Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

22 January 2019*

(Reference for a preliminary ruling — Charter of Fundamental Rights of the European Union — Article 21 — Equal treatment in employment and occupation — Directive 2000/78/EC — Article 2(2)(a) — Direct discrimination on grounds of religion — National legislation grating certain employees a day's holiday on Good Friday — Justification — Article 2(5) — Article 7(1) — Obligations of private employers and national courts resulting from the incompatibility of national law with Directive 2000/78)

In Case C-193/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 24 March 2017, received at the Court on 13 April 2017, in the proceedings

**Cresco Investigation GmbH**

v

**Markus Achatzi,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, C. Toader and C. Lycourgos (Rapporteur), Presidents of Chambers, A. Rosas, M. Ilešič, M. Safjan, D. Šváby, C. Vajda and S. Rodin, Judges,

Advocate General: M. Bobek,

Registrar: R. Șereș, Administrator,

having regard to the written procedure and further to the hearing on 10 April 2018,

after considering the observations submitted on behalf of

– Cresco Investigation GmbH, by M. Zehetbauer, Rechtsanwältin,

– M. Achatzi, by A. Obereder, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili and F. De Luca, avvocati dello Stato,

* Language of the case: German.

– the Polish Government, by B. Majczyna, M. Szwarc and A. Siwek, acting as Agents,

– the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 July 2018,

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 1, 2(2)(a), 2(5) and 7(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between Cresco Investigation GmbH ('Cresco') and Mr Markus Achatzi in respect of the latter's right to a payment in addition to his regular salary for work done on a Good Friday.

### Legal context

#### *European Union law*

3 Recital 24 of Directive 2000/78 states:

'The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.'

4 Article 1 of that directive reads as follows:

'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.'

5 Article 2 of that directive provides:

'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;

…

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.'

6 Article 7 of the same directive, headed 'Positive action', provides, in paragraph 1 thereof:

'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.'

7 Article 16 of Directive 2000/78 provides:

'Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.'

***Austrian law***

8 Paragraph 1(1) of the version of the Arbeitsruhegesetz (Law on Rest Periods and Public Holidays, BGBl. 144/1983) applicable to the facts in the main proceedings ('the ARG') provides:

'This federal Law shall apply to all employees of every kind, unless otherwise provided for below.'

9 Paragraph 7 of the ARG provides:

'(1) Employees shall be entitled to an uninterrupted rest period of at least 24 hours on public holidays, which must begin not earlier than 00:00 and not later than 06:00 on the day of the public holiday.

(2) For the purposes of this federal Law, public holidays are:

1 January (New Year's Day), 6 January (Epiphany), Easter Monday, 1 May (State Holiday), Ascension Day, Whit Monday, Corpus Christi, 15 August (Assumption of the Virgin Mary), 26 October (National Day), 1 November (All Saints' Day), 8 December (Immaculate Conception), 25 December (Christmas Day) and 26 December (St. Stephen's Day).

(3) 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.

…'

10 Paragraph 9 of the ARG is worded as follows:

'(1) Employees shall be entitled to payment for work not performed due to a public holiday.

(2) Employees shall be entitled to the payment that they would have received if they had not been allowed to be absent from work for the reasons specified in subparagraph 1.

…

(5) In addition to the remuneration payable in accordance with subparagraph 1, employees who work during the rest period associated with public holidays shall be entitled to payment for the work performed, unless time off in lieu has been agreed in accordance with Paragraph 7(6).'

11 Directive 2000/78 was transposed into Austrian law by, inter alia, the Gleichbehandlungsgesetz (Law on Equal Treatment, BGBl. I, 66/2004). This establishes a principle of non-discrimination in connection with employment relationships, in particular on grounds of religion or belief, in the determination of pay and other working conditions.

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

12 Under Paragraph 7(3) of the ARG, Good Friday is a paid public holiday, entailing a 24-hour rest period for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church ('the churches covered by the ARG'). If a member of one of those churches does nevertheless work on that day, he is entitled to additional pay in respect of that public holiday ('public holiday pay').

13 Mr Achatzi is an employee of Cresco, a private detective agency, and is not a member of any of the churches covered by the ARG. He claims that he suffered discrimination by being denied public holiday pay for the work he did on 3 April 2015, which was Good Friday, and, for that reason, seeks payment from his employer of EUR 109.09, plus interest.

14 The appeal court varied the judgment at first instance, which dismissed the action brought by Mr Achatzi.

15 The Oberster Gerichtshof (Supreme Court, Austria), which is hearing the appeal brought by Cresco against the decision on appeal, observes, first, that, of the 13 public holidays listed in Paragraph 7(2) of the ARG, all — except for 1 May and 26 October, which have no religious connotations — have a link with Christianity, 2 of them being exclusively linked to Catholicism. Further, all of these public holidays are paid days off for all employees, regardless of their religious affiliation.

16 The referring court goes on to note that the special regime established by Paragraph 7(3) of the ARG seeks to allow members of one of the churches covered by the ARG to practise their religion on a religious holiday that is particularly important for them.

17 According to the referring court, Paragraph 7(3) of the ARG makes the granting of an additional public holiday dependent on the employee's religion, with the consequence that those who are not members of the churches covered by the ARG have one paid public holiday fewer than the members of one of those churches, which constitutes, in principle, less favourable treatment on grounds of religion.

18 The referring court is, however, unsure whether the situation of these two categories of employee is comparable.

19 It notes, in that regard, that the purpose of Paragraph 7(3) of the ARG is to allow employees who are members of one of the churches covered by the ARG to practise their religion on Good Friday without having to agree with their employer that they will take a day's leave for that purpose. Employees who are members of the Roman Catholic Church, to which the majority of the Austrian population belongs, are able to do this because the public holidays referred to in Paragraph 7(2) of the ARG, which are associated with their religion, are days off for all employees.

20 However, even though the applicant in the main proceedings is not claiming that his religious needs were not taken into consideration on Good Friday, the referring court takes the view that it is necessary, in order to assess the compatibility of the national legislation at issue in the main proceedings with Directive 2000/78, to take account of the fact that the religious needs of some employees are not taken into consideration by that legislation. It is true that some collective agreements contain provisions comparable to Paragraph 7 of the ARG, in particular with regard to Yom Kippur in the Jewish religion or Reformation Day in Protestant churches. However, in the absence of any such provision, employees are largely dependent on the goodwill of their employer.

21 The referring court also points out that the difference in treatment at issue in the main proceedings may be addressed by EU law in a dispute between individuals, such as that in the main proceedings, only if that law is directly applicable. It points out that Directive 2000/78 was transposed by the Law on Equal Treatment, which does not take precedence over the ARG, and that the clear wording of Paragraph 7(3) of the ARG precludes an interpretation consistent with EU law which extends the arrangement in respect of Good Friday to employees who are not members of the churches covered by the ARG.

22 The referring court also points out that, under Article 2(5) of Directive 2000/78, that directive is without prejudice to measures laid down by national law which, in a democratic society, are necessary for, inter alia, the protection of the rights and freedoms of others, and notes that, according to the case-law of the Court, freedom of religion and the right to practise a religion are two of the bases of a democratic society.

23 Therefore, that court is uncertain whether the regime set out in Paragraph 7(3) of the ARG should be considered as constituting a measure that is necessary to protect the freedom of religion and the right to practise a religion of employees who are members of one of the churches covered by the ARG.

24 The referring court is also uncertain whether the difference in treatment in question may be justified under Article 7(1) of Directive 2000/78, in that it constitutes positive action intended to eliminate existing disadvantages.

25 It is true that the referring court points out that on the Austrian labour market there are, in principle, no structural disadvantages for employees who are members of one of the churches covered by the ARG. However, requiring the latter to work on one of the most important days for their religion, when there is no such obligation, for example, for members of the Roman Catholic Church, the most important religious festivals of which are days off for all employees, could be considered to be a disadvantage of the sort that Paragraph 7(3) of the ARG was intended to compensate for.

26 Finally, in the event that the Court finds that the statutory arrangement relating to Good Friday set out in Paragraph 7(3) of the ARG infringes Directive 2000/78, the question arises as to whether that infringement must be compensated for by the obligation on an employer that is a private company to grant that public holiday to all its employees, even though the Austrian legislature intended to take into account the requirements justified on religious grounds of only a clearly defined group of employees in order to safeguard the interests of employers, who opposed an excessive increase in the overall number of general public holidays.

27 Moreover, if it were to be found that the statutory arrangement relating to Good Friday does not constitute positive action within the meaning of Article 7(1) of Directive 2000/78, the referring court is uncertain as to whether that finding should lead to the complete inapplicability of Paragraph 7(3) of the ARG, so that, on Good Friday, no employee could be given either a public holiday or public holiday pay.

28 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is EU law, in particular Article 21 of the [Charter], in conjunction with Articles 1 and 2(2)(a) of Directive [2000/78], 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 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 under which, if an employee [belonging to one of those churches] works, despite that day being a holiday, he is entitled, in addition to the pay received as he is allowed not to work on account of the day being a public holiday, to payment for the work actually done, 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], in conjunction with Article 2(5) of Directive [2000/78], 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 which, 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], in conjunction with Article 7(1) of Directive [2000/78], to be interpreted as meaning that the national legislation referred to in the first question constitutes positive action for the benefit of members of the churches mentioned in the first question designed to guarantee their full equality in working life and to prevent or offset disadvantages to those members due to religion, if they are thereby granted the same right to practise their 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 employees are not required to work on the holidays for the religion that is observed by the majority of employee?

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

(4) Is EU law, in particular Article 21 of the [Charter], in conjunction with Articles 1, 2(2)(a) and 7(1) of Directive [2000/78], 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 employee?'

## The jurisdiction of the Court

29 The Polish Government claims that, under Article 17(1) TFEU, the grant by a Member State of a public holiday for the celebration of a religious festival is not covered by EU law, with the result that the Court has no jurisdiction to answer the questions referred to it by the referring court.

30 In that regard, it should be noted that Article 17(1) TFEU provides that the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

31 However, such a provision does not mean that a difference in treatment under national legislation concerning the grant to certain employees of a public holiday for the celebration of a religious festival is excluded from the scope of Directive 2000/78, nor that the determination of whether such a difference in treatment is compatible with that directive is not subject to effective judicial review.

32 First, the wording of Article 17 TFEU corresponds, in essence, to that of Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Treaty of Amsterdam. The fact that Declaration No 11 is expressly mentioned in recital 24 of Directive 2000/78 shows that the EU legislature must have taken that declaration into account when adopting the directive (see, to that effect, judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 57, and of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 48).

33 Second, it is true 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 (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 58, and of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 48). However, the national provisions at issue in the main proceedings do not seek to organise the relations between a Member State and churches, but seek only to give employees who are members of certain churches an additional public holiday to coincide with an important religious festival for those churches.

34 The plea alleging lack of jurisdiction raised by the Polish Government must therefore be rejected.

## Consideration of the questions referred

### *The first three questions*

35 By its first three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 1 and 2(2) of Directive 2000/78 must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to public holiday pay, constitutes direct discrimination on grounds of religion. If the answer is in the affirmative, it also asks whether the measures provided for by the national legislation can be regarded as measures that are necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of that directive.

36 In the first place, it should be noted that, in accordance with Article 1 of Directive 2000/78, the purpose of that directive is to establish 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.

37 Under Article 2(1) of that directive, the ‘principle of equal treatment’ is defined as meaning that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(1) thereof, direct discrimination is to be taken to occur where one person is treated less favourably than another is treated in a comparable situation, on any of the grounds referred to in Article 1 of the directive, which include religion.

38 In that context, it is necessary, first, to determine whether the legislation at issue in the main proceedings gives rise to a difference in treatment between employees on the basis of their religion.

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

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

41 Second, it is necessary to examine whether such a difference in treatment relates to categories of employees who are in comparable situations.

42 In that regard, whether the requirement that situations must be comparable for the purpose of determining whether there is a breach of the principle of equal treatment has been met must be assessed in the light of all the elements which characterise them and, in particular, in the light of the subject matter and purpose of the national legislation which makes the distinction at issue (see, to that effect, judgments of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 89, and of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 42).

43 It must also be pointed out that, on the one hand, it is not required that the situations be identical, but only that they be comparable and that, on the other hand, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner, in the light of the benefit concerned (judgment of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited).

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

45 In that regard, it is apparent from the documents before the Court that the 24-hour rest period granted on Good Friday to employees who are members of one of the churches covered by the ARG is justified, according to the national competent authorities, by the importance of that day for those religious communities.

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

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

48 Further, it follows from a reading of Paragraph 7(3), in conjunction with Paragraph 9(5), of the ARG that only employees who are members of one of the churches covered by the ARG are entitled to public holiday pay if they work on Good Friday.

49 Having regard to the financial nature of the benefit concerned by such different treatment and the inextricable link between the benefit and the grant of a public holiday on Good Friday, it must also be concluded that, in respect of the grant of such a financial benefit, the situation of employees who are members of one of the churches covered by the ARG is comparable to that of all other employees, regardless of whether or not they have a religion.

50 As is apparent from the documents before the Court, the grant of public holiday pay to an employee who is a member of one of those churches and is required to work on Good Friday is dependent only on whether that employee is formally a member of one of those churches. Accordingly, that employee is entitled to such public holiday pay even if he worked on Good Friday without feeling any obligation or need to celebrate that religious festival. Therefore, his situation is no different from that of other employees who worked on Good Friday without receiving such a benefit.

51 It follows that the national legislation at issue in the main proceedings has the effect of treating comparable situations differently on the basis of religion. This therefore amounts to direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78.

52 In the second place, it must be determined whether such direct discrimination may be justified on the basis of Article 2(5) of Directive 2000/78 or Article 7(1) of that directive.

53 First, pursuant to Article 2(5) of Directive 2000/78, that directive is to 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.

54 In adopting that provision, the EU legislature intended, in the area of employment and occupation, to prevent and adjudicate on a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the need to ensure public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of Directive 2000/78, the principles established by the directive do not apply to measures incorporating differences in treatment on one of the grounds referred to in Article 1 of the directive, on condition, however, that those measures are 'necessary' for the attainment of the abovementioned objectives (judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 55).

55 Moreover, as Article 2(5) of Directive 2000/78 establishes an exception to the principle prohibiting discrimination, it must be interpreted strictly. The terms used in that provision also suggest such an approach (judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 56 and the case-law cited).

56 In the present case, it should be noted, in the first place, that the measures at issue in the main proceedings, namely the recognition of Good Friday as a public holiday for employees who are members of one of the churches covered by the ARG and the grant of public holiday pay to those employees if they are required to work during the rest period provided for that public holiday, are laid down by national law, as referred to in Article 2(5) of Directive 2000/78.

57 In the second place, as the referring court notes, the objective of granting a public holiday on Good Friday to employees who are members of one of the churches covered by the ARG is to take account of the particular importance of the religious celebrations associated with that day for members of those churches.

58 It is established that freedom of religion is one of the fundamental rights and freedoms recognised by EU law and that the term 'religion' must be understood, in that regard, as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of

religious faith in public (see, to that effect, judgments of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 28, and of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204, paragraph 30). It follows that the objective pursued by the Austrian legislature is included among those listed in Article 2(5) of Directive 2000/78.

59 It remains to be determined, in the third place, whether such measures are necessary for the protection of the religious freedom of the employees in question.

60 In that regard, it must be noted that, as the Austrian Government confirmed during the hearing before the Court, provision is made in Austrian law, for employees not belonging to the churches covered by the ARG, to celebrate a religious festival that does not coincide with any of the public holidays listed in Paragraph 7(2) of the ARG not by the grant of an additional public holiday, but principally by the imposition of a duty of care on employers vis-à-vis their employees, which allows the latter to obtain, if they so wish, the right to be absent from their work for the amount of time necessary to perform certain religious rites.

61 It follows that national measures such as those at issue in the main proceedings cannot be considered necessary for the protection of freedom of religion, within the meaning of Article 2(5) of Directive 2000/78.

62 Second, it should be verified whether provisions such as those at issue in the main proceedings may be justified under Article 7(1) of Directive 2000/78.

63 It is clear from that provision that the principle of equal treatment does not prevent a Member State from retaining or adopting, in order to ensure full equality in practice, specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1 of that directive.

64 Article 7(1) of Directive 2000/78 is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society (see, by analogy, judgment of 30 September 2010, *Roca Álvarez*, C-104/09, EU:C:2010:561, paragraph 33 and the case-law cited).

65 Further, in determining the scope of any derogation from an individual right such as equal treatment, due regard must be had to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued (see, to that effect, judgment of 19 March 2002, *Lommers*, C-476/99, EU:C:2002:183, paragraph 39).

66 In the present case, without it being necessary to determine whether the fact that Good Friday, which appears to be one of the most important days for the religion of the employees who are members of the churches covered by the ARG, does not correspond to any of the public holidays listed in Paragraph 7(2) of that law constitutes a practical disadvantage in their working life, as referred to in Article 7(1) of Directive 2000/78, it should be noted that the national legislation at issue in the main proceedings cannot be regarded as including specific measures the aim of which is to compensate for such a 'disadvantage' in accordance with the principle of proportionality and, as far as possible, the principle of equal treatment.

67 As stated in paragraph 60 above, the provisions at issue in the main proceedings grant a 24-hour rest period on Good Friday to employees who are members of one of the churches covered by the ARG, while employees belonging to other religions, whose important festivals do not coincide with the public holidays set out in Paragraph 7(2) of the ARG, can, in principle, be absent from work in order to perform the religious rites associated with those festivals only if they are so authorised by their employer in accordance with the duty of care.

68 It follows that the measures at issue in the main proceedings go beyond what is necessary to compensate for that alleged disadvantage and establish a difference in treatment between employees who are subject to comparable religious duties that does not guarantee, as far as is possible, observance of the principle of equal treatment.

69 Having regard to all the foregoing considerations, the answer to the first three questions is:

– Articles 1 and 2(2) of Directive 2000/78 must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to public holiday pay, constitutes direct discrimination on grounds of religion; and

– the measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of the directive.

***The fourth question***

70 By its fourth question, the referring court asks, in essence, whether EU law must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday and, consequently, if the latter are required to work on that day, to recognise that they are entitled to public holiday pay.

71 It follows from the answer to the first three questions that Directive 2000/78 must be interpreted as precluding a difference in treatment on grounds of religion, such as that established by the provisions at issue in the main proceedings.

72 However, it must be noted, in the first place, that, according to the Court's settled case-law, a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. If the possibility of relying on directives that have not been transposed or have been incorrectly transposed were to be extended to the sphere of relations between individuals, that would amount to recognising a power on the part of the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 76 and the case-law cited).

73 Accordingly, a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive (judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 44).

74 Nevertheless, it should be noted, in the second place, that it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision can be interpreted in conformity with Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 71, and of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 63).

75 If, as appears to be the case from the order for reference, it is impossible for the referring court to interpret national law in conformity with that directive, it must be pointed out, in the third place, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment

and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 thereof (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75, and of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 67).

76 The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

77 As regards its mandatory effect, Article 21 of the Charter is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).

78 Therefore, if it proved to be the case that national provisions could not be interpreted in a manner which was consistent with Directive 2000/78, the referring court would nevertheless be obliged to guarantee individuals the legal protection afforded to employees under Article 21 of the Charter and to guarantee the full effect of that article.

79 In the fourth place, it should be noted that, according to settled case-law of the Court, 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. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned (judgment of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 66 and the case-law cited).

80 In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category. That obligation persists regardless of whether or not the national court has been granted competence under national law to do so (judgment of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 67 and the case-law cited).

81 Nevertheless, such an approach is intended to apply only if there is a valid point of reference (judgment of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 68 and the case-law cited).

82 That is the case in the main proceedings, as the arrangements applicable to members of the churches covered by the ARG remain, for want of the correct application of EU law, the only valid point of reference.

83 Therefore, until measures reinstating equal treatment have been adopted by the national legislature, it is for employers to ensure that employees who are not members of one of those churches enjoy the same treatment as that enjoyed only by employees who are members of one of those churches under the provisions at issue in the main proceedings.

84 It should be pointed out, in that regard, that it is apparent from the relevant national legislation that the latter category of employees are obliged to inform their employer that they belong to one of the churches covered by the ARG, so that that employer is aware that they will be absent on Good Friday.

85 Consequently, until such time as compliant legislation is introduced, employers must recognise, pursuant to Article 21 of the Charter, that employees who are not members of any of the churches covered by the ARG are entitled to a public holiday on Good Friday, provided that, prior to that day, those employees have informed their employer that they do not wish to work on that day.

86 Further, it follows that an employee who does not belong to any of the churches covered by the ARG has the right to receive from his employer the pay referred to in Paragraph 9(5) of the ARG where that employer refuses to approve his request to be absent from work on that day.

87 In the fifth place, it should be noted that the obligations imposed on employers, as recalled in paragraphs 85 and 86 above, are applicable only until measures reinstating equal treatment have been adopted by the national legislature.

88 Although Member States are obliged, in accordance with Article 16 of Directive 2000/78, to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished, that article does not require Member States to adopt specific measures to be taken in the event of a breach of the prohibition of discrimination but leaves them free to choose, from among the different solutions suitable for achieving its intended objective, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise (see, to that effect, judgment of 14 March 2018, *Stollwitzer*, C-482/16, EU:C:2018:180, paragraphs 28 and 30).

89 In the light of the foregoing considerations, the answer to the fourth question is that Article 21 of the Charter must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to public holiday pay where the employer has refused to approve such a request.

## Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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

   **The measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of the directive.**

2. **Article 21 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to a payment in addition to their regular salary for work done on that day where the employer has refused to approve such a request.**

[Signatures]