

KEY CONCEPTS

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RELIGION AND BELIEF

EU LAW

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Article 1: Purpose

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

Charter of Fundamental Rights of the European Union

Article 10 : Freedom of thought, conscience and religion

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

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COUNCIL OF EUROPE LAW

European Convention on Human Rights and Fundamental Freedoms

Article 9 : Freedom of thought, conscience and religion

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

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

Article 2 of Protocol 1 – Right to education

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own **religious and philosophical convictions**”

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THE BROAD DEFINITION OF RELIGION

A common notion with two facets

CJUE 14 March 2017, case C-157/15, Achbita, pt 28/CJUE 14 March 2017, case C-188/15, Bougnaoui, pt 30

*“As is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the **same meaning and scope.**”*

*“In so far as the ECHR and, subsequently, the Charter use the term ‘religion’ in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore **the concept of ‘religion’ in Article 1 of that directive should be interpreted as covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public.**”*

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THE BROAD DEFINITION OF RELIGION

Two-tier protection

ECHR 12 April 2007, no. 52435/99, Ivanova v. Bulgaria

*“Unlike the second paragraphs of Articles 8, 10 and 11 of the Convention, which cover all the rights mentioned in the first paragraphs of those Articles, **that of Article 9 of the Convention refers only to “freedom to manifest one's religion or belief”.** In so doing, it recognizes that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. At the same time, it emphasises the primary importance of the right to freedom of thought, conscience and religion and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs”*

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THE DIFFERENT NOTION OF (PHILOSOPHICAL) CONVICTIONS

ECHR 25 February 1982, No 7511/76, Campbell and Cosans v. United Kingdom

“In its ordinary meaning **the word "convictions"**, taken on its own, is not synonymous with the words "opinions" and "ideas", such as are utilised in Article 10 (art. 10) of the Convention, which guarantees freedom of expression; it is more akin to the term "beliefs" (in the French text: "convictions") appearing in Article 9 (art. 9) - which guarantees freedom of thought, conscience and religion - and **denotes views that attain a certain level of cogency, seriousness, cohesion and importance.**

Having regard to the Convention as a whole, including Article 17 (art. 17), the expression "**philosophical convictions**" in the present context denotes, in the Court's opinion, such convictions as are **worthy of respect in a "democratic society" and are not incompatible with human dignity**; in addition, they must not conflict with the fundamental right of the child to education, the whole of Article 2 (P1-2) being dominated by its first sentence.”

THE DIFFERENT NOTION OF (PHILOSOPHICAL) CONVICTIONS

ECHR 7 July 2011, No 23459/03, Bayatan v. Armenia

“[The Court] considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person’s conscience or his deeply and genuinely held religious or other beliefs, **constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9**”

DIRECT/INDIRECT DISCRIMINATION

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DEFINITIONS

Council Directive 2000/78/CE of 27 November 2000

Article 2 : Concept of discrimination

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

2. For the purposes of paragraph 1:

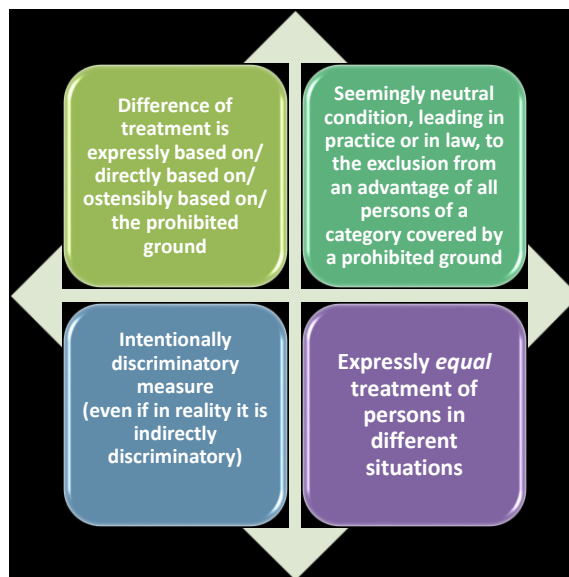
(a) **direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) **indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (...)

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CATEGORIES OF DIRECT DISCRIMINATION



CJEU 22 January 2019, C-193/17, Cresco Investigation

*“Articles 1 and 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that national legislation under which, first, **Good Friday is a public holiday only for employees who are members of certain Christian churches** and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion.”*

THE CHARACTERISATION OF DIRECT DISCRIMINATION

→ **A difference in treatment between workers on the basis of their religion**

*“In that regard, Paragraph 7(3) of the ARG establishes the right to a public holiday on Good Friday only for employees who are **members of one of the churches** covered by the ARG. It follows that public holiday pay that can be claimed under Paragraph 9(5) of the ARG by an employee who is required to work on a public holiday is payable to employees who work on Good Friday only if they are members of one of those churches.*

*Therefore, the legislation at issue in the main proceedings gives rise to a difference in treatment that is directly based on the religion of employees. **The test used by the legislation in order to differentiate is based directly on whether an employee belongs to a particular religion.**”*

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THE CHARACTERISATION OF DIRECT DISCRIMINATION

→ **Categories of workers in a comparable situation**

*“Paragraph 7(3) of the ARG grants a continuous rest period of 24 hours on Good Friday only to employees who are members of the churches covered by the ARG. Accordingly, that provision establishes a difference in treatment in respect of the grant of a public holiday between those **employees and all other employees**”*

However, as is apparent from the order for reference, the grant of a public holiday on Good Friday to an employee who is a member of one of the churches covered by the ARG is not subject to the condition that the employee must perform a particular religious duty during that day, but **is subject only to the condition that such an employee must formally belong to one of those churches**. Thus, that employee remains free to choose, as he wishes, how to spend his time on that public holiday, and may, for example, use it for rest or leisure purposes.

The situation of such an employee is no different in that regard from that of other employees who wish to have a rest or leisure period on Good Friday without, however, being entitled to a corresponding public holiday.

CJEU 14 March 2017, C-157/15, Achbita

*“(...) the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. **The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs.***

It is not evident from the material in the file available to the Court that the internal rule at issue in the main proceedings was applied differently to Ms Achbita as compared to any other worker.

*Accordingly, **it must be concluded that an internal rule such as that at issue in the main proceedings does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78.***

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CJEU 14 March 2017, C-157/15, Achbita

“such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.”

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THE CHARACTERISATION OF INDIRECT DISCRIMINATION

→ ***A particular disadvantage for persons belonging to a particular religion or belief***

“it is not inconceivable that the referring court might conclude that the internal rule at issue in the main proceedings introduces a difference of treatment that is indirectly based on religion or belief, for the purposes of Article 2(2)(b) of Directive 2000/78, if it is established — which it is for the referring court to ascertain — that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.”

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THE CHARACTERISATION OF INDIRECT DISCRIMINATION

→ ***Legitimate aim***

“(...) the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate

*An employer’s wish to project an image of neutrality towards customers relates to the **freedom to conduct a business** that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.”*

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THE CHARACTERISATION OF INDIRECT DISCRIMINATION

→ **the appropriateness of the measure**

“it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner”

→ **the necessity of the measure**

“it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.”

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THE CHARACTERISATION OF INDIRECT DISCRIMINATION

→ **Reasonable accommodation?**

*“In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an Islamic headscarf when carrying out her professional duties for G4S customers, **it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her.** It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.”*

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GENUINE AND DETERMINING OCCUPATIONAL REQUIREMENTS

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THE FRAME OF THE EXCEPTION

Council Directive 2000/78/EC of 27 November 2000

Article 4 : Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

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CJEU 14 March 2017, C-188/15, Bougnaoui

« it should be borne in mind that the Court has repeatedly held that it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based **but a characteristic related to that ground** which must constitute a genuine and determining occupational requirement.

It should, moreover, be pointed out that, in accordance with recital 23 of Directive 2000/78, it is only **in very limited circumstances** that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.

It must also be pointed out that, according to the actual wording of Article 4(1) of Directive 2000/78, such a characteristic may constitute such a requirement only **'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'**. »

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CJEU 14 March 2017, C-188/15, Bougnaoui

It follows from the information set out above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to **a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out**. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.

Consequently, the answer to the question put by the referring court is that Article 4(1) of Directive 2000/78 must be interpreted as meaning that **the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision**.

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