

## Between ECHR and Horizontal Effect: the *Egenberger* Case-Law

Court of Justice of the European Union (Grand Chamber)

17 April 2018, C-414/16, ECLI:EU:C:2018:257 (*Egenberger*)

Judges: Lenaerts (President), Tizzano, Silva de Lapuerta, von Danwitz, da Cruz Vilaca, Rosas, Juhasz, Safjan, Švaby, Berger, Prechal, Jarašiūnas, Biltgen, Vilaras, Regan

(Advocate General: E. Tanchev)

and

11 September 2018, C-68/17, ECLI:EU:C:2018:696 (*IR v JQ*)

Judges: Lenaerts (President), Tizzano, Silva de Lapuerta, von Danwitz, da Cruz Vilaca, Rosas, Malenovsky, Juhasz, Safjan, Švaby, Prechal, Biltgen, Jurimae, Vilaras, Regan

(Advocate General: M. Wathelet)

and

22 January 2019, C-193/17, ECLI:EU:C:2019:43 (*Cresco Investigation*)

Judges: Lenaerts (President), Silva de Lapuerta, Bonichot, Arabadjiev, Prechal, Toader, Lycourgos, Rosas, Ilešič, Safjan, Švaby, Vajda, Rodin

(Advocate General: M. Bobek)

Equal treatment in employment and occupation – Difference of treatment on grounds of religion or belief – Direct and indirect discrimination – Whether it may be relied upon in a dispute between individuals – Obligations of private employers and national courts resulting from the incompatibility of national law with Directive 2000/78

Article 2(2)(a) Directive 2000/78/EC – Articles 10, 21 and 47 of Charter of Fundamental Rights of the European Union – Article 17 of Treaty on the Functioning of the European Union

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\* Pierpaolo Gori, judge at the Italian *Cour de Cassation*. *A Ginevra e Leonardo, per il tempo (da) loro sottratto*.

<sup>1</sup> All views expressed are strictly personal.

*The Egenberger ruling<sup>2</sup> is the first major judgment from the Court of Justice of the European Union playing a balance exercise between the autonomy rights of religious organizations, and the right of workers of such institutions, having regard to discrimination based on grounds of religion or beliefs. This commentary aims to put the Egenberger ruling in the context of the notion horizontal effect.*

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2 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257.

## 1. Introduction

This article will commentate the effects of the Egenberger ruling. In the following section, this contribution focuses on how the European Court of Human Rights had already identified, extensively, individual criteria in cases concerning conflicts between freedom of religion and other human rights protected. Apparently, the applicable regulation in EU Law and in the Convention is similar,<sup>3</sup> and the ECtHR indeed, referring *inter alia* to Council Directive 2000/78/EC of 27 November 2000 (the ‘Directive’), already established a general framework for equal treatment in employment and occupation.<sup>4</sup>

Such comparison is aimed to consider potential tensions with the ECHR system, namely in the light of indirect discrimination regarding freedom of religion in working places.<sup>5</sup>

The second part of the Commentary (Section 3), analyzes under which terms the ECJ judgment is remarkable, not solely for its substantial regulation on freedom of religion through, an original ‘balance exercise’ and proportionality test:<sup>6</sup> *Egenberger* is interesting under the procedural corner of fundamental rights protection as well.

The Court of Justice already established that fundamental rights are entitled not only to ‘vertical direct effects’,<sup>7</sup> but also to ‘horizontal direct effects’ in EU Law,<sup>8</sup> provided that the object of the review falls within Article 51(1) Charter, and that the provision is self-sufficient, unconditional, and does not require to be implemented, not even by national law, to confer on individuals a right over which they can rely as such in disputes with other individuals.<sup>9</sup>

However, this landmark-case inaugurated a series of rulings, delivered in a short span of time,<sup>10</sup> where the Court of Justice has further elaborated the possibility

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3 See *infra*, section 2.2 of the paper.

4 *Infra*, Sections 2.3 and 2.4.

5 See Sections 2.1 and 2.5.

6 Section 3.1, *infra*.

7 Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321.

8 Section 3.2.

9 Case C-144/04 *Werner Mangold v Rüdiger Helm* EU:C:2005:709; Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* EU:C:2010:21; Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* EU:C:2014:2. K. Lenaerts and J.A. Gutierrez-Fons, ‘The European Court of Justice as the Guardian of the Rule of “EU Social law”’, in F. Vandenbroucke, C. Barnard and G. De Baere (eds) *A European Social Union after the Crisis* (2017), at p. 407 *et seq.*

10 See Section 3.3.

of direct horizontal effects from the EU Charter of Fundamental Rights (the ‘Charter’), sufficient in itself to confer on individuals rights which they may rely on as such in disputes within a field covered by EU law, without need to be read in conjunction with the Directive. As result of *Egenberger*, far-reaching consequences on the national regulatory framework implementing the Directive are foreseeable, and this may lead to difficulties in the execution of ECJ judgments at a national level.<sup>11</sup>

A brief conclusion, in Section 4 of the paper, offers a few findings to the reader on the subject.

## 2. Differences about Freedom of Religion’s Protection under the ECHR and EU Law

### 2.1 *Religion, an individual Matter?*

In November 2012 a private subject, Evangelisches Werk, published an offer of fixed-term employment for a project for producing a report regarding the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. The offer of employment specified the conditions to be satisfied by candidates and, one of these, reads as follows: ‘*We presuppose membership of a Protestant church or a church belonging to the [Working Group of Christian Churches in Germany] and identification with the diaconal mission. Please state your church membership in your curriculum vitae.*’ Ms Egenberger, of no denomination, applied for the post offered and, although her application was shortlisted after a preliminary selection by the employer, she was not invited for an interview. Ms Egenberger brought an action before the *Arbeitsgericht* and then the case came before the *Bundesarbeitsgericht*, the Federal Labour Court in Germany, which referred a preliminary ruling to ECJ. It was uncertain whether such criteria were relevant for the interpretation of Article 4(2) of Directive 2000/78/EC,<sup>12</sup> whether the difference of treatment on grounds of religion could regard a recruitment stage, and whether Article 17 of Treaty on the functioning of the EU (TFEU) had an effect on the interpretation of that provision. The referring court also questioned whether national judges had to carry out a comprehensive review, or merely a review of plausibility.

11 *Infra*, Section 3.4.

12 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Equality Directive) [2000] OJ L 303/16.

The latter implied that the labour court could not call into question activities that the church itself described as ‘close’ or ‘distant’ from its core message and beliefs.<sup>13</sup>

## 2.2 Relevant EU Provisions

Ms Vera Egenberger relied first of all on the Directive, aimed to prohibit direct and indirect discrimination in employment on grounds of religion, gender, and sexual orientation.<sup>14</sup> Although the main purpose of the Directive is to lay down a general framework contrasting discrimination, among *alia*, on grounds of religion or belief, under Article 4(1) it does afford protection for the autonomy of religious organisations as well.<sup>15</sup> Indeed, a discrimination measure may be imposed by an employer where “*by reason of the nature of the particular occupational activities or of the context within which they are carried out*” as long as the measure reflects a “*genuine and determining occupational requirement, provided the objective is legitimate and the requirement is proportionate*”. This regulation is in line with the previous Declaration No. 11 added to the last act of the Treaty of Amsterdam.<sup>16</sup>

A key provision of the Directive is laid down by Article 4 (2):

*‘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*

13 Egenberger, *supra* note 2, paras. 24 - 41.

14 P. Stein, ‘Diskriminierungsschutz und Kirchenautonomie’ (2018) *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, pp. 277-283.

15 J. Jousen, ‘Der EuGH und die Kirchenzugehörigkeit von Beschäftigten’, (2018) *Europäische Zeitschrift für Arbeitsrecht*, pp. 421-435.

16 The Declaration on the Status of Churches and of Non-Confessional Organisations [1997] OJ C-340/133 provides: ‘*The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations.*’

*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.'*

In 2007, as amended by the Lisbon treaty, TFEU was adopted, and its Article 17(1) provides:

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

By means of Article 4(2), the Directive reconciles a balancing exercise between the right of autonomy of the religious institutions, as recognised by Article 17 TFEU and Article 10 Charter, with the prime aim of the Directive, protecting the *"fundamental right of workers not to be discriminated against on grounds of their religion or belief"*.

Therefore, *"The objective of Article 4(2) of Directive 2000/78/EC is thus to ensure a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief, in situations where those rights may clash."*<sup>17</sup> However, Ms Egenberger claimed that Article 4(2) Directive had to be read not solely, but in the light of Articles 21 and 47 Charter, protecting, respectively, the right not to be discriminated and the right to effective remedies.<sup>18</sup>

The relevant part of Article 21(1) Charter (Non-discrimination) states: *'Any discrimination based on any ground such as ... religion or belief ... shall be prohibited.'*

Article 47(1) Charter (Right to an effective remedy and to a fair trial) reads as follows: *'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'* The ECJ reaffirmed that the Directive, source of secondary EU law, is a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 Charter.<sup>19</sup>

<sup>17</sup> *Egenberger*, supra note 2, para. 50.

<sup>18</sup> K. Klocke and H. Wolters, 'Die Reichweite der Religionsfreiheit im Rahmen kirchlicher Arbeitsverhältnisse - Mit Besprechung zu EuGH, 17.4.2018 - C-414 - "Egenberger", (2018) *Betriebs-Berater*, pp. 1460-1465.

<sup>19</sup> *Egenberger*, supra at note 2, para 47.

Furthermore, it held that Article 47 Charter applied to a dispute such as that in the main proceedings, given that the national relevant regulation implemented the Directive in Germany for the purposes of Article 51(1) Charter ('Scope'), and taken in to account that the dispute concerned two private parties, namely a peculiar employer such as a religious institution seeking respect for her own autonomy, and an individual who alleged a difference of treatment on grounds of religion in connection with access to employment,<sup>20</sup> claiming to be subject to indirect discrimination.

### 2.3 *Indirect Discrimination on Grounds of Religion or Belief in ECtHR Case-Law and in EU Law*

Although in *Egenberger* the employer made reference both to the guarantee of freedom of religion or belief, protected by Article 10 Charter, and to Article 17 TFEU,<sup>21</sup> the ECJ relied extensively on constitutional principles to reinforce its decision that excessive margin had been provided for religious organizations by German legislation in choosing their own workers.<sup>22</sup> Indirect discrimination on grounds of religion is described by Article 2(1) letter b) of the Directive 2000/43<sup>23</sup> ('Concept of discrimination') as a condition where, in an employment context there is '*an apparently neutral provision, criterion or practice [that] would put persons having a particular religion or belief ... at a particular disadvantage compared to other persons*', without being pursuant a legitimate aim, or the means to achieve such goal are considered not appropriate or necessary.

Article 10 Charter reproduces within EU law, almost literally, the protection for religious freedom enshrined by Article 9 of the European Convention on Human Rights (ECHR), and indeed, according to the Explanations relating to the Charter of Fundamental Rights, Articles 9 ECHR and 10 of the Charter are seen as equal rights, in accordance with Article 52(3) of the latter. However,

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20 *Egenberger*, supra note 2, paras 47-49.

21 A. Junker, 'Gleichbehandlung und kirchliches Arbeitsrecht - Ein deutscher Sonderweg endet vor dem EuGH', *Neue juristische Wochenschrift* (2018) 1850-1853.

22 A. Sagan, 'Arbeitsrecht: Unterschiedliche Behandlung von Bewerbern wegen ihrer Konfession im Stellenbesetzungsverfahren eines kirchlichen Arbeitgebers', *Europäische Zeitschrift für Wirtschaftsrecht* (2018), 386-387.

23 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

Freedom of religion and protection against indirect discrimination<sup>24</sup> have different purposes and a partially different meaning under the Convention and in EU law.

Freedom of religion<sup>25</sup> is directed, *inter alia*, to grant an individual freedom to choose and maintain a specific belief. Protection against discrimination aims to mitigate difficulties faced by believers for choosing a specific religion or belief. The importance of the difference is perceivable in the ECtHR *Eweida* judgment.<sup>26</sup> Ms Eweida was a member of the check-in staff working for a private company. She was requested by the employer to conceal under her uniform a cross she displayed over her uniform. After a denial she was sent home without salary, until she chose to comply with her contractual obligation. After a removal of the ban on wearing the cross, according to a new policy, the employee could work again as she used to, but the company refused to compensate her for the earnings lost in the meanwhile. Ms Eweida lodged a case in front of domestic courts, for damages claiming to be victim of indirect discrimination, in violation of the national regulation implementing the Directive and complaining of a breach of her right to manifest her religion, contrary to Article 9 ECHR as well. National Courts held that the concept of indirect discrimination implied discrimination against a defined group, and dismissed her application on the grounds of the fact that she had not established evidence of a group disadvantage. The applicant contested such approach, but, in any case, in front of the Strasbourg Court, characterized her decision to wear the cross as a personal choice rather than a condition imposed by her Christian religion.

In conclusion, this brief survey shows that, due to its mainly individualistic approach, the freedom of religion falls under the scope of the Convention easier, and therefore it is easier for an applicant as such to lodge a case in front of the Strasbourg Court. However, the EU Law provides a deeper protection regarding the freedom of religion, due to role played by the concept of indirect discrimination as developed by the ECtHR case-law vis à vis the ECJ's.

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24 See FRA and ECtHR joint publication, Handbook on European non-discrimination law, European Union Agency for Fundamental Rights <[https://fra.europa.eu/sites/default/files/fra\\_uploads/1510-FRA-CASE-LAW-HANDBOOK\\_EN.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf)> (accessed 28 August 2019).

25 Freedom of Conscience and Religion is a broad definition in EU law, implying, in particular, the freedom for everyone to manifest his religion or belief, in worship, teaching, practice and observance: see Case C-25/17 *Jehovan todistajat* EU:C:2018:551, para. 46.

26 ECtHR, *Eweida and Others v the United Kingdom*, Appl. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013.



## 2.4 *Freedom of Religion in the ECHR*

According to the ECtHR case law, although there is room for the protection under Article 9 ECHR of the institutional and collective aspects of religious freedom,<sup>27</sup> the main approach to freedom of religion is individualistic, in line with the liberal architecture of the traditional international 'European Human Rights Regime.'<sup>28</sup> Such liberty indeed primarily concerns individual conscience and autonomy, and encompasses the relationship between Divinity and human beings, and its denial as well. This perspective leads to important consequences: on one hand both religious and non-religious world views fall within the scope of Article 9 ECHR, as long as the latter point of view demonstrates sufficient 'cogency, seriousness, cohesion and importance'.<sup>29</sup> Such an approach helps to avoid difficult definitions of the content of what a religion may be or may not be, a perilous view initially shared by the ECtHR in early case-law.<sup>30</sup> On the other hand, freedom of religion is considered a typical relative right, therefore falling in the balance between other human rights enshrined by the Convention, and these rights contribute to shape the limits of the freedom, through an extensive rights-focused case law, developed over decades by the ECtHR.

Such a liberal approach, although it has many advantages in reflecting and protecting a pluralistic and democratic society, however falls short in understanding fully some elements characteristic to religion-state norms, only imperfectly codified in individual rights. For instance, in the famous Italian case *Lautsi*,<sup>31</sup> where the litigation concerned the public and permanent display of a crucifix in classroom, the panel sitting in the Chamber and then in the Grand

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27 ECtHR, *Fernández Martínez v Spain* (Grand Chamber), Appl. No. 56030/07, judgment of 12 June 2014, para. 127. '*Religious communities traditionally and universally exist in the form of organised structures (...). The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.*'

28 A. Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1 *European Journal of International Relations*, Issue 2, at p. 157 *et seq.*; J. Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (2012), at p. 7 *et seq.*

29 ECtHR, *Bayatyan v Armenia* (Grand Chamber), Appl. No. 23459/03, judgment of 7 July 2011, para. 110.

30 *Eweida*, *supra* note 26, para. 37.

31 ECtHR, *Lautsi and Others v Italy* (Grand Chamber), Appl. No. 30801/06, judgment of 18 March 2011.

Chamber, was deeply divided in assessing how a ‘cultural exception’ could be unified with the rights-focused traditional approach of the ECtHR.

There was a clear trend, if not a proper ‘consensus’, emerging from comparative analysis encompassing many Member States within the Council of Europe, but the solution found was nonetheless an enlargement of the margin of appreciation afforded to the responsible Member State. An indirect religious influence was eventually considered acceptable, on the grounds of the respect for national cultural identities and traditions, although the result was criticised by several scholars as a clear limitation of the foreseeability and consistency of the case-law in matters of religion.<sup>32</sup>

## 2.5 *Potential Tensions between the ECJ and the ECtHR*

A potential tension between the ECJ and the ECtHR is due to the fact that EU legislation covers freedom of religion in terms similar to Article 9 of the ECHR, but the Directive grants a very advanced protection from discriminations, based on religion, on specific terms. Of course, Article 14 ECHR offers protection against discrimination as well, but in relation to the rights enshrined within the Convention only.<sup>33</sup> Concerns may arise in particular in two sectors of labour law, where there is substantial EU regulation. The first in relation to the question of indirect discrimination on grounds of religion towards the non-discrimination EU Directives. The second about the rights of employees of religious organizations.<sup>34</sup>

The Directive requires a ‘particular disadvantage’, notion to be interpreted as ‘exceptional’ or ‘unusual’ and, given that the relevant provision of the Directive is worded in the plural and that, usually, indirect discrimination cases were lodged in front of ECJ by single believers alleging praxis hitting identifiable groups, like minorities, even within a given religion, single disadvantages not perceived as such by other believers are not relevant in principle.

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32 See ECtHR Research Division’s, *Overview of the Court’s case law on freedom of religion* [2013], available at <[https://www.echr.coe.int/Documents/Research\\_report\\_religion\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf)> (accessed 1 September 2019).

33 T. Khaitan, *A Theory of Discrimination Law* (2015), at p. 15 *et seq.*

34 R. McCrea, ‘Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination and the Secular State’, (2016) 5 *Oxford Journal of Law and Religion*, Issue 2, pp. 183-210, at pp. 198-99.

By contrast, in relation to the rights protected by the ECHR, as above seen religious freedom is primarily a matter of individual thought and conscience, although the protection encompasses manifestation and practice of the belief in community with others and in public, in the respect of the right of the others,<sup>35</sup> but for the applicant there is no need to be victim of a group disadvantage to fall within the scope of Article 9.

An exemplification can show the ECtHR approach. Ms Ladele was registrar in the UK responsible, among *alia*, for same-sex unions (civil partnerships) registration, and claimed in Strasbourg that her right to freedom of religion had been breached, because the State (UK) failed to exempt her from a national regulation imposing to avoid discrimination on grounds of sexual orientation, while carrying out her public functions. The ECtHR stated that she *'did not complain under Article 9 taken alone, but instead complained that she had suffered discrimination as a result of her Christian beliefs, in breach of Article 14 taken in conjunction with Article 9. For the Court, it is clear that the applicant's objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs. The events in question fell within the ambit of Article 9 and Article 14 is applicable.'*<sup>36</sup>

Ultimately, for the ECtHR the proportionality test was decisive, and in particular the large margin of appreciation left to national authorities in this field - both under the angle of Article 9 and of Article 14, leading to a declaration of non-violation, without any analysis of whether the objection was characteristic of the applicant only, or encompassed a group of believers in comparable positions.<sup>37</sup>

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35 *Eweida and Others*, supra note 26, para. 80.

36 *Ibid.*, para. 103.

37 *Eweida*, supra note 26, para. 106: *'It remains to be determined whether the means used to pursue this aim were proportionate. The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights (see, for example, *Evans v the United Kingdom* [GC], no. 6339/05, para 77, ECHR 20071). In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. It cannot, therefore, be said that there has been a violation of Article 14 taken in conjunction with Article 9 in respect of the third applicant.'*

Under the ECHR therefore, once the applicant showed the interference from the State with her religious freedom, claiming that such (non) action was discriminatory as well did not add any extra protection. The scheme takes place even when the interference not directly comes from a national Authority, but from another individual. In case of clashes with a position covered by specific ‘positive obligations’ the State is required to avoid human rights violations between individuals. Such view of indirect religious discrimination is in line with the focus on individual rights enshrined by the Convention, and therefore on protecting believers from discrimination as individuals.

This reading was reaffirmed by other ECtHR landmark cases on religious freedom, such as the case of *SAS*, where the applicant, challenging a prohibition on public face-veiling, relied not only on Article 9, but on Articles 8 (respect for his private and family life) and 10 (freedom of expression) ECHR as well, taken separately and in conjunction with Article 14 ECHR.<sup>38</sup> These claims the panel unanimously declared admissible, but rejected on the merits. Relative (not absolute) rights such as encompassed by Article 8 and 10 ECHR do equally apply to individuals without connection with religious beliefs.<sup>39</sup> If this is true, the conclusion reached in *SAS* seems to confirm that under the ECHR a claim based on freedom of religion does not require on the victim the difficult proof of being part a group disadvantage, and therefore it is easier to be lodged, but in principle freedom of religion as such does not grant a higher degree of protection to the applicant.<sup>40</sup>

Then another a partial divergence with the EU law deserves to be recognized, having regard to the discrimination on grounds of religion or belief. Indeed, the Directive regulates both direct and indirect discriminatory conditions as a tool to mitigate exceptional disadvantages suffered by persons not taken alone, but for the fact they share with others a common identity based on religion or belief.

Again, case analysis can better explain the partially different approach. In *Egenberger*, the German referring court was aware of the more group focused notion of freedom of religion in EU Law, when asked to the ECJ whether the prohibition of discrimination on grounds of religion or belief in Article 21 (1) Charter

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38 ECtHR, *SAS v France* (Grand Chamber), Appl. No. 43835/11, judgment of 1 July 2014, para. 74.

39 P. Gori, *ECHR Article 10: how does the Protection work?* (2014), at p. 5 *et seq.*

40 R. McCrea, *Salvation outside the church? The ECJ rules on religious discrimination in employment*, EU Law Analysis <<http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html>> (accessed 26 August 2019).

did attribute ‘a subjective right on an individual’ which could be enforced by that person before national judges. In the language of the judgment, German, the wording used ‘*dem Einzelnen ein subjektives Recht verleihe*’ leaves no reasonable doubt about. However, the specific circumstances of the case, whereas the individual condition of the worker prevented from getting hired, and probably the case-by-case approach characteristic to ECJ as well, left no need for a systematic interpretation on the matter.

An early answer from the ECJ delivered on 22 January 2019 with the judgment *Cresco Investigation*<sup>41</sup>, seems to confirm such reading, having the Court made reference to a ‘disadvantaged group’ on grounds of religion, connected with the broader scope of EU law, whose task encompasses, but goes beyond issues related to human rights.<sup>42</sup> In that preliminary ruling, the Austrian national judges referred (*inter alia*) a question about how Article 21 Charter, read in conjunction with Article 2(5) Directive, had to be interpreted. The national legislation granted the right to paid public holiday to only a relatively small group of members of certain churches, other than the Roman Catholic church, followed by the majority of the population. The referring court asked if such national regulation was affected or not by the Directive, taking into account it concerned a measure which, in a democratic society, was necessary to ensure the protection of the rights and freedoms of others, particularly the right freely to practise a religion. The ECJ found such regulation carried a direct discrimination, and maintained that ‘*In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.*’<sup>43</sup>

The above conducted analysis seems to confirm a partially different approach between the ECJ and the ECtHR on freedom of religion, potentially driving to diverging results in settling cases, since seems to be recognizable a more group-focused approach of EU law, in front of a rights-focused one underpinning the ECtHR case-law.

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41 Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi* EU:C:2019:43, paras. 36 *et seq.*

42 F. Cranmer, Good Friday holidays and discrimination: *Cresco v Achatzi*, Law & Religion UK <<https://www.lawandreligionuk.com/2019/01/22/good-friday-holidays-and-discrimination-cresco-v-achatzi/>> (accessed 26 August 2019).

43 *Cresco Investigation*, supra note 41, paras. 28 (2) and 80.

### 3. Egenberger's Innovative Path

#### 3.1 *Balance Exercise and Proportionality Test*

*Egenberger* is a classic case where the very essence of the litigation is focused on the balance exercise between conflicting fundamental rights protected by the Charter,<sup>44</sup> and in perspective by the ECHR as human rights as well. This leads the interpretation of the source of secondary law and, by implication, of the national law implementing the Directive itself. The fundamental rights at stake were indeed, for the employer the right to self-determination, protected both by the Charter and the TFEU and, for the (aspiring) employee, the right not to be discriminated taken with the right to an effective remedy, equally protected by the Charter.

Sharing the Opinion of Advocate General Tanchev,<sup>45</sup> the ECJ found the German law not compliant with the Directive against discrimination.<sup>46</sup> This conclusion followed a key consideration, exposed in paragraph 69 of the judgment: “Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.”

The ECJ acknowledged the balancing exercise required by Article 4(2) Directive, between the freedom of organization of a religious institution and the protection against discrimination on grounds of religion or belief, the ECJ acknowledged is a rather difficult task. States, in accordance with the ECtHR case-law, on one hand are not allowed in principle to assess whether religious beliefs or even the means used to express such beliefs are legitimate or not.<sup>47</sup>

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44 E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union* (2019), at p. 105.

45 Case C-414/16 *Egenberger* EU:C:2017:851, Opinion of the AG Tanchev.

46 M. Fuhlrott, ‘Unterschiedliche Behandlung von Bewerberinnen wegen ihrer Konfession im Stellenbesetzungsverfahren eines kirchlichen Arbeitgebers’ (2018) *Neue Zeitschrift für Arbeitsrecht*, pp. 573-575.

47 ECtHR, *Hasan and Chaush v Bulgaria*, Appl. No. 30985/96, judgment of 26 October 2000, para. 62; *Fernández Martínez*, supra note 27, para. 129.

However, they are expected to fulfil certain positive obligations,<sup>48</sup> ensuring that no infringement of the worker's rights takes place, even between private parties, due to discriminations, on grounds inter alia of religion or belief. A point key to this test, is to show the occupational requirement imposed by the religious institution (church or other organisation) as 'genuine, legitimate and justified', having regard to its ethos.

The ECJ elaborates on the meaning of this triple occupational requirement, reading such provision of Article 4(2) Directive in the light of the fundamental rights enshrined by the Charter and of proportionality, a general principle of the EU.

The ECJ makes reference to an "*objectively verifiable (...) link between the occupational requirement imposed by the employer and the activity concerned.*"<sup>49</sup> This link may well be recognizable due to the nature of the activity, close to the core of the life of the institution, concurring in the determination of the ethos of the religious body or church, or due to the circumstances in which the activity is required, for instance to present credibly the institution to the outside world.<sup>50</sup> It is upon the religious organisation to prove the supposed risk of causing harm to its ethos or to its right of autonomy, probable and substantial, so that imposing such a requirement is necessary, and that the measure is 'proportionate', a requirement not provided by the Directive, but already recognized as general principle of EU law by ECJ established case law.<sup>51</sup>

The wording itself used by ECJ reminds of the proportionality test usually carried out by the ECtHR while dealing with Article 9 ECHR. This test takes place after the Strasbourg Court is satisfied with the evidence of the legal base of the interference, and with the demonstration that it was pursuing a legitimate aim mentioned by Article 9(2).

This is a remarkable conclusion, since the need for a proportionality evaluation was not evident in text, and therefore the ECJ needed to rely extensively on the Charter and on general principles of law to affirm the principle. In substance,

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48 S. Denys, *Différences de traitement fondées sur la religion et droit de l'Union* (2018), Étude No. 6, pp. 5-7.

49 Egenberger, supra note 2, paras 61 - 63.

50 J. Joussen, 'Religionszugehörigkeit als Einstellungskriterium' (2018) *ZMV - Die Mitarbeitervertretung*, pp. 162-164.

51 Egenberger, supra note 2, quoted, to that effect, among alia, Case C-206/13 *Siragusa v Regione Sicilia* EU:C:2014:126, para. 34.

the ECJ modelled its reasoning on the ECtHR traditional review of the national courts' assessment.

Indeed, following a traditional approach on the proportionality of the interference, from a private company against the applicant's freedom of religion covered by positive obligations on the Government to prevent discrimination on grounds of religion, the Court of Human Rights held in favour of Ms Eweida's claim. The ECtHR, stated that her right to freedom of religion protected under the Convention had been breached, without need of evidence that the applicant '*acted in fulfilment of a duty mandated by the religion in question*'. The Strasbourg Court was instead satisfied with her proof of the existence of a 'sufficiently close and direct nexus between the act and the underlying belief'.<sup>52</sup> Interestingly, this proportionality test is preferred by *Egenberger* although the ECtHR in recent years considered a partially different approach on the proportionality assessment, at least in controversial and 'not neutral' matters, as it is the case of religious issues, reason why the Court affords to the State a wide margin of appreciation.<sup>53</sup> In *Fernández Martínez* for instance, the ECtHR was well aware of the 'ministerial exception' doctrine, recently shared by the US Supreme Court,<sup>54</sup> a doctrine according to which otherwise applicable laws prohibiting employment discrimination could not be applied to 'ministerial employees'. Accordingly, the Strasbourg Court partially modified her balance exercise between the rights involved to evaluate if the interference could be considered 'necessary in a democratic society'.<sup>55</sup> This could be a reaction to critics moved in the past about the extensive but incoherent use in the traditional proportionality test of the 'margin of appreciation' doctrine,<sup>56</sup> and the connected use of 'consensus' on a specific matter, as eventually displayed by comparative analysis carried out within member States, to widen or restrict the margin of appreciation for the responding State.

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52 *Eweida*, supra note 26, para. 82.

53 ECtHR, *Sindicatul "Păstorul cel Bun" v Romania* (Grand Chamber), Appl. No. 2330/09, judgment of 9 July 2013, para. 160.

54 United States Supreme Court's judgment of 11 January 2012 in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission et al.*

55 *Fernández Martínez*, supra note 27, paras. 101 and 124 - 125.

56 G. Letstas, 'The truth in autonomous concepts: How to interpret the ECHR?', (2004) 15 *European Journal of International Law*, 279-296; J.A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law', (2004) 11 *Columbia Journal of European Law*, pp. 113 et seq.; Y. Arai-Takahashi, *The Margin Of Appreciation Doctrine and The Principle of Proportionality in the Jurisprudence of ECHR* (2002), pp. 197 et seq.



### 3.2 *Egenberger's direct Horizontal Effect*

Further, the judgment is interesting for its findings about the direct horizontal effects of the Charter, sufficient in itself, with consequences on the national law implementing the Directive.<sup>57</sup> At least some of the Fundamental rights conferred by the Charter, insofar as they fulfil requirements laid down by the ECJ case-law, may be immediately applicable in disputes between individuals, and if the interference comes from a private act or conduct as well, with considerable impact on national regulation derogating or even implementing the Directive concerned.

In this way, recalling her previous *Mangold* landmark case, the ECJ elaborated an interesting development of the 'EU direct horizontal effect' theory:<sup>58</sup> 'As regards its mandatory effect, Article 21 Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (...)'. Equally, Article 47 Charter reads: 'on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.'<sup>59</sup> Domestic courts are then required to take into account the two provisions, both mandatory and unconditional: the national framework has to observe Articles 21 and 47 of the Charter 'while possibly balancing the various interests involved, such as respect for the status of churches as laid down in Article 17 TFEU, it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings ...'<sup>60</sup>

Through interpretation, subsequently, the ECJ held that whether it is not possible to reconcile in a dispute between private parties Articles 21 and 47 Charter with national regulation, the national judge has to hold the latter as inapplicable, if needed.

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57 L. Cappuccio, 'L'efficacia diretta orizzontale della Carta dei diritti fondamentali nella decisione Vera Egenberger' (2018) *Quaderni costituzionali*, pp. 708-711.

58 C. O'Mara, 'Horizontal enforcement of general principles of EU employment equality law - Mangold revisited' (2018) 15 *Irish Employment Law Journal*, Issue 3, pp. 91-94.

59 *Egenberger*, supra note 2, paras. 79 - 80.

60 *Egenberger*, supra note 2, paras. 81.

This finding is considerably innovative, relying on the previous *Mangold* doctrine,<sup>61</sup> but reading it in a rather different context, since at that time the Lisbon treaty and the Charter did not exist. Before *Egenberger*, the issue of whether the Directive read in the light of the Charter's rights could develop direct effects in a dispute between private parties was debated. An established ECJ case-law denied such effect, on the grounds of the consideration that 'it should be borne in mind that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.'<sup>62</sup>

However, an important argument in favour of direct horizontal effects of the Charter in itself has to be found in the final part of its preamble, which states that '*Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.*'. More, relying mainly on this provision in a more recent series of cases the ECJ seems to attribute a sort of 'derivative' horizontal direct effect to secondary sources of EU law like directives, when read in conjunction with some provisions of the Charter, in the sense that the existence of a directive can attract a dispute between individuals in their own scope, under certain conditions.<sup>63</sup>

This second trend developed a kind of general twofold test to be applied to the rights protected by the Charter for the purpose, to establish if they may lead not only to vertical, but to horizontal direct effects as well. The latter is indeed in principle an exception rather than the standard, as the ECJ has made clear in several rulings.<sup>64</sup>

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61 *Mangold*, supra note 9, para. 77.

62 Case C-282/10 *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* EU:C:2012:33, para. 42; consistent with previous settled case-law: Joined Cases C-397/01 to C-403/01 *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* EU:C:1994:584, para. 109; Case C-91/92 *Paola Faccini Dori v Recreb Srl* EU:C:1994:292, para. 20; Case C-152/84 *Marshall v Southampton and South-West Hampshire Health Authority* EU:C:1986:84, para. 48.

63 Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* EU:C:2018:874, paras. 73-75. See Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer* EU:C:2018:337, Opinion of the AG Bot, para. 75. This case, about 31(2) of the Charter, speaks of 'ambiguity' of such trend, in reference to Case C-441/14 *Dansk Industri (DI) v Sucession Karsten Eigil Rasmussen* EU:C:2016:278, paras. 22 and 27; and *Küçükdeveci*, supra note 9, paras. 50 - 51; *Mangold*, supra note 9, paras. 75-78.

64 Case C-569/16 *Bauer* EU:C:2018:871, para. 84; *AMS*, supra note 9, paras. 44 - 45. This case is about Article 27 of the Charter; *Max-Planck*, supra note 63, para. 73.

The first condition to be checked is if the rights at stake are unconditional in nature. This demands the provisions of the Charter to be ‘self-sufficient’,<sup>65</sup> in the sense they do not need ‘to be given concrete expression by the provisions of EU or national law’, although secondary law may well lay down ‘certain conditions for the exercise of that right’, or even specify certain characteristics of the right concerned, namely its extent.<sup>66</sup> A line should at this regard be drawn between ‘rights’ and ‘principles’ set out in the Charter, according to the Explanations relating to the Charter of Fundamental Rights of the European Union, 2007/C 303/02, under Article 52(5): ‘Paragraph 5 clarifies the distinction between ‘rights’ and ‘principles’ set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities.’

The ‘self-sufficient’ requirement, should therefore rule out, Articles 25, 26 and 37 where principles are settled, and other provisions of the Charter, namely Articles 23, 33 and 34, containing both elements of a right and of a principle.<sup>67</sup> If the ECJ is satisfied with this first step, a second requirement is needed to access the horizontal effect, because the relevant provisions of the Charter have to be mandatory. In principle, relative rights could also be mandatory, exactly as absolute rights can, and what is really needed is clarity and precision in their very wording.<sup>68</sup> In *Egenberger*, the two-fold test is applied in para 76: ‘The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely

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65 See Case C-569/16 *Bauer* EU:C:2018:337, Opinion of the AG Bot, para. 80.

66 *Max-Planck*, supra note 63, para. 74; *Bauer*, supra note 64, para. 85.

67 Such interpretation seems to be confirmed by ECJ findings, in *AMS*, supra, note 9, para 39: ‘Nevertheless, the Court has stated that this principle of interpreting national law in conformity with European Union law has certain limits. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem (see Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100, and *Dominguez*, paragraph 25)’. More recently, see Case C-385/17 *Verbraucherzentrale Berlin eV v Unimatic Vertriebs GmbH* EU:C:2018:1018, para. 51., specifically on the ‘horizontal direct effect’ doctrine.

68 Case C-537/16 *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa* EU:C:2018:193, paras. 65 - 65., about Article 50 of the Charter.

on ...”<sup>69</sup> It remains to verify whether, after *Egenberger*, the ECJ reiterated the principle of horizontality of the Charter’s rights, under the above mentioned conditions. Under a partially different angle, it has to be seen how national authorities, especially Constitutional Courts, are going to apply the new ECJ’s horizontal-effect decisions.<sup>70</sup>

### 3.3 *Aftermath: ECJ’s Recent Developments*

The line of reasoning outlined in *Egenberger* under paragraphs 72-81, has been immediately and consistently reaffirmed in a series of important AG opinions<sup>71</sup> and Grand Chamber rulings, starting with *IR vs JQ*, a judgment delivered on 11 September 2018, concerning occupational activities within churches and other organisations the ethos of which is based on religion or belief. There, the ECJ relied fully on *Egenberger*’s findings on the possibility for the Directive to be read in conjunction with Article 21(1) Charter for horizontal effects.<sup>72</sup> In *Max-Planck*, judgment delivered on 6 November 2018, the ECJ quoting *Egenberger* held that ‘*the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between*

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69 See B. Schinkele, ‘Der kirchliche “Tendenzschutz” vor dem EuGH’ (2018) 7 *Ecolex* (2018), pp. 653-656.

70 A. Edenharter, ‘Grundrechtskonforme gerichtliche Kontrolle vorgeschriebenen Religionszugehörigkeit für eine kirchliche Stelle’ (2018) 13 *Deutsches Verwaltungsblatt*, pp. 867-871.

71 See, among others references, Case C-396/17 *Martin Leitner v Landespolizeidirektion Tirol* EU:C:2001:476, Opinion of the AG Saugmandsgaard Øe, para. 67.

72 Case C-68/17 *IR v JQ* EU:C:2018:696, paras. 69-70: ‘*Before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal status as the treaties, that principle derived from the common constitutional traditions of the Member States. The prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law (see, to that effect, judgment of 17 April 2018, Egenberger, C414/16, EU:C:2018:257, paragraph 76). Accordingly, in the main proceedings, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision.*’. C.D. Classen, ‘Das kirchliche Arbeitsrecht unter europäischem Druck - Anmerkungen zu den Urteilen des EuGH (jeweils GK) vom 17.04.2018 in der Rs. C-414/16 (*Egenberger*) und vom 11.09.2018 in der Rs. C-68/17 (*IR*)’, (2018) 6 *Europarecht*, pp. 752-767.

*individuals*'.<sup>73</sup> In the coeval ruling *Bauer*, the ECJ used *Egenberger* as example for national judges of interpretation of national regulations in a manner consistent with EU law.<sup>74</sup> In *Cresco Investigation*, judgment delivered by the Grand Chamber on 22 January 2019,<sup>75</sup> the ECJ making reference to *Egenberger* has ultimately admitted the possibility of relying on Article 21(1) Charter for horizontal direct effects of the Directive, ruling that the Austrian law, to pay Good Friday as public holiday only for members of the Evangelical churches of the Augsburg and Helvetic confessions, the Old Catholic church and the Evangelical Methodist church, entailed a direct discrimination of the workers on grounds of religion.

Generally speaking directives can be interpreted and implemented having regard to the Charter, but their scope cannot in principle be widened by the latter, as expressly provided by Article 51(1) Charter.<sup>76</sup> Having said that, however in *Julian Hernández* the ECJ has interpreted the provision in partially derogatory terms, to widen the capacity of the directive involved, stretching the limits of its own scope, for the purpose of granting an effective implementation of the fundamental right at stake.<sup>77</sup> Again, in *Milkova*<sup>78</sup> the ECJ maintained that: '*... the national legislation applicable to the main proceedings falls within the implementation of EU law, which means that, in the present case, the general principles*

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73 *Max-Planck*, supra note 63, para 77. In *Max-Planck* the issue at stake regarded a period of paid annual leave, see para 74: '*The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, Egenberger, C414/16, EU:C:2018:257, paragraph 76).*'

74 *Bauer*, supra note 64, para. 68.

75 *Cresco Investigation*, supra note 41, paras. 76-77: '*The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (judgment of 17 April 2018, Egenberger, C414/16, EU:C:2018:257, paragraph 76). As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (judgment of 17 April 2018, Egenberger, C414/16, EU:C:2018:257, paragraph 77).*'

76 Article 51(1) Charter reads as follows: '*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union Law.*'

77 Case C-198/13 *Víctor Manuel Julian Hernández e.a. v Reino de España (Subdelegación del Gobierno de España en Alicante) e.a.* EU:C:2014:2055, para. 33.

78 Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* EU:C:2017:198, para. 54.

of EU law, including the principle of equal treatment, and of the Charter are applicable.<sup>79</sup> In conclusion, a remarkable series of decisions reaffirmed and further elaborated *Egenberger*'s findings, both under the angle of substantial protection of freedom of religion and under the procedural angle of the fundamental rights' 'direct effect doctrine'. Under the latter, ECJ's new course inaugurated with *Egenberger* with Article 21(1) Charter, sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual, is extended, for instance, in *Max-Planck* and in *Bauer*: 'where it is impossible to interpret a national rule such as that at issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the national court ... must disapply that national legislation'.<sup>80</sup> According to an interesting reading, this means that the existence of a directive can attract a dispute between private parties in the scope of the Charter, since the Charter cannot itself empower directives with direct horizontal effects, given that it is excluded by their own nature.<sup>81</sup> However, ECJ's wording could lead to a far reaching impact on the national regulation framework at stake.

### 3.4 Implementation at a National Level

Need for interpretation from the ECJ of a directive, to be read in connection with the Charter and in the light of the Explanations relating to the Charter, about issues where landmark cases from the ECtHR play a significant role - precisely the case settled in the *Egenberger* ruling - is not uncommon. However, there may be difficulties in the implementation and execution of the approach recently inaugurated.

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79 C-55/18 CCOO EU:C:2019:87, Opinion of the AG Pitruzzella, para. 94 follows a similar line of reasoning: 'The Court has already held, with reference to the right to annual leave, that Article 31(2) of the Charter can have direct effect in horizontal relations between individuals. Given that the structure of the right to the limitation of maximum working hours and to daily and weekly rest periods is the same as that of the right to annual leave, and given that these rights are all closely connected and are all intended to secure working conditions which respect the health, safety and dignity of workers, and that they are provided for in the same article of the Charter, the Court's case-law on the direct effect of Article 31(2) of the Charter in horizontal relationships between individuals can, in my opinion, be applied also with regard to the right to the limitation of maximum working hours and to daily and weekly rest periods.'

80 *Bauer*, supra note 64, para. 92.

81 L.S. Rossi, 'The *Küçükdeveci* ambiguity: "derivative" horizontal direct effects for directives?', *EU Law Analysis* <<http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html>> (accessed 28 August 2019). See also, in ECJ's case-law, *AMS*, supra note 9, para 36: 'even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (see Pfeiffer and Others, paragraph 109, and Case C-555/07 *Küçükdeveci* [2010] ECR I-365, paragraph 46).'

The line of reasoning laid down in *Egenberger* in paragraph 76, affirming that the prohibition of all discrimination on grounds of religion or belief under Article 21(1) Charter is mandatory as a general principle of EU law and ‘sufficient in itself to confer on individuals a right which they may rely on’, is a clear development of the *Mangold* doctrine. *Mangold* originated a series of cases that attracted criticism from national courts, especially from Constitutional courts, because its approach was thought to lead to potential legal unpredictability,<sup>82</sup> and a similar perception seems to face the new case-law started with *Egenberger*.

Danish authorities already expressed concerns for the recent developments of the *Mangold* and *Küçükdeveci* case-law carried on by the Grand Chamber in the *Ajos* ruling,<sup>83</sup> a decision about the direct applicability of the general principle prohibiting discrimination in relationships between private persons. The *Ajos* judgment, whose reasoning is close to *Egenberger*’s although not much elaborated, is already considered by Danish authorities a ruling *ultra vires*.<sup>84</sup> Then, there is the German perspective.<sup>85</sup> The established case-law of the German *Verfassungsgericht* reaffirms that fundamental rights already enjoy ‘*Drittwirkung*’, whereas indirect effect on third parties, and national courts are accordingly required to interpret the rules of private law.<sup>86</sup> Indeed, at the domestic level both the church (employer) and Ms Egenberger claimed Article 4(2) Directive needed to be read in the light of fundamental rights protected, *inter alia*,

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82 M. De Mol, *The Direct Effect of the Fundamental Rights of the EU* (2014), at pp. 345 *et seq.*

83 Case C-441/14 *Ajos A/S v Estate of Karsten Eigil Rasmussen* EU:C:2016:278, paras. 22 and 27: ‘... it is appropriate first of all to note that the source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States (see judgments in *Mangold*, C144/04, EU:C:2005:709, paragraph 74, and *Küçükdeveci*, Case C-555/07, EU:C:2010:21, paragraphs 20 and 21). It is also apparent from the Court’s case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law (see judgments in *Mangold*, Case C-144/04, EU:C:2005:709, paragraph 75, and *Küçükdeveci*, Case C-555/07, EU:C:2010:21, paragraph 21).’ And (...) ‘the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, must be interpreted as precluding, including in disputes between private persons, national legislation, such as that at issue in the proceedings before the referring court, which deprives’.

84 C. Eckes, *EU Powers Under External Pressure: How the EU’s External Actions Alter its Internal Structures* (2019), at p. 29.

85 H. Reichold and P. Beer, ‘Eine „Abmahnung“ des EuGH mit Folgen : neue Anforderungen an die kirchliche Personalpolitik nach dem Urteil in der Rechtssache Egenberger aus juristischer und theologischer Sicht’ (2018) *Neue Zeitschrift für Arbeitsrecht*, pp. 681-686; G. Thüsing and R. Mathy, ‘Diskriminierungsschutz von Stellenbewerbern und Auswählermessen von Einrichtungen mit kirchlichem Auftrag’ (2018) *Recht der internationalen Wirtschaft*, pp. 559-564.

86 *Lüth*, BverfGE 7, 198; in that very first case, delivered on 15 January 1958, the fundamental right concerned was the freedom of expression, Article 5 GG.

by the Charter, respectively on the one side the right to self-determination and on the other side the right not to be discriminated against with the right to an effective remedy. However, the German legal framework, rooting on Article 137 *Weimarer Verfassung* and on Article 140 *Grundgesetz*, gives limited room to national courts for a review of decisions taken by the Church or other religious institutions, and this could lead to tensions in the implementation of the new course.<sup>87</sup>

Again, *Küçükdeveci*, was originated by a German preliminary reference about national provisions disadvantaging younger workers, and reignited a tense situation between German authorities and the ECJ.<sup>88</sup> Moreover, the *Egenberger* ruling revived an important aspect of the ‘EU horizontal effect’ doctrine that, after *Mangold*, was specifically questioned by the employer - for having constitutionalized a large swath of the employer-employee relationship<sup>89</sup> in front of the German Constitutional Court, as *ultra vires* and inconsistent with the German constitution.<sup>90</sup>

The Italian Constitutional Court recently delivered a judgment about a litigation concerning data protection, referred by an administrative judge on the grounds of the lack of direct horizontal effect of the Directive 95/46/EC.<sup>91</sup> Although the relevant provisions of the Directive, Articles 6 and 7, were considered detailed and self-executing as well, and read in connection with Articles 7 and 8 Charter, the domestic judge referred the case to the Constitutional Court for a ‘centralized, ex post’ evaluation of the compatibility of national regulation with EU law, instead of referring a preliminary ruling to the

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87 J. Heuschmid, ‘Kirchliches Sonderarbeitsrecht ist unionsrechtswidrig’ (2018) 12 *Arbeit und Recht*, pp. 586-590.

88 J. Mathews, *Extending Rights’ Reach: Constitutions, Private Law, and Judicial Power* (2018), 82.

89 K. Friedemann, ‘Rückkehr der unmittelbar-horizontalen Grundrechtswirkung aus Luxemburg?’ (2018) 14 *Neue Zeitschrift für Arbeitsrecht*, pp. 894-900.

90 *Honeywell*, BverfGE 126, 286.

91 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.



ECJ.<sup>92</sup> In case of contrast between the Charter - given its constitutional content - and a national regulation, a consistent interpretation of the judgment of the Corte Costituzionale No.269/2017, required a prior centralized decision of the Constitutional Court itself, aimed to deliver an *erga omnes* decision on the legitimacy of internal law.<sup>93</sup> By some scholars, such approach seemed to be a break with an established traditional interpretation founded on the ‘*primauté*’ of EU law,<sup>94</sup> leading the ECJ to deliver the *Global Starnet* ruling.<sup>95</sup> Now, with the judgment No. 20/2019 delivered on 21 February 2019, the Corte Costituzionale in principle reaffirms her previous line of reasoning developed in 2017 (so called ‘*doppia pregiudizialità*’ doctrine)<sup>96</sup> but with a significant and express specification: national courts are free in any case to refer preliminary rulings to the ECJ<sup>97</sup>. Will this be sufficient to reconcile an approach rather different

92 See Corte Costituzionale, judgment no. 20/2019 delivered on 21 February 2019, para. 2.1. For a commentary on the judgment, see Ruggeri, ‘La Consulta rimette a punto i rapporti tra diritto eurounitario e diritto intero con una pronunzia in chiaroscuro (a prima lettura di Corte cost. n. 20 del 2019)’, *Consultaonline* (2019), available at <http://www.giurcost.org>; Pollicino and Resta, ‘Trasparenza amministrativa e riservatezza, verso nuovi equilibri: la sentenza della Corte costituzionale’, *Agenda Digitale* (2019), available at <https://www.agendadigitale.eu>; Bronzini, ‘La sentenza n. 20/2019 della Corte costituzionale italiana verso un riavvicinamento all’orientamento della Corte di giustizia?’, *Questione Giustizia* (2019), available at <http://questionegiustizia.it> (all links are accessed on 1 August 2019).

93 Corte Costituzionale, 14 December 2017 No.269, para. 5.1., about conflicts with EU law without direct effects: ‘... quando una disposizione di diritto interno diverge da norme dell’Unione europea prive di effetti diretti, occorre sollevare una questione di legittimità costituzionale, riservata alla esclusiva competenza di questa Corte, senza delibare preventivamente i profili di incompatibilità con il diritto europeo.’. See also para 5.2 about the Charter: ‘... laddove una legge sia oggetto di dubbi di illegittimità tanto in riferimento ai diritti protetti dalla Costituzione italiana, quanto in relazione a quelli garantiti dalla Carta dei diritti fondamentali dell’Unione europea in ambito di rilevanza comunitaria, debba essere sollevata la questione di legittimità costituzionale, fatto salvo il ricorso, al rinvio pregiudiziale per le questioni di interpretazione o di invalidità del diritto dell’Unione, ai sensi dell’Article 267 del TFUE.’. See Cosentino, ‘La Carta di Nizza nella giurisprudenza di legittimità dopo la sentenza della Corte costituzionale n. 269 del 2017’, 3, *Osservatorio sulle fonti* (2018), available at <http://www.osservatoriosullefonti.it>; Di Marco, ‘The “Path Towards European Integration” of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17’, *European Papers* (2017), available at <<http://www.europeanpapers.eu>> (accessed 1 August 2019).

94 V. Piccone and O. Pollicino (eds) *La Carta dei diritti fondamentali dell’Unione europea: Efficacia ed effettività* (Editoriale Scientifica 2018).

95 Case C-322/16 *Global Starnet Ltd v Ministero dell’Economia e delle Finanze and Amministrazione Autonoma Monopoli di Stato* EU:C:2017:985, para. 26: ‘In the light of all the foregoing, the answer to the first question is that Article 267(3) TFEU must be interpreted as meaning that a national court against whose decisions there is no judicial remedy is required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law even if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law.’.

96 See R.G. Conti, ‘Giudice comune e diritti protetti dalla Carta UE: questo matrimonio s’ha da fare o no?’, *GiustiziaInsieme*, available at <<https://www.giustiziainsieme.it/it/news/29-main/europa-corti-internazionali/591-giudice-comune-e-diritti-protetti-dalla-carta-ue-questo-matrimonio-s-ha-da-fare-o-no>> (accessed 28 August 2019).

97 Corte Costituzionale, no. 20/2019, supra note 92, para. 2.3.

from the ECJ's, and to mitigate tensions falling ultimately on national courts, at the same time natural judges of human and fundamental rights, but bound to respect the case law of their own national Constitutional Court?<sup>98</sup>

#### 4. Conclusions

In *Egenberger* the Court of Justice of the European Union developed an original proportionality assessment, not evident in text, to strike a balance between the autonomy rights of religious organizations, and the right of workers of such institutions in the light of contrast to discrimination based on grounds of religion or beliefs. This exercise, characteristic of many complex cases where several conflicting fundamental rights need to be taken into account, should be avoided in case of absolute rights,<sup>99</sup> but faces limits even in case of a relative right such as freedom of religion. The essence of the freedom should be respected in any case, according to Article 52(1) Charter, and also a procedural remedy, enabling individuals to pursue legal actions, needs to be granted.<sup>100</sup>

The ECtHR had an already established case-law concerning conflicts between freedom of religion and other rights protected on working places, making specific reference inter alia to the Directive, but on different grounds, namely in individual cases. The new ECJ case-law has been confirmed by other significant judgments from the Grand Chamber, notably by *IR v JQ* and *Cresco Investigation*, in the specific fields of the difference of treatment and discrimination on basis of religion or belief in employment and occupation. The EU law approach seems to be more group-focused than ECtHR's, having regard to religion's discrimination issues, and Article 14 ECHR offers protection against discrimination, but in relation to the rights enshrined within the Convention only, vis à vis a very advanced protection against discrimination granted by the

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98 On 12 February 2019, the European Parliament adopted a resolution on the implementation of the Charter of Fundamental Rights of the European Union in the EU institutional framework (2017/2089 (INI). Paragraph 30 reads as follow: '*Calls for the adoption of the horizontal Anti-Discrimination Directive [Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation] to be concluded without delay in order to further guarantee fundamental rights in the EU by means of concrete EU legislation*'. Paragraph 43 states: '*Encourages the EU institutions and the Member States to allow for more straightforward application of the Charter as a whole*'.

99 This is the case of the right to live or of freedom from torture, which in principle do not tolerate any compression or interference both from national authorities and from individuals.

100 Case C-362/14 *Schrems* EU:C:2015:650, para. 93. J.P. Jacqué, Les limitations aux droits fondamentaux dans la Charte des droits fondamentaux de l'Union européenne, *Droit de l'Union européenne* <<http://www.droit-union-europeenne.be>> (accessed on 28 August 2017).

Directive; such differences potentially may lead the two international Courts to diverging results.

In *Egenberger*, the ECJ faced another key issue, whether the Charter, not necessarily read in conjunction with the Directive, may be relied upon in a dispute between individuals, where the interference with fundamental rights came from a private conduct. The ECJ already recognized in *Mangold* the principle of non-discrimination on grounds of age as a general principle of European Union law for horizontal effects purposes.<sup>101</sup> In *Kücükdeveci* the Court of Justice relied on that doctrine, classifying the Directive as a specific expression of the above mentioned general principle, reading it in conjunction, for the first time with Article 21(1) Charter.<sup>102</sup> However, both *Mangold* and *Kücükdeveci* third party effect of prohibition against discrimination implicated the review of public acts in a horizontal setting. *AMS* went beyond the previous case law, extending the direct horizontal effect to a different Charter's provision, Article 27,<sup>103</sup> read in conjunction with a different directive, No. 2002/14/EC,<sup>104</sup> and implying the review of private acts in a horizontal setting.<sup>105</sup>

Such review requires the duty for individuals to respect fundamental rights and establishes, under certain conditions, positive obligations on the State to grant such respect in private parties' relationships.<sup>106</sup> Namely, the object of the review has to fall within the scope of Article 51(1) Charter, the relevant provision needs to be self-sufficient, whereas unconditional, and mandatory, not

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101 *Mangold*, supra note 9, para. 75.

102 *Kücükdeveci*, supra note 9, paras. 21 and 22; the ruling, adopted right after the entry into force of the Lisbon Treaty, follows the codification of Fundamental Rights in the Treaties. Before protected as general principles of EU as a result of constitutional traditions common to Member States, see Case C-29/69 *Erich Stauder v City of Ulm*, *Sozialamt* EU:C:1969:57.

103 'Workers' right to information and consultation within the undertaking'.

104 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

105 *AMS* was a private subject although association with a social object, see *AMS*, supra note 9, para 37.

106 See Case C-6/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428: Common judges are bound by EU Law to enforce a fundamental right at issue in a horizontal litigation, however it's upon the national legal framework of each Member State to choose the appropriate judicial remedy.

requiring to be implemented, not even by national law, to confer on individuals a right over which they can rely as such in disputes with other individuals<sup>107</sup>.

However, in *Egenberger* the ECJ seems to go further, implicitly affirming that the Charter *dans son ensemble* may be source of direct effects in litigations between individuals.<sup>108</sup> With this new course, the Court of Justice inaugurated a series of rulings in quick succession, such as *IR v JQ*, and *Cresco Investigation* on Article 21 Charter and the Directive 2000/78/EC, and also *Max-Planck and Bauer*, where Article 31(2) Charter and Directive 2003/88/EC was at stake. Those provisions of the Charter met the ‘self-sufficient’ requirement, not settling ‘principles’, nor mixing them with elements of a ‘right’. Far-reaching consequences on the national regulatory framework implementing EU Law are foreseeable, with difficulties in the execution of ECJ judgments at a national level, for instance in Denmark, Germany and Italy, according to the survey conducted.

In any case, an improved multilevel system of protections, requires to focus on obligations of private employers to respect fundamental rights, and sets positive obligations upon Member States, resulting from the incompatibility of national law with the above mentioned directives. *Egenberger* is then paradigmatic of cases where the very essence of the litigation is focused on the balance exercise between conflicting fundamental rights protected by the Charter, and in perspective by the ECHR as human rights as well, leading the interpretation of the source of secondary law and, by implication, of the national law implementing the Directive itself, resulting in a disapplication of national regulation if needed.

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107 For instance, in *AMS*, the ECJ, analyzed the very wording of Article 27 Charter and the explanatory notes to that article, and concluded that Article 3(1) Directive 2002/14 could not, as such, be invoked in a dispute between private parties, in order to conclude that the national provision, not in conformity with the directive, should not be applied (*AMS*, supra note 9, para. 46).

108 K. Lenaerts, ‘Les limites aux limitations. Le contenu essentiel des droits fondamentaux dans l’UE’, in R. Chenal *et al.* (eds) *Intersecting Views on National and International Human Rights Protection* (Tilburg: WLP 2019): ‘Il est vrai que l’article 51, paragraphe 1, de la Charte ne mentionne pas explicitement les particuliers parmi ses destinataires, à la différence des institutions, organes et organismes de l’UE, ainsi que les États membres mais uniquement lorsqu’ils mettent en oeuvre le droit de l’UE. Cette absence pourrait venir étayer la thèse selon laquelle la Charte dans son ensemble n’est pas de nature à produire un effet direct horizontal. Toutefois ... la CJUE a implicitement rejeté cette thèse dans certaines arrêts (arrêt du 17 avril 2018, *Egenberger*, Case C-414/16, EU:C:2018:257, point 76) ...’