it ought not to be confined to merely dealing with instructions that are mandatory in nature, but should extend to catch situations where there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected grounds. This is an area that may evolve through the jurisprudence of the courts".[126]

The handbook also points out that "it could be that harassment and instruction or incitement to discriminate also fall under the national criminal law".[127]

Most Member States have provided against instruction to discriminate in their national anti-discrimination laws, but Bulgarian law only prohibits an intentional instruction to discriminate, while the requirement of intent was removed from Croatian law in 2012. UK law regulates instructions to discriminate as well as causing or inducing another person to discriminate.[128]

[124] Ibid, 53.
[125] Ibid, 54.
[126] Handbook on European Anti-discrimination Law, above note 98, 33.
[127] Ibid, 334.
[128] Chopin and Germaine, above note 12, 56.

V. Victimisation

Article 11 of the Employment Equality Directive, under the heading "victimisation" determines that

> "Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment".

And Recital 30 gives the rationale for this: "the effective implementation of the principle of equality requires adequate judicial protection against victimisation".

An example of victimisation would be were an employee has complained of religion and belief discrimination and is then not promoted because of doing so.
It will be clear from this definition, that no comparator is required for a finding of victimisation. Before the Equality Act 2010 came into force in the UK, victimisation did require a comparator, which meant that the old legislation was not in line with the EU legislation.[129]

Choudhury writes that "a prohibition of victimisation is aimed at providing protection to those involved in a complaint of discrimination from facing adverse consequences as a result of their involvement in that claim". He also points out that people would be reluctant to bring a complaint, provide evidence, act as a witness or act in support of someone bringing a claim, if they were not protected against adverse consequences of doing so. Enforcement of the law would then become impossible and thus "protection against victimisation is critical to maintaining the integrity and the effectiveness of the law".[130]

This suggests that the protection against victimisation covers not only the victim, but also those who assist the victim, those who provide evidence in a complaint (by someone else) or act as witness in a claim. However, the legislation in the Member States varies in this respect. For example, in Denmark, the protection applies to a person who files a complaint regarding differential treatment of herself or himself or of another person and, in Italy, anti-discrimination decrees have been amended to extend the protection against discrimination to any person beyond the claimant. French law and UK law also protect other persons beyond the victim, and under Croatian law, a person who has reported discrimination, files a complaint or who has witnessed discrimination are all protected. Bulgarian law provides wide protection, as it includes protection of other than the victim himself or herself and victimisation by assumption and by association. On the other hand, in Belgium, "the protection against victimisation is limited to victims filing a

[129] Ibid, 105.
[130] T. Choudhury, Instruction to Discriminate and Victimisation, in D. Schiek, L. Waddington and M. Bell, (eds), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, Hart Publishing, Oxford/Portland, Oregon, 2007, 561.

complaint of discrimination and any formal witness in the procedure", which suggests that not every person involved is protected, for example persons who provide assistance or support. The same situation exists in Romania.[131]

Chopin and Germaine write that "preventative measures are implicitly required by the Directive" but that the protection against victimisation in the UK is retrospective only.[132] The law in Slovenia can be seen as an example of good practice as it provides proactive protection:

> "upon finding discrimination in the original case, the Advocate of the Principle of Equality should order in writing the legal person in which discrimination allegedly occurred to apply appropriate measures to protect the person who faced discrimination, or persons assisting the victim of discrimination, from victimisation or adverse consequences of the complaint. In the event that an alleged offender does not obey the Advocate's order, the inspector has the duty to prescribe appropriate measures that protect the person from victimisation".[133]

In *Coote v Granada Hospitality*, a woman claimed victimisation when her ex-employer failed to provide a reference because she had made a claim for sex discrimination. The CJEU held that victimisation covers the employer's action in relation to the employee after the employment relationship has ended.[134] In the UK, it was not clear whether the Equality Act 2010 covered post-employment acts of victimisation, but this has now been settled in *Jessemey v Rowstock.* In this case, Mr Jessemey was given a bad reference because he had previously made a complaint about discrimination. The Court of Appeal held that the omission of protection for post-employment victimisation was accidental and that there was no reason why the provisions of Section 108 of the Act (on victimisation) should not be read to give effect to the EU obligation to prohibit post-employment victimisation.[135]

[131] Chopin and Germaine, above note 12, 104-106.
[132] Ibid, 105.
[133] Ibid.
[134] C-185/97 *Belinda Jane Coote v Granada Hospitality Limited,* ECLI:EU:C:1998:424, para 28.
[135] *Jessemey v Rowstock Ltd and Another* [2014] EWCA Civ 185, para 47.

Chapter 4 Exceptions

I. Article 2(5)

As mentioned, Article 2(5) Employment Equality Directive contains a general exception. It states that

> "This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others".

There is no equivalent provision in the Race Directive. The wording of Article 2(5) seems to be based loosely on the exception clauses in the ECHR in Articles 8(2), 9(2), 10(2) and 11(2). It is also similar to Article 52(1) EUCFR, which determines that

> "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

According to the Explanations to the EUCFR,[136] this is based on the case law of the CJEU which held, in *Karlsson and Others*, that restrictions may be imposed on the exercise of fundamental rights provided that those restrictions "do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights".[137] This is thus clearly a proportionality test and, for guidance in interpreting Article 2(5), the CJEU and the national courts could look at the EUCFR and at the interpretation of limitation clauses by the European Court of Human Rights.

Ellis and Watson write about Article 2(5) of the Employment Equality Directive that "the provision is one which was inserted into the directive during the final hours of negotiation" and it was absent from the original draft of the Directive. They continue that "it was thought necessary to prevent members of harmful cults, paedophiles and people with dangerous physical and mental illnesses from gaining protection from the directive". But they do advise that the CJEU patrols its boundaries carefully, as it is "an extremely broadly drafted provision, especially given that the Framework Directive [Employment Equality Directive] covers only workplace discrimination".[138]

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[136] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/33.
[137] C-292/97 *Karlsson and Others,* ECLI:EU:C:2000:202, para. 45.
[138] E. Ellis and P. Watson, *EU Anti-discrimination Law,* 2nd ed., Oxford University Press, Oxford, 2012, 402-403.

In *Petersen,* the CJEU held that, as Article 2(5) is an exception to the principle of the prohibition of discrimination, it must be interpreted strictly.[139] This case concerned a German law which set the maximum age limit for panel dentists working within a statutory insurance scheme at 68. Two of the reasons advanced for this fell within the protection of health ground in Article 2(5): one reason was that it protected the health of patients, assuming that competence declines with age; and, the second reason was the preservation of the financial balance of health care. The CJEU held that the rule was not necessary for the first objective, since dentists could work in private practice beyond the age of 68. The CJEU left the second reason to the national Court to decide.[140]

In *Prigge,* Lufthansa automatically ended employment contracts of pilots at the age of 60. The CJEU held that the measure was covered by "public security" in Article 2(5) but that it was not necessary because both national and international law allowed pilots to fly until 65.[141] The CJEU reiterated that Article 2(5), as an exception to the general principle of discrimination, must be interpreted strictly.

Of the EU Member States, Article 2(5) is reproduced in legislation in Cyprus, Greece and Malta, while it is largely incorporated in Italy.

> "In Croatia, an exception for conduct aimed at "preserving health and preventing criminal acts and misdemeanours" was amended in 2012 to include a note that such conduct cannot lead to direct or indirect discrimination on the grounds of race or ethnic origin, skin colour, religion, gender, ethnic or social origin, sexual orientation or disability".[142]

In the UK, Section 192 of the Equality Act 2010 under the heading "national security" determines that a person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose. And, "in Portugal, even though the laws implementing the Directives do not include any specific exceptions concerning public security, these exceptions may be considered implicit".[143]

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[139] C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe.* ECLI:EU:C:2010:4, para 60.
[140] See on this: Ellis and Watson, above note 138, at 403-404; and, Annex to COM (2014) 2, above note 40, at 7.1.b).
[141] C-447/09, *Prigge and Others v Deutsche Lufthansa AG*, ECLI:EU:C:2011:573. See also Ellis and Watson, above note 138, at 404 and Annex to COM (2014) 2, above note 40, under 7.1.b).
[142] Chopin and Germaine, above note 12, 79.
[143] Ibid.

II. Genuine and determining occupational requirements and religious ethos organisations

1. Article 4(1)

Article 4(1) of the Employment Equality Directive provides for situations where being of a particular religion or belief, or any of the other protected grounds in this Directive, is a genuine and determining occupational requirement of a job due to the nature of the particular occupational activities concerned or of the context in which they are carried out. In such cases, provided that the objective is legitimate and the requirement proportionate, there is no discrimination. So, Article 4(1) requires a proportionality test. Similar exceptions are laid down in the Race Directive and in the Gender Equality Directives for situations where being of a particular racial or ethnic origin or of a particular gender is a genuine and determining occupational requirement.

The CJEU has consistently held, in relation to the gender occupational requirement, that this provision, as derogation from an individual right laid down in the Directive, must be interpreted strictly.[144] The CJEU will get a chance to interpret Article 4(1) in relation to a woman wearing an Islamic headscarf, as a request for a preliminary ruling has been made by the French Cour de Cassation in April 2015.[145] The question referred is:

> "Must Article 4(1) of Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?"[146]

The fact that the occupational requirement must be interpreted strictly suggests that the answer to this question must be that this is not a genuine and determining occupational requirement.

[144] See, for example, C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para. 36; C-273/97 *Sirdar v The Army Board and Secretary of State for Defence*, ECLI:EU:C:1999:523, para. 23; C-285/98 *Kreil v Bundesrepublik Germany*, ECLI:EU:C:2000:2, para. 20.
[145] C-188/15 *Asma Bougnaoui*, above note 15.
[146] Ibid.

2. Article 4(2) part 1

The Employment Equality Directive has a further exception in Article 4(2) which is absent from the other EU Directives. This exception only applies to churches and other public or private organisations the ethos of which is based on religion or belief. There are two elements to the exception in Article 4(2). The first is an occupational requirement: organisations with a religious ethos may treat a person's religion or belief as an occupational requirement where this is justified by the nature or the context of the activities. So an organisation managed by a religious order can require employees to practice the religion of the organisation, but will have to demonstrate that the nature and context of the employee's activities requires them to share the organisation's religion in order to maintain the ethos.

But, is the exemption for situations where religion or belief is an occupational requirement not already covered by Article 4(1)? Does Article 4(2) add anything? The difference with the occupational requirement in Article 4(1) is, that here the requirement only has to be a "genuine occupational requirement" and not "determining" as well, although it still needs to be "legitimate" and "justified." So, there is still a proportionality test. But, despite this test, it might be easier to establish a genuine occupational requirement under Article 4(2) than under Article 4(1). However, the requirement still needs to be "occupational" and, according to Article 4(2), "by reason of the nature of these activities and of the context in which they are carried out", so it must be linked to the specific job and "only covers posts which exist entirely to promote or represent religion (e.g. priests, not cleaners)".[147] Article 4(2) does also add, that this "should not justify discrimination on another ground". An Islamic school could thus require a teacher who is involved in leading worship or teaching religion to be of the Islamic faith. However, under this paragraph, it could not require cleaners to be of the Islamic faith, as the nature and context of their activities do not require this. It could also not refuse to employ an Islamic teacher just because they are gay, as this would be discrimination on grounds of sexual orientation.[148]

A good example is a case from Denmark, where a person was dismissed from his cleaning job in a Christian humanitarian organisation because he was not a member of the national Lutheran Church. The person was awarded compensation for religious discrimination and "the judgment can be interpreted as recognising that cleaning positions etc. cannot be exempted under Article 4 from the general prohibition against discrimination in Articles 1 and 2 of the Directive".[149] On the other hand, a case from the UK makes clear that, if a post does include fulfilling a role in the promotion of the religion and the representation of the religious organisation, the occupational requirement of Article 4(2) can be used.[150]

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[147] Equinet, above note 6, 53.
[148] See on this also Bell, above note 66, 308-309. But see below on the second part of Article 4(2).
[149] European Anti-discrimination Law Review, 3 (April 2006), 59.
[150] See the case of *Reaney v Hereford Diocesan Board of Finance*, Employment Tribunal, Case Number 1602844/2006, described in Equinet, above note 6, 54-55.

3. Article 4(2) part 2

The second element of Article 4(2) allows organisations with a religious ethos to require individuals working for them to act in good faith and with loyalty to the organisation's ethos, provided that the provisions of the Directive are otherwise complied with.[151] Does this allow a Muslim school to require their female teachers to wear a headscarf? In a case from the Netherlands, a Muslim woman was refused a job as an Arabic teacher in a Muslim school because she refused to wear the Islamic headscarf. Article 5(2)(c) of the Dutch Equal Treatment Act, states that the prohibition of direct discrimination when recruiting people does not apply when it concerns

> "the freedom of a private, educational establishment to impose requirements on the occupants of a post which, in view of the establishment's purpose, are necessary for it to live up to its founding principles".[152]

The Equal Treatment Commission[153] found that the school had not established that the wearing of the headscarf was a necessary condition for maintaining or realising the founding principles of the school. One of the issues considered was that the school had also appointed some non-Muslim female teachers who were not required to wear the headscarf. The school had also not established that the wearing of the headscarf was a functional criterion for the proper performance of the task of teaching the Arabic language.[154] This does suggest that the school could have required female teachers to wear a headscarf if this had been necessary because of the ethos (or founding principles) of the school. It also suggests that the nature of the job might be significant for the second part of Article 4(2) as well and, thus, that those who do work which is not linked to the religious ethos of the organisation, would not need to conform to the ethos. However, this is an area that needs explanation by the CJEU. In the light of the fact that the CJEU has always held that the occupational requirement, as an exception to the principle of equal treatment, must be interpreted strictly, the Court could well accept this interpretation.

An example from the case law in Finland is given by Equinet.[155] Here, a female minister applied for the office of assistant vicar while she was openly living with another woman and was possibly going to have this partnership registered. The Church Chapter decided that she did not possess the necessary qualities to be an assistant vicar because of the relationship. The Administrative Court

> "seems to emphasise that it is permissible for a church or religious community to say that they will only accept a worker who does not live in a same-sex relationship, if this is part of the doctrine or ethos. However, in this particular case, the court found that in the Finnish

[151] Ibid.
[152] European Anti-discrimination Law Review, 3 (April 2006), 79.
[153] This has now become the Netherlands Institute for Human Rights.
[154] European Anti-discrimination Law Review, 3 (April 2006), 79.
[155] Equinet, above note 6, 53-54.

> Evangelical Lutheran Church there was no unanimity on this issue (i.e. it was not part of the doctrine of the Lutheran Church). As no such agreed doctrine existed, the decision of the Cathedral Chapter is unlawful in this case".[156]

However, this case distinguishes itself from the previous case, as here it concerns an assistant vicar whose work is closely linked to the religious ethos.

Another example is a case, discussed under "political opinion" above, from the Netherlands Institute for Human Rights, where a part-time local councillor for the right wing Party for Freedom (PVV) posted a number of strongly worded twitter messages expressing Islamophobic opinions. The claimant was also a teacher of civil education in a Catholic high school providing education from a Catholic/inter-confessional perspective. He was suspended because the School Board considered that the twitter messages were incompatible with his position and not consistent with the school's mission. The Netherlands Institute of Human Rights found discrimination on the ground of political opinion, but then found that the exception for institutions founded on religious and ideological principles applied and thus the suspension did not constitute prohibited discrimination.[157]

Can secularity or neutrality be seen as a religious ethos? Equinet reports a case from Austria, where a woman working as kindergarten assistant wore a religious headscarf. When her contract came up for renewal, a group of parents opposed her reappointment thus her contract was not renewed. The kindergarten claimed that they considered themselves to be religiously neutral and that that was a genuine occupational requirement, but the Ombud for Equal Treatment did not agree. The Ombud held that Article 4(1) and (2) were not applicable as the kindergarten was not an organisation attached to a particular ethos where the religion or belief of the person concerned constituted a genuine, legitimate and justified occupational requirement.[158]

On the other hand, in the French "Baby Loup" case, the Paris Court of Appeal considered that a privately run day care centre for underprivileged children "could be considered as an organisation with an ethos based on the "belief" of secularity".[159] But, the Paris Court of Appeal did not address the fact that France did not transpose Article 4(2) of the Directive.

So, in some countries, secularism or neutrality is seen as an ethos for the purposes of Article 4(2) of the Directive, but in others it is not. This appears to stretch the exception in

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[156] Ibid.

[157] See: European Anti-discrimination Law Review, 17 (November 2013) 72-73 and the internet link there. The religious ethos exemption will be discussed later on in this report.

[158] Equinet, above note 6, 17.

[159] Chopin and Germaine, above note 12, 18-19. The case went through a number of different courts in France. All these courts had slightly different explanations, see on this case: Vickers, above note 39, 29-30. For a similar decision in relation to Belgium, see Council of State, Decision No. 210.000, 21 December 2010 (in Dutch) < http://www.raadvst-consetat.be/Arresten/210000/000/210000dep.pdf

Article 4(2) rather far and, possibly, beyond what was meant by the EU legislator, especially in light of the general opinion of the CJEU that exceptions to the principle of equal treatment must be interpreted narrowly. However, in *Ebrahimian v France,*[160] the European Court of Human Rights referred to the constitutional principle of the secular nature of the French state, as stated in Article 1 of the French Constitution. In this case a social worker was told that her fixed term contract with a public hospital service would not be renewed on account of her refusal to remove her Muslim headscarf, following complaints from patients. The Court held that the restriction on the applicant's manifestation of her belief pursued the legitimate aim of protecting the rights and freedoms of others. It also found that the State, as employer of the applicant in a public hospital, could consider it necessary that she refrain from expressing her religious beliefs in discharging her functions in order to guarantee equality of treatment of patients. The Court found that the restriction derived from the principles of the secular nature of the State and of the neutrality of public services. The Court mentioned that it had already approved a strict implementation where a founding principle of the State was involved. The Court also stated that it was not the Court's task to rule, as such, on the French model. The Court came to the conclusion that France had not exceeded its margin of appreciation in deciding to give precedence to the requirement of neutrality and impartiality of the State.[161] It is not quite clear if this stressing of the importance of secularity as a constitutional principle in France means that secularism could also be seen an ethos for the purpose of Article 4(2) of the Employment Equality Directive. This is thus an area in need of clarification by the CJEU.

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4. Transposition of Article 4(2)

According to Chopin and Germaine

> "Most of the controversy around the implementation of the provisions of the Employment Equality Directive on religion or belief centres on the extent of any exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools)".[162]

[160] *Ebrahimian v France,* App. No. 64846/11, 26 November 2015. For an analysis criticising the judgment see: E. Brems, Ebrahimian v France: Headscarf Ban Upheld for the Entire Public Sector, Strasbourg Observers, 27 November 2015, < http://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/

[161] That there is no consensus on this issue in Europe appears to be clear as, contrary to France, Lower Saxony, one of the German States, has recently changed its rules and now allows teachers in public schools to wear headscarves. This change was made after a high court ruled that a ban is against principles of religious freedom, although the decision was vague and so it is not clear that the 7 other German States which ban teachers from wearing headscarves in public schools, are obliged to abolish these bans. See: "German State lifts Headscarf Ban for Public School Teachers", 7 September 2015, < http://www.dw.com/en/german-state-lifts-headscarf-ban-for-public-school-teachers/a-18699223 . So, even within states there is no consensus.

[162] Chopin and Germaine, above note 12, 19.

Member States are not obliged to introduce the exceptions in Article 4(2) into their national legislation and France, Portugal, Romania and Sweden have not done so, although, in Romania, the provisions on determining occupational requirements can be interpreted to allow ethos or religion-based exceptions.[163] The preliminary reference from the French Cour de Cassation, mentioned above,[164] is based on Article 4(1), probably because France has not implemented Article 4(2). However, this does mean that the CJEU will not get a chance to interpret Article 4(2), which is, as Chopin and Germaine describe it, the much more controversial part of Article 4 and thus would benefit from interpretation and explanation by the CJEU.

Table 4 Transposition of Article 4(2) Employment Equality Directive

	Article 4(2) transposed into national law?[165]
Austria	Yes
Belgium	Yes[166]
Bulgaria	Yes, possibly stricter than the Directive [see below]
Croatia	Yes
Cyprus	Yes
Czech Republic	Yes
Denmark	Yes
Estonia	Yes[167]
Finland	No, considered to be covered by Article 4(1) which contains stricter requirements than Article 4(2)[168]
France	No
Germany	Yes
Greece	Yes, possible too wide
Hungary	Yes, going beyond Directive? [see below]
Ireland	Yes, possibly too wide [see below]
Italy	Yes, possibly too wide
Latvia	Yes
Lithuania	Yes
Luxembourg	Yes
Malta	Yes

[163] Chopin and Germaine, above note 12, 120.
[164] See above, footnote 15.
[165] The information in this table is based on Chopin and Germaine, above note 12, 20, unless otherwise stated.
[166] See: E. Bribosia and I. Rorive, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Belgium, 112-113, < http://www.equalitylaw.eu/country/belgium
[167] See: V. Poleshchuk, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Estonia, 50, < http://www.equalitylaw.eu/search?searchword=estonia&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search under 14.
[168] See: R. Hiltunen, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Finland, 68-69 < http://www.equalitylaw.eu/search?searchword=finland&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search&start=20 under 21.

	Article 4(2) transposed into national law?[165]
Netherlands	Yes, was ambiguous, now clearer after abolishing 'single ground construction' [see below]
Poland	Yes
Portugal	No
Romania	No, but Genuine Occupational Requirement provisions can be interpreted to allow ethos or religion-based exceptions
Slovakia	Yes
Slovenia	Yes
Spain	Not in the anti-discrimination laws, but Article 6 the Organic Law on Religious Freedom is in keeping with Article 4(2) Directive[169]
Sweden	No
United Kingdom	Yes, but ambiguous? [see below]

Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Slovenia and the UK have adopted provisions which seek to rely on Article 4(2), but some of these "appear to go beyond the strict terms of the Directive (for example, Hungary) or which remain ambiguous (for example, the Netherlands and the UK)".[170]

Up to 1 July 2015, the General Equal Treatment Act in the Netherlands contained the so-called 'sole ground construction'. This meant that educational institutions with a religious ethos could require loyalty from (future) employees to this religious ethos but that they could not dismiss or refuse to employ someone 'on the sole ground' of, for example, being homosexual. The text of this part of the act and the explanatory notes suggested that people could be refused employment or dismissed on these grounds if other circumstances where present. In practice, the Dutch courts have never allowed this, but the fact remained that the law was unclear and was seen as discriminatory. This 'sole ground construction' has been removed as of 1 July 2015 which makes the law clearer. The exemption for faith based organisations to require (future) employees to be of the organisation's religion remains, but the new law makes clear that they can only discriminate on the grounds of religion and not on other grounds, such as sexual orientation. This brings the General Equal Treatment Act in line with the Employment Equality Directive.[171]

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[169] See: L. Cachon, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Spain, 65-67 < http://www.equalitylaw.eu/search?searchword=Spain&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search&start=40 under 44.

[170] Chopin and Germaine, above note 12, 19.

[171] See on this: Enkele Feit Constructie verdwijnt uit Wet, Nieuwsbericht, < https://www.rijksoverheid.nl/actueel/nieuws/2015/05/13/enkele-feitconstructie-verdwijnt-uit-de-wet (in Dutch) and R. Holtmaat, News report, 16 March 2015, Bill abolishing 'Sole Ground Construction' adopted by Dutch Senate, European Network Experts in Gender Equality and Non-discrimination, < http://www.equalitylaw.eu/search?searchword=religion%20or%20belief&searchphrase=all&areas[0]=documents_search

In Bulgaria, the Protection against Discrimination Act uses the terms "genuine and determining", which arguably makes it stricter than the Directive, but "in Ireland, the Employment Equality Act does not refer to the terms "legitimate" and "proportionate" as required by the Directive" which suggests that the exemptions under Irish law are wider than what is allowed under the Employment Equality Directive.[172] However, the Commission Report on the Implementation of the Race and Employment Equality Directives states that

> "the Commission has monitored the consistency of national implementing law with this derogation, which has to be interpreted narrowly since it concerns an exception. Initially six Member States (Germany, Ireland, the Netherlands, Slovenia, Finland and the UK) had problems in correct implementation of the derogation, but all the infringement proceedings have now been closed".[173]

5. Concluding remarks on occupational requirements

From the above it will be clear that the exception for churches and organisations with a religious ethos in Article 4(2) of the Employment Equality Directive is very complicated and has been interpreted in different ways in different Member States. But, it must be kept in mind that, as mentioned, the CJEU has consistently held, in relation to the gender occupational requirement, that this provision, as derogation from an individual right laid down in the Directive, must be interpreted strictly.[174] This case law will almost certainly be followed by the CJEU in relation to the genuine occupational requirements in the Employment Equality and Race Directives.

In *Fernandez Martinez v Spain,* the European Court of Human Rights held that religious organisations are entitled to demand a certain degree of loyalty from those working for them or representing them.[175] Therefore, the refusal to renew the employment contract of a teacher of (Catholic) religion and ethics because of publicly showing his disagreement with the Catholic Church's position on abortion, divorce, sexuality and contraception was held not to be a breach of the right to respect for private and family life under Article 8 ECHR. The employee had knowingly and voluntarily accepted a special duty of loyalty to the religious organisation which limited the scope of his right to respect for his private and family life to a certain degree. Such contractual limitations were, according to the Court, permissible under the Convention where they are freely accepted.[176]

In an earlier case, the European Commission of Human Rights had held that the dismissal of a doctor by a Catholic hospital for publicly expressing his pro-abortion view was not a violation of the right to freedom of expression under Article 10 ECHR. The

[172] Chopin and Germaine, above note 12, 19.
[173] COM (2014) 2, above note 10, 15.
[174] See the cases in footnote 144.
[175] *Fernandez Martinez v Spain*, App. No. 56030/07, 12 June 2014, para 131.
[176] Ibid, para 134.

Commission's reasoning was the same as that of the Court in *Fernandez-Martinez*, that contractual limitations on Article 10 were permissible where they had been freely accepted.[177]

On the other hand, in *Obst and Schüth v Germany*,[178] the European Court of Human Rights scrutinised the dismissal of two church employees more strictly. Obst was director of public relations of the Mormon Church for Europe, while Schüth was an organist and choir master in a Catholic church. Both were dismissed because they had extra-marital relationships.
The European Court of Human Rights held that there was no breach of Article 8 ECHR in relation to Mr Obst. Mr Obst had grown up in the Mormon Church and he had been or should have been aware when signing the employment contract of the importance of marital fidelity for his employer and of the incompatibility of his extra-marital relationship with the increased duties of loyalty he had contracted towards the Church as director for Europe of the public relations department.[179]

In contrast, in relation to Mr Schüth, the European Court of Human Rights found a breach of Article 8 ECHR because the national Labour Court of Appeal had not examined the argument of the employer but had simply reproduced it without giving any attention to Mr Schüth's family life or the legal protection afforded to it. The national Court had thus not balanced all the interests involved and a more detailed examination was required when weighing the competing rights and interests at stake. The European Court of Human Rights mentioned that the national Court should have taken into account that Mr Schüth had not challenged the position of the Catholic Church and the limited possibilities he had of getting another job.[180] This suggests, as Vickers writes, that the CJEU, under Article 4 of the Employment Equality Directive,

> "will need to consider the right to religious freedom of the religious employer along with other competing interests such as the equality, privacy and dignity rights of employees when assessing the proportionality of any occupational requirement imposed by an ethos-based employer".[181]

III. Positive action

Article 7 of the Employment Equality Directive, entitled "Positive Action" allows Member States to maintain or adopt specific measures to prevent or compensate for

[177] *Rommelfanger v Germany,* App. No. 12242/86, 6 September 1989.
[178] *Obst and Schüth v Germany*, Appl. Nos. 425/03 and No. 1620/03, 23 September 2010.
[179] Ibid.
[180] Ibid.
[181] Vickers, above note 39, 35.

disadvantages linked to any of the grounds covered by the Directive "with a view to ensuring full equality in practice". So Member States can take positive action measures but they are not obliged to do so. But what is positive action? Article 7 mentions the adoption and maintenance of "specific measures to prevent or compensate for disadvantages" and thus it allows for differential or more favourable treatment of individuals who have suffered disadvantages connected to a protected ground.

Positive action, like indirect discrimination, can be said to aim at substantive or factual equality rather than mere formal equality. It recognises that some individuals are or have been disadvantaged or discriminated against because of their membership of a particular group, for example, an ethnic or religious group. These disadvantaged groups face extra barriers to achieving equality and positive action measures aim to compensate for this, in order to ensure "full equality in practice", as Article 7 of the Employment Equality Directives states. According to the EU Agency for Fundamental Rights, positive action "allows Member States to address issues of structural discrimination and pre-empt breaches of non-discrimination law".[182] A positive action measure could, for example, allow an employer to give preference to a Muslim candidate for a job over a non-Muslim candidate, because Muslims are under-represented among the workforce and the employer is aiming to have a more diverse workforce.

Different terms are used to refer to positive action measures. In the US, the term "affirmative action" is more common, while in international law the term "special measures" is often used.[183] The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD, 1966) and the Convention on the Elimination of all Discrimination against Women (CEDAW, 1979) both allow special measures to be taken but both make clear that this should not lead to the maintenance of separate or unequal rights or standards. They also make clear that these measures are temporary and should not last after the objectives for which these measures were taken, has been achieved.[184] In other words, these measures should not continue after the historically disadvantaged groups have reached the same level and can enjoy the same rights in the same way.

Article 15 of the Employment Equality Directive allows for positive action legislation in relation to Northern Ireland on grounds of religion in relation to the recruitment of teachers and to the police service. According to Article 15, the first is allowed "in order to maintain a balance of opportunity in employment for teachers… while furthering the reconciliation of historical divisions between the major religious communities" while the second is meant "to tackle the under-representation of one of the major religious communities in the police service".

Section 46 of the Police (Northern Ireland) Act 2000, headed "discrimination in appointments" can be found in Part IV of the Act under the heading "temporary provisions concerning composition of the police". So, here again, these measures are temporary. Section 46 required the appointment of one Catholic person for every person

[182] EU Agency for Fundamental Rights, Opinion, above note 2, 37.
[183] See, for example, Articles 1(4) and 2(2), ICERD and Article 4, CEDAW.
[184] Ibid.

of another religion who was awarded a post as police trainee or support staff. The other paragraphs of section 46 empowered the Secretary of State to amend the requirements if not enough people could be appointed. The measure was originally meant to apply for three years but it was extended three times. It ended on 28 March 2011 when it had been in force for ten years. One of the reasons for ending this was that the percentage of Catholic police officers had gone up from 8% when the measure was put in place to almost 30% ten years later. The Government consultation before abolishing the provision showed that 94% of respondents to the consultation was in favour of ending the provisions and of letting the recruitment of police officers be based solely on merit.[185]

Many EU Member States have put in place positive action measures, most often in relation to disabled people.[186] There are very few examples of positive action measures in relation to religion and belief. According to Chopin and Germaine, only Cyprus, Denmark and the UK use positive action in relation to religion, Cyprus in education, Denmark in public governmental projects on employment and integration and the UK in employment and in access to goods and services.[187]

According to the country report on Cyprus of 2013, there are a few measures in place for the three constitutionally recognised "religious groups": the Armenians, the Maronites and the Latins. These measures promote the use of the languages of the religious groups. The most important measure was the codification of Cypriot Maronite Arabic. Other measures include the repair and maintenance of places of worship, cemeteries and schools, small grants for newspapers and other print media published by Maronites, Armenians and Latins and for the creation and upgrade of their websites. The report notes that the three religious groups enjoy a high degree of social integration and amicable relations with the majority population.[188]

In July 2009, the Cypriot Equality Body found that positive action is necessary in order to safeguard the Maronites' right to be taught their language, history and culture by Maronite teachers. The decision stated that special treatment involves deviations from the principle of equality, which take the form of positive measures or special rights targeting a certain group aiming at the elimination of discrimination.[189]
According to the Country report on Denmark from 2013:

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[185] See: Northern Ireland Office: Police (Northern Ireland) Act 2000 Review of Temporary Recruitment Provisions, 22 March 2011, < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136383/police__northern_ireland__act_2000_review_of_temporary_recruitment_privisio__1_.pdf

[186] Chopin and Germaine, above note 12, 82.

[187] Ibid. 82-83.

[188] C. Demietriou, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Cyprus, 178 < http://www.equalitylaw.eu/search?searchword=cyprus&searchphrase=all&areas[0]=documents_search under 17.

[189] C. Demietriou, News Report, 7 July 2009, Equality Body Recommends the Adoption of Special Measures in Order to Implement the Right to Education of the Maronite Community, European Network of Legal Experts in the Non-discrimination Field, < http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=1104&Itemid=295

> "Section 9(2) of the Act on the Prohibition of Discrimination in the Labour Market states that the Act does not prevent measures being taken with a view to improving employment opportunities for persons of a specific race, skin colour, religion, political opinion, sexual orientation or national, social or ethnic origin, age or disability by virtue of other legislation, rules other than legislation and other public measures. Besides of such possible public measures, there are no provisions in Danish law explicitly allowing for positive measures on grounds of religion or faith".[190]

Although positive action measures in relation to religion or belief are thus allowed, no examples are given of such measures.

In the UK, positive action is also allowed (but not prescribed) in relation to all grounds of discrimination covered by the Equality Act 2010 via Sections 158 ("positive action: general") and 159 ("positive action: recruitment and promotion"). Both sections contain a proportionality test: positive action can only be taken if it has a legitimate aim and the means used to achieve that aim are proportionate. The explanatory notes to both sections make clear that the provisions need to be interpreted in accordance with what EU law allows. What forms of positive action are permitted under EU law according to the CJEU is discussed below.

As already mentioned, in Portugal, the Constitutional Court has held that

> "the constitutional protection of religious freedom goes beyond the principles of freedom of religion and non-discrimination, by also requiring the creation of conditions for the effective implementation of the right to religious freedom, including measures of positive action and reasonable accommodation of working hours".[191]

This suggests that positive action measures in relation to religion and belief are permitted under the Portuguese Constitution.

The CJEU has decided on positive action measures in relation to sex discrimination and, there, it has held that this excludes programmes which involve automatic preferential treatment at the point of selection in employment.[192] In other words, the CJEU appears to allow positive action in employment in so-called "tie-break" situations: where two candidates are equally qualified, the employer can give preference to the candidate from

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[190] P. Justesen, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Denmark, 81 < http://www.equalitylaw.eu/search?searchword=denmark&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search&start=20 under 24.

[191] See above note 111.

[192] See, for example, cases C-450/93 *Kalanke v Freie Hansestadt Bremen,* ECLI:EU:C:1995:322; C-409/95 *Marschall v Land Nordrhein-Westfalen,* ECLI:EU:C:1997:533; C—158/97 *Badeck's Application,* ECLI:EU:C:2000:163; and C-407/98 *Abrahamsson and Anderson v Fogelqvist*, ECLI:EU:C:2000:367.

the under-represented group. But the individual merits of both candidates need to be considered and an employer cannot give automatic preference to a candidate from an under-represented group.[193] Positive action measures prior to the point of selection are accepted. For example, encouraging people with a specific religion to apply because this religion is underrepresented would be allowed.

The CJEU has also held that positive measures, as an exception to or derogation of the principle of equal treatment, must be interpreted strictly.[194] And as the CJEU determined in the *Lommers* case, which also concerned positive measures to promote the equality between men and women,

> "according to settled case-law, in determining the scope of any derogation from an individual right … due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued".[195]

Positive action measures are thus subject to a proportionality test. This would also suggest that such measures need to be limited in time and should not last beyond the time when "full equality in practice" has been achieved.

Apart from positive action measures, a number of EU Member States have introduced legal duties to promote equality. Sometimes this has been done via a broad obligation in the constitution, like in Greece or in Spain.[196] In Bulgaria, 'the Protection against Discrimination Act,

> "places a duty on all authorities to take measures whenever necessary to equalise opportunities for disadvantaged groups and to guarantee participation by ethnic minorities in education to accomplish the objectives of the Act. The Act requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination".[197]

Under the Finish Non-Discrimination Act, all public authorities must foster equality, while in Sweden, employers have to "carry out goal-oriented work to actively promote ethnic diversity in working life".[198]

In the UK, the Equality Act 2010 imposes a "Public Sector Equality Duty", a duty on public authorities, in the exercise of their public functions:

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[193] Ibid.
[194] See *Kalanke,* para 22 and Marschall, para. 32, both above note 192.
[195] Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij,* ECLI:EU:C: 2002:183, para 39.
[196] Chopin and Germaine, above note 12, 81.
[197] Ibid, 81.
[198] Ibid.

> "to have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it".[199]

This duty covers religion or belief as well as the other grounds covered by the Employment Equality Directive. The section specifically determines that

> "compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act".[200]

[199] S 149(1) Equality Act 2010.
[200] S 149(6) Equality Act 2010.

Chapter 5 Specific issues

I. Multiple discrimination

The Employment Equality Directive and the Race Directive both refer in their Preambles to the fact that "women are often victims of multiple discrimination".[201] The 2014 report from the Commission on the Directives also mentions this and then continues to state that "the Directives already allow a combination of two or more grounds of discrimination to be tackled in the same situations".[202] So, according to the Commission, multiple discrimination is covered by the Directives. However, the same report also points out that "problems may arise from the differences in level of protection provided for the different grounds" because the material scope of the two Directives is different.[203] According to EU Agency for Fundamental Rights,

> "the available evidence shows that too many individuals' social and economic achievement is significantly hindered and undercut by diverse forms of discrimination, including multiple and intersection discrimination".[204]

4% of the people surveyed for the Special Barometer 393 on discrimination in the EU, reported that they had experienced discrimination on multiple grounds.[205]

But what is multiple discrimination? In its simplest form, you can say that multiple discrimination occurs when a person is discriminated against on more than one ground of discrimination at the same time. In some cases, this can be challenged on each of the discrimination grounds present separately, but in other cases this cannot be done. For example, a police department has a minimum height requirement for police officers, which disproportionately affects women as they tend to be shorter than men. It also requires all police officers to work on Saturdays, which could disproportionately affect Jewish people who celebrate their Sabbath on Saturdays. In this case, a Jewish woman would suffer a double disadvantage and this could be challenged as sex discrimination, as religious discrimination, or, as discrimination on both grounds.

But sometimes there is intersectional discrimination where two or more grounds of discrimination interact and discrimination takes place because of this interaction, for example, Muslim men who are discriminated against because they are seen as terrorists. Discrimination takes place not because they are male nor because they are Muslim, but

[201] Recital 3, Preamble, Employment Equality Directive and Recital 14 Preamble, Race Directive.
[202] Above note 10, 9-10.
[203] Ibid.
[204] Opinion of the EU Agency for Fundamental Rights, above note 2, 6.
[205] Special Eurobarometer 393, above note 3, 62.

because they are both male and Muslim. Muslim women are generally much less often seen as terrorists, as are men with another religion or belief.[206]
Other good examples of multiple discrimination are: bans on the wearing of a burqa or a face-covering veil at work, which is indirectly discriminatory against Muslim women, unless it is objectively justified, because it is only Muslim women who wear burqas and face covering veils; and, similarly, a ban on the wearing of turbans or beards which would only affect men.

Multiple discrimination can involve discrimination on any combination of two or more grounds covered by anti-discrimination law. But intra-group discrimination can also take place, for example, individuals may be discriminated against within their own religious community because of their sexual orientation. Individuals may then face discrimination both within and outside their community and this can also lead to multiple discrimination: individuals can be discriminated against because of, for example, their sexual orientation and because of their membership of the religious or ethnic group.

As mentioned above, the Employment Equality Directive allows for claims on more than one discrimination ground. This appears to be the case in most Member States as well. Some national laws provide explicitly for claims for multiple discrimination, but even if they do not do so, the law does not seem to prohibit such claims either. According to Chopin and Germaine, explicit provisions are provided in Greece; in Bulgaria, where the law defines multiple discrimination as "discrimination based on more than one [protected] ground" and a statutory duty is placed on public authorities to give priority to positive action measures to the benefit of victims of multiple discrimination; and, in Germany, where any unequal treatment on the basis of several prohibited grounds has to be justified with regard to each of these grounds.[207] In Romania and Portugal, multiple discrimination constitutes an aggravating circumstance and thus the level of compensation may be higher.[208] Chopin and Germaine conclude that

> "all existing national provisions bear limited effects in practice and case law remains very scarce. In the few existing cases reported, no specific approach with regard to the comparator had been followed by either the courts or the equality bodies".[209]

The CJEU has dealt with some cases where more than one ground was claimed by the victim. In *Meister v Speech Design Carrier Systems*, discrimination was claimed on the grounds of age, sex and ethnic origin when Ms Meister was turned down for a job she had applied for. But the case revolved around the burden of proof and whether the

[206] For more information on multiple discrimination see the following paper and the literature referred to there: E. Howard, (2011) Multiple Discrimination in Law, Think Equal Symposium on Multiple Discrimination, 1 November 2011, National Commission for the Promotion of Equality, Malta: http://socialdialogue.gov.mt/en/NCPE/Documents/Projects_and_Specific_Initiatives/Think_Equal/paper_erica_howard.pdf
[207] Chopin and Germaine, above note 12, 43.
[208] Ibid.
[209] Ibid.

claimant has a right to receive information on the other candidates who applied, and the CJEU did not address how to deal with claims on more than one prohibited ground.[210]

Odar v Baxter Deutschland concerned a redundancy scheme which took account of both age at time of redundancy and retirement age. The latter was normally 65, but for Dr Odar it was 60, because he was severely disabled. Because of this, Dr Odar received less than half the redundancy payment he would have had if he had not been disabled. Dr Odar claimed both direct age discrimination and indirect disability discrimination. The CJEU held that the direct age discrimination was justified, but that the indirect disability discrimination was not. The Court thus appears to have looked at each claim separately.[211]

In *Z v A Government Department and the Board of Management of a Community School*,[212] a woman claimed discrimination against her employer on the grounds of gender, disability and family status (the latter ground is a protected ground of discrimination under Irish law). The claimant had had a child through a surrogacy arrangement as the commissioning mother, since she was unable to bear children herself due to a condition which constituted a disability in accordance with national anti-discrimination law. Her employer refused to grant her paid leave equivalent to adoption and/or maternity leave following the birth of the child. The CJEU again appeared to look at each of the grounds claimed separately.

The fact that the CJEU looked at each individual ground separately in both cases might be linked to the way the questions referred for a preliminary ruling were phrased. But if these cases are an indication of how to deal with multiple discrimination, they suggest that each ground of discrimination must be looked at in turn. Looking at multiple discrimination in this way could lead to problems: not only does it increase the burden of proof for the complainant, as each ground needs to be proven separately, but it might also leave a victim of intersectional discrimination without a remedy if they cannot prove discrimination on either one of the grounds on its own.

One of the reasons for dealing with multiple discrimination by examining each ground of discrimination in turn, might be that the Employment Equality Directive, like the other EU Anti-discrimination Directives and many national laws, require a comparator to establish both direct and indirect discrimination. And, even if a hypothetical comparator can be used, choosing a comparator becomes more difficult when more grounds of discrimination are involved.

[210] Case C-415/10 *Galina Meister v Speech Design Carrier Systems GMBH*, ECLI:EU:C:2012:217.
[211] Case C-152/11 *Johann Odar v Baxter Deutschland GMBH,* ECLI:EU:C:2012:772.
[212] Case C-363/12 *Z v a Government Department and the Board of Management of a Community School,* ECLI:EU:C:2014:159.

II. Religion – sexual orientation

The Employment Equality Directive protects against both religion and belief discrimination and against sexual orientation discrimination. However, these two can clash in certain situations, not only with each other but also with the right to freely manifests one's religion or belief under Article 10 EUCFR and Article 9 ECHR. As mentioned, the right to manifest one's religion or belief can be restricted under Article 52(1) EUCFR and 9(2) ECHR if this is necessary for the protection of the rights of others. The latter includes the right of others not to be discriminated against for example on the grounds of sexual orientation.

The CJEU has not dealt with cases where these rights seem to clash, but the European Court of Human Rights has. In *Pichon and Sajous v France*, where the applicants, who jointly owned a pharmacy, refused to sell contraceptive pills based on their religious beliefs, the European Court of Human Rights held that there was no interference with the applicants' right under Article 9 ECHR. As long as the sale of contraceptives was legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants could not give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they could manifest those beliefs in many ways outside the professional sphere.[213]

In *Eweida and Others v UK*,[214] two of the applicants, Ladele, a registrar of birth, deaths and marriages and McFarlane, a relationship counsellor, refused to perform those parts of their duties which involved providing a service to same-sex couples. This was based on their Christian belief that homosexuality was against God's law. Both were dismissed and challenged this in the national courts as discrimination on the grounds of religion or belief. When this challenge was unsuccessful, they both applied to the European Court of Human Rights, claiming a violation of Article 9 (claimed by McFarlane) or Article 14 in conjunction with Article 9 (claimed by both Ladele and McFarlane).

In relation to both applicants, the European Court of Human Rights held that they were manifesting their belief. The Court considered that their employer's policy pursued a legitimate aim - to provide its services without discrimination. The Court then stated that the right not to be discriminated against on the ground of sexual orientation is also protected under the ECHR and that a difference in treatment on this ground requires particularly serious reasons by way of justification. This means that, in relation to sexual orientation, the European Court of Human Rights will closely examine the justification brought forward for the discriminatory behaviour. When examining the proportionality of the means used to achieve the legitimate aim of providing the service without discrimination, the European Court of Human Rights held that the national authorities are allowed a wide margin of appreciation when it comes to striking a balance between competing ECHR rights. In both cases, they did not exceed this margin and thus there was no violation of Article 9 or Article 14 in conjunction with Article 9.

[213] *Pichon and Sajous v France*, No. 49853/99, 2 October 2001.
[214] *Eweida and Others*, above note 37.

These two cases from the European Court of Human Rights suggest that the Court will find that the requirement to provide goods and services to the public in a non-discriminatory way is either not an interference with the rights under Article 9 ECHR or, if it is, that it is justified by the goal of combating discrimination. National courts appear to follow this as well.[215] Therefore, this sends the message that there is no right to discriminate. This could provide the CJEU with guidance when it is called upon to decide on cases where competing rights such as the right to be free from religious discrimination and the right to be free from sexual orientation discrimination are at stake.

[215] See, for example, for Spain: Supreme Court of Spain *Interpuesto por Pablo de law Rubio Comos* Application No 69/2007 (11 May 2009); for the United Kingdom: *Bull and Bull v Hall and Preddy* [2013] UKSC 73; *Black and Morgan v Wilkinson* [2013] EWCA Civ 820; *Greater Glasgow Health Board v Doogan and Wood* [2014] UKSC 68. For Northern Ireland: *Lee v Ashers Baking Co Ltd,* County Court Northern Ireland, 19 May 2015, < http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf For more information on conflicting rights and how to deal with this see: A. Donald and E. Howard, The Right to Freedom of Religion or Belief and its Intersection with Other Rights, A Research Report for ILGA-Europe, January 2015, < http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf

Conclusion

This study has provided an overview of the provisions against religion or belief discrimination in EU law and in particular their implementation in the law of the Member States. Throughout the study, examples of good practice have been identified on which the CJEU and the courts in the Member States can draw for guidance when required to decide on issues regarding religion or belief discrimination in the Employment Equality Directive.

At present, the Employment Equality Directive only imposes a duty on Member States to have legislation against discrimination on the grounds of religion and belief in employment related areas and, thus, the focus of this study has been on this area. It is a very positive development that many Member States go beyond these minimum requirements of the Directive and provide protection against religion or belief discrimination in areas outside employment and occupation as well. Only Greece and Poland do not do so, but all other Member States have extended the protection against religion and belief discrimination to some or all areas covered by the Race Directive for racial and ethnic origin (see Table 1).

The study has explained that the protection against religion and belief discrimination in the EU and in the Member States is provided through both anti-discrimination law and human rights law and that these two are mutually influencing each other. Human rights law and, more specifically, the ECHR plays an important role in the interpretation of the Employment Equality Directive, especially in relation to religion or belief discrimination. This is because the right to freedom of religion or belief and the right to be free from discrimination are basic human rights laid down in both the ECHR and the EUCFR. These rights are strengthened because most Member States also have constitutional guarantees of both the right to freedom of religion and the right to protection against discrimination. In Austria, the freedom of religion is not laid down in the Constitution, but in the Basic Law on General Rights of Nationals. In the Czech Republic, there are no constitutional guarantees of these rights as such, but Article 10 determines that the Human Rights Treaties ratified by the Czech Republic apply, and thus both rights are guaranteed in this way. Denmark's Constitution guarantees freedom of religion, but there is no provision against discrimination, while in France the opposite is true: there is no right to freedom of religion laid down in the Constitution, but there is a right to non-discrimination. Article 1 of the French Constitution states that France is a secular Republic. The UK has no written constitution but the ECHR has been incorporated into domestic law by the Human Rights Act 1998 (see Table 2).

For what is to be understood under the terms 'religion' and 'belief', the CJEU and the national courts in the Member States could and should look to the case law of the European Court of Human Rights for guidance. This Court has given a broad interpretation to both terms. Most Member States have not defined these terms in national law, with the exception of Hungary. Some Member States, like Belgium, France, Germany, the Netherlands and the UK, have provided guidance through explanatory notes to legislation or through case law. Based on the way the European Court of Human

Rights has recently dealt with religion or belief, by accepting quite readily that there is a manifestation of an individual's belief, it would be good practice for the CJEU and the national courts in the Member States to accept that something is a manifestation of religion or belief and to only concern themselves with making sure that an assertion of religious belief is made in good faith. They should not assess the validity or correctness of a religion or belief.

In relation to political beliefs, these are, according to the Commission, not covered by the Employment Equality Directive.[216] However, the following Member States do cover these in some form: Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, France, Hungary, Latvia, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, and Spain. In the UK, political beliefs are covered for Northern Ireland, but not for Great Britain. Finnish anti-discrimination law covers 'opinions', while Lithuanian law covers 'convictions', both of which could include political beliefs (see Table 3). An anti-discrimination law covering political as well as philosophical beliefs provides more protection and simplifies issues for the courts, as it is not always easy to determine the boundaries between the two, as the case law from the UK, discussed in Chapter 2, III, shows.

All Member States have provided against direct discrimination on the grounds of religion or belief. The definition of direct discrimination in the Employment Equality Directive includes both discrimination by association (where someone is discriminated against because of their association with a person with a particular religion or belief) and discrimination by perception (where someone is discriminated against because the discriminator assumes that they have a particular religion or belief).[217] This extends the protection provided. The anti-discrimination legislation in both Ireland and Bulgaria explicitly provides protection against both forms of discrimination, while in the UK, the explanatory notes to the anti-discrimination law make clear that both are included. The laws in Belgium, Croatia and the Czech Republic provide against assumptive discrimination, while Austrian law provides against associative discrimination. In Belgium, case law has established that discrimination by association is also covered.

The definition of direct discrimination requires a comparison to be made with another person and the Employment Equality Directive allows for a hypothetical comparator. The law in most Member States does provide for real or hypothetical comparators. However, French law does not cover a hypothetical comparator, while Irish law does not provide for a hypothetical comparator in employment cases. The law in Poland and Spain do not appear clear in this regard.

The Employment Equality Directive does not allow for justification of direct religion or belief discrimination and this is followed by all Member States with the exception of Hungary, where the law provides for a general objective justification of direct discrimination, in apparent breach of the Directive.

[216] See SWD(2014)5, above note 40, under 4.
[217] See COM (2014) above note 10, 10.

The concept of indirect discrimination has given rise to initial difficulties in transposition, but it is now enshrined in the law of the Member States. However, its application in practice remains a challenge and some Member States have expressed concerns about the lack of understanding of the concepts in national courts.[218]

The majority of EU Member States have adopted definitions of harassment which appear similar to the definition in the EU Employment Equality and Race Directives. However, there are some concerns about whether the law in a number of Member States is in complete compliance with the Directive. These Member States include Denmark, France, Hungary, Romania, Slovakia, Spain and Sweden. On the other hand, some Member States have provided that employers can be held liable for harassment of their employees and /or by a third party, like Ireland and the Netherlands. Other Member States have imposed a duty on employers to take action to prevent and redress harassment in the work place, for example Germany and Croatia.

Most Member States have provided against instruction to discriminate, although Bulgarian law only prohibits intentional instructions. UK law also prohibits causing or inducing another person to discriminate. Most Member States have also made provisions against victimisation, but the legislation varies as to who is covered. Sometimes only the victim is covered, while at other times those who assist the victim or those who provide evidence or act as a witness are also protected. It is important that the protection is wide and extends beyond the victim because, if it does not, people would be reluctant to bring a claim, provide evidence or act as a witness or in support of someone bringing a claim. In Denmark, the protection applies to a person who files a complaint regarding differential treatment of themselves or of another person and, in Italy, the protection against discrimination is extended to any person beyond the claimant. French and UK law also protect persons beyond the victim, and, under Croatian law, a person who has reported discrimination, files a complaint or who has witnessed discrimination are all protected. Bulgarian law provides wide protection, as it includes protection of other than the victim himself or herself and victimisation by assumption and by association. On the other hand, in Belgium, "the protection against victimisation is limited to victims filing a complaint of discrimination and any formal witness in the procedure", which suggests that not every person involved is protected, for example, persons who provide assistance or support. The same situation exists in Romania.

The Employment Equality Directive contains a number of exceptions. A general exception is laid down in Article 2(5) of the Directive. There is no equivalent provision in the Race or Gender Equality Directives. This general exception is reproduced in legislation in Cyprus, Greece and Malta, while it is largely incorporated in Italy and appears to be implicit in the law in Portugal. In the UK, there is an exception for safeguarding national security.

Article 4(1) of the Employment Equality Directive contains a general exception for genuine and determining occupational requirements, subject to a proportionality test, applicable to all grounds of discrimination covered by the Directive. In relation to the

[218] COM (20140, 2, above note 10, 8.

gender occupational requirement, the CJEU has consistently held that this provision, as a derogation from an individual right, must be interpreted strictly.

But Article 4(2) contains a further occupational exception which only applies to churches and other public or private organisations the ethos of which is based on religion or belief. In the implementation of the Employment Equality Directive, the exceptions provided in Article 4(2) have given rise to the most controversy.[219] Finland, France, Portugal, Romania and Sweden have not introduced these exceptions into their national law, although, in Romania, the provisions on genuine and determining occupational requirements can be interpreted to allow ethos-based exceptions. In Finland, the exceptions are covered by Article 4(1), which contains stricter requirements than Article 4(2). The exceptions in Bulgarian law appear to be stricter than the exceptions in Article 4(2), but the law in Greece, Hungary, Ireland, and Italy appears to be wider and thus go beyond what the Directive allows. The exception in UK law appears to be ambiguous, but the ambiguity in the law of the Netherlands has been removed in July 2015 (see Table 4). There is a lot of uncertainty about the meaning and width of the exceptions in Article 4(2) and this is an area that urgently needs to be clarified by the CJEU.

Article 7 of the Employment Equality Directive allows for positive action measures. Member States can maintain or adopt specific measures to prevent or compensate for disadvantages linked to religion or belief and the other grounds covered. Many Member States have put in place positive action measures, mostly in relation to disabled people. There are very few examples of positive action measures in relation to religion and belief. Cyprus seems to have used the provision to safeguard the rights of the Maronites, one of their recognised religious groups. And, although Danish and UK law allow for positive action measures in relation to religion or belief, there are no examples of such measures. In Portugal, the case law seems to have established that positive action measures in relation to religion or belief are permitted under the Portuguese Constitution. The CJEU has held that positive action measures, as a derogation from the principle of equal treatment, must be interpreted strictly and are subject to a proportionality test.

Finally there are no open infringement procedures against any of the EU Member States in relation to the religion or belief aspects of the Employment Equality Directive.

[219] Chopin and Germaine, above note 12, 19.

Bibliography

M. Bell, Direct Discrimination, in D. Schiek, L. Waddington and M. Bell, (eds), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, Hart Publishing, Oxford/Portland, Oregon, 2007, 185-322

E. Brems, Ebrahimian v France: Headscarf Ban Upheld for the Entire Public Sector, Strasbourg Observers, 27 November 2015, < http://strasbourgobservers.com/2015/11/27/ebrahimian-v-france-headscarf-ban-upheld-for-entire-public-sector/

E. Bribosia and I. Rorive, Reasonable Accommodation beyond Disability in Europe? (European Network of Legal Experts in the Non-discrimination Field, 2013) European Commission, Directorate-General for Justice, < http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_beyond_disability_in_europe_en.pdf

E. Bribosia and I. Rorive, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Belgium, 112-113, < http://www.equalitylaw.eu/country/belgium

L. Cachon, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Spain, < http://www.equalitylaw.eu/search?searchword=Spain&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search&start=40

I. Chopin and C. Germaine, Developing Anti-discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared, (European Network of Legal Experts in the Non-discrimination Field, 2015) European Commission, Directorate-General for Justice and Consumers, < http://ec.europa.eu/justice/discrimination/files/comparative_analysis_2014.pdf

T. Choudhury, Instruction to Discriminate and Victimisation, in D. Schiek, L. Waddington and M. Bell, (eds), *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law*, Hart Publishing, Oxford/Portland, Oregon, 2007, 561-627

COM (2008) 426, Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons irrespective of Religion or Belief, Disability, Age or Sexual orientation

COM (2014) 2, Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation ('Employment Equality Directive'), 17 January 2014, < http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf

M. Connolly, *Discrimination Law,* 2nd ed., Sweet and Maxwell, London, 2011

Council Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Discrimination based on Sex, OJ L 14, 6

Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin, OJ L 180/22 (the Race Directive)

Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303/16 (the Employment Equality Directive)

Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37

Council Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23.

Council of the European Union, EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (adopted 24 June 2013) < http://eeas.europa.eu/delegations/fiji/press_corner/all_news/news/2013/eu_guidelines_on_the_promotion_and_protection_of_freedom_of_religion_or_belief_%28june_24_2013_fac%29.pdf

Council of Europe, Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2, https://wcd.coe.int/ViewDoc.jsp?id=1761031#P66_5638

C. Demietriou, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Cyprus, < http://www.equalitylaw.eu/search?searchword=cyprus&searchphrase=all&areas[0]=documents_search

C. Demietriou, News Report, 'Equality Body Recommends the Adoption of Special Measures in Order to Implement the Right to Education of the Maronite Community', European Network of Legal Experts in the Non-discrimination Field, < http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=1104&Itemid=295

A. Donald and E. Howard, The Right to Freedom of Religion or Belief and its Intersection with Other Rights, Research Paper for ILGA-Europe, January 2015, < http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf

E. Ellis and P. Watson, *EU Anti-discrimination Law,* 2nd ed., Oxford University Press, Oxford, 2012

Enkele Feit Constructie verdwijnt uit Wet, Nieuwsbericht, < https://www.rijksoverheid.nl/actueel/nieuws/2015/05/13/enkele-feitconstructie-verdwijnt-uit-de-wet (in Dutch)

Equinet, Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination, Equinet, Brussels, 2008, < http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf

Equinet, Equality Law in Practice A Question of Faith: Religion and Belief in Europe, Equinet, Brussels, 2011, < http://www.equineteurope.org/Equality-Law-in-Practice-Religion

EU Agency for Fundamental Rights Opinion – 1/2013: Opinion of the European Union Agency for Fundamental Rights on the Situation of Equality in the European Union 10 Years on from Initial Implementation of the Equality Directives, 2013, < http://fra.europa.eu/sites/default/files/fra-2013-opinion-eu-equality-directives_en.pdf

EU Agency for Fundamental Rights and European Court of Human Rights, Council of Europe, Handbook on European Non-discrimination Law, Luxembourg, Publications Office of the European Union, 2011, < http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf

Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/33

"German State lifts Headscarf Ban for Public School Teachers", 7 September 2015, < http://www.dw.com/en/german-state-lifts-headscarf-ban-for-public-school-teachers/a-18699223

R. Hiltunen, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Finland < http://www.equalitylaw.eu/search?searchword=finland&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search&start=20

R. Holtmaat, News Report, 16 March 2015, Bill Abolishing 'Sole Ground Construction' adopted by Dutch Senate European Network of Legal Experts in Gender Equality and Non-Discrimination Field, http://www.equalitylaw.eu/search?searchword=religion%20or%20belief&searchphrase=all&areas[0]=documents_search

E. Howard, *Multiple Discrimination in Law*, Think Equal Symposium on Multiple Discrimination, 1 November 2011, National Commission for the Promotion of Equality, Malta: http://socialdialogue.gov.mt/en/NCPE/Documents/Projects_and_Specific_Initiatives/Think_Equal/paper_erica_howard.pdf

E. Howard, Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law, *European Law Review* 38, 3, 2013, 360-375

E. Howard, Indirect Discrimination 15 Years on, *E-Journal of International and Comparative Labour Studies*, 4, 3, Sept/Oct 2015, http://www.adapt.it/EJCLS/index.php/ejcls_adapt/article/view/321

Human Rights Committee, General Comment 22, The Right to Freedom of Thought, Conscience and Religion, (on Art. 18), 1993

Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, (on Article 19 ICCPR) 2011

P. Justesen, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Denmark, <

http://www.equalitylaw.eu/search?searchword=denmark&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search&start=20

A. McColgan, National Protection beyond the Two EU Anti-discrimination Directives The Grounds of Religion and Belief, Disability, Age and Sexual Orientation beyond Employment (European Network of Legal Experts in the Non-discrimination Field 2013) European Commission, Directorate-General for Justice, < http://ec.europa.eu/justice/discrimination/files/final_beyond_employment_en.pdf

Northern Ireland Office: Police (Northern Ireland) Act 2000 Review of Temporary Recruitment Provisions, 22 March 2011, < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136383/police__northern_ireland__act_2000_review_of_temporary_recruitment_privisio__1_.pdf

V. Poleshchuk, Report on Measures to Combat Discrimination, Directives 2000/43/EC and 2000/78/EC, Country Report 2013, Estonia, < http://www.equalitylaw.eu/search?searchword=estonia&ordering=newest&searchphrase=all&limit=20&areas[0]=documents_search

Special Eurobarometer 393 on Discrimination in the EU in 2012, < http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_en.pdf

SWD(2014) 5 final. Annexes to the Joint Report on the Application of the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC), accompanying the Document COM(2014) 2 final, < http://ec.europa.eu/justice/discrimination/files/swd_2014_5_en.pdf

C. Tobler, Limits and Potential of the Concept of Indirect Discrimination (European Network of Legal Experts in the Non-discrimination Field, 2008) European Commission, Directorate-General for Employment Social Affairs and Equal Opportunities, < http://www.migpolgroup.com/public/docs/146.LimitsandPotentialoftheConceptofIndirectDiscrimination_EN_09.08.pdf

L. Vickers, Religion and Belief Discrimination in Employment – the EU Law (European Network of Legal Experts in the Non-discrimination Field, 2006) European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, < http://ec.europa.**eu**/social/BlobServlet?docId=1689&langId=en

L. Vickers, Religion and Belief Discrimination in Employment under the Employment Equality Directive: a Comparative Analysis, 1, *European Equality Law Review*, 2015, 25-36

Case Law

Court of Justice of the European Union

C-407/98 *Abrahamsson and Anderson v Fogelqvist*, ECLI:EU:C:2000:367
C-157/15 *Samira Achbita, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV*, preliminary reference 3 April 2015, < http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CN0157&from=EN
C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, ECLI:EU:C:1978:49
C—158/97 *Badeck's Application,* ECLI:EU:C:2000:163
C-170/84 *Bilka Kaufhaus GMBH v Karin Weber von Hartz*, ECLI:EU:C:1986:204
C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*, preliminary reference 24 April 2015 , http://curia.europa.eu/juris/document/document.jsf?text=&docid=165123&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=341315
C-303/06 *Coleman v Attridge Law and Steve Law,* ECLI:EU:C:2008:415
C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia*, ECLI:EU:2015:480
C-185/97 *Belinda Jane Coote v Granada Hospitality Limited*, ECLI:EU:C:1998:424,
C-546/11 *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet*, AG: ECLI:EU:C:2013:68
C-335/11 and C-337/11 *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening*, AG: ECLI:EU:C:2012:775, CJEU: ECLI:EU:C:2013:222
C-96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* ECLI:EU:C:1981:80
C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206
C-450/93 *Kalanke v Freie Hansestadt Bremen,* ECLI:EU:C:1995:322
C-292/97 *Karlsson and Others,* ECLI:EU:C:2000:202
C-285/98 *Kreil v Bundesrepublik Germany*, ECLI:EU:C:2000:2
Case C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij,* ECLI:EU:C:2002:183
C-409/95 *Marschall v Land Nordrhein-Westfalen,* ECLI:EU:C:1997:533
Case C-415/10 *Galina Meister v Speech Design Carrier Systems GMBH*, ECLI:EU:C:2012:217
C-614/11 *Niederösterreichische Landes-Landwirtschaftskammer v Kuso*, ECLI:EU:C:2013:544
Case C-152/11 *Johann Odar v Baxter Deutschland* GMBH, ECLI:EU:C:2012:772
Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschafts-kammer Österreich,* ECLI:EU:C:2004:334
C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* ECLI:EU:C:2010:703
C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, ECLI:EU:C:2010:4
C-447/09 *Prigge and Others v Deutsche Lufthansa* AG, ECLI:EU:C:2011:573
C-273/97 *Sirdar v The Army Board and Secretary of State for Defence,* ECLI:EU:C:1999:523

European Court of Human Rights

Ahmet Arslan and Others v Turkey, App. No.41135/98, 23 February 2010
Angeleni v Sweden, App. No. 10491/83, 3 December 1986
Arrowsmith v United Kingdom, App. No. 7050/75, 12 October 1978
Campbell and Cosans v United Kingdom App. Nos 7511/76 and 7743/76, 23 March 1983
Chappell v United Kingdom, App. No. 12587/86, 30 March 1989
Dahlab v Switzerland, App. No. 42393/98, 15 February 2001
Ebrahimian v France, App. No. 64846/11, 26 November 2015
Eweida and Others v the United Kingdom, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10 and 59842/10, 15 January 2013
Fernandez Martinez v Spain, App. No. 56030/07, 12 June 2014
Handyside v the United Kingdom, App. No. 5493/72, 7 December 1976
Hasan and Chaush v Bulgaria, App. No. 30985/96, 26 October 2000
ISKCON and Others v United Kingdom, App. No. 20490/92, 8 March 1994
Kosteski v The Former Yugoslav Republic of Macedonia, App. No. 55170/00, 13 July 2006
Manousakis and Others v Greece, App. No. 18748/91, 26 September 1996
Obst and Schüth v Germany, Appl. Nos. 425/03 and 1620/03, 23 September 2010
Otto Preminger Institute v Austria, App. No. 13470/87, 20 September 1994
Pichon and Sajous v France, No. 49853/99, 2 October 2001
Phull v France, App. No. 35753/03, 11 January 2005
Rommelfanger v Germany, App. No. 12242/86, 6 September 1989
S.A.S. v France, App. No. 43835/11, 1 July 2014 (Grand Chamber)
Sahin v Turkey, App. No 44774/98, 29 June 2004 (Chamber) and 10 November 2005 (Grand Chamber)
Serif v Greece, App. No. 38178/97, 14 March 2000
Swami Omkarananda and the Divine Light Zentrum v Switzerland, App. No. 8118/77, 19 March 1981
W v United Kingdom, App. No. 18187/91, 10 February 1993
X and Church of Scientology v Sweden, App. No. 7805/77, 5 March 1977
X v United Kingdom, App. No. 7992/77, 12 July 1978

Others:

Belgium:
Council of State, Decision No. 210.000, 21 December 2010 (in Dutch) < http://www.raadvst-consetat.be/Arresten/210000/000/210000dep.pdf
Judgment No. 12/1064/A of the Labour Court of Leuven of 10 December 2013
Ireland:
McKeever v Board of Management Knocktemple National School and Minister for Education & Science, DEC-E2010-189 <
http://www.equalitytribunal.ie/en/Cases/2010/October/DEC-E2010-189-Full-Case-Report.html
Northern Ireland:
Gibson v Police Authority of Northern Ireland [2006] NIFET 00406_00 (24 May 2006)

Lee v. *Ashers Baking Co Ltd,* County Court Northern Ireland, 19 May 2015, < http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf
Spain:
Supreme Court of Spain *Interpuesto por Pablo de law Rubio Comos* Application No 69/2007 (11 May 2009)
UK:
Black and Morgan v Wilkinson [2013] EWCA Civ 820
Bull v Hall and Preddy [2013] UKSC 73
Eweida v British Airways Plc [2010] IRLR 322 (CA)
Grainger Plc v Nicholson [2010] IRLR 4
Greater Glasgow Health Board v. Doogan and Wood [2014] UKSC 68
Henderson v GMB [2013] IRLR 451
Home Office (UK Border Agency) v Essop and Others [2015] EWCA Civ 609
Jessemey v Rowstock Ltd and Another [2014] EWCA Civ 185
Kelly and Others v Unison, No. 2203854/08, 22 December 2009
Panesar v Nestle Co Ltd [1980] ICR 144
Reaney v Hereford Diocesan Board of Finance, Employment Tribunal, Case Number 1602844/2006
Singh v Rowntree Mackintosh [1979] ICR 554
USA:
Griggs v Duke Power Co 401 US 424 (1971)

The Employment Equality Directive (adopted in 2000) imposed a duty on the EU Member States to provide protection against discrimination on the grounds – among others – of religion or belief in the areas of employment, occupation and vocational training. This study examines the legal issues linked to this protection, including the interpretation of key concepts, and the exceptions provided for in the Directive. Throughout the study, examples of good practice in various Member States have been identified on which the CJEU and the national courts can draw for guidance when required to decide on issues regarding religion or belief discrimination in employment contexts.

This is a publication of the Ex-Post Impact Assessment Unit
EPRS | European Parliamentary Research Service
European Parliament

PE 536.345
ISBN 978-92-823-8471-8
Doi:10.2861/783216
QA-01-15-940-EN-N