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REAFFIRMATION OF THE DIRECT HORIZONTAL EFFECT OF THE GENERAL PRINCIPLE OF NON-DISCRIMINATION IN EU LAW: COMMENT ON THE CASE C-193/17 *CRESCO INVESTIGATION GMBH V. MARKUS ACHATZI*

Abstract: *The relevant ruling concerns discrimination based on religion, in particular the question of the incompatibility of national legislation with EU Directive 2000/78. Following a short presentation of the factual background, the opinion of the Advocate General, and the judgment of the Court, the article offers comments on questions raised in the judgment, including the direct horizontal effect of the general principle of non-discrimination. In its previous case law the Court confirmed that the principle has "the horizontal exclusion effect." However, in Cresco Investigation the question was whether it can be the source of rights for individuals. The ECJ adopted a firm approach, ruling that the general principle of non-discrimination as enshrined in Art. 21(1) of the Charter is sufficient in itself to confer rights on individuals which can be invoked in disputes with other private parties. This means that the Court recognised "the horizontal substitution effect" of the general principle of non-discrimination, which is connected with both setting aside any discriminatory provision of national law and applying to members of the disadvantaged group the same arrangements as those enjoyed by persons in the privileged category. The possible consequences of this approach are discussed in the article.*

Keywords: Cresco Investigation, direct horizontal effect, discrimination based on religion, EU Charter of Fundamental Rights, general principle of non-discrimination in EU Law

INTRODUCTION

Cresco Investigation is an important case for numerous reasons. However, this article focuses on two aspects that seem to be crucial. The first is connected with the reaffir-

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mation of the direct horizontal effect of the general principle of non-discrimination as enshrined in Art. 21(1) of the EU Charter of Fundamental Rights. It should be noted although that the application of this principle in private disputes is a sensitive issue inasmuch as it raises essential questions regarding the division of competences between the Union and Member States, the internal EU separation of powers between the Court of Justice (further also as the Court) and EU legislator (institutional balance), and the public-private divide.[1] Therefore, it is interesting to analyse the reasons, scope and possible consequences of the approach according to which the general principle of non-discrimination can be relied on directly before national courts also in a horizontal context.

The second important development brought about by the *Cresco Investigation* case can be seen in its confirmation of the meaning of the general principle of non-discrimination on grounds of religion or belief. Undoubtedly, protection from discrimination based on religion has begun to play a significant role in the case law of the Court. The *Achbita*[2] and *Bougnaou*[3] cases concerned the prohibition on wearing an Islamic headscarf as a form of indirect discrimination on grounds of religion. In *Egenberger*[4] and *IR v. JQ*[5] the question of non-discrimination *vis-a-vis* the right to religious autonomy was considered. In both cases the Court of Justice referred to the prohibition of discrimination on grounds of religion or belief as a mandatory general principle of EU law which is sufficient in itself to confer on individuals a right that they may rely on in disputes between them in a field covered by EU law. This novel approach was maintained and even reinforced in the ruling in *Cresco Investigation*.

1. THE *CRESCO INVESTIGATION* CASE

Under paragraph 7(3) of the Austrian Law on Rest Periods and Public Holidays, Good Friday was a paid public holiday, entailing a 24-hour rest period for members of certain Christian churches. If their members nevertheless worked on that day, they were entitled to additional pay in respect of that public holiday. Markus Achatzi was an employee of Cresco, a private detective agency, and was not a member of any of the privileged churches. Consequently, he claimed that he suffered discrimination by being denied public holiday pay for the work he did on Good Friday, and for that reason he sought payment from his employer of EUR 109.09, plus interest.

[1] M. de Mol, *The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?*, 18 Maastricht Journal of European and Comparative Law 109 (2011), p. 110.

[2] Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, EU:C:2017:203.

[3] Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v. Micropole SA*, EU:C:2017:204.

[4] Case C-414/16 *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

[5] Case C-68/17 *IR v. JQ*, EU:C:2018:696.

The questions asked by the Supreme Court in Austria concerned the interpretation of Art. 21 (1) of the EU Charter of Fundamental Rights in conjunction with Arts. 1, 2 (2a and 5) and 7(1) of the Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[6] The first question addressed the main problem of the case, which was discrimination based on religion. In its second and third questions, the referring court wished to establish whether these national provisions could be treated as a measure which, in a democratic society, was necessary to ensure the protection of the rights and freedoms of others, particularly the freedom to practice a religion (Art. 2(5) of Directive 2000/78), or as a positive action for the benefit of members of the churches covered by Austrian regulations. In other words, whether there was any possibility to justify the national regulations. Finally, the Supreme Court inquired whether, so long as the legislature had not created a non-discriminatory legal situation, a private employer was required to grant the rights and entitlements in respect of Good Friday to all employees, irrespective of their religious affiliation.

In his lengthy opinion of 25 July 2018, Advocate General Bobek considered all these important issues. He had no doubts that the national regulation subject to the proceedings before the Court constituted discrimination directly based on religion. Moreover, he rejected the possibility of its justification under Art. 52(1) of the Charter and Art. 2(5) of the Directive. Notably, the A.G. attributed a fundamental role to a restrictive interpretation of these exceptions to the prohibition on discrimination and to the test of proportionality. He referred to the case law of the Court concerning the assessment of proportionality of a discriminatory national measure, and concluded that the measures in favour of the members of the four churches were disproportionate in the sense that they were inappropriate to achieve the ends of protection of religious freedom. A similar approach was adopted with regard to the question whether those measures fell within the notion of positive action under Art. 7(1) of Directive 2000/78. The A.G. noted that in general "positive action" had no clear definition in either the legislation or in the case law. However, this was not relevant for the facts of the case because national measures were not adopted with the objective of ensuring full equality. Moreover, they were not compatible with the principle of proportionality, and A.G. Bobek had no doubt that, according to the Court, a positive action had to be necessary "to neutralise perceived disadvantage." Consequently, he considered the relevant national law measures disproportionate, and as such not covered by the concept of positive action.

In the most important part of the Opinion, the A.G. referred to the question of how the breach of the prohibition on discrimination should be remedied, more specifically when it occurred in a relationship between private parties. He discussed the previous case law of the Court, but underlined that there was nothing in the judgment in *Egenberger* which could confirm that Art. 21(1) of the Charter was "horizontally directly

[6] [2000] OJ L 303.

effective," and adopted a rather cautious approach that it should not be considered as such. He also excluded the possibility of a remedy against the employer if the latter acted in accordance with a national law incompatible with the EU non-discrimination principle. Thus, A.G. Bobek concluded that Art. 21(1) of the Charter, in conjunction with the appropriate provisions of Directive 2000/78, could not impose obligations on the employer, and a party injured as a result of the application of national law could obtain, if appropriate, compensation from the State for the loss sustained.[7] The Court, however, did not follow this advice, laying a solid ground for the horizontal direct effect of the general principle of non-discrimination as enshrined in Art. 21 of the Charter.

The Grand Chamber of the Court ruled that the national legislation subject to the proceedings before it constituted direct discrimination on grounds of religion. The Court referred to the justification suggested by the national court, that is, to Art. 2(5) of Directive 2000/78. However, it noted that this provision was an exception to the general principle of non-discrimination, and as such had to be interpreted strictly. Moreover, the applied measures had to be necessary for the attainment of one of the objectives mentioned in Art. 2(5), *inter alia* ensuring the protection of the religious freedom of the other employees. With regard to this question, the Court noted that according to the information given by the Austrian Government, "provision was made in Austrian law, for employees not belonging to the churches covered by the Austrian Law on Rest Periods and Public Holidays, to celebrate a religious festival (...) principally by the imposition of a duty of care on employers vis-à-vis their employees, which allowed the latter to obtain, if they so wished, the right to be absent from their work for the amount of time necessary to perform certain religious rites." Therefore, the Court of Justice excluded the possibility to consider the national measures at issue as necessary for the protection of freedom of religion within the meaning of Art. 2(5) of Directive 2000/78.

A similar approach was adopted with regard to the second justification suggested by the referring court. The Court noted that in order to ensure full equality in practice, Member States could retain or adopt specific measures to prevent or compensate for disadvantages linked to any of the grounds covered by Directive 2000/78, but they had to observe the principle of proportionality, which required that derogations remained within the limits of what was appropriate and necessary in order to achieve the aim in view. According to the Court, the national measures at issue went beyond what was necessary to compensate for the alleged disadvantage, as they treated employees in a different way – those who were members of one of the churches covered by the measures were granted a 24-hour rest period on Good Friday, while employees belonging to other religions could be absent from work in order to perform the religious rites associated with their festivals only if they were so authorised by their employer in accordance with the duty of care.[8]

[7] Opinion in case C193/17, EU:C:2018:614, para. 197.
[8] Judgment, paras. 67-68.

Referring to the most important question, i.e. whether Art. 21 (1) of the Charter could be relied on directly before national courts in a horizontal context, the Court noted that a directive could not be relied on in a dispute between individuals. However, Directive 2000/78 did not itself establish the principle of equal treatment in the field of employment and occupation, which originated in various international instruments and the constitutional traditions common to the Member States, adding that "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."[9] Consequently, if national provisions could not be interpreted in a manner consistent with Directive 2000/78, the referring court was obliged to guarantee the full effect of Art. 21(1) of the Charter, which in discrimination cases was connected with granting to persons being at a disadvantage the same advantages as those enjoyed by persons within the favoured category. Therefore, the Court concluded that until the amendment of the national legislation granting the right to a public holiday on Good Friday only to employees who were members of certain Christian churches, a private employer who was subject to such legislation was obliged to grant his other employees the same rights as those enjoyed by the members of certain Christian churches, that is, a public holiday on Good Friday subject to their request and a public holiday pay for work done on that day if the employer had refused to approve such a request.

2. COMMENTS

2.1. The direct horizontal effect of the general principle of non-discrimination in the previous case law

As early as in *Defrenne* the Court of Justice recognised that the general principle of equal pay for equal work contained in Art. 119 of the EEC Treaty (now Art. 157 TFEU) "extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."[10] In other words, it was accepted that the general principle of non-discrimination based on sex could enjoy horizontal direct effect. A similar approach was adopted in *Anognese*[11] with regard to the prohibition of discrimination based on nationality; and it was underlined that although Art. 48 of the EEC Treaty (now Art. 45 TFEU) was addressed to the Member States, it could be relied on also in disputes between private parties, thus conferring obligations on the latter. As a result, in their respective fields (mainly concerning employment law) Arts. 157 and 45(2) TFEU fully apply directly in private relations.[12]

[9] Judgment, para. 76.

[10] Case C-43/75 *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, EU:C:1976:56, para. 39.

[11] Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA.*, EU:C:2000:296.

[12] de Mol, *supra* note 1, p. 115.

A similar approach could be seen in *Mangold*,[13] where the Court referred to the general principle of non-discrimination on grounds of age and stated that the national courts were responsible for the full effectiveness of this principle also in disputes involving two private parties. Although some academics generally accepted the establishment of the general principle of non-discrimination on the grounds of age,[14] this position also attracted criticism. In particular, several Advocates General commented on *Mangold,* suggesting a more restrained interpretation according to which the prohibition of age discrimination identified by the Court constituted a particular expression of the general principle of equality.[15] *Mangold* was also contested by some German courts, which considered it as *ultra vires*. It was underlined that it would be unwise to accept the proposition that the general principle of equality was horizontally directly effective in all its various manifestations and to all situations falling within the scope of Community law.[16] However, "one should not exclude the possibility that a general principle of Community law might, in appropriate circumstances, be applied horizontally."[17] Thus, the main task of the Court was to determine "the scope of horizontality," as it was not clear if the horizontal direct effect was conferred only to the general principle of non-discrimination based on age, or also on other grounds. There were also other unanswered questions, such as the source and the nature of the general principle of equality.[18]

Even though the Court of Justice tried to clarify its earlier approach, these issues were not resolved in *Kücükdeveci*.[19] The Court referred to Art. 21(1) of the Charter as the potential source of the general principle of non-discrimination on grounds of age, but at the same time it underlined that this principle was expressed in Directive 2000/78. Mentioning the Charter in the *Kücükdeveci* case opened up a debate about the potential horizontal applicability of this document, either independently or as an expression of general principles of Union law.[20] With regard to the scope of the general principle of non-discrimination on grounds of age, the Court noted only that it should

[13] Case C-144/04 *Werner Mangold v. Rüdiger Helm*, EU:C:2005:709.

[14] *See e.g.* D. Schiek, *Constitutional Principles and Horizontal Effect: Kücükdeveci Revisited*, 1 European Labour Law Journal 368 (2010), pp. 370 and 371.

[15] *See, inter alia,* A.G. Sharpston's opinion in case C-227/04 P, *Maria-Luise Lindorfer v Council of the European Union*, EU:C:2006:748, in particular paras. 52-58; or A.G. Mazák's opinion in case C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA.,* EU:C:2007:106, in particular paras. 87-97 and 132-138.

[16] D. Wyatt, *Horizontal Effect of Fundamental Freedoms and the Right to Equality After Viking and Mangold, and the Implications for Community Competence*, 4 Croatian Yearbook of European Law and Policy 1 (2008), p. 15.

[17] A.G. Sharpston's opinion in case C-427/06 *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, EU:C:2008:297, para. 85.

[18] *See* further T. Papadopoulos, *Criticizing the Horizontal Direct Effect of the EU General Principle of Equality*, 11 European Human Rights Law Review 438 (2011), p. 447.

[19] Case C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG.*, EU:C:2010:21.

[20] D. Leczykiewcz, *Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection and State Liability*, in: D. Chalmers, A. Arnull (eds.), *The Oxford Handbook of European Union Law*, Oxford University Press, Oxford: 2015, p. 242.

be applied "within the scope of European Union law." However, the rationale for the horizontal direct effect of this principle was not explained in detail.

Consequently, the Danish Supreme Court refused to apply the given ruling in *Dansk Industri*[21], indicating that the principle of conferral did not allow the Court to apply the general principle of non-discrimination to a litigation between private parties.[22] Such a position could be connected with the fact that in its judgment the Court of Justice underlined the fundamental nature of the general principle of non-discrimination, which according to its previous law "confers on private persons an individual right they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle."[23] The refusal of the Danish Supreme Court to apply the given ruling in *Dansk Industri* clearly showed that it was not easy for a national court to accept the far-reaching effects of the general principle of non-discrimination.

Despite this criticism, or even contestation, the approach underlining that general principle of non-discrimination holds a special place within the general principles of the EU has been maintained by the Court. The *Egenberger*[24] and *IR v. JQ*[25] decisions have confirmed and reinforced the direct horizontal effect of the prohibition of discrimination in labour relations, which had evolved in a coherent fashion, starting with *Defrenne* and continuing through *Mangold*, *Kücükdeveci* and *Dansk Industri*.[26] However, these rulings also introduced important new elements with regard to the direct horizontal effect of the general principle of non-discrimination. First of all, the Court referred to the general principle of non-discrimination based on religion or belief, thus confirming that the direct horizontal effect covered not only sex, nationality, or age, but also religion. In this way the Court of Justice dispelled doubts expressed in the literature as to whether its approach was applicable only to discrimination on the ground of age, or also to other grounds mentioned by the Treaties.[27] Moreover, it was underlined that the prohibition of all discrimination on grounds of religion or belief was "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" and "as regards its mandatory effect, Art. 21 of the Charter is no different, in principle, from the various provisions of the founding

[21] Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

[22] *See further* G. Zaccaroni, *Is the horizontal application of general principles ultra vires? Dialogue and conflict between supreme European courts in Dansk Industri*, 9 Federalismi.it 1 (2010), p. 14.

[23] Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and Others*, EU:C:2014:2, para. 47.

[24] Case C-414/16 *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU:C:2018:257.

[25] Case C-68/17 *IR v. JQ*, EU:C:2018:696.

[26] A.C. Ciacchi, *The Direct Horizontal Effect of EU Fundamental Rights. ECJ 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and ECJ 11 September 2018, Case C-68/17, IR v JQ*, 15 European Constitutional Law Review 294 (2019), p. 305.

[27] *See e.g.* de Mol, *supra* note 1, p. 24.

Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals."[28] Thus the Court underlined the binding nature of the general principle of non-discrimination, which was not only an unwritten general principle but was also confirmed by the Member States in the Charter. Consequently, a national court is obliged to guarantee its full effectiveness, including by disapplying, if there is such a need, any contrary provision of national law. However, according to the rulings in both *Egenberger* and *IR v. JQ,* the horizontal direct effect of the general principle of non-discrimination should be resorted in situations where it is not possible to interpret the national legislation according to EU law.

2.2. The direct horizontal effect of the general principle of non-discrimination according to the current stance of the Court, and its potential consequences for private parties

Cresco Investigation seems to be the logical continuation of the previous case law of the Court. However, all of the cases discussed above concerned "the horizontal exclusion effect," i.e. the situation where the contract between private parties is based on a national norm which, however, after a review in the light of the general principle of non-discrimination, is declared incompatible with the latter. Thus the provision of EU primary law excludes the application of an inconsistent national norm between individuals.[29] Therefore, some academics refer to such a situation as an example of the application of the primacy of EU law.[30] A similar approach was adopted by A.G. Bobek – in his opinion he referred to "a right not to suffer discrimination" as a consequence of the primacy of EU law, not its direct effect. According to him, the judgment in *Egenberger* confirmed the primacy of EU primary law in the form of Art. 21(1) of the Charter in the specific context of a horizontal dispute. A.G. Bobek also suggested that the Court should not go beyond this basic finding.[31] However, the Court has always referred to such situations/disputes as involving the question of direct horizontal effect, not the primacy of the EU law. This is connected with the fact that the latter concentrates on the issue of which legal norms prevail, but it does not confer any rights on individuals. Only norms which have a direct effect can be invoked by them before a court.

In *Cresco Investigation* the Court of Justice did not hesitate to extend the protection of individual rights, and recognised "the horizontal substitution effect" of the general principle of non-discrimination. It confirmed that Art. 21(1) of the Charter is the source of a right not to suffer discrimination, and can be invoked not only against the Member States and the EU institutions, but also against other individuals in disputes

[28] Case C-414/16, paras. 76 and 77.

[29] S. Sever, *Horizontal Effect and the Charter*, 10 Croatian Yearbook of European Law 39 (2014), p. 42.

[30] *See e.g.* P. Craig, G. de Búrca, *EU Law: Text, Cases and Materials* (6th ed.), Oxford University Press, Oxford: 2015, pp. 184-224.

[31] Opinion in the commented case C-193/17, para. 140.

in a field covered by EU law. Some EU lawyers and Advocates General argue that the latter cannot be directly obligated on the basis of the provisions of the Charter, inasmuch as its Art. 51(1), which refers to the scope of application of the Charter, mentions only the Member States and the EU institutions, not private parties.[32] Other academics underline that horizontality is not excluded by virtue of Art. 51(1) for any part of the Charter.[33] Arguments based on a strict textual interpretation are not convincing in the light of the case law of the Court either. Firstly, in *Defrenne*[34] it was underlined that "the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual (...)." Secondly, in a recent judgment – *Bauer*[35] – the Court of Justice referred directly to the provisions of Art. 51(1) of the Charter and noted that it did not "address the question whether individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility." The main argument given by the Court to support the direct horizontal effect of Art. 21 is that in principle it is not different from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals. The logical consequence of the Charter having the same legal value as that enjoyed by the Treaties is to give its provisions the same effect. In particular, it would be difficult to imagine that some of the Charter's provisions which reproduce horizontally effective Treaty rights, for instance the right to equal pay, are stripped of that feature in respect of the Charter's application alone.[36] Taking this into account, it seems to be justified to accept the direct horizontal effect of Art. 21. However, this does not mean that all the Charter's provisions have horizontal direct effect e.g. in the above-cited case of *Association de médiation sociale* the Court rejected the possibility to invoke Art. 27 of the Charter in disputes between individuals.[37] This confirms that the non-discrimination principle holds a special position within the general principles of the EU.

It should be emphasised however that Art. 21(1) of the Charter can be invoked in disputes between individuals if national provisions cannot be interpreted in a manner consistent with Directive 2000/78. Thus, the Court underlines that the horizontal

[32] *See e.g.* the opinion of A.G. Trstenjak in case C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559, para. 80.

[33] E. Frantziou, (*Most of) the Charter of Fundamental Rights is horizontally applicable: ECJ 6 November 2018, joined cases C-569/16 and C-570/16, Bauer et al.*, 15 European Constitutional Law Review 306 (2019), p. 317.

[34] Case C-43/75, para. 31.

[35] Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, EU:C:2018:871, para. 87.

[36] E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality*, 21 European Law Journal 657 (2015), p. 660.

[37] *See* further E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, Oxford University Press, Oxford: 2019, pp. 91-109.

application of Art. 21(1) of the Charter can be resorted to only in a case where this Directive cannot have "indirect effects." It should be noted that national courts and the Court of Justice refer to both acts in their rulings, as they concentrate on the same problems: non-discrimination. The Court has always underlined that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds.[38] However, the Charter has the status of primary law, while the Directive is an act of secondary law which requires implementation, and according to the established case law of the Court cannot be relied on in a dispute between individuals. Therefore, only Art. 21(1) of the Charter can be invoked in such situations.

The Court also gives directions on how to ensure the full observance of equality – it should be done by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Therefore, the national court is obliged not only to set aside any discriminatory provision of national law (the horizontal exclusion effect) but also to apply to members of the disadvantaged group the same rights as those enjoyed by the persons in the other category (the horizontal substitution effect). The latter obligation can be applied, however, only if there is "a valid point of reference," as the Court puts it in its case law.[39] In other words, there must be a person (or a group of persons, e.g. members of certain churches) that enjoys certain rights (e.g. the right to a public holiday or public holiday pay) and the same benefits should be granted to other persons affected by the discrimination.

As a consequence, the obligation to comply with the general principle of non-discrimination would require that the scope of national rules granting rights to the members of certain churches should be extended so that those protective rules also benefit other persons (non-members of those churches). However, until this amendment of legislation is introduced, a private employer is obliged to ensure the full observance of the general principle of non-discrimination and to grant his other employees the same rights as those enjoyed by the members of the privileged group (certain Christian churches). The Supreme Court in Austria in its judgment of 27 February 2019 confirmed that all employees are entitled to public holiday pay while working on Good Friday but "this right only exists if the employee has previously requested his employer to be dismissed on Good Friday and the employer has not complied with this request."[40]

As a consequence, individuals are bound by the general principle of non-discrimination even if (or in particular if) it is not properly implemented by the Member States. This, however, is connected with the blurring of the public/private divide and the rise of fundamental human rights as general principles of law, thus failure to protect

[38] *See e.g.* Case C-414/16 *Vera Egenberger* and also the commented case.

[39] *See also* Joined Cases C-231/06 to C-233/06 *National Pensions Office v Emilienne Jonkman*, *Hélène Vercheval* and *Noëlle Permesaen v. National Pensions Office*, EU:C:2007:373.

[40] OGH | 9 ObA 11/19m. It should be added that the Supreme Court decided to refer the case to the first court for a new hearing and decision.

individuals from the violation of certain principles on the part of other private parties might frustrate the overall effectiveness of the system of fundamental rights protection set up by the EU.[41] Nevertheless, it can also be said that with the establishment of the horizontal direct effect of the general principle of non-discrimination in EU law, the Court shifts onto individuals a part of the burden connected with the protection of fundamental rights, which have so far rested on the Member States; in cases of their violation both are responsible for ensuring that the fundamental EU rights are granted.[42]

2.3. The confirmation of the meaning of the general principle of non-discrimination on grounds of religion or belief

As was noted in the introduction, in a series of rulings including *Achbita, Bougnaou, Egenberger* and *IR v. JQ,* the Court underlined the meaning of the prohibition of discrimination based on religion or belief, which should be treated as a "mandatory general principle of EU law." Such an approach is maintained in *Cresco Investigation*. It should also be noted that the Court of Justice has no doubts that national regulations according to which Good Friday is a public holiday only for employees who are members of certain Christian churches, and that only those employees are entitled, if required to work on that public holiday, to holiday pay for work done on that day, constituted direct discrimination on the grounds of religion. Indeed, the difference in treatment of employees in a comparable situation, at least with regard to their rights to have a rest on Good Friday and to a public holiday pay if they work on that day, is based directly on their religion or beliefs.

The possibility of justification of direct discrimination in EU law is limited, as generally it has to be provided for in the legal provisions, in particular those of Directive 2000/78. Most of them are subject to the additional requirement of proportionality, which was underlined by A.G. Bobek and the Court. They both rightly rejected the possibility of justification of the Austrian measure based on the provisions of Art. 2(5) of Directive 2000/78. The latter provides that it is to be applied "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." The Court has consistently held that as an exception to the principle prohibiting discrimination, this provision must be interpreted strictly,[43] with particular emphasis on the term "necessary."

Referring to the second possible justification suggested by the national court, i.e. Art. 7(1) of Directive 2000/78, which provides for so-called positive action, both A.G. Bobek and the Court underlined that such specific measures should prevent or compensate for disadvantages linked to any of the protected grounds and should be adopted "with the

[41] *See inter alia* F. Fontanelli, *Some Reflections on the General Principles of EU and on Solidarity in the Aftermath of Mangold and Kücükdevec*, 17 European Public Law 225 (2011), p. 233.

[42] *Ibidem*, pp. 238-239.

[43] *See* C-447/09 *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, EU:C:2011:573, para. 56.

objective of ensuring full equality." These general requirements were not met by the national legislation. Moreover, both A.G. Bobek and the Court rightly noted that the national measures "go beyond what is necessary to compensate for disadvantages linked to religion" and therefore should be considered as disproportionate.

This part of the analysed ruling clearly shows that the general principle of non-discrimination on grounds of religion or belief is a fundamental element of EU law which should be strictly observed. Any exceptions to direct discrimination based on those criteria are interpreted in a strict manner, with due regard to proportionality. According to the established case law of the Court, this requires the measures to be both appropriate and necessary in order to achieve the aim in view. The *Cresco Investigation* case can be treated as the continuation of this case law, as it confirms that in order to justify direct discrimination based on religion or belief, the Member States have to give sufficient reasons and the undertaken measure should be compatible with proportionality.

CONCLUSIONS

An especially positive dimension of the *Cresco Investigation* case is its reaffirmation of the special constitutional value of the general principle of non-discrimination, which is sufficient in itself to confer rights on individuals. Art. 21(1) of the Charter is an autonomous source of rights that can be invoked when Directive 2000/78 is not applicable and it is not possible to interpret national provisions in a manner consistent with Art. 21(1). According to the ruling handed down in *Cresco Investigation*, the right not to suffer discrimination can be relied on in disputes in a field covered by EU law not only against the Member States and EU institutions, but also against individuals. Thus, the Court recognises "the horizontal substitution effect" of Art. 21(1) of the Charter, which is connected with both setting aside any discriminatory provision of national law and granting to members of the discriminated group the same rights as those enjoyed by persons in the privileged category. The latter obligation rests on individuals, who are to ensure the full observance of the general principle of non-discrimination until the proper change of any national legislation incompatible with EU law is introduced. Consequently, when the right not to suffer discrimination is invoked, the private defendant will not be able to benefit from his State's default, as is the case when a directive is invoked.[44]

Considering that *Cresco Investigation* is the logical continuation of the previous case law of the Court, it seems that Art. 21 of the Charter can be invoked also in disputes between private parties concerning discrimination based not only on religion, but also on other grounds. However, the question remains whether those criteria should be regulated by the Treaties, or not. This is an important issue given the fact that Art. 21 of the Charter contains an open list of grounds for discrimination. Nevertheless, the

[44] Fontanelli, *supra* note 33, p. 238.

practical consequences of the commented judgment are far-reaching, as it has opened the door to further expansion of the general principle of non-discrimination. If the Court of Justice maintains this line of reasoning in its future case law, individuals will be better protected against various forms of discrimination, regardless of their source.

The analysed ruling also confirms the importance of the general principle of non-discrimination based on religion as a particular expression of the general principle of equality. All exceptions to the prohibition of discrimination linked to this ground should be interpreted in a strict manner. Similarly to discrimination based on other protected criteria, such as nationality, sex, age, disability etc., the proportionality of the applied measures seems to play a decisive role. As a result, Art. 2(5) of Directive 2000/78 can be referred to by the Member States only if it is established that national legislation is really necessary for the protection of the rights and freedoms of others. Likewise, positive actions should be undertaken "with the objective of ensuring full equality," and cannot go beyond what is necessary to compensate for disadvantages linked to any of the protected grounds.