

DRAFT:

Non discrimination in EU law
The background of the legislative work on the directive 2000/78

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1. Preliminary remarks

The main aim of this paper is to present the principle of non-discrimination in the EU law from the angle of the *travaux préparatoires* of the directive 2000/78. It shall explain the general (EU) context of the non-discrimination policy, in particular the religious aspect of non-discrimination. This paper does not cover jurisprudence of the European Court for Human Rights in Strasbourg.

The non-discrimination policies of the EC/EU date back to 1976, when directive 76/207 on the implementation of the principle of equal treatment for men and women as regard access to employment, vocational training and promotion, and working conditions was adopted. Since then, the European institutions and in particular the European Court of Justice developed a comprehensive anti-discrimination policy, covering a number of areas. Interestingly, among rich jurisprudence of the ECJ, only one case refers directly to religion (case Prais, see below). Other judgments of the ECJ are of interest for churches as they refer to the principles proclaimed by churches or to the social teaching of a church, but not to churches/ religions directly.

Art. 13 of the Treaty on the functioning of the European Union (previously: Treaty establishing the European Community) does not prohibit discrimination itself, but it authorises the Council to take action against such discrimination¹. The discrimination is prohibited in Art. 21 of the Charter of Fundamental Rights, where a number of grounds is foreseen (**Non-discrimination.** 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited). On 29 June 2000 the Council adopted Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. These two directives: 2000/43 and 2000/78, although not adopted simultaneously, are linked in many ways, as the religion overlaps frequently with race or ethnic origin.

2. The directive 2000/78: the legislative process

2.1. The European Commission

It was only in 1999 - already after the Declaration No. 17 to the Amsterdam Treaty 1997 - when the Commission started work on new directives dealing with non-discrimination. The Commission adopted the draft directive as COM (1999) 565 on 25.11.1999, bearing title: directive

¹ J. Łopatowska, Discrimination based on religion, in: *Derecho y Religion*, vol. IV (2009), p. 71.

establishing a general framework for equal treatment in employment and occupation. This draft directive was a common undertaking of Commissioner Diamantopoulou (Employment and Social Affairs) and Commissioner Vitorino (Justice and Home Affairs). The text was sent to the Council and to the European Parliament, but as the legislative process was based on Art. 13 TEC, the latter was merely consulted.

In explanatory memorandum, the Commission described its idea in a following way:

"Article 4

Genuine Occupational Qualifications

Article 4 allows justified differences of treatment when a characteristic constitutes a genuine occupational qualification for the job. The justification in these cases relates to the nature of the job concerned or the context in which it is carried out.

It is evident that in organisations which promote certain religious values, certain jobs or occupations need to be performed by employees who share the relevant religious opinion. Article 4(2) allows these organisations to require occupational qualifications which are necessary for the fulfilment of the duties attached to the relevant post."

The initial wording of Art. 4 (2) proposed by the Commission varied significantly from the text finally adopted, which was result of the work of the Council and of opinion of the EP. The text became longer, two new sentences were added. The table below shows various stages of legislative work: the original draft of the Commission, the amendment No. 37 of the European Parliament, the text adopted by the Employment and Social Policy Council as "political agreement" on 17 October 2000 and - in the fourth column - the final text of directive 2000/78.

Art. 4(2) of directive 2000/78 at various stages of the legislative process

Original proposal of the Commission COM (1999) 565	European Parliament: Amendment 37 (report of MEP Thomas Mann)	Adopted by the Council on 17.10.2000 as "political agreement"	Directive 2000/78: comparison between COM (1999) 565 and the final text
Member States may provide that,	Member States <i>shall</i> provide that, <i>religion or belief of an individual</i> shall not constitute discrimination where, by reason of	Member States may maintain national legislation or provide for future legislation incorporating existing national practices pursuant to which,	Member States may <u>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,</u>
in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions,	in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the <i>educational, social, health care and related work they undertake</i> , and for the	in the case of churches or other public or private organisations the ethos of which is based on religion or belief, as regards the occupational activities within those organisations,	in the case of <u>occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief,</u> which pursue directly and essentially the aim of ideological

and for the particular occupational activities within those organisations which are directly and essentially related to that aim,	particular occupational activities within those organisations which are directly and essentially related to that aim,		guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim,
a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification.	a difference of treatment based <i>specifically upon the nature of these activities, the religion or beliefs in question constitute</i> a genuine occupational qualification.	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 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.	a difference of treatment based on a <u>person's relevant characteristic related to religion or belief</u> shall not constitute discrimination where, by reason of the nature of these activities <u>or of context in which they are carried out</u> , a <u>person's religion or belief</u> the characteristic constitutes a genuine, <u>legitimate and justified</u> occupational requirement, having regard to the <u>organisation's ethos. qualification</u>
	<i>This will not justify discrimination on any other grounds.</i>	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.	<u>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.</u>
		Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or	<u>Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or</u>

		private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.	<u>private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.</u>
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The table shows that the proposal of the Commission indeed underwent major changes. As stated above, it was the Council which played decisive role and the European Parliament was merely consulted. Due to differences in *modus operandi* of these two European institutions, it is possible to analyse statements of every single member of the EP, but it is not possible to receive detailed minutes of the Council to learn more about discussions between the representatives of the Member States. Nevertheless, it seems useful to remind that at the time in power were among others: the conservative British government of John Major, the socialist government of Lionel Jospin in France, social democratic and green government of chancellor Gerhard Schröder. The Netherlands were run by a labour government of Wim Kok, Spain by a Christian democrat government of Jose Maria Aznar, and Italy by a communist Massimo D'Alema. As always, the composition of national governments had clear influence on the work of the Council.

2.2. The European Parliament

The European Parliament worked on the draft directive (like on any other directive) within numerous committees. The main work was done in the Committee on Employment and Social Affairs, and the rapporteur was German MEP Thomas Mann (EPP-ED, European People's Party, Christian democrats). The plenary discussion took place on 4 October 2000, so two weeks before the meeting of the Council. A number of deputies intervened in the discussion, in particular in relation to the amendment 37, referring to the Art. 4 (2). Within this paper only discussions referring to this particular paragraph will be reported.

Although the discussion on Art. 4 (2) was quite lively, taking account of the political lines of the deputies and their national background, there were no major surprises.

The rapporteur, Thomas Mann, was clearly in favour of exception provided by Art. 4 (2). In preliminary remarks he described Art. 13 of the Treaty as "sleeping giant", to which the Commission tried to give life. Mr Mann referred to the US experience, which is built on the Anti-Discrimination Act, showing that there is a long way ahead of the EU. He noticed that "Discrimination must be combated in the early stages, in cases of an intimidating, hostile or offensive environment (...) Human resources can only be utilised to the full in a climate of peace at the workplace". Rapporteur confirmed in his expose that he is in favour of situation, where the Member States can allow different treatment when it comes to religion or belief. "These communities make vital contributions to society in terms of social facilities such as nurseries, hospitals and educational institutions. They see the danger of having to hire people who do not identify with their values and convictions". Finally, Mr Mann underlined that "Committee on Employment and Social Affairs voted by a large majority in favour of the compromise under which different treatment does not represent discrimination in cases where religion and belief are major requirements for the performance of a job".

Speaking on behalf of the Committee on Budgets, Spanish deputy Mr. Naranjo Escobar (also EPP), endorsed the amendments to the directive, describing the report as reflecting "balance, moderation and legal expertise".

Deputy Ms. Martens (EPP, NL), draftperson of the Committee on Women's Rights and Equal Opportunities, was in favour of Art. 4(2), which she described as "a compromise, but one which enjoys wide support within Parliament".

Deputy Ms. Ludford (ELDR, European Liberal Democrat and Reform Party) underlined that "discrimination on religious grounds should not be a pretext to discriminate against employees on other grounds, for example, because they are homosexual". As she stressed, "I am sure that sensible and moderate religious organisations would not seek to do so to exploit this as a loophole. But we must not allow fundamentalists with prejudiced views of any religion to allow their views to prevail against the non-discrimination standards of secular society". Ludford finished her intervention by stating that "there is a proper sphere for religion. The compromise in this report allows plenty of space to religious organisations and it must not be abused."

French deputy, Ms. Gillig (ESP, European Socialist Party), came back to the point of secularism, stating "I should like to express our reservations on this difficult issue and restate our commitment to the principle of secularism, especially in the context of the fight against discrimination". Another French deputy, Ms. Y. Boudjenah (GUE/NGL, European United Left/Nordic Green Left), stated that she "considers the exemption of Art. 4 (2) to be very dangerous and perhaps even a legal cover for the most reactionary ideas".

Speaking on behalf of the Green Party (Verts/ALE), Ms. Lambert underlined that her group welcomes amendment No. 37, but at the same time she noted that there are only very few jobs where having a particular belief system is an essential qualification, e.g. being British Monarchy. According to Ms. Lambert, the religion/belief is not relevant for driving a bus of a religious foundation. She stressed that she would be against situation in which a religious organisation refuses employment on the basis of the homosexuality of the (potential) employee.

Deputy Sbarbati referred to local Italian experience, while Greek deputy Karamanou (PSE) reminded that religious fanaticism may still be a burning issue, as the case of Balkans (at the time) showed it. The Dutch deputy Mr. Blokland (EDD, Europe of Democracies and Diversities, this group ceased to exist) was concerned about the link between freedom of religion and belief, and the right to respect for privacy. Only deputy Ian Paisley, himself reverend and member of the group NI (Non-Inscrits), linked the freedom of religion with homosexuality.

One of last speakers, deputy Mr. Purvis (EPP) in his quite emotional speech underlined that Amendment 37 must be supported. He finished his speech by saying "a spiritual dimension is vital to Europe. We must avoid absurd tangles of red tape, which will only succeed in reducing Europe to a purely materialistic, politically correct but pointless entity".

Finally, French Deputy Mr. Cadron (ESP) welcomed the report, but he found some of exemptions "shocking": he referred to possible derogation on terms of religion, which he, as "confirmed secularist", could not possibly endorse.

In conclusion: it seems worth noticing that the main rapporteur and rapporteurs of the associated committees represented the EPP, Christian democrats, usually willing to co-operate with churches and religious communities. The discussion in the EP could be described as "Europe in a nutshell": while Christian democrat deputies from various countries endorsed the amendment to Art. 4 (2), the French deputies underlined the secular aspect of this situation and warned against "fundamentalism" and "reactionism".

Following the discussion and vote in the European Parliament on 5 October 2000, a week later the European Commission introduced amended proposal: COM (2000) 0652, where Art. 4(2) received a new wording²; nevertheless, it seems that the Council worked on original wording of COM (1999) 565, and modified its content.

² Notwithstanding paragraph 1, the Member States may provide that in the case of public or private organisations based on religion or belief, and for the particular occupational activities within those organisations which are directly and essentially related to religion or belief, a difference in treatment based on a person's religion or belief shall not constitute discrimination where, by reason

2.3. The Council of the European Union

The text was discussed within the Employment and Social Policy Council on 17 October 2000. The Council added to the text *expressis verbis* “churches” as employers which may differentiate (original draft spoke merely of “public or private organisations”). From the very beginning of legislative process both religion and belief were protected, which should not surprise as philosophical organisations gained status similar to the status of churches and religious communities already in Declaration No. 17 to the Amsterdam Treaty. Concerning occupational requirements, which may justify differentiation, the Council added adjectives “legitimate and justified”. Finally, the Council added two sentences: one underlines that the implementation should take “account of Member States’ constitutional provisions and principles”, which is usually of particular importance for the Member States. The second sentence added by the Council provides for an obligation of employees not being members of given religion (organisation) to act in good faith and with loyalty to the organisation’s ethos. This sentence seems to be response to the case of *Rommelfanger* (1989): the European Court of Human Rights confirmed dismissal of a doctor from a Catholic hospital, after the doctor disagreed in an interview with prohibition of abortion.

3. Transposition and implementation

Although Member States acting in the Council had significant influence on the final version of the Directive 2000/78, in course of transposition they encountered a number of challenges. Czech Republic, Belgium (?), Estonia, Finland, France, Lithuania, Portugal and Sweden do not provide exception based on Art. 4(2)³. On the other hand, Bulgaria, Hungary, Ireland, Luxembourg and Slovenia went further, by extending the prohibition based on religion and belief to all areas outside employment. The transposition and implementation of the 2000/78 Directive is subject of the communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, document COM (2008) 225 final/2 (version of 8 July 2008, replacing the version of 19 June 2008). Next communication of the Commission is due in 2013.

4. Jurisprudence of the European Court of Justice

As stated above, only one case decided by the ECJ refers directly to the religious non-discrimination. British citizen, Ms Prais (case 130/75) applied for a recruitment organised by the Council of the EC, but the day of written exam coincided with Jewish holiday of Shavuot. Ms Prais notified the Council that as practicing Jew she can not sit exam on that day and asked for another date. The Council answered that all candidates must write the exam on the same day, to guarantee the same rights, and rejected the proposal of Ms Prais. The ECJ agreed with the Council, by this giving priority to the principle of equal opportunities over personal religious convictions of Ms. Prais, who was factually discriminated. The judgment is controversial till today. While applying in February, Ms. Prais could not have thought that the exam would take place on 16 May, first day of Shavuot. On the other hand, the Council was not allowed to ask the candidates to what religious group they belong, as it would clearly violate their rights. In the UK, there is no list of recognised churches and religious communities – a fortiori, it is impossible to know when the churches/religious communities have their festivities.

In a different case from the 70’s, the Dutch citizen – Ms. Yvonne van Duyn - was refused the entry to the UK, as she wanted to work as secretary for the Church of Scientology, a legally

of the nature of these activities or the context in which they are carried out, a person's religion or belief constitute a genuine occupational requirement. This difference of treatment may not, however, give rise to any discrimination on the other grounds referred to in Article 13 of the EC Treaty.

³ (COM (2008) 225/2 p. 4).

functioning British organisation (case 41/74). The ECJ confirmed that the Home Office was allowed to refer to public order while refusing her right of entry. It seems that in the case of van Duyn the ECJ would decide differently in the 21st century, as it was demonstrated 20 years later in case *Donatella Calfa v. Greece*. In this case (C-348/96) the ECJ decided on the basis of directive 64/221 that the behaviour of given person must be judged on a behaviour of this person and not on the fact of belonging to a certain group.

In these two cases: *Prais* and *van Duyn* the ECJ discriminated the applicant on the ground of their religion; interestingly, in case of *Rev. van Roosmalen* (300/84) the ECJ granted social security rights to a missionary who spent his life in Africa. The ECJ decided that *Rev. van Roosmalen* was “independent” within the meaning of the EC-Treaty, quite a courageous statement in case of a member of religious congregations. It seems more logical to qualify a priest, and in particular member of an order, as employee (worker), and in some Member States where the established State Church exist, even as an official (e.g. Denmark). In case *van Roosmalen* the ECJ wanted to help the priest and granted him social security rights it could not grant under other provisions. (additional remark: two women discriminated, a man put in a favourable situation...)

Finally, there are cases which remain in scope of interest of churches and religious communities, as they interfere with the doctrine or social teaching. *Tadao Maruko* is protagonist in one of these judgments (C-267/06): the ECJ granted a survivor's pension to Mr Maruko, whose male life partner died in 2005.

Last but not least one has to bear in mind that according to the ECJ that “direct discrimination also occurs when no identifiable individual was discriminated against but potentially could have been” (Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*).

5. A European equality authority?

There is no institution which could be described as a European equality authority. Nevertheless, two bodies should be briefly mentioned. The Fundamental Rights Agency (FRA) was created in 2007 and it has seat in Vienna (<http://fra.europa.eu>). It was established by Council Regulation (EC) No 168/2007 of 15 February 2007 as the successor to the European Monitoring Centre on Racism and Xenophobia (EUMC). The FRA could be regarded to certain extent as a European equality authority, as it prepares reports covering various discrimination issues in all EU-Member States. Nevertheless, the FRA is frequently accused for not working efficiently.

Complaints can be addressed also to the European Ombudsman, who is responsible for dealing with complaints concerning the activities of the European institutions only. That makes the scope of his activities quite limited.

6. Closing remarks

Despite lacking ECJ-jurisprudence in the field of religious discrimination, there is a number of publications dealing with the issue. The main difficulties identified are linked to several points others than already mentioned above. Unlike in case of race or disability, many issues depend on personal perceptions: a statement neutral for some persons can be regarded as offensive or humiliating for the others. Moreover, the religion or belief is not necessarily known to the interlocutors; therefore it is possible to commit a faux-pas or to harass a person by: a) not knowing the religion/belief of the other person or b) by wrongly assuming that the person is of certain religion/belief. L. Vickers points out, that the “tribunal could not rule with any certainty whether a person who was offended was being unduly sensitive, and taking offence too easily”⁴. Finally, the proselytism at workplace (on purpose or unwillingly) can not be excluded neither.

So far there is no definition of religion/ belief at the EU level, neither in legislation nor in the jurisprudence of the ECJ. As the religious identity often overlaps with race or ethnic

⁴ L. Vickers, *Is all harassment equal? The case of religious harassment*, in: *Cambridge Law Journal*, 65 (3), November 2006, pp. 595.

background, the issue is particularly complicated. Finally, the EU-legislator has to bear in mind various traditions and perception of Member States, which the Council of the EU does reiterate frequently.

7. Appendix: Art. 4(2) in questions of the European Parliament, addressed to the European Commission

Polish deputy to the European Parliament, Mr Konrad Szymański, member of the European Conservatives and Reformists, asked on 30 September 2010 a written question entitled: EU anti-discrimination law and the rights of religious organisations (question P-8168/2010).

"Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁽¹⁾ states that 'this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

In this connection, is a Catholic school in a Member State which refuses to employ a person who has openly declared that they are a homosexual acting in breach of EU anti-discrimination law? In particular, is it acting in breach of the provisions of the above directive?

What exactly does the right of the Church and other public or private organisations, the ethos of which is based on religion, to 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos' entail under EU law?

Is the Commission planning to make any changes with respect to exemptions for churches and other public or private organisations whose ethos is based on religion or belief from the non-discrimination principle outlined in the above directive?"

The answer given by Commissioner V. Reding on behalf of the Commission was very short: "The Commission would refer the Honourable Member to its answer to Written Question **P-7979/10**⁽¹⁾ by Mr Cashman." In this latter answer, the Commission stated inter alia: "In particular, Article 4(2) of the directive allows organisations the ethos of which is based on religion or belief to take a person's religion or belief into account, where necessary, when recruiting personnel and to require their personnel to show loyalty to that ethos. That paragraph makes it clear, however, that any difference in treatment should not justify discrimination on grounds other than of religion or belief.

Article 4(1) of the directive applies to all employers and allows requirements relating to other characteristics (religion or belief, sexual orientation, age or disability) to be taken into account where they are essential for the job in question. It provides for a strict test to determine whether a difference in treatment may be considered non-discriminatory: the occupational requirement must be genuine and determining, the objective must be legitimate and the requirement proportionate.

This issue has not yet come before the Court of Justice of the European Union. In any case, in conformity with the jurisprudence of the Court, any exceptions from EC law need to be interpreted narrowly. While it is difficult to make a statement about a hypothetical case, the Commission fails to see how a teacher's sexual orientation could reasonably constitute a genuine and determining occupational requirement."

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