Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 31 May 2018[1]

Case C-68/17

IR
v
JQ

(Request for a preliminary ruling
from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling — Directive 2000/78/EC — Equal treatment in employment and occupation — Occupational activities of churches — Occupational requirements — Duty of good faith and loyalty towards the ethos of the church — Difference of treatment based on faith — Dismissal of a Catholic worker, in a managerial role, because of a second marriage following divorce)

I. Introduction

1. In this request for a preliminary ruling, the Bundesarbeitsgericht (Federal Labour Court, Germany) seeks guidance from the Court as to the legality of the dismissal of the Head of the Internal Medicine Department of a Catholic hospital subject to the supervision of the Catholic Archbishop of Cologne, on the sole ground that he divorced and remarried in a civil ceremony, even though he would not have been dismissed had he not been Catholic.

2. It would be a manifestly unlawful dismissal, representing direct discrimination based on religion, if churches and organisations the ethos of which is based on religion did not benefit from a special legal system both under German constitutional law and under Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Directive 2000/78').[2]

3. The question raised in the present case is whether respect for the concept of marriage under the doctrine and canon law of the Catholic Church constitutes a genuine, legitimate and justified occupational requirement, within the meaning of Article 4(2) of Directive 2000/78, which can entail a difference of treatment, in terms of dismissal, between Catholic employees and those who belong to another faith or to none at all.

1 Original language: French.

2 OJ 2000 L 303, p. 16.

II. Legal context

A. EU law

4. Article 17(1) TFEU provides:

'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.'

5. Recitals 4, 23, 24 and 29 of Directive 2000/78 state:

'(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right …

…

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion … constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. …

(24) 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.

…

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.'

6. Article 1 of Directive 2000/78, entitled 'Purpose', provides:

'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.'

7. Article 2 of Directive 2000/78, entitled 'Concept of discrimination', lays down the following in paragraphs 1 and 2:

'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;

…'

8. Article 4 of Directive 2000/78, entitled 'Occupational requirements', provides:

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

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of [EU] law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

B. German law

1. Constitutional law

9. Article 140 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1, 'the Basic Law') provides that '[t]he provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.'

10. Article 137 of the Verfassung des Deutschen Reichs (Constitution of the German Empire), adopted on 11 August 1919 in Weimar (Reichsgesetzblatt 1919, p. 1383; 'the Weimar Constitution'), which entered into force on 14 August 1919, states:

'There shall be no State church.

Freedom of association to form religious societies shall be guaranteed. There shall be no restrictions on the combination of religious societies within the territory of the Länder.

Each religious society shall arrange and administer its affairs independently within the limits of the law that applies to everyone.

…

Religious societies that are entities under public law are entitled to levy taxes on the basis of the civil tax lists in accordance with the provisions of the laws of the states.

Associations whose purpose is to foster a philosophical belief in the community shall have the same status as religious societies.

…'

2. The Law on Protection against Dismissal

11. Paragraph 1 of the Kündigungsschutzgesetz (Law on Protection against Dismissal) of 25 August 1969 (BGBl. 1969 I, p. 1317, 'the KSchG') states that the dismissal of an employee is to be void where it is 'socially unjustified', namely 'when it is not based on reasons relating to the person or conduct of the employee or caused by urgent operational requirements which prevent the employee's continued employment in the business.'

3. The General Law on Equal Treatment

12. Directive 2000/78 has been transposed into German law by the Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897, 'the AGG').

13. Paragraph 1 of the AGG, entitled 'Objective of the law', provides:

'The objective of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual identity.'

14. Paragraph 7 of the AGG, entitled 'Prohibition of discrimination', provides in subparagraph 1:

'Workers must not be discriminated against on any of the grounds mentioned in Paragraph 1; this applies also where the person responsible for the discrimination merely assumes in the course of the discrimination that one of the grounds mentioned in Paragraph 1 exists.'

15. Paragraph 9, entitled 'Permissible difference of treatment because of religion or belief', provides:

'(1) … a difference of treatment on grounds of religion or belief in connection with employment by religious communities, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity.

(2) The prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious communities, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief, mentioned in subparagraph 1, to be able to require their employees to act in good faith and loyalty in accordance with their self-perception.'

C. The law of the Roman Catholic Church

16. According to Canon 11 of the Codex Iuris Canonici (the Code of Canon Law, 'the CIC'), promulgated by the Apostolic Constitution '*Sacrae disciplinae leges*' of Pope John Paul II, of 25 January 1983 (DC 1983, No 1847, p. 244), '[m]erely ecclesiastical laws bind those who have been baptised in the Catholic Church or received into it, possess the efficient use of reason, and, unless the law expressly provides otherwise, have completed seven years of age'.

17. Canon 1085 of the CIC states:'§1 A person bound by the bond of a prior marriage, even if it was not consummated, invalidly attempts marriage.

§2 Even if the prior marriage is invalid or dissolved for any reason, it is not on that account permitted to contract another before the nullity or dissolution of the prior marriage is established legitimately and certainly.'

18. According to the terms of Canon 1108, §1, of the CIC, '[o]nly those marriages are valid which are contracted before the local ordinary, pastor, or a priest or deacon delegated by either of them, who assist, and before two witnesses according to the rules expressed in the following canons and without prejudice to the exceptions mentioned in Canons 144, 1112, §1, 1116, and 1127, §§1-2'.

19. Article 1 of the Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse (Basic regulations on service in the Church in employment relationships) of 22 September 1993 (Amtsblatt des Erzbistums Köln 1993, p. 222, 'the GrO 1993')[3] states as follows:

'Basic principles of service in the Church

All persons working in an institution of the Catholic Church contribute together through their work, irrespective of their employment status, to ensuring that the institution can play its part in the mission of the Church (community of service). …'

20. Article 3(2) of the GrO 1993, entitled 'Establishment of the employment relationship', states:

'The church employer can assign pastoral, catechetical and, as a rule, educational and managerial tasks only to a person who is a member of the Catholic Church.'

21. Article 4 of the GrO 1993, entitled 'Obligations of loyalty', states as follows:

'(1) Catholic employees are expected to recognise and observe the principles of Catholic doctrinal and moral teaching. In pastoral, catechetical and educational work in particular, as well as among employees who are working on the basis of a *missio canonica* (canonical mission), personal conduct in compliance with the principles of Catholic doctrinal and moral teaching is required. This also applies to employees in managerial positions.

(2) Non-Catholic Christian employees are expected to respect the truths and values of the Gospel and to contribute to giving them effect within the organisation.

…

(4) All employees must refrain from acting contrary to the Church. They must not by their personal life and their conduct at work jeopardise the credibility of the Church and the institution in which they are employed.'

3 Official Gazette of the Archdiocese of Cologne, p. 222.

22. Article 5 of the GrO 1993, entitled 'Violations of the obligations of loyalty', states:

'(1) If an employee no longer complies with the requirements for employment, the employer must attempt to counsel the employee permanently to rectify this defect. … Dismissal may be considered as a last resort.

(2) For a dismissal for reasons specifically relating to the Church, the following infringements of loyalty in particular are regarded by the Church as serious:

– Breach by an employee of the obligations under Articles 3 and 4, in particular withdrawal from the Church and public defence of positions contrary to the basic principles of the Catholic Church (such as in relation to abortion) and serious personal moral failings,

– Entering into a marriage that is invalid according to the Church's interpretation of its faith and its legal system [4],

– Acts that imply a clear separation from the Catholic Church under canon law, and in particular apostasy or heresy (according to Canon 1364, §1 read in conjunction with Canon 751 of the CIC), iniquity in relation to the Holy Eucharist (Canon 1367 of the CIC), public blasphemy and the inciting of hatred or contempt against religion and the Church (Canon 1369 of the CIC), and infringements against the ecclesiastical authorities and the freedom of the Church (in particular according to Canons 1373 and 1374 of the CIC).

(3) Conduct generally considered as a possible ground for dismissal in accordance with paragraph 2 excludes the possibility of continued employment when undertaken by … managerial employees. In exceptional cases, a dismissal may be avoided if serious reasons in the individual case make it appear excessive.'

23. The Grundordnung für katholische Krankenhäuser in Nordrhein-Westfalen (Basic regulations for Catholic hospitals in North Rhine-Westphalia, Germany) of 5 November 1996 (Amtsblatt des Erzbistums Köln, p. 321),[5] states as follows:

'A. Assignment to the church

…

(6) The [GrO 1993], issued on the basis of the statement of the German bishops on service in the Church, as amended and supplemented, is binding on the responsible body. Managerial employees within the meaning of the above basic regulations include members of hospital management and heads of department.'

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

24. IR is a limited liability company established under German law. Its purpose is to carry out the work of Caritas (the international confederation of Catholic charitable organisations) as an expression of the life and nature of the Roman Catholic Church through, among other things, the operation of hospitals. IR is primarily a non-profit organisation and is subject to the supervision of the Archbishop of Cologne.

4 According to the current version of Article 5(2) of the GrO 1993 (which entered into force on 1 August 2015), the conclusion of a civil marriage that is invalid under the canon law of the Catholic Church is a ground for dismissal only if it is objectively capable under the specific circumstances of creating a significant nuisance in the community of service or in the professional sphere and of negatively affecting the credibility of the Church. This version does not apply to the dismissal at issue in the main proceedings, which dates from 30 March 2009.

5 Official Gazette of the Archdiocese of Cologne, p. 321.

25. JQ is of the Roman Catholic faith. He is a doctor by training and had been working since 2000 as Head of the Internal Medicine Department of an IR hospital located in Düsseldorf (Germany). His employment contract with IR was concluded on the basis of the GrO 1993, adopted by the plenary meeting of the German Bishops' Conference and applicable to service in the Church in the context of employment relationships.

26. JQ was married according to the Roman Catholic rite. In August 2005, his wife separated from him and he has been living with his new partner since 2006. After his divorce from his first wife was granted in accordance with German civil law in 2008,[6] JQ married his new partner in a civil ceremony. As at the date of the second marriage, his first marriage had not been annulled.

27. Having learned of the second marriage, IR sent a letter dated 30 March 2009 giving notice of termination of the employment relationship with JQ, with effect from 30 September 2009.

28. JQ brought an action against that dismissal on the ground that his remarriage did not justify the dismissal. In his view, the dismissal was an infringement of the principle of equal treatment because, in accordance with the GrO 1993, in the case of heads of department of the Protestant faith or of no faith, remarriage would not have had any consequences for their employment relationships with IR.

29. However, IR asserted that the dismissal in question was socially justified. Indeed, given that JQ was a managerial employee within the meaning of Article 5(3) of the GrO 1993, by entering into a marriage that is invalid under canon law, he clearly infringed his obligations under his employment relationship with IR.

30. The Arbeitsgericht (Labour Court, Germany) allowed JQ's action, considering that the breach of the prohibition laid down in Canon 1085 of the CIC in relation to entering into a civil marriage while the pre-existing Catholic marriage had not yet been annulled by the Catholic Church did not constitute a serious breach of the obligation of loyalty.

31. IR lodged an appeal against that judgment before the Landesarbeitsgericht (Higher Labour Court, Germany), which, however, dismissed that appeal, holding that even if a breach of Canon 1085 of the CIC constituted a serious breach of the obligation of loyalty, JQ's dismissal by IR in that context was contrary to the principle of equal treatment. According to the Landesarbeitsgericht (Higher Labour Court), in the case of remarriage, IR would not have dismissed non-Catholic employees holding the same position as the applicant. Furthermore, IR knew that JQ had been living with his partner since 2006 and did not take any steps in that regard, although that relationship was also contrary to the doctrine of the Catholic Church.

32. The Bundesarbeitsgericht (Federal Labour Court) dismissed the application for review filed by IR against the judgment of the Landesarbeitsgericht (Higher Labour Court), holding, essentially, that the dismissal was not justified because IR would not have dismissed non-Catholic employees holding the same position as JQ in the event that they were to remarry.

33. IR then brought the matter before the Bundesverfassungsgericht (Federal Constitutional Court, Germany), which set aside the judgment of the Bundesarbeitsgericht (Federal Labour Court) on the basis of failure to state reasons.[7]

6 It is unclear whether JQ or his wife petitioned for divorce.

7 See order of the Second Chamber of 22 October 2014, 2 BvR 661/12 (DE:BVerfG:2014:rs20141022.2bvr066112).

34. According to the Bundesverfassungsgericht (Federal Constitutional Court), in the case of disputes in employment relationships in the service of churches, the laws on protection of workers, such as the KSchG applicable in this case, must be interpreted in the light of the principle of religious self-determination, enshrined in Article 140 of the Basic Law, read in conjunction with Article 137 of the Weimar Constitution. This means that religious societies may make full use of the latitude available to them under non-mandatory legal provisions, but that, in the application of binding regulations, the scope for interpretation must also be applied, where necessary, in favour of religious societies, with particular weight being given to what the Bundesverfassungsgericht (Federal Constitutional Court) refers to as the 'self-perception of the church' ('Selbstverständnis der Kirche').

35. The Bundesverfassungsgericht (Federal Constitutional Court) has introduced a system of judicial review in the form of a two-stage test of those dismissals based on a breach of the obligation of loyalty. Firstly (plausibility criterion), the State Courts must review, on the basis of the 'self-perception of each church', whether a religious organisation or body participates in implementing the fundamental mission of the church, whether a specific obligation of loyalty is an expression of a tenet of the church's faith and what weight this obligation of loyalty and an infringement of it should be given in accordance with the 'self-perception of the church'. According to the Bundesverfassungsgericht (Federal Constitutional Court), the State Labour Courts may examine obligations of loyalty determined by religious employers, such as, in this case, those laid down in Article 5(2) of the GrO 1993, only in terms of this plausibility criterion.

36. In that connection, the Bundesverfassungsgericht (Federal Constitutional Court) held that religious societies could impose a gradation of the loyalty requirements for employees according to position and religious denomination. Those obligations may be more or less onerous according to the religion of the employee and, therefore, may be different for employees with identical or similar roles.

37. Secondly (balancing criterion), an overall balancing exercise is then carried out in which the basic rights of the affected employee are also taken into account, in addition to the concerns of the church, with special weight accorded to the self-perception of the church.

38. Following referral of the case to the Bundesarbeitsgericht (Federal Labour Court), that court held that the case turned on the interpretation of Paragraph 9(2) of the AGG. If the German concept of the right to religious self-determination, which allows the Catholic Church to require different gradations of loyalty from its employees depending on their professed religion even where they hold similar positions, were held to comply with the second subparagraph of Article 4(2) of Directive 2000/78, then the application for review by IR would be well founded. Otherwise, a fresh decision would be necessary as to whether or not, having regard to the general principles of EU law, the dismissal of 30 March 2009 lacked social justification.

39. In those circumstances the Bundesarbeitsgericht (Federal Labour Court) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is the second subparagraph of Article 4(2) of [Directive 2000/78] to be interpreted as meaning that the [Catholic] [C]hurch can determine with binding effect that an organisation such as [IR], where employees in managerial positions are required to act in good faith and with loyalty, shall differentiate between employees who belong to the church and those who belong to another faith or to none at all?

(2) If the first question is answered in the negative:

(a) Must the provision of national law, in this case Article 9(2) of the [AGG], according to which unequal treatment of this kind on the basis of the religious affiliation of employees is justified in accordance with the Church's self-perception, be disapplied in these proceedings?

(b) What requirements apply, in accordance with the second subparagraph of Article 4(2) of Directive 2000/78, in respect of a requirement for employees of a church or one of the other organisations mentioned to act in good faith and with loyalty to the organisation's ethos?'

IV. Procedure before the Court

40. This request for a preliminary ruling was lodged at the Court on 9 February 2017. IR, the German and Polish Governments and the European Commission submitted written observations. A hearing took place on 27 February 2018 during which IR, the German and Polish Governments and the Commission submitted their oral observations.

V. Analysis

A. The first question referred and second part of the second question referred

41. By its first question referred for a preliminary ruling, the referring court seeks to determine, essentially, whether the second subparagraph of Article 4(2) of Directive 2000/78 must be interpreted as meaning that it allows a religious organisation to require that its employees of the same faith in managerial roles display good faith and loyalty greater than that required of employees who belong to another faith or to none at all.

42. This question is intrinsically linked to the second part of the second question referred for a preliminary ruling, by which the referring court seeks to determine the conditions that must be met by a requirement of good faith and loyalty in accordance with the second subparagraph of Article 4(2) of Directive 2000/78. In that context, it will be necessary to interpret the introductory sentence of that provision, according to which the provisions of that directive must otherwise be complied with.

43. I therefore propose to examine them together.

1. The concept of 'private organisation' of which the ethos is based on religion

44. The first area of doubt indicated by the referring court as regards the interpretation of the second subparagraph of Article 4(2) of Directive 2000/78 concerns its personal scope. More specifically, that court wishes to know whether, as a private limited company active in the healthcare sector and applying market practices, IR may invoke the right to require that its employees display an attitude of good faith and loyalty, a right which that provision confers upon 'churches and other public or private organisations, the ethos of which is based on religion or belief'.

45. The question of whether IR is a private organisation the ethos of which is based on religion is a question of fact which the referring court will need to determine.

46. As part of that determination, the mere fact that IR is subject to supervision by the Catholic Archbishop of Cologne and that its company object is the implementation of the missions of Caritas is not sufficient to establish that its ethos is based on religion.

47. On the contrary, the referring court will need to assess the ethos of IR in terms of its activities, including in particular the healthcare services provided through hospital management. It will, therefore, be necessary to determine whether the practice of the hospitals managed by IR falls within the doctrine of the Catholic Church in that those services are provided in a way that distinguishes them clearly from the services provided by public hospitals. That determination must address ethical questions in the healthcare sphere with particular importance in the doctrine of the Catholic Church,

and in particular abortion,[8] euthanasia,[9] contraception and other measures to regulate procreation.[10]

48. In that regard, if, in particular, in accordance with the catechism of the Catholic Church, the hospitals managed by IR do not perform abortions and do not administer the 'morning-after' pill, unlike public hospitals, IR may be classified as a private organisation the ethos of which is based on religion within the meaning of the second subparagraph of Article 4(2) of Directive 2000/78. If, on the other hand, that determination leads to the conclusion that the hospitals managed by IR handle those issues in the same way as public hospitals, IR cannot be considered as a private organisation the ethos of which is based on religion.

2. May a private organisation the ethos of which is based on religion apply, for the same managerial roles, depending on the professed religion of its employees, a gradation in the attitude of good faith and loyalty that it imposes on those employees?

49. The second subparagraph of Article 4(2) of Directive 2000/78 provides that '[p]rovided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.

50. IR and the German Government consider that by using the phrase 'acting in conformity with national constitutions and laws', Directive 2000/78 is referring to national law as the sole criterion for determining the legality of a requirement for good faith and loyalty, thus excluding EU law. To support that argument, they rely on recital 24 of that Directive, on Article 17 TFEU, and on Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Treaty of Amsterdam.[11]

51. As the Commission notes, the wording of the second subparagraph of Article 4(2) of Directive 2000/78 precludes that interpretation because it expressly makes the right of churches and religious organisations to require that their employees display good faith and loyalty conditional upon compliance with all the provisions of Directive 2000/78 ('[p]rovided that its provisions are otherwise complied with').

52. To that effect, a difference of treatment in the application of the obligation of loyalty is permissible only if it complies, inter alia, with the first subparagraph of Article 4(2) of Directive 2000/78, according to which 'a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of [EU] law, and should not justify discrimination on another ground'.

8 See *Catechismus Catholicae Ecclesiae* (Catechism of the Catholic Church), approved and published by the apostolic letter '*Laetamur Magnopere*' of Pope John Paul II, of 15 August 1997, paragraphs 2270 to 2275, available from the website of the Holy See at the following address: http://www.vatican.va/archive/ccc/index.htm.

9 See *Catechismus Catholicae Ecclesiae* (Catechism of the Catholic Church), approved and published by the apostolic letter '*Laetamur Magnopere*' of Pope John Paul II, of 15 August 1997, paragraphs 2276 to 2279, available from the website of the Holy See at the following address: http://www.vatican.va/archive/ccc/index.htm.

10 See *Catechismus Catholicae Ecclesiae* (Catechism of the Catholic Church), approved and published by the apostolic letter '*Laetamur Magnopere*' of Pope John Paul II, of 15 August 1997, paragraphs 2366 to 2372, available from the website of the Holy See at the following address: http://www.vatican.va/archive/ccc/index.htm.

11 OJ 1997 C 340, p. 133.

53. The reasoning applied by IR and the German Government also conflicts with the interpretation of that provision by the Court, according to which 'where a church or other organisation whose ethos is based on religion or belief asserts … that … religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case'[12] and not the criteria imposed solely by national law.

54. In so holding, the Court expressly rejected the idea that 'the fact that Article 4(2) of Directive 2000/78 refers to national legislation in force at the date of adoption of [that] directive and national practices existing at that date [could] be interpreted as authorising the Member States to withdraw compliance with the criteria set out in that provision from the scope of effective judicial review'.[13]

55. Furthermore, as the Court held, all that Article 17 TFEU does is express 'the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities. On the other hand, that article is not such as to exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78 from effective judicial review'.[14]

3. Does a gradation in the obligation of loyalty on the basis of the faith of the employee constitute discrimination based on religion prohibited by the first subparagraph of Article 4(2) of Directive 2000/78?

56. According to the terms of the first subparagraph of Article 4(2) of Directive 2000/78, 'a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.

57. IR and the German and Polish Governments assert, essentially, that by imposing a gradation in the obligation of loyalty on the basis of an employee's faith, IR is merely treating differently persons finding themselves in different situations, since only Catholics are covered by the doctrine and canon law of the Catholic Church[15] and, therefore, only Catholics can, through their behaviour, safeguard or undermine the image of the Catholic Church.[16] In other words, they consider that IR's Catholic staff are not in a comparable situation to that of staff who belong to another faith or to none at all. On that basis, they conclude that there is no discrimination prohibited by Article 4(2) of Directive 2000/78.

12 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 55).

13 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 54).

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

15 See Canon 11 of the CIC. Furthermore, the penalties imposed by the CIC are spiritual and as such can only be imposed on Catholics. See, in particular, Canon 1367 of the CIC, to which the third indent of Article 5(2) of the GrO 1993 refers, which imposes the penalty of *latae sententiae* excommunication (for a lay person) and dismissal from the clerical state (for a member of the clergy) for anyone who throws away the consecrated species.

16 This intention to protect the image of the Catholic Church emerges more clearly from the wording of Article 4(4) of the GrO 1993, which requires that the lifestyle and behaviour of all employees during service not be such as to compromise the credibility of the Catholic Church.

58. The existence of a difference of treatment based on religion between, on the one hand, JQ as a Head of the Internal Medicine Department and, on the other hand, another employee performing a managerial role is not contested by any party or participant in these proceedings.[17] Indeed, several of the grounds for dismissal provided for in Article 5(2) of the GrO 1993, including in particular the conclusion of a marriage that is invalid on the basis of the doctrine and canon law of the Catholic Church, withdrawal from the Church, apostasy, heresy and so forth, affect only Catholic employees. Each of those grounds therefore automatically creates a difference of treatment.

59. It is, therefore, necessary to examine the comparability of the situations affecting, on the one hand, Catholic employees and, on the other hand, employees from another faith or no faith at all in relation to those grounds for dismissal.

60. On that point, IR and the German and Polish Governments approach the comparability of the situations from an individual perspective on the basis of the employee's faith, while the referring court, JQ and the Commission approach this in objective terms on the basis of the occupational activities of the religious employer, in this case the provision of healthcare services.

61. In my view, the wording of the first subparagraph of Article 4(2) of Directive 2000/78 clearly favours the latter approach, because it imposes an obligation to examine whether '*by reason of the nature of these … [occupational] activities [of the church or religious organisation] or of the context in which they are carried out*, … religion … constitute[s] a *genuine, legitimate and justified occupational requirement*, having regard to the [church or religious organisation's] ethos'.[18]

62. The recent case-law of the Court confirms that reading of the first subparagraph of Article 4(2) of Directive 2000/78. Indeed, the Court has held that 'the lawfulness from the point of view of that provision of a difference of treatment on grounds of religion … depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may follow either from the nature of the activity, for example where it involves taking part in the determination of the ethos of the church or organisation in question or contributing to its mission of proclamation, or else from the circumstances in which the activity is to be carried out, such as the need to ensure a credible presentation of the church or organisation to the outside world'.[19]

63. With regard to the interpretation of the terms '*genuine, legitimate and justified* occupational requirement', the Court has held that professing the religion or belief on which the ethos of the church is founded is a 'genuine' occupational requirement where it appears 'necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church … of its right of autonomy'.[20]

64. The concept of a 'legitimate' occupational requirement means that the 'requirement of professing the religion or belief on which the ethos of the church … is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church … of its right of autonomy'.[21]

17 According to JQ, the difference of treatment results from the fact that a head of department of another faith (a Protestant, for example) or one with no faith at all would not have been dismissed for having contracted a civil marriage after having obtained a divorce from a first spouse.

18 My emphasis.

19 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 63).

20 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 65).

21 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 66).

65. Lastly, the term 'justified' 'implies not only that compliance with the criteria in Article 4(2) of Directive 2000/78 can be reviewed by a national court, but also that the church … imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary'. [22]

66. In this case, the occupational requirement is not membership of a particular religion, as it was in the case giving rise to the judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257), but rather the professing of a particular belief of the Catholic Church, namely the concept of marriage defined by the doctrine and canon law of the Catholic Church, which includes respect for the religious form of marriage and the sacred and indissoluble nature of the bonds of matrimony. [23] It is clear that such a profession of belief does not constitute, in this case, an occupational requirement, much less one that is genuine and justified. [24]

67. First of all, that requirement is in no way linked to the occupational activities of IR and JQ, namely the provision of healthcare services and patient care. The proof of this is that membership of the Catholic Church is not a required condition for the role of Head of the Internal Medicine Department and that IR recruits non-Catholics for roles with medical responsibility and entrusts managerial duties to them. Furthermore, since it is directed at JQ's private and family life, the requirement in question has no possible link with the administrative tasks for which he is responsible as the Head of Department in the department concerned. Therefore, this is not a real occupational requirement.

68. Moreover, respect for the concept of marriage according to the doctrine and canon law of the Catholic Church is not a genuine occupational requirement since it does not appear necessary because of the importance of IR's occupational activity, namely the provision of healthcare services, for the manifestation of IR's ethos or the exercise by IR of its right of autonomy. In that regard, it should be noted that there is no expectation on the part of his patients and colleagues that the Head of the Internal Medicine Department be Catholic and still less that he not have contracted a marriage that is invalid on the basis of the doctrine and canon law of the Catholic Church. On the contrary, what is important for those individuals is his qualifications and medical skills and his abilities as a good administrator.

69. For the same reasons, the requirement in question is far from being justified. JQ's divorce [25] and remarriage in a civil ceremony pose no risk, whether probable or substantial, of causing harm to IR's ethos or to its right of autonomy. [26] Moreover, it should be noted that IR did not even consider relieving JQ of his duties as Head of the Internal Medicine Department but rather dismissed him directly, whereas as a doctor without any managerial role, he would not have been bound by the requirement in question.

70. IR and the Polish Government have countered that this interpretation of the first subparagraph of Article 4(2) of Directive 2000/78 would require that organisations such as IR hire only Catholics.

22 Judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 67).

23 See Canon 1085 and Canon 1108, §1, of the CIC.

24 There is nothing in the file submitted to the Court that would support the argument that the requirement in question is not legitimate in that it is used to pursue an aim that has no connection with the ethos of IR.

25 My analysis remains the same regardless of whether the divorce was petitioned for by JQ or his wife or of any issue of 'fault'.

26 I can only note the dissonance between the rigour with which IR has decided to defend the purity of Catholic doctrine and the spirit of openness and conciliation towards Catholics who have divorced and remarried in a civil ceremony shown by the post-synodal apostolic exhortation '*Amoris Laetitia*' by Pope Francis to bishops, priests and deacons, consecrated persons, Christian married couples and all the lay faithful on love in the family (Vatican Press, 19 March 2016, especially paragraph 299).

71. To my mind, such a recruitment policy would be clearly incompatible with the first subparagraph of Article 4(2) of Directive 2000/78 because religion could not be classified as a genuine and justified occupational requirement for jobs linked to the provision of healthcare services, for the reasons I have just given.

72. IR and the Polish Government also assert that, if IR were not permitted to apply gradations of the obligation of loyalty on the basis of the faith of its employees, it would be obliged to require that all of its staff adhere to the higher level of loyalty required of Catholic employees.

73. I am not convinced that this would necessarily be problematic, since some of the grounds for dismissal stated in Article 5(2) of the GrO 1993 apply to all IR employees, irrespective of their faith. For example, that provision prohibits all employees from publicly defending positions contrary to the principles of the Catholic Church concerning abortion. The same applies to personal moral failings such as, for example, crimes against human life or personal integrity.

74. In the light of the above, I consider that the second subparagraph of Article 4(2) of Directive 2000/78 must be interpreted as meaning that it allows a religious organisation such as IR to require, from its employees of the same faith, an attitude of good faith and loyalty greater than that required from employees of a different faith or those with no faith at all, only to the extent that that requirement complies with the criteria stated in the first subparagraph of Article 4(2) of Directive 2000/78.

B. The first part of the second question referred

75. By the first part of the second question, the referring court asks, essentially, whether, if the first question referred for a preliminary ruling is answered in the negative, a provision of national law, such as Article 9(2) of the AGG, which justifies a difference of treatment on the basis of religion in accordance with the church's self-perception, should be disapplied.

76. It justifies the relevance of this question by referring to paragraph 31 of the judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278), which requires it to interpret national law in accordance with Directive 2000/78, so that the full effect of EU law is achieved without, however, applying a *contra legem* interpretation of the national law. If Article 9(2) of the AGG were not to lend itself to an interpretation in line with that approach, it would then need to be ascertained whether that provision should be left unapplied.

77. I do not support the premiss of this question, which presupposes not only that Article 9(2) of the AGG constitutes an incorrect transposition of the second subparagraph of Article 4(2) of Directive 2000/78, but also that it addresses the question of differences of treatment on grounds of religion.

78. Firstly, the wording of Article 9(2) of the AGG is essentially identical to the wording of the second subparagraph of Article 4(2) of Directive 2000/78.[27] Therefore, I do not see how it could not be interpreted in conformity with the latter.

27 Admittedly, the introductory sentence of the second subparagraph of Article 4(2) of Directive 2000/78 ('[p]rovided that [the] provisions [of Directive 2000/78] are otherwise complied with') is omitted from the wording of Article 9(2) of the AGG. As I explained in points 51 and 52 of this Opinion, that introductory sentence serves to clarify the fact that the option provided to religious organisations to impose an obligation of loyalty on their employees is still subject to the general prohibition on the discriminations listed in Article 2 of Directive 2000/78 and to the conditions that a difference of treatment based on religion must observe in order to avoid being classified as discrimination in accordance with Article 4(1) of that directive. As this sentence is a clarification, even in its absence, the second subparagraph of Article 4(2) of Directive 2000/78 would not have the effect of authorising religious organisations to introduce forms of discrimination based on religion that are contrary to the first subparagraph of that provision (namely differences of treatment based on religion where this does not constitute a genuine, legitimate and justified occupational requirement) or even discrimination based on the other grounds listed in Article 1 of that directive (namely disability, age and sexual orientation).

79. Secondly, the question of differences of treatment on grounds of religion, even in the context of the obligation of loyalty, is covered by Article 9(1) of the AGG, not by Article 9(2) of that text.

80. In order to provide a helpful response to the referring court, I therefore propose to supplement that response by examining the question of whether Article 9(1) of the AGG should be left unapplied, in the event that the referring court finds that the requirement that IR's Catholic managerial employees do not conclude marriages that are invalid on the basis of the doctrine and canon law of the Catholic Church does not comply with the first subparagraph of Article 4(2) of Directive 2000/78.

81. That question only arises in the event that, as I propose, the prohibition on contracting marriages that are invalid on the basis of the doctrine and canon law of the Catholic Church, laid down in the second indent of Article 5(2) of the GrO 1993, does not constitute a genuine and justified occupational requirement under the first subparagraph of Article 4(2) of Directive 2000/78.

82. In its judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257), the Court held that if, in a dispute between private parties, the referring court were required to hold that Article 9(1) of the AGG did not lend itself to an interpretation in line with Directive 2000/78, it would be required to ensure the judicial protection for individuals flowing from Articles 21[28] and 47[29] of the Charter of Fundamental Rights of the European Union ('the Charter') and to guarantee the full effectiveness of those articles by disapplying, if need be, any contrary provision of national law.[30]

83. That solution may perfectly well be transposed to the dispute in the main proceedings, which is also between private parties, although it does not fall within the scope of the Charter *ratione temporis*.

84. Indeed, in comparable situations dating from before the entry into force of the Charter, the Court applied the general principle of non-discrimination on grounds of age and held that it granted private persons an individual right that could be invoked as such in disputes between private persons and required national courts to set aside the application of national provisions not in line with that principle.[31]

85. This also applies for the principle of non-discrimination on grounds of religion or belief which, given the historical context in which the European Union was founded, constitutes a fundamental constitutional value of the EU legal order, which the Court has recognised as a general principle of EU law.[32]

86. Indeed, I see no reason why certain discrimination criteria would be treated differently when they all achieve the same result.

87. For all of those reasons, I consider that the answer to the first part of the second question referred for a preliminary ruling is that a national court hearing a dispute between two private parties is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from the general principle of non-discrimination on grounds of religion and to guarantee the full effectiveness of that principle by disapplying, if need be, any contrary provision of national law.

28 Entitled 'Non-discrimination', this article states in paragraph 1 that '[a]ny discrimination based on any ground such as … religion or belief … shall be prohibited'.

29 This article guarantees litigants the right to an effective remedy and to a fair trial.

30 Paragraphs 75 to 79 of that judgment.

31 See judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraphs 76 and 77); of 19 January 2010, *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraphs 50 and 51); of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 47); and of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 36).

32 See judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 76).

VI. Conclusion

88. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

(1) The second subparagraph of Article 4(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 it allows a religious organisation such as IR to require, from its employees of the same faith, an attitude of good faith and loyalty greater than that required from employees of a different faith or those with no faith at all, only to the extent that that requirement complies with the criteria stated in the first subparagraph of Article 4(2) of Directive 2000/78.

(2) A national court hearing a dispute between two private parties is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from the general principle of non-discrimination on grounds of religion and to guarantee the full effectiveness of that principle by disapplying, if need be, any contrary provision of national law.