European network of legal experts in gender equality and non-discrimination

The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC

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Contents

EXECUTIVE SUMMARY 6
RÉSUMÉ 15
ZUSAMMENFASSUNG 25
INTRODUCTION 36
1 THE GENERAL INTERPRETATIVE APPROACH OF THE CJEU TO THE 2000 ANTI-DISCRIMINATION DIRECTIVES 37
1.1 The *Mangold* approach reaffirmed 38
1.2 *Egenberger* and the EU Charter of Fundamental Rights 40
1.3 The role of human rights instruments as interpretive guidance 42
2 THE CJEU'S CASE LAW ON THE SCOPE OF THE 2000 DIRECTIVES 45
2.1 The material scope of the directives 45
2.2 The meaning of 'education' in the Racial Equality Directive 48
2.3 The meaning of 'disability' 48
2.4 The meaning of 'ethnic origin' 50
3 THE CASE LAW OF THE CJEU IN RESPECT OF THE OPERATIVE PROVISIONS OF THE 2000 DIRECTIVES 53
3.1 Direct discrimination 53
3.2 Indirect discrimination 56
3.2.1 'Particular disadvantage' 56
3.2.2 Objective justification 59
3.3 Age discrimination 60
3.3.1 Unequal treatment not on grounds of age 61
3.3.2 Objective justification for age discrimination 62
3.3.3 Exceptions under Article 6(2) 65
3.3.4 Age distinctions as genuine occupational requirements 66
3.4 Discrimination on grounds of 'religion or belief' 67
3.4.1 The 'religious ethos' exceptions 69
3.5 Reasonable accommodation 71
3.6 Positive action 72
3.7 Multiple or intersectional discrimination 73
3.8 Remedies and enforcement 75
4 CASE STUDIES 78
4.1 Case Study A: the impact of the CJEU's judgments in *Egenberger* and *IR* on German and Irish law relating to 'religious ethos' exceptions 78
4.1.1 Germany: EU proportionality analysis replacing domestic 'plausibility review' 79
4.1.2 Ireland: legislative narrowing of a wide discretion 83
4.2 Case Study B: pushback against the developing equality jurisprudence of the CJEU – the Danish Supreme Court judgment of *Ajos* 85
4.3 Case Study C: the CJEU's emphasis on the need for a contextual approach to identifying disability-related disadvantage – and its application to national law in Spain and the UK regulating dismissals based on long periods of absence (sick leave) 88
5 TRENDS AND FUTURE DIRECTIONS 92
6 CONCLUSIONS 99

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Executive summary

Article 13 TEC (now Article 19 TFEU) was inserted into the EC Treaty by the Treaty of Amsterdam in 1999. It gave the institutions of the European Union (EU) competency to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This enabling power was used as a legal basis for the subsequent adoption of two directives concerned with discrimination other than sex. Directive 2000/43/EC (the Racial Equality Directive) prohibits discrimination on the grounds of racial or ethnic origin in the spheres of employment and occupation, social protection, social advantages, education and access to and supply of goods and services, while Directive 2000/78/EC (the Framework Equality Directive) prohibits discrimination on the grounds of age, disability, religion or belief and sexual orientation in the sphere of employment and occupation.

The Court of Justice of the European Union (the CJEU) has delivered a series of important judgments that have clarified how many of the key provisions of the directives should be interpreted and applied. This report analyses the evolution and impact of this case law, from 1 September 2012 to 1 June 2019.

The interpretative approach of the CJEU

The Court's case law has established that the 2000 equality directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment. This principle is derived from the well-established human right to equality and non-discrimination that exists in international human rights law and the constitutional traditions of European Union Member States. It is also set out in Article 21 of the EU Charter of Fundamental Rights, which, since December 2009, has had the same legal status as the EU treaties. This is the lens through which the CJEU interprets the specific provisions of both directives, which have been given a purposive interpretation to ensure the effective protection of this right.

This interpretative approach as applied to the 2000 equality directives was set out initially in *Mangold v Helm*.[1] In this case, the Court ruled that the Framework Equality Directive should be read as setting out a 'general framework' of rules, which gave specific expression to the general principle of equal treatment. In the subsequent case of *Ajos*,[2] the Court clarified and reaffirmed that this general principle was capable of having direct horizontal effect within the scope of application of EU law. It also reiterated that this general principle is now enshrined in Article 21 of the Charter.

In *Egenberger*,[3] the Court held that the prohibition of discrimination on grounds of religion or belief constitutes an aspect of this general principle of equal treatment as enshrined in Article 21 of the Charter. *Egenberger* also confirmed that both this aspect of the general principle and Article 21, as well as the associated right to effective judicial protection, are enforceable and have full horizontal direct effect as between private parties (including employers and employees).

The Court has also invoked the Charter to justify delineating a generous ambit for the personal and material scope of the 2000 equality directives. In the decision of the Grand Chamber in *CHEZ*,[4] the Court referred to the importance of ensuring effective protection for the right to equality and non-discrimination

1 Judgment of 22 November 2005, *Mangold v Helm*, C-144/04, ECLI:EU:C:2005:709.

2 Judgment of the Court (Grand Chamber), 19 April 2016, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, Case C-441/14, ECLI:EU:C:2016:278.

3 Judgment of 17 April 2018, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, ECLI:EU:C:2018:257.

4 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, ECLI:EU:C:2015:480.

as set out in Article 21 in adopting a broad interpretation of what qualifies as discrimination on the basis of race or ethnic origin.

The CJEU has also looked to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as an important external reference point, particularly in defining the concepts of 'ethnic origin', in *CHEZ*, and 'religion or belief,' in *Achbita* and *Bougnaoui*.[5]

One of the most influential human rights instruments on the case law of the CJEU has been the UN Convention on the Rights of Persons with Disabilities (CRPD). Since the EU became a party to the CRPD, it has become an important source of interpretative guidance for the Court regarding multiple aspects of disability discrimination, and particularly the meaning of 'disability'.

The scope of the directives

The CJEU has issued many decisions related to the material scope of the 2000 directives, particularly Directive 2000/78. In its judgments, it has consistently given the directives a purposive interpretation.

In *Asociația ACCEPT*,[6] the prohibition on discrimination in 'access to employment' under the Framework Equality Directive was interpreted broadly by the CJEU to apply to public statements by the dominant shareholder of a football club which indicated that the club maintained a discriminatory recruitment process, even when that shareholder was not legally responsible for recruitment decisions.

The Court has also recently emphasised that this broad interpretation of 'access to employment' must be read in light of the overarching purpose of the directive. The Court thus held in *Kratzer*[7] that a serial litigant who was not genuinely seeking employment, but 'merely the status of applicant in order to bring claims for compensation' did not come within the protection of the Framework Equality Directive.

In *De Lange*,[8] the Court held that the material scope of the directive extended to a tax scheme which allows persons who have not yet reached the age of 30 to deduct in full, under certain conditions, vocational training costs from their taxable income. The Court noted that the financial consequences of such treatment could affect access to such training, and thus inflict discrimination against older workers who were not able to take advantage of this scheme. However, it was also relevant to the age discrimination claim that the deduction's stated objectives were to promote young people's access to training and to improve their labour market position.

In line with its long-established sex discrimination case law, the CJEU defines 'pay' under the directives to encompass any benefits that an employee receives by reason of his or her employment relationship. However, in the case of *C*,[9] it held that 'pay' does not encompass a national tax scheme that imposed a supplementary tax on income received from a retirement pension.

The Racial Equality Directive has the broadest material scope of all the equality directives, covering additional areas of social protection, including: social security and healthcare; social advantages; education; and access to and supply of goods and services that are available to the public, including housing. In *Heiko Jonny Maniero*,[10] the Court concluded that a private foundation's award of grants to

5 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [25]-[26]; Judgment of 14 March 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204.

6 Judgment of the Court, 25 April 2013, *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.

7 Judgment of 28 July 2016, *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, C-423/15, ECLI:EU:C:2016:604.

8 Judgment of 10 November 2016, *J.J. de Lange v Staatssecretaris van Financiën*, C-548/15, ECLI:EU:C:2016:850.

9 Judgment of 2 June 2016, *C.*, C-122/15, ECLI:EU:C:2016:391.

10 Judgment of 15 November 2018, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV,* C-457/17, ECLI:EU:C:2018:912.

students to support research projects and studies abroad constituted 'education' and thus fell within the material scope of the directive.

The text of the Framework Equality Directive does not define 'disability' and the meaning of the concept has been subject to much debate. In *HK Danmark*,[11] the CJEU clarified the concept of 'disability' to be consistent with the provisions of the CRPD, concluding that a 'disability' is a 'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.

However, the CJEU has subsequently clarified that a 'limitation' cannot form the basis of a disability unless it specifically affects the individual's ability to carry out work or participate in *professional* life. In *Z v A*,[12] the Court held that a women's inability to give birth did not hinder her ability to participate in employment and thus could not form the basis of her disability discrimination claim.

A third judgment from the CJEU, *Fag og Arbejde*,[13] held that while obesity *as such* is not a disability, a particular worker's obesity may be covered by the prohibition on disability if it results in impairments that meet the definition laid out in *HK Danmark*.

The Racial Equality Directive does not define the concepts of either 'race' or 'ethnic origin'. In *Jyske Finans*,[14] the Court held that a practice based on 'country of birth' was not equivalent to one based on ethnic origin. This interpretation has attracted sharp academic criticism.

The operative provisions of the directives

The CJEU has also clarified how the specific operative provisions of the 2000 equality directives should be applied to situations involving the different protected grounds.

Direct discrimination

The CJEU held in *CHEZ* that the concept of 'discrimination on the grounds of ethnic origin' applies where a practice that predominantly adversely affects persons of a certain ethnic origin also causes a person *not of that origin* to suffer the less favourable treatment or particular disadvantage in question.

In *Hay*,[15] the Court confirmed that unequal treatment on the basis of civil partnership may constitute direct discrimination on the basis of sexual orientation, where the situations of marriage and civil partnership are comparable with respect to the specific benefit in question.

Indirect discrimination

Direct discrimination is concerned with the *grounds* for a difference in treatment. In contrast, indirect discrimination captures practices that have the *effect* of placing a group of persons at a 'particular disadvantage'.

11 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222.

12 Judgment of 18 March 2014, *Z v A*, Case C-363/12, ECLI:EU:C:2014:159.

13 Judgment of 18 December 2014, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, C-354/13, ECLI:EU:C:2014:2463.

14 Judgment of 6 April 2017, *Jyske Finans A/S v Ligebehandlingsnævnet*, C-668/15, ECLI:EU:C:2017:278.

15 Judgment of 12 December 2013, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12, ECLI:EU:C:2013:823.

In *Jyske Finans*, the Court held that demonstrating the 'particular disadvantage' element of indirect discrimination requires the explicit identification of a *specific* ethnic group that has been disadvantaged. A comparison between the requirement's impact on a set of ethnic groups (non-ethnically Danish persons) and a single ethnic group (ethnic Danes) was not sufficient. Again, this conclusion has attracted a degree of academic criticism.

A practice that produces a disadvantageous effect upon a protected group is not discrimination if that practice can be 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. In the context of ethnic origin, the Court has emphasised in *CHEZ* that this assessment of proportionality must take into account whether a practice unduly prejudices the legitimate interests of the persons concerned, including its offensive or stigmatizing effect.

In cases such as *Ruiz Conejero*,[16] the Court has also repeatedly emphasised that particular attention must be given in applying this proportionality test to the particular difficulties and risks faced by persons with disabilities with respect to their financial needs and their participation in the labour market.

Age discrimination

The general provisions of the Framework Equality Directive apply to age as they do to the other grounds that come within its scope, but Article 6 specifically provides that differential treatment directly on the basis of age is permitted in certain circumstances.

Age is a complex ground to protect because of the prevalence of age-based or age-correlated distinctions in the employment sphere. The Court has made clear that employment legislation may differentiate between different categories of workers based on criteria that correlates with age without triggering the protections of the Framework Equality Directive.

The case law of the Court has given Member States and employers some leeway in pursuing objectives related to their regulation of the labour market in cases such as *Abercrombie and Fitch*[17] and *de Lange*.

However, the Court has strictly applied the 'appropriate and necessary' prong of the objective justification test, finding that age discriminatory polices cannot be justified if they impose undue harm on affected parties (eg. *Commission v Hungary*)[18] or if an alternative that does not use age as a criterion is available (eg. *Specht*).[19]

Article 6(2) of the Framework Directive delineates a specific exception for age discrimination with regard to occupational social security schemes. The CJEU has held that this exception is limited strictly to the conditions set out in the text of the directive.

Each of the anti-discrimination directives contains an exception to its mandate for 'genuine and determining occupational requirements'. The CJEU has held that this restriction must be interpreted strictly, with particular emphasis paid to the specific nature of the job in question. This requirement justified different results in two cases challenging a maximum recruitment age for a police force (*Pérez* and *Gorka Salaberria Sorondo*).[20]

16 Judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal,* C-270/16, ECLI:EU:C:2018:17.

17 Judgment of 19 July 2017, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, C-143/16, ECLI:EU:C:2017:566.

18 Judgment of 6 November 2012, *European Commission v Hungary*, C-286/12, ECLI:EU:C:2012:687.

19 Judgment of 19 June 2014, *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland*, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, ECLI:EU:C:2014:2005.

20 Judgment of 13 November 2014, *Mario Vital Pérez v Ayuntamiento de Oviedo*, C-416/13, ECLI:EU:C:2014:2371; judgment of 15 November 2016, *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, C-258/15, ECLI:EU:C:2016:873.

Religion and belief

The CJEU decided two important cases concerning religious dress under the Framework Equality Directive, both of which concerned employer restrictions on the wearing of Islamic headscarves.

In *Achbita*, the Court held that an employer's 'workplace neutrality' policy prohibiting the wearing of any religious, philosophical or political forms of dress did not directly discriminate against the claimant (who wore an Islamic headscarf), because it applied to all workers. It could however be indirectly discriminatory, if an employer did not apply the policy on an equal basis or failed to show that the imposition of a neutral dress requirement was strictly necessary to give effect to a legitimate aim.

The *Bougnaoui* case involved a Muslim design engineer who was dismissed because a client objected to her headscarf. The Court held that this decision could not be justified on the basis that it constituted a genuine and determining occupational requirement (GDOR) for the performance of that job, because client preference is a subjective consideration and a GDOR must be objectively dictated by the nature of the position itself.

Both *Achbita* and *Bougnaoui* have generated considerable academic commentary. It remains to be seen how the approach outlined by the Court in both these cases will be applied in subsequent judgments.

The Court also examined the exception laid out in Article 4(2) of the Framework Equality Directive, which delineates a specific GDOR exception for churches or other religious organisations that wish to discriminate against persons on the basis of religion or belief for reasons related to the organisation's ethos. In *Egenberger*, the Court held that a determination of compliance with this exception cannot be entrusted to the organisation itself and must be subject to effective judicial review if challenged.

IR v JQ addressed the religious ethos exception again, specifically the scope for employers to impose obligations on their employees to behave with loyalty towards the religious ethos of their employer, as per the second paragraph of Article 4(2). The Court reaffirmed the criteria set forth in *Egenberger* as to when employers will be able to take advantage of this exception to the general principle of equal treatment, and offered guidance as to their application.

In *Cresco*,[21] the Court determined that national legislation granting a public holiday, or additional payment in lieu of taking that holiday, only to members of certain Christian churches, constitutes direct discrimination on grounds of religion.

Taken together, these five religious discrimination cases have broken important new ground in the case law of the CJEU.

Reasonable accommodation

Article 5 of the Framework Equality Directive provides that employers must make appropriate 'reasonable accommodation' to allow persons with disabilities to 'have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'.

In *HK Danmark*, the Court held that 'reasonable accommodation' measures could extend to including organisational changes, such as a reduction in a disabled person's working hours.

21 Judgment of 22 January 2019, *Cresco Investigation GmbH v Markus Achatzi*, C-193/17, ECLI:EU:C:2019:43.

Positive action

The Court has interpreted the positive action provision of the Framework Equality Directive consistently with its previous case law on positive action with respect to sex. In *Cresco*, the Court did not determine whether the exclusion of an important religious day from the list of national public holidays constituted a practical 'disadvantage' that could be the target of lawful positive action. However, it held that in any event the particular legislation at issue – which favoured certain religious minorities – could not be justified as a positive action measure within the meaning of Article 7(1) of the Framework Equality Directive because it was not proportionate to the aim of mitigating such a disadvantage.

Intersectional discrimination

The CJEU has held that while nothing prevents a claim that alleges that a single adverse action discriminated against an individual on two separate grounds, there can be no new category of discrimination consisting of the combination of more than one of those grounds (*Parris*).[22]

Enforcement

Both of the 2000 directives contain a set of common provisions that are concerned with ensuring that their content is enforced by national authorities and that individuals are able to obtain effective remedies against discrimination.

In *Asociația ACCEPT*, the Court held that discriminatory statements of a financial patron of a football club could constitute 'facts from which it may be presumed that there has been discrimination' on the part of the club itself, thus shifting the burden to the club to prove that it did not have a discriminatory recruitment policy.

In *An Garda Síochána*,[23] the Court held that a state's obligation to effectively enforce the Framework Equality Directive means that any national body established by law in order to ensure that enforcement must be able to disapply a rule of national law that is contrary to EU law.

Case studies

The case law of the CJEU in relation to the 2000 equality directives has thus continued to evolve. This process of evolution is also reflected at national level. As the CJEU's case law develops, it has an inevitable impact on the case law of the adjudicatory bodies within Member States, which are charged with enforcing compliance with the requirements of national and EU law. It also can influence national legislation, as domestic law is recalibrated to comply with the unfolding requirements of EU anti-discrimination law.

Three case studies are presented here to show the impact that the CJEU's case law relating to the directives continues to have on the development of national law. They have been selected to illustrate the dynamic and pluralist nature of this process, as well as the tensions that it can generate.

The first case study concerns the impact of the CJEU's judgments in the cases of *Egenberger* and *IR*, which clarify the scope of the 'religious ethos' exception set out in Article 4(2) of the Framework Equality Directive, as well as the relationship between the right to non-discrimination as protected by Article 21 of the EU Charter and the relevant provisions of both the TFEU and the EU Charter relating to freedom of religion and the status of religious organisations.

In many Member States, bodies affiliated with a particular religious organisation have historically been able to require their employees to adhere to their specific religious ethos. National law has often adopted a hands-off approach in this regard, motivated by a desire not to interfere with the decisions of bodies with such affiliations. For example, in Germany and Ireland, bodies affiliated with religious organisations have for decades enjoyed wide discretion in deciding whether to require employees to adhere to their religious ethos – with case law from the German Constitutional Court and the Irish Supreme Court indicating that this discretion was protected by the freedom of religion provisions of their respective national constitutions.

However, the CJEU in *Egenberger* and *IR* interpreted Article 4(2) as involving the balancing of the fundamental right to non-discrimination with the right to religious freedom. In both judgments, the CJEU emphasised both the importance of proportionality as a mechanism for balancing the rights concerned, and also the need to show a clear objective justification for the imposition of a 'religious ethos' as an occupational requirement.

This contrasts with the situation in German domestic law, where priority is given to the widely defined religious autonomy rights of religious organisations and affiliated bodies. As a consequence, the *Egenberger* judgment in particular has triggered a degree of controversy, and is currently the subject of a constitutional challenge before the German Constitutional Court. However, both judgments have also been welcomed by German academic commentators as representing a positive recalibration of the relationship between the right to non-discrimination and the right to religious freedom.

In Ireland, bodies affiliated with religious organisations once enjoyed very wide discretion to enforce employee compliance with their religious ethos. However, legislative reform has substantially narrowed the scope of this discretion, with the influence of the Framework Equality Directive playing a major role in this regard. *Egenberger* and *IR* will also be major reference points in interpreting the current legal position, which mirrors closely the requirements of EU law.

Thus, in both countries, *Egenberger* and *IR* have required a departure from long-established national policy, which had enjoyed constitutional sanction. This shift has generated controversy in Germany, but less so in Ireland. However, it has also attracted positive commentary in both Member States, with the requirements of EU equality law in both countries being viewed by a substantial body of academic and political opinion as striking a more reasoned and defensible balance between the competing rights to non-discrimination and to religious freedom.

While the first case study set out above shows the dynamic impact of EU equality law, it also illustrates how it can generate pushback. The second case study explores some of these tensions, by reference to the decision of the Danish Supreme Court in *Ajos*.[24]

In this case, the Danish Supreme Court did not apply the CJEU's judgment in the preliminary reference made in this case, ruling that the Danish Law of Accession that governs the relationship between domestic and EU law did not provide a legal basis for the general principle of non-discrimination to be given direct horizontal effect in Danish law.

This decision has attracted plenty of excited commentary, with some academics describing it as an unprecedented rejection of the authority of the CJEU. For now, it remains to be seen whether *Ajos* is a one-off decision, specific to the particular constitutional and legal context of Denmark, or the beginning of a wider trend.

24 Danish Supreme Court, Case 15/2014, *Dansk Industri, acting for Ajos A/S v Estate of A*, Judgment of 6 December 2016, UfR 2017.824H (the SCDK judgment).

The third case study focuses on how the Court's developing case law on disability discrimination has established that national courts must take into account the specific nature of disability as a ground, and the particular disadvantages that disabled persons may face in accessing and operating within the labour market. In turn, this has influenced the development of national disability discrimination law, especially as regards the status of disabled employees who are required to take extended periods of sick leave from work. The situation in Spain and the UK (still subject to the EU equality directives at the time of writing) is used to illustrate how the development of the CJEU jurisprudence generates shifts at national level.

In judgments such as *Odar* and *Bedi*,[25] the CJEU has emphasised the importance of adopting a contextual approach in assessing whether disabled persons have been subject to less favourable treatment, and in identifying the extent and nature of this treatment for the purposes of proportionality analysis in the case of an indirect discrimination claim. The Court in *HK Danmark*[26] applied this approach in the context of an indirect disability discrimination challenge against Danish legislation permitting employers to dismiss employees who had taken extended periods of sick leave. The CJEU ruled that such a measure was liable to place disabled workers at a disadvantage, and thus had to be shown to be objectively justified.

This approach was subsequently applied in the Spanish case of *Ruiz Conejero*, which also concerned national legislation governing the power of employers to dismiss workers following long periods of sick leave. In its judgment, the CJEU made clear the need for the particular vulnerabilities of persons with disabilities to be taken into account in any objective justification analysis, while noting the absence of any specific provisions dealing with this issue in the legislation. The referring Spanish court subsequently ruled that the dismissal being challenged in that case was null and void, on the basis that it constituted indirect disability discrimination.

The CJEU's approach in cases such as *Odar*, *HK Danmark* and *Ruiz Conejero* is also influencing legal developments in other Member States, even in the absence of preliminary references to the Court relating to the specific area of law. This can, for example, be seen in the UK, where the Court of Appeal has cited *HK Danmark* in rejecting arguments that the disability discrimination requirements of the Equality Act 2010 would be satisfied by treating disabled and non-disabled employees alike when it came to employer policies regarding employee absences.

Trends and future directions

Stepping back from this overview of the development of the Court's case law relating to the interpretation of the 2000 equality directives, and the three accompanying case studies, it is possible to identify some trends. These vary in interesting ways from the trends reported in the previous 2012 report, suggesting that the evolution of EU law in this area is dynamic, rather than a steadily developing process.

In the previous 2012 report, it was noted that no religious discrimination cases had been referred to the CJEU – a striking absence, given the important and controversial legal issues potentially generated in this context by the Framework Equality Directive. Now, however, the CJEU has dealt with five references relating to religious discrimination. All have been significant judgments, with potentially dramatic implications for the future development of EU law in relation to the ground of religion.

As for the other grounds, the Court has continued to receive a steady trickle of age discrimination references. This remains its most 'popular' ground, reflecting the complexity of the legal issues involved

25 Judgment of 6 December 2012, *Odar v Baxter Deutschland GmbH*, Case C-152/11, ECLI:EU:C:2012:772; judgment of 19 September 2018, *Bedi v Bundesrepublik Deutschland*, C-312/17, ECLI:EU:C:2018:734.

26 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222.

and the lack of domestic legal experience in this area. However, during the time period covered by this report, the Court has heard cases relating to each of the covered grounds, with disability and religion (as mentioned) coming more to the fore.

It is still the case that the bulk of references in this area come from particular countries. German courts remain repeat customers, especially when it comes to age cases (but now also religion). Spanish courts are also increasingly active in making references. Some countries, such as the Netherlands, remain conspicuously absent.

The substance of the case law has also continued to develop since 2012 – with the CJEU in general maintaining fidelity to its well-established purposive approach. Certain aspects of the Court's case law have attracted criticism: in particular, the Court's uncertain approach to employer 'religious neutrality' policies in *Achbita*, its decision on intersectionality in *Parris*, and the significantly narrow interpretation of the reach of the Racial Equality Directive that it adopted in *Jyske Finans* and *Heiko Jonny Maneiro*. It remains to be seen how the legal issues arising in these cases will be addressed in the years ahead.

There is also an evident trend toward further 'proceduralisation' of EU equality law. In particular, the litigation in this respect is being increasingly shaped by public equality bodies and NGOs, both of which are provided for to some extent in the 2000 directives. Such collective actors have played a part in recent cases, such as *Asociația ACCEPT* and *CHEZ*, and herald possibilities for future strategic litigation, particularly on behalf of marginalised communities that have difficulty accessing judicial remedies on their own.

Finally, it is noteworthy that the CJEU has yet to clarify the important concepts of 'harassment' and 'victimisation', both of which are prohibited in the 2000 equality directives. In some Member States, harassment claims have been a powerful means of challenging forms of unequal treatment that do not fit the traditional comparative model of direct discrimination. Furthermore, victimisation is a significant element of procedural non-discrimination law, in that it protects individuals from retaliation for seeking to enforce the law. Both concepts are due for consideration and clarification by the CJEU.

Conclusions

Overall, this report demonstrates that the CJEU has made significant headway in developing the law of the 2000 equality directives since 2012. In general, the Court has adhered to a purposive approach grounded in the general principle of non-discrimination, which has resulted in expansive interpretations of the scope and meaning of the directives' substantive provisions. However, some recent cases are arguably inconsistent with this approach, and raise questions that are likely to need resolution in future case law.

It is clear that the Court's case law in relation to the equality directives remains dynamic and influential. The outcome of the *Ajos* case in Denmark shows that debate continues as to the appropriate role of the CJEU and that there are tensions between the CJEU and national courts. However, in general, the Court's jurisprudence continues to exert a wide-ranging influence on the development of non-discrimination law at national level and will continue to do so in the future.

Résumé

L'article 13 TCE (devenu l'article 19 TFUE), inséré dans le traité CE par le traité d'Amsterdam en 1999, a habilité l'Union européenne (UE) à «prendre les mesures nécessaires en vue de combattre toute discrimination fondée sur le sexe, la race ou l'origine ethnique, la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle». Cette compétence a servi de fondement juridique à l'adoption ultérieure de deux directives portant sur d'autres discriminations que le sexe. La directive 2000/43/CE («directive sur l'égalité raciale») interdit la discrimination fondée sur la race ou l'origine ethnique dans les domaines de l'emploi et du travail, de la protection sociale, des avantages sociaux, de l'éducation, et de l'accès aux biens et aux services et la fourniture de biens et services, tandis que la directive 2000/78/CE («directive-cadre sur l'égalité») interdit la discrimination fondée sur l'âge, un handicap, la religion ou les convictions ou l'orientation sexuelle en matière d'emploi et de travail.

La Cour de justice de l'Union européenne (la «CJUE») a, dans une série d'arrêts majeurs, clarifié la façon dont il convenait d'interpréter et d'appliquer de nombreuses dispositions clés de ces directives. Le présent rapport s'attache à analyser l'évolution et l'incidence de cette jurisprudence entre le 1er septembre 2012 et le 1er juin 2019.

L'approche interprétative de la CJUE

La jurisprudence de la Cour établit que les directives 2000 sur l'égalité doivent être interprétées comme la formulation spécifique d'une norme fondamentale de l'ordre juridique de l'UE, à savoir le principe général de l'égalité de traitement. Ledit principe découle d'un droit à l'égalité et à la non-discrimination dûment établi et consacré par le droit international relatif aux droits de l'homme ainsi que par les traditions constitutionnelles des États membres de l'Union européenne. Il est également énoncé à l'article 21 de la Charte des droits fondamentaux de l'UE, laquelle bénéficie depuis décembre 2009 du même statut juridique que les traités. Tel est le prisme au travers duquel la CJUE interprète les dispositions spécifiques des deux directives – leur interprétation téléologique visant à assurer une protection effective du droit en question.

Cette approche interprétative appliquée aux directives 2000 sur l'égalité apparaît pour la première fois dans l'affaire *Mangold c. Helm*,[1] la Cour ayant statué en l'espèce que la directive sur l'égalité dans l'emploi devait être interprétée comme établissant un «cadre général» de règles formulant spécifiquement le principe général de l'égalité de traitement. Dans l'affaire ultérieure *Dansk Industri*,[2] la Cour a précisé et réaffirmé que ce principe général pouvait avoir un effet horizontal direct dans les matières relevant du champ d'application du droit de l'UE. Elle a également rappelé que ce principe général est désormais consacré à l'article 21 de la Charte.

Dans l'affaire *Egenberger*,[3] la Cour a considéré que l'interdiction de discrimination fondée sur la religion ou les convictions constitue un aspect de ce principe général de l'égalité de traitement tel que consacré par l'article 21 de la Charte. Elle a également confirmé dans cet arrêt que cet aspect du principe général et l'article 21, de même que le droit à une protection judiciaire efficace, sont applicables et produisent un plein effet direct horizontal tel qu'entre particuliers (y compris employeurs et salariés).

1 Arrêt du 22 novembre 2005, *Mangold contre Helm*, C-144/04, ECLI:EU:C:2005:709.

2 Arrêt de la Cour (grande chambre) du 19 avril 2016, *Dansk Industri (DI), agissant pour Ajos A/S contre Succession Karstel Elgil Rasmussen*, affaire C-441/14, ECLI:EU:C:2016:278.

3 Arrêt du 17 avril 2018, *Egenberger contre Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, ECLI:EU:C:2018:257.

La Cour a également invoqué la Charte pour justifier une délimitation généreuse du champ d'application personnel et matériel des directives 2000 sur l'égalité. Dans l'arrêt prononcé par la grande chambre dans l'affaire *CHEZ*,[4] la Cour rappelle l'importance de garantir la protection effective du droit à l'égalité et à la non-discrimination telle que visée à l'article 21 en optant pour une interprétation large de ce qui constitue une discrimination fondée sur la race ou l'origine ethnique.

La CJUE a recouru aussi à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH) en tant que point de référence externe, notamment pour la définition des concepts «origine ethnique» dans l'affaire *CHEZ* et «religion ou convictions» dans les affaires *Achbita* et *Bougnaoui*.[5]

Parmi les instruments en matière de droits de l'homme ayant exercé la plus forte influence sur la jurisprudence de la CJUE figure la Convention des Nations unies relative aux droits des personnes handicapées (CDPH). Celle-ci est en effet, depuis que l'UE en est devenue partie, une source majeure d'orientations interprétatives pour la Cour en ce qui concerne toute une série d'aspects de la discrimination fondée sur un handicap et plus particulièrement le sens du terme même de «handicap».

Le champ d'application des directives

La CJUE a rendu de nombreux arrêts relatifs au champ d'application matériel des directives 2000, et de la directive 2000/78 en particulier. Elle y donne systématiquement une interprétation téléologique desdites directives.

Dans l'affaire *Asociația ACCEPT*,[6] l'interdiction de discrimination en matière d'«accès à l'emploi» au titre de la directive-cadre sur l'égalité a fait l'objet d'une interprétation large de la part de la CJUE: la Cour a estimé en effet que cette interdiction s'appliquait aux déclarations publiques de l'actionnaire principal d'un club de football suggérant que le club avait un processus d'embauche discriminatoire, même si ledit actionnaire n'était pas légalement responsable des décisions en matière de recrutement.

La Cour a également souligné récemment qu'il convenait de lire cette large interprétation de «l'accès à l'emploi» à la lumière de l'objectif essentiel de la directive. Elle a donc considéré dans l'affaire *Kratzer*[7] qu'un requérant en série ne cherchant pas réellement un emploi mais voulant obtenir «le statut formel de candidat uniquement afin de demander une indemnisation pour discrimination» ne pouvait se prévaloir de la protection offerte par la directive-cadre sur l'égalité.

Dans l'affaire *De Lange*,[8] la Cour a considéré que le champ d'application matériel de la directive s'étendait à un régime fiscal autorisant des personnes de moins de 30 ans à déduire intégralement, sous certaines conditions, les frais de leur formation professionnelle de leurs revenus imposables. La Cour constate que les conséquences financières découlant de ce régime sont susceptibles d'avoir une incidence sur l'accessibilité effective à une telle formation, et d'infliger ainsi une discrimination envers des travailleurs plus âgés n'ayant pu bénéficier de ce régime. Le fait que la déduction fiscale ait pour objectifs déclarés de favoriser l'accès des jeunes à la formation et d'améliorer leur situation sur le marché du travail s'avère toutefois également pertinent pour ce qui concerne l'allégation de discrimination fondée sur l'âge.

4 Arrêt du 16 juillet 2015, *CHEZ Razpredelenie Bulgaria AD contre Komisia za zashtita ot diskriminatsia*, C-83/14, ECLI:EU:C:2015:480.

5 Arrêt du 14 mars 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [25]-[26]; arrêt du 14 mars 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204.

6 Arrêt de la Cour du 25 avril 2013, *Asociaţia ACCEPT contre Consiliul Naţional pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.

7 Arrêt du 28 juillet 2016, *Nils-Johannes Kratzer contre R+V Allgemeine Versicherung AG*, C-423/15, ECLI:EU:C:2016:604.

8 Arrêt du 10 novembre 2016, *J.J. de Lange contre Staatssecretaris van Financiën*, C-548/15, ECLI:EU:C:2016:850.

Dans le droit fil de sa jurisprudence constante en matière de discrimination fondée sur le sexe, la CJUE inclut dans la définition de «la rémunération» visée par les directives toute prestation perçue par un salarié en raison de son emploi. Elle a toutefois considéré dans l'affaire *C*[9] que «la rémunération» n'englobe pas un régime fiscal national prévoyant une imposition supplémentaire des revenus provenant d'une pension de retraite.

De toutes les directives relatives à l'égalité, c'est celle sur l'égalité raciale qui a le champ d'application matériel le plus large puisqu'il couvre les domaines supplémentaires suivants: la protection sociale, y compris la sécurité sociale et les soins de santé; les avantages sociaux; l'éducation; et l'accès aux biens et aux services et la fourniture de biens et services à la disposition du public, y compris en matière de logement. Dans l'affaire *Heiko Jonny Maniero*,[10] la Cour conclut que l'attribution par une fondation privée de bourses destinées à encourager des projets de recherche ou des études à l'étranger relève de la notion d'«éducation» et, partant, du champ matériel de la directive.

Le texte de la directive-cadre ne définit pas le «handicap» et la signification de ce concept a fait l'objet de nombreux débats. Dans l'affaire *HK Danmark*,[11] la CJUE a clarifié la notion de «handicap» dans une perspective de cohérence avec les dispositions de la CDPH en concluant qu'un «handicap» est «une limitation résultant notamment d'atteintes physiques, mentales ou psychiques, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs».

La CJUE a toutefois précisé ultérieurement qu'une «limitation» ne peut constituer le fondement d'un handicap à moins d'affecter spécifiquement l'aptitude de la personne concernée d'exercer un emploi ou de participer à la vie *professionnelle*. Dans l'affaire *Z* c. *A*,[12] la Cour a estimé que l'impossibilité pour une femme de porter un enfant n'entrave pas son aptitude à occuper un emploi et ne peut donc constituer le fondement de sa plainte pour discrimination fondée sur un handicap.

Un troisième arrêt de la CJUE, rendu dans l'affaire *Fag og Arbejde*,[13] établit que si l'état d'obésité ne constitue pas, en tant que tel, un «handicap», l'obésité d'un travailleur particulier peut être visée par l'interdiction de discrimination fondée sur un handicap si cet état se traduit par des atteintes telles que définies dans l'arrêt *HK Danmark*.

La directive sur l'égalité raciale ne définit ni le concept de «la race» ni celui de «l'origine ethnique». Dans l'affaire *Jyske Finans*,[14] la Cour a considéré qu'une pratique fondée sur «le pays de naissance» n'est pas équivalente à une pratique fondée sur l'origine ethnique – une interprétation qui a suscité de très vives critiques dans les milieux académiques.

Les dispositions opérationnelles des directives

La CJUE a également précisé de quelle manière les dispositions opérationnelles spécifiques des directives 2000 sur l'égalité doivent être appliquées dans des situations impliquant différents motifs protégés.

9 Arrêt du 2 juin 2016, *C.*, C-122/15, ECLI:EU:C:2016:391.

10 Arrêt du 15 novembre 2018, *Heiko Jonny Maniero contre Studienstiftung des deutschen Volkes eV,* C-457/17, ECLI:EU:C:2018:912.

11 Arrêt du 11 avril 2013, *HK Danmark, agissant pour Jette Ring contre Dansk almennyttigt Boligselskab et HK Danmark, agissant pour Lone Skouboe Werge contre Dansk Arbejdsgiverforening, agissant pour Pro Display A/S*, affaires jointes C-335/11 et C-33711, ECLI:EU:C:2013:222.

12 Arrêt du 18 mars 2014, Z contre A, affaire C-363/12, ECLI:EU:C:2014:159.

13 Arrêt du 18 décembre 2014, *Fag og Arbejde (FOA), agissant pour Karsten Kaltoft contre Kommunernes Landsforening (KL), agissant pour Billund Kommune*, C-354/13, ECLI:EU:C:2014:2463.

14 Arrêt du 6 avril 2017, *Jyske Finans A/S contre Ligebehandlingsnævnet*, C-668/15, ECLI:EU:C:2017:278.

Discrimination directe

La CJUE a considéré dans l'affaire *CHEZ* que la notion de «discrimination fondée sur l'origine ethnique» a vocation à s'appliquer lorsqu'une pratique touchant principalement les personnes ayant une certaine origine ethnique engendre également le traitement moins favorable ou le désavantage particulier en question pour une personne *ne possédant pas ladite origine*.

Dans l'affaire *Hay*,[15] la Cour a confirmé que l'inégalité de traitement fondée sur un partenariat de vie peut constituer une discrimination directe fondée sur l'orientation sexuelle lorsque les situations du mariage et du partenariat de vie sont comparables pour ce qui concerne la prestation spécifiquement visée.

Discrimination indirecte

La discrimination directe concerne les *motifs* d'une différence de traitement. La discrimination indirecte porte, en revanche, sur les pratiques ayant pour *effet* d'entraîner un «désavantage particulier» pour un groupe déterminé de personnes.

Dans l'affaire *Jyske Finans*, la Cour a considéré que la démonstration de l'élément «désavantage particulier» de la discrimination indirecte exige l'identification explicite d'un groupe ethnique *spécifique* ayant été défavorisé. Une comparaison entre l'incidence de l'exigence sur une série de groupes ethniques (personnes non ethniquement danoises) et un groupe ethnique unique (Danois ethniques) ne suffit pas – une conclusion qui a suscité, elle aussi, de vives critiques de la part des milieux académiques.

Une pratique ayant un effet défavorable sur un groupe protégé ne constitue pas une discrimination si la pratique en question peut être «objectivement justifiée par un objectif légitime, et si les moyens de réaliser cet objectif sont appropriés et nécessaires». En ce qui concerne l'origine ethnique, la Cour a souligné dans son arrêt *CHEZ* que l'évaluation de cette proportionnalité doit déterminer si la pratique visée préjudicie indûment les intérêts légitimes des personnes concernées, y compris en ayant sur elles un effet offensant ou stigmatisant.

La Cour a également insisté à maintes reprises, dans des arrêts tels que *Ruiz Conejero*,[16] sur l'attention particulière qui doit être accordée, lors de l'application de ce critère de proportionnalité, aux difficultés et aux risques spécifiquement rencontrés par les personnes handicapées en termes de besoins financiers et de participation au marché du travail.

Discrimination fondée sur l'âge

Les dispositions générales de la directive-cadre sur l'égalité s'appliquent à l'âge tout comme aux autres motifs relevant de son champ d'application, mais son article 6 prévoit spécifiquement qu'une différence de traitement directement fondée sur l'âge est autorisée dans certaines circonstances.

L'âge est un motif complexe à protéger en raison de l'omniprésence de distinctions basées sur l'âge ou liées à celui-ci dans le domaine de l'emploi. La Cour a très clairement indiqué que la législation en matière d'emploi peut établir des distinctions entre diverses catégories de travailleurs en s'appuyant sur des critères liés à l'âge sans déclencher pour autant les protections prévues par la directive-cadre sur l'égalité.

15 Arrêt du 12 décembre 2013, *Frédéric Hay contre Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12, ECLI:EU:C:2013:823.

16 Arrêt du 18 janvier 2018, *Carlos Enrique Ruiz Conejero contre Ferroser Servicios Auxiliares SA et Ministerio Fiscal,* C-270/16, ECLI:EU:C:2018:17.

Dans des arrêts tels que *Abercrombie & Fitch*[17] et *de Lange,* la jurisprudence de la Cour laisse une certaine marge aux États membres et aux employeurs dans la poursuite des objectifs relevant de la réglementation de leur marché du travail.

La Cour respecte néanmoins rigoureusement le critère «approprié et nécessaire» du test de justification objective en disant pour droit que des mesures discriminatoires en termes d'âge ne peuvent se justifier lorsqu'elles causent un préjudice indu aux parties touchées (*Commission c. Hongrie* notamment)[18] ou lorsqu'il existe une solution alternative n'utilisant pas l'âge comme critère (*Specht,* par exemple).[19]

L'article 6, paragraphe 2, de la directive-cadre définit une exception particulière en matière de discrimination fondée sur l'âge en ce qui concerne les régimes professionnels de sécurité sociale. La CJUE dit pour droit que cette exception est strictement limitée aux conditions énoncées dans le texte de la directive.

Chacune des directives antidiscrimination prévoit une exception à son mandat pour des «exigences professionnelles essentielles et déterminantes». La CJUE considère que cette restriction doit être interprétée strictement en mettant un accent particulier sur la nature spécifique de l'emploi en question. Cette obligation a justifié des conclusions différentes dans deux affaires contestant un âge maximum de recrutement dans la police (*Pérez* et *Gorka Salaberria Sorondo*).[20]

Religion ou convictions

La CJUE s'est prononcée, en référence à la directive-cadre sur l'égalité, dans deux affaires importantes portant sur des tenues vestimentaires religieuses. Toutes deux concernaient des restrictions imposées par des employeurs au port de foulards islamiques.

Dans l'affaire *Achbita*, la Cour a considéré que la politique de «neutralité du lieu de travail» adoptée par l'employeur et interdisant le port visible de toute signe politique, philosophique ou religieux ne constituait pas une discrimination directe à l'encontre de la requérante (qui portait un foulard islamique) car elle s'appliquait à tous les travailleurs. Ladite politique pourrait néanmoins constituer une discrimination indirecte si l'employeur ne l'appliquait pas sur un pied d'égalité ou s'il ne pouvait démontrer que l'obligation de porter une tenue neutre est strictement nécessaire pour donner effet à un but légitime.

L'affaire *Bougnaoui* concernait une ingénieure d'études musulmane licenciée parce qu'un client élevait une objection au fait qu'elle portait le voile. La Cour a estimé que cette décision de pouvait se justifier en faisant valoir qu'il s'agissait d'une exigence professionnelle essentielle et déterminante pour l'exécution du travail concerné – la préférence d'un client étant une considération subjective et l'exigence professionnelle essentielle et déterminante devant être objectivement dictée par la nature de la fonction elle-même.

Les arrêts *Achbita* et *Bougnaoui* ont donné lieu l'un et l'autre à beaucoup de commentaires académiques, et il faudra voir de quelle façon l'approche exposée par la Cour dans les deux cas sera appliquée dans des arrêts ultérieurs.

La Cour s'est également penchée sur l'exception prévue à l'article 4, paragraphe 2, de la directive-cadre, à savoir la dérogation aux exigences professionnelles essentielles et déterminantes spécifiquement

17 Arrêt du 19 juillet 2017, *Abercrombie & Fitch Italia Srl contre Antonino Bordonaro*, C-143/16, ECLI:EU:C:2017:566.

18 Arrêt du 6 novembre 2012, *Commission européenne contre Hongrie*, C-286/12, ECLI:EU:C:2012:687.

19 Arrêt du 19 juin 2014, *Thomas Specht e.a. contre Land Berlin et Bundesrepublik Deutschland*, affaires jointes C-501/12 à C-506/12, C-540/12 et C-541/12, ECLI:EU:C:2014:2005.

20 Arrêt du 13 novembre 2014, *Mario Vital Pérez contre Ayuntamiento de Oviedo*, C-416/13, ECLI:EU:C:2014:2371; arrêt du 15 novembre 2016, *Gorka Salaberria Sorondo contre Academia Vasca de Policía y Emergencias*, C-258/15, ECLI:EU:C:2016:873.

accordée aux églises et autres organisations religieuses qui souhaitent procéder à une différence de traitement fondée sur la religion ou les convictions envers certaines personnes pour des motifs relevant de l'éthique de l'organisation. Dans l'arrêt *Egenberger*, la Cour a estimé que la détermination de la conformité avec cette exception ne peut être confiée à l'organisation elle-même mais doit faire l'objet d'un contrôle juridictionnel effectif en cas de contestation.

L'arrêt *IR c. JQ* porte lui aussi sur l'exception fondée sur l'éthique religieuse, et plus spécifiquement sur la mesure dans laquelle un employeur est en droit d'exiger des personnes travaillant pour lui une attitude de loyauté envers l'éthique de son organisation en vertu de l'article 4, paragraphe 2, second alinéa. La Cour a réaffirmé les critères qui, exposés dans l'arrêt *Egenberger*, servent à déterminer quand des employeurs peuvent bénéficier de cette dérogation au principe général de l'égalité de traitement, et donné certaines orientations quant à leur application.

Dans l'affaire *Cresco*,[21] la Cour a établi qu'une législation nationale octroyant un jour de congé ou une indemnité complémentaire à la rémunération en lieu et place de ce congé uniquement aux travailleurs membres de certaines églises chrétiennes constitue une discrimination directe fondée sur la religion.

Considérés ensemble, ces cinq affaires de discrimination religieuse marquent une avancée innovante majeure de la jurisprudence de la CJUE.

Aménagement raisonnable

L'article 5 de la directive-cadre sur l'égalité dispose que les employeurs doivent effectuer des «aménagements raisonnables» pour permettre à une personne handicapée «d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation lui soit dispensée, sauf si ces mesures imposent à l'employeur une charge disproportionnée».

Dans l'arrêt *HK Danmark*, la Cour a considéré que les mesures d'«aménagement raisonnable» peuvent être élargies à l'inclusion de changements organisationnels tels que la réduction du temps de travail d'une personne handicapée.

Action positive

La Cour a interprété la disposition relative à l'action positive figurant dans la directive-cadre sur l'égalité en conformité avec sa jurisprudence antérieure relative à l'action positive en rapport avec le sexe. Dans l'affaire *Cresco*, la Cour n'a pas établi si l'exclusion d'une fête religieuse importante de la liste des jours fériés nationaux constitue un «désavantage» pratique susceptible de faire l'objet d'une action positive légitime. Elle a néanmoins considéré que, dans tous les cas, la législation particulière en cause – qui favorise certaines minorités religieuses – ne peut être justifiée en tant que mesure d'action positive au sens de l'article 7, paragraphe 1, de la directive-cadre sur l'égalité car elle n'est pas proportionnée au but recherché, à savoir atténuer ce type de désavantage.

Discrimination intersectionnelle

La CJUE estime que si rien n'empêche une plainte alléguant qu'une seule et même action a été discriminatoire à l'égard d'une personne pour deux motifs distincts, il ne peut y avoir de nouvelle catégorie de discrimination résultant de la combinaison de plusieurs de ces motifs (*Parris*).[22]

21 Arrêt du 22 janvier 2019, *Cresco Investigation GmbH contre Markus Achatzi*, C-193/17, ECLI:EU:C:2019:43.
22 Arrêt du 24 novembre 2016, *David L. Parris contre Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:897.

Mise en application

Les deux directives 2000 contiennent une série de dispositions communes visant à garantir la mise en application de leur contenu par les autorités nationales et la mise à la disposition des personnes concernées de voies de recours efficaces contre les discriminations.

Dans l'affaire *Asociația ACCEPT*, la Cour a estimé que les déclarations discriminatoires d'un dirigeant financier d'un club de football peuvent constituer «des faits qui permettent de présumer l'existence d'une discrimination» de la part du club lui-même: la charge de la preuve est dès lors transférée à ce dernier, auquel il incombe de démontrer que sa politique de recrutement n'est pas discriminatoire.

Dans l'affaire *An Garda Síochána*,[23] la Cour a dit pour droit que l'obligation d'un État de faire effectivement appliquer la directive-cadre sur l'égalité signifie que tout organe national établi par la loi afin de garantir cette application doit pouvoir décider de laisser inappliquée une règle de droit national contraire au droit de l'Union.

Études de cas

La jurisprudence de la CJUE en rapport avec les directives 2000 sur l'égalité a donc continué d'évoluer. Ce processus transparaît également au niveau national, étant donné que l'évolution de la jurisprudence de la Cour européenne a nécessairement une incidence sur les décisions des organes juridictionnels chargés, au sein des États membres, d'assurer le respect des exigences du droit national et de l'UE. Elle peut en outre influencer la législation nationale dans la mesure où le droit interne est réajusté pour se conformer aux obligations progressivement introduites par le droit antidiscrimination de l'UE.

Trois études de cas sont présentées ci-après pour montrer l'impact que la jurisprudence de la CJUE continue d'avoir sur l'évolution du droit national lié aux directives. Ils ont été choisis parce qu'ils illustrent à la fois le caractère dynamique et pluraliste de ce processus et les tensions qu'il est susceptible de générer.

La première étude de cas concerne l'incidence des arrêts de la CJUE dans les affaires *Egenberger* et *IR*, lesquels clarifient la portée de l'exception relative à «l'éthique religieuse» visée à l'article 4, paragraphe 2, de la directive-cadre sur l'égalité, ainsi que le lien entre le droit à la non-discrimination tel que protégé par l'article 21 de la Charte de l'UE et les dispositions pertinentes tant du TFUE que de la Charte de l'Union concernant la liberté de religion et le statut des organisations religieuses.

Dans de nombreux États membres, des organes affiliés à une organisation religieuse particulière ont traditionnellement pu exiger des membres de leur personnel qu'ils adhèrent à leur éthique religieuse spécifique. Le droit national a souvent opté à cet égard pour une approche non interventionniste motivée par un désir de ne pas interférer avec les décisions d'organes ayant ce type d'affiliation. En Allemagne et en Irlande, par exemple, les organes ayant une affiliation religieuse jouissent depuis des décennies d'une grande latitude pour décider s'ils exigent ou non des membres de leur personnel qu'ils adhèrent à leur éthique – la jurisprudence de la Cour constitutionnelle fédérale allemande et de la Cour suprême irlandaise montrant que cette latitude est protégée par les dispositions de leurs constitutions nationales respectives en matière de liberté de religion.

Dans ses arrêts *Egenberger* et *IR*, toutefois, la CJUE a interprété l'article 4, paragraphe 2, comme ayant pour objectif d'assurer un juste équilibre entre le droit fondamental à la non-discrimination et le droit à la liberté de religion. Elle insiste dans les deux cas sur l'importance de la proportionnalité en tant que

23 Arrêt du 4 décembre 2018, *Minister of Justice and Equality, Commissioner of An Garda Síochána contre Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979.

mécanisme de mise en balance des droits concernés, de même que sur la nécessité de faire état d'une justification claire et objective pour imposer une «éthique religieuse» en tant qu'exigence professionnelle.

Cette approche tranche avec la situation établie par l'ordre juridique interne de l'Allemagne, qui donne la priorité aux droits largement définis à l'autonomie religieuse des organisations religieuses et de leurs organes affiliés – ce qui a eu pour effet que l'arrêt *Egenberger* en particulier a suscité de vives controverses, et qu'il fait actuellement l'objet d'une contestation constitutionnelle devant la Cour constitutionnelle fédérale. Il n'en reste pas moins que les deux arrêts ont été favorablement accueillis par des commentateurs académiques allemands estimant qu'il s'agit d'un réajustement positif du lien entre le droit à la non-discrimination et le droit à la liberté de religion.

En Irlande, les organes affiliés à des organisations religieuses ont bénéficié à une époque d'une grande latitude pour exiger le respect de leur éthique religieuse par les membres de leur personnel. Une réforme législative a cependant fortement restreint cette latitude – l'influence de la directive-cadre sur l'égalité ayant joué un rôle déterminant à cet égard. Les arrêts *Egenberger* et *IR* constitueront par ailleurs d'importants points de référence pour l'interprétation de la position juridique actuelle, qui reflète étroitement les exigences du droit de l'UE.

Ainsi donc, les arrêts *Egenberger* et *IR* ont donné lieu dans ces deux pays à une rupture avec une politique nationale établie de longue date et consacrée par la Constitution. Cette évolution a suscité la controverse en Allemagne, et dans une moindre mesure en Irlande. Mais elle a également suscité des commentaires positifs dans l'un et l'autre de ces États membres, où une large part de l'opinion académique et politique considère que le droit de l'UE en matière d'égalité établit un équilibre davantage raisonné et défendable entre les droits concurrents à la non-discrimination et à la liberté de religion.

Tout en montrant l'impact dynamique du droit européen à l'égalité, la première étude de cas illustre également la réaction négative qu'il peut susciter. La seconde étude de cas s'intéresse à certaines de ces tensions en se référant au jugement prononcé par la Cour suprême danoise dans l'affaire *Ajos*.[24]

En l'espèce, la Cour suprême danoise n'a pas appliqué l'arrêt rendu par la CJUE dans le renvoi préjudiciel relatif à cette affaire, affirmant que la loi danoise d'adhésion qui régit la relation entre le droit national et le droit de l'UE ne constitue pas une base juridique permettant de donner au principe général de non-discrimination un effet horizontal direct en droit danois.

Cette décision a suscité énormément de commentaires passionnés, certains milieux académiques la qualifiant de rejet sans précédent de l'autorité de la CJUE. Pour l'heure, il reste à voir si l'arrêt *Ajos* est une décision ponctuelle propre au contexte constitutionnel et juridique spécifiquement danois – ou s'il s'agit de l'amorce d'une tendance plus générale.

La troisième étude de cas se concentre sur la manière dont la jurisprudence émergente de la Cour en matière de discrimination fondée sur un handicap a établi l'obligation pour les juridictions nationales de prendre en compte la nature spécifique du handicap en tant que motif, et les désavantages particuliers que des personnes handicapées peuvent subir pour accéder au marché du travail et y exercer une activité. Cette évolution a influencé à son tour le développement du droit national relatif à la discrimination fondée sur un handicap, notamment pour ce qui concerne le statut des travailleurs handicapés obligés de prendre un congé de maladie de longue durée. La situation en Espagne et au Royaume-Uni (encore soumis aux directives de l'UE en matière d'égalité à l'heure d'écrire ces lignes) est décrite ici pour illustrer la manière dont l'évolution de la jurisprudence de l'UE engendre des réorientations au niveau national.

24 Cour suprême danoise, affaire 15/2014, *Dansk Industri, agissant pour Ajos A/S contre Estate of A*, arrêt du 6 décembre 2016, UfR 2017.824H (arrêt SCDK).

Dans des arrêts tels que ceux rendus dans les affaires *Odar* et *Bedi*,[25] la CJUE insiste sur l'importance d'adopter une approche contextuelle pour évaluer si des personnes handicapées ont subi ou non un traitement moins favorable, et pour déterminer l'ampleur et la nature de ce traitement à des fins d'analyse de proportionnalité lorsqu'il s'agit d'une allégation de discrimination indirecte. La Cour a opté pour cette approche dans l'affaire *HK Danmark*[26] dans laquelle une allégation de discrimination indirecte fondée sur le handicap était portée à l'encontre d'une législation danoise autorisant un employeur à mettre fin au contrat de travail d'un salarié ayant eu des absences de longue durée pour cause de maladie. La CJUE a dit pour droit qu'une telle mesure était susceptible de défavoriser les travailleurs handicapés et devait dès lors faire l'objet d'une justification objective.

Cette approche a été ultérieurement appliquée en Espagne dans l'affaire *Ruiz Conejero*, qui concernait également une législation nationale régissant le pouvoir des employeurs de licencier des travailleurs à la suite de longues périodes congé de maladie. Dans son arrêt, la CJUE a insisté sur la nécessité pour toute analyse de la justification objective de prendre en compte les vulnérabilités particulières des personnes handicapées, tout en notant l'absence de la moindre disposition spécifique à ce sujet dans la législation. La juridiction espagnole de renvoi a subséquemment conclu que le licenciement contesté était en l'espèce nul et sans effet, considérant qu'il constituait une discrimination indirecte fondée sur le handicap.

L'approche de la CJUE dans des affaires telles que *Odar*, *HK Danmark* et *Ruiz Conejero* influence également les évolutions juridiques dans d'autres États membres, même en l'absence de demandes de renvoi préjudiciel adressées à la Cour concernant le domaine du droit spécifiquement visé. On peut citer à ce titre l'exemple du Royaume-Uni où la Cour d'appel a cité l'arrêt *HK Danmark* pour réfuter des arguments selon lesquels les exigences de la loi de 2010 sur l'égalité seraient remplies en ce qui concerne la discrimination fondée sur le handicap à partir du moment où la politique de l'employeur en matière d'absences traite de la même manière les travailleurs handicapés et les travailleurs valides.

Tendance et orientations futures

Un léger recul par rapport à cet aperçu de l'évolution de la jurisprudence de la Cour relative à l'interprétation des directives 2000 sur l'égalité, et aux trois études de cas qui l'accompagnent, permet d'esquisser certaines tendances. Celles-ci se démarquent de façon intéressante de celles décrites dans le précédent rapport (2012), ce qui conduit à penser que le droit de l'EU dans ce domaine connaît une évolution dynamique plutôt qu'une progression régulière.

Le rapport de 2012 signalait qu'aucun cas de discrimination fondée sur la religion n'avait été porté devant la CJUE – une absence frappante au vu des questions juridiques importantes et controversées que la directive-cadre sur l'égalité peut soulever dans ce contexte. Or, à ce jour, la CJUE a été saisie de cinq renvois en rapport avec une discrimination fondée sur la religion. Tous ont donné lieu à des arrêts importants susceptibles d'avoir des répercussions majeures sur l'évolution future du droit de l'UE en rapport avec le motif de la religion.

En ce qui concerne les autres motifs, la Cour a continué d'être régulièrement saisie de renvois portant sur une discrimination fondée sur l'âge; celui-ci demeure le motif le plus «courant», ce qui atteste de la complexité des problèmes juridiques en jeu et du manque d'expérience juridique nationale en la matière. La Cour a toutefois examiné au cours de la période couverte par le présent rapport des affaires relatives à chacun des motifs couverts, le handicap et la religion (comme indiqué) occupant une place de plus en plus importante.

25 Arrêt du 6 décembre 2012, *Odar contre Baxter Deutschland GmbH*, affaire C-152/11, ECLI:EU:C:2012:772; arrêt du 19 septembre 2018, *Bedi contre Bundesrepublik Deutschland*, C-312/17, ECLI:EU:C:2018:734.

26 Arrêt du 11 avril 2013, *HK Danmark, agissant pour Jette Ring contre Dansk almennyttigt Boligselskab et HK Danmark, agissant pour Lone Skouboe Werge contre Dansk Arbejdsgiverforening, agissant pour Pro Display A/S*, affaires jointes C-335/11 et C-33711, ECLI:EU:C:2013:222.

La majeure partie des renvois devant la Cour continuent d'émaner en la matière de certains pays en particulier. C'est ainsi que les juridictions allemandes restent des clients réguliers, surtout lorsqu'il s'agit d'affaires liées à l'âge (mais désormais à la religion également). Les juridictions espagnoles sont également à l'origine de renvois de plus en plus fréquents à la Cour. Plusieurs pays, tels les Pays-Bas, continuent en revanche d'être singulièrement absents.

Le fond de la jurisprudence a connu lui aussi de nouvelles évolutions depuis 2012 – la CJUE restant fidèle, de façon générale, à son approche téléologique dûment établie. Certains aspects de sa jurisprudence ont suscité la critique: on songe notamment à l'approche incertaine de la Cour vis-à-vis des politiques de «neutralité religieuse» dans l'affaire *Achbita*, sa décision en matière d'intersectionnalité dans l'affaire *Parris*, et l'interprétation très étroite du champ d'application de la directive sur l'égalité raciale qu'elle a adoptée dans les affaires *Jyske Finans* et *Heiko Jonny Maneiro*. Reste à voir comment elle traitera au cours des années à venir les questions juridiques suscitées par ces affaires.

On observe également une tendance manifeste à une «procéduralisation» plus poussée du droit de l'UE en matière d'égalité. C'est ainsi que les litiges en la matière sont de plus en plus souvent façonnés par des organismes publics de promotion de l'égalité et par des ONG, lesquels sont, les uns et les autres, prévus dans une certaine mesure par les directives 2000. Ces acteurs collectifs ont joué un rôle dans des affaires récentes telles que *Asociația ACCEPT* et *CHEZ*, et annoncent la possibilité de recours stratégiques, notamment pour le compte de communautés marginalisées qui éprouvent de la difficulté à introduire seules des recours en justice.

Enfin, il convient de noter que la CJUE doit encore clarifier les concepts majeurs que sont «le harcèlement» et «les rétorsions», interdits l'un et l'autre par les directives 2000 sur l'égalité. Dans certains États membres, les recours pour harcèlement ont constitué un puissant moyen de mettre en cause des formes d'inégalité de traitement qui ne relèvent pas du modèle comparatif traditionnel de la discrimination directe. Les rétorsions constituent pour leur part un élément majeur du droit procédural antidiscrimination dans la mesure où les personnes qui cherchent à faire appliquer la loi se trouvent ainsi protégées de toutes représailles. Ces deux concepts doivent être examinés et clarifiés par la CJUE.

Conclusions

L'ensemble du rapport atteste que la CJUE a contribué de manière significative depuis 2012 au développement de la législation liée aux directives 2000 sur l'égalité. La Cour a globalement adopté une approche téléologique fondée sur le principe général de la non-discrimination, ce qui a donné lieu à de larges interprétations du champ d'application et du sens des dispositions de fond des directives. On pourrait néanmoins faire valoir que certaines affaires récentes ne s'inscrivent pas dans cette approche et soulèvent des questions que la future jurisprudence va sans doute être appelée à résoudre.

Il apparaît clairement que la jurisprudence de la Cour relative aux directives sur l'égalité reste dynamique et influente. L'issue de l'affaire *Ajos* au Danemark montre que le débat se poursuit quant au rôle de la CJUE et qu'il existe des tensions entre la CJUE et les juridictions nationales. De façon générale, toutefois, la jurisprudence de la Cour continue d'exercer une large influence sur le développement du droit antidiscrimination au niveau national, et il en restera ainsi à l'avenir.

Zusammenfassung

Artikel 13 EGV (jetzt Artikel 19 AEUV) wurde 1999 im Zuge des Vertrags von Amsterdam in den EG-Vertrag aufgenommen und ermächtigte die Organe der Europäischen Union (EU), „geeignete Vorkehrungen [zu] treffen, um Diskriminierungen aus Gründen des Geschlechts, der Rasse, der ethnischen Herkunft, der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung zu bekämpfen“. Diese Ermächtigung diente als Rechtsgrundlage für die darauffolgende Verabschiedung zweier Richtlinien, die Diskriminierung aus anderen Gründen als Geschlecht behandeln. Während die Richtlinie 2000/43/EG (Antirassismusrichtlinie) Diskriminierungen aus Gründen der Rasse oder der ethnischen Herkunft in den Bereichen Beschäftigung und Beruf, Sozialschutz, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen verbietet, verbietet die Richtlinie 2000/78/EG (Gleichbehandlungsrahmenrichtlinie) Diskriminierungen wegen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung in Beschäftigung und Beruf.

Der Gerichtshof der Europäischen Union (EuGH) hat eine Reihe wichtiger Entscheidungen gefällt, in denen klargestellt wurde, wie viele Kernbestimmungen der Richtlinien ausgelegt und angewendet werden sollten. Der vorliegende Bericht untersucht die Entwicklung und Auswirkungen dieser Rechtsprechung zwischen dem 1. September 2012 und dem 1. Juni 2019.

Der Auslegungsansatz des EuGH

Aus der Rechtsprechung des EuGH ergibt sich, dass die beiden Gleichbehandlungsrichtlinien von 2000 dahingehend auszulegen sind, dass sie einer Grundnorm der Unionsrechtsordnung, nämlich dem allgemeinen Grundsatz der Gleichbehandlung, konkreten Ausdruck verleihen. Dieser Grundsatz leitet sich aus dem fest etablierten Menschenrecht auf Gleichheit und Nichtdiskriminierung ab, das in internationalen Menschenrechtsnormen und in den Verfassungstraditionen der EU-Mitgliedstaaten existiert. Es ist auch in Artikel 21 der EU-Grundrechtecharta verankert, die seit Dezember 2009 den gleichen Rechtsstatus wie die EU-Verträge hat. Dies ist gleichsam die Linse, durch die der EuGH die konkreten Bestimmungen der beiden Richtlinien auslegt, wobei seine Auslegung eine teleologische ist, um den wirksamen Schutz dieses Rechts zu gewährleisten.

Dieser Auslegungsansatz, der bei den Gleichbehandlungsrichtlinien von 2000 zur Anwendung kam, wurde erstmals in *Mangold/Helm*[1] beschrieben. Den Ausführungen des Gerichtshofs in dieser Rechtssache zufolge war die Gleichbehandlungsrahmenrichtlinie so zu verstehen, dass sie einen „allgemeinen Rahmen“ festlegt, der dem allgemeinen Grundsatz der Gleichbehandlung konkreten Ausdruck verleiht. In der späteren Rechtssache *Ajos*[2] erläuterte und bekräftigte der Gerichtshof, dass dieser allgemeine Grundsatz im Geltungsbereich des Unionsrechts unmittelbare horizontale Wirkung haben kann. Er wies auch erneut darauf hin, dass dieser Grundsatz jetzt in Artikel 21 der Charta verankert ist.

In *Egenberger*[3] stellte der Gerichtshof fest, dass das Verbot der Benachteiligung aus Gründen der Religion oder der Weltanschauung ein Aspekt dieses in Artikel 21 der Charta verankerten allgemeinen Grundsatzes der Gleichbehandlung ist. *Egenberger* bestätigte außerdem, dass sowohl dieser Aspekt des allgemeinen Grundsatzes als auch Artikel 21, und auch der damit verbundene Anspruch auf wirksamen Rechtsschutz, durchsetzbar sind und vollständige horizontale Direktwirkung zwischen Privatparteien (einschließlich Arbeitgebern und Arbeitnehmern) haben.

1 Urteil vom 22 November 2005, *Mangold/Helm*, C-144/04, ECLI:EU:C:2005:709.

2 Urteil des Gerichtshofs (Große Kammer) vom 19. April 2016, *Dansk Industri (DI), handelnd für die Ajos A/S/Nachlass des Karsten Eigil Rasmussen*, Rechtssache C-441/14, ECLI:EU:C:2016:278.

3 Urteil vom 17. April 2018, *Egenberger/Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, ECLI:EU:C:2018:257.

Der Gerichtshof hat sich auch auf die Charta berufen, um die Absteckung eines großzügigen persönlichen und sachlichen Geltungsbereichs der Gleichbehandlungsrichtlinien von 2000 zu rechtfertigen. In der Entscheidung der Großen Kammer in *CHEZ*[4] verwies er darauf, dass es wichtig sei, den wirksamen Schutz des in Artikel 21 verankerten Rechts auf Gleichbehandlung und Nichtdiskriminierung durch eine weite Auslegung dessen zu gewährleisten, was als Diskriminierung aus Gründen der Rasse oder der ethnischen Herkunft anzusehen sei.

Der EuGH hat auch die Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten (EMRK) als wichtigen externen Bezugspunkt herangezogen, insbesondere bei der Definition der Konzepte „ethnische Herkunft" in *CHEZ* und „Religion oder Weltanschauung" in *Achbita* und *Bougnaoui*.[5]

Eines der Menschenrechtsinstrumente, die die Rechtsprechung des EuGH am stärksten beeinflusst haben, ist das Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen (VN-Behindertenrechtskonvention). Seit die EU dem Übereinkommen beigetreten ist, hat sich dieses für den Gerichtshof zu einer wichtigen Orientierungshilfe bei der Auslegung vieler Aspekte von Diskriminierung aufgrund von Behinderung, und insbesondere des Begriffs „Behinderung", entwickelt.

Der Geltungsbereich der Richtlinien

Der EuGH hat zahlreiche Urteile gefällt, die sich auf den sachlichen Geltungsbereich der Richtlinien von 2000, insbesondere der Richtlinie 2000/78, bezogen. In seinen Entscheidungen hat er den Richtlinien stets eine teleologische Auslegung gegeben.

In *Asociația ACCEPT*[6] wurde das in der Gleichbehandlungsrahmenrichtlinie enthaltene Verbot von Diskriminierung beim „Zugang zur Beschäftigung" vom EuGH weit ausgelegt und auf öffentliche Äußerungen des dominierenden Aktionärs eines Fußballvereins angewandt, die darauf hindeuteten, dass der Verein ein diskriminierendes Einstellungsverfahren praktizierte, obwohl der betreffende Aktionär für Einstellungsentscheidungen rechtlich nicht verantwortlich war.

Der Gerichtshof hat unlängst auch unterstrichen, dass diese weite Auslegung von „Zugang zur Beschäftigung" im Lichte des übergeordneten Zwecks der Richtlinie zu sehen sei. So stellte er in *Kratzer*[7] fest, dass ein Serienkläger, der nicht wirklich eine Stelle, sondern nur den „Status als Bewerber erlangen möchte, und zwar mit dem alleinigen Ziel, eine Entschädigung geltend zu machen", nicht in den Geltungsbereich der Gleichbehandlungsrahmenrichtlinie fiel.

In *De Lange*[8] kam der Gerichtshof zu dem Ergebnis, dass eine steuerliche Regelung, wonach Personen, die das 30. Lebensjahr nicht vollendet haben, die Kosten einer Berufsausbildung unter bestimmten Voraussetzungen in vollem Umfang von ihrem steuerpflichtigen Einkommen in Abzug bringen können, in den sachlichen Geltungsbereich der Richtlinie fiel. Nach Ansicht des Gerichtshofs konnten die finanziellen Folgen einer solchen Behandlung Auswirkungen auf den Zugang zu einer Berufsausbildung haben und somit ältere Arbeitnehmer benachteiligen, die diese Regelung nicht in Anspruch nehmen konnten. Für die Klage wegen Altersdiskriminierung war jedoch auch von Bedeutung, dass das erklärte Ziel des Abzugsrechts darin bestand, den Zugang junger Menschen zur Ausbildung zu fördern und ihre Chancen auf dem Arbeitsmarkt zu verbessern.

4 Urteil vom 16. Juli 2015, *CHEZ Razpredelenie Bulgaria AD/Komisia za zashtita ot diskriminatsia*, C-83/14, ECLI:EU:C:2015:480.
5 Urteil vom 14. März 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [25]-[26]; Urteil vom 14. März 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204.
6 Urteil des Gerichtshofs vom 25. April 2013, *Asociația ACCEPT/Consiliul Național pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.
7 Urteil vom 28. Juli 2016, *Nils-Johannes Kratzer/R+V Allgemeine Versicherung AG*, C-423/15, ECLI:EU:C:2016:604.
8 Urteil vom 10. November 2016, *J.J. de Lange/Staatssecretaris van Financiën*, C-548/15, ECLI:EU:C:2016:850.

Gemäß seiner langjährigen Rechtsprechung zu geschlechtsbezogener Diskriminierung definiert der EuGH „Entgelt" im Rahmen der Richtlinien so, dass dies alle Bezüge umfasst, die ein Arbeitnehmer aufgrund seines Beschäftigungsverhältnisses erhält. In der Rechtssache *C.*[9] stellte er jedoch fest, dass eine nationale Regelung, die eine Zusatzsteuer auf Einkünfte aus Altersrenten erhob, nicht unter den Begriff „Entgelt" fiel.

Die Antirassismusrichtlinie hat den breitesten sachlichen Geltungsbereich aller Gleichbehandlungsrichtlinien und deckt außerdem Bereiche des Sozialschutzes ab, einschließlich Sozialversicherung und Gesundheitswesen, soziale Vergünstigungen, Bildung sowie Zugang zu und Versorgung mit Gütern und Dienstleistungen, die der Öffentlichkeit zur Verfügung stehen, darunter auch Wohnraum. In *Heiko Jonny Maniero*[10] kam der EuGH zu dem Ergebnis, dass die Vergabe von Stipendien durch eine private Stiftung, mit denen Forschungs- und Studienvorhaben im Ausland gefördert werden sollten, unter den Begriff „Bildung" und somit in den sachlichen Geltungsbereich der Richtlinie fiel.

Der Begriff „Behinderung" wird in der Gleichbehandlungsrahmenrichtlinie nicht definiert und seine Bedeutung war Gegenstand zahlreicher Diskussionen. In *HK Danmark*[11] legte der EuGH dar, dass der Begriff mit den Bestimmungen der VN-Behindertenrechtskonvention übereinstimmt, und kam zu dem Schluss, dass „Behinderung" eine „Einschränkung erfasst, die insbesondere auf physische, geistige oder psychische Beeinträchtigungen zurückzuführen ist, die in Wechselwirkung mit verschiedenen Barrieren den Betreffenden an der vollen und wirksamen Teilhabe am Berufsleben, gleichberechtigt mit den anderen Arbeitnehmern, hindern können".

Später hat der EuGH jedoch ausgeführt, dass eine „Einschränkung" nur dann Grundlage einer Behinderung sein kann, wenn sie speziell die Fähigkeit der betreffenden Person beeinträchtigt, einer Arbeit nachzugehen oder am Berufsleben teilzunehmen. In *Z/A*[12] stellte das Gericht fest, dass die Unmöglichkeit, ein Kind zu bekommen, es einer Frau nicht unmöglich machte, am Berufsleben teilzunehmen, und somit keine Grundlage für deren Klage wegen Diskriminierung aufgrund einer Behinderung sein konnte.

In einem dritten Urteil entschied der EuGH in *Fag og Arbejde*,[13] dass Adipositas als solche zwar keine Behinderung sei, die Adipositas eines Arbeitnehmers jedoch unter das Verbot von Diskriminierung wegen einer Behinderung fallen könne, wenn sie zu Beeinträchtigungen gemäß der in *HK Danmark* dargelegten Definition führe.

In der Antirassismusrichtlinie wird weder der Begriff „Rasse" noch der Begriff „ethnische Herkunft" definiert. In *Jyske Finans*[14] vertrat der Gerichtshof die Auffassung, dass eine Praxis, die sich auf das „Geburtsland" stützte, nicht mit einer Praxis gleichzusetzen war, die sich auf die ethnische Herkunft stützte – eine Auslegung, die im Schrifttum auf scharfe Kritik stieß.

Die operativen Bestimmungen der Richtlinien

Der EuGH hat auch dargelegt, wie die spezifischen operativen Bestimmungen der Gleichbehandlungsrichtlinien von 2000 auf die verschiedenen geschützten Merkmale angewendet werden sollten.

9 Urteil vom 2. Juni 2016, *C.*, C-122/15, ECLI:EU:C:2016:391.

10 Urteil vom 15. November 2018, *Heiko Jonny Maniero/Studienstiftung des deutschen Volkes eV*, C-457/17, ECLI:EU:C:2018:912.

11 Urteil vom 11. April 2013, *HK Danmark, handelnd für Jette Ring/Dansk almennyttigt Boligselskab* und *HK Danmark, handelnd für Lone Skouboe Werge/Dansk Arbejdsgiverforening, handelnd für die Pro Display A/S*, verbundene Rechtssachen C-335/11 und C-33711, ECLI:EU:C:2013:222.

12 Urteil vom 18. März 2014, *Z/A*, Rechtssache C-363/12, ECLI:EU:C:2014:159.

13 Urteil vom 18. Dezember 2014, *Fag og Arbejde (FOA), handelnd für Karsten Kaltoft/Kommunernes Landsforening (KL), handelnd für Billund Kommune*, C-354/13, ECLI:EU:C:2014:2463.

14 Urteil vom 6. April 2017, *Jyske Finans A/S/Ligebehandlingsnævnet*, C-668/15, ECLI:EU:C:2017:278.

Unmittelbare Diskriminierung

In *CHEZ* stellte der EuGH fest, dass der Begriff der „Diskriminierung aufgrund der ethnischen Herkunft" anzuwenden sei, wenn eine Praxis, die überwiegend auf Personen einer bestimmten ethnischen Herkunft negative Auswirkungen hat, auch dazu führt, dass eine Person, *die nicht diese Herkunft aufweist*, weniger günstig behandelt oder in besonderer Weise benachteiligt wird.

In *Hay*[15] bestätigte der Gerichtshof, dass eine unterschiedliche Behandlung, die auf einer eingetragenen Lebenspartnerschaft beruht, eine unmittelbare Diskriminierung aufgrund der sexuellen Ausrichtung darstellen kann, wenn Ehe und eingetragene Lebenspartnerschaft in Bezug auf die in Frage stehende spezifische Vergünstigung vergleichbar sind.

Mittelbare Diskriminierung

Unmittelbare Diskriminierung betrifft die *Gründe* für eine unterschiedliche Behandlung. Mittelbare Diskriminierung erfasst hingegen Praktiken, die zur *Folge* haben, dass Personen, die einer Gruppe angehören, „in besonderer Weise benachteiligt" werden.

In *Jyske Finans* stellte der EuGH fest, dass der für mittelbare Diskriminierung erforderliche Nachweis, dass eine Person „in besonderer Weise benachteiligt" wurde, es erforderlich mache, ausdrücklich eine *bestimmte* ethnische Gruppe zu identifizieren, die benachteiligt wurde. Es genüge nicht, die Auswirkungen auf eine Reihe ethnischer Gruppen (Personen nicht dänischer ethnischer Herkunft) mit den Auswirkungen auf eine einzige ethnische Gruppe (Personen dänischer ethnischer Herkunft) zu vergleichen. Auch diese Schlussfolgerung stieß im Schrifttum teilweise auf Kritik.

Ein Verfahren, das nachteilige Auswirkungen auf eine geschützte Gruppe hat, stellt keine Diskriminierung dar, wenn das Verfahren „durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel … zur Erreichung dieses Ziels angemessen und erforderlich" sind. Im Zusammenhang mit ethnischer Herkunft betonte der EuGH in *CHEZ*, dass bei dieser Angemessenheitsprüfung berücksichtigt werden müsse, ob eine Praxis die legitimen Interessen der betroffenen Personen übermäßig beeinträchtigt und gegebenenfalls beleidigende oder stigmatisierende Wirkung hat.

In Rechtssachen wie *Ruiz Conejero*[16] hat der Gerichtshof auch wiederholt darauf hingewiesen, dass bei der Prüfung der Angemessenheit die speziellen Risiken und Schwierigkeiten, denen Menschen mit Behinderungen hinsichtlich ihrer finanziellen Bedürfnisse und ihrer Beteiligung am Erwerbsleben ausgesetzt sind, besonders berücksichtigt werden müssen.

Altersdiskriminierung

Die allgemeinen Bestimmungen der Gleichbehandlungsrahmenrichtlinie gelten für Alter genauso wie für alle anderen Merkmale, die in den Geltungsbereich der Richtlinie fallen; Artikel 6 sieht jedoch ausdrücklich vor, dass eine unmittelbar auf dem Alter beruhende Ungleichbehandlung unter bestimmten Voraussetzungen zulässig ist.

Alter ist aufgrund der Prävalenz altersbasierter bzw. alterskorrelierter Unterscheidungen im Beschäftigungsbereich ein komplexer Schutzgrund. Der EuGH hat klargestellt, dass das Arbeitsrecht auf der Grundlage von Kriterien, die mit dem Alter korrelieren, zwischen verschiedenen Kategorien von

15 Urteil vom 12. Dezember 2013, *Frédéric Hay/Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12, ECLI:EU:C:2013:823.

16 Urteil vom 18. Januar 2018, *Carlos Enrique Ruiz Conejero/Ferroser Servicios Auxiliares SA und Ministerio Fiscal,* C-270/16, ECLI:EU:C:2018:17.

Arbeitnehmern unterscheiden darf, ohne die in der Gleichbehandlungsrahmenrichtlinie vorgesehenen Schutzmechanismen auszulösen.

In Rechtssachen wie zum Beispiel *Abercrombie & Fitch*[17] und *de Lange* hat der Gerichtshof den Mitgliedstaaten und den Arbeitgebern bei der Umsetzung ihrer arbeitsmarktpolitischen Ziele einen gewissen Spielraum eingeräumt.

Bei der Prüfung der sachlichen Rechtfertigung hat er das Kriterium „angemessen und erforderlich" jedoch strikt angewandt und festgestellt, dass altersdiskriminierende Maßnahmen nicht als gerechtfertigt angesehen werden können, wenn sie die Interessen der Betroffenen übermäßig beeinträchtigen (z.B. *Kommission/Ungarn*)[18] oder wenn eine Alternative zur Verfügung steht, die nicht auf das Kriterium des Alters zurückgreift (z.B. *Specht*).[19]

Artikel 6 Absatz 2 der Gleichbehandlungsrahmenrichtlinie sieht eine besondere Ausnahme für Ungleichbehandlungen wegen des Alters bei betrieblichen Systemen der sozialen Sicherheit vor. Der EuGH hat unterstrichen, dass sich diese Ausnahme strikt auf die in der Richtlinie festgelegten Bedingungen beschränkt.

Alle Antidiskriminierungsrichtlinien sehen eine Ausnahme von ihrem Mandat für den Fall vor, dass es um eine „wesentliche und entscheidende berufliche Anforderung" geht. Der EuGH wies darauf hin, dass diese Bedingung streng auszulegen sei und vor allem die Art der betreffenden Tätigkeit berücksichtigt werden müsse. Diese Vorgabe war der Grund dafür, dass es in zwei Rechtssachen, in denen ein Höchstalter für die Einstellung von Polizeibeamten angefochten wurde (*Pérez* und *Gorka Salaberria Sorondo*),[20] zu unterschiedlichen Ergebnissen kam.

Religion und Weltanschauung

Der EuGH hat auf der Grundlage der Gleichbehandlungsrahmenrichtlinie zwei wichtige Rechtssachen entschieden, die religiöse Kleidung zum Gegenstand hatten; in beiden Fällen ging es um arbeitgeberseitige Beschränkungen für das Tragen islamischer Kopftücher.

In *Achbita* stellte der Gerichtshof fest, dass die von einem Arbeitgeber praktizierte Politik der Neutralität am Arbeitsplatz, die das Tragen jeglicher religiösen, philosophischen oder politischen Bekleidung untersagte, keine unmittelbare Diskriminierung der Klägerin (die ein islamisches Kopftuch trug) darstellte, da sie für alle Beschäftigten gleichermaßen galt. Die entsprechende Regelung konnte nach Auffassung des Gerichtshofs jedoch eine mittelbare Diskriminierung darstellen, wenn der Arbeitgeber sie nicht auf alle Beschäftigten gleichermaßen anwandte oder nicht nachwies, dass die Vorschrift des Tragens neutraler Bekleidung unbedingt erforderlich war, um ein rechtmäßiges Ziel zu erreichen.

In der Rechtssache *Bougnaoui* ging es um eine muslimische Softwaredesignerin, die entlassen wurde, weil ein Kunde Anstoß an ihrem Kopftuch genommen hatte. Nach Ansicht des Gerichtshofs konnte die Entlassung nicht damit gerechtfertigt werden, dass es sich um eine wesentliche und entscheidende berufliche Anforderung für die Ausübung der betreffenden Tätigkeit handelte, da Kundenwünsche eine subjektive Erwägung seien, eine wesentliche und entscheidende berufliche Anforderung jedoch von der Art der betreffenden beruflichen Tätigkeit objektiv vorgegeben sein müsse.

17 Urteil vom 19. Juli 2017, *Abercrombie & Fitch Italia Srl/Antonino Bordonaro*, C-143/16, ECLI:EU:C:2017:566.
18 Urteil vom 6. November 2012, *Europäische Kommission/Ungarn*, C-286/12, ECLI:EU:C:2012:687.
19 Urteil vom 19. Juni 2014, *Thomas Specht u.a./Land Berlin und Bundesrepublik Deutschland*, verbundene Rechtssachen C-501/12 bis C-506/12, C-540/12 und C-541/12, ECLI:EU:C:2014:2005.
20 Urteil vom 13. November 2014, *Mario Vital Pérez/Ayuntamiento de Oviedo*, C-416/13, ECLI:EU:C:2014:2371; Urteil vom 15. November 2016, *Gorka Salaberria Sorondo/Academia Vasca de Policía y Emergencias*, C-258/15, ECLI:EU:C:2016:873.

Sowohl *Achbita* als auch *Bougnaoui* wurden im Schrifttum ausgiebig kommentiert. Es bleibt abzuwarten, wie der vom Gerichtshof in diesen beiden Rechtssachen skizzierte Ansatz in nachfolgenden Urteilen umgesetzt wird.

Der EuGH untersuchte auch die in Artikel 4 Absatz 2 Gleichbehandlungsrahmenrichtlinie enthaltene Ausnahme, die hinsichtlich des Kriteriums „wesentliche und entscheidende berufliche Anforderung" eine Sonderregelung für Kirchen oder andere religiöse Organisationen vorsieht, die aufgrund des Ethos ihrer jeweiligen Organisation Personen wegen der Religion oder Weltanschauung ungleich behandeln wollen. In *Egenberger* erkannte der Gerichtshof für Recht, dass die Entscheidung darüber, ob die Kriterien für diese Ausnahme erfüllt sind, nicht der Organisation selbst überlassen werden könne und im Fall einer Anfechtung einer wirksamen gerichtlichen Überprüfung unterliegen müsse.

In *IR/JQ* ging es erneut um die Ausnahme wegen religiösem Ethos, insbesondere um den Spielraum, den Arbeitgeber gemäß Artikel 4 Absatz 2 Unterabs. 2 haben, um von ihren Mitarbeitern zu verlangen, dass sie sich loyal im Sinne des religiösen Ethos des Arbeitgebers verhalten. Der Gerichtshof bestätigte die in *Egenberger* aufgestellten Kriterien dafür, wann Arbeitgeber von dieser Ausnahme vom allgemeinen Gleichbehandlungsgrundsatz Gebrauch machen können, und gab Hinweise bezüglich ihrer Anwendung.

In *Cresco*[21] kam der Gerichtshof zu dem Ergebnis, dass eine nationale Regelung, die nur Mitgliedern bestimmter christlicher Kirchen einen Feiertag oder ein Zusatzentgelt anstelle der Inanspruchnahme dieses Feiertags gewährte, eine unmittelbare Diskriminierung wegen der Religion darstellte.

Insgesamt haben diese fünf Rechtssachen wegen religiöser Diskriminierung in der Rechtsprechung des EuGH wichtiges Neuland eröffnet.

Angemessene Vorkehrungen

Artikel 5 der Gleichbehandlungsrahmenrichtlinie sieht vor, dass der Arbeitgeber geeignete „angemessene Vorkehrungen" treffen muss, um Menschen mit Behinderung „den Zugang zur Beschäftigung, die Ausübung eines Berufes, den beruflichen Aufstieg und die Teilnahme an Aus- und Weiterbildungsmaßnahmen zu ermöglichen, es sei denn, diese Maßnahmen würden den Arbeitgeber unverhältnismäßig belasten".

In *HK Danmark* entschied der Gerichtshof, dass „angemessene Vorkehrungen" auch organisatorische Änderungen wie zum Beispiel die Verkürzung der Arbeitszeit eines behinderten Arbeitnehmers umfassen können.

Positive Maßnahmen

Der EuGH hat die Bestimmung der Gleichbehandlungsrahmenrichtlinie über positive Maßnahmen im Einklang mit seiner früheren Rechtsprechung zu positiven Maßnahmen in Bezug auf Geschlecht ausgelegt. In *Cresco* äußerte sich der Gerichtshof nicht dazu, ob der Ausschluss eines wichtigen religiösen Tages aus der Liste der nationalen Feiertage eine praktische „Benachteiligung" darstellte, die Ziel rechtmäßiger positiver Maßnahmen sein konnte. Er entschied jedoch, dass die in Rede stehende nationale Vorschrift – die bestimmte religiöse Minderheiten begünstigte – nicht als positive Maßnahme im Sinne von Artikel 7 Absatz 1 der Gleichbehandlungsrahmenrichtlinie gerechtfertigt werden konnte, da sie in keinem angemessenen Verhältnis zu dem Ziel der Abmilderung einer solchen Benachteiligung stand.

21 Urteil vom 22. Januar 2019, *Cresco Investigation GmbH/Markus Achatzi*, C-193/17, ECLI:EU:C:2019:43.

Intersektionelle Diskriminierung

Der EuGH hat festgestellt, dass in einer Klage zwar geltend gemacht werden kann, dass eine einzige nachteilige Handlung eine Person aus zwei verschiedenen Gründen diskriminiert hat, dass es jedoch keine neue, aus der Kombination dieser Gründe resultierende Diskriminierungskategorie gibt (*Parris*).[22]

Durchsetzung

Die beiden Richtlinien von 2000 enthalten eine Reihe gemeinsamer Bestimmungen, die gewährleisten sollen, dass ihr Inhalt von den nationalen Behörden durchgesetzt wird und Betroffene in der Lage sind, wirksam gegen Diskriminierung vorzugehen.

In *Asociația ACCEPT* stellte der EuGH fest, dass diskriminierende Äußerungen seitens eines finanziellen Förderers eines Fußballvereins als „Tatsachen, die das Vorliegen einer Diskriminierung vermuten lassen" gewertet werden konnten. Die Beweislast wurde folglich auf den Verein verlagert, der nun beweisen musste, dass er keine diskriminierende Einstellungspolitik betrieb.

In *An Garda Síochána*[23] kam der Gerichtshof zu dem Ergebnis, dass die Verpflichtung eines Staates zur wirksamen Durchsetzung der Gleichbehandlungsrahmenrichtlinie bedeutet, dass jede nationale Stelle, die durch Gesetz eingerichtet wurde, um die Durchsetzung des Unionsrechts zu gewährleisten, befugt sein muss, eine dem Unionsrecht entgegenstehende nationale Rechtsvorschrift unangewendet zu lassen.

Fallstudien

Die Rechtsprechung des EuGH bezüglich der Gleichbehandlungsrichtlinien von 2000 hat sich also weiterentwickelt. Dieser Entwicklungsprozess spiegelt sich auch auf nationaler Ebene wider. Indem die Rechtsprechung des EuGH sich entwickelt, hat sie unweigerlich Auswirkungen auf die Rechtsprechung der Gerichte in den Mitgliedstaaten, deren Aufgabe es ist, die Bestimmungen des nationalen Rechts und des Unionsrechts durchzusetzen. Sie kann des Weiteren die nationale Gesetzgebung beeinflussen, da das innerstaatliche Recht neu justiert wird, um es den sich entwickelnden Anforderungen des EU-Antidiskriminierungsrechts anzupassen.

Es werden drei Fallstudien vorgestellt, die zeigen, welche Auswirkungen die Rechtsprechung des EuGH in Bezug auf die Richtlinien nach wie vor auf die Entwicklung des nationalen Rechts hat. Sie wurden ausgewählt, um die Dynamik und den pluralistischen Charakter dieses Prozesses sowie die Spannungen zu veranschaulichen, die er auslösen kann.

Die erste Fallstudie beschäftigt sich mit den Auswirkungen der Urteile des EuGH in den Rechtssachen *Egenberger* und *IR*, die den Geltungsbereich der Ausnahme des „religiösen Ethos" in Artikel 4 Absatz 2 Gleichbehandlungsrahmenrichtlinie sowie das Verhältnis zwischen dem Recht auf Nichtdiskriminierung in Artikel 21 der EU-Charta und den einschlägigen Bestimmungen des AEUV und der EU-Charta zur Religionsfreiheit und zum Status religiöser Organisationen klären.

In vielen Mitgliedstaaten konnten Einrichtungen, die einer religiösen Organisation angegliedert sind, traditionell von ihren Beschäftigten die Befolgung ihres spezifischen religiösen Ethos verlangen. Das nationale Recht hat diesbezüglich häufig einen Ansatz des Laissez-faire verfolgt, der von dem Wunsch getragen war, sich in die Entscheidungen solcher Einrichtungen nicht einzumischen. In Deutschland und Irland haben zum Beispiel Einrichtungen, die einer religiösen Organisation angegliedert sind, seit Jahrzehnten einen erheblichen Ermessensspielraum, wenn es darum geht zu entscheiden, ob

22 Urteil vom 24. November 2016, *David L. Parris/Trinity College Dublin u.a.*, C-443/15, ECLI:EU:C:2016:897.
23 Urteil vom 4. Dezember 2018, *Minister of Justice and Equality, Commissioner of An Garda Síochána/Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979.

sie ihre Beschäftigten zur Befolgung ihres religiösen Ethos verpflichten oder nicht – wobei aus der Rechtsprechung des deutschen Bundesverfassungsgerichts und des irischen Supreme Court hervorgeht, dass dieser Ermessensspielraum durch die Bestimmungen der jeweiligen nationalen Verfassungen zur Religionsfreiheit geschützt ist.

In *Egenberger* und *IR* legte der EuGH Artikel 4 Absatz 2 jedoch so aus, dass dieser die Herstellung eines angemessenen Ausgleichs zwischen dem Grundrecht auf Nichtdiskriminierung und dem Recht auf Religionsfreiheit bezweckt. In beiden Urteilen betonte der EuGH die Bedeutung der Verhältnismäßigkeit als Mechanismus zur Herstellung eines angemessenen Ausgleichs zwischen den betreffenden Rechten sowie die Notwendigkeit, eine klare, sachliche Begründung dafür vorzulegen, warum ein „religiöses Ethos" als berufliche Anforderung verlangt wird.

Dies steht im Widerspruch zur innerstaatlichen Rechtslage in Deutschland, wo den weit gefassten Rechten auf religiöse Autonomie von religiösen Organisationen und angegliederten Einrichtungen Vorrang eingeräumt wird. Insbesondere das *Egenberger*-Urteil hat deshalb gewisse Kontroversen ausgelöst und ist derzeit Gegenstand einer Verfassungsbeschwerde vor dem deutschen Bundesverfassungsgericht. Beide Urteile wurden jedoch auch von deutschen Kommentatoren als positive Neujustierung des Verhältnisses zwischen dem Recht auf Nichtdiskriminierung und dem Recht auf Religionsfreiheit begrüßt.

In Irland hatten Einrichtungen, die religiösen Organisationen angegliedert sind, früher einen sehr großen Ermessensspielraum, wenn es darum ging, von ihren Beschäftigten die Befolgung ihres religiösen Ethos zu verlangen. Im Zuge einer Gesetzesreform wurde dieser Ermessensspielraum jedoch stark eingeschränkt – der Einfluss der Gleichbehandlungsrahmenrichtlinie hat diesbezüglich eine wichtige Rolle gespielt. *Egenberger* und *IR* werden auch bei der Auslegung der derzeitigen Rechtslage, die den Vorgaben des Unionsrechts weitgehend entspricht, wichtige Bezugspunkte sein.

Egenberger und *IR* haben also in beiden Ländern eine Abkehr von einer seit langem etablierten und in der Verfassung sanktionierten innerstaatlichen Politik erforderlich gemacht. In Deutschland hat diese Entwicklung zu Kontroversen geführt, in Irland dagegen weniger. In beiden Mitgliedstaaten hat sie jedoch auch positive Reaktionen hervorgerufen: Zahlreiche Stimmen aus Wissenschaft und Politik äußerten sich in beiden Ländern dahingehend, dass die Vorgaben des EU-Gleichbehandlungsrechts einen vernünftigeren und nachvollziehbareren Ausgleich zwischen den konkurrierenden Rechten auf Nichtdiskriminierung und Religionsfreiheit herstellt.

Die obige, erste Fallstudie zeigt nicht nur die dynamischen Auswirkungen des EU-Gleichbehandlungsrechts, sondern veranschaulicht auch, welchen Widerstand es hervorrufen kann. Die zweite Fallstudie befasst sich mit einigen dieser Spannungen und zieht dafür das Urteil des dänischen Obersten Gerichtshofs in der Rechtssache *Ajos*[24] heran.

In dem genannten Rechtsstreit wandte der dänische Oberste Gerichtshof die Vorabentscheidung des EuGH nicht an und entschied, dass das dänische Beitrittsgesetz, das das Verhältnis zwischen dem innerstaatlichen Recht und dem Unionsrecht regelt, keine rechtliche Grundlage bot, um dem allgemeinen Grundsatz der Nichtdiskriminierung im dänischen Recht horizontale Direktwirkung zu verleihen.

Diese Entscheidung löste zahlreiche aufgeregte Kommentare aus und wurde von einigen Wissenschaftlern als beispiellose Ablehnung der Autorität des EuGH bezeichnet. Vorläufig bleibt abzuwarten, ob es sich bei *Ajos* um eine einmalige, auf den speziellen verfassungsrechtlichen und juristischen Kontext Dänemarks beschränkte Entscheidung handelt – oder um den Beginn einer breiteren Entwicklung.

24 Højesteret (Oberstes dänisches Gericht), Rechtssache 15/2014, *Dansk Industri, handelnd für die Ajos A/S/Nachlass des A*, Urteil vom 6. Dezember 2016, UfR 2017.824H.

In der dritten Fallstudie wird untersucht, wie die Rechtsprechung des EuGH zum Thema Diskriminierung aufgrund einer Behinderung die nationalen Gerichte verpflichtet hat, den besonderen Charakter von Behinderung als Diskriminierungsgrund und die besonderen Nachteile zu berücksichtigen, mit denen behinderte Menschen beim Zugang zu Beschäftigung und der Ausübung eines Berufs unter Umständen konfrontiert sind. Dies wiederum hat die Entwicklung nationaler Rechtsvorschriften zum Schutz vor Diskriminierung aufgrund einer Behinderung beeinflusst, insbesondere was den Status behinderter Arbeitnehmer betrifft, die sich krankheitsbedingt längere Zeit von der Arbeit freistellen lassen müssen. Anhand der Situation in Spanien und im Vereinigten Königreich (das zum Zeitpunkt der Erstellung dieses Berichts noch immer den EU-Gleichbehandlungsrichtlinien unterliegt) wird veranschaulicht, wie die Entwicklung der Rechtsprechung des EuGH zu Veränderungen auf nationaler Ebene führt.

In Urteilen wie *Odar* und *Bedi*[25] hat der EuGH betont, wie wichtig es ist, einen kontextbezogenen Ansatz zu wählen, um zu beurteilen, ob Menschen mit Behinderungen weniger günstig behandelt wurden, und um – zum Zweck der Verhältnismäßigkeitsprüfung, falls es sich um eine Klage wegen mittelbarer Diskriminierung handelt – Umfang und Art dieser Behandlung zu ermitteln. In *HK Danmark*[26] hat der Gerichtshof diesen Ansatz im Zusammenhang mit einer Klage wegen mittelbarer Diskriminierung aufgrund von Behinderung angewandt, die sich gegen eine dänische Rechtsvorschrift richtete, die es Arbeitgebern erlaubte, Arbeitnehmer zu entlassen, die längere Zeit krankgemeldet waren. Der EuGH entschied, dass eine solche Maßnahme behinderte Arbeitnehmer benachteiligen könne und daher nachgewiesen werden müsse, dass sie sachlich gerechtfertigt sei.

Dieser Ansatz kam in der Folge in der spanischen Rechtssache *Ruiz Conejero* zur Anwendung, in der es ebenfalls um nationale Rechtsvorschriften ging, die die Befugnis der Arbeitgeber regelten, Arbeitnehmer nach langen krankheitsbedingten Abwesenheiten zu entlassen. In seinem Urteil wies der EuGH darauf hin, dass bei der Prüfung der sachlichen Rechtfertigung die besondere Anfälligkeit von Menschen mit Behinderungen berücksichtigt werden müsse, und stellte gleichzeitig fest, dass die Rechtsvorschriften keinerlei spezifische Bestimmungen zu diesem Thema enthielten. Das vorlegende spanische Gericht entschied daraufhin, dass die angefochtene Kündigung null und nichtig war, da sie eine mittelbare Diskriminierung aufgrund einer Behinderung darstellte.

Der Ansatz des EuGH in Rechtssachen wie *Odar*, *HK Danmark* und *Ruiz Conejero* beeinflusst auch die Rechtsentwicklung in anderen Mitgliedstaaten, selbst wenn kein Vorabentscheidungsersuchen zu dem speziellen Rechtsgebiet an den Gerichtshof gerichtet wurde. Dies zeigt sich beispielsweise im Vereinigten Königreich, wo sich der Court of Appeal auf *HK Danmark* berief, um Argumente zurückzuweisen, wonach die Bestimmungen des Equality Act 2010 in puncto Diskriminierung wegen Behinderung dadurch erfüllt würden, dass die Politik des Arbeitgebers in Bezug auf Abwesenheitszeiten von Mitarbeitern behinderte und nicht behinderte Arbeitnehmer gleich behandelte.

Trends und künftige Orientierung

Ausgehend von diesem Überblick über die Entwicklung der Rechtsprechung des EuGH zur Auslegung der Gleichbehandlungsrichtlinien von 2000 und den drei begleitenden Fallstudien ist es möglich, einige Tendenzen zu erkennen. Diese unterscheiden sich auf interessante Weisen von den im Vorgängerbericht von 2012 beschriebenen Tendenzen, was darauf hindeutet, dass die Entwicklung des Unionsrechts in diesem Bereich dynamisch und kein gleichmäßig verlaufender Prozess ist.

25 Urteil vom 6. Dezember 2012, *Odar/Baxter Deutschland GmbH*, C-152/11, ECLI:EU:C:2012:772; Urteil vom 19. September 2018, *Bedi/Bundesrepublik Deutschland*, C-312/17, ECLI:EU:C:2018:734.

26 Urteil vom 11. April 2013, *HK Danmark, handelnd für Jette Ring/Dansk almennyttigt Boligselskab* und *HK Danmark, handelnd für Lone Skouboe Werge/Dansk Arbejdsgiverforening, handelnd für die Pro Display A/S*, verbundene Rechtssachen C-335/11 und C-33711, ECLI:EU:C:2013:222.

Im Bericht von 2012 wurde festgestellt, dass dem EuGH keine Fälle von Diskriminierung wegen der Religion vorgelegt worden waren – ein erstaunlicher Umstand angesichts der wichtigen und kontroversen Rechtsfragen, die die Gleichbehandlungsrahmenrichtlinie in diesem Zusammenhang aufwerfen konnte. Inzwischen wurden dem EuGH jedoch fünf Fälle von religiöser Diskriminierung vorgelegt. Sie alle haben zu wichtigen Urteilen geführt, die dramatische Auswirkungen auf die künftige Entwicklung des Unionsrechts in Bezug auf den Diskriminierungsgrund „Religion" haben können.

Was die anderen Gründe betrifft, so erhält der Gerichtshof – langsam, aber stetig – immer wieder Vorlagen zum Thema Altersdiskriminierung. Alter ist nach wie vor der „gängigste" Grund – Ausdruck der Komplexität der damit verbundenen Rechtsfragen und des Mangels an innerstaatlicher Rechtserfahrung in diesem Bereich. Im Berichtszeitraum hat der Gerichtshof jedoch Fälle behandelt, die sich auf alle geschützten Gründe bezogen, wobei Behinderung und Religion (wie erwähnt) einen immer wichtigeren Platz einnehmen.

Noch immer ist es so, dass die meisten Vorlagen in diesem Bereich aus bestimmten Ländern kommen. Deutsche Gerichte sind nach wie vor „Stammkunden", vor allem wenn es um Diskriminierung aufgrund des Alters (inzwischen aber auch Religion) geht. Auch spanische Gerichte legen dem Gerichtshof immer häufiger Fälle zur Vorabentscheidung vor. Einige Länder, zum Beispiel die Niederlande, fehlen unübersehbar.

Auch inhaltlich hat sich die Rechtsprechung seit 2012 weiterentwickelt – wobei der EuGH seinem bewährten teleologischen Ansatz grundsätzlich treu geblieben ist. Bestimmte Aspekte seiner Rechtsprechung waren Gegenstand von Kritik, vor allem die unbestimmte Haltung des Gerichts bezüglich der Arbeitgeberpolitik der „religiösen Neutralität" in *Achbita*, seine Entscheidung zu Intersektionalität in *Parris* und die sehr enge Auslegung des Geltungsbereichs der Antirassismusrichtlinie in den Rechtssachen *Jyske Finans* und *Heiko Jonny Maneiro*. Es bleibt abzuwarten, wie in den kommenden Jahren mit den in diesen Verfahren aufgeworfenen Rechtsfragen umgegangen wird.

Es gibt auch einen klaren Trend zu einer weiteren „Prozeduralisierung" des EU-Gleichbehandlungsrechts. Insbesondere werden Rechtsstreite in diesem Bereich zunehmend von öffentlichen Gleichbehandlungsstellen und NROs geprägt – beides Einrichtungen, die in den Richtlinien von 2000 bis zu einem gewissen Grad vorgesehen sind. Solche kollektiven Akteure haben in jüngster Zeit in Rechtssachen wie *Asociația ACCEPT* und *CHEZ* eine Rolle gespielt und kündigen die Möglichkeit künftiger strategischer Klagen an, vor allem im Namen marginalisierter Bevölkerungsgruppen, die Schwierigkeiten haben, allein vor Gericht zu ziehen.

Schließlich ist anzumerken, dass eine Klärung der wichtigen Konzepte „Belästigung" und „Viktimisierung" – beides Handlungen, die nach den Gleichbehandlungsrichtlinien von 2000 verboten sind – seitens des EuGH noch aussteht. In einigen Mitgliedstaaten waren Belästigungsklagen ein wirksames Mittel, um gegen Formen von Ungleichbehandlung vorzugehen, die in das traditionelle Vergleichsmuster der unmittelbaren Diskriminierung nicht hineinpassen. Viktimisierung ist ihrerseits ein wesentliches verfahrensrechtliches Element in Antidiskriminierungssachen, da sie diejenigen, die versuchen, das Recht durchzusetzen, vor Vergeltungsmaßnahmen schützt. Beide Konzepte müssen vom EuGH geprüft und geklärt werden.

Schlussfolgerungen

Insgesamt macht der Bericht deutlich, dass der EuGH seit 2012 bei der Fortbildung des Rechts der Gleichbehandlungsrichtlinien von 2000 erhebliche Fortschritte gemacht hat. Der Gerichtshof hat im Allgemeinen einen teleologischen Ansatz, basierend auf dem allgemeinen Grundsatz der Nichtdiskriminierung, angewandt, was zu weiten Auslegungen des Geltungsbereichs und des Sinns der materiellrechtlichen Bestimmungen der Richtlinien geführt hat. Einige jüngere Rechtssachen stehen möglicherweise jedoch nicht im Einklang mit diesem Ansatz und werfen Fragen auf, die vermutlich in der zukünftigen Rechtsprechung gelöst werden müssen.

Fest steht, dass die Rechtsprechung des EuGH in Bezug auf die Gleichbehandlungsrichtlinien dynamisch und richtungsweisend bleibt. Der Ausgang des *Ajos*-Verfahrens in Dänemark zeigt, dass die Debatte über die Rolle des EuGH weitergeht und dass es Spannungen zwischen dem EuGH und den nationalen Gerichten gibt. Generell übt die Rechtsprechung des Gerichtshofs jedoch immer noch einen erheblichen Einfluss auf die Entwicklung des nationalen Antidiskriminierungsrechts aus und wird dies auch in Zukunft tun.

Introduction

Article 13 TEC (now Article 19 TFEU) was inserted into the EC Treaty by the Treaty of Amsterdam in 1999. It gave the institutions of the European Union (EU) competency to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This enabling power was used as a legal basis for the subsequent adoption of Directives 2000/43/EC (the Racial Equality Directive)[1] and 2000/78/EC (the Framework Equality Directive).[2] The provisions of these directives greatly expanded the scope of EU discrimination law. Previously, only sex discrimination in employment and occupation had been prohibited under what was then European Community law. However, Directive 2000/43/EC prohibited discrimination on the grounds of racial or ethnic origin not only in employment and occupation but also in the areas of social protection, social advantages, education and access to and supply of goods and services. Directive 2000/78/EC extended this prohibition to cover discrimination on the grounds of age, disability, religion or belief and sexual orientation – but its scope was confined to the sphere of employment and occupation.

Member States were required to transpose the provisions of the Racial Equality Directive by 19 July 2003 and the Framework Equality Directive by 2 December 2003,[3] but could take advantage of an additional period of three years to implement the age and disability provisions of the Framework Equality Directive (this period expired on 2 December 2006). Since then, the Court of Justice of the European Union (CJEU – formerly known as the European Court of Justice) has handed down an ever-increasing number of judgments that relate to their provisions. This case law has clarified the scope of the 2000 equality directives and established how many of their key provisions should be interpreted and applied.

An initial overview of the evolution of this case law, addressing key-themes within its development, was written in 2012 by Colm O'Cinneide.[4] This report aims to provide an updated account of developments since 2012. It also examines the impact of this case law on national law and provides a critical analysis of the evolution of the Court's jurisprudence. The methodology used is qualitative, involving close analysis of the judgments of the Court, opinions of Advocates General, academic commentary and decisions of national courts in Member States. The contents of the report are divided into a number of chapters focusing on specific aspects of the Court's case law, modelled on the approach followed in the 2012 report and as set out below.

The report begins by identifying what the Court considers to be the primary purpose and objectives of the 2000 equality directives and how their provisions relate to the general principles of EU law and the individual rights set out in the text of the Charter of Fundamental Rights, which since December 2009 has had the same legal status as the EU Treaties. It then examines the role that other international human rights instruments have played in the Court's interpretation of the directives. The report then moves on to explore how the Court has interpreted and applied the specific provisions of the 2000 equality directives in light of these background factors, focusing in particular on judgments of the Court that concern the following key 'structural' issues: i) the scope of the directives, and ii) the application of their general provisions (such as the prohibition on direct discrimination) across the different discrimination grounds. The impact of the Court's case law is then examined through case studies of how national legislatures and courts have responded to the legislation and the relevant judgments of the CJEU. Finally, the report concludes with an analysis of trends emerging in the case law of the directives and an assessment of how the jurisprudence of the CJEU may develop in the years to come. The analysis presented here covers the Court's case law in respect of the 2000 equality directives as it stands as of 1 June 2019.

1 The general interpretative approach of the CJEU to the 2000 anti-discrimination directives

The 2000 equality directives lay down a detailed framework of legal norms that set out how states should prohibit discrimination in the areas that come within their scope of application. In accordance with the principles of direct effect and the supremacy of EU law, states are obliged to ensure that their national law conforms to the requirements of the directives, while national courts are required to 'set aside' national legislation that is not compatible with their provisions.[5]

Many of the key provisions of the 2000 equality directives are similar to equivalent provisions set out in EU gender equality law and reflect the established definitions given by the CJEU in its case law of concepts such as indirect discrimination. However, the 2000 equality directives also contain some unique provisions that have no equivalent in the realm of gender equality.[6] Furthermore, the text of the directives does not define their scope of application in detail, or specify how their general provisions should be applied across the various non-discrimination grounds.

As a result, an ever-growing number of cases relating to the provisions of the 2000 equality directives have been referred to the CJEU from national courts via the preliminary reference procedure set out in Article 267 TFEU (formerly Article 234 TEC), which permits (and in certain circumstances requires) national courts to seek guidance from the CJEU on how to interpret provisions of EU law that are relevant to resolving legal disputes that they have been asked to adjudicate. In response, the Court's judgments have clarified how the provisions of the 2000 equality directives should be implemented in national law.[7]

In line with how it interprets other EU legal instruments, the Court has adopted a purposive approach to the 2000 equality directives, while also demonstrating fidelity to their written provisions. This means that the Court pays close attention to the text of the directives and interprets it in light of the directives' underlying purpose and objectives, as well as their place in the overarching *telos* of the European Union legal order as a whole.[8] In particular, the Court has established that the 2000 equality directives should be interpreted as giving specific expression to a fundamental norm of the EU legal order, namely the general principle of equal treatment. This principle protects individuals against discrimination within the scope of EU law: it is derived from the well-established right to equality and non-discrimination that exists in international human rights law and the constitutional traditions of EU Member States,[9] and is also set out in the provisions of Article 21(1) of the EU Charter of Fundamental Rights.

In other words, the Court has made clear that the primary purpose and objective of the directives is to give effect to the fundamental right of individuals not to be subjected to discrimination, as given expression through the principle of equal treatment and the provisions of the EU Charter. This same purposive interpretation is also the lens through which the CJEU interprets the specific provisions of both directives.

5 See Craig, P. and de Búrca, G. (2011) *EU Law: Text Cases and Materials* (5th ed.), Oxford, OUP, pp. 180-217 and 256-301.

6 For example, Article 5 of Directive 2000/78/EC requires employers to make reasonable accommodation for the needs of disabled persons, while Article 6(1) makes it possible for a difference of treatment directly based on age to be objectively justified in certain circumstances. No equivalent provisions exist in EU gender equality law.

7 Belavusau, U. and Henrard, K. (2018) 'The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law: Achievements and Pitfalls', in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart Publishing, p. 16.

8 Eg Judgment of 6 October 1982, *Cilft v Italian Ministry of Health*, Case 283/81, 1982 E.C.R. 3415, 3430, ECLI:EU:C:1982:335.

9 See for example Article 14 of the European Convention on Human Rights; Article 26 of the UN International Covenant on Civil and Political Rights; Article 2(2) of the UN International Covenant on Economic, Social and Cultural Rights; Articles 2 and 5 of the UN International Convention on the Elimination of All Forms of Racial Discrimination; Articles 2 and 3 of the UN International Convention on the Elimination of All Forms of Discrimination Against Women; Article 1 of the Constitution of France (1958); Article 3 of the Basic Law for the Federal Republic of Germany (1949); Article 3 of the Constitution of Italy (1948).

1.1 The *Mangold* approach reaffirmed

This interpretive approach was set out initially in the Court's very first judgment that concerned the 2000 directives, *Mangold v Helm*.[10] In this decision, the CJEU held that non-discrimination on grounds of age constituted a general principle of EU law that could be relied upon directly in 'horizontal' disputes between private individuals, even before the expiry of the period for transposing the Framework Equality Directive. The Court asserted that this general principle of equal treatment was not 'laid down' by the 2000 directives. Their provisions set out a 'general framework' of rules which gave specific expression to this general principle, but it was a separate, free-standing and 'active principle' of the Community legal order in its own right, the 'source' of which was to be found in the non-discrimination provisions of international human rights law and the constitutional traditions common to the Member States.[11]

Thus despite the fact that the Framework Equality Directive itself was not applicable to the case at hand – because the period for transposing the directive into national law had not yet expired and the dispute was between two private individuals – the CJEU ruled that the general principle of non-discrimination itself was applicable to preclude age discrimination. It was the 'responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination' by setting aside national laws that were incompatible with this fundamental norm of the European legal order.[12]

The *Mangold* decision generated a certain degree of controversy. Critics argued that a general principle of non-discrimination lacked clear content and was insufficiently precise to serve as a basis for setting aside national laws, especially in the context of a 'horizontal' legal dispute between private parties, such as at issue in *Mangold*.[13] However, in a number of subsequent judgments, the Court reaffirmed and clarified the approach it adopted in *Mangold*.[14] Thus, in the case of *Kücükdeveci*,[15] the Court reiterated its finding in *Mangold* that national courts were obliged to disapply national legislation that was incompatible with the general principle of equal treatment, even in the context of a horizontal relationships between private parties – while also clarifying that this obligation only applied to situations that came within the scope of application of EU law.[16]

Despite this established line of case law, some concerns about the *Mangold* approach, and particularly the horizontal effect of the principle, have lingered. The Court's 2016 judgment in *Ajos* revisited this question and rejected a potential limitation on the application of the *Mangold* approach – namely, the possibility raised by the referring court that the application of the general principle of non-discrimination can be limited by the principles of legal certainty and legitimate expectations.[17]

The claimant in *DI*, Mr Rasmussen, was dismissed from his private employer at the age of 60, and soon took on other employment. Danish law entitled a person in his situation to receive a severance allowance. However, an exception to the law allowed employers to refuse to pay the allowance to persons who, at the time of their dismissal, were old enough to retire and 'will receive an old-age pension from the employer.' The Danish courts had consistently interpreted 'will receive an old-age pension' to include anyone who was technically entitled to receive such a pension. Thus, despite the fact that Mr Rasmussen had not claimed his pension and instead remained in the labour market, he was still denied

10 Judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709.

11 Judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709 [74].

12 Judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709 [78].

13 See the discussion in Kuitenbrouwer, F. (2006) 'Onbescheiden Rechters', *NRC Handelsblad*, 7 February 2006, summarised in Jans, J. (2007) 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law' 34(1) *Legal Issues of Economic Integration* pp. 53-66, 58-60.

14 Judgment of 23 September 2008, *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, Case C-427/06, ECLI:EU:C:2008:517; Judgment of 19 January 2010, *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, ECLI:EU:C:2010:21.

15 Judgment of 19 January 2010, *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, ECLI:EU:C:2010:21.

16 Judgment of 19 January 2010, *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, ECLI:EU:C:2010:21, [23].

17 Judgment of the Court (Grand Chamber), 19 April 2016, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, C-441/14, ECLI:EU:C:2016:278.

the severance allowance. Mr Rasmussen's heirs brought a suit demanding payment of the allowance. The claim eventually reached the Danish Supreme Court, which made a preliminary reference to the CJEU.

It is of note that this was not the first time that the challenged Danish provision had made its way to the CJEU. The CJEU had already considered the law as applied to a *public sector* employee (i.e. a circumstance where the employee could rely directly on the Framework Equality Directive, as it involved a 'vertical' relationship between an individual employee and a public body) and found that the Danish court's interpretation of it was contrary to the Framework Equality Directive.[18] For Mr Rasmussen, as a private employee, the Framework Equality Directive could not apply directly, as directives in general lack direct horizontal effect. Furthermore, the Danish Supreme Court took the view that its previous body of case law made it *contra legem* for it to now interpret the Danish severance allowance law in conformity with the directive. This left only the option of Mr Rasmussen relying on the horizontal effect of the general principle of EU law prohibiting age discrimination in order to recover his severance allowance, regardless of the conflicting national law.

The Danish Supreme Court thus referred two questions to the CJEU. First, it asked whether the general principle of EU law prohibiting discrimination on grounds of age precluded the Danish legislation. Secondly, it asked whether the Danish court could weigh the general principle of non-discrimination on grounds of age, and the issues raised by giving this principle direct horizontal effect, against the important countervailing principles of legal certainty and the protection of legitimate expectations – and ultimately determine that the latter two principles took precedence over the principle of non-discrimination. By this second question, the Danish Supreme Court was in effect inviting the CJEU to limit its approach as developed in the *Mangold* line of cases.[19]

In its judgment, the CJEU clarified and reinforced aspects of the *Mangold* approach. With respect to the first question, the Court recalled that *Mangold* had established that the prohibition of discrimination on the grounds of age is a general principle of EU law. As in *Mangold*, the Court located the source of the general principle prohibiting discrimination on grounds of age in the 'various international instruments and in the constitutional traditions common to the Member States'.[20] The Court also strengthened the link, first made in *Kucukdeveci*, between the Charter and the general principle, observing that the principle is 'now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union'.[21] The Court also emphasised the relationship between the general principle and the directive, affirming that the directive is not the source of the principle but rather 'gives concrete expression to that principle' and helps to clarify its scope.[22] Because the CJEU had previously held that the Danish severance allowance law was precluded by the directive, the law challenged in *DI* was also necessarily precluded by the general principle.[23]

With respect to the second question, the Court recalled the obligation of national courts to provide effective legal protection for the entitlements that individuals derive from EU law.[24] To this end, the Court first rejected the Danish Supreme Court's assertion that interpreting its national law consistently with EU law would be impossible merely because it had always interpreted it in a manner that was incompatible with EU law. The requirement to interpret national law in conformity with EU law obliges national courts

18 Judgment of the Court (Grand Chamber), 12 October 2010, *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

19 See Holdgaard, R. Elkan, D. and Krohn Schaldemose, G. (2018) 'From Cooperation to Collision; The ECJ's *Ajos* Ruling and the Danish Supreme Court's Refusal to Comply' 55 *Common Market Law Review* 17, pp. 20-23, 27.

20 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [22], citing Judgment of 22 November 2005, *Mangold*, C-144/04, ECLI:EU:C:2005:709 [74], and judgment of 19 January 2010, *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, ECLI:EU:C:2010:21 [20] and [21].

21 See judgments in *Mangold*, [75] and *Kücükdeveci*, [21]; see also *HK Danmark (Ring, Skouboe Werge)*, [22].

22 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, paragraphs [23], [27].

23 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [25]-[27].

24 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [28].

to *change* their established case law where necessary. As such, the Court reminded the Danish Supreme Court that it had the option of giving *indirect* effect to the Employment Equality Directive through a consistent interpretation of its own law.

If national law could not, however, be made compatible with EU law via interpretation, the Danish Supreme Court was obliged to disapply it.[25] The CJEU reiterated that the 'principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle'.[26] The CJEU proceeded to clarify that the notion of legitimate expectations certainly could not justify a national court in *continuing* to apply an incompatible national rule.[27] To allow legitimate expectations to supersede the non-discrimination principle would 'have the effect of limiting the temporal effects of the Court's interpretation', reducing uniform and effective application of EU law.[28] Further, it would result in 'denying the individual who has brought proceedings culminating in the Court interpreting EU law as precluding the rule of national law at issue the benefit of that interpretation.'[29]

The *DI* judgment is significant for its strong confirmation of the *Mangold* approach and the corresponding need for national courts to ensure effective protection for the non-discrimination rights of individuals under EU law. The case is also important for following the lead of *Kücükdeveci* in linking the general principle of non-discrimination to Article 21 of the EU Charter of Fundamental Rights, and affirming the binding nature of this right even as between private parties.

As will be discussed in the section on national case studies below, the Danish Supreme Court chose not to give effect to the CJEU's decision in *DI*. In particular, the Danish Supreme Court declared that it had no jurisdiction to set aside national law based on an 'unwritten principle prohibiting discrimination on grounds of age' that had no grounding in EU primary law.[30] Despite this reaction, the CJEU has continued to affirm its *Mangold* approach in subsequent cases – and also to provide further clarification of the relationship between the general principle of non-discrimination, the provisions of the Charter, and the provisions of the 2000 equality directives.

1.2 *Egenberger* and the EU Charter of Fundamental Rights

In the important case of *Egenberger*,[31] which followed *DI*, the Court reaffirmed and reinforced the *Mangold* approach to the horizontal application of the principle of non-discrimination, while also explicitly extending it to the grounds of religion. In its judgment, the Court extensively quotes the *DI* decision, reaffirming its validity despite the negative reaction of the Danish Supreme Court.

In *Egenberger*, an association connected with the Protestant Church advertised for a position that entailed the preparation of a legal and policy report on German compliance with international human rights standards. The posting explicitly stated that membership of a German Protestant church was a requirement for the job. Ms Egenberger, who has no religious affiliation, applied for the position and was rejected. She brought a suit before the German court for unlawful discrimination on the basis of religion. The association countered that its requirement of church membership was a justified occupational requirement, in line with the requirements of Article 4(2) of the Framework Equality Directive.

25 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [37].
26 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [36].
27 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [39].
28 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [39].
29 Judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [41].
30 Danish Supreme Court, judgment of 6 December 2016, Case 15/2014, *Dansk Industri, acting for Ajos A/S v Estate of A*, UfR 2017.824H. An English translation of the judgment is available here: http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Pages/TherelationshipbetweenEUlawandDanishlawinacaseconcerningasalariedemployee.aspx.
31 Judgment of 17 April 2018, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, ECLI:EU:C:2018:257.

Article 4(2) makes provision for a limited exception to be made to the principle of non-discrimination for churches and organisations with an ethos based on religion or belief. Such organisations may discriminate in their employment on the basis of religion or belief '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 constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.' The German law transposing Article 4(2), as interpreted by case law, limited judicial review of the application of such a 'religious ethos' requirement to a mere plausibility review of the genuineness of the religious organisation's decision, rather than requiring a review by a court or other independent authority of its objective justification.[32] This effectively allowed organisations with a religious ethos to determine authoritatively whether compliance with their ethos was an occupational requirement for the performance of the post in question. The question arose as to whether such an interpretation was consistent with EU law and, if this was not sufficient to satisfy the requirements of EU law, whether, in a horizontal dispute between individuals like the one at issue, a national court was required to disapply the relevant national law.

In addressing these questions, the CJEU initially noted that if the determination of whether a religious organisation had complied with Article 4(2) were left to the organisation itself, it would deprive that article of meaningful effect.[33] The Court went on to stress that the Article 4(2) exception could not be interpreted in a manner that undermines the general purpose of the directive, which is to lay down a specific framework for combating discrimination and thereby to give effective expression to the general principle of non-discrimination as laid out in Article 21 of the Charter. Articles 9 and 10 of the Framework Equality Directive make it clear that Member States are required to establish effective legal mechanisms to ensure adequate remedies for victims of discrimination. Furthermore, Article 47 of the Charter recognises the right of individuals to effective judicial protection of their rights under EU law, and applies to situations such as the one at stake in *Egenberger*, which fell within the scope of EU law. As such, the Court concluded that it was necessary for national courts to be able to review whether religious organisations were objectively justified in applying a 'religious ethos' occupational requirement in line with Article 4(2).[34]

The Court went on to emphasise that national courts should, where possible, interpret their own law in conformity with the Framework Equality Directive, reiterating its statement in *DI* that this requirement applied even when the national law provision in question had previously been interpreted differently.[35] If such an interpretation was not possible, then the relevant provision of national law had to be disapplied, even in the context of a horizontal dispute between private parties such as that in issue in this case. In so concluding, the Court affirmed that the specific prohibition on discrimination on grounds of religion or belief set out in the Framework Equality Directive was 'mandatory', as it gave effect to the general principle of equal treatment and Article 21 of the Charter – thereby reiterating its case law position as developed in *Mangold* and *DI*, and confirming that the prohibition on discrimination on grounds of religion and belief constituted an aspect of the wider general principle of equal treatment in line with the Court's treatment of age discrimination in *Mangold*.[36] The Court also concluded that Article 47 was a self-standing enforceable right, capable of being applied in a horizontal context, despite not having been made more specific in secondary EU legislation.[37] Thus if it is impossible to interpret a provision of Member State law in conformity with the Framework Directive, the general principle of equal treatment taken together with Articles 21 and 47 of the Charter become applicable and mandates disapplication of contrary national law.[38]

32 As discussed in the relevant case study below, this legislative provision reflected the established case law of the German Constitutional Court in relation to the right to religious freedom set out in Article 4 of the German Basic Law as it applies to religious organisations.

33 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [46].

34 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [48]-[59].

35 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [72]-[73].

36 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [77].

37 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [78].

38 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [79].

This conclusion was not disturbed by the existence of potentially conflicting fundamental rights such as respect for religious freedom and the autonomy of churches as set out in Article 17 TFEU and Article 10 of the Charter.[39] National courts may be called upon to balance such rights against the requirements of Articles 21 and 47 of the Charter, but this 'has no effect on the possibility of relying on the rights in question in such a dispute'.[40] Furthermore, in balancing such rights, consideration should be given to how the provisions of the directive itself have struck a balance between the interests at stake.[41]

Egenberger is thus significant for several reasons. It clarified that the prohibition of discrimination on grounds of religion or belief is an element of the mandatory general principle of equal treatment, which is enshrined in Article 21 of the Charter.[42] It also confirmed that Articles 21 and 47 of the Charter are enforceable and have full horizontal direct effect – at least, for the latter, in the context of legal disputes relating to the application of anti-discrimination law. This in turn constitutes a reiteration and extension of the *Mangold/DI* line of case law. Finally, *Egenberger* has served to clarify the requirements of Article 4(2) of the Framework Equality Directive, as discussed further below, with the Court once again taking account of Charter rights (specifically Articles 21 and 47) in applying its usual purposive interpretative approach to the 2000 equality directives and concluding that national courts must have the authority to review the objective justification for any occupational requirements based on 'religious ethos'.

1.3 The role of human rights instruments as interpretive guidance

Article 21(1) of the Charter also featured prominently in the decision of the Grand Chamber in *CHEZ*, where the need to ensure effective protection of this right was cited by the Court as the basis for adopting a broad interpretation of the meaning of discrimination on the basis of race or ethnic origin. Following the *Mangold* line of case law relating to the provisions of the Framework Equality Directive, the CJEU in *CHEZ* described the Racial Equality Directive as giving 'specific expression, in its field of application, to the principle of non-discrimination on grounds of race and ethnic origin which is enshrined in Article 21 of the Charter'.[43] In interpreting the text of the directive, the Court emphasised the need to have regard to the 'context and to the general scheme and the aim of Directive 2000/43', 'its objective and the nature of the rights which it seeks to safeguard', and the fact that the directive expressed 'the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter'.[44] Taken together, this meant that the scope of Directive 2000/43/EC should not be given an unduly restrictive or narrow interpretation, a conclusion that is by now well established in the Court's case law.[45] Ultimately, this interpretation led the Court to conclude that a discrimination claim alleging disadvantage against a particular ethnic group could be brought by a person who was not a member of this group herself. This is discussed further in Chapter 3, below.

39 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [80].

40 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257.

41 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257, [81]; see also judgment of 19 April 2016, *Ajos,* Case C-441/14, ECLI:EU:C:2016:278, [27]. This aspect of the *Egenberger* judgment is significant in that it confirms that secondary EU legislation law should be taken into account in determining how Charter rights should be balanced together. See Lourenço, L. (2019) 'Religion, Discrimination and the EU General Principles' Gospel: *Egenberger*' 56(1) *Common Market Law Review* 193-208, 206.

42 See also the subsequent application of this rule in CJEU, judgment of 11 September 2018, *IR v JQ*, C-68/17, ECLI:EU:C:2018:696, [69]; Judgment of 22 January 2019, *Cresco Investigation GmbH v Markus Achatzi*, Case C-193/17, ECLI:EU:C:2019:43, [76].

43 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, C-83/14, ECLI:EU:C:2015:480, [72]; see also *CHEZ*, [58].

44 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [55], [56], [42].

45 Eg. Judgment of 6 December 2012, *Odar v Baxter Deutschland GmbH*, Case C-152/11, ECLI:EU:C:2012:772, [67] ('such a line of reasoning, if accepted, would undermine the effectiveness of the national provisions providing for that advantage, the rationale for which is generally to take account of the specific difficulties and risks faced by severely disabled workers'); cf Judgment of 28 July 2016, *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, C-423/15, ECLI:EU:C:2016:604, [32]-[35] (any interpretation must be compatible with objectives of the Framework Directive).

In *CHEZ*, the CJEU also looked to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as an external source of interpretation. The Racial Equality Directive provided no definition of the complicated concept of 'ethnicity,' so when faced with defining this concept, the Court took account of the case law of the European Court of Human Rights (ECtHR) relating to race discrimination issues arising under the non-discrimination provisions of Article 14 ECHR, reflecting the CJEU's long-established recognition of the ECHR as an authoritative source of guidance in interpreting the scope of fundamental rights recognised in EU law.[46] The CJEU thus drew upon the case law of the ECtHR in defining ethnicity as having 'its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds'.[47]

The CJEU has also invoked the ECHR to help define the concept of 'religion'. In its first two cases regarding the grounds of religion, *Achbita* and *Bougnaoui*, the Court was required to determine whether 'religion' covers 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.[48] The Court observed that the Framework Directive does not itself define 'religion', but that Recital 1 of the directive's preamble references the fundamental rights guaranteed by the ECHR.[49] Article 9 of the ECHR provides for freedom of thought, conscience and religion and explicitly defines this freedom as encompassing not only religious belief, but also the right to *manifest* that religion or belief 'in worship, teaching, practice and observance'. The Court further noted that the Charter enshrines a corresponding definition of freedom of religion in Article 10(1), which is also invoked by Recital 1 of the directive through its reference to 'the constitutional traditions common to the Member States, as general principles of EU law.'[50] As both the ECHR and the Charter define religion in this 'broad sense' and are referenced in the Framework Directive, the CJEU determined that the EU legislature must have intended the directive to extend to public manifestations of religious faith.[51]

In *Achbita*, in the course of applying the indirect discrimination provisions of Article 2 of the Framework Directive, the Court again took account of the Charter and the ECHR. In particular, the Court referenced Article 16 of the Charter, which protects the freedom of employers to conduct a business, in making the determination that the employer's aim in that case of maintaining an image of religious neutrality should be regarded as legitimate.[52] The Court further cited the case law of the ECtHR in support of the idea that such an aim can justify restricting an individual's freedom to manifest her religion.[53] However, the Court's invocation of Article 16 of the Charter and the ECHR case law in this context has been subject to some academic criticism. O'Connor has criticised the Court's interpretation of Article 16 of the Charter, suggesting that it extends the scope of the right further than is warranted.[54] Similarly, some concern has been expressed that the CJEU, despite citing the ECtHR judgment in *Eweida* relating to the wearing of religious dress, did not give a similar weight in its proportionality analysis to the employee's right to religious freedom as the ECtHR did in *Eweida*.[55] It remains to be seen how the Court's case law in this regard will develop in the future.

46 See eg Case 4/73, *Nold v Commission* [*1974*] *ECR* 491.

47 See Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [46], quoting *Sejdić and Finci v Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, paragraphs 43 to 45 and 50, ECHR 2009.

48 See CJEU, judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203 [28].

49 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [25]-[26]; Judgment of 14 March 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204, [27]-[28].

50 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [27]; Judgment of 14 March 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204, [29].

51 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [28]; Judgment of 14 March 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204, [30].

52 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [37]-[38].

53 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203, [39], citing ECtHR, *Eweida v United Kingdom,* no. 48420/10, 15 January 2013, ECHR 37.

54 O'Connor, N. (2017) 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' 8(3) *European Labour Law Journal* 193-216.

55 Vickers, L. (2017) '*Achbita* and *Bougnaoui*: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' 8(3) *European Labour Law Journal* 232-257, 233.

As will be discussed in greater detail below, one of the human rights instruments most influential on the case law of the CJEU has been the UN Convention on the Rights of Persons with Disabilities (the CRPD). The EU became a party to the CRPD in 2010, 10 years after adopting the Framework Equality Directive. The CRPD may not be relied on directly by individuals in litigation,[56] but it has become an important source of interpretative guidance for the Court regarding multiple aspects of disability discrimination. The CJEU has held that EU secondary legislation (including directives) must be interpreted 'as far as possible' to comply with the provisions of the CRPD, which is now an 'integral part' of the EU legal order.[57] As a result, the CRPD has played a particular role in the CJEU's definition of the concept of 'disability' – with the scope of this concept being given a wider definition by the CJEU in *HK Danmark* and *Fag og Arbejde* in order to reflect the requirements of the CRPD. However, the Court's judgment in *Z v A* indicates that this interpretative approach cannot be pushed so far as to disregard the limits of the text of the directive (this issue is discussed in further detail below).

56 Judgment of 18 March 2014, *Z v A*, Case C-363/12, ECLI:EU:C:2014:159, [90].

57 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [32], [30].

2 The CJEU's case law on the scope of the 2000 directives

Article 3 of the Racial Equality Directive sets out its scope, which covers employment and occupation (and associated activities such as vocational training and membership of work-related organisations), 'social protection, including social security and healthcare', 'social advantages', education and access to and supply of goods and services 'which are available to the public, including housing'. The scope of the Framework Equality Directive is more limited, being confined to employment, occupation and associated activities. Article 3(2) of both directives provides that they do not cover differences of treatment based on nationality or the legal status of third-country nationals, while Article 3(3) of the Framework Equality Directive provides that its scope does not extend to 'payments of any kind made by a state scheme, including social security or social protection schemes'. Article 3(4) of the same directive allows states to exempt their armed forces from the directive's provisions in respect of age and disability.

Some of these provisions governing the scope of the directives are not defined in detail. The case law of the CJEU in the analogous field of gender equality has clarified which types of relationship come within the field of employment and occupation, and the Court in line with its general interpretative approach to the 2000 equality directives has carried over this case law and applied it consistently across all of the 'new' non-discrimination grounds.[58] However, even though this 'carry over' from the gender equality field has helped to clarify the meaning of key provisions of the 2000 equality directives, the CJEU has nevertheless been required to interpret certain unique provisions of these directives that have no functional equivalent within EU gender equality law. In so doing, the Court has consistently applied its purposive, rights-orientated approach – as outlined in the previous chapter of this paper, and in what follows.

2.1 The material scope of the directives

In general, the CJEU has adopted a broad interpretation of the material scope of both the 2000 equality directives, as set out in Article 3 of each directive. While the vast majority of the case law concerning material scope has arisen under the Framework Directive, the fact that the article's text is identical with that of the Racial Equality Directive suggests that this case law would apply to the provisions of the latter, as well – similar to the way in which the interpretation of the provisions of the gender equality directives that have an equivalent in the 2000 equality directives has been carried across to both those directives.[59]

The concept of 'access to employment' under the Framework Equality Directive[60] has been interpreted by the CJEU in the case of *ACCEPT*[61] to include public statements by the dominant shareholder of a football club indicating that the club maintained a discriminatory recruitment process, even when that shareholder was not legally responsible for recruitment decisions. In line with the approach that it had adopted previously in the race discrimination case of *Firma Feryn*,[62] the Court focused on the potential deterrent effect such statements might have on potential applicants:

58 See eg judgment of 1 April 2008, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen,* C-267/06, EU:C:2008:179, [46]-[48]; judgment of 12 January 2010, *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,* C-341/08, ECLI:EU:C:2010:4, [60]; judgment of 13 September 2011, *Reinhard Prigge and Others v Deutsche Lufthansa AG*, C-447/09, ECLI:EU:C:2011:573, [56].

59 See eg O'Cinneide, C. (2013) *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union*, Migration Policy Group, pp. 22-23, available at https://www.migpolgroup.com/_old/portfolio/the-evolution-and-impact-of-the-case-law-of-the-court-of-justice-of-the-european-union/.

60 Framework Equality Directive, Article 3(1)(a).

61 Judgment of the Court, 25 April 2013, *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.

62 Judgment of 10 July 2008, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV,* C-54/07, ECLI:EU:C:2008:397.

> '48. The mere fact that statements such as those at issue in the main proceedings might not emanate directly from a given defendant is not necessarily a bar to establishing, with respect to that defendant, the existence of 'facts from which it may be presumed that there has been … discrimination' within the meaning of Article 10(1) of that directive.
>
> 49. It follows that a defendant employer cannot deny the existence of facts from which it may be inferred that it has a discriminatory recruitment policy merely by asserting that statements suggestive of the existence of a homophobic recruitment policy come from a person who, while claiming and appearing to play an important role in the management of that employer, is not legally capable of binding it in recruitment matters.
>
> 50. In a situation such as that at the origin of the dispute in the main proceedings, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts.
>
> 51. In that connection, it should be recalled that the perception of the public or social groups concerned may be relevant for the overall assessment of the statements at issue in the main proceedings'.[63]

At the same time, the Court has also recently emphasised that this purposive approach to defining 'access to employment' must be applied with regard to the overarching purpose of the directive. The *Kratzer* case raised the issue of whether a serial litigant who was not genuinely seeking employment, but 'merely the status of applicant in order to bring claims for compensation' qualified as someone seeking 'access to employment, to self-employment or to occupation' within the meaning of the Framework Equality Directive.[64] The Court emphasised that the objective of the directive is to guarantee equal treatment in employment to all persons by protecting them against certain forms of discrimination.[65] It therefore concluded that a litigant such as Mr Kratzer, who is not genuinely seeking access to such employment, cannot invoke the protection of the directive.[66] He was not a 'victim' who had experienced loss or damage in the sense of the directive and could therefore not bring a claim.

The Court also considered that Mr Kratzer's conduct qualified as an abuse of rights under EU law. It determined that there were two elements to be considered in deciding whether Mr Kratzer's conduct can be understood as relying on EU law to an 'abusive or fraudulent end'. First, it must be objectively established that, despite his claim formally observing the conditions laid down by EU rules, it did not reflect the purpose of these rules.[67] Secondly, there is a subjective element, 'namely that it must be apparent from a number of objective factors that the essential aim of the transactions is to obtain an undue advantage'.[68] This second element may be satisfied where there is a 'purely artificial nature (to) the transactions concerned'.[69]

Beyond 'access to employment', the scope of each directive also extends to 'access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience'.[70] In *J.J. de Lange v Staatssecretaris van Financië*, the CJEU considered whether this concept covered a tax scheme that allowed persons who have not yet reached the age of 30 to deduct in full, under certain conditions, vocational training costs from their taxable income.[71] The

63 Judgment of 25 April 2013, *Asociaţia ACCEPT*, C-81/12, ECLI:EU:C:2013:275, [48]–[51].
64 Judgment of 28 July 2016, *Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG*, C-423/15, ECLI:EU:C:2016:604.
65 Judgment of 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604, [32]-[35].
66 Judgment of 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604 [29].
67 Judgment of 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604 [39].
68 Judgment of 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604 [40].
69 Judgment of 28 July 2016, *Kratzer*, C-423/15, ECLI:EU:C:2016:604 [41].
70 Framework Equality Directive, Article 3(1)(b).
71 Judgment of 10 November 2016, *J.J. de Lange v Staatssecretaris van Financiën*, C-548/15, ECLI:EU:C:2016:850.

Court noted that while such tax treatment did not exclude outright any persons from receiving vocational training, its financial consequences could, in practice, affect access to such training.[72] It was also relevant to the analysis that the stated objectives of the tax deduction were to promote young people's access to training and to improve their labour market position, which was consistent with the directive's objective in prohibiting discrimination at this stage of the employment relationship. Such a taxation scheme had thus to be interpreted as falling within the directive's material scope.

Much of the CJEU's recent case law has focused on the concept of 'pay', which is specifically referenced in Article 3(1)(c) as an employment condition subject to the protection of both the 2000 equality directives. Pay is defined in Article 157(2) of the TFEU as the 'ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer'. The boundaries of the concept of 'pay' are specifically limited by a further provision of the Framework Equality Directive, which excludes from its scope 'payments of any kind made by state schemes or similar, including social security or social protection'.[73]

Consistent with previous cases arising under the 2000 equality directives, such as *Maruko*, as well as equivalent cases arising in the context of gender equality, the Court has adopted a broad definition of 'pay,' bringing much national legislation into the material scope of the directives.[74] 'Pay,' defined in reference to Article 157(2) TFEU, encompasses any benefits that an employee receives 'in respect of his or her employment from his or her employer.'[75] The Court has found, for example, that 'pay' includes benefits that are paid after the termination of the employment relationship, such as a retirement pension.[76]

The case of *E.B.* involved a police officer who was subject, as a disciplinary sanction for having committed a same-sex sexual offence, to compulsory retirement, accompanied by a 25 % reduction of his pension entitlement.[77] He alleged discrimination on the basis of sexual orientation in violation of the Framework Equality Directive. As a preliminary question, the CJEU had to determine whether the disciplinary sanction fell within the directive's material scope. With respect to the sanction mandating early retirement, the Court held that this clearly affected E.B.'s employment and working conditions within the meaning of Article 3. As to the pension reduction, the Court stated that the decisive criterion is 'whether the pension is paid to the worker by reason of the employment relationship between him and his former employer'.[78] The Court identified relevant factors that help determine whether a pension derives from an employment relationship, including whether the pension concerns only a specific category of workers, whether it is directly related to the period of service completed, and whether it is calculated by reference to final salary. If E.B.'s pension met these criteria, then a disciplinary sanction that affected the value of such a pension would fall within the scope of the directive.

This broad interpretation of 'pay' may also include: 1) benefits provided to employees on the occasion of their marriage;[79] 2) financial assistance with healthcare expenses given to public employees in the event of illness;[80] and 3) 'bridging assistance' paid by an employer to a worker who has been made

72 Judgment of 10 November 2016, *de Lange*, C-548/15, ECLI:EU:C:2016:850, [18].

73 Framework Equality Directive, Article 3(3).

74 Judgment of 1 April 2008, *Maruko,* C-267/06, EU:C:2008:179.

75 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [26]; Judgment of 2 January 2015, *Georg Felber v Bundesministerin für Unterricht, Kunst und Kultur*, C-529/13, ECLI:EU:C:2015:20 [22].

76 Judgment of 2 January 2015, *Felber*, C-529/13, ECLI:EU:C:2015:20.

77 Judgment of 15 January 2019, *E.B. v Versicherungsanstalt öffentlich Bediensteter BVA,* C-258/17, ECLI:EU:C:2019:17.

78 Judgment of 15 January 2019, *E.B.*, C-258/17, ECLI:EU:C:2019:17, [45]; see also, judgment of 2 January 2015, *Felber*, C-529/13, ECLI:EU:C:2015:20, [23].

79 Judgment of 12 December 2013, *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12, ECLI:EU:C:2013:823.

80 Judgment of 6 December 2012, *Bundesrepublik Deutschland v Karen Dittrich and Robert Klinke and Jörg-Detlef Müller v Bundesrepublik Deutschland,* joined Cases C124/11, C125/11 and C143/11, ECLI:EU:C:2012:771.

redundant, even though the worker is no longer performing any work provided for in their contract of employment.[81] In a number of different cases, the Court has emphasised that the key criteria is whether the benefit is paid by reason of the employment relationship between the worker and his employer (or former employer), which will generally be deemed to be the case if the benefit is calculated by reference to facets of that relationship.[82]

However, in the case of *C*, the Court demonstrated that the concept of 'pay' has limits. *C* concerned a Finnish tax scheme that imposed a supplementary tax on income received from a retirement pension.[83] Mr C brought proceedings arguing that the tax constituted discrimination on the basis of age. As Advocate General Kokott observed in her opinion, this case had the potential to hugely widen the scope of the directive and 'open a new chapter in the influence of EU law on the income tax legislation of the Member States'.[84] While affirming that the pension income itself formed part of a person's pay, the Court separated that from national legislation determining the rate of tax on that income.[85] Such taxation fell outside the meaning of 'pay' because it had no link to the contract of employment and was 'external to the employment relationship.'[86] Rather, taxation derived directly and exclusively from national tax legislation which was applicable to all persons of a certain income, and not to particular employees. For these reasons, the supplementary tax on pension income was deemed not to be an employment condition or pay within the scope of the directive.

2.2 The meaning of 'education' in the Racial Equality Directive

The Racial Equality Directive has the broadest material scope of all the equality directives, covering additional areas of social protection, including: social security and healthcare; social advantages; education; and access to and supply of goods and services which are available to the public, including housing.[87] The CJEU has had very little opportunity to assess the particular scope of these provisions that go beyond the material areas shared by the Framework Equality Directive. But in a recent case, the Court examined for the first time the Racial Equality Directive's reference to 'education' as listed in Article 3(1)(g). In *Heiko Jonny Maniero*, the Court considered a private foundation that awarded grants to students to support research projects and studies abroad.[88] The Court asserted that the Racial Equality Directive cannot be interpreted restrictively in light of its objective of promoting equality with respect to racial and ethnic origin. A purposive interpretation of the concept of 'education' must include access to education and the elimination of relevant financial hurdles. The objective of the directive could not be achieved were discrimination to be allowed in the awarding of financial benefits that are closely linked to individuals being able to participate in educational projects. Thus the private foundation's work was deemed to fall within the material scope of the directive, and correspondingly was subject to the prohibition on discrimination on the basis of race or ethnic origin.

2.3 The meaning of 'disability'

The text of the Framework Equality Directive does not define 'disability' and the meaning of the concept has been subject to much debate. In the 2000 case of *Chacón Navas*,[89] the Court adopted a 'medical' model of disability that focused on the nature and extent of an individual's impairment. However, as discussed in Chapter 1, the EU subsequently became party to the United Nations Convention on the

81 Judgment of 19 September 2018, *Bedi v Bundesrepublik Deutschland*, C-312/17, ECLI:EU:C:2018:734.
82 Judgment of 19 September 2018, *Bedi*, C-312/17, ECLI:EU:C:2018:734, [36], [42].
83 Judgment of 2 June 2016, *C.*, C-122/15, ECLI:EU:C:2016:391.
84 Opinion of AG Kokott, of 28 January 2016, *C.*, C-122/15, ECLI:EU:C:2016:65 [1].
85 Judgment of 2 June 2016, *C.*, C-122/15, ECLI:EU:C:2016:391, [23]-[24].
86 Judgment of 2 June 2016, *C.*, C-122/15, ECLI:EU:C:2016:391 [25]-[26].
87 Racial Equality Directive, Article 3(e)-(h).
88 Judgment of 15 November 2018, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV,* C-457/17, ECLI:EU:C:2018:912. The English version of this judgment was not available at the time of this writing.
89 Judgment of 11 July 2006, *Chacón Navas v Eurest Colectividades SA*, C-13/05, ECLI:EU:C:2006:456.

Rights of Persons with Disabilities (CRPD). The CRPD embraces a 'human rights' model of disability. This approach builds on the earlier 'social' model of disability, which understands disability as arising from the interaction of individual impairments with other barriers, such as the physical layout of workplaces or the negative attitudes of employers.[90] The 'human rights' model develops the 'social' model by emphasising several additional facets, including that a) disability is a 'social construct' rather than an objectively definable reality; b) that persons with disabilities are rights-holders not objects of charity; and that c) disability is one of many layers of identity, and there is great diversity in human impairment.[91] In 2013, the Court held in *HK Danmark* that the directive 'must, as far as possible, be interpreted in a manner consistent with [the CRPD]'.[92] This prompted a change in the Court's approach to the meaning of disability.

HK Danmark involved two employees who were dismissed from their jobs with a reduced notice period because each had taken a large amount of workplace leave due to health problems.[93] The employees argued that they were disabled persons and thus the employer needed to reasonably accommodate their inability to work long hours. The employer disputed that their state of health was covered by the notion of 'disability'. In evaluating this case, the Court adopted a definition of 'disability' closely informed by Article 1 of the CRPD. It asserted that 'the concept of "disability" must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[94] The Court elaborated that this definition did not limit the origins of disability to those impairments that are congenital or a result of an accident. If an illness produces the limitation described in the definition above, and that limitation is long term, this could constitute a disability.[95] The Court further rejected the notion that a person's ability to work to only a limited extent could not form the basis of disability because the definition of disability does not require a person's *complete* exclusion from professional life.[96]

The CJEU has subsequently clarified, in the 2014 case of *Z v A*,[97] that a limitation cannot form the basis of a disability unless it specifically affects the individual's ability to carry out work or participate in *professional* life. Z involved a woman who had a medical condition that prevented her from becoming pregnant.[98] Ms Z and her husband arranged for a surrogate to carry their child. When her employer refused to provide her paid maternity or adoption leave after the child's birth, she challenged this decision as discriminatory on the basis of disability. The Court acknowledged that Ms Z's inability to give birth constituted a limitation resulting in physical and psychological impairments that were long term. However, it held that this limitation did not in itself hinder or preclude her ability to participate in professional life and the concept of disability is limited to medical conditions that 'prevent [the person] from having access to, participating in or advancing in employment'.[99] Ms Z's condition did not make it impossible for her to carry out her work and thus it was not a disability that was protected within the scope of the directive.

90 See Waddington, L. (2007) 'Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, Judgment of the Grand Chamber of 11 July 2006' 44(2) *Common Market Law Review* 487-499.

91 Eg Waddington, L. and A. Broderick, A. (2018) *Combatting Disability Discrimination and Realising Equality: A Comparison of the UN, CRPD and EU Equality and Non-Discrimination Law,* Brussels: European Commission, p. 38, available at https://ec.europa.eu/info/sites/info/files/combatting_disabiliy_discrimination.pdf.

92 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge),* Joined cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [32].

93 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge),* Joined cases C-335/11 and C-33711, ECLI:EU:C:2013:222.

94 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge),* Joined cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [38].

95 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge),* Joined cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [40]-[41].

96 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge),* Joined cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [43]-[44].

97 Judgment of 18 March 2014, *Z. v A Government Department and The Board of Management of a Community School*, C-363/12, ECLI:EU:C:2014:159.

98 Judgment of 18 March 2014, *Z. v A.*, C-363/12, ECLI:EU:C:2014:159.

99 Judgment of 18 March 2014, *Z. v A.*, C-363/12, ECLI:EU:C:2014:159 [81].

The narrowness of this interpretation and its focus on the literal capacity to perform work has been criticised. While Ms Z's inability to bear children may not have directly affected her ability to work, this impairment did lead to her exclusion from accessing the employment benefit of maternity leave in contrast to a person in a similar situation who did not have her condition (eg. a women who gave birth biologically). Paid leave in the event of childbirth is now considered 'an essential component of the rights provided to workers for successfully combining their working life and family obligations.'[100] Ms Z's exclusion from accessing such leave arguably hindered her ability to effectively participate in professional life on an equal basis with others.

A third judgment from the CJEU, *Fag og Arbejde (FOA)*, concerned an obese man who alleged that he was dismissed from his job due to his obesity, and that this was contrary to the Framework Equality Directive's prohibition on disability discrimination.[101] Consistent with its assertion in *HK Danmark* that the *origin* of the impairment is irrelevant to the definition of disability, the Court further held that neither is the fact that a person may have contributed to the onset of his own disability.[102] The Court held that obesity *as such* is not a disability because it does not necessarily result in a limitation on a person's ability to participate in professional life. However, a particular worker's obesity may be covered if it results in impairments that meet the definition laid out in *HK Danmark*.[103] This might be the case for an obese worker experiencing reduced mobility or other obesity-related medical conditions that prevent, or make uncomfortable, carrying out his work.[104] The Court reiterated this conclusion with respect to the relationship between obesity and disability in the subsequent 2018 case of *Ruiz Conejero*.[105]

The Court has also given further guidance on the requirement that an impairment be 'long term'. In *Mohamed Daouidi*, the CJEU considered the status of a person who had been injured in an accident at work resulting in his temporary incapacity, but for an indeterminate duration.[106] The Court emphasised that the claimant's injury could only form the basis of a disability discrimination claim if his incapacity was 'long term'.[107] This was a factual question for the national court to answer on the basis of all of the available objective evidence, including current medical knowledge.[108] The Court advised that a long-term incapacity could be indicated by the fact that at the time of the allegedly discriminatory act, the recovery prognosis of the worker was either unclear or that it seemed that his incapacity was likely to be significantly prolonged.[109]

2.4 The meaning of 'ethnic origin'

The Racial Equality Directive does not define the concepts of either 'racial' or 'ethnic origin'. In *CHEZ,* the CJEU first attempted to explain the meaning of 'ethnic origin' by drawing upon the definition of the concept adopted by the ECtHR. As already discussed above, the CJEU concluded that the concept of ethnicity has 'its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and background'.[110] The Court considered it uncontroversial that this definition applied to persons of 'Roma origin.'

100 Lourenço, L. and Pohjankoski, P. (2018) 'Breaking Down Barriers? The Judicial Interpretation of 'Disability' and 'Reasonable Accommodation' in *EU Anti-Discrimination Law Beyond Gender*, Hart Publishing, 331.

101 Judgment of 18 December 2014, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, C-354/13, ECLI:EU:C:2014:2463, [56].

102 Judgment of 18 December 2014, *FOA*, C-354/13, ECLI:EU:C:2014:2463, [56].

103 Judgment of 18 December 2014, *FOA*, C-354/13, ECLI:EU:C:2014:2463, [59] ('physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one'.).

104 Judgment of 18 December 2014, *FOA*, C-354/13, ECLI:EU:C:2014:2463, [60].

105 Judgment of 18 January 2018, *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal,* C-270/16, ECLI:EU:C:2018:17, [29]-[30], citing *FOA* C-354/13, ECLI:EU:C:2014:2463 [59]-[60].

106 Judgment of 1 December 2016, *Mohamed Daouidi v Bootes Plus SL and Others*, C-395/15, ECLI:EU:C:2016:917.

107 Judgment of 1 December 2016, *Daouidi*, C-395/15, ECLI:EU:C:2016:917.

108 Judgment of 1 December 2016, *Daouidi*, C-395/15, ECLI:EU:C:2016:917 [57].

109 Judgment of 1 December 2016, *Daouidi*, C-395/15, ECLI:EU:C:2016:917 [56].

110 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [46].

In a subsequent case, *Jyske Finans*, the Court applied the same concept of ethnic origin as set out in *CHEZ*. However, it concluded that a practice based on country of birth did not, qualify as a practice based on 'ethnic origin' for the purposes of the Racial Equality Directive.

This case concerned the policy of a Danish credit institution to require loan applicants to provide additional proof of identity if they were not born in a Nordic country or an EU Member State. The complainant was born in Bosnia and Herzegovina but had been a Danish citizen since 2000. He was required to provide additional documentation when taking out a car loan, while his partner, a Danish citizen born in Denmark, was not. He alleged that this differential treatment on the basis of his country of birth constituted discrimination, either direct or indirect, on the basis of racial or ethnic origin.

The Court acknowledged that even though a person's country of birth is not explicitly mentioned in the list of criteria set out in *CHEZ* as defining the concept of 'ethnic origin', it could be relevant as an additional factor in that determination. However, it asserted that '[e]thnic origin cannot be determined on the basis of a single criterion but, on the contrary, is based on a whole number of factors, some objective and others subjective'. Country of birth 'cannot, in itself, justify a general presumption that that person is a member of a given ethnic group such as to establish the existence of a direct or inextricable link between those two concepts'.[111] The CJEU thus held that a difference in treatment based solely on a person's country of birth, which did not also incorporate any of the characteristics mentioned in the above definition, does not fall under the definition of ethnicity in relation to the Framework Equality Directive.[112] The Court's conclusion that ethnic origin did not cover country of birth was sufficient to preclude a finding that direct discrimination had taken place.[113] It went on to determine that the practice in question also did not provide a basis for a claim of indirect discrimination, on the basis that it could not be inferred from the application of a 'place of birth' criterion that a particular ethnic group had been subject to disadvantage. This aspect of the case has been subject to sustained academic criticism, and is discussed further below.

The Court has not yet offered a definition of 'racial origin'. In *Jyske Finans*, Advocate General Wahl suggested in his Opinion that engaging with the notion of 'race' would only replicate the harmful group generalisations that the directive was intended to counteract. He described the exercise of determining the meaning of race to be 'increasingly unacceptable in modern societies', citing Recital 6 of the directive, which states that the 'European Union rejects theories which attempt to determine the existence of separate human races.'[114] The Advocate General went on to suggest that 'the prohibition against discrimination on the basis of racial origin has perhaps ceded its pre-eminence in favour of the less overt and tangible concept of discrimination on the basis of ethnic origin'.[115] In its judgment, the Court confined its analysis to the concept of 'ethnic origin' and did not engage with the concept of 'race'.

It should be noted that Advocate General Wahl's approach to the 'racial origin' aspect of the scope of the Racial Equality Directive has attracted much academic criticism. For example, Atrey has argued that the inclusion of 'racial origin' within the directive's scope does not reflect discredited pseudo-scientific thinking about racial identity. Instead, it reflects a desire to target the use of 'race' as a social construct and the associated disadvantages it imposes on certain social groups, such as xenophobia, being treated as the inferior 'Other', and other forms of exclusionary treatment.[116] As such, she suggests that Advocate General Wahl's approach, which effectively sidelines the concept of 'racial origin' as an analytical tool within EU law, risks obscuring the very problem that Directive 2000/43/EC was enacted to address, namely the substantial problem of racial discrimination. She concludes by suggesting that such reasoning may fortify 'what some commentators recognise as the growing phenomenon of "European

111 Judgment of 6 April 2017, *Jyske Finans A/S v Ligebehandlingsnævnet*, C-668/15, ECLI:EU:C:2017:278, [20].
112 Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278 [20].
113 Judgment of 6 April 2017, *Jyske Finans*, C-668/15, ECLI:EU:C:2017:278 [23]
114 Opinion of AG Wahl, 1 December 2016, *Jyske Finans*, C-668/15, ECLI:EU:C:2016:914 [31].
115 Opinion of AG Wahl, 1 December 2016, *Jyske Finans*, C-668/15, ECLI:EU:C:2016:914 [31].
116 Atrey, S. (2018) 'Race Discrimination in EU Law after *Jyske Finans*' 55(2) *Common Market Law Review* 625-642.

silence on race"'.[117] It remains to be seen how the case law of the CJEU will engage with the concepts of 'race', 'racial origin', and 'race discrimination' in the future, but Atrey's critique is a powerful one, not least because it finds support in the recitals of Directive 2000/43/EC.[118] Similar concerns recur in respect of the Court's approach to indirect discrimination in *Jyske Finans*, as discussed below in section 3.2.a.

117 See Atrey, S. (2018) 'Race Discrimination in EU Law after *Jyske Finans*' p. 640. For an earlier framing of such arguments, see Möschel, M. (2011) 'Race in Mainland European Legal Analysis: Towards a European Critical Race Theory' 34 *Ethnic and Racial Studies* 1648.

118 See the reference in Recital 3 of Directive 2000/43/EC to the provisions of the UN Convention on the Elimination of Racial Discrimination (CERD), which adopts the same approach to the concept of race and racial discrimination as indicated by Atrey. See also the reference in Recital 11 to the Council Joint Action adopted on 15 July 1996 (96/443/JHA) concerning action to combat racism and xenophobia. See also in general Bell, M. (2009) *Racism and Equality in the European Union*, OUP 2009.

3 The case law of the CJEU in respect of the operative provisions of the 2000 directives

The operative provisions of the 2000 equality directives have a number of common provisions which apply across all the discrimination grounds which come within their scope. Direct discrimination, indirect discrimination and harassment are prohibited across each of the enumerated grounds. The provisions of both directives that define what constitutes a genuine occupational requirement and govern positive action, burden of proof, remedies, and the prohibition of victimisation are similarly universal.[119] Specific provisions also apply in respect of particular grounds. For example, Article 6(1) of the Framework Equality Directive provides that less favourable treatment on the grounds of age can be objectively justified, which is not the case for the other grounds, while Article 5 requires employers to provide reasonable accommodation for persons with disabilities and Article 4(2) makes specific provision for organisations with an 'ethos based on religion or belief'.

In the earlier years of the directives, the CJEU clarified how some of those provisions should be interpreted and applied. In so doing, it has consistently applied the general interpretative approach outlined above. In particular, the Court has interpreted the text of the directives as being intended to give expression to the principle of equal treatment. Derogations from this principle have been read narrowly, and the Court has repeatedly emphasised that the purpose of the 2000 equality directives is to provide effective protection against discrimination within the scope of their application.

Since 2012, when the previous report on this topic was written, the Court has had the opportunity to make rulings relevant to many more of these concepts and explore them across different protected grounds. For example, the Court has delivered its first judgments with regard to 'religion or belief,' and added significantly to its case law with respect to race. But it remains the case that most of its judgments continue to concern the grounds of disability and (in particular) age. These trends are further analysed in Chapter 5 of this paper.

In general, the Court has interpreted the operative provisions of the 2000 equality directives in a consistent, cross-ground manner. However, in specific instances, the Court has been prepared to treat particular grounds differently when it comes to the application of these common operative provisions, where a textual or conceptual justification exists for so doing.

3.1 Direct discrimination

Article 2(2)(a) of both directives define direct discrimination as occurring 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation' on any of the non-discrimination grounds. The equivalent provisions of the Equal Treatment Directive (originally Council Directive 76/207/EEC, now contained in the recast Directive 2006/54/EC) have been extensively interpreted and applied by the CJEU in its gender equality case law. The prohibition on direct discrimination contained in the 2000 equality directives has been interpreted in a similar manner. As a result, where persons are subjected to less favourable treatment for reasons that are directly linked to any of the non-discrimination grounds, this will violate the requirements of the 2000 directives. A hostile intention to discriminate is not required. Furthermore, direct discrimination will be prohibited unless a specific exception set out in the text of the directives applies to the situation. Unlike the case with indirect discrimination, less favourable treatment cannot be shown to be objectively justified, except: a) in the case of age where the special provisions of Article 6(1) of the Framework Equality Directive apply (see below), or b) where the difference of treatment in question can be justified on the basis that it is necessary

119 For a general comparative overview of the provisions of the 2000 directives, see Bell, M. and Waddington, L. (2001) 'More Equal than Others: Distinguishing European Union Equality Directives?' 38(3) *Common Market Law Review* 587-611.

to give effect to a genuine and determining occupational requirement, in line with the provisions of Article 4 of Directive 2000/43/EC and Article 4(1) of the Framework Equality Directive.

In the case of *CHEZ*, the CJEU provided useful clarification as to the scope of direct discrimination.[120] *CHEZ* involved an electricity supplier's practice of placing its meters at a height of 6-7m in predominantly Roma-populated districts, while meters were positioned lower than 2m above ground in non-Roma districts. The supplier company claimed that the higher heights were necessary to prevent tampering with the commercial measuring instruments and unlawful connections to the electricity network. A non-Roma shopkeeper, Ms Nikolova, who ran a business in a predominantly Roma district, claimed that the law disadvantaged her because she was unable to check her energy consumption given her meter's height. She challenged the law as discriminatory under the Racial Equality Directive.

In its judgment, the Court offered important guidance on the three key components of direct discrimination: (i) what qualifies as treatment 'on grounds of' a protected characteristic (in this case, racial or ethnic origin); (ii) what constitutes 'less favourable treatment'; and (iii) what constitutes a 'comparable situation'.

The CJEU had initially to determine whether the concept of 'discrimination on the grounds of ethnic origin' applies where a practice that predominantly adversely affects persons of a certain ethnic origin also causes a person *not of that origin* (in this case, Ms Nikolava) to suffer the less favourable treatment or particular disadvantage in question.[121] In answering this question, the Court began its analysis by reiterating its standard interpretative approach (discussed above), namely that the scope of the directive should not be given an unduly narrow or restrictive definition, as it is a specific expression of the general EU principle of equality enshrined in Article 21 of the Charter.[122] The Court went on to say that the overarching aim of the directive and the fundamental nature of the rights it protects supported interpreting the directive's provisions as directed towards the elimination of all discriminatory treatment based on racial or ethnic origin.[123] The Court thus concluded that the principle of equal treatment precluded not just less favourable treatment directed against a particular category of persons defined by racial or ethnic origins, but also any such treatment that was based on grounds of racial and ethnic origins more generally.[124] Although Ms Nikolova was not herself of Roma origin, the Roma origin of the other inhabitants of her district formed the basis of the less favourable treatment she alleged.[125] The treatment that she had been subjected to thus constituted discrimination on the ground of ethnic origin, which should be treated as coming within the scope of the prohibition on direct discrimination set out in Article 2(2)(a) of the directive.

The CJEU further supported this interpretation by reference to the wording of other relevant provisions, none of which specify that discrimination must be on the basis of the claimant's own ethnic origin. Recital 16 in the preamble to the directive, read together with Article 3(1), asserts that protection against discrimination on grounds of racial or ethnic origin is to benefit 'all' persons; Article 19 of the Treaty on the Functioning of the European Union describes its target as discrimination 'based on… racial and ethnic origin'; and Article 21 of the Charter of Fundamental Rights of the European Union refers to discrimination 'based on any [protected] ground'.

CHEZ thus extends the concept of associative discrimination, first upheld by the CJEU in *Coleman v Attridge*.[126] In *Coleman*, the CJEU held that it is not necessary for an employee to be herself disabled to bring a direct disability discrimination claim: rather a claim can arise when a person is subject to less

120 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480.

121 Importantly, this question affects the definition of both direct and also indirect discrimination, which is discussed in the section below.

122 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [42], [66], [76].

123 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [42], [66], [76].

124 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [56].

125 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [59].

126 Judgment of 17 July 2008, *Coleman v Attridge Law and Steve Law,* C-303/06, ECLI:EU:C:2008:415.

favourable treatment based on her association with another person with a protected characteristic.[127] But while the facts of *Coleman* featured a close personal relationship between the claimant and the individual with the protected characteristic (a mother and her disabled son), in *CHEZ* the 'association' was not necessarily an intimate one. *CHEZ* thus suggests that a discrimination claim may be brought by anyone who, like Ms Nikolova, is subject to less favourable treatment that is grounded on a protected characteristic. In her Opinion, Advocate General Kokott described these persons as 'victims by way of collateral damage'.[128] Moreover, in *CHEZ*, the Court extended the associative concept to the definition of *indirect* discrimination on grounds of race, too.

Having clarified the meaning of 'on grounds of racial or ethnic origin', the Court went on to consider whether a causal link existed between the alleged less favourable treatment at issue and the protected ground of racial and ethnic origin. The Court asserted that a *prima facie* case of direct discrimination exists where a protected characteristic is *a* determining factor for the decision to impose differential treatment. If the practice were adopted for reasons related to the ethnic origin common to most of the inhabitants of the implicated district, this would constitute direct discrimination, even though other persons of a different ethnic origin were affected as well.[129] The Court advised the national court on several factors that weighed in favour of a finding that a *prima facie* case of direct discrimination had occurred: namely (i) that the contested practice was established only in districts that were predominantly Roma; (ii) that the supplier had previously asserted that meters were tampered with mainly by persons of Roma origin, suggesting a reliance on ethnic stereotypes or prejudice; (iii) that the supplier had failed to adduce evidence of the alleged problematic activity (i.e. meter tampering and unlawful connection); and (iv) the enduring and indiscriminate nature of the practice.

The Court also discussed the two other components of the definition of discrimination – unfavourable treatment and comparability to other situations – and adopted a broad and purposive reading of both. It first concluded that the treatment at issue was unfavourable to those affected. The Court noted that this included not only the tangible disadvantage of inaccessible electric meters, but also the stigmatising and offensive character of the practice for persons subject to it – thereby interpreting the concept of 'less favourable treatment' in broad terms, and reinforcing the effectiveness of the prohibition on direct discrimination.[130] The Court also did not require the complainant to demonstrate that she and other inhabitants of her district had been treated less favourably in comparison to districts that were experiencing similar problems of interference with electric meters. Rather the Court concluded that a broader comparative analysis could be adopted, whereby the treatment of the inhabitants of Ms Nikolova's district could be compared with the treatment in general of all final electricity consumers who lived in the relevant urban area and were supplied by the same company.[131] Again, in reaching this conclusion the Court adopted a broad and purposive reading of the comparative requirement, instead of giving it a narrow and restrictive interpretation that might have effectively deprived the prohibition on direct discrimination of real force.

A second case, from 2013, also addressed the scope of direct discrimination and affirmed that it sometimes applies to differential treatment that is not explicitly and overtly based on one of the protected grounds. *Hay* involved provisions in a French collective agreement that permitted employees to claim special benefits on the occasion of a marriage, but not on the occasion of the formation of a civil partnership.[132] In its previous judgment in *Maruko*, the Court had concluded that unequal treatment on the basis of civil partnership could constitute direct discrimination on the basis of sexual orientation, per the rationale that *only* homosexual couples could enter into such a partnership and thus only homosexuals were

127 See judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [58], citing *Coleman* by analogy.
128 *CHEZ*, Opinion of AG Kokott, C-83/14, ECLI:EU:C:2015:170 [58].
129 *CHEZ*, Opinion of AG Kokott, C-83/14, ECLI:EU:C:2015:170 [76].
130 *CHEZ*, Opinion of AG Kokott, C-83/14, ECLI:EU:C:2015:170 [87].
131 *CHEZ*, Opinion of AG Kokott, C-83/14, ECLI:EU:C:2015:170 [88].
132 Judgment of 12 December 2013, *Hay*, C-267/12, ECLI:EU:C:2013:823.

affected by the less favourable treatment in question.[133] However, the civil partnership scheme in *Hay* differed from the scheme in *Maruko*: the French law challenged in *Hay* allowed *both* heterosexual and homosexual unmarried couples to enter into a partnership, while not permitting homosexual couples to get married. The Court deemed this irrelevant as it did not change the critical fact that, at the time of the case, same-sex couples were excluded from the institution of marriage and its associated benefits. The Court concluded that the less favourable treatment in question constituted direct discrimination on the basis of sexual orientation, i.e., the Court found it was analogous to the treatment at issue in *Maruko*.

In reaching this conclusion, the CJEU determined that the prohibition on same-sex couples entering marriage had the effect of denying such couples access to the benefits in this case, despite such couples being in a comparable situation to married opposite-sex couples.[134] The Court emphasised that this determination of comparability must be conducted in light of the specific nature, purpose and function of the particular benefits at issue, and it 'must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage'.[135] It is also notable that the Court was willing to make this conclusion on comparability itself without requiring reference back to the national court, as it had in previous cases.

3.2 Indirect discrimination

Virtually identical definitions of indirect discrimination are set out in Article 2(2)(b) of both directives. These provisions establish that indirect discrimination will be taken to exist when 'an apparently neutral provision, criterion or practice would put persons of a particular [protected characteristic (i.e. being of a particular ethnic group, sexual orientation, age etc.)] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.[136] This wording is based on the case law of the CJEU relating to indirect discrimination in the context of gender equality as it developed before the 2000 equality directives were agreed.[137] The Court has handled an increasing number of references relating to issues of indirect discrimination under the 2000 directives, and its judgments have clarified how these provisions should be interpreted with respect to the grounds protected therein.

3.2.1 'Particular disadvantage'

Direct discrimination is concerned with the *reasons* for a difference in treatment. In contrast, indirect discrimination captures practices that are facially neutral 'at first glance',[138] but have the *effect* of placing a group of persons at a 'particular disadvantage'.[139] In accordance with the Court's ruling in *CHEZ*, the victim of indirect discrimination is not limited to an individual who possesses the characteristic on which the particular disadvantage is based; the victim can also be someone who suffers that disadvantage as a result of the protected characteristic of someone else.[140]

In *CHEZ*, the Court also further examined the meaning of a 'particular disadvantage' in the definition of indirect discrimination on the grounds of racial or ethnic origin. The Court clarified that this wording does not require any 'particular degree of seriousness' with respect to the inequality produced. Rather, the word

133 Judgment of 1 April 2008, *Maruko,* C-267/06, EU:C:2008:179.
134 Judgment of 12 December 2013, *Hay*, C-267/12, ECLI:EU:C:2013:823, [36].
135 Judgment of 12 December 2013, *Hay*, C-267/12, ECLI:EU:C:2013:823 [34].
136 For a comprehensive analysis of the concept of indirect discrimination, see C. Tobler, C. (2008) *Limits and Potential of the Concept of Indirect Discrimination, Thematic Report of the European Network of Legal Experts in the Non-Discrimination Field*, Brussels: European Commission/MPG.
137 See eg Judgment of 13 May 1986, *Bilka-Kaufhaus GmbH v Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.
138 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [93].
139 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [95].
140 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [59]-[60].

'particular' denotes that the practice must impact 'particularly persons of a given ethnic origin'.[141] This less restrictive meaning was more compatible with the objectives of the indirect discrimination provision, which the Court once again emphasised should be read purposefully. In application, the Court observed that the challenged practice had only been applied in urban districts inhabited mainly by persons of Roma origin. It was liable to affect Roma persons in considerably greater proportions, and accordingly to put them at a particular disadvantage compared with other persons.[142]

In the subsequent case of *Jyske Finans*, the Court added a further dimension to the definition of 'particular disadvantage'.[143] As described previously, *Jyske Finans* involved a requirement that persons born outside of EU countries provide additional identification in support of a loan application. The Court again followed the reasoning of Advocate General Wahl relating to indirect discrimination and concluded that demonstrating the existence of 'particular disadvantage' requires the concrete identification of a *specific* ethnic group that has been disadvantaged *vis à vis* other groups. Because the challenged requirement applied to *all* persons born outside the EU, this meant that it could not be shown that any specific ethnic group was being disadvantaged. In this regard, the Court rejected the argument that a comparison could be made between the requirement's impact on a set of ethnic groups (non-ethnically Danish persons) and a single ethnic group (ethnic Danes). The Court ruled that the claim that a person's country of birth 'is generally more likely to affect persons of a "given ethnicity" than "other persons" cannot be accepted', reasoning that it is 'apparent that ethnic origin cannot generally be presumed on the sole basis of a person's country of birth'.[144]

This element of the Court's judgment has been subject to strong academic criticism.[145] For example, Atrey has argued that it sits uncomfortably with the text of the directive, the directive's overarching purpose, and the reality of how racial prejudice tends to manifest. First, it is not clear that the directive requires identification of a specific racial or ethnic group.[146] The text of Article 2(2)(b) only refers to 'particular disadvantage' not 'particular' ethnic or racial groups, and indeed, refers to 'persons of a racial or ethnic origin' not persons of a *specific* one. Secondly, this narrow understanding of the requirements of discrimination arguably does not fit the objectives of the Racial Equality Directive, nor the nature of race discrimination. Prejudice may target a specific racial or ethnic group, but it is just as likely to manifest more broadly as hatred, dislike or differential treatment of persons considered 'other' – with immigrants, either non-Europeans or persons from Eastern Europe or other non-EU countries, often being a particular target for discriminatory behaviour. Indeed, evidence shows that one of the objectives of the Racial Equality Directive is to combat anti-immigrant prejudice, and the preamble to the directive links the concept of racism to xenophobia on several occasions.[147]

Understood in this way, the practice challenged in *Jyske Finans* would appear to be the type of less favourable treatment that should be interrogated under the indirect discrimination prohibition. Atrey suggests that the less favourable treatment of persons not born in the EU was based on a perception that they constituted a suspect category of person who had to be subject to extra identity check – and it is precisely this type of group stereotyping that should be subjected to judicial scrutiny under the provisions of the Race Equality Directive.[148] She concludes by suggesting that the 'Court's approach to addressing the situation by, first, defining ethnic origin, and then isolating a particular ethnic group as the victim of discrimination, has little to do with the substantive idea of racial discrimination' that she suggests

141 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [27].
142 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480 [107].
143 Judgment of 6 April 2017, *Jyske Finans*, C668/15, ECLI:EU:C:2017:278.
144 Judgment of 6 April 2017, *Jyske Finans*, C668/15, ECLI:EU:C:2017:278 [34]-[35].
145 See Atrey, S. (2018) 'Race Discrimination in EU Law', 55 *Common Market Law Review*, 625, 634-635 for criticism of this decision.
146 Atrey, S. (2018) 'Race Discrimination in EU Law', p. 634.
147 Atrey, S. (2018) 'Race Discrimination in EU Law', p. 639; Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd ed.).
148 Atrey, S. (2018) 'Race Discrimination in EU Law', 55 *Common Market Law Review*, 625, 636. See also Bell, M. (2009) *Racism and Equality in the European Union*, Oxford University Press, p. 10; Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd ed.), p. 34.

underlies the directive.[149] Similarly, Ward has argued that '[t]he Opinion of the Advocate General and the judgment of the First Chamber in *Jyske Finans* diminishes the impact of a measure that is neutral on its face as the touchstone for determining whether indirect discrimination has occurred; an approach that is so ingrained in the case law of the CJEU that it might be viewed as having constitutional status'.[150]

It should also be noted that the Court's approach to the indirect race discrimination element of *Jyske Finans* is out of step with the approach adopted by the Grand Chamber of the ECtHR in the case of *Biao v Denmark*.[151] This case involved a challenge to Danish laws on family reunification, under which a family partnership looking to establish a right to reside in Denmark was required to show either that one of the partners had been a Danish national for at least 28 years or, in the case of non-Danish nationals, had been born or raised in Denmark and lived there lawfully for 28 years. This rule was challenged by a Danish citizen of immigrant ethnic origin who had only been naturalised for nine years, on the basis that the '28 year rule' constituted indirect discrimination on grounds of racial or ethnic origin under Article 14 ECHR taken together with Article 8. The ECtHR considered that it could 'reasonably be assumed' that a vast majority of those affected by this rule were going to be of non-Danish or foreign ethnic origin, and took particular account of evidence that negative stereotyping about non-ethnic Danes played a role in the development of the '28 year rule'.[152] As such, the approach of the Strasbourg Court differed from the CJEU in its readiness to accept that persons not born in Denmark were likely to be of a non-Danish ethnicity, and to treat stereotyping of this group as constituting a particular disadvantage for the purposes of indirect discrimination analysis.[153]

Still, the CJEU subsequently adopted a similarly narrow understanding of 'particular disadvantage' in a third reference interpreting the Racial Equality Directive, *Heiko Jonny Maneiro*.[154] This case involved a criterion with a similar effect to the one challenged in *Jyske Finans*: an educational scholarship was only available to persons who had passed a German state law examination, and not to those who had passed an equivalent exam in other countries (the claimant's degree was from Armenia). The Court again concluded that it could not be shown that any one specific ethnic group would be more affected by this condition than any other groups, and disallowed a comparison between an advantaged ethnic group, Germans, and members of all other ethnic groups, i.e. non-Germans.

This approach as adopted in *Jyske Finans* and *Heiko Jonny Maneiro* represents a sharp departure from the Court's usual purposive interpretative approach to the text and objectives of the Racial Equality Directive, and also departs from the approach of the ECtHR as adopted in *Biao v Denmark*. It remains to be seen how the Court's jurisprudence will develop in this regard, and how it will engage with the understanding in different jurisdictions throughout the European Union of how racial and ethnic stereotyping may impact on groups.[155]

Interestingly, this approach to 'particular disadvantage' has not been carried across to other grounds. For example, in the context of disability, the Court has not required a claimant to demonstrate an impact specific to a single disability in order to bring an indirect discrimination claim. Rather, the fact that a criterion is likely to disadvantage disabled persons in general in contrast to non-disabled ones has been found to be sufficient.

149 Atrey, S. (2018) 'Race Discrimination in EU Law', 55 *Common Market Law Review*.

150 Ward, A. (2018) 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?' *Cambridge Yearbook of European Studies* 1-29.

151 ECtHR, *Biao v Denmark* [GC], Application No. 38590/10, Judgment of 24 May 2016.

152 Schüler, A. (2016) '*Biao v Denmark*', *Strasbourg Observers Blog*, 13 June 2016, available at https://strasbourgobservers.com/2016/06/13/biao-v-denmark-grand-chamber-ruling-on-ethnic-discrimination-might-leave-couples-seeking-family-reunification-worse-off/.

153 Atrey, S. (2018) 'Race Discrimination in EU Law', 55 *Common Market Law Review*, 625, 639.

154 Judgment of 15 November 2018, *Heiko Jonny Maniero,* C-457/17, ECLI:EU:C:2018:912.

155 See generally, Bell, M. (2009) *Racism and Equality in the European Union*; Howard, E. (2010) *The EU Race Directive: Developing the Protection against Racial Discrimination within the EU* London: Routledge.

For example, *Ruiz Conejero* involved a Spanish law allowing employers to dismiss employees with accumulated days of absence because of illness.[156] In this case, a worker subject to a disability (obesity and associated conditions) had suffered various periods of related sickness. He was subsequently dismissed under Spanish legislation on the ground that the cumulative duration of his absences had exceeded the limits laid down in that provision. Although the provision was apparently neutral in that both disabled and non-disabled workers alike could be dismissed for such absences, the Court found that this provision was liable to placing disabled workers in general at a particular disadvantage because 'a worker with a disability has the additional risk of being absent by reason of an illness connected with his disability'.[157]

3.2.2 Objective justification

A practice that produces a disadvantageous effect upon a protected group is not discrimination if that practice can be 'objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.[158] In applying this objective justification requirement in the context of the 2000 equality directives, the Court has applied the same general approach as it does in the context of gender equality. As such, it requires that the policy in question: a) pursues a legally permitted objective, and b) that the measures utilised are proportionate to the achievement of that objective.[159]

In *CHEZ*, for example, after the Court determined that the challenged electricity meter practice put persons of Roma origin at a particular disadvantage, it went on to consider whether this disadvantage could be objectively justified. The Court accepted as legitimate in principle the aims put forward by the electricity supplier: to prevent fraud and abuse, to protect individuals against the risks to their life and health, and to ensure the quality and security of electricity distribution in the interest of all users. However, it held that it was for the referring court to determine whether the measures implemented were *objectively* – that is, *factually* – justified by such aims. In particular, the Court required that the supplier establish the actual existence of unlawful conduct and explain the reasons for considering that there was a major risk it would continue in the affected district.[160] The supplier also needed to establish that no other appropriate and less restrictive measures existed for the purpose of achieving its stated aims. In this regard, the Court particularly noted that other electric companies had solved the tampering problem while keeping the electric meters at normal height.[161]

Further, the defendant supplier's stated aim would not be proportionate if the practice unduly prejudiced the legitimate interests of the persons inhabiting the district concerned, namely that their access to electricity had an offensive or stigmatising effect. This analysis would need to take into consideration the widespread and long-standing nature of this practice and balance this effect against the aims being pursued.[162] The Court's opinion indicated that it was very unlikely that this practice could be justified, but it was for the referring court to make the final determination.[163]

The application of the objective justification test was again an issue in the disability case of *Ruiz Conejero*, which, as mentioned above, involved a worker subject to a disability (obesity and associated conditions) who had suffered various periods of related sickness and ultimately been dismissed under Spanish

156 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17.
157 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17 [39] (citing the same analysis as absenteeism policy in *HK Danmark (Ring, Skouboe Werge)*, [76]). In a recent case, decided after the temporal scope of this report, the CJEU reiterated that using absenteeism rate as an employee dismissal selection criteria is liable to place disabled workers at a disadvantage causing them to suffer indirect discrimination. Judgment 11 September 2019, C-397/18, *DW v Nobel Plastiques Ibérica SA*, ECLI:EU:C:2019:703 [59], [71].
158 Racial Equality Directive, Article 2(b); Framework Equality Directive, Article 2(2)(b).
159 Eg Judgment of 13 May 1986, *Bilka-Kaufhaus GmbH v Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.
160 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [116].
161 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [121].
162 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [125].
163 Judgment of 16 July 2015, *CHEZ*, C-83/14, ECLI:EU:C:2015:480, [127].

legislation allowing employers to dismiss employees with accumulated days of absence because of illness.[164]

The Court considered that the national law's aim of increasing productivity and efficiency at work by combating absenteeism constituted a legitimate aim. With respect to the appropriateness of the measure, the CJEU instructed the national court to particularly consider the costs of absenteeism borne by companies, and the effect of having a right to dismiss for absenteeism on encouraging employer recruitment. With respect to whether the measure was necessary, the referring court emphasised that particular attention must be given to the adverse effects it is liable to have on persons with disabilities. The national court was not to overlook 'the risks run by persons with disabilities, who generally face greater difficulties than persons without disabilities in re-entering the labour market, and have specific needs in connection with the protection their condition requires'.[165]

The need to include consideration of the specific situation of persons with disabilities is thus now a firmly established part of the Court's analysis of objective justification. Indeed, the failure of a Member State to consider the special difficulties faced by disabled workers has been found in itself sufficient to deem an indirectly discriminatory measure unjustifiable.[166] This can be seen in the case of *Bedi v Bundesrepublik Deutschland*,[167] which concerned a collective agreement under which 'bridging assistance' – a form of subsistence provided to workers who have recently lost their jobs – ceased once the worker became entitled to a retirement pension under the statutory pension scheme. Severely disabled workers like the claimant were entitled to early payment of a retirement pension and thus the claimant's bridging assistance was terminated sooner than it would have had he not been disabled. The CJEU held that the challenged provision was not directly discriminatory because it applied generally to groups of workers who received early retirement pension, and not specifically to severely disabled workers. The provision did, however, indirectly put disabled workers at a disadvantage because they would receive a lower average income during the relevant time period compared to non-disabled workers approaching retirement age who had also been made redundant.[168] The aims of the rule regarding bridging assistance were, in principle, legitimate: that of providing compensation for the future of redundant workers and facilitating reintegration into the labour market, while also achieving a fair distribution of financial resources. The means by which the rules achieved those aims also appeared appropriate: given the objective of providing temporary support to recently laid-off workers, it was logical that this support could be stopped when the worker came into another source of financial protection, namely a statutory retirement pension.[169]

In evaluating the necessity prong of proportionality, however, the Court emphasised the adverse financial effects of the challenged provision on disabled persons who had reached pensionable age.[170] The Court highlighted that disabled persons may have particular financial needs related to both their present condition and the need to plan for the possibility of that condition worsening in the future. As the bridging assistance scheme did not account for these special needs, it inflicted excessive adverse effects on the legitimate interests of severely disabled workers and thus was unjustifiable indirect discrimination.

3.3 Age discrimination

The general provisions of the Framework Equality Directive apply to age as they do to the other grounds that come within its scope. However, Article 6 specifically provides that differential treatment directly on

164 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17.
165 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17 [51].
166 Judgment of 6 December 2012, *Odar v Baxter Deutschland GmbH*, Case C-152/11, ECLI:EU:C:2012:772 (concerning a social plan under which redundancy compensation was reduced for disabled workers entitled to receive a pension early); see also *HK Danmark*, [91].
167 Judgment of 19 September 2018, *Bedi*, C-312/17, ECLI:EU:C:2018:734.
168 Judgment of 19 September 2018, *Bedi*, C-312/17, ECLI:EU:C:2018:734 [53]-[57].
169 Judgment of 19 September 2018, *Bedi*, C-312/17, ECLI:EU:C:2018:734 [61]-[64].
170 Judgment of 19 September 2018, *Bedi*, C-312/17, ECLI:EU:C:2018:734 [66].

the basis of age is permitted in certain circumstances. Article 6(1) provides that age differential policies are not discriminatory 'if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary'.

In other words, a rule or a policy that subjects employees to less favourable treatment on the grounds of age will not constitute discrimination if it a) is designed to achieve a 'legitimate aim', and b) is 'appropriate and necessary' to achieving that particular aim. This is the 'objective justification' test already discussed in the context of indirect discrimination, which is exceptionally applied to *prima facie* cases of *direct* discrimination in the context of age (see the discussion on direct discrimination in section 3.1, above).

This provision gives a number of examples of such justified differences in treatment, which include: the 'setting of special conditions on access to employment and vocational training' in order to promote the vocational integration of particular age categories of workers or to 'ensure their protection'; the 'fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment'; and 'the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement'.

In addition to this general exception, Article 6(2) of the Framework Equality Directive provides that states may exempt age limits that govern admission to occupational social security schemes or entitlement to the benefits they provide from the prohibition on age discrimination.

Age discrimination has been the subject of multiple references to the Court. Some of these references have raised issues relating to the scope of Directive 2000/78 and its relationship to the general principle of equal treatment, as discussed above in Chapter 2. However, the questions referred by national courts to the CJEU have largely focused on how the two exceptions laid out in Article 6 should be interpreted and applied.

3.3.1 Unequal treatment not on grounds of age

Age is a particularly complex ground because age-based or age-related distinctions are commonly used across Europe to differentiate between different categories of workers. Often these distinctions are based on generalisations, stereotyping and prejudice. However, at times, their use may be based on rational considerations. The case law of the CJEU reflects an understanding of this complexity and a commitment to distinguishing between truly discriminatory distinctions and those that fall outside the scope of the directive's protection.

For example, in *O v Bio Philippe Auguste SARL*,[171] the Court was asked to consider French legislation that provided for an insecurity payment to be payable in the event that employment under a fixed-term contract was not followed by an offer of permanent employment. Young persons who work during their school holidays or university vacations were excluded from eligibility for such payments. One such person challenged this exclusion as age discrimination. The Court concluded that a *prima facie* case of age discrimination could not be established because the situation of a person like the claimant was not comparable to that of other workers. The purpose of the insecurity payment was to compensate for the insecurity of a worker's situation when he had hoped that the employment would continue and it did not. Students on temporary break are not in these circumstances because they intend to return to school after the expiry of a fixed-term contract, rather than continue in the labour market.[172] Because the two groups were not comparable, less favourable treatment on the grounds of age could not be established in order to sustain a discrimination challenge.

171 Judgment of 1 October 2015, *O v Bio Philippe Auguste SARL*, C-432/14, ECLI:EU:C:2015:643.
172 Judgment of 1 October 2015, *O*, C-432/14, ECLI:EU:C:2015:643, [33]-[39].

The Court has also looked sceptically upon attempts by claimants to challenge different categories or levels of jobs receiving different pay under the framework of age discrimination.[173] In rejecting such claims, it has acknowledged that criteria such as date of recruitment or level of experience are common and rational means of sorting employees. Nor are such differences of treatment based on, or even linked to age per se. For example, in *Carlos Escribano Vindel v Ministerio de Justicia*, the Court considered a challenge to general salary-reduction measures, which entailed greater percentage reductions for those members of the judiciary on the two lower pay grades than for those on a higher pay grade.[174] The former group was generally younger and had a shorter length of service than the latter. The Court asserted that there did not appear to be any difference in treatment that could form the basis of either a direct or indirect discrimination claim because the two groups were not in objectively comparable situations, since the members of the judiciary are divided into separate categories and hold different posts.[175]

The case of *Bowman* involved a provision of a collective labour agreement by which employees who benefited from account being taken of periods of school education have a longer period in order to advance from the first to the second salary step than that which applies to advancements between subsequent steps.[176] The Court held that because periods of school education could be taken into account for salary classifications regardless of the age of the employee at the time of recruitment, the scheme was 'based on a criterion which is neither inextricably nor indirectly linked to the age of employees'.[177] The extended advancement period applied in the same way to all workers, including both younger workers just starting out and older workers who requested inclusion of their school experience retroactively. The challenged provision did not then amount to differential treatment, directly or indirectly, on the basis of age. These cases demonstrate that the CJEU has been careful to withhold the directive's protection from legislation that differentiates between individuals on the basis of a criterion that *correlates* with age but is itself meaningful independently of that correlation.

3.3.2 Objective justification for age discrimination

The very possibility of objective justification demonstrates that age is a distinct ground of non-discrimination. This does not mean, however, that age does not constitute a 'suspect' ground. The Court has stated that Article 6(1) constitutes a very specific derogation from the general principle of equal treatment.[178] As such, this exception is to be read narrowly, in line with the general interpretative approach that the Court has applied in interpreting the provisions of the 2000 equality directives.[179] Furthermore, as the Court has recently reiterated, the right to work was protected by Article 15(1) of the EU Charter, and the provisions of Article 6(1) have to be read subject to this fundamental entitlement.[180] As a result, the objective justification test set out in Article 6(1) must be applied in a rigorous and demanding manner particularly with respect to the 'appropriate and necessary' prong of the test.[181]

173 See eg Judgment of 14 February 2019, *Tomás Horgan and Claire Keegan v Minister for Education & Skills and Others*, C-154/18, ECLI:EU:C:2019:113 (challenge to Irish scheme introducing lower salary scales for new entrants to the profession of national teacher while leaving unaltered the pay of those teachers already in employment).

174 Judgment of 7 February 2019, *Carlos Escribano Vindel v Ministerio de Justicia*, C-49/18, ECLI:EU:C:2019:106.

175 See also Judgment of 14 March 2018, *Stollwitzer v ÖBB Personenverkehr AG ÖBB Personenverkehr AG,* C-482/16, ECLI:EU:C:2018:180 [40].

176 Judgment of 21 December 2016, *Daniel Bowman v Pensionsversicherungsanstal*, C-539/15, ECLI:EU:C:2016:977.

177 Judgment of 21 December 2016, *Bowman*, C-539/15, ECLI:EU:C:2016:977 [28].

178 Judgment of 5 March 2009, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, C-388/07, ECLI:EU:C:2009:128, [60]–[67].

179 See Judgment of 5 March 2009, *Age Concern England*, C-388/07, ECLI:EU:C:2009:128 [62] (stating that this provision 'in that it constitutes an exception to the principle prohibiting discrimination, is however strictly limited by the conditions laid down in Article 6(1) itself').

180 Judgment of 5 July 2017, *Werner Fries v Lufthansa*, C-190/16, ECLI:EU:C:2017:513.

181 The wording of the objective justification test set out in Article 6(1) differs from that set out in respect of indirect discrimination in Article 2(2)(b) of the same Directive, in that the wording of Article 6(1) requires that a difference in treatment be 'objectively and reasonably justified'. However, in *Age Concern*, the Court made it clear that this difference in wording was not significant. See Judgment of 5 March 2009, *Age Concern England*, C-388/07, ECLI:EU:C:2009:128, [53]-[67].

However, the Court has also taken account of the specific nature of the age ground and that differences of treatment may be justified in a wider range of circumstances than is the case for the other non-discrimination grounds. In so doing, it has tried to strike a delicate balance between enforcing the prohibition on age discrimination and ensuring that Member States and employers enjoy some room for manoeuvre in this context. To this end, the Court has held that Member States enjoy broad discretion in their choice of objectives to pursue in the field of social and employment policy, as well as in the definition of measures capable of achieving such objectives.[182]

The Court has been particularly respectful of how states choose to regulate their labour markets. In *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*,[183] a challenge was brought against an Italian law that permitted the use of 'on-call' employment contracts without conditions for any workers who were either under the age of 25 or over the age of 45. Mr Bordonaro worked for Abercrombie for over a year under such a contract until his 25th birthday when the contract was terminated. The Court accepted that unfavourable treatment had taken place, but held that it was objectively justified by the aim of creating a flexible labour market and facilitating the entry of young persons into that market. By making casual, less burdensome employment contracts available to employers, the challenged legislation would encourage employers to hire more young persons. The Court accepted that the measure was necessary in light of the persistent weak labour market in Italy and the imperative of giving as many young people as possible access to some type of employment.[184]

The Court approved age differential treatment in service of a similar aim in the case of *De Lange*. *De Lange* involved a Dutch tax scheme that allowed persons who had not yet reached the age of 30 to deduct in full, under certain conditions, vocational training costs from their taxable income, whereas that right to deduct was restricted in the case of persons who had reached that age.[185] The Court found that the tax deduction was an appropriate means of achieving the legitimate objective of promoting the position of young people in the labour market in order to advance their vocational integration. As to whether the taxation scheme was necessary, the CJEU considered it significant that persons *over* the age of 30 were not excessively disadvantaged because they could still deduct some of their training expenses. Older persons also generally have already had the opportunity to undertake training and to pursue a professional activity, with the result that they are in a better financial position than young people to bear at least part of the financial burden of new training. In light of these arguments and the broad discretion accorded to Member States in the social policy and employment field, the CJEU was not convinced that the taxation scheme went beyond what is necessary to attain the objective of promoting the position of young people in the labour market. However, it was for the national court to make the final determination.

De Lange and *Abercrombie* demonstrate that the CJEU looks favourably on age differentiations that pursue important social policy objectives, such as improving access to the labour market.[186] In contrast,

182 *See eg* Judgment of 19 June 2014, *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland*, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, ECLI:EU:C:2014:2005 [45].

183 Judgment of 19 July 2017, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, C-143/16, ECLI:EU:C:2017:566.

184 The Court did not consider the appropriateness of the measure's exclusion of persons *over* the age of 45. While the question referred by the national court concerned only the availability of flexible work contracts for persons *under 25*, it stands to reason that the arguable over-inclusiveness of the legislation generally could be relevant to the Court's evaluation of the legitimacy of the Member State's chosen means and objective with respect to younger persons. In particular, the rationale of the Italian Government that it intended to give younger persons more opportunity to gain labour market experience is contradicted by the measure's extension to older workers, who would be likely to already have such experience. This may be a sign of the broad discretion given to Member States to justify age discrimination. See Bell, M. (2018) 'EU Equality Law and Precarious Work' in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart Publishing, p. 92.

185 Judgment of 10 November 2016, *de Lange*, C-548/15, ECLI:EU:C:2016:850.

186 The legitimacy of similar aims has been incorporated into other parts of the age discrimination analysis, including the determination of whether a measure involves unfavourable or disadvantageous treatment that could form the basis of a discrimination claim. See eg. Judgment of 28 February 2018, *Hubertus John v Freie Hansestadt Bremen*, C-46/17, ECLI:EU:C:2018:131 (The directive did not preclude national legislation which made the postponement of the date of termination of employment of workers who have reached the legal qualifying age for a retirement pension subject to the consent of the employer, who was entitled to give such consent only for a (renewable) fixed time period.).

purely budgetary considerations cannot satisfy the requirement of a legitimate aim.[187] *Schmitzer* involved Austrian legislation for pay in the public sector that provided that payments based on length of service did not take into account a worker's periods of service prior to the age of 18. Following a previous ruling from the CJEU, the Austrian civil service law was amended to comply with the prohibition on age discrimination outlined in the Framework Equality Directive.[188] However, the remedial transitional measures introduced a provision imposing a different disadvantage on those harmed by the previous system.[189] The Court has given Member States some latitude in seeking to amend and transition from previously discriminatory systems. Nonetheless, the Court in *Schmitzer* stressed that mere cost could not justify a failure to eliminate age discrimination, particularly with respect to a measure that indefinitely maintains an age discriminatory difference in treatment.[190] Budgetary considerations may *influence* national social policy legislation but cannot *per se* justify an age discriminatory regime. The same is true for administrative considerations.[191]

In the context of such transitions from previous systems, the Court has given credence to the sometimes countervailing imperative of respecting the acquired rights and legitimate expectations of persons favoured by the previous system. In *Schmitzer*, the Court stated that such objectives constitute legitimate employment-policy and labour-market objectives that can justify the maintenance of a system that discriminates on the basis of age, *but only for a temporary transitional period*.[192] There must ultimately be a full transition to a non-discriminatory system in respect of the category of persons previously disadvantaged.

Thus in a later challenge to Austria's amended civil service remuneration system, the Court rejected a mechanism that still calculated a civil servant's salary with reference to the salary received under the previous discriminatory system.[193] The Court found that this mechanism failed to facilitate the necessary convergence between the pay treatment of civil servants disadvantaged by the previous system and those who were treated more favourably. It could not then be in compliance with the requirements of the Framework Equality Directive. The Court explicitly contrasted the challenged Austrian system with transitional plans that had been implemented in Germany, which reduced or eventually eliminated the pay gap established under a previous system.[194] In doing so, it emphasised that the protection of the acquired rights and legitimate expectations of civil servants must eventually acquiesce to the establishment of a fully non-discriminatory system.

Even laws that pursue a legitimate social policy objective must be designed carefully to ensure that the objective can be achieved and that in doing so, no persons will be unduly harmed. In *Commission v Hungary*, a new compulsory retirement age for judges could be justified in service of the two related goals of (i) standardisation of age limits for compulsory retirement; and (ii) the creation of a more balanced age structure facilitating access for young lawyers to the profession of judge and thus ensuring intergenerational fairness.[195] However, while the means were appropriate to achieve the aim of standardisation, they were not *necessary* because they did not allow any transitional period for judges who would suddenly be retired. Judges would not have adequate time to make financial adjustments for the future, and the legislation could have instead provided for a more gradual staggering. Regarding the second aim, the Court found that the retirement provisions would not actually create the desired age

187 Judgment of 11 November 2014, *Leopold Schmitzer v Bundesministerin für Inneres*, C-530/13, ECLI:EU:C:2014:2359, [41].
188 Judgment of 18 June 2009, *David Hütter v Technische Universität Graz*, C-88/08, ECLI:EU:C:2009:381.
189 See eg Judgment of 19 June 2014, *Specht*, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, ECLI:EU:C:2014:2005 (approving the necessity of a transitional scheme that calculated remuneration with reference to a previous system tainted by age discrimination); Judgment of 9 September 2015, *Daniel Unland v Land Berlin*, C-20/13, ECLI:EU:C:2015:561.
190 Judgment of 11 November 2014, *Schmitzer*, C-530/13, ECLI:EU:C:2014:2359, [44].
191 Judgment of 28 January 2015, *ÖBB Personenverkehr AG v Gotthard Starjakob*, C-417/13, ECLI:EU:C:2015:38 [34].
192 Judgment of 11 November 2014, *Schmitzer*, C-530/13, ECLI:EU:C:2014:2359, [42]; see also judgment of 28 January 2015, *Starjakob*, C-417/13, ECLI:EU:C:2015:38, [39].
193 Judgment of 8 May 2019, *Martin Leitner v Landespolizeidirektion Tirol*, C-396/17, ECLI:EU:C:2019:375.
194 See Judgment of 8 May 2019, *Leitner*, C-396/17, ECLI:EU:C:2019:375, [48] (citing *Specht* and *Unland*).
195 Judgment of 6 November 2012, *European Commission v Hungary*, C-286/12, ECLI:EU:C:2012:687.

balance in the judiciary. Although in the short term it would create more diversity of age in the profession because of the sudden turnover of many age groups, in the long term, that turnover rate would begin to slow as only a single age group would retire. Therefore, the selected means were not appropriate to the achievement of this aim, and thus did not comply with the principle of proportionality.

Because of the prevalence of age stereotyping in the employment sphere, the Court has given particular attention in its proportionality analysis to whether a less restrictive alternative exists to using age per se as an employment criterion. A measure that differentiates on the basis of age cannot be considered necessary if age is being used as a proxy category and a neutral criterion could instead be relied on directly. For example, in *Specht and Others v Land Berlin and Bundesrepublik Deutschland*, the challenge was to a national provision that determined pay for civil servants by reference to age at the time of recruitment.[196] The Government defended the provision as legitimate because it rewarded previous professional experience. The CJEU acknowledged that rewarding professional experience is a legitimate aim, and that using the length of an employee's service as a criterion for determining pay is an appropriate means of achieving that aim. However, it found that it was unnecessary to use age as a proxy for professional experience when experience itself could be measured directly.

3.3.3 Exceptions under Article 6(2)

Article 6(2) delineates a specific exception for age discrimination with regard to the fixing of ages for occupational social security schemes for admission or entitlement to retirement or invalidity benefits. Unlike the general objective justification test of Article 6(1), this exception is not subject to a requirement of proportionality. For example, *Franz Lesar v Telekom Austria* involved an Austrian law that excluded taking into account periods of apprenticeship and employment completed by a civil servant before reaching the age of 18, for the purpose of determining the entitlement to a retirement pension and the calculation of its amount.[197] The CJEU found that this retirement scheme provided civil servants with benefits designed to replace the benefits provided for by statutory social security schemes. As the scheme complied with the criteria in the text of the provision, the CJEU found that age differential treatment could be justified in so far as it sought to guarantee a uniform age for admission to, and entitlement to, benefits as per this civil service retirement scheme.

The Court also considered this exception in the case of *Parris v Trinity College Dublin*.[198] *Parris* involved an occupational benefit scheme that made the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60. The Court held that this rule established a difference of treatment based directly on the criterion of age. However, as the rule regulated access to a survivor's pension, a form of old-age benefit, it fell within the scope of the Article 6(2) exception. The Court further stated that this conclusion was not affected by the fact that it was legally impossible for the claimant to have qualified under the rule because he was in a same-sex relationship and civil partnership had not been available to him before he reached the age of 60. The relevant national law did not provide for any form of civil partnership for same-sex couples at the time and this exclusion was not precluded by EU law. The complex issues of this case are discussed in further detail in section 3.7 below.

Despite Article 6(2) not requiring an objective justification test, this provision must still be interpreted restrictively as an exception to the principle of non-discrimination.[199] Accordingly, the Court has interpreted this exception in narrow terms. First, the exception applies only to *retirement* or *invalidity* benefits, i.e.

196 Judgment of 19 June 2014, *Specht*, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, ECLI:EU:C:2014:2005 ibid.

197 Judgment of 16 June 2016, *Franz Lesar v Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt*, C-159/15, ECLI:EU:C:2016:451.

198 Judgment of 24 November 2016, *David L. Parris v Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:897.

199 Judgment of 16 June 2016, *Lesar*, C-159/15, ECLI:EU:C:2016:451 [24]; see also Judgment of 26 September 2013, *HK Danmark acting on behalf of Glennie Kristensen v Experian A/S*, C-476/11, ECLI:EU:C:2013:590, [46], [54].

benefits that exist to cover the risks of old age and ill health.[200] A Danish law awarded 'availability pay' to civil servants who were made redundant in order to ensure that a pool of workers was 'on standby' for future work. The Court held that such availability pay was not covered by the exception, since it was related only to the risk of being out of work after being made redundant. Secondly, the Court has specified that the Article 6(2) exception only covers the fixing of ages for *admission* or *entitlement* to a qualified benefit scheme: it does not extend to age differentiation made in the setting of the *amount of employee contributions* to a social security scheme.[201] It should be noted that if Article 6(2) does not apply, the employer still has resort to the general age justification provision of Article 6(1).[202]

3.3.4 Age distinctions as genuine occupational requirements

Each of the non-discrimination directives contains an exception to its mandate for 'genuine and determining occupational requirements' (GDORs). A difference of treatment on protected grounds does 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'.[203] This exception allows employers to discriminate against individuals on the basis of a protected ground where this ground is directly linked with the requirements of a particular position. Any such requirement must be necessary and proportionate to achieve a related legitimate aim. The question of when age limits may be justified on the basis that they constitute GDORs arose in two recent cases, with different results.

In *Mario Vital Pérez*, the CJEU considered whether an age limit of 30 years for the recruitment of a local police officer could be justified as a GDOR.[204] The CJEU reaffirmed its finding in a previous case that 'the possession of particular physical capacities is one characteristic relating to age' and thus could serve as a GDOR.[205] It also approved as legitimate the aim of ensuring the operational capacity and proper functioning of the police service. However, the Court rejected the argument that an age limit was necessary to achieve this aim. The police force already used physical tests and these would be a sufficient means by which to assess whether the candidates possess the particular level of physical fitness required for the performance of their professional duties. A proxy of age was thus not necessary when individual assessment was feasible. In other words, the measure was disproportionate because a less discriminatory alternative existed. The Court also doubted the necessity for all police officers to have the exceptionally high physical capacity linked to such a young age given that other Spanish municipalities employed a variety of older age limits for their police forces.

In contrast, in *Gorka Salaberria Sorondo*, the Court upheld an age limit of 35 years for recruitment as a police officer in the Basque Police and Emergency Services.[206] The CJEU distinguished this case from *Perez* by looking at the specifics of the job in question. The police forces at issue in *Sorondo* were tasked with physically demanding operational duties required for the maintenance of public order and public safety, in contrast to the police officer position in *Perez*, which included many administrative duties. The Court also credited the assertion of the Basque police academy that the age limit was necessary for career longevity: police officers who are over 55 years old are no longer in full possession of the capabilities necessary for the proper performance of their duties, meaning that there was an imperative

200 Judgment of 26 September 2013, *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, Case C-546/11, ECLI:EU:C:2013:603, [42]-[44].

201 Judgment of 26 September 2013, *HK Danmark*, C-476/11, ECLI:EU:C:2013:590, [52].

202 See eg, Judgment of 26 September 2013, *HK Danmark*, C-476/11, ECLI:EU:C:2013:590 [55]; see also Judgment of 6 December 2012, *Odar*, Case C-152/11, ECLI:EU:C:2012:772, [72].

203 Gender Equality Directive (recast), Article 14(2); Racial Equality Directive, Article 4; Framework Equality Directive, Article 4(1).

204 Judgment of 13 November 2014, *Mario Vital Pérez v Ayuntamiento de Oviedo*, C-416/13, ECLI:EU:C:2014:2371.

205 In 2010, in *Wolf v Stadt Frankfurt am Main*, the CJEU upheld a maximum recruitment age of 30 for a post involving frontline fire-fighting duties. Judgment of 12 January 2010, C-229/08, ECLI:EU:C:2010:3.

206 Judgment of 15 November 2016, *Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias*, C-258/15, ECLI:EU:C:2016:873.

for candidates to be recruited early in order to be assigned to their professional duties for a sufficiently long period before this time. Statistical data indicated that the viability of the police force over time depended on increasing its younger staff in the present. Given this overarching goal of building a police force with a satisfactory age pyramid for longevity, physical tests would not be a viable alternative to direct consideration of age because they could only measure fitness at time of recruitment and not a candidate's potential years of service.

3.4 Discrimination on grounds of 'religion or belief'

In 2017, the CJEU decided its first two cases concerning religious discrimination under the Framework Equality Directive, both of which concerned employer restrictions on the wearing of Islamic headscarves. In these cases, the Court had the opportunity to give guidance on the concepts of direct discrimination, indirect discrimination, and genuine occupational requirements in the context of religion or belief.

The first case, *Achbita v G4S Secure Solutions*, concerned a Muslim receptionist working for a security firm in Belgium.[207] The firm had in place an unwritten policy prohibiting the wearing of visible religious, political or philosophical symbols in the workplace. Three years into her employment, Ms Achbita decided to wear an Islamic headscarf for religious reasons. She was dismissed in compliance with the company policy. The reference to the CJEU asked whether the dismissal decision constituted discrimination.

As described in section 1.3, the Court interpreted the concept of 'religion' broadly and consistently with the case law under the ECHR: it held that 'religion' encompassed both Ms Achbita's belief in the Muslim faith and also her manifestation of this belief via the wearing of a headscarf. The Court then turned to whether the restriction on this manifestation constituted direct discrimination. The CJEU noted that the challenged policy prohibited visible signs of all beliefs – political, philosophical or religious – without distinction. It thus treated all workers in the same way by subjecting them to a generally applicable rule requiring 'neutral' dress.[208] As such, Ms Achbita had not experienced any less favourable treatment based on religion or belief and had no foundation for a direct discrimination claim.

The Court did, however, acknowledge the possibility that such a rule could constitute *indirect* discrimination if its effect was to put persons of a particular religion at a particular disadvantage. It was for the national court to determine whether such a disadvantage was objectively justified. The CJEU advised that an employer's desire to display a policy of religious, political, and philosophical neutrality to its customers is a legitimate aim for the purposes of this test. The Court bolstered this conclusion by referencing Article 16 of the Charter of Fundamental Rights, which delineates the freedom of employers to conduct a business.[209] It asserted that an employer's wish to project an image of neutrality falls within this freedom, particularly where the policy is limited to workers with customer-facing roles[210] (as discussed above, the Court further referenced the ECtHR judgment in *Ewedia v UK* in this regard).

As to whether the employer's policy was *appropriate*, the Court emphasised that it must be a genuine policy that is consistently and systematically applied. In particular, the national court should look to whether the policy was established prior to Ms Achbita's dismissal, or whether it appeared to be created solely to target her. As to whether the employer policy was *necessary*, the Court advised the national court to consider whether the rule was indeed limited to workers with public-facing roles. It was also relevant whether the employer had explored the less restrictive alternative of offering Ms Achbita a role that did not involve contact with customers.

207 Judgment of 14 March 2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, C-157/15, ECLI:EU:C:2017:203.
208 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203 [30].
209 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203 [37].
210 Judgment of 14 March 2017, *Achbita*, C-157/15, ECLI:EU:C:2017:203 [38].

The second reference, *Bougnaoui v Micropole Univers*, involved a Muslim design engineer who was dismissed after wearing a headscarf in front of a client.[211] The client complained that this had 'upset' a number of their employees. The employer asked Ms Bougnaoui to abide by their principle of 'neutrality' as regards her dress and agree not to wear her headscarf in front of clients. When she refused to do so, she was dismissed. The reference to the CJEU asked whether an employer's willingness to accept a customer's wish not to have services provided by an employee wearing an Islamic headscarf, is a GDOR within the meaning of Article 4(1). The Court noted that the GDOR exception is only allowed in limited circumstances, and the requirement must be 'objectively dictated' by the particular nature or context of the occupational activities involved in the position in question. It thus concluded that this definition excluded 'subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer'.[212]

These decisions have been subject to a degree of academic criticism, in particular the *Achbita* judgment.[213] The strict application of the GDOR test in *Bougnaoui* has been generally welcomed, as being consistent with the Court's jurisprudence in other contexts. However, concern has been expressed that the Court is applying a lower level of protection to religious discrimination claims, by appearing to give more weight to an employer's preference for a 'neutral' work environment that is not necessarily central to the functioning of the business in question, than to the individual's right to maintain and express their religious beliefs. Concerns have also been expressed that employers' 'neutrality' policies might prove to be a back door for placating customers and accommodating their preferences, which (as held in *Firma Feryn*) could not, in the context of other protected grounds, be used to justify indirect discrimination. In this respect, particular criticism has been directed at the Court's suggestion that applying a different approach to employees in front and back offices might be objectively justified. As Mark Bell asserts, 'it would surely be firmly rejected if an employer sought to place other groups vulnerable to discrimination in job roles that avoided contact with customers'.[214] Concern has also been expressed at the lack of any consideration of the intersectional element to these cases (a topic discussed further in section 3.7 below).[215] In general, it remains to be seen how the *Achbita* and *Bougnaoui* judgments are applied in future cases, especially given the importance of religious belief as both a key element of personal identity and as a marker of difference.[216]

In 2019, the Court decided another case concerning the meaning of discrimination on the grounds of religion or belief, *Cresco Investigations v Achatzi*.[217] *Cresco* concerned Austrian legislation that provided for an extra day of holiday leave on Good Friday, but only for members of specified Christian churches. If a member of one of the specified churches worked on that day, he or she was entitled to additional pay. The majority of the population in Austria is Roman Catholic and the national holiday schedule is arranged accordingly: the Good Friday rule was intended to allow members of minority churches to celebrate an important public holiday without having to obtain consent to leave from their employer. The claimant,

211 Judgment of 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* C-188/15, ECLI:EU:C:2017:204.

212 Judgment of 14 March 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204 [40].

213 Bell, M. (2017) 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' 17(4) *Human Rights Law Review* 784-796; Brems, E. (2017) 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', Blog of the IACL, AIDC, accessed 10 April 2018, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace /; Jolly, S. (2017) 'Religious Discrimination in the Workplace: the European Court of Justice Confronts a Challenge', 3 *European Human Rights Law Review* 308-314; Howard, E. (2017) 'Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui*' 24(3) *Maastricht Journal of European and Comparative Law* 348-366.

214 Bell, M. (2017) 'Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace' 17(4) *Human Rights Law Review*, p. 796.

215 Schiek, D. (2018) 'On the Use, Mis-Uses and Non-uses of Intersectionality before the Court of Justice of the EU' 18(2) *International Journal of Discrimination and the Law* 82-103.

216 As AG Sharpston stated in her *Bougnaoui* opinion, '[i]t would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not'. Opinion of AG Sharpston of 13 July 2016, *Bougnaoui*, C-188/15, ECLI:EU:C:2016:553 [118].

217 Judgment of 22 January 2019, *Cresco*, Case C-193/17, ECLI:EU:C:2019:43.

who was not a member of one of those churches, alleged that he had been discriminated against because he did not receive additional holiday pay after working on Good Friday.

The Court determined that this regime constituted direct discrimination on grounds of religion because it treated persons in comparable situations differently on the basis of their religion. Although Good Friday was an important day for the specified churches, the challenged rule was not conditioned on church members practising their religion on that day, but only on their formal membership of the church. A member was free to choose to spend the holiday in leisure time rather than being required to perform a religious duty, or alternatively, a church member could work on Good Friday and receive additional pay, whether or not he or she had felt a religious obligation to celebrate the holiday. Such an employee's situation was thus comparable to a non-church member who might also want to choose rest or leisure time that day, or to receive additional pay.[218] Given that the employee situations were comparable, their differential treatment with respect to the holiday amounted to direct discrimination on the basis of religion. The Court then considered the possibility that an exception applied, as discussed in section 3.6 below.

3.4.1 The 'religious ethos' exceptions

As demonstrated by the *Bougnaoui* decision, the general provision in Article 4(1) of the Framework Equality Directive permitting GDORs applies to the grounds of religion or belief. In addition, the Framework Equality Directive specifically permits organisations that are based around a 'religion' or 'belief' to impose certain restrictions on employees. Article 4(2) of the directive permits churches and other organisations with an ethos based on religion or belief to impose GDORs consistent with the organisation's ethos. The second paragraph of Article 4(2) further states that the directive does not interfere with the right of such organisations to 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. Two important judgments from 2018 have shed light on these exceptions to the general scope of the equal treatment principle: *Egenberger* and *IR v JQ*.

In *Egenberger*, an association connected with the Protestant Church advertised for a research and writing position that required membership of the church.[219] Ms Egenberger, who is of no denomination, was rejected for the position. She argued that she had been discriminated against on the basis of religion, and the association defended the requirement of church membership as a justified occupational requirement. The German law transposing Article 4(2) of the Framework Equality Directive, as interpreted by German case law, limited judicial review to assessing the plausibility of the church's own determination of whether religion affiliation was required for a particular position. The question arose as to whether this interpretation of the directive's requirements was consistent with EU law.

The CJEU ruled that a church or religious organisation could not be allowed to make its own authoritative determination as to whether the directive's criteria for a GDOR were met. To interpret the directive in this manner would deprive it of its effectiveness.[220] The Court emphasised that the directive is a specific expression of the more general prohibition of discrimination as laid out in Article 21 of the Charter. Observance of this principle is guaranteed by Articles 9 and 10 of the directive, as well as Article 47 of the Charter, each of which requires Member States to provide judicial procedures or protection enabling enforcement of the directive's obligations.[221] EU law thus mandates that, if necessary, a determination by a church that religion is a GDOR be effectively reviewable by an independent authority, such as a court.

The Court acknowledged that the GDOR exception also brings into play another important right: the autonomy of churches and other religious organisations as recognised by Article 17 TFEU, Article 10 of

218 Judgment of 22 January 2019, *Cresco*, Case C-193/17, ECLI:EU:C:2019:43 [46]-[51].
219 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257.
220 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [46].
221 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [48].

the Charter and Article 9 ECHR.[222] However, this did not alter the Court's conclusion regarding judicial review. The GDOR exception intends to ensure a fair balance between the right of workers not to be discriminated against and the right of religious organisations to their autonomy. This balancing must be carried out in conformity with the text of Article 4(2) and be subject to review by a national court.[223]

As to the specifics of how this balancing should be undertaken, the Court offered significant guidance to national courts in determining whether religion or belief constitutes a GDOR. First, Article 4(2) requires the objectively verifiable existence of a direct link between the occupational requirements and the nature of the activity at issue.[224] Secondly, the text of the provision mandates that the occupational requirement be (i) genuine, (ii) legitimate, and (iii) justified. The Court defined 'genuine' as meaning that adherence to the religion or belief must be necessary because of the importance of the occupational activity in question for the promotion of that ethos or the exercise by the church or organisation of its right of autonomy. 'Legitimate' indicates that the GDOR must not be used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy. 'Justified' implies not only that a national court be able to review the GDOR for compliance with Article 4(2), but also that the GDOR is necessary to the organisation because the risk of undermining its ethos or its right of autonomy would otherwise by probable and substantial. Finally, the GDOR must generally comply with the principle of proportionality: the national court must ascertain whether the requirement in question is necessary and proportionate by virtue of the specific nature of the activity or circumstances at issue and its potential impact on the maintenance of the ethos of the organisation concerned.

Following *Egenberger*, *IR v JQ* addressed the religious ethos exception again, specifically the scope for employers to impose obligations on their employees to behave with loyalty towards the religious ethos of their employer according to the second paragraph of Article 4(2).[225] This case involved an employee, JQ, who was the head of internal medicine at a hospital run by a not-for-profit, Catholic organisation. JQ is a Roman Catholic who divorced his first wife and later married a new partner in a civil ceremony. When his employer became aware of his remarriage, he was dismissed. JQ argued that his dismissal amounted to impermissible discrimination on the basis that an employee who was not a Catholic would not have been dismissed for remarrying. His former employer argued that the dismissal of JQ was justified because by remarrying, he had breached the duty (contained in his contract) to be loyal to the ethos of the Catholic Church. JQ's Catholic employers believed it necessary to place employees with managerial roles who shared their Catholic faith under a greater obligation of loyalty than that placed on non-Catholic employees. German law implementing Directive 2000/78 provided them with significant scope to do so.

The *IR* decision confirmed much of the analysis in *Egenberger* and held that the same principles applied to the second paragraph of Article 4(2) with respect to the imposition of obligations related to loyalty towards the ethos of the employer. These obligations were a form of GDOR that had to meet the requirements of being genuine, legitimate, and justified and consistent with a proportionality test. Further, as the Court had held in *Egenberger*, the imposition of any such obligation must be capable of being assessed by an independent court, not just the religious organisation itself.

While the ultimate determination was left to the national court, the Court appeared sceptical as to the genuineness of the requirement that JQ not have remarried. In accordance with the *Egenberger* standard, it emphasised the need to show a clear connection between the employment role in question and the maintenance of the ethos or autonomy of the religious organisation. It observed that adherence to that notion of marriage did not appear to be necessary for the promotion of the hospital's ethos, particularly with respect to the occupational activities carried out by the claimant, which were giving medical care and managing the department. Further casting doubt on the genuineness of the requirement was the fact that other managerial roles in the hospital were performed by non-Catholics who were not subject to

222 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [50].
223 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [52]-[53].
224 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [63].
225 Judgment of 11 September 2018, *IR v JQ,* C-68/17, ECLI:EU:C:2018:696.

the same requirement to act in good faith and with loyalty to the hospital's ethos.[226] *IR* thus makes clear that the religious ethos exception will be assessed restrictively, with particular attention paid to the link between the religious requirement and the specific nature of the position in question.

3.5 Reasonable accommodation

Article 5 of the Framework Equality Directive provides that employers must make appropriate 'reasonable accommodation' to allow persons with disabilities to 'have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer'. In addition, Recital 20 in the preamble to the directive gives a non-exhaustive list of such reasonable accommodation measures, which include 'adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.'

In *HK Danmark*, two employees were dismissed from their jobs with a shortened notice period because of workplace absences resulting from health problems.[227] The referring court posed the question of whether a reduction in working hours could constitute one of the accommodation measures required by Article 5. The CJEU held that 'reasonable accommodation', understood with reference to Article 2 of the CRPD, has a broad definition that refers to 'the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with others'.[228] The concept of reasonable accommodation encompasses not only material, but also organisational measures, which could include an alteration to the speed or rhythm at which work is done. As such, a reduction in working hours could constitute a reasonable accommodation where fewer hours would make it possible for a worker to continue to participate in employment.[229] Adoption of this measure would be mandated in the claimants' cases if, as per the text of Article 5, it would not place a disproportionate burden on the employer. The CJEU advised the national court to consider in making this factual determination the fact that, after one of the claimants was dismissed, the employer advertised for a part-time worker, suggesting that reduced working hours was an organisational possibility.[230] It might also be relevant that Danish law makes it possible to grant public assistance to businesses for accommodation measures, meaning that the financial burdens on the employer may be lessened.[231]

The Court has made clear that the obligation to adopt reasonable accommodation measures applies to *all* employers. In *European Commission v Italian Republic*, the CJEU examined an Italian disability law that exempted certain categories of employers from the duty to provide reasonable accommodation measures.[232] The Court held that the duty to adopt effective and practical measures where needed could not be limited in such a way, and thus Italy had failed to fulfil its obligation to ensure the correct and full implementation of Article 5 of the directive.

It is also of note that the Court has made clear that the definition of 'disability' within the meaning of Article 1 of the Framework Equality Directive precedes the determination and assessment of the appropriate accommodation measures. Although reasonable accommodation constitutes part of the non-discrimination guarantee for disabled workers under EU law, such accommodation measures are the '*consequence*, not the *constituent element*, of the concept of disability'.[233] That is, there is no requirement

226 Judgment of 11 September 2018, *IR v JQ*, C-68/17, ECLI:EU:C:2018:696 [58].

227 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222.

228 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222 [53]-[54].

229 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222 [55].

230 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222 [62].

231 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222 [63].

232 Judgment of 4 July 2013, *European Commission v Italian Republic*, C-312/11, ECLI:EU:C:2013:446

233 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222, [46] (emphasis added).

that an individual receive or be able to benefit from accommodation measures in order for that person to be regarded as disabled.[234] For example, in the case of *FOA*, which considered disability discrimination stemming from obesity, the mere fact that accommodation measures had not been taken in respect of the claimant did not preclude him from being considered a disabled person in accordance with the meaning of the directive.[235]

3.6 Positive action

Each of the non-discrimination directives makes further exception for 'positive action'. Article 7 of the Framework Equality Directive, for example, provides that, 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1'.[236] The CJEU has developed a significant body of case law concerning positive action in the context of gender equality.[237] These cases highlight that the positive action exception, as a derogation from the principle of equal treatment, applies only in limited circumstances. In particular, national rules that allow discrimination on the basis of a protected ground must be carefully designed to address actual instances of inequality and may not employ group-based preferences that are unconditional or absolute.

In *Cresco Investigation GmbH*, the Court considered a positive action defence in the context of religion.[238] The case involved an Austrian law that provided for paid public holiday leave on Good Friday (with additional pay awarded if an employee worked on that day), but only to members of specified Christian churches (for which Good Friday was a particularly significant religious holiday). The state alleged that this difference in treatment could be justified as a form of positive action for religious minorities – arguing that this measure was necessary to redress the disadvantage suffered by members of the churches in question by virtue of how important religious holidays for Austria's majority religion (Roman Catholicism) were public holidays for all workers, which was not the case for these minority groups in respect of Good Friday.

The CJEU confirmed that its understanding of positive action in the context of gender also applies to the Framework Equality Directive: namely, that the positive action exception 'is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society'.[239] The Court did not determine whether the exclusion of an important religious day from the list of national public holidays constituted a practical 'disadvantage' that could be the target of a lawful positive action measure. However, it confirmed that any positive action measure must be appropriate and necessary to the achievement of that aim, and must be reconciled as far as possible with the principle of equal treatment.

Applying these standards to the case at hand, the Court ruled that the challenged law did not meet these criteria. The Court's analysis turned on how Austrian law treated religious minorities who observe religious holidays other than Good Friday. Instead of being granted a public holiday, such employees could

234 Judgment of 11 April 2013, *HK Danmark, (Ring, Skouboe Werge)*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222 [45]; Judgment of 18 December 2014, *FOA*, C-354/13, ECLI:EU:C:2014:2463, [45]-[46].

235 Judgment of 18 December 2014, *FOA*, C-354/13, ECLI:EU:C:2014:2463. The recent case of *DW v Nobel Plastiques Ibérica SA*, referenced *supra* in footnote 183, held that the dismissal of a disabled employee on the basis of criteria that imposes a particular disadvantage on disabled persons constitutes indirect discrimination if an employer failed to provide that worker with reasonable accommodation prior to dismissal. Judgment 11 September 2019, C-397/18, *DW v Nobel Plastiques Ibérica SA*, ECLI:EU:C:2019:703 [75].

236 Framework Equality Directive, Article 7; see also Racial Equality Directive, Article 5.

237 See judgment of 17 October 1995, *Eckhard Kalanke v Freie Hansestadt Bremen*, C-450/93, ECLI:EU:C:1995:322; Judgment of 11 November 1997, *Hellmut Marschall v Land Nordrhein-Westfalen*, C-409/95, ECLI:EU:C:1997:533; Judgment of 6 July 2000, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, C-407/98, ECLI:EU:C:2000:367.

238 Judgment of 22 January 2019, *Cresco*, C-193/17, ECLI:EU:C:2019:43.

239 Judgment of 22 January 2019, *Cresco*, C-193/17, ECLI:EU:C:2019:43 [64], citing Judgment of the Court 30 September 2010, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, C-104/09, EU:C:2010:561 [33].

only be absent from work for their religious festivals if such absence was authorised by their employer in accordance with that employer's duty of care. The Court concluded that the special treatment afforded to the minority Christian churches who celebrated Good Friday thus went beyond the usual Austrian practice of accommodating employees whose important religious holidays coincided with a work day. In fact, the measure itself imposed a difference in treatment between employees who are subject to comparable religious duties, which is at odds with the principle of equal treatment and the objective of positive action policies.[240]

In addition to the general provision regarding positive action in Article 7(1), the Framework Equality Directive includes a specific provision, Article 7(2), authorising Member States to adopt measures with respect to persons with disabilities for the 'protection of health and safety at work' or 'for safeguarding or promoting their integration into the working environment'. In *Milkova*, the Court examined national legislation that conferred special protection regarding dismissal on employees with certain disabilities, without conferring the same protection on civil servants.[241] In this context, the Court asserted that the purpose of Article 7(2) 'is to authorise specific measures aimed at effectively eliminating or reducing actual instances of inequality affecting people with disabilities, which may exist in their social lives and, in particular, their professional lives, and to achieve substantive, rather than formal, equality by reducing those inequalities'.[242] It further noted that Article 7(2) is permissive in that it allows, but does not require, the Member States to adopt such measures. However, should a Member State choose to adopt a positive action measure, it must do so in compliance with EU law, including the principle of equal treatment.[243] It was for the national court to determine whether the distinction between civil servants and employees complied with this principle.

3.7 Multiple or intersectional discrimination

It is increasingly recognised that inequality is sometimes experienced because of the coincidence or aggregation of protected characteristics.[244] An individual may, in a single act, experience disadvantage on the basis of two or more grounds (often referred to as 'multiple discrimination'). Or an individual may be subject to 'intersectional discrimination,' wherein several grounds operate in interaction with each other to produce qualitatively distinct forms of disadvantage. The recitals to both the Racial Equality Directive and the Framework Equality Directive acknowledge that 'women are often the victims of multiple discrimination'.[245] Some commentators have taken this reference as having the 'clear implication' that the EU law should recognise the concept of multiple discrimination.[246] Moreover, while the list of grounds covered by the directives is exhaustive, nothing in their language explicitly precludes the possibility that multiple grounds cannot together form the basis of a discrimination claim. Article 2(1), for example, provides that: 'the principle of "equal treatment" shall mean that there shall be no direct or indirect discrimination *whatsoever on any of the grounds*' (emphasis added).

240 Judgment of 22 January 2019, *Cresco*, C-193/17, ECLI:EU:C:2019:43, [68]; see also Opinion of AG Bobek of 25 July 2018, *Cresco*, C-193/17,, ECLI:EU:C:2018:614 [110] (casting doubt on a measure that is not adopted to ensure full equality of *all* groups which have been disadvantaged in general in the past or, more specifically, do not have a public holiday for an important festival, unlike the Catholic majority).

241 Judgment of 9 March 2017, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control*, C-406/15, ECLI:EU:C:2017:198.

242 Judgment of 9 March 2017, *Milkova*, C-406/15, ECLI:EU:C:2017:198 [47].

243 Judgment of 9 March 2017, *Milkova*, C-406/15, ECLI:EU:C:2017:198 [52]-[56].

244 Opinion of AG Kokott, 30 June 2016, *David L. Parris v Trinity College Dublin and Others*, C-443/15, ECLI:EU:C:2016:493 [76], citing Burri, S. and Schiek, D. (2009) 'Multiple Discrimination in EU Law – Opportunities for Legal Responses to Intersectional Gender Discrimination?', European Commission, pp. 3 and 4; Baer, S. Bittner M. and Götsche, A.L. (2010) *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Berlin, p. 10 et seq.; Bamforth, N. Malik M. and O'Cinneide, C. (2008) *Discrimination Law: Theory and Context*, London, p. 541.

245 See Framework Equality Directive, recital 3; Racial Equality Directive, recital 14.

246 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd ed.), p. 33.

In *Parris v Trinity College Dublin*, the CJEU was explicitly asked to make a ruling as to whether a discrimination claim can be brought as a result of the combined effect of two protected grounds.[247] The claimant, Dr Parris, requested that on his death the survivor's pension provided for by his pension scheme should be granted to his same-sex civil partner. His request was denied because he did not meet the pension scheme requirement of having entered into a civil partnership before turning 60. Civil partnership, however, was not recognised in Ireland until 2011, meaning a gay man born before 1951 was categorically excluded from being able to claim a survivor's benefit for his civil partner under this scheme. Dr Parris alleged that he had been discriminated against on the grounds of sexual orientation and age, taken alone or in combination.

The Court concluded that the challenged provision did not directly discriminate on the grounds of sexual orientation because it was neutral in this regard. The Court focused on the fact that the pension scheme did not itself draw a line between surviving spouses and surviving civil partners: both groups were covered and both had to meet the condition that the marriage or civil partnership was entered into before the member reached the age of 60.[248] Thus the scheme made no distinction between marriages and civil partnerships. The criterion at issue – whether an employee was married or entered into a civil partnership before his 60th birthday – delineated two broad categories of persons, which were not inseparably linked to sexual orientation. Many reasons other than sexual orientation could prevent an individual from meeting the pension criterion.[249]

The CJEU held that the rule did not indirectly discriminate on the basis of sexual orientation either. Dr Parris's inability to satisfy the condition was the consequence of the law that existed in Ireland at the time. The Court recalled Recital 22 of the directive, which expressly states that the directive 'is without prejudice to national laws on marital status and the benefits dependent thereon'.[250] This indicates that the Member States retain competence on the regulation of marital status in their territory. EU law did not then require Ireland to provide for marriage or civil partnership for same-sex couples, to give retrospective effect to the act, or to create transitional measures for pension schemes. This precluded the challenged rule from being challenged as indirect discrimination on the grounds of sexual orientation.

With regard to discrimination on the ground of age, the Court acknowledged that the contested provision treated persons less favourably based on the age at which they entered into a marriage or civil partnership, and therefore amounted to a difference of treatment based directly on age.[251] However, it found this age limit fell within the exception for occupational social security schemes laid out in Article 6(2) of the directive. The Court determined that the survivor's benefit at issue was a form of old-age pension and that the rule on entry into civil partnerships at 60 was a form of age limit for entitlement to that benefit.[252] The Court therefore concluded that the provision did not amount to discrimination on the ground of age, adding that the legal impossibility for a member of the scheme to enter into a civil partnership before reaching the age limit was inconsequential in this regard, as this impossibility was based on the permissible state of Irish civil partnership law at the time.

Having dispatched the claims on the individual grounds of sexual orientation and age, the CJEU ruled that if the challenged policy was not capable of sustaining a discrimination claim on any of the grounds prohibited by the directive in isolation, then it could not be considered to constitute discrimination as a result of two grounds together. While nothing prevents the bringing of a claim alleging multiple disadvantages stemming from a single adverse action, there can be no new and discrete category of discrimination consisting of the combination of more than one of the protected grounds.

247 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897.
248 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897 [47]- [48].
249 Opinion of AG Kokott, 30 June 2016, *Parris*, C-443/15, ECLI:EU:C:2016:493, [52].
250 Opinion of AG Kokott, 30 June 2016, *Parris*, C-443/15, ECLI:EU:C:2016:493 [57].
251 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897 [65]-[68].
252 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897 [72]-[74].

The situation in *Parris* exemplifies the problem of multiple axes of group membership interacting to produce a distinct disadvantage. The group disadvantaged by the scheme was defined by both sexual orientation and age: individuals with same-sex partners who reached the age of 60 before 2011. These individuals faced a clear disadvantage: they were categorically denied the possibility of leaving a survivor's benefit to their partners. In contrast to the Court, Advocate General Kokott saw this situation as coming within the scope of the directive. In her Opinion, she asserted that 'it would be inconsistent with the meaning of the prohibition on discrimination enshrined in Article 1 in conjunction with Article 2 of Directive 2000/78 for a situation such as that at issue here to be split and assessed exclusively from the point of view of one or other of the grounds for a difference of treatment in isolation'.[253] She opined that the 'fundamental rule of the Directive' that there must be no discrimination based on any of the protected grounds necessarily applied to cases involving possible discrimination based on a combination of more than one of those grounds. Advocate General Kokott also argued that a finding of discrimination in this case would not interfere with the reservation to the Member State of the competency to regulate marriage. Dr Parris was not seeking to change his marital status retroactively, but only to be exempt from a rule that discriminated against him in the present day, despite Irish recognition of civil partnerships and now same-sex marriage.

The Court's refusal to view Dr Parris's exclusion from the survivor's benefit as a type of intersectional disadvantage has been subject to some criticism. Atrey, for example, has criticised the judgment as 'ignor[ing] the distinct experience of discrimination against older gays who suffer not only both homophobia and ageism generally, but also unique disadvantages that result from the combination of both'.[254] There is also generally strong academic support for the argument that the CJEU should be prepared to develop a multiple and/or intersectional approach to discrimination, which would be in line with its purposive interpretative approach and the need to provide effective protection against discrimination.[255] On the other hand, it could be argued that the texts of the directives do not provide a clear basis for the Court to develop a multiple or intersectional approach to discrimination – a view that the Court appeared to adopt in *Parris*, despite Advocate General Kokott's argument for a more open approach.

3.8 Remedies and enforcement

Both of the 2000 equality directives contain a set of common provisions that are concerned with ensuring that their content is enforced by national authorities and that individuals are able to obtain effective remedies against discrimination. Article 7 of the Racial Equality Directive and Article 9 of the Framework Equality Directive require that judicial and/or administrative procedures are available to all persons who consider themselves to have been discriminated against, while Article 6(2) of the Racial Equality Directive and Article 8(2) of the Framework Equality Directive provide that implementation of the directives should not constitute grounds for a reduction in the level of protection offered against discrimination in national law (the 'principle of non-regression'). Article 8 of the Racial Equality Directive and Article 10 of the Framework Equality Directive make provision for a shift in the burden of proof when a claimant establishes the existence of facts that are capable of giving rise to a presumption that discrimination has taken place. Furthermore, Article 15 of the Racial Equality Directive and Article 17 of the Framework Equality Directive require states to ensure that sanctions against discrimination are 'effective, proportionate and dissuasive', while Article 14 of the Racial Equality Directive and Article 16 of the Framework Equality Directive provide that states must abolish all national laws that are contrary to

253 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897 [153].

254 Atrey, S. (2018) 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in *Parris v Trinity College Dublin*' 47 *Industrial Law Journal*, 278, 284.

255 See eg Solanke, I. (2009) 'Putting Race and Gender Together: A New Approach To Intersectionality' 72(5) *Modern L. Rev.* 723-749; Schiek, D. (2018) 'On the Use, Mis-Uses and Non-uses of Intersectionality before the Court of Justice of the EU' 18(2) *International Journal of Discrimination and the Law* 82-103.

the principle of equal treatment and ensure that contractual provisions or terms of collective agreements contrary to the principle are also abolished.[256]

The CJEU clarified certain aspects of these provisions in 2013. In *Asociația ACCEPT*, the Court examined two different dimensions of the effective enforcement of anti-discrimination law: (i) the shifting of the burden of proof; and (ii) the provision of effective sanctions for wrongdoing. In addressing these, the Court has made it clear that remedies for discrimination must reflect the fundamental importance of the principle of equal treatment.[257] They must also be applied in an effective manner so as to provide substantive protection for individuals against discrimination.[258]

Asociația ACCEPT concerned a shareholder of a football club who made a public statement that the club would not recruit homosexual players. An NGO concerned with LGBT rights lodged a complaint, claiming that his statement amounted to discrimination in recruitment matters in violation of the Framework Equality Directive.[259] The Court held that the fact that the shareholder did not have a legally binding capacity in recruitment matters was not a bar to establishing a presumption of discrimination on the part of the football club itself. The shareholder presented himself, and was considered by the public, as playing a significant part in the club's management. In accordance with Article 10 of the directive, statements by such a person could constitute 'facts from which it may be presumed that there has been discrimination', thus shifting the burden to the club to prove that it did not have a discriminatory recruitment policy.

When deciding what the football club could present to refute the presumption of discrimination, the Court emphasised that it would not be required to provide evidence that persons with a specific sexual orientation had been recruited in the past because that would interfere with such persons' right to privacy. Instead, the club could refute an appearance of discrimination by a consistent body of evidence showing that it had distanced itself from the discriminatory public statements, and that it had explicit provisions in its recruitment policy aimed at ensuring compliance with the principle of equal treatment.[260]

In its judgment in *Asociația ACCEPT*, the Court went on to examine the requirement of the Framework Equality Directive that Member States establish judicial and/or administrative procedures allowing individuals to enforce their rights.[261] The directive further confers on Member States the responsibility for establishing sanctions for infringement of national provisions implementing the directive.[262] While the specifics of such sanctions are not prescribed by EU law, the sanctions must be 'effective, proportionate and dissuasive.' In *Asociația ACCEPT*, the CJEU stressed that a purely symbolic sanction would not meet the criteria for effective implementation of the directive. While a sanction need not be pecuniary, the sanction in the present case – a mere verbal warning – was unlikely to be sufficient.[263] This case affirms that although states enjoy some discretion as to how they implement the directives within their national legal systems, effective remedies must be available which are sufficiently proportionate and dissuasive so as to combat the specific form of discrimination at issue.

In another case, the CJEU has elaborated on the duty of Member States to ensure the availability of judicial and/or administrative procedures in accordance with Article 9 of the Framework Equality Directive.

256 For a general analysis of these provisions, see Tobler, C. (2005) *Remedies and Sanctions in EU Non-discrimination Law: Thematic Report of the European Network of Legal Experts in the Non-discrimination Field*, Brussels: European Commission/MPG.

257 Judgment of the Court, 25 April 2013, *Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării*, C-81/12, ECLI:EU:C:2013:275.

258 Judgment of the Court, 25 April 2013, *Asociaţia ACCEPT*, C-81/12, ECLI:EU:C:2013:275.

259 Judgment of 25 April 2013, *Asociaţia ACCEPT*, C-81/12, ECLI:EU:C:2013:275.

260 Judgment of 25 April 2013, *Asociaţia ACCEPT*, C-81/12, ECLI:EU:C:2013:275 [58].

261 See Framework Equality Directive, Article 9(1).

262 See Framework Equality Directive, Articles 9(1) and 17.

263 Judgment of 25 April 2013, *Asociaţia ACCEPT*, C-81/12, ECLI:EU:C:2013:275, [68]-[71].

In *An Garda Síochána*,[264] three individuals were excluded from the Garda, the police service of Ireland, as they were above the maximum age for recruitment laid down in the service regulations. The individuals brought complaints before the Workplace Relations Commission (WRC), a statutory body established by the Irish legislature to ensure compliance with Article 9 of the directive.[265] Despite establishing the WRC to resolve employment-related disputes, Irish law had reserved the authority to disapply or ignore a rule of national law contrary to EU law to its High Court. In the *An Garda Síochána* case, the Minister for Justice pleaded that the WRC lacked jurisdiction on the ground that the Garda age regulations were a national law, and only courts established under the Constitution had jurisdiction to decide, if necessary, to disapply national law that conflicts with EU law. The question eventually referred to the CJEU was whether a national body established by law in order to ensure enforcement of EU law in a particular area must be able to disapply a rule of national law that is contrary to EU law.

The CJEU noted that the WRC was specifically established by the Irish legislature to ensure, in accordance with Article 9 of the Framework Equality Directive, that the obligations arising from the directive are effectively enforced.[266] When a dispute is before such a body then, the primacy of EU law requires it to provide the full legal protection that individuals derive from EU law and to ensure that EU law is fully effective. This includes, where necessary, disapplying any inconsistent provision of national legislation.[267] Thus the power to disapply or disregard national law if it conflicts with EU law cannot be confined to courts of law, but rather extends to national bodies and administrative authorities in EU Member States that are tasked with applying EU law.

264 Judgment of 4 December 2018, *Minister of Justice and Equality, Commissioner of An Garda Síochána v Workplace Relations Commission*, C-378/17, ECLI:EU:C:2018:979.

265 Judgment of 4 December 2018, *An Garda Síochána*, C-378/17, ECLI:EU:C:2018:979 [44].

266 Judgment of 4 December 2018, *An Garda Síochána*, C-378/17, ECLI:EU:C:2018:979 [44].

267 Judgment of 4 December 2018, *An Garda Síochána*, C-378/17, ECLI:EU:C:2018:979 [48].

4 Case studies

The case law of the CJEU in relation to the 2000 equality directives has thus continued to evolve. The Court's judgments have clarified how established elements of its Court's jurisprudence – such as the *Mangold* doctrine relating to the horizontal applicability of the general principle of equal treatment, or the objective justification test used in indirect discrimination cases – should be applied by national courts in a range of new legal and factual contexts. Furthermore, the Court's case law has broken new ground, in particular in the area of religious discrimination.

This process of evolution is reflected at national level as well. As the CJEU's case law develops, it has an inevitable impact on the case law of the adjudicatory bodies within Member States that are charged with enforcing compliance with the requirements of national and EU law. It also can influence national legislation, as domestic law is recalibrated to comply with the unfolding requirements of EU anti-discrimination law.

Space prevents a comprehensive analysis of how the evolution of the CJEU's case law has affected developments at the level of Member States. However, three case studies are presented here to highlight the range of impacts that the CJEU's case law has had at the national level. They have been selected to illustrate the dynamic and pluralist nature of this process, as well as the tensions that it can generate.

First, the impact of the religious ethos exception contained in Article 4(2) of the Framework Equality Directive will be examined with respect to two countries, Germany and Ireland. The case study with respect to Germany demonstrates national change in the equality framework via the CJEU's decision in *Egenberger*, while the Irish situation highlights a state proactively enacting legislation that complies with the requirements of EU law. The second case study highlights a remarkable instance of a national court's defiant response to the CJEU's answer to its preliminary reference: namely, the CJEU's decision in *Ajos* and the subsequent judgment of the Supreme Court of Denmark. Finally, the third case study focuses on how the Court's case law on disability discrimination has influenced the development of national disability discrimination law, especially as regards the status of disabled employees who are required to take extended periods of sick leave from work, in both Spain and the UK.

4.1 Case Study A: the impact of the CJEU's judgments in *Egenberger* and *IR* on German and Irish law relating to 'religious ethos' exceptions

The first case study concerns the impact of the CJEU's judgments in the cases of *Egenberger* and *IR*. As discussed above, these two judgments are significant for several different reasons. Together with the *Achbita* and *Bougnaoui* judgments, they are the CJEU's first judgments relating to religious discrimination. More specifically, they clarify the scope of the 'religious ethos' exception set out in Article 4(2) of the Framework Equality Directive, as well as the relationship between the right to non-discrimination as protected by Article 21 of the EU Charter and relevant provisions of both the TFEU and the EU Charter relating to freedom of religion and the status of religious organisations.

This is a complex area of law and policy. In many Member States, bodies affiliated with a particular religious organisation have historically been able to require their employees to adhere to the organisation's specific religious ethos. National law has often adopted a hands-off approach in this regard, motivated by a desire not to interfere with the decisions of such bodies affiliated with a religion.[268] In part, this approach has been justified on the basis of the right of such organisations to enjoy religious freedom. In some states, it also reflects historical sensitivities about state intervention in the affairs of religious bodies. However, the freedom this gives employers to discriminate on grounds of religion or belief can be very extensive. For example, in Germany and Ireland, bodies affiliated with religious organisations have

268 See in general McCrea, R. (2010) *Religion and the Public Order of the European Union*, OUP.

for decades enjoyed wide discretion in deciding whether to require employees to adhere to their religious ethos – with case law from the German Constitutional Court and the Irish Supreme Court indicating that this discretion was mandated by the freedom of religion provisions of their respective national constitutions.[269]

The text of Article 4(2) of the Framework Equality Directive makes it clear that bodies affiliated with a religious organisation may treat adherence to their religious ethos as a genuine occupational requirement in certain limited circumstances.[270] But as this represents an exception to the general prohibition on religious discrimination, many legal scholars have taken the view that this exception should be given a restrictive interpretation, in line with the CJEU's usual interpretative approach in this regard – or, at least, that the CJEU in interpreting Article 4(2) should adopt a balancing approach rooted in a rigorous application of proportionality analysis, rather than giving bodies affiliated with a religious organisation a *de facto* blanket exception from the general requirements of discrimination law.[271] However, such an interpretation could well conflict with the existing legal position in certain Member States, such as Germany and Ireland, which have historically adopted a more permissive approach.

4.1.1 Germany: EU proportionality analysis replacing domestic 'plausibility review'

The importance of *Egenberger* in particular thus lies in how the CJEU clarified that a narrow interpretation should be given to the requirements of Article 4(2), in line with its interpretative approach in other contexts – and that the permissive approach adopted in German law in this regard was not compatible with the directive's provisions. To understand the impact and consequences of the judgment, it is necessary to explore the relevant German legal context in more detail, and to analyse the questions referred to the CJEU by the German court.[272]

As outlined above, the *Egenberger* case arose out of a decision by an association connected with the Protestant Church in Germany (Evangelische Kirche in Deutschland) to reject an applicant for a fixed-term research position, on the basis that the candidate concerned did not belong to a religious denomination. She claimed that she had been discriminated against on the basis of religion. In response, the association claimed that the requirement of denominational membership was a justified occupational requirement, which was intended to preserve its distinct religious ethos in line with the requirements of Article 4(2) of the directive and the relevant provisions of national law.

The relevant provisions of the *Allgemeines Gleichbehandlungsgesetz* (General Equal Treatment Act) of 14 August 2006 (the AGG),[273] which transposed the Framework Equality Directive into German law, permitted the association to impose such an occupational requirement where to do so reflected the 'self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity' at issue. Furthermore, Article 9(2) of the AGG provided that '[t]he prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to

269 See below for further detail.

270 As Vickers has noted, this exception is wider than the general GDOR exception provided for in Article 4(1) of the Directive, as the type of genuine occupational requirement to which Article 4(2) applies need not be *determining* in relation to the job at question – although it must still be legitimate and objectively justified. Vickers, L. (2006) *Religion and Belief Discrimination in Employment – The EU Law*, Thematic Report, European Network of Legal Experts in the Non-discrimination Field, European Commission, p. 56.

271 See Svensson, E. (2016) 'Religious Ethos, Bond of Loyalty, and Proportionality – Translating the "Ministerial Exception" into "European"' 4(2) *Oxford Journal of Law and Religion* 224–243. For a general overview of the provisions of Article 4(2) and the manner in which they have been implemented in the different Member States of the EU, see Vickers, L. (2006) *Religion and Belief Discrimination in Employment – The EU Law*, pp. 55-62.

272 In his Opinion in *Egenberger*, AG Tanchev drew attention to the number of workers potentially affected by a change to the existing German situation, noting that 'religious organisations in Germany employ around 1.3 million people': Opinion of AG Tanchev, 9 November 2017, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, ECLI:EU:C:2017:851, [126].

273 Germany, General Equal Treatment Act of 14 August 2006 (*Allgemeines Gleichbehandlungsgesetz*) BGBl. 2006 I, p. 1897.

the communal nurture of a religion or belief … to be able to require their employees to act in good faith and loyalty in accordance with their self-perception.'

The German legislature inserted these provisions into the AGG to maintain conformity with the case law of the German Constitutional Court (*Bundesverfassungsgericht*), which in interpreting the right to religious freedom set out in Article 4 of the German Basic Law (*Grundgesetz*) and other relevant constitutional provisions has placed considerable emphasis on the self-determination rights of religious organisations – including not just 'core' religious communities such as churches, but also all affiliated institutions established to give effect to their mission.[274] In accordance with this case law, Article 9 of the AGG thus maintained the pre-existing legal rule that judicial review of the validity of 'religious ethos' requirements should be confined to a 'plausibility review', i.e. to checking the genuineness of the religious organisation's views that the ethos requirement in question was necessary to give effect to their values.[275]

As a result, the AGG did not provide for any judicial scrutiny of whether such ethos requirements were objectively justified. This meant that German religious organisations were legally able to impose wide-ranging ethos requirements, subject only to the obligation that such requirements accorded with their subjective self-perception of what respect for their faith entailed.

The German Federal Labour Court (*Bundesarbeitsgericht*) considered that this legal position was not compatible with the plain text of Article 4(2) of the Framework Equality Directive, which provides that differences in treatment based on adherence to a particular religious ethos had to constitute a 'genuine, legitimate and justified occupational requirement'. However, it noted the potential applicability of other elements of European law, in particular the rights to religious freedom set out in Article 10 of the Charter and Article 9 ECHR, and also the provisions of Article 17 TFEU, which state that 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'. In light of these considerations, the Federal Labour Court asked the CJEU to determine whether the situation under the German law was compatible with Article 4(2) – and, if not, whether the relevant provisions of the AGG had to be disapplied to ensure compliance with the Framework Equality Directive and effective protection for the right to non-discrimination under EU law.

As already discussed, the CJEU held that a religious organisation could not be permitted to decide for itself whether an ethos requirement could be imposed, as this would deprive the directive of its effectiveness. The Court recognised that the rights to non-discrimination and access to effective legal remedies as protected by Articles 21 and 47 of the Charter had to be balanced against the right to autonomy of churches and other religious organisations as recognised by Article 17 TFEU, Article 10 of the Charter and Article 9 ECHR. However, this balance was reflected in the provisions of Article 4(2) of the Framework Equality Directive, which, even though its text refers to national legislation and national practices existing at the date of adoption of the directive, 'cannot be interpreted as authorising the Member States to withdraw compliance with the criteria set out in that provision from the scope of effective judicial review'.[276]

The CJEU went on to affirm that Article 4(2) of the Framework Equality Directive required national courts to make an objective assessment as to whether the imposition of an ethos requirement satisfied the test of proportionality, in the sense of being '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'.[277] The Court concluded by affirming the horizontal effect of both Article 21 and Article 47 of the Charter, and ruling in line with its *Mangold* doctrine that a national court had to disapply any contrary provision of national law if it could not be interpreted so as to conform

274 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [31].
275 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257.
276 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [54].
277 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [69].

with the requirements of the right to non-discrimination – while emphasising that national courts should endeavour where possible to interpret national legislation in conformity with EU law, including departing from existing case law if necessary.[278] Subsequently, it reached a similar conclusion in *IR v JQ*, making it clear that the Article 4(2) religious ethos exception should be assessed restrictively, with particular attention paid to the link between an employer's religious ethos requirement (a duty of loyalty in this case) and the specific nature and associated duties of the position in question.[279]

The first point to note about the approach of the CJEU in *Egenberger* and *IR* is the manner in which the Court interpreted Article 4(2) as involving the balancing of the fundamental right to non-discrimination with the right to religious freedom. This contrasts with the situation in German domestic law, where priority is given to the widely defined autonomy rights of religious organisations and affiliated bodies. In both judgments, the CJEU emphasised the importance of proportionality as a mechanism for balancing the rights concerned, and the need to show clear objective justification for the imposition of a 'religious ethos' occupational requirement.

In so doing, as McCrea argues, the CJEU established that 'under EU law there is a sliding scale of religious autonomy with decreasing autonomy for religious employers the more distant a role is from the core religious functions'.[280] For example, the law would allow a church more deference in its determination that its priests must be devout Christians, than a determination that persons in its accounting office adhere to that same belief. In contrast, the situation under German domestic law had not made provision for such a 'sliding scale': instead, employers with a religious affiliation had wide discretion to impose an ethos requirement, irrespective of the extent to which the position involved functions central to the religion.

Furthermore, as McCrea notes, the CJEU established that 'religious bodies cannot determine for themselves the degree of exemption from anti-discrimination rules necessary to protect their ethos'.[281] National courts were required to assess whether such bodes were objectively justified in seeking to protect their religious identity by imposing specific 'religious ethos' exceptions – and, as confirmed in *IR* – should also assess whether such exceptions were applied equally to other employees holding similar positions in the organisation concerned.

In adopting this general line of analysis in *Egenberger* and *IR*, the CJEU not only took a different approach from that adopted in German law, but also departed from the more permissive approach of the European Court of Human Rights in this context.[282] However, the CJEU's analysis is arguably in line with the text of Article 4(2) itself, which suggests that a restrictive approach is warranted for the scope of the 'religious ethos' exception. It also reflects academic views that proportionality analysis is the best available method of reconciling the competing rights at issue in this context, as opposed to more absolutist approaches that run the risk of giving religious organisations unduly wide leeway to discriminate for reasons that may have limited relevance to the preservation of their specific ethos.[283]

278 Judgment of 17 April 2018, *Egenberger*, Case C-414/16, ECLI:EU:C:2018:257 [82].

279 Judgment of 11 September 2018, *IR v JQ,* C-68/17, ECLI:EU:C:2018:696 [58].

280 McCrea, R. (2018) 'Religious Discrimination at Work: Can employees be fired for getting divorced?', *WEU Law Analysis Blog*, 12 September 2018, available at http://eulawanalysis.blogspot.com/2018/09/religious-discrimination-at-work-can.html. See also McCrea, R. (2018) 'Salvation Outside the Church? The ECJ rules on religious discrimination in employment', *EU Law Analysis Blog*, 18 April 2018, available at http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html.

281 McCrea, R. (2018) 'Salvation Outside the Church? The ECJ rules on religious discrimination in employment', *EU Law Analysis Blog*.

282 See eg *Fernandez Martinez v Spain*, [GC], no. 56030/07, 12 June 2014, ECHR 615.

283 See McCrea, R. (2016) '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' 5(2) *Oxford Journal of Law and Religion* 183-210; Svensson, E. (2015) 'Religious Ethos, Bond of Loyalty, and Proportionality' 4(2) *Oxford Journal of Law and Religion*, 224–243; more generally, Vickers, L. (2008) *Religious Freedom, Religious Discrimination and the Workplace*, Hart. See also AG Tanchev's comments at [110] of his Opinion in *Egenberger*, delivered 9 November 2017: '[t]he ethos of a religion is subjective, and quite separate and distinct from the activities entailed in sustaining it, the latter being an objective matter to be reviewed by courts…', C-414/16, ECLI:EU:C:2017:851.

In this respect, the reaction in German legal circles to the *Egenberger* and *IR* judgments is interesting. The judgments have triggered a degree of controversy. Part of this controversy relates to the Court's invocation of the *Mangold* doctrine in *Egenberger* in ruling that the relevant provisions of German law should if necessary be set aside to ensure horizontal effect was given to the right to non-discrimination: this doctrine has always been particularly contentious in Germany.[284] A potentially more serious issue is that the *Egenberger* judgment has been accused of weakening the protection of an important constitutional right within the scheme of the German Basic Law, namely the right to religious freedom as set out in Article 4 of the German Basic Law – and therefore of undermining the 'constitutional identity' of the German state, which is built around respect for fundamental individual rights.[285] In particular, some have argued that the *Egenberger* decision unduly infringes upon the right of religious communities to self-determination, as set out in the above-mentioned case law of the German Constitutional Court.[286] Indeed, a constitutional challenge has been launched against the subsequent decision of the German Labour Court in the *Egenberger* case, which had applied the CJEU's judgment and concluded that the requirement of faith group membership at issue in the case was not objectively justified in the circumstances (awarding EUR 4 000 in compensation). This challenge alleges that it was unconstitutional for the Labour Court to have given effect to the CJEU's judgment, on the basis that the CJEU had acted outside the scope of competence assigned to it within the framework of the German constitutional order, which the claimants assert precludes any application of EU law that undermines fundamental rights.[287]

However, other German academic commentators have welcomed the *Egenberger* and *IR* judgments, not least on the basis that the relevant jurisprudence of the *Bundesverfassungsgericht* (the Federal Constitutional Court) needed recalibration, and that the CJEU's approach conforms to the logic of EU equality law and the recognition of non-discrimination as a core human right.[288] Furthermore, as Advocate General Tanchev had noted in his Opinion in *Egenberger*, the existing German legal position has been the subject of sustained legal criticism.[289] While the outcome of the constitutional challenge to the *Egenberger* judgment remains to be seen, Sauer has argued that the challenge is flawed, and that there is no tangible basis for concluding that the *Egenberger* judgment represents a threat to German constitutional identity or an unwarranted extension of the competence of the CJEU.[290]

The *Egenberger* and *IR* judgments thus illustrate how EU equality law places significant weight on the right to non-discrimination. They also demonstrate the value of proportionality as a legal tool for striking a good balance between this right and other important rights, such as freedom of religion. How this balance should be struck can be a controversial issue, especially when the CJEU reaches different

284 See the criticisms of the *Mangold* judgment aired in the subsequent 'Honeywell' judgment of the Bundesverfassungsgericht: BVerfG, Beschluss des Zweiten Senats of 6 July 2010 – 2 BvR 2661/06BVerfGE 126, 286-331. For a critical analysis of the CJEU's application of the *Mangold* doctrine in *Egenberger*, see Frantziou, E. (2018) 'Mangold Recast? The ECJ's Flirtation with Drittwirkung in Egenberger', *European Law Blog*, 24 April 2018, available at http://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/.

285 See eg, the criticisms aired by the President of the Evangelische Werk für Diakonie und Entwicklungin (EWDE) in the press release of 19 March 2019, available here: https://www.diakonie.de/pressemeldungen/ewde-erhebt-verfassungsklage-gegen-urteile-des-bag-und-eugh/.

286 EWDE (2019) Press Release of 19 March 2019.

287 For an excellent overview of the arguments being raised in this appeal, see Sauer, H. (2019) 'Kirchliche Selbstbestimmung und deutsche Verfassungsidentität: Überlegungen zum Fall "Egenberger"', *Versfassungsblog*, 3 May 2019, available at https://verfassungsblog.de/kirchliche-selbstbestimmung-und-deutsche-verfassungsidentitaet-ueberlegungen-zum-fall-egenberger/. See also European Commission (2019), 'Flash Report: Constitutional complaint in *Egenberger* case', 1 July 2019, available at https://www.equalitylaw.eu/downloads/4906-germany-constitutional-complaint-in-egenberger-case-pdf-68-kb.

288 See eg Edenharter, A. (2018) '"Doomsday" für das kirchliche Arbeitsrecht?', *VerfassungsBlog,* 18 April 2018, available at https://verfassungsblog.de/doomsday-fuer-das-kirchliche-arbeitsrecht/.

289 Opinion of AG Tanchev, 9 November 2017, *Egenberger*, C-414/16, ECLI:EU:C:2017:851, [125]. He notes that Article 9 of the AGG 'has attracted criticism before the [United Nations Committee on the Elimination of all Forms of Racial Discrimination]', 'once formed the subject of infringement proceedings instituted by the Commission against Germany, and has been called into question by a German Government body that monitors compliance with anti-discrimination law within that Member State'.

290 Sauer, H. (2019) 'Kirchliche Selbstbestimmung und deutsche Verfassungsidentität: Überlegungen zum Fall "Egenberger"', *Versfassungsblog*, 3 May 2019.

conclusions from the approach historically adopted by national courts. However, this pair of judgments also demonstrates how a rigorous application of EU equality law, namely the overarching requirement of effective judicial enforcement and the substantive provisions of the directive regarding GDORs, can shift embedded domestic legal positions, even those rooted in national constitutional case law. The result of *Egenberger* is a new German approach to GDORs that differs markedly from the previous and consistent interpretation of its courts, even though that interpretation had been based on the German constitutional guarantee of the autonomy of religious institutions.

4.1.2 Ireland: legislative narrowing of a wide discretion

A similar dynamic can be seen when it comes to developments in Irish law, where the 'religious ethos' provisions of the Framework Equality Directive have generated significant shifts in the legal framework regulating such issues, even though no reference has yet been made to the CJEU in relation to this issue from Ireland.

For historical reasons, bodies affiliated with the Catholic Church play important roles in the Irish education and healthcare sectors. This is particularly the case with primary and secondary-level education. For example, 97 % of 'recognised' primary schools in Ireland are denominational in character, with 91 % specifically under the patronage of the Catholic Church.[291] Teachers in Irish primary and secondary schools were historically expected to respect the religious ethos of the religious organisation 'sponsoring' the school, with employment legislation imposing no effective restriction on the ability of school boards to dismiss employees for non-compliance with their ethos.[292]

The lawfulness of this situation was confirmed by the Irish Supreme Court decision of *McGrath and Ó Ruairc v Trustees of Maynooth College*.[293] In this case, lecturers had been dismissed from a prominent Catholic third-level institution as a result of their public disagreement with aspects of Catholic religious teaching. The Supreme Court ruled that the right to non-discrimination as set out in Article 40 of the Irish Constitution did not apply to private educational bodies, even if they were in receipt of public funding (as was the case here). Furthermore, the Court also took the view that prohibiting educational institutions affiliated with a particular religion from discriminating on grounds of religious ethos would 'lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religion'.[294]

Thus, when Ireland introduced comprehensive anti-discrimination legislation in the form of the Employment Equality Act 1997 and the Equal Status Act 2000, wide leeway was given to schools and hospitals controlled by religious organisations to discriminate on the basis of religious ethos. Section 37(1) of the Employment Equality Act applied to any 'religious, educational or medical institution which is under the direction or control of a body established for religious purposes … or whose objectives include the provision of services in an environment which promotes certain religious values'. It provided that such institutions were able to give 'favourable treatment' on religious grounds where 'reasonable to do so in order to maintain the religious ethos of the institution', or to take action which is 'reasonably necessary to prevent an employee from undermining the religious ethos of that institution'. The Irish Supreme Court ruled on the constitutionality of this legislation in the case of *Re Article 26 and the Employment Equality Bill 1996*,[295] and concluded that this exception was permissible on the basis that it helped to secure the right to religious freedom enjoyed by such institutions.[296]

291 For an overview, see Irish Human Rights Commission (2011), *Religion & Education: A Human Rights Perspective*.
292 See eg Irish Supreme Court, *Flynn v Sisters of the Holy Faith* [1985] ILRM 336.
293 Irish Supreme Court, *McGrath and Ó Ruairc v Trustees of Maynooth College* [1979] ILRM 166.
294 Irish Supreme Court, *McGrath and Ó Ruairc v Trustees of Maynooth College* [1979] ILRM 166, p. 187.
295 Irish Supreme Court, *Re Article 26 and the Employment Equality Bill 1996,* [1997] 2 IR 321.
296 Subsequently, in the case of *Greally v Min. for Education (No 2)* [1999] 1 IR 1, the Irish High Court suggested that a school policy that required applicants for teaching posts to have teaching experience in Catholic schools could be justified on the basis of the constitutionally recognised right of parents 'to have their children educated in denominational schools'.

However, the coming into force of the Framework Equality Directive triggered legal debate as to the potential impact of Article 4(2) on the scope of the religious ethos exception in Section 37(1) of the 1997 act. There was wide consensus among legal experts that the scope of this exception had to be read down to comply with the requirements of the directive, with the power of religious organisations to discriminate where 'reasonable' to maintain their ethos as set out in Section 37(1) of the 1997 act in particular being viewed as too wide. However, the extent of any such 'read down' remained unclear, meaning that the legal situation in this respect was very uncertain – a problem amplified by a lack of domestic case law. This uncertainty generated political controversy, and provoked demands for legislative reform.

The Equality (Miscellaneous Provisions) Act 2013 eventually narrowed the scope of Section 37(1) of the 1997 act. It provided that institutions in receipt of public funds invoking the religious ethos exception cannot discriminate on any other ground aside from religious belief – and that the religion or belief of the employee must constitute a genuine occupational requirement in respect of the particular post at issue, having regard to the institution's ethos, the nature of its activities, and the context in which those activities are carried out. Similarly, any action taken by a publicly funded religious, educational or medical institution to prevent an employee from undermining its religious ethos must be shown to be objectively justified.

This narrowing of the scope of the religious ethos exception was designed to reflect the requirements of Article 4(2) of the directive, and to ensure national law remained in conformity with its provisions. Widely welcomed as a necessary clarification of the law, this legislative reform still left open the key question as to when adherence to a religious ethos would constitute a genuine occupational qualification.[297] However, the *Egenberger* and *IR* cases now provide useful guidance in this respect. They have clarified that clear objective justification must be shown before this requirement can be satisfied. In particular, the *IR* judgment has established that the specific nature of the post in question, the extent to which the institution's ethos is potentially impacted by employee performance in that role, and any difference in treatment as between employees performing the same or analogous roles will all be relevant considerations in satisfying that test.

It remains to be seen how these judgments, along with the provisions of the 2013 act, will be applied by Irish courts and tribunals. The wide discretion formerly enjoyed by religious institutions in this regard has been substantially limited by the development of EU law. Unlike in Germany, this shift has generally not been viewed as involving a clash of fundamental rights. The relevant constitutional jurisprudence – in particular the case of *McGrath* mentioned above – is not very clear. However, it would appear that the original width of the religious ethos exception was treated by the Irish courts as *permissible* by reference to the relevant constitutional norms, not as *mandated* by them. This reduces any tension arising from the reach of EU equality law into this sensitive area of law and policy. In any case, this was an area ripe for reform, given that the denominational nature of the bulk of the Irish educational system is arguably no longer reflective of the social and religious views of the population at large.[298]

The impact of the *Egenberger* and *IR* judgments on German and Irish law, taken together with the relevant provisions of Article 4(2) of the Framework Equality Directive and the background framework of EU equality law, thus makes for an interesting case study. In both states, the requirements of EU law have required the relevant provisions of domestic law to be substantially amended. This has involved a departure from long-established national policy, which had enjoyed constitutional sanction in both states. This shift has generated controversy in Germany, but less so in Ireland. However, it has also attracted positive commentary in both states, with the requirements of EU equality law in both countries being viewed by a substantial body of academic and political opinion as striking a more reasoned and defensible balance between the competing rights to non-discrimination and to religious freedom. This case study

297 See the parliamentary debate at the Second Reading stage of the Equality (Miscellaneous Provisions) Bill, Vol. 897 Nos. 1&2, *Parliamentary Debates: Dáil Eireann* 18 & 19 November 2015.

298 See RTE News (2015), 'Survey finds Support for School Admission Reforms', 9 December 2015, available at https://www.rte.ie/news/2015/1209/752253-religion-in-schools/.

also illustrates that the impact of the EU equality directives is not always transmitted through judgments of the CJEU: while the Court's decisions play an important role in clarifying the relevant provisions of EU equality law, the key adjustment to the Irish legal position was brought about by domestic legislation.

4.2 Case Study B: pushback against the developing equality jurisprudence of the CJEU – the Danish Supreme Court judgment of *Ajos*

While the first case study set out above shows the dynamic impact of EU equality law, it also illustrates how it can generate pushback. The constitutional challenge to the German Labour Court's application of *Egenberger* is significant. Motivated by how *Egenberger* effectively requires German courts to set aside a long-established (if controversial) legal position rooted in constitutional jurisprudence concerning the scope of freedom of religion, it raises the issue of whether the development of the CJEU's case law has exceeded the appropriate scope of authority allocated to the Court under German law and therefore is undermining German 'constitutional identity'. As discussed, this challenge faces substantial legal hurdles. In interpreting Article 4(2) of the Framework Equality Directive while taking account of Article 21 of the EU Charter and the general principle of EU law, the CJEU would appear to be clearly acting within the scope of the authority conferred upon it by the EU Treaties. Also, the existing German constitutional case law relating to 'religious ethos' cases is unlikely to be treated by the German Constitutional Court as constituting a part of the core set of constitutional norms that are foundational to the German state.[299] However, even if this legal challenge does not succeed, it is clear that the CJEU's developing case law as it relates to the 2000 equality directives is attracting some resistance from national courts – motivated by similar concerns that the CJEU is stretching the limits of its competence and intruding upon areas of constitutional regulation that form part of the basic normative framework of the state.

The *Mangold* doctrine – namely that the general principle of non-discrimination and now the right to non-discrimination protected by Article 21 of the EU Charter enjoys direct horizontal effect in national law – has been a particular source of controversy in this regard. In the eyes of its critics, this doctrine has no textual source in either EU primary or secondary legislation. It also threatens legal certainty, by making it possible for private actors to be subject to non-discrimination requirements arising from judicial norm-generation rather than from the text of the EU equality directives themselves.[300]

As mentioned above (and as discussed in the 2012 report), in 2010, the German Constitutional Court rejected a challenge to the application of the *Mangold* judgment by the German labour courts.[301] It concluded that the CJEU's determination fell within the scope of its authority to interpret and apply EU law, and thus the Court had acted within its conferred competence when viewed through the prism of German constitutional law. However, constitutional issues relating to the *Mangold* doctrine have surfaced again more recently, this time in Denmark in the *Ajos* case.[302] The tensions between domestic and EU law exposed by this case make it a useful case study: it helps to shed some light on the factors that may be generating national court resistance to the developing CJEU case law in this field.

The origins of *Ajos* can be traced back to the earlier CJEU judgment in *Ole Andersen*.[303] Here, the CJEU had interpreted Article 6(1) of the Framework Equality Directive as precluding a situation where a dismissed

299 Sauer, H. (2019) 'Kirchliche Selbstbestimmung und deutsche Verfassungsidentität: Überlegungen zum Fall "Egenberger"', *Versfassungsblog*, 3 May 2019.

300 See in general Mazák, J. and Moser, M.K. (2013) 'Adjudication by Reference to General Principles of EU Law: A Second Look at the Mangold Case Law', in Adams et al. (eds*), Judging Europe's Judges: The Legitimacy of the European Court of Justice,* Oxford: Hart, pp. 61–86.

301 BVerfG, Beschluss des Zweiten Senats of 6 July 2010 – 2 BvR 2661/06BVerfGE 126, 286-331.

302 Danish Supreme Court, Case 15/2014, *Dansk Industri, acting for Ajos A/S v Estate of A*, Judgment of 6 December 2016, UfR 2017.824H (the SCDK judgment). An English translation of the judgment is available here: http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Pages/TherelationshipbetweenEUlawandDanishlawinacaseconcerningasalariedemployee.aspx.

303 Judgment of 12 October 2010 *Ingeniørforeningen i Danmark (acting on behalf of Ole Andersen) v Region Syddanmark*, C-499/08, ECLI:EU:C:2010:600.

employee, who would otherwise have been entitled to receive a severance allowance corresponding to three months salary, was denied that payment because he had reached the age of 60 and was entitled to an old-age pension from his employer under a scheme he had joined before reaching the age of 50. The CJEU ruled that this constituted unjustified age discrimination. In *Ole Andersen*, the employer was a public body. This meant that the claimant employee could rely directly upon the provisions of the directive in bringing their claim, with the well-established EU law doctrine of direct effect requiring that any contrary provisions of Danish law be set aside. Subsequently, a similar age discrimination claim was initiated against a private company (Ajos A/S). In this situation, the claimants could not rely directly on the provisions of the directive, but instead attempted to invoke the *Mangold* doctrine, and argued that Danish legislation inconsistent with the general principle of non-discrimination should be set aside.

The first instance court ruled that the relevant Danish legislation, previously interpreted by the Danish courts as enabling employers to avoid paying severance payments if employees were entitled to a pension, was incompatible with both the requirements of the Framework Equality Directive and the general principle of non-discrimination on the grounds of age – and therefore should be disapplied. On appeal, the Danish Supreme Court asked two questions of the CJEU: (i) whether the relevant Danish legislation was in fact incompatible with the general principle of non-discrimination; and, if so, (ii) whether national courts should weigh the requirements of this general principle against the competing requirements of the principle of legal certainty in deciding whether to disapply the relevant legislation. In essence, the Supreme Court was querying whether it was required to give direct horizontal effect to the general principle of non-discrimination on the grounds of age, despite what it saw as the loss of legal certainty this would cause for the private employer.[304]

In response, the CJEU in *Ajos* confirmed that the general principle of non-discrimination precluded effect being given to the Danish legislation in question, insofar as it permitted employers to refuse to pay the severance payment at issue.[305] It also affirmed that national courts should interpret national legislation in conformity with the requirements of the general principle where possible to do so, if necessary deviating from established domestic case law, and, if this was not possible, that the legislation in question should be set aside. In response to the Danish Supreme Court's clearly signalled concerns about legal certainty, the Court emphasised that these requirements were necessary to preserve the consistency and integrity of EU law.

The CJEU's judgment would usually be the end of the story but that is not what happened here. When the case returned to the Danish Supreme Court, the majority of the Court concluded that there was no legal basis in Danish law for allowing 'the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on Salaried Employees [the contested Danish legislation at issue]'.[306] In other words, the majority did not apply the CJEU's judgment, deciding that the Danish Law of Accession that governs the relationship between domestic and EU law did not provide a legal basis for the general principle of non-discrimination to be given direct horizontal effect. As a consequence, Ajos A/S were able to rely on the Danish legislation permitting it to dispense with the severance payments, and the age discrimination claim failed.

This decision has attracted plenty of excited commentary. Academics have described it as an unprecedented rejection of the authority of the CJEU, a breach of the principle of mutual trust between the CJEU and domestic courts, and as posing a challenge to the integrity of EU law taken as a whole.[307]

304 In this regard, the Danish Supreme Court made reference to the possibility of the employee seeking damage against the Danish state for failure to adequately implement EU law norms, i.e. it implicitly drew the CJEU's attention to the existence of an alternative remedy for the employee, namely the possibility of bringing a '*Factortame*' action against the state, by way of querying the need for the general principle of non-discrimination to be given direct horizontal effect.

305 Judgment of the Court, 19 April 2016, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, Case C-441/14, ECLI:EU:C:2016:278.

306 SCDK Judgment, [48].

307 Nielsen, R. and Tvarnø, C.D. (2017) 'Danish Supreme Court Infringes the EU Treaties by its Ruling in the *Ajos* Case' *Europarättsligt Tidsskrift*, 303–26; Madsen, M. et al. (2017), 'Competing Supremacies and Clashing Institutional Rationalities:

Its impact has been all the more striking given that the Danish Supreme Court has historically adopted what Neergaard and Sørensen describe as a 'pragmatic and careful approach' to implementing EU law.[308]

The Danish Supreme Court's reasoning thus deserves close analysis. As a first step in its judgment, the majority of the Court concluded that the relevant Danish legislation could not be interpreted so as to comply with the requirements of the directive and the general principle of non-discrimination. In reaching this conclusion, the Court cited its own established case law interpreting the legislation, along with the relevant *travaux préparatoires*, and concluded that a re-interpretation of the legislation to accord with the requirements of EU law would be *contra legem*. The majority then considered whether the legislation could be set aside, and concluded that the provisions of the Danish Law of Accession provided no legal basis for unwritten principles of EU law as developed by the CJEU to be given direct effect in Danish law. In other words, the majority recognised the authority of the CJEU to interpret EU law – but decided that Danish courts could not directly apply general principles developed by the CJEU that lacked a clear footing in the text of the EU Treaties.

The majority's reasoning has been subject to criticism. For example, Neergaard and Sørensen suggest that it was open to the Supreme Court to interpret the relevant Danish legislation in a way that was compatible with the requirements of the directive and the general principle. They also criticise the Court for adopting an artificially restrictive interpretation of the Law of Accession, noting the strong dissent on this point from the one judge who did not join the majority opinion.[309]

However, as Neergaard and Sørensen also note, it is clear that the Danish Supreme Court's judgment was motivated by concerns about legal certainty and the developing CJEU jurisprudence relating to the general principles of EU law. They suggest a 'lack of trust' underpins the Supreme Court's approach, and perhaps also discontent with the expanding reach of EU law and the specific role of the CJEU in this regard. The *Ajos* saga certainly serves as a dramatic example of judicial resistance directed against the CJEU's reliance on general principles to flesh out EU equality law.

The impact of the *Ajos* judgment remains to be seen. The provisions of the Danish legislation at issue in the case that permitted employers to withhold severance payments – Section 2(a)(2) and (3) of the Salaried Employees Act – were repealed in 2015, while the case was ongoing. This has removed the immediate flashpoint in this case. However, the Supreme Court's judgment suggests that not just the general principle of non-discrimination, but also all other 'unwritten' principles recognised to exist by the CJEU may not be directly applicable within Danish law. This would leave an important lacuna in the framework of EU law as it applies in Denmark, extending beyond the specific issue of non-recognition of the direct horizontal effect of the general principle of non-discrimination.[310] This gap could be remedied by legislative intervention by the Danish Parliament to clarify the Law of Accession. However, until this happens, the judgment continues to cast a shadow over the implementation of EU law in general, and the CJEU's case law on the principle of non-discrimination in particular.

Ajos thus serves as a case study of potential backlash against certain aspects of the CJEU's equality jurisprudence. It may be possible to alleviate some of the concerns that may be motivating such a backlash. Frantziou has suggested that the CJEU should be more explicit in outlining the rationale for giving direct horizontal effect to the right to equality, and more willing to engage in balancing of the

The Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation' *iCourts Working Paper Series*, Copenhagen, No. 85, 1–15; Haket, S. (2017) 'The Danish Supreme Court's Ajos judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order' *Review of European Administrative Law*, 135-51.

308 Neergaard, U. and Sørensen, K. E. (2017) 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' 36(1) *Yearbook of European Law* 275–313.

309 Neergaard, U. and Sørensen, K. E. (2017) 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' 36(1) *Yearbook of European Law*.

310 Neergaard, U. and Sørensen, K. E. (2017) 'Activist Infighting among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the Ajos Case' 36(1) *Yearbook of European Law*.

relevant rights and interests at issue.[311] The Court could perhaps also be more explicit in highlighting the importance of equality law within the EU's overall scheme of values, and the fundamental nature of the right to non-discrimination within European law. Some commentators have suggested that both the CJEU and national courts should adopt a more pluralist mode of engagement and that the conflict of approaches in *Ajos* might have been headed off if both the CJEU and the Danish Supreme Court had engaged with each other's doctrinal concerns in greater detail.[312] However, such steps may only provide a partial remedy to some of the deeper issues highlighted by *Ajos*. For now, it remains to be seen whether *Ajos* is a one-off decision, specific to the particular constitutional and legal context of Denmark, or the beginning of a wider trend.

4.3 Case Study C: the CJEU's emphasis on the need for a contextual approach to identifying disability-related disadvantage – and its application to national law in Spain and the UK regulating dismissals based on long periods of absence (sick leave)

The third case study departs from the contested terrain of the direct horizontal effect of the principle of non-discrimination and the complex relationship between EU and national constitutional law. Instead, it highlights the way in which the interpretation given by the CJEU to the 2000 equality directives is clarifying ambiguous aspects of their text, and by extension improving protection against discrimination at national level.

Specifically, the case study focuses on how the Court's developing case law on disability discrimination has clarified the key question of how comparator requirements should be applied in this context. In so doing, it has established that national courts must take into account the specific nature of disability as a non-discrimination ground, and the particular nature of the disadvantages disabled persons may face in accessing and operating within the labour market. In turn, this has influenced the development of national disability discrimination law, especially as regards the status of disabled employees who are required to take extended periods of sick leave from work. The situation in Spain and the UK (still subject to the EU equality directives at the time of writing) is used to illustrate how the development of the CJEU jurisprudence generates shifts at national level.

Article 2 of the Framework Equality Directive prohibits direct and indirect discrimination 'on grounds' of disability in employment and occupation. All forms of less favourable treatment arising as a consequence of disability, whether taking the form of (i) treatment which disadvantages disabled persons by ensuring they are treated differently from others or (ii) treatment which treats disabled persons the same as others but that disadvantages them by failing to take account of the specific vulnerabilities of disabled persons, fall within the scope of this prohibition. However, if courts applying this prohibition are not alert to the ways in which specific forms of treatment may have a particularly negative impact on disabled persons, then the protection offered by the directive may be rendered ineffective. In a sequence of judgments over the last half decade or so, the CJEU has consequently placed considerable emphasis on the need for national courts to take account of the practical impact on the lives of disabled persons of the measures being challenged.

In its 2012 judgment in *Odar v Baxter Deutschland*,[313] the CJEU was asked to rule on the compatibility with the age and disability provisions of the Framework Equality Directive of an occupational social security scheme that gave workers over the age of 54 being made redundant a lower compensation payment than other workers, depending on the date they became eligible for a retirement pension. The

311 Frantziou, E. (2018) 'Mangold Recast? The ECJ's Flirtation with Drittwirkung in Egenberger', *European Law Blog*, 24 April 2018, available at http://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/.

312 See Davies, G. (2018) 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation' 24(6) *European Law Journal* 358-375.

313 Judgment of 6 December 2012, *Odar v Baxter Deutschland GmbH*, C-152/11, ECLI:EU:C:2012:772.

Court concluded that such a scheme did not constitute unlawful age discrimination. However, severely disabled persons had a lower retirement age, and thus received a lower payment than non-disabled workers in the same situation. The CJEU determined that such severely disabled employees were being subject to indirect discrimination on the grounds of their disability, on the basis that the difference in treatment at issue could not be objectively justified as it (i) was not based on objective factors other than the fact of their disabled status and (ii) undermined the rationale for this aspect of the scheme, which was to take account of the specific difficulties and risks faced by severely disabled workers. In reaching this conclusion, the Court emphasised the need to take account of the specific disadvantages faced by severely disabled workers, in particular their greater risk of poverty, difficulties in finding work, and the likelihood that they would have special financial requirements arising out of their disability.[314] The Court later applied a similar logic in *Bedi v Bundesrepublik Deutschland*,[315] concluding that the treatment of disabled employees under a similar compensation mechanism for the loss of employment was not objectively justified because the mechanism in question failed to take account of their particular financial vulnerability.

In other words, the CJEU has emphasised the importance of adopting a contextual approach in assessing whether disabled persons have been subject to less favourable treatment, and in identifying the extent and nature of this treatment for the purposes of proportionality analysis in the case of indirect discrimination claims (such as was at issue in *Odar* and *Bedi*). As the Court made clear in *Odar*, such an approach should take into account the specific vulnerabilities of the affected persons with disabilities and the practical impact of the treatment in question, rather than just focusing on whether disabled persons have been treated in a formally equal manner.

This approach was applied in the CJEU's judgment in *HK Danmark*[316] to the important issue of whether legislative provisions limiting the employment rights of workers who have been absent on extended periods of sick leave discriminate on grounds of disability. Employees with disabilities may often have to take extended sick leave: as such, they are a group who may be disproportionately affected by such legislative provisions. In *HK Danmark*, the legislation under challenge permitted employers to terminate an employment contract with a reduced period of notice if the worker concerned had been on sick leave for 120 days during the previous 12 months. The CJEU ruled that such a measure was liable to place disabled workers at a disadvantage, and thus had to be shown to be objectively justified: it also clarified that 'the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked' in this assessment (citing *Odar*).[317]

This judgment in *HK Danmark* set out the general approach to be adopted by national courts in applying the objective justification test in such cases involving challenges to sick leave regulations based on a claim of indirect disability discrimination. The CJEU subsequently provided further guidance in a reference from the Spanish courts, *Ruiz Conejero*.[318]

This reference related to Article 52(d) of the Spanish Workers' Statute, which permitted employers to terminate a worker's employment when the worker's sick-leave related absences from work amounted to 20 % of working hours in two consecutive months, provided that total absences in the previous 12 months had amounted to 5 % of working hours, or 25 % of working hours in four non-continuous months

314 Judgment of 6 December 2012, *Odar v Baxter Deutschland GmbH*, C-152/11, ECLI:EU:C:2012:772 [69].

315 Judgment of 19 September 2018, *Bedi*, C-312/17, ECLI:EU:C:2018:734.

316 Judgment of 11 April 2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, Joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222. This judgment is also significant for what the CJEU says about the relevance of the UN Convention on the Rights of Persons with Disabilities (CRPD) and the interpretation of the reasonable accommodation requirements set out in Article 5 of Directive 2000/78/EC: see p. 26 above.

317 Judgment of 11 April 2013, *HK Danmark (Ring, Skouboe Werge)*, joined Cases C-335/11 and C-33711, ECLI:EU:C:2013:222 [91].

318 Judgment of 18 January 2018, *Ruiz Conejero*, C-270/16, ECLI:EU:C:2018:17.

within a 12-month period.[319] This law was designed to provide a clear statutory basis for employers to dismiss employees for absenteeism – a recognised labour market problem in Spain. The claimant in this case, Ruiz Conejero, had worked for his employer and related companies since 1993, without incident. However, by 2014, he was medically diagnosed as suffering from a disability, primarily generated by disease of the endocrine-metabolic system (obesity) and functional limitation of the spine, and between 2014 and 2015 had been obliged to take a number of periods of sick leave as a result of side effects of his condition. When his employer relied on Article 52(d) of the Workers' Statute to terminate his employment, Ruiz Conejero alleged his dismissal constituted indirect disability discrimination. The referring Spanish court noted that disabled persons were more exposed to the risk of dismissal under Article 52(d) of the Workers' Statute than other groups, and arrived at the view that (taking the CJEU's approach in *HK Danmark* into account) that this legislative provision was contrary to Directive 2000/78 on the basis that it failed to take adequate account of the particular situation of disabled employees. As such, it asked the CJEU to rule on this issue.

The CJEU in response considered that, although the relevant legislation treated disabled and non-disabled workers alike, it was liable to place disabled workers at a particular disadvantage because 'a worker with a disability has the additional risk of being absent by reason of an illness connected with his disability'.[320] Turning then to the question of objective justification, the Court considered that the legislation's aim of combating absenteeism constituted a legitimate aim. With respect to the appropriateness of the measure, the CJEU instructed the national court to take into account the potential costs of absenteeism, but also 'the risks run by persons with disabilities, who generally face greater difficulties than persons without disabilities in re-entering the labour market, and have specific needs in connection with the protection their condition requires'.[321] The Court also indicated that the national court should consider whether 'the Spanish legislature omitted to take account of relevant factors relating, in particular, to workers with disabilities', noting the absence of any general disability-related exception to the scope of Article 52(d) of the Workers' Statute.[322] The impact of national legislation regarding reasonable accommodation should also be taken into account.[323]

The judgment in *Ruiz Conejero* thus provided more detail as to how the objective justification test sketched out in *HK Danmark* should be applied to legislation governing dismissals based on sick leave. It also fleshed out the Court's contextual approach to identifying disability-related disadvantage as set out in *Odar*. As Broderick has argued, in *Ruiz Conejero* the CJEU 'threads a careful path between the needs of people with disabilities and the legitimate constraints experienced by employers'.[324] However, in so doing, the CJEU made clear the need for the particular vulnerabilities of persons with disabilities to be taken into account in any objective justification analysis, while noting the absence of any specific provisions dealing with this issue in the legislation.

As such, it is unsurprising that the referring Spanish court subsequently ruled that the dismissal was null and void on the basis that it constituted indirect disability discrimination, citing the CJEU's judgment and interpreting Article 52(d) of the Workers' Statute to comply with the provisions of Directive 2000/78/EC.[325] It remains to be seen how other cases will be handled by the Spanish courts, or whether legislation will be introduced to clarify the provisions of the Workers' Statute in this regard – as may be necessary.

319 The legislation provided for certain exceptions, such as absence due to cancer or a similar serious illness: no specific disability-related exception was included.

320 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17, [39] (citing same analysis as absenteeism policy in *HK Danmark (Ring, Skouboe Werge)*, [76]).

321 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17 [51].

322 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17 [50]-[54].

323 Judgment of 18 January 2018, *Ruiz Conejero,* C-270/16, ECLI:EU:C:2018:17 [56].

324 Broderick, A. (2019) '*Ruiz Conejero*: (Re-)Conceptualizing Disability-Based Discrimination and Sickness Absence at Work' 5(1) *International Labour Rights Case Law* 86-91.

325 Social Court No 1 of Cuenca (Spain), Judgment 171/2018, of 7 March 2018.

The CJEU's approach in cases such as *Odar*, *HK Danmark* and *Ruiz Conejero* is also influencing legal developments in other Member States, even in the absence of preliminary references to the Court relating to this specific area of law. This can be seen in the UK, for example.

There is no British equivalent to the Spanish legislation at issue in *Ruiz Conejero*. If an employer wishes to terminate an employment contract as a result of illness-related work absences, such a dismissal may be challenged under the UK's unfair dismissal legislation – or (in Britain) under the Equality Act 2010, if there is a disability dimension to the claim. In such a situation, employers will generally be expected to have engaged in appropriate 'absence management policies', and to be able to demonstrate that they have acted reasonably in the specific circumstances at issue. It will not necessarily constitute a breach of reasonable accommodation requirements for disabled employees to be subject to such procedures.[326] However, an employee's disability is a consideration that should be taken into account by an employer, along with any disability-related reasonable accommodation that may be required under the 2010 act and EU law, which may involve disabled workers being treated more favourably than non-disabled employees who have taken a similar amount of sick leave.

This was confirmed in the important Court of Appeal judgment of *Griffiths v Secretary of State for Work and Pensions*.[327] In this case, the Court rejected arguments brought by the public authority employer that the disability discrimination requirements of the Equality Act 2010 would be satisfied by treating disabled and non-disabled employees alike in applying absence management policies.[328] Instead, Lord Justice Elias, giving the judgment of the Court noted that '[w]hilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences'.[329] As such, insofar as the application of absence management policy 'leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees,' which in turn triggers the application of the reasonable accommodation and indirect disability discrimination provisions of the Equality Act, with the result that an employer may be required to adopt special measures to accommodate disabled employees.[330]

In reaching this conclusion, the Court of Appeal made explicit reference to the CJEU's approach in *HK Danmark* in support of its reasoning.[331] The CJEU's emphasis on recognising the particular vulnerability of disabled employees was echoed by the UK court. *Griffiths* thus serves as an important example of how the CJEU's case law is influencing developments at national level, even in the absence of a direct reference to the Court, as in *Ruiz Conejero*.

326 *Jennings v Barts and London NHS Trust*, UKEAT/0056/12/DM, EAT Judgment of 5 February 2013.
327 *Griffiths* [2015] EWCA Civ 1265.
328 *Griffiths* thus overturned an earlier ruling by the Employment Appeals Tribunal in *Royal Bank of Scotland v Ashton* [2011] ICR 632.
329 *Griffiths* [2015] EWCA Civ 1265, [47].
330 *Griffiths* [2015] EWCA Civ 1265 [58].
331 *Griffiths* [2015] EWCA Civ 1265 [61].

5 Trends and future directions

Stepping back from this overview of the development of the Court's case law relating to the interpretation of the 2000 equality directives, and the three accompanying case studies, it is possible to identify some burgeoning trends. These vary in interesting ways from the trends reported in the previous 2012 report, suggesting that the evolution of EU law in this area is a dynamic rather than a steadily developing process.

In general, the CJEU has adhered to its well-established purposive approach, whereby the text of the 2000 equality directives is interpreted by reference to the objective of ensuring effective protection for the fundamental right of individuals not to be subjected to discrimination as recognised by Article 21 of the EU Charter. Indeed, one decided trend of the past decade is the Court's affirmation of the expansive approach adopted in *Mangold* to the horizontal effect of fundamental rights in the EU and the further rooting of this approach in the Charter. The series of rulings in the context of non-discrimination, particularly *Egenberger* and *IR*, have been instrumental in settling the debate about whether the Court would fully embrace *Mangold* or develop a more restrictive approach. Further, more recent cases confirm that the case law on the Charter's horizontal effect pioneered in the non-discrimination context has influenced the legal status of other rights enshrined in the Charter. For example, in the 2018 case of *Bauer*, the Grand Chamber held that the right to paid annual leave protected by Article 31(2) of the Charter is also horizontally applicable.[332] The Court heavily referenced *Egenberger* in reaching this decision. The Court appears, then, to be moving in the general direction of 'constitutionalising' and giving full horizontal effect to certain rights laid out in the EU Charter. We can expect more references to the CJEU exploring which other provisions of the Charter share the status of fundamental rights and also the precise legal consequences of such a finding.

The Court has not only dealt directly with the status of the principle of non-discrimination in the EU's constitutional structure, but also continues to demonstrate the influence of this principle on its approach to interpreting the specific substantive provisions of the directives. These provisions are interpreted purposively in line with the overarching principle, and exceptions to the principle of equal treatment will be read strictly and narrowly. It also appears that the provisions of the directives will be read in accordance with the principles of respect for human dignity and autonomy and the other fundamental rights set out in the EU Charter. The Court has made clear that this template will be applied whenever it is called upon to interpret the 2000 equality directives.

As a consequence, the Court's case law remains characterised by a high level of consistency and predictability, especially when it comes to the application of core concepts such as direct and indirect discrimination. It has also meant, to some extent, that the Court has interpreted the protection against discrimination in an expansive way that maximises protection for individuals. An example of the Court's adherence to this purposive approach is *CHEZ*, which not only clarified the meanings of direct and indirect discrimination, but also affirmed the concept of 'discrimination by association' as first adopted in the disability context in *Coleman*. In clarifying these terms, *CHEZ* offered a generous and progressive interpretation of the meaning of discrimination, which considered not only the practical injuries faced by victims, but also the more intangible injuries of stereotyping and stigma. In reaching these conclusions, the Court referenced not only the telos of EU equality law, but also other supranational human rights documents, like the European Convention on Human Rights. Future cases will in all likelihood be adjudicated in line with the general interpretative approach that the Court has already set out in comprehensive detail in its case law on the 2000 directives.

332 Judgment of 6 November 2018, *Stadt Wuppertal and Volker Willmeroth als Inhaber der TWI Technische Wartung und Instandsetzung Volker Willmeroth e.K. v Maria Elisabeth Bauer and Martina Broßonn*, joined cases C-569/16 and C-570/16, ECLI:EU:C:2018:871. See also Judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung derWissenschaften e.V. v Tetsuji Shimizu*, C-684/16, ECLI:EU:C:2018:874.

CHEZ also potentially represents a trend toward enforcement of EU equality law by non-traditional claimants. The *CHEZ* case was brought by a shopkeeper who was not of Roma origin to challenge discriminatory decisions against Roma persons that collaterally affected her. The Court's decision determined that she had standing to challenge such a situation despite not being a member of the group on which the discriminatory decision-making was based – even in the case of an *indirect* discrimination claim. This expansion of personal standing to challenge indirect discrimination is likely to spur further claims that both test the scope of the concept of associational discrimination, and use the *CHEZ* decision to bring claims of indirect discrimination, which is a relatively under-litigated area.[333] McCrudden highlights the possible concern that the success of the non-Roma litigant in *CHEZ* could result in discrimination cases being shaped and voiced by members of majority groups who experience only the tangential effects of structural discrimination against other groups.[334] He points to the phenomenon of male claimants litigating and benefiting from sex discrimination challenges, which has been criticised as being at odds with an understanding of equality that is concerned with the recognition and empowerment of socio-politically disadvantaged groups.

The Court's reasoning in *CHEZ* – that the language of the Racial Equality Directive prohibits discrimination '*on grounds of* racial or ethnic origin' not discrimination based on a particular person's own racial or ethnic origin – could also have wider consequences. For example, this reasoning appears to affirm that discrimination by perception – that is, disadvantageous treatment based on an incorrect belief in the victim's group membership (for example, the homophobic harassment of a heterosexual employee) – would be covered by EU law.

However, there are aspects of the Court's recent jurisprudence as it has developed with respect to the different equality grounds set out in the 2000 directives that could be viewed as departing from this purposive approach. As discussed above, some academic commentators have been particularly critical of the Court's approach to employer 'religious neutrality' policies in *Achbita*, its restrictive case law on intersectionality in *Parris v Trinity College Dublin*, and the significantly narrow interpretation of the reach of the Racial Equality Directive adopted in *Jyske Finans* and *Heiko Jonny Maneiro*. Such critics have taken the view that these judgments deviate from the Court's standard interpretative approach by adopting a narrower reading of the texts of the relevant directives than is warranted. Different legal issues arise in each case, and it remains to be seen how the Court will address these issues in its subsequent jurisprudence.

To begin with the *Parris* case, questions remain regarding the future of intersectional or multiple discrimination claims after this decision. *Parris* involved a relatively straightforward factual scenario of intersectional disadvantage: the challenged provision completely excluded a group defined by both age and sexual orientation. The clear-cut nature of this combined effect meant the case featured none of the logistical problems that are of concern in other multiple discrimination cases.[335] Given a) this factual presentation, b) the national court's express phrasing of a preliminary reference question regarding whether a standalone claim based on the combined effect of two grounds could exist, and c) the CJEU's explicit statement that 'no new category of discrimination resulting from the combination of more than one of those grounds may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established',[336] it seems that the possibility of a distinct multiple or intersectional discrimination claim under EU law has been extinguished.

333 McCrudden, C. (2016) 'The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?' *European Equality Law Review*, 1-10. 11-13.

334 McCrudden, C. (2016) 'The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?' *European Equality Law Review* p. 13.

335 Atrey, S. (2018) 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in *Parris v Trinity College Dublin*' 47 *Industrial Law Journal*, 295-96.

336 *Judgment of 24 November 2016, Parris, C-443/15, ECLI:EU:C:2016:897*, [80].

However, there may still be potential for a judicial interpretation that incorporates the particular issues faced by persons who face multiple axes of group disadvantage *within* the existing legal framework. Fredman describes this as a 'capacious' interpretation of a ground of discrimination, wherein intersectional experiences and effects are addressed within a single axis format.[337] For example, in a claim brought on the grounds of race, the Court could give specific consideration to how the victim's disadvantage was enhanced by her gender and religion when assessing whether a challenged act of indirect discrimination is justified.[338] These factors might tip the scales in favour of the victim when weighed against the interests of the employer or state entity in the context of a proportionality analysis.

Such an approach is arguably consistent with the Court's approach in its disability cases requiring a *contextual* approach in assessing whether disabled persons have been subjected to less favourable treatment, and in identifying the extent and nature of this treatment for the purposes of proportionality analysis in the case of an indirect discrimination claim. For example, the claimant in the *Odar* case challenged a worker compensation package that was reduced based on his eligible retirement date, which was calculated by both his current age and his disability. The Court implicitly incorporated the factor of age into its analysis of disability discrimination, by requiring consideration of the greater difficulties faced by severely disabled persons as they approach retirement age.[339] Although this case did not formally employ the language of multiple or intersectional discrimination, the Court's willingness to consider these forces influenced its proportionality assessment. Future litigation may focus on such an approach and find more traction with the Court in the wake of *Parris*. Given academic criticism of the *Parris* case, as well as a growing concern and awareness of the problem of multidimensional disadvantage (experienced by, for example, the female Muslim complainants in *Achbita* and *Bougnaoui*), it seems likely that further cases might seek to develop this area or seek other innovative developments, on both the doctrinal and legislative sides.

In terms of the *pattern* of references to the Court, there have been some changes in recent years. In the previous 2012 report, it was noted that no religious discrimination cases had been referred to the CJEU. This was a striking absence, given the important and controversial legal issues potentially generated in this context by the directive. Now, however, the CJEU has dealt with five references relating to religious discrimination – *Achbita* and *Bougnaoui* on employer bans on the wearing of religious symbols, *Egenberger* and *IR* on 'religious ethos' exceptions, and recently, the *Cresco Investigations* case on religious holidays and associated time off.

These have been significant judgments, which have attracted plenty of attention. The potential importance of *Egenberger* and *IR* has been discussed in detail in the first case study set out in this report. In *Bougnaoui*, the Court made it clear that targeted religious discrimination based on individual customer preferences will constitute direct discrimination. It also confirmed that the genuine and determining occupational requirement defence should be applied restrictively in the context of the religion or belief ground, as elsewhere (the Court subsequently applied this approach again in *Egenberger* and *IR*). However, in *Achbita*, the Court accepted the legitimacy of 'religious neutrality' workplace policies, linking such policies to the freedom to engage in business protected by Article 16 of the EU Charter. As discussed above, the Court's acceptance of the general legitimacy of such employer policies, detached from specific circumstances where compelling justifications may exist for such a policy to be applied, can be difficult to reconcile with the more demanding approach applied by the Court in other contexts.[340] It also potentially

337 See Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, May 2016), 72.

338 See Opinion of AG Kokott, 30 June 2016, *Parris*, C-443/15, ECLI:EU:C:2016:493, [157]; Tryfondiou, A. (2016) 'Another failed opportunity for the effective protection of LGB rights under EU law', *EU Law Analysis*, 1 Dec 2016, http://eulawanalysis.blogspot.com/2016/12/another-failed-opportunity-for.html.

339 See Xenidis, R. (2018) 'Multiple discrimination in EU anti-discrimination law: towards redressing complex inequality?', in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart Publishing, pp. 67-68.

340 The approach of the CJEU in *Achbita* may reflect the sensitivity of political debate surrounding the wearing of Islamic religious symbols in several European countries, and the desire of the Court to tread cautiously in this regard. However, the consequences of this approach may be to weaken protection against religious discrimination. See Vickers, L. (2017)

compromises the capacity of EU discrimination law to protect religious minorities from social exclusion and disadvantageous treatment in the workplace.[341]

Given (i) these potential issues with the *Achbita* judgment, (ii) the associated difficulty in drawing a clear line between direct and indirect discrimination in the context of the wearing of religious symbols (as noted by Advocate General Sharpston in her Opinion in *Bougnaoui*), and (iii) the political sensitivities that surround issues of religious discrimination in general, the CJEU is likely to see future references from national courts seeking further clarification of the requirements of EU law in relation to religious discrimination. The CJEU's decision in *Achbita* may have been influenced by its deference to the differing Member State opinions as to the appropriate role of religion in the public sphere, which is a politically sensitive issue, and such deference may inform future judgments as well.[342] In sum, it is fair to say that religious discrimination is now very much on the 'agenda' in the European context, with the existing case law likely to generate further legal developments over the next few years.

As for the other grounds, the Court has continued to receive a steady trickle of age discrimination references. Indeed, this remains its most 'popular' ground. As of 2018, approximately half of the preliminary references made to the Court regarding the grounds enumerated in the 2000 equality directives were based on age.[343] This reflects the fact that age-based distinctions have historically been commonly used across Europe to differentiate between different categories of employee, often as part of collective agreements.[344] Furthermore, age was a relatively 'new' ground of discrimination when it was introduced, as few European legal systems have a history of prohibiting age discrimination, and thus there is less comparable national case law on the topic. For these reasons, there has been much uncertainty surrounding age discrimination, requiring national courts to repeatedly refer difficult cases to Luxembourg.[345] It is also notable that about 50 % of age discrimination references are from Germany, with Austrian and Danish courts also contributing a high number of references.[346] This may be due to the demographics of the labour markets of these countries or to the presence of trade unions.[347] However, the age element of the Court's case law has become less dominant than hitherto. This suggests that national courts have become more comfortable applying the legal requirements associated with this ground, perhaps as a result of the large body of case law guidance that the CJEU has produced on the topic.

Anecdotally, several commentators have expressed surprise to the authors of this report that there have not been more race discrimination referrals. Indeed it remains comparatively rare for the Racial Equality Directive to be invoked in preliminary references.[348] Whether the relatively low number of such referrals (i) reflects a sense that the law is clear in this regard, (ii) suggests that the area is under-litigated, or alternatively (iii) indicates a certain unwillingness on the part of national courts to refer cases to Luxembourg, must for now remain a matter of speculation. Some authors have suggested that non-discrimination norms on race in Europe remain more likely to be enforced in criminal, rather than civil

'*Achbita* and *Bougnaoui*: One Step Forward and Two Steps Back for Religious Diversity in the Workplace', 8(3) *European Law Journal* 232.

341 The implications for the law's protection of, in particular, Muslim women, a multiply marginalised group, are compounded in light of the Court's decision *Parris v Trinity College Dublin*, which as discussed above forecloses the possibility of intersectional discrimination claims being brought under the Framework Equality Directive.

342 A further case on religious attire in the workplace is pending before the CJEU at the time of this writing. See C-804/18, *IX v WABE e. V*., Request for a preliminary ruling from the Arbeitsgericht Hamburg (Germany) lodged on 20 December 2018.

343 This data is from Miller, J. and Eklund, H. (2018) *Equality Law in Europe: A New Generation CJEU Database, Anti-Discrimination PRs by Ground Excluding Gender*, available at https://equalitylaw.eui.eu/database/, and covers the period of 1970-2018.

344 O'Cinneide, C. (2003) 'Comparative European Perspectives on Age Discrimination Legislation', in S. Fredman and S. Spencer, *Age as an Equality Issue*, Oxford: Hart Publishing, pp. 195-218.

345 See O'Cinneide, C. (2010) 'Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age' 2 *Revue des Affaires Européennes* 253.

346 This data is from Xenidis, R. (2019) 'Transforming EU Equality Law?', *Yearbook of European Law*, 53, and covers the period from 2004-2015.

347 Xenidis, R. (2019) 'Transforming EU Equality Law?', *Yearbook of European Law*, 53.

348 Möschel, M. (2018) 'Eighteen Years of the Race Directive', in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart Publishing, 152.

proceedings.[349] It is also likely true that the low number of judgments is partially attributable to a lack of knowledge and resources among the most marginalised ethnic and racial minorities. This may change with the increasing participation of equality bodies in assisting individual claimants, as described below.

Another issue that may reduce references to the CJEU in the future is the narrow interpretation of what qualifies as discrimination on grounds of race or ethnicity that was adopted by the CJEU in *Jyske Finans*. As discussed above, the CJEU concluded that differential treatment on the basis of a person's country of birth could not be assumed to involve discrimination based on ethnicity.[350] As noted by Mathias Möschel, 'under the cloak of immigration and nationality rules or through claims that the discriminatory treatment is based on nationality rather than race or ethnicity, a range of discriminatory practices can escape the application of the [Racial Equality Directive]'.[351] It remains to be seen how this narrow interpretation of the directive will affect the evolution of the CJEU's case law.[352]

In general, across the different equality grounds, it is still the case that the bulk of references are coming from particular countries. German courts remain repeat customers, especially when it comes to age cases (but now also religion). Spanish courts now seem to be making more referrals – some commentators have theorised that this may be part of a general trend involving a rising number of Spanish references to the CJEU in the wake of the 2008 economic crisis.[353] UK courts are referring less, which is perhaps unsurprising, given both Brexit and the relatively well-developed state of British law in this area since the Equality Act 2010. Some countries, such as the Netherlands – whose courts have enthusiastically engaged with the CJEU in other contexts like migration – remain conspicuously absent.[354]

It is clear that while the Court's case law in relation to the equality directives remains dynamic and influential, it is also sometimes controversial. The outcome of the *Ajos* case in Denmark shows that tensions exist as to the appropriate role of the CJEU and national courts, as does the long-running discontent in Germany and elsewhere in respect of the *Mangold* doctrine. It cannot be known whether the decision of the Danish Supreme Court (SCDK) in *Ajos* is a one-time, fact-specific occurrence, or whether it reflects the growing nationalist political winds in Europe manifesting in resentment of the CJEU's perceived interference, or at least lack of collaboration, with Member State legal institutions.[355] Pushback against the supremacy of the CJEU has certainly played a role in the Brexit phenomenon, for example, in the fact that Brexit negotiators have insisted that removing Britain from the jurisdiction of the CJEU is imperative.[356] However, some Danish scholars have suggested that the result of the *Ajos* saga will not be reduced confidence in or respect for the CJEU, but instead reduced confidence in the SCDK itself.[357] Indeed, the SCDK's decision is conspicuously out of sync with the more balanced approach of other

349 See Belavusau, U. and Henrard, K. (2018) 'The Impact of the 2000 Equality Directives on the EU Anti-Discrimination Law', in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* Hart Publishing, 19 (citing Suk, J. C. (2007) 'Procedural Path Dependence: Discrimination and the Civil-Criminal Divide' 85 *Wash. U. L. Rev.* 1315, 1315).

350 Judgment of 6 April 2017, *Jyske Finans*, C668/15, ECLI:EU:C:2017:278 [23]-[24].

351 Möschel, M. (2018) 'Eighteen Years of the Race Directive', in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender*, p. 152. Möschel also points to the cases of Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others*, Judgment of the Court (Grand Chamber), 24 April 2012 and Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court (Second Chamber), 12 May 2011.

352 See the discussion above of Atrey's critical views on *Jyske Finans* in particular.

353 See Gomez-Pomar, F. and Lyczkowska, K. (2014) 'Spanish Courts, the Court of Justice of the European Union, and Consumer Law' 4 *InDret*, Vol. 4, available at http://www.indret.com/pdf/1093.pdf; The Diplomat (2019) 'Spain Accounted for 43 % of Mortgage Cases in the EU Court', available at https://thediplomatinspain.com/en/2019/05/spain-accounted-for-43-of-mortgage-cases-in-the-eu-court/. See also Burgorgue-Larsen, L. (2015) 'The Constitutional Dialogue in Europe: A "Political Dialogue"', 21(1) *European Journal of Current Legal Issues* sec. 2.1.

354 See Krommendijk, J. (2018) 'The Preliminary Reference Dance Between the CJEU and the Dutch Courts', (Special Issue) *European Journal of Legal Studies* 102, 115.

355 Cf Madsen, M.R. Olsen, H.P. Šadl, U. (2017) 'Competing Supremacies and Clashing Institutional Rationalities: the Danish Supreme Court's Decision in the *Ajos* Case and the National Limits of Judicial Cooperation', 23(1-2) *European Law Journal* 140, 149, 150.

356 See Armstrong, K.A. (2017) *Brexit Time: Leaving the EU – Why, How and When?*, Cambridge University Press, 113.

357 Neergaard, U. and Sørensen, K.E. (2017) 'Activist Infighting Among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos Case', 36 Yearbook of European Law* 275, 311-313.

countries that have found themselves in disagreement with the CJEU.[358] In general, then, it can be said that the Court's jurisprudence in respect of equality law continues to evolve, and exert a wide-ranging influence on the development of non-discrimination law at national level.

Some commentators have also observed a trend toward the development of the procedural dimension of EU equality law.[359] This 'proceduralisation' is focused on the goal of improving access to judicial remedies in order to facilitate the enforcement of the relevant law, making the procedural dimension central to the project of EU equality policy.[360] In particular, the litigation of EU non-discrimination law is increasingly being shaped by public equality bodies and private NGOs, which is encouraged and to some extent required by the 2000 equality directives. The Racial Equality Directive requires Member States to designate specialised public entities to help secure and promote its provisions, including by assisting individual victims in bringing claims within the judicial system.[361] While this mandatory provision is unique to the Racial Equality Directive, in practice such bodies also cover the grounds protected by the Framework Equality Directive. In addition, both the 2000 directives require states to ensure that private interested entities may assist with legal enforcement by engaging on behalf of or in support of, individual complainants.[362] These entities have played significant and diverse roles in the development of equality law over the past decade and are likely to grow in influence.

For example, *Asociația ACCEPT*, the 2013 case regarding the liability of a football club for the homophobic statements of a shareholder, was launched by an autonomous LGBT rights NGO in Romania. The role of the NGO was of particular importance in the factual scenario at issue because there was not necessarily an identifiable individual victim, given the nature of the challenged act as a public statement of intent to discriminate. Notably, the previous seminal case on discriminatory advertising, *Firma Feryn*, was brought by the Belgian equality body established under Article 13 of the Racial Equality Directive.[363] Belavusau and Henrard describe these types of 'strategic litigation' as having the potential to 'essentially revolutionize future development of anti-discrimination law in Europe'.[364]

A second example is illustrated by the case of *CHEZ*, which was one piece of a sustained effort in Bulgaria to challenge discriminatory practices against persons of Roma origin. Both the Bulgarian national equality body, Komisia za zashtita ot diskriminatsia, and various NGOs were involved in that case, and a previous one challenging the same practice, ultimately resulting in the decision by the CJEU.[365] Equality bodies in other Member States are responsible for the development of the law in this area and the push for preliminary references to the CJEU by facilitating claims of individual victims: the litigation that resulted in the *Achbita* case appearing before the CJEU was also driven by the Belgian equality body, which intervened in the case and influenced the formulation of the question eventually referred to the CJEU.[366] Overall, it seems that equality bodies have played a central role in the enforcement of equality for racial and religious minorities. Again, given the possibility that the small number of references on behalf of these marginalised groups may be attributable to the difficulties (eg lack of knowledge, expense, and

358 Neergaard, U. and Sørensen, K.E. (2017) 'Activist Infighting Among Courts and Breakdown of Mutual Trust? The Danish Supreme Court, the CJEU, and the *Ajos Case', 36 Yearbook of European Law*, citing Craig, P. and De Búrca, G. (2015) *EU Law: Text Cases and Materials*, OUP, 278-309.

359 Belavusau, U. and Henrard, K. (2019) 'A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives', *German Law Journal* 20(5), 614, 628; see also Muir, E. (2018) *EU Equality Law: The First Fundamental Rights Policy of the EU*, OUP, 145.

360 See Muir, E. (2018) *EU Equality Law: The First Fundamental Rights Policy of the EU*, OUP, 162.

361 Racial Equality Directive, Article 13.

362 Framework Equality Directive, Article 9(2); Racial Equality Directive, Article 7(2).

363 Judgment of 10 July 2008, *Feryn,* C-54/07, ECLI:EU:C:2008:397, [15].

364 Belavusau, U. and Henrard, K. (2019) 'A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives', *German Law Journal* 20(5), 629.

365 See Farkas, L. (2017) 'NGO and equality body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector', in E. Muir et al (eds), *How EU Law Shapes Opportunities for Preliminary Reference on Fundamental Rights,* EUI Working Paper Law 2017/17, 36.

366 See Muir, E. and Kolf, S. (2017) 'Belgian equality bodies reaching out to the CJEU: EU procedural law as a catalyst', in E. Muir et al (eds), *How EU Law Shapes Opportunities for Preliminary Reference on Fundamental Rights*, EUI Working Paper Law 2017/17, 29-30.

even fear of retribution) faced by individuals seeking judicial redress, the rise of collective actors could result in further positive developments.

The European Commission has encouraged these types of collective efforts to enforce EU law in addition to the traditional individual claim model.[367] The possibilities for the collective entities to support victims of discrimination could result in more litigation, or more efforts at the national level or further references concerning discrimination against marginalised communities. Equality bodies could also prove particularly useful in conducting the fact-intensive and complex contextual analyses mandated by the CJEU to assess discrimination in a case like *CHEZ*, where an individual claimant may lack the resources to present such an analysis.[368]

Finally, it is noteworthy that the CJEU has yet to clarify several of the substantive provisions of the directives, including the prohibitions on harassment and victimisation. Issues surrounding these concepts will need resolution in the future, particularly given the public attention on sexual harassment worldwide.

Both directives prohibit harassment as a form of discrimination and define it as occurring 'when unwanted conduct related to [a prohibited ground] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment'.[369] The Court has yet to clarify the boundaries of this category of conduct or to distinguish it from direct discrimination. Both directives specifically allow for Member States to define harassment 'in accordance with [their] national law and practices', but judicial clarification of the minimum standard required by EU law is necessary.[370] It is noteworthy that the concept of harassment in some national law foregoes the often-restrictive requirement of the comparator exercise required by direct discrimination. The concept of harassment thus has important potential to expand the types of harm and embedded discrimination that threaten the achievement of equal treatment and will need judicial attention in the future.

Victimisation is addressed in both directives, and has been understood as both a substantive prohibition, like direct and indirect discrimination, and also a key procedural mechanism, in that protection against retaliation is an essential component of individual access to justice.[371] Article 9 of the Racial Equality Directive, for example, provides that 'Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment'. There has been no case law directly addressing the scope and nature of this important provision, leaving its interpretation unresolved.

367 See Muir, E. (2018) *EU Equality Law: The First Fundamental Rights Policy of the EU*, OUP, citing Commission (EU), 'Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' [2013] OJ L 201/60.

368 Xenidis, R. (2018) 'Multiple discrimination in EU anti-discrimination law: towards redressing complex inequality?', p. 59.

369 Racial Equality Directive, Article 2(3); Framework Equality Directive, Article 2(3).

370 See eg Racial Equality Directive, Article 2(3).

371 See Muir, E. (2018) *EU Equality Law: The First Fundamental Rights Policy of the EU*, OUP, 152.

6 Conclusions

The report has demonstrated that the Court has made significant headway in developing the law of the 2000 equality directives since 2012. An ever-growing number of cases have been referred to the CJEU from national courts via the preliminary reference procedure. In response, the Court has continued to deliver significant judgments that have clarified how many of the key provisions of the directives should be interpreted and applied. The field of equality law remains a key example of EU policy that is strongly driven by judicial developments, and the recent case law only confirms that the CJEU remains a significant force in the establishment of equality norms across and within the Member States.

The directives are designed to protect a fundamental right of non-discrimination, as is made clear by the text of their recitals and operative provisions. As a result, while uncertainty exists as to how the case law of the Court will develop over the next few years, its future direction of travel appears to be clear. From its judgment in the *Mangold* case on, the CJEU has interpreted the directives by reference to this objective and has only cemented this approach in recent years. The Court's commitment to the overarching objective of making equal treatment a reality throughout the Member States is likely responsible for the continuities that are obvious in the case law, both over time and across the different grounds. In general, the Court's purposive interpretation has resulted in the CJEU expanding protection against discrimination. However, some recent cases have seen the CJEU adopt a more restrictive interpretation that is arguably inconsistent with this tendency. Given the small number of preliminary references decided by the CJEU and the amount of equality work that necessarily occurs at the national level, the project of equality law harmonisation will require the CJEU to deliver conceptually consistent and persuasive decisions that make clear its standards and general approaches.

The case law of the CJEU has clarified many of these issues relating to the scope of the 2000 equality directives. It has also helped to establish how many of the operative provisions of both directives should be interpreted and applied. The breadth of issues addressed in the past few years is a testament to the density of law contained in the 2000 directives, in both their substantive and procedural dimensions. A further testament to this fact is that many of these provisions are still to be completely fleshed out, in terms of both their general application and their particular application to some of the less 'popular' grounds.

It is overall clear that the case law thus far has had a considerable impact across Europe, albeit mainly in those areas where the Court's case law is most developed, such as on age discrimination. As more cases are referred to the Court and its case law expands in scope, it is likely that the influence of its jurisprudence will continue to grow. However, as the case study examining the *Ajos* case demonstrates, this expansion may lead to resistance on the part of national bodies. This is arguably a near-inevitable problem inherent to the supranational nature of the CJEU's work. More dialogue between the national judiciaries and the European Court could go a long way to ensuring a collaborative co-existence.

While challenges and questions remain, the directives still have much untapped potential to achieve the EU's goal of establishing equal treatment throughout the Member States.

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