OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 9 November 2017(1)

Case C−414/16

Vera Egenberger
v
Evangelisches Werk für Diakonie und Entwicklung e.V.

(Request for a preliminary ruling from the Bundesarbeitsgericht (Labour Court, Germany))

(Equal treatment in matters of employment — Article 4(2) of Directive 2000/78/EC — Genuine, legitimate and justified occupational requirements of organisations the ethos of which is based on religion or belief — Difference in treatment based on religion in matters of employment by an auxiliary organisation to a church — Article 17 TFEU — Ecclesiastical privilege of self-determination — Limited judicial review under Member State constitutional law of 'self-conception' of religious groups — Primacy, unity, and effectiveness of EU equal treatment law — Articles 52(3) and 53 of the Charter of Fundamental Rights of the European Union — Balancing of competing rights — Horizontal effects of the Charter)

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I. Introduction

1. After reading an advertisement for a job that was published in November of 2012, Vera Egenberger applied unsuccessfully for a fixed term post of 18 months with the Evangelisches Werk für Diakonie und Entwicklung e.V., ('the defendant'). This is an association which exclusively pursues charitable, benevolent and religious purposes, is governed by private law, and which is an auxilliary organisation of the Evangelische Kirche in Deutschland (the Protestant Church in Germany). The post advertised entailed preparing a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination ('the race discrimination report'). Vera Egenberger ('the applicant') had many years of experience in this field and was the author of a range of relevant publications. (2)

2. The applicant claims that she was not appointed to the post because of her lack of confessional faith, and that this was in breach of her right to belief as reflected in Article 10 of the Charter of Fundamental Rights of the European Union ('the Charter') and that she has been discriminated against on the basis of this belief in breach of Article 21 of the Charter and Articles 1 and 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Directive 2000/78'). (3)

3. Given that the defendant's case is based on Article 4(2) of Directive 2000/78, this dispute is essentially concerned with difference of treatment on the basis of belief with respect to 'occupational activities within churches and other private or public oganisations the ethos of which is based on religion or belief' pursuant to that provision. However, it is also the first occasion on which the Court has been called on to interpret Article 4(2) of Directive 2000/78, (4) thereby generating complex questions on the interaction of this provision with various provisions of the Charter, including Article 22, which provides that the 'Union shall respect cultural, religious and linguistic diversity', along with Article 17 TFEU, which preserves the 'status' under Member State law of churches and religious associations or communities, and philosophical and non-confessional organisations. (5)

4. Moreover, church related institutions are reported to be the second largest employer in Germany, and as occupying a quasi-monopolistic position in some regions and fields of work. (6) It would therefore be difficult to overstate the delicacy of balancing preservation of the right of the EU's religious organisations to autonomy and self-determination (7) (this being the primary plank of the arguments of the defendant with respect to the unequal treatment in issue) against the need for effective application of the prohibition on discrimination with respect to religion and belief on the EU's ethnically and religiously diverse labour market, when equal access to employment and professional development are of fundamental significance to everyone, not merely as a means of earning a living and securing an autonomous life, but also for achieving self-fulfilment and realisation of personal potential. (8)

II. Legal framework

A. European Convention for the Protection of Human Rights and Fundamental Freedoms

5. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') states:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

B. Treaty on European Union

6. Article 4(2) TEU states:

'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

C. Treaty on the Functioning of the European Union

7. Article 10 TFEU states:

‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

8. Article 17 TFEU states:

‘1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.’

D. Charter of Fundamental Rights of the European Union

9. Article 10 of the Charter is entitled ‘Freedom of thought, conscience and religion’. Article 10(1) states:

‘Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.’

10. Article 22 of the Charter is entitled ‘Cultural, religious and linguistic diversity’ and states:

‘The Union shall respect cultural, religious and linguistic diversity.’

11. Article 52(3) of the Charter states:

‘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. This provision shall not prevent Union law providing more extensive protection.’

12. Article 53 of the Charter, entitled ‘Levels of protection’, states:

‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and … the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.’

E. Directive 2000/78

13. Recital 24 of Directive 2000/78 states:

‘The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.’

14. Article 1 of Directive 2000/78, entitled ‘Purpose’, states;

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

15. Article 2 of Directive 2000/78 is entitled ‘Concept of discrimination’. Article 2(1) states:

‘For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.’

16. Article 2(2)(a) states:

‘For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1’,

17. Article 4 of Directive 2000/78 is entitled ‘Occupational requirements’. The first paragraph of Article 4(2) of Directive 2000/78 states:

‘Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.’

F. German law

18. Article 4(1) and (2) of the Grundgesetz (Basic Law of the Federal Republic of Germany, ‘the GG’) states:

‘(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

(2) The undisturbed practice of religion shall be guaranteed.’

19. Article 140 of the GG provides that Articles 136 to 139 and 141 of the Verfassung des Deutschen Reiches (Constitution of the German State, ‘the WRV’) form an integral part of the Basic Law. The salient provisions of Article 137 of the WRV state as follows:

“(1) There shall be no State church.

(2) The freedom to form religious societies shall be guaranteed. …

(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the involvement of central government or local authorities.

…

(7) Associations whose purpose is to foster a philosophical belief in the community shall have the same status as religious societies.

…’

20. Paragraph 1 of the Allgemeine Gleichbehandlungsgesetz (General Law on equal treatment; ‘the AGG’) states:

‘The objective of the present law is to prevent or eliminate all discrimination on the basis of race, ethnic origin, sex, religion or belief, handicap, age, or sexual orientation.’

21. Paragraph 7(1) of the AGG states:

‘Workers must not be subjected to discrimination on any of the grounds listed in Paragraph 1. This prohibition applies equally when the author of the discrimination only assumes the existence of one of the forms of discrimination listed in Paragraph 1.’ (9)

22. Paragraph 9(1) of the AGG states:

‘Without prejudice to the provisions of Paragraph 8 [hereof], a difference in treatment based on religion or belief shall also be admitted in the case of employment by religious societies, by institutions affiliated therewith, regardless of legal form, or by associations whose purpose is to foster a religion or belief in the community, where a given religion or belief constitutes a justified occupational requirement, having regard to the employer’s own perception, in view of the employer’s right of autonomy or by reason of the nature of its activities.’

III. The facts in the main proceedings and the questions referred for a preliminary ruling

23. The advertisement in issue in the main proceedings stated as follows:

‘We require membership of a Protestant church, or of a church which is a member of the Arbeitsgemeinschaft Christlicher Kirchen in Deutschland (Cooperative of Christian Churches in Germany), and identification with the welfare mission. Please state your membership in your *curriculum vitae*.’

24. The tasks specified in the same advertisement included personally representing, within the framework of the project, the Diaconie of Germany to the outside political world, the public, and organisations for the protection of human rights, and cooperating with relevant authorities. It also entailed provision of information to the Diaconie of Germany and coordinating the process of forming opinions within that organisation.

25. As mentioned above, the applicant, who does not belong to any religious community, unsuccessfully applied for the advertised post. The person ultimately appointed was someone who had stated his religious membership as being ‘a Protestant Christian socialised in the Berlin regional church’.

26. The applicant lodged a claim with the Arbeitsgericht Berlin (Employment Court, Berlin) for payment of damages to a minimum of EUR 9 788.65. The Arbeitsgericht (Labour Court) declared that the applicant had suffered discrimination, but awarded damages only to the level of EUR 1 957.73. The case was appealed to the Landesarbeitsgericht Berlin-Brandenburg (Regional Employment Court, Berlin-Brandenburg) and then to the Bundesarbeitsgericht (Federal Employment Court).

27. Since that court is uncertain of the correct interpretation of EU law in the circumstances of the case, it has referred the following questions to the Court under Article 267 TFEU.

‘(1) Is Article 4(2) of Directive 2000/78/EC to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or

of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos?

(2) If the first question is answered in the negative:

In a case such as the present, is it necessary to disapply a provision of national law — such as, in the present case, the first alternative of Paragraph 9(1) of the AGG (Allgemeines Gleichbehandlungsgesetz, General Law on equal treatment) — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them is also lawful where adherence to a specific religion, in accordance with the self-conception of the religious body, having regard to its right of self-determination, constitutes a justified occupational requirement?

(3) If the first question is answered in the negative, further:

What requirements are there as regards the nature of the activities or of the context in which they are carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive 2000/78/EC?'

28. Written observations have been submitted to the Court by the applicant, the defendant, the German Government and Ireland, and the European Commission. All except Ireland participated at the hearing that took place on 18 July 2017.

IV. The order for reference

29. It has not been contested in the main proceedings that, via the relevant provisions of the AGG, Germany has exercised the option in the first paragraph of Article 4(2) of Directive 2000/78 to either 'maintain national legislation in force at the date of the adoption of Directive 2000/78' or 'provide for future legislation incorporating national practices' existing at the same date with respect to 'genuine, legitimate and justified' occupational requirements.(10) According to the order for reference, the applicant claims that it is not compatible with the prohibition on discrimination under Paragraph 7(1) of the AGG, at least when interpreted in conformity with EU law, to take into account religion in the appointment process in issue, it being clear from the advertisement that this is what had been done. Paragraph 9(1) of the AGG could not justify the discrimination that had occurred. It was also apparent that the defendant did not consistently make adherence to a confessional faith a requirement of all posts it advertised, and that the advertised post had been financed, inter alia, by project-related funds provided by non-church third parties.

30. The defendant considers that the difference in treatment on the ground of religion here in issue is justified under Paragraph 9(1) of the AGG. The rules governing the Protestant Church in Germany provide that membership of a Christian church is an essential requirement for the creation of an employment relationship. The right to put in place such a requirement forms part of the right of self-determination of churches, which is protected by German constitutional law, flowing from Article 140 of the GG in conjunction with Article 137(3) of the WRV. This is compatible with EU law, in particular having regard to Article 17 TFEU. In addition, religious adherence, in accordance with the self-conception of the defendant organisation, is a justified occupational requirement by reason of the nature of the activities in issue.

31. With respect to question 1, the order for reference says that it was the express will of the German legislature that Article 4(2) of Directive 2000/78 be transposed in such a way that existing legal provisions and practices were maintained; the national legislature made this decision having regard to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), and made express reference to Article 140 of the GG in conjunction with Article 137(3) of the WRV as regards the 'privilege of self-determination'. Thus, under German law, judicial review in the context of Article 4(2) of the Directive 2000/78 is limited to plausibility review, on the basis of a religion's self-conception defined by belief. However, the national

referring court queries whether such an interpretation of Paragraph 9(1) of the AGG is consistent with EU law.

32. With regard to question 2, the referring court notes that the established case-law of the Court compels reflection on whether the prohibition on discrimination on the basis of religion is a subjective right that requires disapplication of inconsistent Member State provisions, even in disputes between two private parties. (11) However, it has not yet been decided whether this applies when an employer relies on primary EU law, such as Article 17 TFEU, to justify disadvantage grounded in religion.

33. As for question 3, clarification is sought of how criteria established under the case-law of the European Court of Human Rights with respect to what the order for reference refers to as conflicts of loyalty concerning belief in established employment relations, might relate to the interpretation of Article 4(2) of Directive 2000/78. These criteria include, in particular, the nature of the post concerned, (12) the proximity of the activity in question to the proclamatory mission, (13) and the protection of the rights of others, for example the interest of a Catholic university in its teaching being characterised by Catholic beliefs. (14) The European Court of Human Rights also undertakes an exercise in balancing competing rights and interests. (15)

V. Assessment

A. Overview

34. I will commence my analysis by addressing three preliminary issues.

35. First, I will consider whether answering the questions referred requires reflection on whether or not the defendant engaged in 'economic activities' when it advertised for members of identified Christian churches to prepare the race discrimination report and represent it professionally, and ultimately selected such a person.

36. Second, I will detail how and why Articles 52(3) and 53 of the Charter are central to the resolution of the legal problems arising in the main proceedings. Article 52(3) of the Charter states that, in so far as rights contained in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same. Article 52(3) adds that this provision 'shall not prevent Union law providing more extensive protection'. The part of Article 53 that is of primary relevance concerns the statement, as interpreted by the Court in its ruling in *Melloni*, (16) that nothing 'in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and … the Member State's constitutions'.

37. Third, I will detail the inconsistencies in the material that has been put to the Court on the precise content of German law, as elaborated in the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), with regard to the limits on judicial review of religious organisations invoking the ecclesiastical privilege of self-determination in the context of employment law.

38. I will then turn to answering the questions referred. I will first answer questions 1 and 3, since they essentially call for an interpretation of Article 4(2) of Directive 2000/78 in the light of primary EU law, including Article 17 TFEU, and pertinent case-law of this Court and of the European Court of Human Rights.

39. In answering question 1, consideration will be given to whether the reference in Article 17 TFEU to the 'status' of religious organisations under Member State law, combined with an allusion to Member State constitutional provisions and principles that is made in the first paragraph of Article 4(2) of Directive 2000/78, (17) are enough to create a *renvoi* to the law of the Member States, and in the main proceedings Germany, with respect to the scale and intensity of judicial review when an employee or

prospective employee (18) challenges reliance by a religious organisation on Article 4(2) of Directive 2000/78 to justify unequal treatment with respect to religion or belief in employment relations.

40. I will draw on the analysis prepared in the answer to question 1, in identifying the 'requirements', as mentioned in question 3 (which I prefer to refer to as relevant 'factors' for the purpose of analysis) as regards the nature of the activities or of the context in which they are carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive 2000/78.

41. Question 2, which I will consider last, is concerned with the consequences that will follow, in terms of remedies, if the interpretation afforded to the provisions of EU law relevant to resolving the dispute to hand are inconsistent with the text of the relevant provisions of German law, to the degree that it is not possible to interpret the latter in conformity with EU law.

42. This issue arises because the fundamental right under EU law not to be discriminated against on the basis of belief is given concrete expression in an EU directive, (19) and the main proceedings concern a horizontal situation in which that EU directive is being relied on by both parties to the dispute as against each other; the applicant is an individual private party and the defendant is an association governed by private law. (20) The applicant relies on Articles 1 and 2 of Directive 2000/78 as against the defendant, and the defendant relies on Article 4(2) of Directive 2000/78 as against the applicant. Yet the Court has consistently held that a directive cannot in and of itself impose an obligation on an individual and cannot be relied upon as such against an individual. (21)

43. The obligation on Member State courts to interpret Member State law compatibly with EU law has further limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem*. (22)

44. In consequence, this manifestation of the classical prohibition on the horizontal direct effect of directives collides with another rule developed in the case-law of the Court. That is, while the fundamental right not to be discriminated against on the basis of age has been given specific expression in an EU directive, it is nonetheless horizontally directly effective to the degree that *all* national measures are to be disapplied that are inconsistent with it, even *contra legem* measures, and even in disputes in which one private party is pitted against another. (23)

45. Therefore, by virtue of question 2, the national referring court wishes to know if the prohibition on discrimination on the basis of religion and belief belongs to the same *cadre* of right as the prohibition on discrimination on the basis of age, so that the national referring court will be bound to disapply *all* national measures that are inconsistent with EU law (and in particular Article 4(2) of Directive 2000/78), notwithstanding the horizontal nature of the dispute before it. (24) Further, it is clear from the order for reference, if not the text of question 2 itself, that the national referring court also seeks guidance on whether Article 17 TFEU is in any way relevant to this determination.

B. Preliminary observations

1. The activities of religious organisations and the field of application of EU law

46. Religion had no place in any of the three treaties founding the European Economic Community, the European Coal and Steel Community, or the European Atomic Energy Community. Moreover, because of the, what may now seem, modest aims of the Treaty of Rome, prescribed as it essentially was to the end of achieving economic integration, (25) the early case-law of the Court determined the circumstances in which participation in a community based on religion or another form of philosophy fell within the field of application of Community law on economic bases alone.

47. The Court held in its 1988 ruling in *Steymann* that the field of application of EEC law encapsulated participation in a community based on religion or another form of philosophy to the extent that such participation could 'be regarded as an economic activity within the meaning of Article 2 of the Treaty', (26) with Advocate General Slynn observing in an opinion issued in the same year in *Humbel and Edel* that religious orders 'employ people and pay for heat and light' and that they 'may also make a charge for certain services'. Yet Advocate General Slynn underscored that 'the real test is whether the services are provided as part of an economic activity'. (27)

48. However, dependence on economic integration to ground EU competence receded under subsequent Treaty amendments, (28) so that whether or not a religious organisation is engaged in an 'economic activity' will not always be pertinent to the substantive tranche of EU law in issue. For example, such organisations have fought restrictions on free movement affecting their interests that Member States have sought to justify on the basis of public policy, (29) an exercise which can entail consideration of policies 'of a moral and philosophical nature'. (30) Under the current constitutional framework of the European Union, both religious organisations (31) and individual applicants (32) can call on the protection afforded by Article 10 of the Charter to contest their right to freedom of religion with respect to acts of the institutions, bodies, offices and agencies of the EU, (33) and those of the Member States when they are implementing EU law, (34) irrespective of whether or not such measures are aimed at regulation of economic activities. The same applies in disputes of a horizontal nature, such as that arising in the main proceedings, which entail interpreting Member State law in conformity with a directive, in so far as it is possible to do so. (35)

49. Therefore, notwithstanding arguments made by the representative of the Commission at the hearing, I have formed the view that it is irrelevant for the purposes of the questions referred in the main proceedings whether or not the defendant was engaged in an economic activity when it advertised for help in preparing the race discrimination report, directed only to prospective applicants who belonged to a defined category of Christian faiths, and selected a candidate from one of those categories.

50. The approach advocated by the Commission might indeed result in undue diminution of the scope *ratione materiae* of Article 17 TFEU to recognition of the status under national law of churches, religious associations or communities, and philosophical and non-confessional organisations only when they undertake economic activities. It might also diminish more widely the scope *ratione materiae* of EU law with respect to these organisations in a manner inconsistent with the modern paradigm of EU competences as prescribed in the EU and FEU Treaties.

51. For example, should a religious organisation constructing a large-scale centre for worship be exempt from the requirements of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, (36) simply because the facility will have no commercial purpose and will be used exclusively for worship, so the religious organisation concerned might not be viewed as engaging in economic activities? This question must necessarily be answered in the negative. (37)

2. Rules on the application of the Charter and the main proceedings

52. The Charter is to be applied in the main proceedings in accordance with the following rules.

53. First, as established in the Court's settled case-law, the rules of secondary legislation of the Union must be interpreted and applied in compliance with fundamental rights. (38) This Court has also held that 'the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.' (39) Article 52(3) of the Charter is intended to ensure consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union. (40) Consequently, the right of religious communities such as the defendant to an autonomous existence is guaranteed to 'the minimum threshold of protection' (41) set in the case-law of the European Court of Human Rights. This *forum externum* of

freedom of religionmust be considered in interpreting Article 4(2) of Directive 2000/78 and Article 17 TFEU.

54. Second, at the same time, given that Article 9 of the ECHR also guarantees the *forum internum* of freedom of religion and belief, (42) which includes freedom not be part of a religion, (43) due account must equally be given, in interpreting Articles 1 and 2 of Directive 2000/78, to the case-law of the European Court of Human Rights that is pertinent to this limb of Article 9 of the ECHR, in determining whether, as a matter of EU law, the applicant has suffered unlawful discrimination or rather been subjected to justified unequal treatment. (44) Both applicant and defendant are, of course, entitled to an effective remedy to enforce their respective rights pursuant to Article 47 of the Charter. (45)

55. This brings me to the third way in which the Charter is pertinent to the main proceedings. It is embedded in both the case-law of this Court, and of the European Court of Human Rights, that in the event of a collision between, or competition among, rights, it is the essential function of courts to undertake a thorough balancing exercise between the competing interests at stake. (46) The same approach must necessarily be deployed in resolving the dispute in the main proceedings, in which there is no direct conflict between an individual and the State over fundamental rights protection, but in which the latter is a protector of conflicting rights. (47)

56. Thus, Article 4(2) of Directive 2000/78 might be viewed as the legislative manifestation within the EU of the defendant's right to autonomy and self-determination, as protected under Articles 9 and 11 of the ECHR with the phrase 'having regard to the organisation's ethos' being the core element of Article 4(2) of Directive 2000/78 that is to be interpreted in the light of the relevant case-law of the European Court of Human Rights. Articles 1 and 2 of Directive 2000/78 are the legislative manifestation of the applicant's right not to be discriminated against on the basis of religion or belief as protected by Articles 9 and 14 of the ECHR, with Article 2(5) of Directive 2000/78, and its mandate for Member States to maintain measures necessary for, inter alia, 'the protection of the rights and freedoms of others' flagging the balancing exercise courts are bound to undertake when confronted with a competition among rights. (48)

57. Fourth, another element of Article 52(3) of the Charter, along with the text of Article 53 of the Charter, is central to the approach to be employed to the questions arising in the main proceedings. Article 52(3) further states that this provision 'shall not prevent Union law providing more extensive protection', while Article 53 entitled '[l]evel of protection' provides, inter alia,that nothing in the Charter 'shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and … by the Member States constitutions.' (49)

58. With regard to the 'more extensive protection' that the Union may provide pursuant to Article 52(3) of the Charter, as will be illustrated in section V(C) below in the answer to question 1, this requires due consideration to be given as to whether or not Article 17 TFEU and Article 4(2) of Directive 2000/78 amount to incidences in which the Union has elected to provide 'more extensive protection' than that supplied under the ECHR, with respect to the scale and intensity of judicial review of decisions in which religious organisations such as the defendant purport to exercise their right to autonomy and self-determination, while question 3 requires elaboration of the factors to be applied by a court when balancing the right not to be discriminated against on the basis of religion or belief, protected by Articles 1 and 2 of Directive 2000/78, (50) and the right to self-determination and autonomy of religions organisations, recognised in Article 4(2) of Directive 2000/78.

59. With regard to Article 53 of the Charter, this Court held in *Melloni* that this provision is to be interpreted as meaning that the application of fundamental rights standards arising from a Member State's constitutional order is precluded when it compromises the 'primacy, unity and effectiveness of EU law' over the territory of that State. (51)

60. Yet, this is what the defendant is asking of the national referring court, so that a compromised impact of the prohibition on discrimination on the basis of belief, guaranteed by Articles 1 and 2 of

Directive 2000/78, along with the ample and firmly worded remedial rules contained in that directive, (52) would necessarily seem to arise due to limitations imposed by German constitutional law, as described in the order for reference, on the intensity of judicial review of justifications proffered by organisations like the defendant for unequal treatment on the basis of religion or belief in the context of employment relations. It therefore needs to be decided whether this arrangement is rendered compatible with EU law through the combined effects of Article 17 TFEU and Article 4(2) of Directive 2000/78.

3. Judicial review of employment relations and religious organisations in Germany

61. Finally, it is important to note that inconsistent descriptions have been put to the Court of the content of case-law of the Bundesverfassungsgericht (Federal Constitutional Court), and the extent to which it places restrictions on judicial review of religious organisations acting as employers, to the end of preserving the latter's ecclesiastical right to self-determination under Article 137 of the WRV, and particularly the first sentence of Article 137(3).

62. According to the order for reference, in the context of a damages claim based on discrimination in an appointment/application process, plausibility review means that the standard laid down by the church itself is not to be reviewed, but instead is simply to be assumed to the extent that the church employer is able to plausibly submit that the appointment requirement of a particular religion is the expression of the church's self-conception as defined by its belief.

63. However, at the hearing the representative of Germany underscored that the Bundesverfassungsgericht (Federal Constitutional Court) had not absolved church employers from any kind of judicial review and contested, in this regard, the analysis contained in the order for reference. (53) The representative of Germany said that the Constitutional Court had in fact developed a two stage review for conflicts of the type arising in the main proceedings. (54)

64. The representative of Germany said that the point of departure is that church employers may decide for themselves which activities require membership of the religion concerned for employment recruitment, and plausibility review comes in at the first stage. Here German labour courts can assess the classification decided upon by the church employer, albeit to the exclusion of doctrinal matters such as the interpretation of holy scripts. Then, at the second stage, labour courts can make an overall assessment, weighing up the interests of the church and their freedom of religion with any competing fundamental rights of the employee on the other. (55)

65. It is not for this Court to interpret the relevant provisions of Member State law in the context of orders for reference. (56) The Court is constrained by the division of jurisdiction between the EU courts and the national courts, of the factual and legislative context, as described in the order for reference, in which the questions put to it are set. (57) Once the Court has interpreted Article 17 TFEU and Article 4(2) of Directive 2000/78 as requested in questions 1 and 3, it will then be for the national referring court to determine whether Article 137 of the WRV and Article 9(1) of the AGG can be interpreted in conformity with EU law, and apply the Court's answer to question 2 in the event that it cannot.

C. Question 1

66. By its first question, the national referring court asks if Article 4(2) of Directive 2000/78 is to be interpreted as meaning that an employer such as the defendant in the main proceedings, or the church on its behalf, may itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the defendant's's ethos.

67. An analysis will first be made of the case-law of the European Court of Human Rights that is relevant to limitations on judicial review when there is a competition between the right of religious organisations to autonomy, as protected under Articles 9 and 11 of the ECHR, and some other right equally guaranteed by the ECHR, such as the Article 8 right to privacy. Next, Article 4(2) of Directive 2000/78

will be analysed, to determine whether it provides more extensive protection of the right of religious organisations to autonomy and self-determination, within the meaning of Article 52(3) of the Charter, with respect to the scale and intensity of judicial review of religious organisations relying on this right in employment relations. Third, Article 17 TFEU will be examined to the same end.

1. Restrictions on judicial review of religious organisations acting as employers under the case-law of the European Court of Human Rights

68. I have formed the view that the case-law of the European Court of Human Rights does not support a restriction on judicial review of the breadth described in the first question.

69. In rulings in which judicial review of an alleged breach of a right under the ECHR has been limited under the law of a contracting party for reasons linked with the autonomy of religious organisations, be that by a constitutional provision or otherwise, the European Court of Human Rights has confirmed that the parameters of judicial review provided by a State party must nonetheless be sufficient to determine whether other rights protected by the ECHR have been respected. The balancing exercise that is applicable in this regard is not predicated on whether the dispute concerns recruitment or dismissal, in much the same way that Article 3 of Directive 2000/78, delimiting the directive's scope, makes no such distinction.

70. For example, *Fernández Martínez v. Spain* (58) concerned assertion of the right to private and family life under Article 8 of the ECHR by a secondary school teacher of the Catholic religion of seven years standing, who had been employed and paid by a Spanish State authority, when his contract was not renewed after publicity was given to his personal status as a married priest. In a case in which the approach of the Tribunal Constitucional (Spanish Constitutional Court) to judicial review when the Catholic church's fundamental right to freedom of religion in its collective or community dimension was in the frame, the European Court of Human Rights held as follows, in a paragraph entitled 'Limits to autonomy [of religious organisations]':

'a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life. *The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination of the circumstances of the case and a thorough balancing exercise between the competing interests at stake*.' (59)

71. I therefore agree with the view that if a religious community or organisation fails to convincingly demonstrate that the State's interference, which in the main proceedings would take the form of judicial application of EU equal treatment law, poses a real threat to its autonomy, it cannot demand that the State refrain from regulating, by means of that State's law, the relevant activities of that community. In this regard, religious communities cannot be immune from State jurisdiction. (60)

72. Indeed, in *Schüth v. Germany*, (61) in which both Article 9(1) of the AGG and Article 137 of the WRV were pertinent to the dispute under consideration, the European Court of Human Rights found that Germany had failed to uphold its positive obligations with respect to the Article 8 of the ECHR right to private and family life toward an organist and choir master of the Catholic Parish Church of Saint Lambertus in Essen who was dismissed from his post for having had an extra-marital affair which produced a child. Germany was found to be in breach of Article 8 of the ECHR due to the quality of the judicial review provided by the national employment tribunal.

73. The European Court of Human Rights in *Schüth* noted the brevity of the reasoning of the national employment appeal tribunal with respect to conclusions to be drawn from the applicant's conduct, (62) and

that the interests of the employing Church were thus not balanced against the applicant's right to respect for his private and family life guaranteed by Article 8 of the ECHR. (63)

74. The European Court of Human Rights noted that the employment appeal tribunal did not examine the question of the proximity between the applicant's activity and the Church's proclamatory mission, but appears to have reproduced the opinion of the employing Church on this point without further verification. The European Court of Human Rights concluded that whilst it was true that, under the ECHR, an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees, a decision to dismiss based on a breach of such duty cannot be subjected, on the basis of the employer's right of autonomy, only to a limited judicial scrutiny exercised by the relevant domestic employment tribunal without having regard to the nature of the post in question and without properly balancing the interests involved in accordance with the principle of proportionality. (64)

75. In consequence, there had been a violation of Article 8 of the ECHR, for failure of Germany to uphold its aforementioned positive obligation.

2. Article 4(2) of Directive 2000/78

(a) Introductory remarks

76. In this regard I would like to make two preliminary comments.

77. First, the situation in the main proceedings is one concerning direct discrimination on the basis of the applicant's belief, or lack of confessional faith. Direct discrimination occurs where one person is treated less favourably than another is, has or would be treated in a comparable situation due to their belief. (65) Thus, direct discrimination arises when an allegedly discriminatory measure is 'inseparably linked to the relevant reason for the difference of treatment.' (66)

78. Therefore, in contrast with recent cases in which the Court was asked to assess a horizontal competition between freedom of religion, in the context of indirect discrimination, and another fundamental right, and notably freedom to conduct a business, (67) Article 2(2)(b)(i) of Directive 2000/78 is not available to the defendant as a justification for unequal treatment. It provides that indirect discrimination will not be taken to have occurred if the relevant provision, criteria or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and nececesary. Because the main proceedings concern direct discrimination, the only justifications open to the defendant lie in so far as Directive 2000/78 provides for them. (68) The justifications pertinent to the main proceedings are Articles 4(2) and 2(5) of Directive 2000/78,(69) as interpreted in the light of primary EU law, and notably Article 17 TFEU and Article 47 of the Charter. (70)

79. Second, while I accept that Article 4(2) of Directive 2000/78, like Articles 4(1) and 2(5) of the same directive, is a derogation from the principle of non-discrimination that is to be interpreted strictly, (71) the case-law of the Court on the interpretation of the text of Article 4(1) of Directive 2000/78 cannot be applied to the interpretation of the text of Article 4(2) of Directive 2000/78. The latter is a special rule that was developed to deal with the specific situation of the circumstances in which religious organisations falling within the scope of Article 3 of Directive 2000/78 can lawfully engage in unequal treatment. This resulted in the promulgation of a paragraph that bears little resemblance to Article 4(1) of Directive 2000/78 and in consequence a body of case-law that does not lend itself to informing the interpretation of the text of Article 4(2) of Directive 2000/78.

80. For example, Article 4(2) of Directive 2000/78 makes no reference to 'characteristics' related to religious belief, and focus on 'characteristics' has been essential to the interpretation of Article 4(1) of Directive 2000/78. (72) Article 4(1) of Directive 2000/78 refers to 'genuine and determining' occupational requirements and expressly subjects limitation on difference in treatment on the grounds listed in Article 1 of Directive 2000/78 to legitimate objectives and proportionate requirements. Article 4(2), however, refers

to ‘genuine, legitimate and justified occupational requirements, having regard to the organisation’s ethos’ while making no direct reference to the principle of proportionality (see further below section V(D)).

(b) Does Article 4(2) of Directive 2000/78 support Member State constitutional restrictions on judicial review?

(1) Wording

81. I acknowledge that the first paragraph of Article 4(2) of Directive 2000/78 refers to Member State law in two respects. (73) First, it refers to the maintenance of legislation and adoption of legislation incorporating national practices existing at the time of the adoption of Directive 2000/78.

82. While this encapsulates both Article 137 of the WRV and Article 9(1) of the AGG, I cannot accept that this means that the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) interpreting these measures is frozen at the time of the adoption of the Directive 2000/78. Such an interpretation would be inconsistent with the wording of Article 4(2) of Directive 2000/78, confined as it is to *legislation*,and the obligation on Member State courts to change established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of the directive. (74)

83. Second, the first paragraph of Article 4(2) of Directive 2000/78 states that the difference of treatment addressed in that provision shall be implemented *taking account* of Member States’ constitutional provisions and principles (see also Article 52(4) of the Charter with respect to the constitutional traditions *common to the Member States*)(75). However, the wording of Article 4(2) of Directive 2000/78 falls short of supporting contraction of the role of courts in reviewing reliance by a religious organisation on Article 4(2) of Directive 2000/78, especially in the absence of any express reference in that provision to Member State law ‘for the purpose of determining its meaning and scope’. (76) As such, the limitation provided in Article 4(2) of Directive 2000/78 is to be given an autonomous meaning, which must take into account the context of that provision and the objective pursued by Directive 2000/78. (77)

(2) Context and purpose

84. In addition to this, Article 2(5) of Directive 2000/78 is indicative of a role for courts to undertake a balancing exercise, and one which is to be undertaken in the light of the fact that the objective of Directive 2000/78, as set out in recital 37 thereof, is the creation within the EU of ‘a level playing field as regards equality in employment and occupation’, and with due regard to the ‘status’ under Member State law of religious organisations, as elaborated in recital 24 of Directive 2000/78 and Article 17 TFEU (see further below at section V(C)(3)).

(3) Origins

85. Finally, I have been unable to identify anything in the *travaux préparatoires* to Article 4(2) to support a role for Member State constitutional law on the scale argued by the defendant. For example, there is no specific proposal for, let alone agreement to, contraction of any provisions in Directive 2000/78 aimed at securing rigorous judicial enforcement of Directive 2000/78 (78) out of deference to standards of judicial review set out in national constitutional law. (79) There is no indication that the important rules on burden of proof contained in Article 10 of Directive 2000/78 are not to apply when Article 4(2) of the same directive is in issue. (80) There is no suggestion of the adoption of special rules of the kind that apply under Article 15 of Directive 2000/78 with respect to Northern Ireland and discrimination on the basis of religion, or Article 6 of Directive 2000/78 on justification for differences of treatment on grounds of age, or Article 3(4) of Directive 2000/78 and its preclusion of discrimination on the basis of disability and age with respect to the armed forces from the scope of Directive 2000/78. (81)

86. However, I acknowledge that, in the process of drafting, Article 4(2) of Directive 2000/78 was the subject of numerous amendments, (82) in much the same way as the discord over the text of Article 17 TFEU which took place in the course of the Convention that led to the adoption of the Treaty establishing a Constitution for Europe (83) (see further Part V(C)(3) below). From this it might be inferred that Member States have a wide margin of appreciation under Article 4(2) of Directive 2000/78 with respect to occupational activities for which religion or belief amount to genuine, legitimate, and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out, (84) but subject always to the interpretation afforded to the provision by the Court. Yet I am unable to draw anything more than this from the *travaux preparatoires*, reflecting as they do the difficult negotiations that led in the end to the adoption of a compromise text, due in part to disagreements over the content of Article 4(2) of Directive 2000/78. (85)

87. Thus, I have come to the conclusion that Article 4(2) of Directive 2000/78 itself sets the parameters in its first paragraph for the standard of judicial review to apply when a religious organisation is challenged for having taken the position that unequal treatment on the basis of belief does not amount to unlawful discrimination. That is, by reason of the nature of the activities in question or the context in which they are carried out, does a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos? I will set out the requirements of this provision in my answer to question 3.

3. Article 17 TFEU

88. Where it is necessary to interpret a provision of secondary EU law, preference should as far as possible be given to the interpretation which renders the provision consistent with the Treaties and the general principles of EU law. (86) Article 17(1) and (2) TFEU therefore has direct relevance to the interpretation to be accorded to Article 4(2) of Directive 2000/78. That said, in my view the impact of Article 17 TFEU on the constitutional fabric of the EU is more muted than as argued by the defendant.

89. The broader constitutional architecture of the EU, and in particular the depth of its commitment to upholding fundamental rights, precludes an interpretation of Article 17(1) TFEU in which the Union 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States' in all conceivable circumstances, and particularly if the status furnished to such organisations under Member State law fails to guarantee their fundamental rights.

90. This is in accordance with the settled case-law of the Court. For the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. (87)

91. Indeed, the minimal level of protection guaranteed by Article 52(3) of the Charter, by reference to the case-law of the European Court of Human Rights with respect to the right of religious organisations to autonomy and self-determination, has a consequence of fundamental importance to the interpretation of Article 17 TFEU. Although Article 17(1) TFEU states that the Union 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States', this cannot mean that rules concerned with the protection of the autonomy of churches and other religious organisations that have been developed under the auspices of Articles 9 and 11 of the ECHR (and which will be detailed below in section V(D)) could simply be set aside in the event of a *diminution* under the law of a Member State of the status of churches, religious associations and communities, or philosophical and non-confessional organisations, although the text of Article 17(1) and (2) TFEU, read in isolation, might suggest this to be the case.

92. In that event, both this Court and the Member State courts, pursuant to the obligations incumbent on them under Article 47 of the Charter and by virtue of Article 19 TEU and the duty it imposes on Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law', (88) would be bound, within the scope of application of EU law, to continue to enforce freedom of thought, conscience and religion, as provided for in Article 10 of the Charter, and indeed freedom of

association under Article 12 of the Charter, (89) in conformity with EU fundamental rights, and the level of protection provided under the case-law of the European Court of Human Rights with respect to the autonomy of religious organisations. As mentioned in the written observations of the Commission, in 'a European Union based on the rule of law, it is for the courts thereof to ensure compliance' with EU law. (90)

93. In other words, it would be a mistake, in my view, for Article 17(1) and (2) TFEU to be interpreted as some kind of *meta* principle of constitutional law (91) that binds the Union to respect the status under Member State law of churches, religious associations and communities, and philosophical and non-confessional organisations, whatever the circumstances. Such an approach would be inconsistent with other provisions of primary EU law, such as the mechanism provided in Article 7 TEU to deal with 'a clear risk of a serious breach by a Member State' of the values on which the EU is founded, as set out in Article 2 TEU. Account should also be taken of Article 10 TFEU and the EU's aims in defining and implementing its policies and activities, and Articles 22 and 47 of the Charter, the former supporting pluralism and the latter reflecting the general principle of the right to an effective judicial remedy in the event of violation of the rights and freedoms guaranteed by EU law. This rule was incorporated into the corpus of EU fundamental rights in the first place through a dispute concerning breach of EU equal treatment law. (92)

94. I acknowledge that it might be argued that Article 5 TEU and its reference to 'subsidiarity' supports an exclusive competence in the hands of the Member States with respect to the scale and intensity of judicial review of the acts of religious organisations that discriminate on the basis of religion and belief with respect to employment relations, and that Article 4(2) TEU underscores the European Union's obligation to respect the national identities of the Member States and their fundamental political and constitutional structures.

95. However, I also agree that, while Article 17 TFEU complements and gives specific effect to Article 4(2) TEU, (93) the latter provision 'does not in itself support the inference that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78. It requires rather that the *application* of that directive must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the directive as such, but must be duly taken into account in the interpretation of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment.' (94) The protection inherent in Article 4(2) TEU encapsulates matters such as division of competences among the constituent organs of government within Member States, such as *Länder*. (95)

96. Thus, there are insufficient imperatively worded provisions of primary law in the Treaties to either put to one side the balancing exercise undertaken by both the European Court of Human Rights and this Court in the event of a competition arising between or among fundamental rights, (96) or to cut away at the competence of the EU with respect to the judicial protection of the prohibition on discrimination on the basis of religion, when a religious organisation relies on Article 4(2) of Directive 2000/78. (97)

97. Nor do the objectives of Article 17 TFEU, as discerned through its origins, (98) afford direct support for such a development. The text of Article 17 TFEU was discussed in the Convention to the Treaty Establishing a Constitution for Europe, (99) in which reportedly vigorous lobbying for reference in the text to the religious and in particular Christian heritage of Europe (100) was pushed back with equal vigour by secular groups and Member States with a strong separation of church and state. (101) The tensions generated are reflected in the fact that a reference to 'spiritual impulse' proposed during the Convention, objected to in any event by some religious groups for failing to refer expressly to Christianity, was not included in the final version of the Treaty Establishing a Constitution for Europe. (102) In the end, the text of Declaration No 11 that had been appended to the Treaty of Amsterdam, (103) (the same revision that expanded the EU's powers to combat discrimination on the basis of, inter alia, religion and belief) (104) was adopted as paragraphs 1 and 2 of Article 17 TFEU, (105) and Article 17(3) TFEU was added to structure an already existing dialogue between the EU institutions and communities of faith and

religion. (106) Indeed, the preamble to the EU Treaty draws inspiration from a range of sources 'cultural, religious, and humanist'.

98. Conspicuous in its absence is any evidence of an intention under Article 17 TFEU for a kind of wholesale transfer to Member State law of judicial review of the justification for unequal treatment on the basis of religion of belief, when such unequal treatment is at the hands of religious organisations falling within the scope of Article 3 of Directive 2000/78. Rather, I read Article 17 TFEU as linked more closely to Article 5(2) TEU which, as pointed out in the written observations of the defendant, serves to place the status of churches within the exclusive competence of the Member States.

99. Thus, Article 17(1) and (2) TFEU mean that Member States have an absolute discretion in selecting a model for their relations with religious organisations and communities and that the Union is obliged to remain in a neutral position with respect to this. (107) So interpreting 'status' under Member State law in Article 17 TFEU is consistent with the scope of the EU's obligation under Article 4(2) TEU to respect the fundamental political and constitutional structures of the Member States. (108)

100. In conclusion, Article 17 TFEU illustrates that the EU's constitutional imperatives reflect what one scholar has referred to as 'value pluralism'. Pursuant to this, conflicts between differing rights, or approaches thereto, are considered to be normal and are resolved through balancing conflicting elements rather than according priority to one over another in a hierarchical fashion. (109) This is echoed in Article 2 TEU, Article 22 of the Charter, and Article 2(5) of Directive 2000/78.

4. Conclusion with respect to Question 1

101. I therefore propose the following answer to question 1.

Article 4(2) of Directive 2000/78/EC is to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos.

D. Question 3

102. Not all acts are protected by law just because they spring from some kind of religious conviction. (110) By question 3, the national referring Court asks about the requirements as regards genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos, in accordance with Article 4(2) of Directive 2000/78.

103. As can be seen from the preceding analysis concerning the answer to question 1, Article 4(2) of Directive 2000/78 holds the tension between the right of religious organisations to autonomy and self-determination, *forum externum*, on the one hand, and the right of employees and prospective employees to the *forum internum* of freedom of belief, and to be free from discrimination on the basis of those beliefs.

104. In addition to laying the foundations for the answer to question 1, this analysis has identified the following factors, or requirements as they are referred to in question 3, that are relevant to whether occupational requirements concerning religion or belief, by reason of the nature of the activities or of the context in which they are carried out, are genuine, legitimate and justified, having regard to the organisation's ethos:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out; (111)

(iii) the reference to 'Member States constitutional provisions and principles', in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced. (112)

105. Given that Articles 10 and 12 of the Charter 'correspond' to Articles 9 and 11 of the ECHR, within the meaning of Article 52(3) of the Charter, the right of religious organisations to self determination and autonomy encapsulates, at minimum, the following protection under EU law.

106. The European Court of Human Rights has held that, but for very exceptional cases, the right to freedom of religion as guaranteed under the ECHR excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. (113) The right of a religious community to an autonomous existence is at the very heart of the guarantees in Article 9 of the ECHR, which is equally indispensable to pluralism in a democratic society. (114) State interference in the internal organisation of churches is precluded under the case-law of the European Court of Human Rights, (115) and determining the religious affiliation of a religious community is a task for its highest spiritual authorities alone and not for the State. (116) Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable. (117)

107. The State is prohibited from obliging a religious community to admit new members or to exclude existing ones. (118) Nor can the State oblige a religious community to entrust someone with a particular religious duty. (119) Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image, or unity. (120) Only the most serious and compelling reasons can possibly justify State intervention, (121) so that States are entitled, for example, to verify whether a movement or association carries on, ostensibly in pursuit of religious aims, activities which are harmful to the population or to public safety. (122) Generally the protection afforded by Article 9 of the ECHR is subject only to adherence by members of the religious organisation to views that attain a certain level of cogency, seriousness, cohesion and importance. (123)

108. Where the organisation of the religious Community is at issue, Article 9 must be interpreted in the light of Article 11, which safeguards associations against unjustified State interference. (124) In this sense, the European Court of Human Rights has repeatedly held that religious freedom implies freedom to manifest one's religion 'within the circle of those whose faith one shares.' (125)

109. The European Court of Human Rights has frequently emphasised the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, while holding that this role is conducive to public order, religious harmony, and tolerance in a democratic society. (126) Attempts by the State to act as arbiter between religious communities and the various dissident factions that may exist or emerge within them can put the autonomy of the churches in issue at risk. (127) Arbitrary State interference in an internal leadership dispute within a church, and thus its internal organisation has been held to be disproportionate in breach of Article 9 of the ECHR. (128)

110. That said, I disagree with submissions made by the defendant that the prohibition on State authorities probing the legitimacy of religious beliefs or interfering with the internal organisation of religious bodies necessarily means that the latter are also the only entities, to the exclusion of courts, that can decide whether an occupational requirement is genuine, legitimate, and justified, having regard to the nature of the

activities and the context in which they are carried out, under Article 4(2) of Directive 2000/78. Rather, I accept arguments made in the written observations of Ireland and by the Commission at the hearing that the ethos of a religion is subjective, and quite separate and distinct from the activities entailed in sustaining it, the latter being an objective matter to be reviewed by courts. In other words, the defendant has conflated two different concepts. While judicial review of the ethos of the church is to be limited, as is reflected in the case-law of the European Court of Human Rights, and for that matter the constitutional traditions of the Member States, (129) this does not mean that a Member State court is excused from assessing the *activities in question*, as against the, nearly unreviewable, ethos of a religion, to determine if unequal treatment on the basis of belief is genuine, legitimate and justified.

111. Three further factors are to be taken into account when the national referring court decides whether adherence to the Christian faith is a genuine, legitimate and justified occupational requirement, for a post entailing the preparation of the race discrimination report, which includes public and professional representation of the defendant and coordination of the process of forming opinions within that organisation: (130)

(iv) the word 'justified' in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words 'genuine, legitimate' require analysis of the proximity of the activities in question to the defendant's proclamatory mission;(131)

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with 'general principles of law', and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self determination produces effects disproportionate with respect to other rights protected by the ECHR, (132) the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief under Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, (133) with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal. (134)

112. Point (iv) and (v) merit further elaboration.

113. The rules on the interpretation of EU measures have been detailed at points 81 to 85 above. With respect to point (iv), it is decisive in my view that the *travaux préparatoires* feature a change, proposed by the Luxembourg delegation, to the word 'justified', from the word 'necessary', in the light of a proposal tabled by the United Kingdom Government for 'necessary' to be replaced with 'appropriate' or 'relevant'. (135) This represents in my view evolution toward acceptance by the EU legislator, by recourse to the word 'justified', of the application of the first arm of the general principle of proportionality. This entails considering the suitability of the measure concerned to secure a legitimate aim. (136)

114. With regard to point (v), I have reached this conclusion by reference to the context of the words 'genuine, legitimate', tied as they are to both 'the organisation's ethos' and 'the nature of' the relevant activities 'or of the context in which they are carried out'. Moreover, there is a discrepancy in the language versions. The word 'genuine' is reflected in the Swedish ('*verkligt'),* Maltese ('*ġenwin*'), Latvian ('*īstu'*), Finnish ('*todellinen'),* Danish, ('*regulært*'), Croatian ('*stvarni'*), and Hungarian ('*valódi*') language versions, while the French version refers to '*essentielle, légitime'* which is equally reflected in the Spanish ('*esencial*'), Italien ('*essenziale*'), Portugese ('*essencial'*), Romanian ('*esențială'),* Dutch ('*wezenlijke*'), German ('*wesentliche*'), Estonian ('*oluline'), Bulgarian ('основно*'), Slovakian ('*základnú*'), Czech ('*podstatný'*), Polish ('*podstawowy*'), Slovenian ('*bistveno'*) and Greek ('ουσιώδης') language versions. Meanwhile the Lithuanian version might be taken to refer to an English equivalent of common, usual or regular ('*įprastas*').

115. Under the established case-law of the Court, in the event of difference in language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part. (137) Given that the term 'genuine, legitimate' does not, due to linguistic discrepancies, 'lend itself to a clear and uniform interpretation', (138) I have reached the conclusion that, on the basis of a schematic approach and the objective inherent in Article 4(2) of Directive 2000/78 of preserving the autonomy and self-determination of religious organisations, (139) the proximity of the occupational activities in issue to the religious organisations proclamatory mission is central to this determination. This is reflected in EU law by recourse to the words 'genuine, legitimate' in Article 4(2) of Directive 2000/78.

116. I therefore propose the following answer to the third question:

'Pursuant to Article 4(2) of Directive 2000/78, in assessing genuine, legitimate and justified occupational requirements, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation's ethos, the national referring court is to take account of the following:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out;

(iii) the reference to 'Member States constitutional provisions and principles', in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;

(iv) the word 'justified' in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words 'genuine, legitimate' require analysis of the proximity of the activities in question to the defendant's proclamatory mission;

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with 'general principles of law', and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self-determination produces effects disproportionate with respect to other rights protected by the ECHR, the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief under Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal.

E. Question 2

117. Question 2 addresses the unusual circumstance in which a general principle of EU law, like the right to equal treatment on the basis of belief, (140) is given concrete expression in a directive, and here Directive 2000/78, but it is impossible for a Member State court to interpret national law in conformity

with the directive because this would entail *contra legem* interpretation of national law, the latter being precluded under the case-law of the Court in disputes of a horizontal nature between two private parties. (141) If the national referring court finds it impossible to interpret Article 137(3) of the WRV and Article 9(1) of the AGG in conformity with Article 4(2) of Directive 2000/78, and Article 17 TFEU, as interpreted by the Court's judgment in the main proceedings, must Article 137(3) of the WRV and Article 9(1) of the AGG be disapplied?

118. In applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. (142) As I have already mentioned, this includes modifying their established case-law if it is based on an interpretation of national law that is incompatible with the objectives of a directive. (143)

119. However, I have come to the conclusion that the prohibition on discrimination based on religion or belief, as reflected in Article 21 of the Charter, is not a subjective right that has horizontal application between private parties in circumstances in which it is in competition with the right of religious organisations to autonomy and self-determination and Member State legal provisions cannot be interpreted in conformity with Article 4(2) of Directive 2000/78. (144) If this is what results from the main proceedings once they are returned to the national referring Court, the remedy available to the applicant under EU law would be an action in State liability for damages against Germany. (145)

120. I reach this conclusion for the following reasons.

121. First, as discussed above, pursuant to Article 17(1) and (2) TFEU, it is the exclusive province of the Member States to establish the model of their choosing for church-State relations. If, in the course of so doing, legislative arrangements fail to comply with the Member State's parallel obligations under EU law with respect to securing the *effet utile* of the Directive 2000/78, it is for that Member State to assume responsibility for the wrong that has occurred.

122. Second, as pointed out in the written observations of Ireland, it would be inconsistent with the broad margin of appreciation for Member States that is inherent in Article 4(2) of Directive 2000/78 with respect to what constitutes a genuine, legitimate and justified occupational requirement, by reason of the nature of the activities or of the context in which they are carried out, for the prohibition on discrimination on the basis of religion to have horizontal direct effect.

123. Third, as is equally pointed out in the written observations of Ireland, by contrast with the other grounds of discrimination listed in Article 19 TFEU, there is no sufficient consensus between national constitutional traditions on the circumstances in which differences in treatment on religious grounds may be genuine, legitimate and justified. Indeed, this is demonstrated by the very promulgation of Article 17 TFEU and Article 4(2) of Directive 2000/78.

124. I therefore propose the following answer to question 2:

In the circumstances of the main proceedings, it is not necessary to disapply a provision of national law — such as, in the present case, the first alternative of Paragraph 9(1) of the AGG (Allgemeines Gleichbehandlungsgesetz, General Law on equal treatment) — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them is also lawful where adherence to a specific religion, in accordance with the self-conception of the religious body, having regard to its right of self-determination, constitutes a justified occupational requirement if it is impossible to interpret that provision in conformity with Article 4(2) of Directive 2000/78.

F. Closing remarks

125. Article 9 of the AGG is a problematic provision. It has attracted criticism before the relevant United Nations Human Rights Committee with respect to its compliance with the United Nations Convention on the Elimination of all froms of Racial Discrimination. (146) It once formed the subject of infringement proceedings instituted by the Commission against Germany, (147) and has been called into question by a German Government body that monitors compliance with anti-discrimination law within that Member State. (148)

126. It is apparent from the fact that religious organisations in Germany employ around 1.3 million people (149) that there is considerable engagement in the public sphere by churches and their affiliates in that Member State. (150) I nevertheless take the view that the tensions generated by this situation, as exemplified by the main proceedings, have been accommodated through promulgation of Article 17 TFEU, Article 4(2) of Directive 2000/78, and acknowledgment of the right of religious organisations to autonomy and self-determination as a fundamental right that is protected under EU law, through the combined effects of Articles 10, 12, and 52(3) of the Charter.

VI. Answers to the questions referred

127. I therefore propose the following answers to the questions referred by the Bundesarbeitsgericht (Labour Court, Germany):

(1) Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to be interpreted as meaning that an employer, such as the defendant in the present case, or the church on its behalf, may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos.

(2) In the circumstances of the main proceedings, it is not necessary to disapply a provision of national law — such as, in the present case, the first alternative of Paragraph 9(1) of the AGG (Allgemeines Gleichbehandlungsgesetz,General Law on equal treatment) — which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations adhering to them is also lawful where adherence to a specific religion, in accordance with the self-conception of the religious body, having regard to its right of self-determination, constitutes a justified occupational requirement if it is impossible to interpret that provisionin conformity with Article 4(2) of Directive 2000/78.

(3) 'Pursuant to Article 4(2) of Directive 2000/78, in assessing genuine, legitimate and justified occupational requirements, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation's ethos, the national referring court is to take account of the following:

(i) the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law, as reflected in Articles 10 and 12 of the Charter. Article 4(2) of Directive 2000/78, and in particular its reference to the 'ethos' of religious organisations, is to be interpreted in conformity with this fundamental right;

(ii) Article 4(2) of Directive 2000/78 affords Member States a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amount to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities or the context in which they are carried out;

(iii) the reference to 'Member States constitutional provisions and principles', in the first paragraph of Article 4(2) of Directive 2000/78, when interpreted in the light of Article 17(1) TFEU, means that Directive 2000/78 is to be implemented in such a way that the model selected by individual Member

States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;

(iv) the word 'justified' in Article 4(2) of Directive 2000/78 requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the defendant to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;

(v) the words 'genuine, legitimate' require analysis of the proximity of the activities in question to the defendant's proclamatory mission;

(vi) in conformity with the requirement in Article 4(2) of Directive 2000/78 for difference of treatment to be implemented in accordance with 'general principles of law', and the approach of the European Court of Human Rights to interpretation of Article 9(2) ECHR in determining whether the exercise of the right of a religious organisation to autonomy and self-determination produces effects disproportionate with respect to other rights protected by the ECHR, the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief under Directive 2000/78, is to be weighed against the right of the defendant to its autonomy and self-determination, with due account taken of the fact that Article 3 of Directive 2000/78 makes no distinction between recruitment and dismissal.

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1 Original language: English.

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2 Written observations of the applicant.

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3 OJ 2000 L 303, p. 16. The main proceedings concern 'conditions for access to employment … including selection criteria and recruitment conditions' under Article 3(1)(a) of Directive 2000/78.

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4 The Court had occasion to interpret Article 4(1) of Directive 2000/78 in the judgment of 14 March 2017, *Bougnaoui and ADDH*, C−188/15, EU:C:2017:204; of 13 November 2014, *Vital Pérez*, C−416/13, EU:C:2014:2371; of 13 September 2011, *Prigge and Others*, C−447/09, EU:C:2011:573; of 12 January 2010, *Wolf*, C−229/08, EU:C:2010:3;and of 15 November 2016, *Sorondo*, C−258/15, EU:C:2016:873.

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5 Robbers, G., *Religion and Law in Germany*, second edition, Wolters Kluwer, 2013; Zucca, L., and Ungureanu, C., *Law,State and Religion in the New Europe*, Cambridge University Press, 2012; Doe, N., *Law and Religion in Europe: a Comparative Introduction*, Oxford University Press, 2011; McCrea, R., *Religion and the Public Order of the European Union*, Oxford University Press, 2010; Lustean, L.N., and Madeley, J.T.S. (eds), *Religion, Politics and Law in the European Union*, Routledge, 2010.; de Charentenay, P., 'Les relations entre l'Union européenne et les religions', *Revue du Marché commun et de l'Union européenne*,465 (2003), p. 904*;* Massignon, B., 'Les relations entre les institutions religieuses et l'Union européenne: un laboratoire de gestion et de la pluralité religieuses et philosophique?' in Armogathe, J.-R., and Willaime, J.-P. (eds), *Les mutations contemporaines du religieux*, Brepols, 2003, p. 25.

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6 *Parallel Report on the 19th-22nd Report submitted by the Federal Republic of Germany to the UN Committee on the Elimination of all forms of Racial Discrimination* (2015), p. 42. The report is available at http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICERD/icerd_state_report_germany_19-22_2013_parallel_FMR_Diakonie_2015_en.pdf. According to the case file, this is the race discrimination report published by the defendant.

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7 In Germany the right to self-determination extends to both religious associations and their affiliates. See paragraph 91, BVerfG of 22 October 2014, 2 BvR 661/12.

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8 See the Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C−188/15, EU:C:2016:553, point 71, citing point 11 of the Opinion of Advocate General Poiares Maduro in *Coleman*,C−303/06,EU:C:2008:61. See also recital 9 of Directive 2000/78.

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9 Article 6(1), sentence two, of the AGG provides, *inter alia*, that candidates for posts are workers for the purposes of Article 7 of the AGG.

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10 Although the AGG bears a publication date of 14 August 2006, see BGB1. I, p. 1897, and the date of entry into force of Directive 2000/78 is 2 December 2000, according to the German Government's proposal for the promulgation of the AGG, it reflects national practices existing at the date of entry into force of Directive 2000/78. See Deutscher Bundestag, Drucksache 16/1780, 8 June 2006, p. 35.

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11 See judgments of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 36and the case-law cited; and of 19 January 2010, *Kücükdeveci*, C−555/07, EU:C:2010:21, paragraph 51.

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12 ECtHR, 12 June 2014, *Fernández Martínez v. Spain*, CE:ECHR:2014:0612JUD005603007, paragraph 131; ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503, paragraphs 48 to 51; and ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69.

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13 ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69. See also the credibility of the church in both the public mind and its own clientele, ECtHR, 3 February 2011, *Siebenhaar v. Germany*, CE:ECHR:2011:0203JUD001813602, paragraph 46, and whether the position in issue was a prominent one, ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503, paragraph 51.

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14 ECtHR, 20 October 2009, *Lombardi Vallauri v. Italy*, CE:ECHR:2009:1020JUD003912805, paragraph 41.

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15 ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69.

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16 Judgment of 26 February 2013, C−399/11, EU:C:2013:107, paragraph 59. See also the Opinion of Advocate General Bot in *M.A.S and M.B.*,C−42/17, EU:C:2017:564, points 157 and 158 (judgment pending).

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17 Given that the main proceedings concern the applicant's beliefs, and not her behaviour, the requirement to '*act* in good faith and with loyalty to the organisation's ethos' (my emphasis) set out in the second paragraph of Article 4(2) of Directive 2000/78 is not relevant to the main proceedings.

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18 Article 3 of Directive 2000/78 encapsulates, *inter alia*, both recruitment (Article 3(1)(a)) and dismissal (Article 3(1)(c)).

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19 Judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 35. Given that the rules on enforcement of directives in Member State law are irrelevant when a fundamental right being enforced horizontally is reflected in a Treaty article, the legal position is more straightforward. See e.g. judgments of 12 December 1974, *Walrave and Koch*, 36/74, EU:C:1974:140; of 15 June 1978, *Defrenne*, 149/77, EU:C:1978:130;and of 6 June 2000, *Angonese*, C−281/98, EU:C:2000:296. See generally Tridimas, T., 'Horizontal effect of general principles: bold rulings and fine distinctions' in Bernitz, U., Groussot, X., and Schulyok, F., *General Principles of EU Law and European Private Law*, Wolters Kluwer, 2013, p. 213.

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20 There is nothing in the case file to suggest that the defendant has been required to perform a task in the public service and been given, for that purpose, special powers by the German Government, or that the defendant is a legal person governed by public law, in which case it would be 'comparable to the state' and subject to the doctrine of direct effect with respect to Directive 2000/78. See judgment of 10 October 2017, *Farrell*, C−413/15, EU:C:2017:745, paragraph 34.

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21 See, most recently *Farrell, ibid.,* paragraph 31 and the case-law cited. See also notably judgments of 24 January 2012, *Dominguez*,C−282/10, EU:C:2012:33, paragraph 37, and of 15 January 2014, *Association de médiation sociale*,C−176/12, EU:C:2014:2, paragraph 36, of 19 January 2010, *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 46, and of 5 October 2004, *Pfeiffer and Others*, C−397/01 to C−403/01, EU:C:2004:584, paragraph 108.

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22 Judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278, paragraph 32 and the case-law cited. Cf. the Opinion of Advocate General Sharpston in *Farrell*, C−413/15, EU:C:2017:492, at point 150, where the Advocate General asked the Court to revisit and review the justifications advanced in the judgment of 14 July 1994, *Faccini Dori*, C−91/92, EU:C:1994:292, for rejecting horizontal direct effect of directives.

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23 For a thorough discussion of the limits of the horizontal effects of directives see the Opinion of Advocate General Bot in *DI*, C−441/14, EU:C:2015:776.

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24 At point 62 of the Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C−188/15, EU:C:2016:553, it is suggested that the principle of non-discrimination on the basis of religion, like the prohibition on age discrimination, is a general principle of law given specific expression in Directive 2000/78. At points 144 to 146 of the Opinion of Advocate General Kokott in *CHEZ Razpredelenie Bulgaria*,C−83/14, EU:C:2015:170, it is argued that the principle of non-discrimination on the basis of ethnic origin and race, which is given specific expression in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), has the same status, at least in legal relationships that 'are characterised by a structural imbalance between the parties'.

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25 See Article 2 of the EEC Treaty. This provision became Article 2 EC and is to be compared with the list of competences now appearing in Article 3 TEU, which 'focuses on non-economic goals to a far greater extent than the EC Treaty'. See Lenaerts, K., and van Nuffel, P., *European Union Law*, Sweet and Maxwell, 2011, p. 107.

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26 Judgment of 5 October 1988, *Steymann*, 196/87, EU:C:1988:475, paragraph 9. See also judgment of 23 October 1986, *van Roosmalen*, 300/84, EU:C:1986:402.

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27 *Humbel and Edel*, 263/86, EU:C:1988:151, at p. 5379. The same approach applies to participation in sport and with respect to educational establishments. See recently the Opinion of Advocate General Kokott in

Congregación de Escuelas Pías Provincia Betania, C−74/16, EU:C:2017:135, point 32 and the case-law cited.

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28 For an account see e.g. Konstadinides, T., *Division of Powers in European Union Law*, Wolters Kluwer, 2009, particularly chapter 1, and at p. 12. Lenaerts and van Nuffel, op. cit., pp. 106 to 111.

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29 E.g. judgment of 14 March 2000, *Église de scientologie*, C−54/99, EU:C:2000:124. For criticism of the lack of discussion of freedom of religion in this case see McCrea, op. cit., pp. 188 to 190. See also the judgment of 4 December 1974, *Van Duyn*, 41/74, EU:C:1974:133.

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30 Opinion of Advocate General Van Gerven in *Society for the Protection of Unborn Children Ireland*, C−159/90, EU:C:1991:249, point 26. E.g. judgment of 24 March 1994, *Schindler*, C−275/92, EU:C:1994:119, paragraph 60.

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31 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*,C−426/16 (pending).

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32 Judgments of 14 March 2017, *Bougnaoui and ADDH*, C−188/15, EU:C:2017:204, and *G4S Secure Solutions*, C−157/15, EU:C:2017:203. See further *IR*, C−68/17 (pending).

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33 E.g. judgment of 27 October 1976, *Prais* v *Council*, 130/75, EU:C:1976:142.

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34 Judgments of 26 February 2013, *Åkerberg Fransson*, C−617/10, EU:C:2013:105, and of 16 May 2017, *Berlioz Investment Fund*, C−682/15, EU:C:2017:373, paragraph 50.

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35 Established in the judgment of 13 November 1990, *Marleasing*, C−106/89, EU:C:1990:395. See above, points 42 to 44.

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36 OJ 2012 L 26, p. 1.

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37 Here the problem considered by the Court in its judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C−74/16, EU:C:2017:496, can be distinguished from the main proceedings. In that case, whether or not the applicant religious organisation was engaged in ‘economic activities’ was essential to determining whether a tax exemption it was seeking from the Spanish Government amounted to State aid within the meaning of Article 107(1) TFEU, pursuant to the Court’s case-law in that substantive field. See the Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania*, C−74/16, EU:C:2017:135, points 36 to 60.

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38 Judgment of 10 August 2017, *Tupikas*, C−270/17 PPU, EU:C:2017:628, paragraph 60.

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39 Judgments of 14 March 2017, *Bougnaoui and ADDH*, C−188/15, EU:C:2017:204, paragraph 29, and *G4S Secure Solutions*, C−157/15, EU:C:2017:203, paragraph 27. See also Explanations to Article 10 of the Charter (OJ 2007 C 303, p. 17).

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40 Judgment of 28 July 2016, *JZ*, C-294/16 PPU, EU:C:2016:610, paragraph 50 and the case-law cited. See also Article 6(1) TEU.

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41 Judgment of 15 March 2017, *Al Chodor*, C−528/15, EU:C:2017:213, paragraph 37.

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42 Judgment of 14 March 2017, *GS4 Secure Solutions*, C−157/15, EU:C:2017:203, paragraph 28.

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43 See e.g. ECtHR, 6 April 2017, *Klein and Others v. Germany*,CE:ECHR:2017:0406JUD001013811, paragraph 77 and the case-law cited. A request for referral of this case to the Grand Chamber is pending.

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44 See the Opinion of Advocate General Kokott in *GS4 Secure Solutions*, C−157/15, EU:C:2016:382, point 25. The approach of the European Court of Human Rights to justified limitations under Article 9(2) of the ECHR entails considering whether the impugned measure is 'necessary in a democratic society'. In so doing the European Court of Human Rights will determine whether the reasons adduced to justify the difference in treatment on the basis of religion or belief are relevant and sufficient and proportionate to the legitimate aim pursued, with the latter entailing an exercise in the weighing of the rights and interests of others against the challenged conduct. See point 47 of the Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C−188/15, EU:C:2016:553, citing ECtHR, 15 February 2001, *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398.

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45 See also Article 19, second paragraph TEU. According to the explanations accompanying the Charter (OJ 2007 C 303, p. 17), the first paragraph of Article 47 of the Charter is based on Article 13 of the ECHR, although under EU law the protection afforded is more extensive. The second paragraph of Article 47 corresponds to Article 6(1) of the ECHR. For detailed and recent analyses see the Opinion of Advocate General Wathelet in *Berlioz Investment Fund*, C-682/15, EU:C:2017:2, and Prechal, S., 'The Court of Justice and Effective Judicial Protection: What has the Charter Changed?' in Paulussen, C., Takács, T., Lazic, V., and Van Rompuy, B. (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspective*, Springer, Berlin, 2016, p. 143. The Court has recently reaffirmed that the characteristics of remedies provided in a directive 'must be determined in a manner that is consistent with Article 47 of the Charter.' See judgment of 27 September 2017, Puškár, C−73/16, EU:C:2017:725, paragraph 60 and the case-law cited. See also ECtHR, 20 October 2009, *Lombardi Vallauri v. Italy*, CE:ECHR:2009:1020JUD003912805, paragraphs 66 to 72.

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46 An analysis entailing the balancing of competing rights was particularly notable in the judgment of this Court of 14 March 2017, *G4S Secure Solutions*, C−157/15, EU:C:2017:203. See also e.g. judgment of 14 October 2004, *Omega*, C−36/02, EU:C:2004:614. Before the European Court of Human Rights see below points 68 to 75.

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47 Jellinek, G., *System der subjektiven öffentlichen Rechte*,Mohr Siebeck**,** 1905, p. 125.

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48 See notably in this regard judgment of 13 September 2011, *Prigge and others*, C−447/09, EU:C:2011:573, paragraphs 52 to 64.

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49 See also Article 52(4) of the Charter.

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50 At points 60 to 67 of her Opinion in *Bougnaoui and ADDH*, C−188/15, EU:C:2016:553, Advocate General Sharpston contends that freedom from direct discrimination on the basis of religion has stronger protection under EU law than the ECHR.

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51 Judgment of 26 February 2013, *Melloni*, C−399/11, EU:C:2013:107, paragraph 60. See also the Opinion of Advocate General Bot in *M.A.S and M.B.*, C−42/17, EU:C:2017:564, point 157 (judgment pending).

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52 See Chapter II of Directive 2000/78 entitled 'Remedies and enforcement', encapsulating, inter alia,Article 9 on the defence of rights and Article 10 on the burden of proof. Also relevant are two provisions contained in Chapter IV and entitled 'Final provisions', namely Article 16 on compliance and Article 17 on sanctions. See also recitals 30 to 32, and 35 of Directive 2000/78. The Court has held, in the context of Directive 2000/78, that all persons who consider themselves wronged because the principle of equal treatment has not been applied to them are to be able to 'have their rights asserted by judicial process'. See judgment of 19 April 2012, *Meister*, C-415/10, EU:C:2012:217, paragraph 38.

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53 The judgment of the Bundesverfassungsgericht (Federal Constitutional Court) of 22 October 2014, 2 BvR 661/12, in particular at paragraph 125, was mentioned as being pertinent in this regard.

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54 A two stage judicial review process is mentioned in the order for reference as a form of judicial review that has been developed by the Bundesverfassungsgericht (Federal Constitutional Court) in the context of dismissals and discrimination on the basis of religion and belief, but it has not yet decided if these rules are to apply to recruitment.

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55 A balancing exercise is also evident in ECtHR, 3 February 2011, *Siebenhaar v. Germany,* CE:ECHR:2011:0203JUD001813602, see in particular paragraphs 42 to 47, and ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503. Arguments made by Robbers, op. cit., at p. 136 accord with those made by the representative of Germany at the hearing; Robbers cites BVerfG of 25 March 1980, BVerfGE 53, 366, 400 et seq.; BVerfG of 13 December 1983, BVerfGE 66, 1, 22; BVerfG of 4 June 1985, BVerfGE 70, 138, 167; and BVerfG of 14 May 1986, BVerfGE 72, 278, 289. See also Freiherr von Campenhausen, A., and de Wall, H., *Staatskirchenrecht* (4th edition, Munich, C.H.Beck 2006) p. 107 to 111.

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56 Judgment of 13 June 2013, *Kostov*, C−62/12, EU:C:2013:391, paragraph 24.

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57 Ibid., paragraph 25 and the case-law cited.

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58 ECtHR, 12 June 2014, CE:ECHR:2014:0612JUD005603007.

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59 Ibid., paragraph 132 (my emphasis) and the case-law cited.

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60 ECtHR, 1 December 2015, *Károly Nagy v. Hungary*, CE:ECHR:2015:1201JUD005666509, paragraph 15 of the joint dissenting opinions of judges Sajó, Vučinić and Kūris. On 14 September 2017 the application in this case was declared inadmissible by the Grand Chamber of the European Court of Human Rights for factual reasons of no pertinence to the main proceedings. See CE:ECHR:2017:0914JUD005666509.

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61 ECtHR, 23 September 2010, CE:ECHR:2010:0923JUD000162003.

62 Ibid., paragraph 66.

63 Ibid., paragraph 67.

64 Ibid., paragraph 69.

65 Article 2(2)(a) in conjunction with Article 1 of Directive 2000/78.

66 Point 44 of the Opinion of Advocate General Kokott in *G4S Secure Solutions*, C−157/15, EU:C:2016:382, and cases cited at footnote 25 of that Opinion. Direct discrimination was held by the Court to have occurred in the context of public statements made by a recruiting employer in the judgment of 10 July 2008, *Feryn*, C−54/07, EU:C:2008:397.

67 Judgments of 14 March 2017 *G4S Secure Solutions*, C-157/15, EU:C:2017:203, and *Bougnaoui and ADDH*, C−188/15, EU:C:2017:204.

68 Opinion of Advocate General Sharpston in *Bougnaoui and ADDH*, C−188/15, EU:C:2016:553, point 63. See also judgment of 18 November 2010, *Kleist*, C−356/09, EU:C:2010:703, paragraphs 41 and 42.

69 Article 52(1) of the Charter is inapplicable to the main proceedings, because it would broaden the justifications available for direct discrimination on the basis of religion and belief beyond those available under Directive 2000/78, namely in Articles 2(5) and 4(2). This would be inconsistent with Article 53 of the Charter, which states that nothing 'in the Charter shall be interpreted as restricting or adversely affection human rights and fundamental freedoms as recognised…by Union law'.

70 It is therefore unnecessary for me to consider, as was argued in the written observations of Ireland, whether Article 4(2) of Directive 2000/78 furnishes the justification applicable to both direct and indirect discrimination on the basis of religion and belief with respect to 'occupational activities within … organisations the ethos of which is based on religion or belief'.

71 See e.g. the judgments of 13 September 2011, *Prigge and Others*, C−447/09, EU:C:2011:573, paragraph 72 with respect to Article 4(1) of Directive 2000/78 and paragraph 56 with respect to Article 2(5) of Directive 2000/78; and of 13 November 2014, *Vital Pérez*, C−416/13, EU:C:2014:2371, paragraph 47, with respect to Article 4(1) of Directive 2000/78. See generally judgment of 11 January 2000, *Kreil*, C−285/98, EU:C:2000:2, paragraph 20 and the case-law cited, to the effect that derogations from individual rights laid down in equal treatment directives are to be interpreted strictly.

72 As underscored at point 68 of the Opinion of Advocate General Kokott in *GS4 Secure Solutions*, C−157/15, EU:C:2016:382, and cases cited at footnote 35 of that Opinion.

73 On principles for the interpretation of EU measures see my Opinion in *Pinckernelle*, C−535/15, EU:C:2016:996, points 34 to 70.

74 Judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278,paragraph 33 and the case-law cited.

75 My emphasis.

76 Judgment of 1 December 2016, *Daouidi*, C−395/15, EU:C:2016:917, paragraph 50 and the case-law cited.

77 Ibid.

78 See above, footnote 52.

79 A proposal by Germany concerning Article 4(2) of Directive 2000/78 for a reference to churches that enjoy special protection under the German Constitution was not adopted. See Council of the European Union, Outcome of the Proceedings of the Working Party on Social Questions of 18 July 2000, 10254/00 (27 July 2000), SOC 250 JAI 77, p. 14, footnote 19.

80 On the shift of the burden of proof to the defendant once a Member State court concludes that there is a presumption of discrimination see e.g. judgment of 18 December 2014, *FOA*, C-354/13, EU:C:2014:2463, paragraph 63.

81 Cf. the judgment of 3 June 2010,*Caja de Ahorros y Monte de Piedad de Madrid*, C−484/08, EU:C:2010:309, paragraph 40, in which the Court held that Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) could not be interpreted as preventing Member States from adopting more stringent rules than those provided by the directive itself, on the condition that they are designed to afford consumers a higher level of protection.

82 For a record of the proposals and counter-proposals considered in the Council go to http://www.consilium.europa.eu/register/en/content/int/?lang=EN&typ=ADV, Interinstitutional File: 1999/0225 (CNS). While Article 4(2) of Directive 2000/78 did not form part of the Commission's initial proposal for legislation (COM (1999) 0565 final, OJ 2000 C 177E, p. 42), once tabled it was the subject of no less than nine drafts and numerous scrutiny reservations and proposals for amendment. All drafts, however, concerned occupational activities related to religious activities. Yet cf. the report of the European Parliament on the Commission's proposal, A5-0264/2000 of 21 September 2000 at p. 24. 'The intention is to widen the text to cover the wider "social" activities of religious organisations while restricting it to personnel directly involved in ideological guidance (i.e. not receptionists or janitors). It also makes it clear that the dispensation will apply only to religious beliefs and not, for example, to sexual orientation.'

83 Signed at Rome on 29 October 2004 (OJ 2004 C 310, p. 1).

84 See by way of analogy the judgment of 12 October 2010, *Ingeniørforeningen i Danmark*, C−499/08, EU:C:2010:600, paragraph 33 and the case-law cited, in which the Court noted, in the context of a dispute concerning age discrimination, that Member States enjoy a broad discretion in the choice of measures capable of

achieving their objectives in the field of social and employment policy, but that that discretion cannot have the effect of frustrating the principle of discrimination on grounds of age.

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85 Draft minutes (published on 1 February 2001) of the 2296th Council meeting (Employment and Social Policy) held in Luxembourg on 17 October 2000, 12458/00, PV/CONS 61 SOC 363, p. 4, and press release of 17 October 2000 concerning the 2296th Council meeting, 12125/00 (Press 378).

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86 Judgment of 1 April 2004, *Borgmann*, C−1/02, EU:C:2004:202, paragraph 30.

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87 Judgment of 27 April 2017, *Pinckernelle*, C−535/15, EU:C:2017:315, paragraph 31 and the case-law cited.

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88 The Court held recently that 'the obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to' Article 47 of the Charter. See point 70 of the Opinion of Advocate General Bobek in *El Hassani*, C−403/16, EU:C:2017:659 (judgment pending), citing the judgment of 16 May 2017, *Berlioz Investment Fund*, C−682/15, EU:C:2017:373, paragraph 44.

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89 The parallel provision to Article 12 of the Charter is Article 11 of the ECHR. The European Court of Human Rights has held that when the organisation of a religious community is in issue, Article 9 of the ECHR must be interpreted in the light of Article 11 of the ECHR on freedom of association. See e.g. ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania,* CE:ECHR:2013:0709JUD000233009, paragraph 136.

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90 Judgment of 21 September 2016, *Commission* v *Spain*, C−140/15 P, EU:C:2016:708, paragraph 117.

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91 See 'Introduction' by Larry Alexander in Alexander, L. (ed), *Constitutionalism:Philosophical Foundations* (Cambridge University Press, 1998) p. 1, and his discussion at pp. 2 to 4 of the distinction between the metaconstitution, the elements of which are relatively fixed (e.g. the separation of powers) and the symbolic constitution, the content of which may change without alteration to the metaconstitution.

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92 Judgment of 15 May 1986, *Johnston*, 222/84, EU:C:1986:206. See more recently e.g. judgment of 27 June 2013, *Agrokonsulting-04*, C−93/12, EU:C:2013:432, paragraph 59.

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93 Opinion of Advocate General Kokott in *Congregación de Escuelas Pías Provincia Betania*, C−74/16, EU:C:2017:135, point 31.

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94 See the Opinion of Advocate General Kokott in *GS4 Security Solutions*, C−157/15, EU:C:2016:382, point 32 and the case-law cited. See generally on Article 4(2) TEU, judgments of 21 December 2016, *Remondis*, C−51/15, EU:C:2016:985, paragraph 40, and of 2 June 2016, *Bogendorff von Wolffersdorff*, C−438/14, EU:C:2016:401, paragraph 73 and case-law cited.

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95 Judgment of 12 June 2014, *Digibet*, C−156/13, EU:C:2014:1756, paragraph 34.

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96 See above, points 55, 56, and 68 to 75.

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97 See by analogy paragraph 16 of the judgment of 11 January 2000, *Kreil*, C−285/98, EU:C:2000:2. It was 'not possible to infer' from the Treaty articles in issue, 'that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security'.

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98 See e.g. judgment of 27 October 2016, *Commission* v *Germany,* C−220/15, EU:C:2016:815, paragraph 39. For detailed discussion of the origins of Article 17 TFEU and relevant parts of the preamble to the TEU see e.g. McCrea, op. cit., pp. 53 to 74, and Oanta, G.A., 'The Status of Churches and Philosophical and Non-Confessional Organizations within the Framework of the European Union Reform', *Lex et Scientia International Journal*, Bucharest (Romania), nº XV, vol. 2, 2008, p. 121.

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99 Article 17 appeared as Article I-52 of the Treaty on a Constitution for Europe (OJ 2004 C 310, p. 1).

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100 See 'Post-Synodal Apostolic Exhortation Ecclesia in Europe of His Holiness Pope John Paul II to the Bishops, Men and Women in the Consecrated Life and All the Lay Faithful on Jesus Christ Alive in His Church the Source of Hope for Europe', 28 June 2003. Quoted in COMECE, *The Treaty Establishing a Constitution for Europe: Elements for an Evaluation*, 11 March 2005, available at http://www.comece.eu/dl/pmnrJKJOmKkJqx4KJK/20050311PUBCONV_EN.pdf, p. 3.

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101 McCrea, op. cit., p. 54. During the Intergovernmental Conference of 1996 the German delegation reportedly proposed without success the following article: 'The Union considers that the constitutional positions of religious communities in the Member States is both an expression of the identity of the Member States and their culture, as part of their common legal heritage.' See Oanta, op. cit., p. 123.

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102 OJ 2003 C 169, p. 1.

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103 Declaration No 11 in the Final Act of the Inter-governmental Conference on the Treaty of Amsterdam signed on 2 October 1997 (OJ 1997 C 340, p. 133).

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104 Article 13 EC was adopted under the Amsterdam revision. Now Article 19 TEU.

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105 Working document of the Conference of the Representatives of the Governments of the Member States, Presidency of the IGC, 23 July 2007, CIG 1/07, p. 49.

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106 Ibid. See e.g. Houston, K., 'The Logic of Structured Dialogue between Religious Associations and the Institutions of the European Union' in Leustean, L.N., and Madeley, J.T.S. (eds), *Religion, Politics and Law in the European Union* (Routledge, 2010), p. 201; Mudrov, S. A., 'The European Union and Christian Churches: The Patterns of Interaction", Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, No 3/14.

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107 Oanta, op. cit., p. 127. One study identifies no less than five models for the management of relations between church and State. See Mancini, S., and Rosenfeld, M., 'Unveiling the limits of tolerance; comparing the

treatment of majority and minority religious symbols in the public sphere' in Zucca and Ungureanu, op. cit., 160 at 162.

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108 Above point 95.

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109 McCrea, op. cit., pp. 60 and 61, citing Bengoetxea, J., MacCormick, N., and Moral Soriano, L., 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in de Búrca, G., and Weiler, J.H.H. (eds), *The European Court of Justice* (Oxford University Press, 2001), p. 64.

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110 Opinion of Advocate General Kokott in *GS4 Security Solutions*, C−157/15, EU:C:2016:382, point 37, citing judgments of the ECtHR, 10 November 2005, *Leyla Şahin v. Turkey,* CE:ECHR:2005:1110JUD004477498, 1 July 2014, *S.A.S. v. France,* CE:ECHR:2014:0701JUD004383511, and 26 November 2015, *Ebrahimian v. France,* CE:ECHR:2015:1126JUD006484611.

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111 Above, point 86.

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112 Above, point 99.

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113 E.g. ECtHR, 8 April 2014, *Magyar Keresztény Mennonita Egyház and Others v. Hungary*, CE:ECHR:2014:0408JUD007094511, paragraph 76 and the case-law cited. For example, promotion of an inhuman ideology would blatantly be at odds with the fundamental values of the EU under Article 2 TEU. See Opinion of Advocate General Kokott in *GS4 Secure Solutions*, C−157/15, EU:C:2016:382, point 89.

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114 Judgment of ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey*, CE:ECHR:2016:0426JUD006264910, paragraph 93 and the case-law cited.

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115 ECtHR, 16 September 2010, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Othersv.Bulgaria,* CE:ECHR:2010:0916JUD000041203, paragraph 26.

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116 ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey*, CE:ECHR:2016:0426JUD006264910, paragraphs 110 and 121 and the case-law cited.

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117 ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania*, CE:ECHR:2013:0709JUD000233009, paragraph 136.

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118 Ibid., paragraph 137.

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119 ECtHR, 12 June 2014, *Fernández Martínez v. Spain*, CE:ECHR:2014:0612JUD005603007, paragraph 129 and the case-law cited.

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120 Ibid., paragraph 128.

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121 ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey,* CE:ECHR:2016:0426JUD006264910, paragraph 110.

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122 ECtHR, 13 December 2001, *Metropolitan Church of Bessarabia and Others v. Moldova,* CE:ECHR:2001:1213JUD004570199, paragraph 113.

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123 ECtHR, 15 January 2013, *Eweida and Others v. The United Kingdom,* CE:ECHR:2013:0115JUD004842010,paragraph 81.

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124 ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania,* CE:ECHR:2013:0709JUD000233009,paragraph 136.

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125 ECtHR, 31 July 2008, *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria,* CE:ECHR:2008:0731JUD004082598, paragraph 61.

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126 ECtHR, 26 April 2016, *İzzettin Doğan and Others v. Turkey,* CE:ECHR:2016:0426JUD006264910, paragraph 107 and the case-law cited.

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127 ECtHR, 9 July 2013, *Sindicatul "Păstorul cel Bun" v. Romania*,CE:ECHR:2013:0709JUD000233009, paragraphs 165 and 166.

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128 ECtHR, 22 January 2009, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria,* CE:ECHR:2009:0122JUD000041203.

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129 For a comprehensive survey of the Member States see Doe, op. cit., chapter 5, pp. 114 to 138. At p. 120 the author asserts that in this respect the case-law of the Konstitutsionen sad (Bulgarian Constitutional Court) is typical, which he quotes as follows: 'State interference and governmental interference in the internal organisational life of religious communities and institutions as well as in their public manifestation are inadmissible save for those performed on the grounds of [the] Constitution.' See Decision No 5, 11 June 1992, Case No 11/92, SG No 49, 16 June 1992.

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130 Above, point 24.

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131 See eg. ECtHR, 23 September 2010, *Schüth v. Germany*, CE:ECHR:2010:0923JUD000162003, paragraph 69. This 'proximity' is also inherent in assessing the credibility of the church in both the public mind and its own clientele, ECtHR, 3 February 2011, *Siebenhaar v. Germany*, CE:ECHR:2011:0203JUD001813602, paragraph 46, and in assessing whether the position in issue is a prominent one, ECtHR, 23 September 2010, *Obst v. Germany*, CE:ECHR:2010:0923JUD000042503, paragraph 51. Designation of occupational requirements with respect to activities that are close to a religious organisations proclamatory mission is also relevant to maintaining legitimacy.

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132 See notably ECtHR, 4 October 2016, *Travaš v. Croatia,* CE:ECHR:2016:1004JUD007558113, paragraph 109 and the case-law cited.

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133 See similarly judgment of 11 January 2000, *Kreil*, C−285/98, EU:C:2000:2, paragraph 23.

134 Above point 69.

135 See Addendum amending 12269/00 SOC 344 JAI 112, Council of the European Union SOC 345 JAI 113 of 12 October 2000, p. 2.

136 E.g. judgment of 26 June 1997, *Familiapress*, C-368/95, EU:C:1997:325, paragraph 28.

137 Judgment of 21 September 2016, *Commission* v *Spain*, C−140/15 P, EU:C:2016:708, paragraph 80.

138 Judgment of 15 May 2014, *Timmel*, C-359/12, EU:C:2014:325, paragraph 62.

139 Above points 106 to 109.

140 Article 6(3) TEU confirms, inter alia, that fundamental rights as guaranteed by the ECHR, constitute general principles of EU law. Judgment of 15 February 2016, *JN*, C−601/15 PPU, EU:C:2016:84, paragraph 45.

141 The defendant is an entity governed by private law and the applicant is an individual private party. See further above points 41 to 45.

142 Judgment of 19 April 2016, *DI*, C−441/14, EU:C:2016:278,paragraph 31 and the case-law cited.

143 Ibid., paragraph 33.

144 Advocate General Kokott has proposed that the horizontal effect of the prohibition on discrimination on the basis of ethnic origin and race can vary by reference to the circumstances in which the right is invoked. See above, footnote 24.

145 Judgment of 15 January 2014, *Association de médiation sociale*, C−176/12, EU:C:2014:2, paragraph 50 and case-law cited.

146 CERD/C/DEU/C0/19-22, 30 June 2015, eighty-sixth session, point 15. See also the race discrimination report, p. 43.

147 On 29 October 2009 the European Commission sent a reasoned opinion to Germany in this respect. See IP/09/1620. See europa.eu/rapid/press-release_IP-09-1620_en.htm. The proceedings were subsequently discontinued.

148 Zweiter Gemeinsamer Bericht der Antidiskriminierungsstelle des Bundes und der in ihrem Zuständigkeitsbereich betroffenen Beauftragten der Bundesregierung und des Deutschen Bundestages, 13 August 2013, Bundestags-Drucksache (publication of the Bundestag) 17/14400.

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149 Ibid p. 238.

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150 McColgan, A., 'Religion and (in)equality in the European framework' in Zucca and Ungereanu, op. cit., p. 215 at p. 230. On the complexities arising when 'the public and private spheres collapse into one another' in the context of religion see Mancini and Rosenfeld, op. cit., p. 162. One commentator has argued that the judgments of the Court of 14 March 2017, *Bougnaoui and ADDH*, C−188/15, EU:C:2017:204 and *G4S Secure Solutions*, C−157/15, EU:C:2017:203 are indicative of a reluctance of a return of religion to civil society. See Robin-Olivier, S., "Neutraliser la religion dans l'entreprise? Arrêts G4S Secure Solutions et Bougnaoui (CJUE 14 mars 2017, aff. C−157/15 et C−188/15) *RTDEur.*, 2, (2017), p. 229.