Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 25 July 2018 [1]

**Case C-193/17**

**Cresco Investigation GmbH**
**v**
**Markus Achatzi**

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Equal treatment in employment and occupation — National regulation conferring certain rights on a limited group of workers — Comparability — Direct discrimination on grounds of religion — Justification — Positive action — Horizontal application of the Charter of Fundamental Rights of the European Union — Horizontal direct effect of the Charter of Fundamental Rights — Obligations of employers and of national judges in case of incompatibility of national law with Article 21(1) of the Charter of Fundamental Rights and Article 2(2)(a) of Directive 2000/78/EC)

## I. Introduction

1. Under Austrian law, Good Friday is a (paid) public holiday for members of four churches only. If, however, members of those churches work on that day, they are effectively entitled to double pay. Mr Markus Achatzi ('the Applicant') is employed by Cresco Investigation GmbH ('the Defendant'). The Applicant does not belong to any of those four churches. Consequently he did not receive a paid holiday nor was he paid double for working on Good Friday in 2015.

2. The Applicant sued the Defendant for the extra pay he believes he should have received for working on Good Friday, arguing that the national rule discriminates on grounds of religion and belief with regard to working conditions and pay. It is in this context that the Oberster Gerichtshof (Supreme Court, Austria) asks the Court essentially whether, in the light of EU law, a national rule like the one at issue in the main proceedings is discriminatory, and if it is, what would be the consequence of such a finding during the period before the national legislature adopted a new, non-discriminatory legal regime: should all employees benefit from the Good Friday holiday rights and the additional pay (paid for by the employer) or should none of them receive such a benefit?

3. In its questions, the referring court invokes 'Article 21 of the Charter (read) in conjunction with' Directive 2000/78/EC. [2] A certain de facto content and application parallelism of a Charter provision and the relevant piece of secondary legislation giving expression to that Charter provision is certainly nothing new in the case-law of this Court. When dealing with the issue of *abstract* compatibility of a

1 Original language: English.

2 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

provision of national law with the Charter and an EU directive,[3] the question of what exactly is being applied to the case at hand is arguably of secondary importance. However, in the present case, the Court is invited to be specific as to the consequences of any such incompatibility for a specific (horizontal) type of legal relationship, which in turn requires the specificity as to what any such national rule would be incompatible with exactly in such type of relationship.

## II. Legal framework

### A. EU law

#### *1. Charter of Fundamental Rights*

4. Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter') provides that: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

5. Article 52(1) of the Charter states that: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

#### *2. Directive 2000/78*

6. Articles 1, 2 and 7 of Directive 2000/78 provide as follows:

'Article 1

Purpose

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

Article 2

Concept of discrimination

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

2. For the purposes of paragraph 1:

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

3 As regards whether a provision of national law with such and such characteristics, in general and essentially irrespective of the nature of the legal relationship in which it has been applied at national level, is compatible with EU law — recently see, for example, judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566).

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

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

…

Article 7

Positive action

1. 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.

…'

## B. National law

7. Paragraph 7(2) of the Bundesgesetz über die wöchentliche Ruhezeit und die Arbeitsruhe an Feiertagen (Arbeitsruhegesetz), BGBl. N 144/1983, as amended (Law on rest and holidays) of 3 February 1983 lists 13 national public holidays, applicable to all employees. Paragraph 7(3) provides that Good Friday is also a public holiday for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church.

8. Paragraph 9 of the Law on rest and holidays provides in essence that a worker who does not work on a public holiday is still entitled to receive a full salary for that day (Paragraph 9(1)) and if he does work, he will be paid double (Paragraph 9(5)).

## III. Facts, procedure and the questions referred

9. Anyone who works on any of the 13 paid public holidays in Austria receives on top of his normal salary additional holiday pay of the same amount ('the indemnity'), with the practical result that he is paid double for working on those days. However, since Good Friday is a paid public holiday for members of the four churches only, only those members are entitled to a paid public holiday on Good Friday or to receive an indemnity in addition to their normal salary if they work on that day.

10. The Applicant is employed by the Defendant. He does not belong to any of the four churches. Consequently he did not receive a paid public holiday or an indemnity from the Defendant for working on Good Friday, 3 April 2015.

11. By his action, the Applicant is seeking a gross payment of EUR 109.09 plus interest. The statutory rule under which Good Friday is a public holiday solely for members of the four churches coupled with an indemnity in the event they in fact do work on that day gives rise, in his view, to discrimination on the grounds of religion and belief with regard to working conditions and pay.

12. The Defendant disputes that assertion and contends that the action should be dismissed with a corresponding order for costs. It maintains that no discrimination is involved.

13. The first-instance court dismissed the claim on the basis that the Good Friday rule constituted objectively justified differential treatment of situations that were not similar.

14. The appellate court allowed the Applicant's appeal and varied the original judgment in such a way as to grant the Applicant's claim. It based its decision on the assumption that the national rules providing for differences in treatment with respect to Good Friday are in breach of Article 21 of the Charter, which is directly applicable. There was, it found, direct discrimination of the employees in question on grounds of religion, which is not justified. Good Friday, as a public holiday, may therefore not be restricted to specific groups of employees, with the result that the Applicant, who had worked on Good Friday, 3 April 2015, was also entitled to an indemnity.

15. The Oberster Gerichtshof (Supreme Court) must now decide on the appeal on a point of law brought by the Defendant against the decision delivered on appeal and by which the Defendant seeks to restore the judgment of the first-instance court dismissing the action. That court decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is EU law, in particular Article 21 of the Charter of Fundamental Rights, in conjunction with Articles 1 and 2(2)(a) of Directive 2000/78/EC, to be interpreted as precluding, in a dispute between an employee and an employer in the context of a private employment relationship, a national rule under which Good Friday is also a holiday, with an uninterrupted rest period of at least 24 hours, only for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church, and if an employee [belonging to one of those churches] works, despite that day being a holiday, he has, in addition to the entitlement to payment for the work not requiring to be performed as a result of the day being holiday, also an entitlement to payment for the work actually performed, whereas other employees, who are not members of those churches, do not have any such entitlement?

(2) Is EU law, in particular Article 21 of the Charter of Fundamental Rights, in conjunction with Article 2(5) of Directive 2000/78/EC, to be interpreted as meaning that the national legislation referred to in the first question, which — as measured against the total population and the membership, on the part of the majority of the population, of the Roman Catholic Church — grants rights and entitlements to only a relatively small group of members of certain (other) churches, is not affected by that directive because it concerns a measure that in a democratic society is necessary to ensure the protection of the rights and freedoms of others, particularly the right freely to practise a religion?

(3) Is EU law, in particular Article 21 of the Charter of Fundamental Rights, in conjunction with Article 7(1) of Directive 2000/78/EC, to be interpreted as meaning that the national legislation referred to in the first question is a positive and specific measure in favour of the members of the churches mentioned in the first question which is designed to guarantee their full equality in working life, to prevent or offset disadvantages to those members due to religion, if they are thereby granted the same right to practise a religion during working hours on what is an important holiday for that religion, such as otherwise exists for the majority of employees in accordance with a separate provision of national law, because generally no work is performed on the holidays for the religion that is observed by the majority of employees?

If it is found that there is discrimination within the meaning of Article 2(2)(a) of Directive 2000/78/EC:

(4) Is EU law, in particular Article 21 of the Charter of Fundamental Rights, in conjunction with Articles 1, 2(2)(a) and 7(1) of Directive 2000/78/EC, to be interpreted as meaning that, so long as the legislature has not created a non-discriminatory legal situation, a private employer is required to grant the rights and entitlements set out in the first question in respect of Good Friday to all employees, irrespective of their religious affiliation, or must the national provision referred to in the first question be disapplied in its entirety, with the result that the rights and entitlements in respect of Good Friday set out in the first question are not to be granted to any employees?'

16. Written submissions were lodged by the Applicant and Defendant, the Austrian, Italian and Polish Governments and the European Commission. Those interested parties also presented oral argument at the hearing held on 10 April 2018.

## IV. Assessment

### A. Introduction

17. I consider that, the grant of a paid public holiday on Good Friday to members of the four churches only, coupled with an indemnity in case such persons work that day constitutes discrimination on the basis of religion within the meaning of Article 21(1) of the Charter, and direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 (question 1 posed by the referring court, addressed in Section C below). There does not appear to be any valid justification for that discrimination (question 2, Section D). Nor does it seem possible to qualify that treatment as 'positive action' (question 3, Section E).

18. In my view, the more complex issue in this case is what are the legal effects of that (abstract) finding of discrimination, made on the basis of a directive (which has no horizontal direct effect between private individuals) and a provision of the Charter, in a dispute between private individuals. The principle of primacy requires that the national rule be set aside. However, can it also be inferred, either from that principle or from the potentially horizontally directly effective Article 21(1) of the Charter that a (private law) employer is obliged, as a matter of EU law, to pay the indemnity to everyone who works on Good Friday, irrespective of their religious convictions, in addition to their normal salary? In my view, it cannot. EU law nonetheless requires that the employee has an effective remedy, which may include the possibility of a damages action against the Member State (question 4, Section F below).

19. Before turning to the referring court's questions in the order indicated, I shall address the jurisdictional issue raised by the Italian and Polish Governments in relation to Article 17 TFEU.

### B. Jurisdiction of the Court

20. In its written and oral pleadings, the Polish Government argued that the rules on the Good Friday public holiday in this case are rules governing relations between the four churches and the Austrian State. As such they fall within the notion of 'the status under national law of churches and religious associations or communities' referred to in Article 17(1) TFEU. The Court does not therefore have jurisdiction to answer the questions put by the referring court. At the oral hearing, the Italian Government presented a similar line of argument in relation to Article 17 TFEU. It concluded that the Court should reply to the questions put to it by confirming the exclusive competence of Member States to decide on the grant of a public holiday or indemnity to particular religious groups.

21. I consider that those arguments must be rejected.

22. In its judgment in *Egenberger*, the Court held that 'Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities'.[4] In his Opinion in the same case, Advocate General Tanchev further added that the requirement of neutrality does not imply that relations between church and State are completely shielded from any review of compliance with EU fundamental rights (or EU law more generally) 'whatever the circumstances'.[5] In the judgment in *Egenberger*, the Court indeed explicitly confirmed that '[Article 17 TFEU] is not such as to exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78 from effective judicial review'.[6]

23. More generally, it has been suggested by the Advocates General in the judgments in *Achbita* and *Egenberger* that Article 17 TFEU 'complements and gives specific effect to Article 4(2) TEU'. The latter provision 'does not in itself support the inference that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78'.[7]

24. In a similar vein, in the judgment in *Concregación de Escuelas Pías de Betania*,[8] Article 17(1) TFEU did not appear in any way to prevent the application of EU State aid rules to the income of churches. The issue of Article 17(1) TFEU was not even discussed in the judgment,[9] even if the substance of the case could be construed as concerning financial relations between church and State or as having considerable implications for the financial status of churches.

25. The picture emerging from that case-law appears to be rather clear: Article 17(1) TFEU does confirm the neutrality of EU law as regards the status of churches and requires it not to prejudice that status. To my understanding, the European Union declares itself entirely neutral, indeed agnostic, with regard to the Member State church arrangements in the narrower sense: for example whether a Member State defines itself as religiously strictly neutral, or whether a Member State in fact has a State church. Such a declaration of neutrality is an important *statement of principle*. Beyond that narrower understanding, it may also serve as an *interpretative tool*, transversally applicable, as is in fact the case with regard to other values and interests captured in Title II of Part One TFEU (entitled 'Provisions having general application') in other areas of EU law: all other factors being equal, an interpretation of EU law that maximises the values or interests reflected in those provisions is to be favoured.

26. However, beyond those two dimensions, Article 17(1) TFEU cannot, in my view, be understood as having the consequence that *any* national rules relating to the State's dealings with, or the status of, churches simply fall outside the scope of EU law. Similar to the fact that tax exemptions do not fall outside of EU law rules on State aid by virtue of the sole fact that they concern a church or wine does not fall outside of the Treaty rules on free movement of goods just because it is sacramental wine to be used for liturgical purposes. Simply put, 'respect for the status of' cannot be read as a 'block exemption' for any matter touching upon a church or a religious community.

27. I therefore fail to see how a rule imposing upon all employers (whatever their faith or absence thereof) an obligation to grant a paid holiday to employees who are members of the four churches (or an indemnity to those members who work on that day) would by virtue of Article 17(1) TFEU be completely shielded from review in the light of the Charter or Directive 2000/78.

4 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257, paragraph 58).

5 Opinion of Advocate General Tanchev in *Egenberger* (C-414/16, EU:C:2017:851, point 93, see also point 88).

6 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257, paragraph 58).

7 Opinion of Advocate General Kokott in *G4S Secure Solutions* (C-157/15, EU:C:2016:382, point 32); Opinion of Advocate General Tanchev in *Egenberger* (C-414/16, EU:C:2017:851, point 95).

8 Judgment of 27 June 2017 (C-74/16, EU:C:2017:496).

9 However, see Opinion of Advocate General Kokott in that case (C-74/16, EU:C:2017:135, points 29 to 33).

28. That understanding of Article 17(1) TFEU is further supported by the fact that Article 17(2) TFEU extends an analogous guarantee of neutrality in respect of the status of philosophical and non-confessional organisations. Since the European Union, in Article 17(2) TFEU, commits itself to 'equal respect' for the status of such organisations, any 'exemption' hypothetically granted to churches and religious associations or communities would immediately become applicable to any philosophical organisations (largely undefined and left to the law of the Member States). Article 17(2) thus further underlines the fact that the intention clearly could not have been to remove any dealings, be it direct or indirect, between the Member States and such organisations from the scope of EU law.

29. In the light of the foregoing, I propose that the Court reject the arguments of the Italian and Polish Governments that the Court is either not competent to reply to the questions referred or that the subject matter falls outside the European Union's jurisdiction.

## C. Question 1

30. By its first question the referring court asks essentially whether Article 21(1) of the Charter and Article 2(2)(a) of Directive 2000/78 preclude a rule of national law granting a paid holiday on Good Friday to members of the four churches only and an indemnity in the event that a member works on that day.

31. I consider that such a rule constitutes discrimination within the meaning of those provisions.

32. In general, direct discrimination exists where a person is (i) treated in a less favourable manner, (ii) than another person in a comparable situation, (iii) on the basis of a protected ground (in this case religion), (iv) without any possible objective justification for such a difference in treatment.[10]

33. The issue of potential justifications under (iv) is the subject of question 2 of the referring court (Section D below).

34. As regards (i) and (iii), it is, in my view, clear that in this case there is less favourable treatment on the basis of religion. That less favourable treatment consists in employees, who are not members of the four churches, receiving normal or 'single' pay for working on Good Friday, whereas members of the four churches effectively receive double pay. Although I understand it is not claimed by the Applicant in this case, the denial of a paid holiday on Good Friday to anyone who is not a member of the four churches is also less favourable treatment on the basis of religion.[11]

35. The last element of the discrimination analysis, that is comparability, is the more complex question in this case. It requires a twofold clarification. First, who is being compared: individual persons or groups of persons (2)? Second, what then are the relevant characteristics of comparison? At what level of abstraction should the comparison be carried out (3)?

36. Before addressing those points in depth, some preliminary clarifications concerning the parameters of the analysis are called for (1).

10 Recently generally, see for example, judgments of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraphs 29 to 31), and of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 31), with naturally the difference that, in the context of the Charter, any such justification must comply with Article 52(1) thereof, whereas in the context of Directive 2000/78, it must comply with Article 2(5).

11 I discuss the distinction between these two benefits further below at points 40 to 44 and points 82 to 86.

### *1. The parameters of the analysis: type of review, applicable law, and the exact nature of the benefit concerned*

37. First, questions 1 and 4 of the referring court have two layers. The first layer concerns the *abstract* assessment of compatibility, whereby the referring court requests a review of compatibility of a rule of national law with Article 21(1) of the Charter in combination with Article 2(2)(a) of Directive 2000/78. The second layer, alluded to by the referring court in its first question and then fully articulated in the fourth question, is the fact that the main case involves litigation between private parties. What then would be the *actual* consequence in this type of relationship of any potential finding that Member State law, as described in the order for reference, is incompatible with EU law?

38. In this Opinion, I treat these two layers separately. The fact that they are indeed intertwined was the cause for quite some confusion in the present proceedings, both at the level of remedies and in the discussion of comparability. Therefore, my suggested answer to question 1 of the referring court, contained in this section, is a general one, concerned only with an (abstract) review of compatibility of rules. The consequences of any such potential finding with regard to the specific, individual case is discussed in question 4 (Section F).

39. Second, connected to that point is the question of applicable law. Where it has been asked whether a provision of national law is precluded by Article 21(1) of the Charter and Article 2(2)(a) of Directive 2000/78, the Court has in the past assessed substantive compatibility with that provision of the directive and effectively extended the same analysis to Article 21(1) of the Charter.[12] Indeed, for the question of abstract review of compatibility, both sources of EU law are clearly applicable.[13] For these reasons, both will be taken into account in parallel in answering questions 1 to 3 of the referring court. By contrast, the situation becomes somewhat more complex in the context of the answer to question 4.

40. Third, the discrimination analysis must be conducted 'in the light of the benefit concerned'.[14] In the present case, different 'benefits' are granted to members of the four churches (and withheld from those not belonging to that group), namely (a) a paid holiday and (b) an indemnity in the event a member works on that day.

41. I consider that, in order to decide this case, it is only necessary to specifically address here the alleged discriminatory nature of the indemnity. Indeed, it follows from the description of the facts in the request for a preliminary ruling that in the main proceedings before national courts, the Applicant *does not claim a paid holiday on Good Friday*. Rather he claims *the indemnity* for having worked on that day.

42. Therefore, the less favourable treatment[15] complained of and in relation to which the discrimination analysis must be conducted is, specifically, the non-payment of the indemnity. It is also in this sense that I understand the referring court's first question, which refers specifically to Paragraph 7(3) and Paragraph 9(5) of the Law on rest and holidays together (providing for double pay for those employees who work on a public holiday), and not to Paragraph 7(3) and Paragraph 9(1) of the Law on rest and holidays (providing for the right to be paid even if not working on a public holiday).

12 Recently, for example, judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraphs 16 to 18 and 47).

13 In greater detail see my Opinion in *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:235, points 20 to 36).

14 Judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 25). See also judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 32).

15 In the sense of step (i) of the test of discrimination outlined above in point 32.

43. I completely understand that all of these provisions are connected in national law. Once a day has been declared a public holiday under national law, the entire regime for public holidays becomes applicable, including both the right to be paid for that day even if not working, and the right to double pay if working on that day (the indemnity). However, that is precisely part of the problem: if certain benefits or entitlements have been bundled together by the operation of national law, *with the same justification*, it becomes rather difficult to unbundle them later and to disregard the full consequences that national law attached to their operation.

44. For the sake of completeness, I will nonetheless return to the issue of the paid holiday at the end of this section. [16]

### *2. Whom to compare: individuals or groups?*

45. The Applicant, the Defendant, the Austrian Government and the Commission all effectively proposed to compare the same groups, namely (i) members of the four churches, and (ii) the Applicant *as someone who is not a member of any of the four churches*.

46. Beyond that basic agreement, however, differences started emerging. In particular, divergent views were voiced as to whether it should be the individual applicant qua individual or the applicant qua the representative of a group that ought to be compared.

47. In its written submissions, the Commission first compares the Applicant to the members of the four churches. It goes on to compare hypothetical groups of other workers in Austria to members of the four churches, stating that it is for the national court to determine whether the national legislation leads to discrimination in those cases. Other parties also extend the comparison beyond the claimant. For example, the Defendant compares members of the four churches to the 'majority' of employees who are able to practice their religion (if they have one) within the public holidays already granted.

48. The Commission further considered that the grant of a paid holiday to members of the four churches *did not* involve discrimination against *the Applicant*, whom the Commission assumed was an atheist. Other than a statement to the effect that he was not a member of any of the four churches, the Applicant's beliefs were in fact never explicitly confirmed before this Court.

49. The Commission's reasoning highlights an interesting point. The Commission strays from a review of compatibility with EU law of national measures such as those described in the order for reference and looks at the specific case of the Applicant. In doing so, it helps to underline the point suggested previously: [17] the issue of the existence of a discriminatory measure precluded by EU law (which is the subject of the referring court's first question and subject to a general, abstract review of compatibility), is an issue best kept separate from the consequences of any such legislative discrimination in the individual case (which is the subject of the fourth question). [18]

50. That logic finds systemic support in cases in which this Court has been asked to assess instances of legislative discrimination. Case-law distinguishes between 'discrimination arising directly from legislative provisions or collective labour agreements' and discrimination by an employer 'in the same establishment'. In other words, discrimination originating, on the one hand, with the *legislature* and, on the other, with the *employer*. [19]

16 Below in points 82 to 86.

17 Above, points 37 and 38 of this Opinion.

18 See, in that regard, Feryn where the source of the discrimination was an employer's hiring policy against immigrants, and it was considered *unnecessary to identify a victim* in order to establish the existence of discrimination (judgment of 10 July 2008 (C-54/07, EU:C:2008:397, paragraph 40)).

19 See, for example, judgments of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 40), and of 17 September 2002, *Lawrence and Others* (C-320/00, EU:C:2002:498, paragraph 17).

51. In the present case, the alleged discrimination originates from *legislative provisions* and the Court is asked to assess the compatibility of such provisions with EU law. In that type of situation the comparison conducted by the Court effectively uses, as a starting point for its analysis, groups defined in legislation. The fact that the individual applicant is a member of such a group is of course relevant for the identification of one of the groups that will be compared. The individual situation of such an applicant may also illustrate the effective operation of the general rules assessed in the individual cases. However, the fact remains that what will be compared in any such abstract review in a case of legislative discrimination and what forms the framework for comparability analysis are groups of persons, not individuals.

52. That was, for example, the case in the judgments in *Mangold* and *Kücükdeveci* on age discrimination.[20] The claimants in those cases alleged that they had been discriminated against because of their age. National labour law allowed *people in their age groups* to receive less protection than that afforded to *other age groups*. Their employers had applied those lower standards to the claimants. The Court concluded that such *national legislation* was discriminatory and precluded by EU law. In doing so, it did not compare the situation of each of the claimants with that of their co-workers. Rather, the comparison was in practice made between the treatment of the less favoured age group and the more favoured age groups (in other words, groups abstractly defined in the impugned legislation).[21]

53. The Court's approach in such cases highlights the fact that the legal analysis is clearly in the nature of an abstract, general *review of compatibility* of national legislation with EU law, rather than an inquiry into discrimination specifically by the individual defendant employer between the claimant and his co-workers.[22]

54. In my view, it is important to keep those points in mind in this case. That is because, in addition to the issue of compatibility, the referring court specifically asks in its fourth question about how to redress the discrimination in specific and practical terms. That question will bring to centre stage the issue of the 'source' of the discrimination as well as the body which 'is responsible for the inequality and which could restore equal treatment'.[23]

### *3. Which groups: characteristics taken as a basis for the comparison*

55. As noted, most of the interested parties that made submissions queried whether the Applicant was in a similar situation to members of the four churches. However, that comparison was conducted with reference to different characteristics, in relation to a different point of comparison. That differentiation in turn generates a different set of comparable groups.

20 Judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709), and of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21).

21 In both the *Mangold* and *Kücükdeveci* cases (and in the present case), the claimant was a member of the less favoured group. For a similar approach, but with less certainty as to whether the measure at issue is actually (only) in favour, or (only) to the detriment, of a given group, see the judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566).

22 That contrasts with the approach in cases where the discrimination originates with the employer and in many cases there is a necessity to identify specific groups of co-workers receiving favourable treatment for the purposes of making any comparison at all. See, in that sense, judgments of 17 September 2002, *Lawrence and Others* (C-320/00, EU:C:2002:498); and of 13 January 2004, *Allonby* (C-256/01, EU:C:2004:18).

23 Judgments of 17 September 2002, *Lawrence and Others* (C-320/00, EU:C:2002:498, paragraphs 17 and 18), and of 13 January 2004, *Allonby* (C-256/01, EU:C:2004:18, paragraphs 45 and 46). That distinction has a clear impact on the issue of remedies available, discussed in detail below in points 172 to 196.

56. Broadly, the parties proposed three alternatives, depending on the chosen level of abstraction:

(i) employees for whom Good Friday is the most important religious festival of the year (the 'narrow comparator', essentially the position of the Austrian Government and the Defendant). Applying that narrow comparator, and on the basis of the Applicant's submissions at the hearing, he would not be in a similar situation to the members of the four churches. That would preclude any comparability and mean that there is no discrimination;

(ii) employees for whom there is a 'particularly special' (religious) festival not coinciding with any other public holiday already recognised under national law (the 'intermediate comparator', essentially the position of the Commission). On the basis of that comparator, it is unclear whether the Applicant would be in a similar situation to the members of the four churches, since his religious beliefs are not known. That would ultimately be a question of fact for the national court;

(iii) employees working on Good Friday who are being distinguished from other employees on the basis of religion in relation to remuneration for that day (the 'broad comparator', essentially the position of the Applicant in this case). On the basis of that comparator, the Applicant would be in a similar situation to the members of the four churches working on Good Friday. That would in principle imply that there is discrimination.

57. Before discussing the appropriate comparator in the present case, a broader point ought to be addressed. In its written questions to the parties in this case, the Court asked whether it was possible as a matter of principle to deny comparability explicitly on the basis of a suspect ground specifically listed in Article 21(1) of the Charter and Article 1 of Directive 2000/78 (in this case, religion).

58. In cases involving difference of treatment directly linked to the suspect ground itself, the Court consistently assumes discrimination to be present.[24] If they are considered at all, the Court generally gives short shrift to arguments as to the absence of comparability in such contexts.[25]

59. However, I do not consider that it is possible to confirm in the abstract that a difference in treatment based on a suspect ground *must in all cases* be equated with direct discrimination.[26] The possibility that a suspect ground may itself serve to deny comparability cannot be completely excluded.[27]

60. I suspect that, as in many other cases, the devil will be in the level of detail at which the ground for differentiation will be formulated. The suspect ground is always abstract (for example, no discrimination on the basis of religion). However, the rules establishing a comparability framework in individual cases are inevitably more detailed, often taking on board other interests and considerations (such as rules on public holidays and remuneration). Thus, in practical terms, it will be rather rare that both the suspect ground as well as the comparability framework will be formulated at exactly the same level of abstraction and with exactly the same scope.

24 Judgments of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383, paragraphs 12 and 17); of 8 November 1990, *Handels- og Kontorfunktionærernes Forbund* (C-179/88, EU:C:1990:384, paragraph 13); of 27 February 2003, *Busch* (C-320/01, EU:C:2003:114, paragraph 39); and of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 72). That is clearly the case where the different treatment is explicitly based on the suspect ground (for example, judgment of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraphs 32 to 34)). However, a mere *reference* by a measure to a suspect ground is not in itself sufficient to conclude that there is direct discrimination (see judgments of 14 March 2017, *Bougnaoui and ADDH* (C-188/15, EU:C:2017:204, paragraph 32), and of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203, paragraph 30)). The Court has taken a similar approach where the suspect ground constitutes the motivation behind the difference in treatment (see, for example, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 91)) or in practice only affects a group that can be identified on the suspect ground (for example judgment of 20 September 2007, *Kiiski* (C-116/06, EU:C:2007:536, paragraph 55)).

25 See, for example, judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraphs 25 to 28). However, see as an example where comparability was denied, judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643).

26 See, for a different viewpoint, Opinion of Advocate General Sharpston in *Bressol and Others* (C-73/08, EU:C:2009:396, point 55).

27 Judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 40).

61. That said, the case-law cited above clearly confirms that where the suspect ground is invoked in such a way, the metaphorical red light starts flashing. A conclusion of absence of comparability is exceptional. Unless there is a clear and compelling case that the groups in question are so fundamentally different, in a way which obviates any need for discussion of the necessity or proportionality of the measure, differences in treatment must be dealt with at the level of 'justifications', not '(lack of) comparability'.

62. That overlap between the issue of comparability and the issue of justification, making the current framework for discrimination analysis internally transitive, is also evident in the present case. The discrimination analysis is formally split into different stages: an inquiry into the existence of comparable situations; difference in treatment of those groups; and if there is found to be discrimination (difference in treatment of comparable situations), an inquiry into justifications. However, all those stages involve similar questions about the extent and relevance of differences in situation and treatment. If the differences in situation are deemed significant enough (keeping an eye on the nature and extent of the difference in treatment in practice), there will be no comparability. If, on the other hand, the differences in situation are not deemed significant enough (a conclusion which is easier to reach if the difference in treatment at first sight seems a bit 'over the top'), then there is comparability and different treatment and the analysis shifts to justifications. In the context of the assessment of justifications, the question is essentially whether, despite being in legally comparable situations, differences in treatment adequately and fairly reflect factual differences in those situations.

63. Bearing that in mind, I turn now to the appropriate comparator in this case.

### *4. Appropriate comparator in the present case*

64. According to established case-law, the 'requirement as to the comparable nature of the situations for the purposes of determining whether there is an infringement of the principle of equal treatment must be assessed in the light of all the factors characterising those situations'.[28] Furthermore, the assessment of that comparability must be carried out having regard to the aim pursued by the national provisions at issue.[29]

65. In the present case, the Austrian Government has stated that Good Friday is the most important religious day for members of the four churches. The *aim* of the national rules at issue is to allow such persons to participate in religious festivals on that day, thus respecting their religious freedom.

66. The case-law also requires the analysis of comparability to be carried out not in a global and abstract manner, but in a specific manner '*in the light of the benefit concerned*'.[30]

67. As already stated,[31] the benefit concerned in the present case is not the holiday on Good Friday, but the indemnity. In the light of that benefit, I consider the broad comparator to be the correct one.

68. As a result of the indemnity benefit, a select group of individuals working on Good Friday is paid double specifically because of their religion. Other people working on that day are paid the normal wage despite the fact that they may be doing exactly the same job. There is no relevant distinguishing factor between those groups in the light of that benefit. Levels of remuneration and faith are, in principle, unconnected.

28 Judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 31).

29 Judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 33).

30 Judgments of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 42); of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 42); of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 33); and of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 32).

31 Above, points 40 to 43.

69. That conclusion is in my view unaffected by the stated aim of the national legislation to protect freedom of religion and worship. I simply do not see how paying a specific, religiously defined group of employees double on a given day has anything to do with that aim. Indeed, it might be argued — admittedly not without a pinch of cynicism — that the right to double pay for members of the four churches who work on Good Friday constitutes an economic incentive *not* to use that day for worship.

70. It might be answered that members of the four churches who work on Good Friday are, in fact, in a different situation because they are particularly affected by working on that day. In that regard, I understand that there are some specific sectors where employers can request even members of the four churches to work on Good Friday. However, as noted above, the relevant question here according to the Court's case-law is whether the situations are comparable having regard to *the aim* of the national law (which, I understand is protecting freedom of religion, not compensation for perceived failure to do so) *and the specific benefits*. Moreover, I also recall that Paragraph 9(5) of the Law on rest and holidays provides for an indemnity for those working on public holidays, *irrespective of whether the public holiday is granted for religious reasons*.

71. For the above reasons, I consider that, in the light of the indemnity benefit and having regard to the aim of the relevant provisions of national law, all employees working on Good Friday who are being distinguished on the basis of religion in relation to remuneration for that day are comparable.

72. I wish to add some further remarks on the issue of comparability.

73. First, to be clear, I obviously do not question the particular importance of Good Friday for the members of the four churches. In that specific element, they can clearly be distinguished from individuals for whom Good Friday has no such significance. However, in my view, that characteristic holds different relevance for different types of measures: granting time off on that day; granting the day off, but deducting it from annual leave; granting a paid day off; and paying someone extra to work on that day. In the present case, the benefit at issue is the indemnity benefit. In the light of that benefit, members of the four churches working on Good Friday might not be in an *identical* situation to other employees, but the relevance of their religion is certainly not such as to render their situations incomparable. [32]

74. Second, the assessment of comparability in EU law takes as its point of departure the aims of, and the categories established in, national law. However, those aims and categories cannot in themselves be decisive and controlling. As I have argued elsewhere, [33] if it were otherwise and the issue of comparability were intellectually predetermined by the categories established by the national legislation, then the national legislation would itself define the set of possible comparisons by its scope of application. Such an assessment is bound to become circular, with no review in fact possible.

75. In the present case, the weight in the comparability analysis of the aims and categories established in national law is, in my view, greatly diminished in particular by the dissonance between the stated aim of protecting the right to worship on Good Friday and the increased economic reward for working on that day.

32 Judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 25).

33 See my Opinion in *MB* (C-451/16, EU:C:2017:937, point 47).

76. Third, the national legislation in this case is arguably specifically tailored. It sets aims and defines categories which single out for particular treatment individuals belonging to specific (and, within the total Austrian population apparently rather small) [34] Christian groups. That in itself is cause for caution. However, if it were to be assumed that those very particular characteristics are indeed of such relevance and significance that they render the situations of the members of the four churches incomparable, it would imply that members of other religious groups are also likely to have relevant characteristics distinguishing them from all others.

77. Discrimination consists not only in treating the same situations differently, but also treating objectively different situations in the same way. If members of the four churches are deemed to have relevant distinguishing characteristics, consideration must, in principle, then be given individually to each religion to determine how members of that religion should be treated differently in terms of additional (paid) holidays and indemnities. [35] Yet that is simply not the approach taken by the Austrian State. It was confirmed in the written and oral pleadings of the Austrian Government that there is a collective agreement granting a holiday to members of the Jewish faith on Yom Kippur, which is, apparently, applicable only to some sectors of the national economy. In any case, that is the only other religion singled out for such treatment. [36]

78. The latter reason is ultimately also another argument as to why the 'narrow comparator', as suggested by the Austrian Government and the Defendant, cannot be maintained. Even accepting the fact that only the members of the four churches have an objective need to worship on Good Friday, which makes it impossible to compare them with any other religious groups (because none of them would presumably have the same need to worship on that specific day), and disregarding the fact that the indemnity discourages rather than encourages that observance, the issue of *selectivity* of the measure clearly emerges, pushing the issue of discrimination up a level. What about other religious groups or communities that also have high religious festivals not reflected in the list of the extant public holidays captured in Paragraph 7(1) of the Law on rest and holidays?

79. Following that (in)comparability logic to its full implications, none of those groups would be comparable to any of the others, because they have an objective need to celebrate different religious festivals. Would that also imply that the national legislature can provide public holidays (presumably also of a different length?) only for some, while withholding them from others, potentially coupled with different levels of pay?

80. For all those reasons, my conclusion is that the combined application of provisions such as Paragraph 7(3) and Paragraph 9(5) of the Law on rest and holidays results in the Applicant being treated less favourably than members of the four churches who receive double pay when they work on Good Friday. The underlying difference in treatment is directly linked to religion. [37]

34 It was explained in the written and oral pleadings of the Austrian Government that historically the members of the four churches were a minority in Austria which, unlike the Catholic majority, did not have a public holiday on their most important religious day. At the time Paragraph 7(3) was inserted into the law, it may have been that the members of the four churches constituted the majority of the non-Catholic population. However, as confirmed in the request for a preliminary ruling, they do not represent the entire non-Catholic population in Austria, which includes other faiths.

35 See, for an example of treating situations in the same way that can nonetheless be differentiated for religious reasons, judgment of the European Court of Human Rights (Grand Chamber) of 6 April 2000, *Thlimmenos v. Greece* (CE:ECHR:2000:0406JUD003436997).

36 See, for example, judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 38). In that case, the Court considered the comparability of 'young people' attending university or school and other workers. The Court held that the groups were not comparable. In doing so it had regard to the aims of the national legislation, but clearly kept an eye on the coherency of the argument and the treatment of other groups.

37 See, in that sense, Opinion of Advocate General Kokott in *G4S Secure Solutions* (C-157/15, EU:C:2016:382, point 43).

81. It is, in my view, irrelevant that the wording of Paragraph 9(5) of the Law on rest and holidays is in fact apparently neutral, since it follows clearly from the request for a preliminary ruling that the right to an indemnity under that provision is triggered by Paragraph 7(3) thereof. That latter provision is not neutral, but explicitly draws distinctions based on religion. The resulting difference in treatment constitutes discrimination within the meaning of Article 21(1) of the Charter and direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78.

### *5. The paid holiday benefit*

82. The above analysis focuses on the issue of discrimination in the light of the indemnity benefit. In the previous section of this Opinion, I sought to explain why this benefit, which is ultimately what is at issue in the main proceedings, should be taken into account for the purpose of comparability. For the sake of completeness, I will briefly address the paid holiday benefit and how the potential focus on that benefit would alter the comparability framework.

83. I already noted that the importance of Good Friday to members of the four churches carried different weight in the context of the comparability analysis if applied to different benefits.[38] Granting (unpaid) time off on that day is clearly more consistent with the stated aim of protecting freedom of religion than the indemnity. The requirement to *remunerate* employees who are absent on Good Friday for the purposes of worship moves somewhat further from the precise aim expressed by the Austrian Government, but arguably remains much more closely connected to that original aim than the indemnity.[39]

84. Those considerations lead me to conclude that if it concerned only the paid holiday benefit, there are solid justifications for having recourse to the intermediate comparator, as effectively advocated by the Commission.

85. However, the fact of the matter remains that, again, what is asked by the Applicant in the main proceedings is not to have Good Friday as a paid holiday. Nor is it to have any other special day recognised as falling within the same regime, thus accommodating his specific and different religious beliefs. What is being requested is the indemnity for working on Good Friday, thereby removing the religiously based discrimination in remuneration.

86. Thus, while remaining fully aware of the overall purpose of the measure, as well as the fact that the paid holiday and indemnity are essentially two sides of the same coin, the intermediate comparator, as suggested by the Commission,[40] cannot be determinant for the purposes of the present case. Furthermore, for the same reasons set out above with regard to the indemnity,[41] I consider that recourse to the narrow comparator as advocated by the Austrian Government and the Defendant is in any event also excluded as regards the paid holiday benefit.

38 Above, points 40 to 43 and 73.

39 Specifically for those employees for whom taking an additional day of unpaid leave is financially difficult.

40 Thus not even entering into the issues of interpretation of the intermediate comparator that would need to be addressed, and which are certainly not straightforward: what qualifies as a 'special' day? Is there a legal threshold of spiritual or religious importance? Which religions should qualify and indeed is the point transposable to other belief systems having multiple days of great importance? What of, for example, atheists that also have days of great importance to them? Should Catholics be denied an extra day because for historic reasons a number of their special days are already covered by the other 13 public holidays? Furthermore, in the oral hearing, the sensitivity of being required to reveal details of one's (religious) beliefs to an employer — a logical consequence of applying the intermediate comparator — were also discussed.

41 Above, points 76 to 79.

### *6. Conclusion on the first question*

87. In the light of the foregoing, I propose that the Court answer the referring court's first question as follows:

Article 21(1) of the Charter, in conjunction with Article 1 and Article 2(2)(a) of Directive 2000/78, are to be interpreted as precluding a national rule under which Good Friday is a holiday, with an uninterrupted rest period of at least 24 hours, only for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church, and if an employee belonging to one of those churches works, despite that day being a holiday, he also has, in addition to the entitlement to payment for the work not requiring to be performed as a result of the day being holiday, an entitlement to payment for the work actually performed, whereas other employees, who are not members of those churches, do not have any such entitlement.

## D. Question 2

88. By its second question, the referring court asks essentially whether measures in favour of the members of the four churches, to the extent they are considered discriminatory, can be justified under Article 2(5) of Directive 2000/78.

89. In my view they cannot.

90. By way of preliminary remark, to the extent that under question 1 it is concluded that the measures at issue are precluded by Article 21(1) of the Charter in combination with Article 2(2)(a) of Directive 2000/78, any justification must be assessed under Article 52(1) of the Charter and Article 2(5) of the directive respectively. Apart from the formal element that a provision of a directive cannot provide for derogation from a Charter provision, the fact remains that both of these provisions are worded in slightly different terms.

91. However, for the purposes of the present case, the substantive analysis under both provisions is similar. Under both provisions, the justification invoked is the 'protection of the rights and freedoms of others'. Moreover, as exceptions to the prohibition on discrimination, both provisions must be interpreted restrictively [42] and are subject to a test of proportionality. [43]

92. There are three reasons in particular which lead me to conclude that the grant of the indemnity benefit *cannot* be justified under either Article 52(1) of the Charter or Article 2(5) of the directive.

93. First, it is not immediately obvious that the 'protection of the rights and freedoms of others' covers the offering of an indemnity in case of restrictions on those freedoms. That appears to me to constitute not protection but compensation for the failure to protect.

94. Nonetheless, to the extent that it could be covered in principle, the provisions specifically refer to the 'protection of the rights and freedoms of *others*'. In that regard, Article 2(5) was apparently inserted into the directive at the 11th hour at the insistence of the United Kingdom, [44] and evidence suggests that the provision was intended to protect the *general public* from the nefarious behaviour of certain groups. [45]

42 See judgments of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 55 and 56), and of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 46).

43 See wording of Article 21(1) of the Charter and recital 23 of the directive. See also judgment of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraph 44).

44 See, for example, Ellis, E., and Watson, P., *EU Anti-Discrimination Law*, 2nd ed., Oxford EU Law Library, 2012, p. 403.

45 Opinion of Advocate General Sharpston in *Bougnaoui and ADDH* (C-188/15, EU:C:2016:553, footnote 99).

95. My understanding of such a provision follows similar lines: it allows derogation in the name of rights and freedoms of *others*, understood in a horizontal and transversal way, that is, the rights and freedoms of the rest of society at large. That would follow the logical structure of derogation: a burden or disadvantage imposed on a specific group might be legitimately borne by that group if it is necessary and proportionate to the overall interest of the general public. At that stage, a certain balancing of interests between the specific (disadvantage) and the general (interest) can take place.

96. Embracing the logic that 'the others' in 'protection of the rights and freedoms of *others*' are actually the members of the group to which the legislation in question awards some advantages would turn that logic on its head. The entire argument would become circular and any specific regime justified by the mere fact of its existence.

97. Second, the *selective* nature of Paragraph 7(3) and Paragraph 9(5) of the Law on rest and holidays is in any event problematic from the point of view of proportionality, in particular its first dimension, appropriateness. Although the stated aim of the measures is the protection of religious freedom, they apply only to particular groups. There is no mention of other minorities. I recall that in the context of the assessment of proportionality of a discriminatory national measure the Court has regard to consistency of the measure with regard to the stated aim. Thus, it has held 'that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it *in a consistent and systematic manner*, and that exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law'.[46] Whilst it is correct that the relevant provisions of national law in this case do not contain exceptions which exclude certain groups, the practical effect of a very narrow drawing of the scope of the right is the same. It excludes all but the members of the four churches.

98. That problem of selectivity is not cured by the grant of time off for religious reasons by virtue of other rules. In that regard, it is correct that in Austria there is, for example, a collective agreement granting a holiday on Yom Kippur to members of the Jewish faith, and also a duty of solicitude of employers vis-à-vis their employees.[47]

99. However, as regards the collective agreement, it was confirmed in the Austrian Government's written replies to the Court's questions that it does not apply to all sectors, and again only applies to members of a specific religious group. As regards the duty of solicitude, in my view the right of an employee to proactively request some hours off for the purposes of religious worship simply cannot be compared with a right to a paid public holiday written into national legislation or a collective agreement. As a more general point, even where time off for purposes of worship can be obtained upon request and subject to agreement by the employer for members of other faiths, there is no general automatic right to a financial indemnity where that time off is not actually taken.

100. Third, there is no obvious connection between the protection of freedom of religion and the right to an indemnity if one works on Good Friday. For the same reasons, I consider that the grant of an indemnity for members of the four churches who work on Good Friday, even if applied in such a selective way, is disproportionate in the sense that it is *inappropriate* to achieve the ends of protection of religious freedom under Article 52(1) of the Charter and Article 2(5) of Directive 2000/78. Again, it is difficult to see how being paid double one's wages for *not worshipping* on Good Friday is appropriate for achieving the aim of protecting the (even selectively awarded) freedom of religion and worship.

101. Finally, I note that, whilst the above considerations focus on the indemnity, the reasoning in points 97 and 98 concerning the selectivity of the measure in the light of the *paid holiday* benefit also applies and precludes justification of the discriminatory nature of that benefit.

46 Judgment of 5 July 2017, *Fries* (C-190/16, EU:C:2017:513, paragraph 48).

47 Contained in Paragraph 8 of the Law on rest and holidays.

102. In the light of the above, I propose that the Court reply to the second question of the referring court as follows:

In circumstances such as the present case, national legislation which grants an indemnity of the type referred to under the first question only to the members of certain churches who work on Good Friday does not constitute a measure that in a democratic society is necessary to ensure the protection of the rights and freedoms of others, within the meaning of Directive 2000/78.

## E. Question 3

103. By its third question, the referring court asks essentially whether measures in favour of the members of the four churches fall within the notion of positive action under Article 7(1) of Directive 2000/78, read in conjunction with Article 21(1) of the Charter.

104. In my view they do not.

105. As a preliminary remark, I note that the precise relationship between Article 21(1) of the Charter and Article 7(1) of Directive 2000/78 is not immediately clear. In particular, the debate as to whether positive action is a (temporary) derogation from the principle of equality or whether it is in fact an inherent component of a truly substantive vision of equality is far from settled. However, for the purposes of the present Opinion, I do not consider it necessary to examine any such profound questions.

106. In the context of the present case, the Austrian Government advanced that the measures could be interpreted as falling within a notion of positive action in the sense of having been adopted to compensate for less favourable treatment in the past. According to the Austrian Government's written pleadings, members of the four churches, unlike the Catholic majority, did not have a right to a day off to celebrate their most important religious festival of the year and had suffered that situation for many years before it was requested and granted in the 1950s.

107. True, 'positive action' has no clear definition in legislation or the case-law. Thus, there is no prima facie limitation on what might fall under that notion, both substantively and temporally. On that level, it could be indeed suggested that the intention to 'compensate for disadvantages linked to any of the grounds referred to in Article 1' might also include the desire to compensate for (even centuries) of past religious persecution.

108. That being said, I confess that simply from a chronological point of view, it does seem rather questionable whether a measure adopted in the 1950s was really conceived of as 'positive action' in the sense of a much more contemporary notion, first appearing, certainly within EU law, only decades later. Such prescience borders on the miraculous.

109. However, lack of definitional specificity and chronology aside, there are two compelling reasons why I consider that the indemnity cannot in any event constitute 'positive action'.

110. First, the measure targets a very specific group, thus again opening up the already discussed issue of its *selectivity* and second-level discrimination.[48] Measures were 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 holiday for an important festival, unlike the Catholic majority.

48 Similarly to points 76 to 79 and points 97 to 98 above.

111. Second, any measure alleged to fall within the scope of positive action must in any event comply with the principle of proportionality. That has recently been confirmed as a general matter in relation to measures restricting religious freedoms assessed in light of the Charter and Directive 2000/78.[49] Although the Court's case-law on the application of the concept of positive action in the context of secondary law does not present the analysis in terms of proportionality, it is clear that the Court scrutinises measures to establish whether they are necessary to neutralise perceived disadvantage.[50] For the same reasons as those set out in relation to the second question,[51] I consider that the relevant national law measures cannot in any event be considered as proportionate and, as such cannot fall within the concept of positive action within the meaning of Article 7(1) of Directive 2000/78.

112. Finally, I note that, whilst the above considerations again focus on the indemnity, the reasoning in points 97, 98 and 101 in relation to the selectivity of the measure in the light of the *paid holiday* benefit also applies and precludes treatment of that benefit as 'positive action'.

113. In the light of the foregoing, I propose to answer the referring court's third question as follows:

National legislation which grants an indemnity of the type referred to under the first question does not constitute positive action within the meaning of Article 7(1) of Directive 2000/78.

## F. Question 4

114. By its fourth question the referring court effectively asks how the breach of the prohibition on discrimination should be remedied, more specifically when it occurs in a relationship between private parties? Before addressing the issue of whether the solution is to deny the holiday and indemnity to everyone or to extend it to everyone, the preliminary question, partially pre-empting that answer, is what shall be applied in such a horizontal relationship and with what consequences.

115. A number of principles already contained in the case-law of the Court provide some guidance.

116. First, a directive cannot be relied upon as such against an individual (such as a private sector employer).[52] In such cases, the victim's remedy in principle takes the form of a damages action against the State.[53]

117. Second, the prohibition on discrimination on the grounds of religion contained in Article 21(1) of the Charter may, in some cases at least, be invoked 'in combination with' Directive 2000/78 against an individual, with the result that the national court must disapply any legislation found to be incompatible with that prohibition. In that sense, the combination of Article 21(1) of the Charter and the directive give rise to a *right not to suffer discrimination* that can be relied on directly before national courts, even in a horizontal context. It is, however, important to be clear that that is the consequences of the *primacy* of EU law, not its direct effect (Section 1 below).

49 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 68).

50 See in that sense for example, judgment of 11 November 1997, *Marschall* (C-409/95, EU:C:1997:533, paragraph 31).

51 Above point 100.

52 Judgments of 14 July 1994, *Faccini Dori* (C-91/92, EU:C:1994:292, paragraph 20); of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 108); and of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 46).

53 Judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428). In the context of Article 21(1) of the Charter, read in combination with Directive 2000/78, see judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 50).

118. Third, in my view, Article 21(1) of the Charter is not 'horizontally directly effective' in the sense of giving rise in and of itself to a defined obligation on the part of a private employer that is to be enforced by national courts directly against that employer, where, as in the present case, the discrimination originates in national law (Section 2). However, the victim must have the possibility of bringing a damages action against the State to remedy such discrimination (Section 3).

### *1. Primacy*

#### *(a) Combining directives with Charter provisions*

119. The Court has compensated the refusal to grant horizontal direct effect to directives mentioned above in various ways. Often that has been through the duty of conform interpretation.[54] According to well-established case-law, that obligation does not, however, require the national court to interpret national law '*contra legem*'. In the present case, the national court has clearly indicated that conform interpretation of national law is not possible.

120. Faced with such limitations on conform interpretation, the Court has 'combined' its reading of general principles of law[55] or the Charter[56] with Directive 2000/78 in order to conclude that an individual may rely on what is in practice the substantive content of a directive in a dispute with another private party in order to have conflicting national law set aside.

121. In the judgments in *Mangold*, *Kücükdeveci* and *DI*[57] the Court determined that the relevant national provisions were incompatible with the specific relevant provisions of the *directive*. It went on to confirm that EU law 'precluded' (with the result that the national court must 'disapply', 'set aside' or 'decline to apply') such provisions of national law to the extent they conflicted with the *general principle*. Thus, national courts had to interpret national law 'in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age'.[58] The relevant content of the directive was thus effectively imported into the general principle before that 'fleshed out' principle was applied in a private dispute to conclude on the incompatibility of national law.

122. In the judgment in *Egenberger*, the Court held that the prohibition on non-discrimination on the grounds of religion or belief in Article 21(1) of the Charter 'is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law'.[59] In applying that prohibition the national court 'will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter'.[60] In other words, the content of the relevant provisions of the directive was effectively held to be implicit in Article 21 of the Charter. The national court must ensure the full effectiveness of that provision 'by disapplying if need be any contrary provision of national law'.[61] The same reasoning was applied *mutatis mutandis* to Article 47 of the Charter.

54 Judgments of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584), and of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257).

55 Judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709), and of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21).

56 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257).

57 Judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraphs 77 and 78); of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraphs 43 and 51); and of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraphs 27 and 35).

58 Judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 43).

59 Judgment of 17 April 2018 (C-414/16, EU:C:2018:257, paragraph 76).

60 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 81).

61 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 79).

123. In the *AMS* case [62], the Court had nonetheless acknowledged limits to that kind of importation of the content of directives into general principles and Charter provisions for the purposes of application in horizontal situations. That case concerned Directive 2002/14/EC, which required employee representation in companies of over 50 employees. [63] Article 3(1) set the '50 employees' threshold, and to the extent relevant here, the case basically concerned the definition of 'employee' for those purposes. The Court found that the relevant national provision was incompatible with Article 3(1) of the directive, because it excluded certain types of employees from the calculation of the number of employees.

124. However, the Court went on to hold that 'the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, *is sufficient in itself to confer on individuals an individual right which they may invoke as such*'. [64] By contrast, Article 27 of the Charter '… does not suffice to confer on individuals a right which they may invoke as such'. [65] The Court thus effectively considered that the rule in Article 3(1) of Directive 2002/14 was too detailed to be considered as inherent in the relevant Charter provision.

### *(b) Legal effects under existing case-law*

125. It is clear that, following the judgment in *Egenberger*, Article 21(1) of the Charter may be 'relied on' in combination with Directive 2000/78, in the context of a dispute between individuals, both as a tool for conform interpretation and, more importantly, a yardstick for challenging the validity of EU law and the compatibility of national law (within the scope of application of EU law). Thus, it can be invoked by individuals against other individuals to 'preclude', or have the national court 'set aside', 'disapply' or 'decline to apply', a conflicting provision of national law.

126. The judgment in *Egenberger* thus confirms the primacy of EU primary law in the form of Article 21(1) of the Charter in the specific context of a horizontal dispute, where the secondary law instrument is a directive, and conform interpretation is not possible.

127. However, the judgment in *Egenberger* does not go into detail as to the further consequences of reliance in such cases. In particular, there is nothing in that judgment (or any of the other judgments cited in the preceding section), which confirms that Article 21(1) of the Charter is 'horizontally directly effective' in the sense of being inherently capable, in and of itself, of constituting a free standing source of rights generating the correlating obligations on another individual in a private law dispute. Nor does that judgment or any of the other case-law cited lead to the conclusion that reliance on Article 21(1) and a finding of incompatibility necessarily leads to any particular remedy.

128. Instead, that case-law reiterates the general formula according to which national courts must provide 'the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective' (by disapplying incompatible national law) [66] or states that the national court must 'ensure that the principle of non-discrimination … is complied with' [67] or that an individual cannot be denied the benefit of an interpretation precluding the impugned national rule. [68]

62 Judgment of 1 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2).

63 Directive of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ 2002 L 80, p. 29).

64 Judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 47). Emphasis added.

65 Judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 49).

66 Judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 29 or 35).

67 Judgments of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 56), and of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraphs 35 to 37).

68 Judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 41).

129. In sum, it is by now clearly established that an abstract review of compatibility in the light of Article 21(1) of the Charter, read in combination with Directive 2000/78, as carried out in reply to question 1 posed by the referring court, may lead to a setting aside of incompatible national law. That is the consequence of primacy of EU law, which can also occur in the context of a dispute between private parties.

130. For reasons set out in the next section, my suggestion to the Court is that it would be wise to remain with that approach. When being explicitly asked about the *specific practical consequences for the parties*, if the national law is indeed set aside, my further suggestion would be, instead of considering the horizontal direct effect of the Charter provisions (2), to rather focus on the issue of remedies (3).

### *2. 'Horizontal direct effect'*

131. Declaring Article 21(1) of the Charter to be horizontally directly effective would mean that individuals could establish, *directly on the basis of that provision*, the existence of a right *and a correlating obligation* on the part of the other private (non-state) party, irrespective of the existence and/or reference to the content of secondary law. In this sense, a rule endowed with direct effect is, in and of itself, sufficiently clear, precise and unconditional to be justiciable in a horizontal relationship.

132. I have difficulty seeing the provision of Article 21(1) of the Charter in the context of the present case as meeting those requirements (a), as well as, for that matter, a number of the Charter provisions generally (b). However and yet again, that does not preclude the Charter provisions in fact being applicable and highly relevant in cases like the present one, although in a different way (c).

#### *(a) Horizontal direct effect of Article 21(1) of the Charter*

133. On a certain level, it could certainly be suggested that the rule prohibiting discrimination on the basis of religion is, at that level of abstraction, indeed sufficiently clear, precise and unconditional. There shall unconditionally and clearly be no discrimination on the grounds of religion.

134. However, if viewed at such a level of abstraction, then essentially any provision of EU law could be directly effective. That is why the traditional test of direct effect is of a different nature: is the content of the specific rule sufficiently clear and precise so as to be justiciable in the context of a given case?

135. The present case itself provides a good example of the complexity of that question and why there is no 'clear, precise and unconditional' rule to provide an answer. Would that be a right to (and an obligation to grant) a paid day of holiday flowing from Article 21(1) of the Charter? Would that holiday be on Good Friday or another specific day? Or can the only claim be for money, in the form of a right to an additional pay cheque or an indemnity or compensation or damages (with a corresponding obligation for such provision falling on the employer)?

136. In my view, the succinctly worded Article 21(1) of the Charter cannot possibly be interpreted as containing replies to such questions. Nonetheless, the national judge 'disapplying' the offending provision of national law will inevitably face them, as in this case.

137. I readily acknowledge that 'clear, precise and unconditional' does not imply that every aspect of the right is explicitly set out in advance in legislation. Such a scenario is simply not realistic. However, what is left undecided must at the very least be justiciable.[69] In my view, the very nature of the right in question (a holiday on Good Friday, one undefined day of paid holiday, indemnity if the holiday in question is not taken) is not something which is in that sense justiciable.

138. More fundamentally, I do not consider that the issue here is one of 'horizontal direct effect' of the Charter (in combination with a directive). Again, at a certain level of abstraction, there may be a 'clear, precise and unconditional' requirement of non-discrimination in Article 21(1) of the Charter, but no 'clear, precise and unconditional' practical requirement flowing from that. In my view, the fourth question of the national court should not be approached in terms of horizontal direct effect. Horizontal direct effect in the sense described above — giving rise to *specific* rights (to money, to benefits and so on) and corresponding obligations — is patently absent.

### *(b) Horizontal direct effect of the Charter more generally*

139. Looking beyond the specific context of the present case and the application of the traditional test of 'direct effect' to Article 21(1) of the Charter, there are further arguments of principle as to why the horizontal direct effect of Charter provisions would be problematic.

140. First, pursuant to Article 51(1), much like directives under Article 288 TFEU, the Charter is simply not addressed to individuals but rather to Member States and EU institutions and bodies. It could be suggested that that (textual) argument is not very strong, since in fact there already are significant *horizontal effects* of the Charter which have been set out in detail above.[70] There is, however, a considerable qualitative difference between, on the one hand, stating that a bill of rights might be used for review of compatibility and potential setting aside of conflicting legislation, as well as that it may be the source of conform interpretation reaching into horizontal situations too and, on the other hand, making the provisions of that bill of rights the *source of direct obligations* for private parties, irrespective of and/or in the absence of statutory provisions. That is also why, to my knowledge, in a number of legal systems, the national bill of rights would perform precisely those two functions, perhaps even coupled with the setting out of positive obligations that the State must assume. However, even if reaching into private law relationships in those ways, fundamental rights would still not be endowed, quite wisely, with horizontal direct applicability.

141. Second, the reason for such restraint is certainly not the absence of the desire to effectively protect fundamental rights. It is rather the need for predictability, legal certainty, and, on the constitutional level, the separation of powers. Bills of rights tend to be quite abstract and thus vague, as is the Charter. They are generally in need of further legislation to give them justiciable content. Imbuing those provisions with horizontal direct effect in and of themselves, for the rights and obligations of private individuals, opens the door to extreme forms of judicial creativity.[71]

69 Thus, also allowing rules formulated at quite some level of abstraction (such as the rule that costs of review procedures challenging legality of certain decisions rendered in the scope of the Environmental Impact Assessment Directive (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40)) are not to be prohibitively expensive), but clearly circumscribed in their scope and field application, as well as the practical results to be achieved, by the structure of the secondary law instrument they form part of, to be directly effective —– see my recent Opinion in *Klohn* (C-167/17, EU:C:2018:387, points 33 to 55).

70 Points 125 to 129 in the previous section of this Opinion.

71 That is also why, back in 1929, Hans Kelsen, who is often invoked as the 'father' of modern constitutional justice, but who would probably have been quite surprised if he saw its current scope, wished to exclude the direct applicability of 'überpositiver Normen', within which he also included fundamental rights, warning that that would give any such constitutional court an effective power monopoly within the State structures — Kelsen, H., *Wesen und Entwicklung der Staatsgerichtsbarkeit. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 5*, Berlin und Leipzig, de Gruyter & Co., 1929, pp. 69 to 70.

142. Third, since the content of the rights and obligations flowing from the Charter are unclear, it might be tempting to search for answers in the relevant secondary legislation. When assessing the compatibility of national law with Charter provisions (the principle of primacy), the Court indeed refers to the application of Charter provisions and general principles 'having regard to' or 'in combination with' secondary legislation.[72] There appears to be a growing body of case-law of this Court which effectively imports the (often quite sophisticated) content of directives into provisions of the Charter before applying those Charter provisions horizontally.[73]

143. There is no doubt that sometimes, consulting secondary legislation is indeed crucial in ascertaining what the (acceptable) content of a right or a general principle at a given time might be.[74] There is, however, a difference between a critical comparative review of (a number of) secondary law sources, in order to conclude what a general trend might be, and the, in effect, uncritical and direct 'transliteration' of the content of a directive into a Charter provision.

144. The constitutional as well as practical problems of the latter approach are numerous.[75] Is the direct effect of Charter provisions actually to be made dependent on whether and what secondary legislation has been adopted in a given area? Will the (non-)existence of the direct effect of the Charter thus be indirectly decided by the EU legislature? Should the Charter be, in such a way, 'de-constitutionalised'? Instead of providing the yardstick for the review of secondary law, should it be determined and dominated by it? If not, or certainly if *not always*, then when should it and when should it not?

145. In the end, it is that problem of predictability and legal certainty, coupled, admittedly, with a distinct flavour of circumvention of one's own previously imposed limits, that brings me to the final point: if indeed this were to be the future approach of the Court, it would perhaps be advisable to revisit the issue of horizontal direct effect of directives. The persistence in formally denying horizontal direct effect to directives while moving heaven and earth to ensure that that restriction has no practical consequences whatsoever, such as importing the content of a directive into a Charter provision, appears increasingly questionable.

### *(c) No horizontal direct effect, but still (significant) effects*

146. The absence of horizontal direct effect of Article 21(1) (and, for that matter, other provisions) of the Charter does not mean they have no horizontal effects. Quite on the contrary. But those are of a different nature. With regard to national law, the Charter serves: (i) as an interpretative tool for conform interpretation of national law; (ii) as a yardstick for the compatibility of EU and national rules, with the possible consequence that where national rules (applied in the context in which the Member State acts within the scope of EU law) are incompatible with the Charter, they must be set aside by the national judge, even in disputes between private individuals. The latter consequence is, however, one of primacy of EU law, not horizontal direct effect of the Charter provisions. New stand-alone obligations cannot be created *solely* on the basis of the Charter for private parties.

72 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257), discussed in this context above in point 122. See also judgment of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21) relating to the principle of non-discrimination on the grounds of age 'as given expression in' Directive 2000/78.

73 Most recently, for example, by my learned colleague Advocate General Bot who proposed to the Court to import into Article 31(2) of the Charter the relevant contents of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9). That conclusion was justified by reference to the explanatory notes accompanying the Charter, according to which Article 31(2) was 'based on Directive 93/104/EC' (codified by Directive 2003/88) — see Opinion of Advocate General Bot in Joined Cases *Bauer and Broßonn* (C-569/16 and C-570/16, EU:C:2018:337, in point 86).

74 For an example of such a careful and balanced analysis, see judgment of 15 October 2009, *Audiolux and Others* (C-101/08, EU:C:2009:626).

75 For a detailed discussion on this topic see the Opinion of Advocate General Trstenjak in *Dominguez* (C-282/10, EU:C:2011:559).

147. Admittedly, disapplication of an incompatible national law may not in itself provide immediate protection to the parties. That is clearly so in the present case. Disapplication means the striking out of the offending provisions of national law. Unless a rather singular, not to mention convoluted and dangerous, approach is taken to the concept of 'disapplication' (involving, for, example, the selective striking out of particular words in the offending provision),[76] disapplication or setting aside of the offending provision would in the present case involve setting aside the whole of Paragraph 7(3) of the Law on rest and holidays. That would mean that from the moment of that judicial declaration of incompatibility, no-one would have a holiday on Good Friday.

148. An alternative approach would be to consider that there is a horizontally directly effective right to be free from discrimination and that, inherent in that right is a right to receive the same rights and benefits as the advantaged group (levelling up) or to see one's peers treated equally badly (levelling down). That is indeed implicit in the national court's fourth question. However, assuming the levelling up solution is adopted — I shall return to that point below — that still does not answer any of the above questions as to the nature and scope of the rights concerned.

149. Instead, the question should in my view be understood as seeking clarity on the precise *remedies* that must be available in cases such as the present, as opposed to an elusive set of specific rights (to holidays, indemnities, etc.). That approach is indeed already in the *Mangold*, *Kükükdeveci*, *DI* and *Egenberger* case-law, which all confirmed disapplication of the offending national provision and the existence of a right to an effective remedy (not the 'horizontal direct effect' of the Charter). However, the focus in the present case on the practical consequences of disapplication means that the Court must be clear about that distinction. It is to that question that I now turn.

### *3. Remedies*

150. Article 21(1) of the Charter does not give rise to a specific set of corresponding rights/obligations for employer and employee. Nonetheless, it is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective.[77] *A remedy for the discrimination must be available*, in accordance with the principle of effective judicial protection.[78]

151. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The Member States, however, are responsible for ensuring that those rights are effectively protected in each case[79] and, in doing so, to respect the principles of equivalence and effectiveness.[80]

76 Paragraph 7(3) of the Law on rest and holidays presently reads: 'Good Friday is also a holiday for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church.' Pushing 'disapplication' to the level of individual words of that provision could then for example amount to deleting the object of the sentence, that is, the reference to the members of the four churches (meaning everyone gets a holiday or indemnity on Good Friday) or striking out the references to members of the four churches and Good Friday (meaning that there is a public holiday of indeterminate date — in practice the Commission's proposal). However, there should perhaps still remain a difference between the setting aside of offending national law and a judicial game of Scrabble, allowing for the creation of whatever rule simply by a recombination of selected words pulled out of the extant legislation.

77 See judgment of 5 October 2004, *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584, paragraph 111). See also judgment of 15 April 2008, *Impact* (C-268/06, EU:C:2008:223, paragraph 42).

78 Judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 37 and the case-law cited).

79 See, in particular, judgments of 9 July 1985, *Bozzetti* (179/84, EU:C:1985:306, paragraph 17); of 18 January 1996, *SEIM* (C-446/93, EU:C:1996:10, paragraph 32); and of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 40).

80 See, in particular, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188, paragraph 5); of 16 December 1976, *Comet* (45/76, EU:C:1976:191, paragraphs 13 to 16); of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 12); of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraph 43); and of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 28).

152. The Court can nonetheless provide guidance as to what is implied by the right to an effective remedy in a case like the present one. There are two issues in relation to which the Court can assist the referring court. Those are, first whether the remedy consists in levelling up or down (a), and second, against whom that remedy should be sought (b).

153. I consider that, in cases such as the present: where there is a dispute between private parties, and where the source of the discrimination lies in national legislation and is established on the basis of Article 21(1) of the Charter (in an abstract review such as with question 1, in combination with Directive 2000/78), EU law does not require a remedy to be provided against the *employer*. However, EU law does require that the victim may bring an action for damages against the *State* to remedy the breach.

154. Before going into those points in more detail, I will deal with the issue of 'levelling up' and 'levelling down'.

### *(a) Levelling up and levelling down*

155. The national court's fourth question envisages two solutions to the problem of discrimination in this case: levelling up or levelling down.

156. I wish to clarify that I understand the question of the referring court to concern only the 'interim period', that is, the time after a declaration of incompatibility is made, but before the national legislature provides for a new regime. For that period, the question of levelling up or down is indeed open.

157. By contrast, the same issue does not really arise for the past, namely for previous years in which the indemnity was granted only to the select group, but not to the others, and those time periods are not yet time-barred under the rules of national law. For those periods, the only way of remedying past discrimination is, in practical terms, indeed merely 'levelling up'. The privileged group cannot be retrospectively stripped off their advantages, because of legitimate expectations, or rather rights that have already been acquired. Thus the only real way of remedying discrimination for that period is by awarding the same benefit to everyone (but subject to the question addressed in the ensuing section as to who may be asked to pay and why).

158. Turning therefore now only to the interim period, with regard to that period, the Commission also suggested that the appropriate answer would be to level up. In support of that argument, both the Applicant and the Commission cited case-law including the judgments in *Milkova*, *Specht* and *Landtová*.[81]

159. It is indeed correct that, in those cases, the Court made the broad observation that 'where discrimination contrary to EU law has been established, *as long as measures reinstating equal treatment have not been adopted*, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining'.[82]

81 Judgments of 22 June 2011, *Landtová* (C-399/09, EU:C:2011:415); of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005); and of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198).

82 Judgments of 22 June 2011, *Landtová* (C-399/09, EU:C:2011:415, paragraph 51); of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 95); and of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraph 67). My emphasis.

160. The implication is that, where the national court is faced with discrimination originating in legislation, the inevitable consequence of setting aside the conflicting provision of national law is indeed 'levelling up', pending the adoption of non-discriminatory legislation (which may potentially level down). [83]

161. I would make the following observations in that regard.

162. First, primacy, including the primacy of the Charter, requires that the provision of national law which is incompatible with EU law must be set aside. This means that the offending provision is essentially supposed to disappear from the national legal order in situations in which it conflicts with EU law. Logically therefore, what has disappeared cannot subsequently be applied to anyone at all. Yet somewhat miraculously, the same provision that was removed when applicable to some is immediately resurrected in order to be applied to all. That paradox, which is implied by the levelling up solution, must be acknowledged before it can be addressed.

163. Second, as a broad proposition, the levelling up solution as an interim default *remedy* (as opposed to a horizontally directly effective right) seems the better option, in particular from the point of view of legitimate expectations of the favoured group. But the devil is again in the detail (or at least in the practical application). The more complex cases involve non-pecuniary benefits. In the present case, the Commission argued in its written pleadings that Paragraph 7(3) of the Law on rest and holidays might discriminate by giving Good Friday as a day off to some religious groups but not others. However, the solution proposed by the Commission was not to extend Good Friday as a public holiday to all. Rather the Commission proposed a judicial rewriting of the provision to extend to all employees the benefit of a paid day off to celebrate a 'particularly important' religious event to be designated by each individual employee. 'Levelling up' is a good sound bite (at least in English) but masks potentially significant complexity, even arbitrariness, in its practical application, not dissimilar to that already encountered with regard to the issue of horizontal direct effect.

164. Third, there are several judgments of the Court where a variant of the 'levelling up' principle has been enunciated. However, each of those cases has distinguishing features. Two are of particular importance, namely, the *source of the discrimination* and the *identity of the defendant*.

165. In that regard, I note that in all cases cited by the parties to support the levelling up solution [84] the source of the discrimination was national law and *the defendant was the State* (and the dispute about money [85]). That is, in my view, the simplest possible configuration (and indeed the most common in the Court's case-law). [86] In the end, the Member State must foot the bill for legislative discrimination. That is the clear result of the *Francovich* case and its progeny. State liability must in principle provide a safety net.

83 See judgment of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60).

84 Above, footnote 81.

85 The fungible benefit par excellence, unlike, for example, the right to a holiday or the right to be employed.

86 Other judgments repeating the '*Landtová*, *Specht*, *Milkova* variant' of the levelling up principle also involve the State as the defendant — see judgments of 12 December 2002, *Rodríguez Caballero* (C-442/00, EU:C:2002:752, paragraph 42); of 21 June 2007, *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraph 39); of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraph 46); and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 30). See also more narrowly worded variants in, for example, reference to discrimination in relation to pay, judgments of 7 February 1991, *Nimz* (C-184/89, EU:C:1991:50, paragraph 18), and of 17 April 1997, *Evrenopoulos* (C-147/95, EU:C:1997:201, paragraph 42). Discrimination arising from collective agreements is also common and effectively assimilated with legislative discrimination and the Court uses a more openly worded variation of the levelling up principle — see for example judgment of 20 March 2003, *Kutz-Bauer* (C-187/00, EU:C:2003:168, paragraph 72).

166. There are also cases where the Court has referred to the levelling up principle in the context of litigation between private parties. However, that has been in a limited number of cases relating to discrimination in relation to pensions [87] or wages [88] generally attributable to the *employer* (not originating in legislation). In the context of private disputes involving alleged discrimination, instead of proposing levelling up as a general solution, the Court has rather focused on the general requirement to provide effective remedies and sanctions. [89]

167. Fourth, absent specific additional reasons, such as human dignity or legitimate expectations, that would prevent levelling down for the interim period in the context of an individual case, I fail to see any principled argument why systematically and in all cases of discrimination, levelling down would be per se excluded. That is all the more so in cases where the benefit granted to the favoured group is not repetitive or, where it is repetitive, there is no relationship of dependency created (such as, for example, recurring social security benefits).

168. Turning to the present case, what would be the specific (additional) reason for effectively overriding the conclusion that the offending provision must be 'set aside' and replacing it with the conclusion that its personal scope must be extended 50-fold? [90]

169. The magnanimity of proclaiming that everyone should be better off is perhaps personally satisfying but hardly legally adequate, without considering economic sustainability. [91] I wish to stress that economic arguments are, of course, no justification for discrimination. However, that in itself does not provide a positive justification for levelling up.

170. Protecting the religious freedom of members of the four churches is also inconclusive. In that regard, I note that Paragraph 8 of the Law on rest and holidays imposes a duty of solicitude on employers, effectively requiring them to reasonably accommodate their employees' need to worship. Why, if that is sufficient for other minority religions in Austria for their special religious festivities, would it not be for the members of the four churches? Conversely, it is not clear how 'levelling up', perhaps by paying all Austrian employees double or giving them a day off on Good Friday, would in any way advance freedom of religion.

171. In the light of the foregoing, I consider that it is not possible in the present case simply to answer the referring court by confirming that 'levelling up' is the only right direction to go in. That is an approach which the Court has developed in the context of actions against the State mainly in relation to social security benefits, and which is not generally transposable to horizontal disputes. Moreover, in the present circumstances it would constitute an overly simplistic answer masking certain complexities which are of great practical importance. Instead, I consider that the reference point in this case should be the Court's case-law on effective remedies.

87 See judgments of 28 September 1994, *van den Akker* (C-28/93, EU:C:1994:351); of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348), and of 28 September 1994, *Avdel Systems* (C-408/92, EU:C:1994:349), which also technically concerned a non-State pension scheme but was a 'contracted out' pension in the sense that contributions to it took the place of contributions to the State pension scheme.

88 Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56).

89 Judgments of 10 April 1984, *Harz* (79/83, EU:C:1984:155), and of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383).

90 I note that in its oral submissions the Commission advocated the extension of the Good Friday holiday/indemnity enjoyed by the members of the four churches (around 2% of the population) to the entire Austrian workforce, and to do the same for Yom Kippur.

91 At the hearing the cost of extending the indemnity for Good Friday to all employees was estimated at 600 million EUR per annum (presumably a similar figure would apply in case of Yom Kippur).

### *(b) Effective remedies (and identity of the defendant)*

172. Although Article 21(1) of the Charter is not horizontally directly effective, the problematic national provision must be set aside (question 1). The issue of levelling up or down has been addressed above. In this closing section, I turn to the question of who should provide a remedy. There are essentially two options: (i) the employer (who may then turn against the State), or (ii) the State (who should be sued directly by the employee). In my view, the correct answer is the latter one: the State.

#### *(i) Remedies against the employer*

173. Does the right to an effective remedy in cases such as the present, where the claimant is the victim of discriminatory national legislation applied by an employer, require that the employee must have a remedy against that employer?

174. Advocate General Cruz Villalón explicitly favoured that option in his Opinion in *AMS*. He considered that it was 'reasonable that the burden of an action for damages should fall on the person who has benefited from the unlawful conduct, and not on the holder of the right arising from the specific expression of the content of the principle'.[92] The employer that is held liable could then turn against the State.

175. Unless I am mistaken, the Court never addressed that point directly. However, the judgment in *DI* could also be read as imposing such a requirement.[93]

176. Such an approach might indeed be justified by effectiveness (of the protection of the employee). It may be cheaper and quicker (and less daunting) for the employee to sue the employer rather than the State. Morally speaking, the employee is harmed by the discriminatory law and deserves protection. There is likely to be, as noted by the learned Advocate General Cruz Villalón, an unlawful benefit obtained by the employer as a result of discrimination that has to be off-set. Overall, the employer is likely to be in a position of relative power.

177. Thus, the arguments in favour of stating that for discrimination in working conditions, there must always be a remedy directly against the employer, essentially tend to revolve around three elements: *source*, *fault*, and *benefit*, potentially coupled with the argument of *strength* and (inherent) *inequality*.

178. On a general level, those arguments are certainly valid for a certain type of discrimination: that attributable, at least partially, to a certain employer. However, they encounter a number of logical difficulties in a case like the present one, where there is a dispute between private parties alleging discrimination on grounds of religion, stemming directly from national legislation.

179. First, the *source* of the breach in the present case is national legislation. There was no genuine discretion or independent decision by the employer. It simply applied binding national legislation. Such a situation is quite different from those in which the Court required a remedy to be provided against the employer, where the source of the discrimination also stemmed from the employer's own decisions.[94]

92 Opinion in *Association de médiation sociale* (C-176/12, EU:C:2013:491, point 79).

93 Judgment of 19 April 2016 (C-441/14, EU:C:2016:278, paragraph 42).

94 For example, in the judgment of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383), the claimant's job application was rejected because she was three months' pregnant. Her happy state was nonetheless classified under national law as a 'sickness'. Since the prospective employer was fully aware of her 'sickness', if it had given her the job it would have had to finance her maternity leave without assistance from the State, which the employer did not wish to do. There was therefore a (significant) financial disincentive to employing pregnant women written into national legislation. It was, however, also clear that the ultimate decision as to how and whether to apply that discriminatory national legislation in the individual case was with the employer.

180. That relates, second, to the element of *fault*. What was the fault for which the employer should pay? Applying valid national law? In cases where the Court has considered alleged discrimination by employers, which infringes EU law, it has often stated that the sanction imposed for a breach must be effective, proportionate and *dissuasive*.[95] Unless employers are expected to act as constitutional policemen, with a positive duty to find out and actively contest national law they consider might potentially conflict with Charter provisions, that rationale of dissuasion or deterrence disappears. Or does the fault consist in the fact that the employer did not challenge the compatibility of national legislation with Article 21(1) of the Charter and Directive 2000/78? Thus, in practical terms, an employer is supposed to anticipate what would emerge after the culmination of several years of procedure with the involvement of the Supreme Court of a Member State, the Grand Chamber of the Court of Justice and many other learned lawyers and judges having given their input at many different stages.

181. Third, I equally fail to see how an employer would benefit from having to pay certain of its employees double, or even being obliged to grant them a paid holiday on Good Friday. Unless, on a very debatable reading, the fact of abstaining from paying the other 98% of workers the same is classified as an unlawful 'benefit' mischievously obtained by the employers, I see only burdens being imposed on the employer.

182. Fourth, there is the argument of relative *weakness*. That argument, in contrast to the three others, has at least some traction. It could even be taken to override all the other considerations: because of the inherent inequality in a labour relationship, the burden of paying the bill should always fall on the employer, irrespective of the circumstances.

183. That argument hides a deeply *ideological* choice on risks and costs allocation.[96] Furthermore, it is perhaps safe to assume that not all employers in Austria, or elsewhere in the European Union, are proverbial faceless multinational corporations. Many companies are run by single individuals or small numbers of people. Why should they bear the cost of applying faulty national legislation?

184. However, it is certainly true that such issues become irrelevant when, essentially, the employer would be asked to foot the bill simply by virtue of being an employer. That is an axiomatic argument but also one, I would suggest, not worth indiscriminately following.

185. Taking the above reasons together, I do not consider that EU law *requires* that there be a remedy against the employer in cases such as the present, where the employer has acted in accordance with national law but where that national law is considered contrary to Article 21(1) of the Charter (read in combination with Directive 2000/78). To be clear, that conclusion applies to disputes between *private* parties, not where the defendant is the State (acting as employer). However, EU law does not *preclude* a remedy even against *private* employers in case any such remedies would be available as a matter of national law.

95 Judgment of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153). Where the Court has held that EU law requires the existence in national law of a damages action against private parties for breach of EU law, it has insisted on the compensatory and *deterrent* aims of such a remedy. See judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 27).

96 It cannot be assumed that any, all or even most employers will mount a successful damages claim against the State. Thus, it is fair to acknowledge that the choice as to who shall be the defendant in a case like the present one means, in reality, a decision on who will bear the costs.

*(ii) Action for damages against the State*

186. There is a difference which is recognised in the Court's case-law between discrimination that has as its original source the *legislature* (as in the main case) and that which stems from the *employer*.[97] To take inspiration from the Commission's cogent arguments in the *Dekker* case:[98] 'It is reasonable to ask in the circumstances whether the employer may legitimately be expected either to ignore altogether the discriminatory national legislation or to challenge it before the courts for incompatibility with the Directive or with the law on the equal treatment [in the *Dekker case*] of men and women. The outcome of such proceedings would, however, be largely uncertain; in any case, a demand of that kind would be tantamount to imposing on the employer an obligation which should be borne by the State.'

187. There are further reasons why it would be inappropriate for EU law to require a remedy against the private employer in such circumstances, and why effective judicial protection should in practice take the form of an action for damages against the State. Most of these are the reflection of arguments already broached in the preceding section.

188. First, there is the simple moral argument, already explored under the headings of source and fault in the preceding section. The primary actor responsible for the discrimination is the State. All things being equal, it is not clear why the cost for that fault should be borne in the first instance by employers.

189. The moral argument is in line with the structural one. If, as a consequence of the principle of primacy and an abstract compatibility review, the offending national provision is set aside, both the fault and the ensuing legislative void are clearly attributable to the Member State.

190. Second, holding individual employers liable in the first instance will not act as a deterrent for them[99] and may even reduce the deterrent effect vis-à-vis the genuinely responsible party: the State. Legislative change requires pressure to be brought to bear on the State.

191. Third, where employees can obtain satisfaction by suing their employer for applying the law and employers in their turn sue the State, there will be a duplication of litigation. Thus, when the harmed party turns directly against the party at fault, rather than the intermediary who is not to blame, one round of litigation has been avoided.

192. Fourth, in the context of a private dispute where conform interpretation of a directive is not possible, the Court has consistently rejected the possibility for an individual to invoke the directive against another individual. There must be a remedy, but it lies against the State in the form of a damages action.[100] It is not clear why in principle that should cease to be the case where provisions of the Charter are invoked in parallel. In this way, the structure of remedies for (horizontal) private law relationships when invoking sources of EU law that are not endowed with horizontal direct effect ought to be consistent.

97 Above, points 50 to 52.

98 As summarised in the report for the hearing. See Ward, A., *Judicial Review and the Rights of Private Parties in EU Law*, 2nd ed., Oxford University Press, Oxford, 2007, p. 57.

99 Above point 180.

100 Judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 45), and of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 50).

193. Fifth and finally, there is another element of overall consistency speaking in favour of the approach on remedies advocated here. It relates again back to the framework of comparison. I have suggested that in cases of an abstract review of compatibility, the framework of comparison is one of groups.[101] That is entirely in line with the fact that the source of differentiation is the national legislation, not any decision on the part of the employer. For that reason, the identity of the other employees of the employer (Cresco Investigation) was not crucial, nor whether when compared with them, the Applicant was treated differently.

194. That question, however, would become quite important, with the connected discussion on comparability being fully reopened, if the Applicant were asked to turn against the employer with the claim that the employer discriminated against him.[102] Assuming that that individual employer does not have any members of the four churches on its workforce,[103] the logical defence would naturally be that it did not discriminate against anyone, because it treated all its employees exactly the same. How could such an employer then be held liable for discrimination that it was entirely impossible for him to commit?

195. The last two points again underline the need for logical consistency in whatever approach the Court eventually embraces, on two levels: first, within the present case (type of review relates to comparability framework which in turn has an impact on remedies) and, second, horizontally in terms of remedies available for the breaches of certain sources of EU law.

196. For the reasons outlined in this and preceding sections, I am of the view that individuals may rely on Article 21(1) of the Charter (in combination with Article 2(2)(a) of Directive 2000/78) to have incompatible provisions of national law set aside. However, EU law does not require that the costs of State failure to ensure conformity of national law with the Charter be borne in the first instance by *private* employers applying that national law.

### *4. Conclusion on the fourth question*

197. In the light of the foregoing, I propose to answer the fourth question of the referring court as follows:

In circumstances such as those in the present case involving proceedings between private parties:

– so long as the legislature has not created a non-discriminatory legal situation, the provisions of national law held not to be in conformity with Article 21(1) of the Charter, in conjunction with Article 1, Article 2(2)(a) and Article 7(1) of Directive 2000/78 must be disapplied;

– Article 21(1) of the Charter, in conjunction with Article 1, Article 2(2)(a) and Article 7(1) of Directive 2000/78 cannot of itself impose obligations on the employer;

– a party injured as a result of such application of national law can nonetheless rely on the judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) in order to obtain, if appropriate, compensation for the loss sustained.

101 Above, points 45 to 54.

102 I suspect that this element accounted partially for the confusion on the issue of comparability (above, points 46 to 48).

103 Which appears statistically rather likely, not only for Cresco Investigation, but also for a number of other Austrian employers. It has been confirmed that the members of the four churches account for about 2% of the Austrian workforce.

## V. Conclusion

198. I therefore propose that the Court reply to the questions of the Oberster Gerichtshof (Supreme Court, Austria), as follows:

(1) Article 21(1) of the Charter of Fundamental Rights of the European Union, in conjunction with Article 1 and Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, are to be interpreted as precluding a national rule under which Good Friday is a holiday, with an uninterrupted rest period of at least 24 hours, only for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church, and if an employee belonging to one of those churches works, despite that day being a holiday, he also has, in addition to the entitlement to payment for the work not requiring to be performed as a result of the day being holiday, an entitlement to payment for the work actually performed, whereas other employees, who are not members of those churches, do not have any such entitlement.

(2) In circumstances such as the present case, national legislation which grants an indemnity of the type referred to under the first question only to members of certain churches who work on Good Friday does not constitute a measure that in a democratic society is necessary to ensure the protection of the rights and freedoms of others, within the meaning of Directive 2000/78.

(3) National legislation which grants an indemnity of the type referred to under the first question does not constitute positive action within the meaning of Article 7(1) of Directive 2000/78.

(4) In circumstances such as those in the present case involving proceedings between private parties:

– so long as the legislature has not created a non-discriminatory legal situation, the provisions of national law held not to be in conformity with Article 21(1) of the Charter (of Fundamental Rights), in conjunction with Article 1, Article 2(2)(a) and Article 7(1) of Directive 2000/78 must be disapplied;

– Article 21(1) of the Charter (of Fundamental Rights), in conjunction with Article 1, Article 2(2)(a) and Article 7(1) of Directive 2000/78 cannot of itself impose obligations on the employer;

– a party injured as a result of such application of national law can nonetheless rely on the judgment of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428) in order to obtain, if appropriate, compensation for the loss sustained.