Expert Opinion in the Case of *Diakonische Werk Hamburg* v *Y. Fadia*

Concerning the application of the EU Employment Equality Directive, the EU Race Directive and Article 14 of the European Convention on Human Rights

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OPEN SOCIETY
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I. Introduction – Referral To The European Court Of Justice

1. The Open Society Justice Initiative ("Justice Initiative") respectfully submits this legal opinion in the case in appeal proceedings before the Hamburg Regional Labor Court between Diakonische Werk Hamburg ("Appellant") and Ms. Y. Fadia ("Respondent"). The Appellant is a charitable organization affiliated with the German Lutheran Evangelist Church. The Respondent is a German citizen of Turkish ethnic origin.

2. The Justice Initiative pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies. Among other activities, the Justice Initiative makes legal submissions before national and international courts on questions of law in which it has specialized expertise, including questions concerning the compatibility of State practices with equality and citizenship guarantees recognized by international and regional human rights law.

3. The Justice Initiative has particular interest and expertise in the questions raised by this case. The key issue in contention is whether the refusal of the Appellant to employ the Respondent for a publicly-funded position as a migrant labor and integration counselor because she does not belong to a Christian church constitutes direct discrimination on grounds of religion and/or indirect discrimination on grounds of ethnicity in violation of the European Council Directive 2000/78/EC[1] (hereafter the "Employment Equality Directive"), which establishes a general framework for equal treatment in employment and occupation, the European Council Directive 2000/43/EC[2] (hereafter the "Race Directive"), which guarantees equal treatment irrespective of racial or ethnic origin, and the European Convention on Human Rights (ECHR).

4. The Justice Initiative submits that the present case merits referral to the European Court of Justice (ECJ) pursuant to Article 234 of the Treaty establishing the European Community[3] (hereafter "EC Treaty") for a preliminary ruling on issues concerning the correct transposition and interpretation of the Employment Equality Directive and the Race Directive in relation to the issues stated above. As this submission elaborates, the present case turns upon a new question of interpretation of these Directives that is of general interest for the uniform application of Community law throughout the Union, in particular since the existing case law does not appear to be applicable to the new set of facts presented by this case.[4]

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[1] Official Journal of the European Communities 2.12.2000, L 303/16-22.
[2] Official Journal of the European Communities 19.7.2000 L 180/18-26
[3] Official Journal C 325, 24/12/2002 P. 0043 – 0043.
[4] See "INFORMATION NOTE on references from national courts for a preliminary ruling", Article 13, Official Journal of the European Union, 2005/C 143/01.

5. This brief will first address the questions of when and how direct and indirect discrimination are established under the Directives, the exceptions to the prohibition on differential treatment set forth in those Directives, and the criteria defining such exceptions, specifically concerning organizations with a religious ethos. The brief then presents a comparative analysis of how various EU Member States have transposed the Directives into national legislation, with a focus on the role and powers of religious organizations to require specific religious adherence by their employees.

6. Furthermore a legal assessment of the differential treatment of the Respondent will be made under the ECHR and the case law of the European Court of Human Rights (ECtHR) concerning the prohibition of discrimination on religious and racial/ethnic grounds. This will firstly be done for the purposes of establishing whether the Respondent's treatment is in conformity with the ECHR. In addition, the case law established by the ECtHR will serve to illuminate the EU standards under the aforementioned anti-discrimination Directives.

7. Although the European Community is not a party to the ECHR and the rulings of the ECtHR do not apply directly in the EU legal order, the ECJ has stated on numerous occasions that "Article 6(2) of the European Union Treaty provides that the Union is to respect fundamental rights as guaranteed, *inter alia*, by the European Convention on Human Rights as general principles of Community law. The special significance of the Convention on Human Rights as a source of inspiration concerning general principles has long been recognized by the Community Courts".[5] Similarly, the ECtHR has affirmed the desirability of ensuring uniformity in the definitions and standards for discrimination in each system, since the overlap of membership in the two systems is substantial.[6]

II. European Framework Governing This Dispute

The dispute in this case is governed by European standards prohibiting employment discrimination

8. Together, the European Union (EU) and the Council of Europe have developed the most comprehensive regional legal framework prohibiting racial and ethnic discrimination in the world. The foundation for the EU's regulation in this area is Article 13 of the EC Treaty, which provides:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament,

[5] See, among others, ECJ, Kongra-Gel v EU Council, 3 April 2008, Case T-253/04, § 69, curia.europa.eu.
[6] *Cf.* ECtHR GC, *D.H. and Others* case *v the Czech Republic,* App. No. 57325/00, 13 November 2007, §§ 81-91, www.echr.coe.int, discussing in detail the EU's Anti-Discrimination Directives and the ECJ's case law.

may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

9. In 2000, the Council of the European Union adopted the Racial Equality Directive and the Employment Equality Directive, which entered into force in 2003. The Race Directive protects against discrimination on racial and ethnic grounds in a broad range of sectors, including employment, education, social protection, social advantages, and the provision of goods and services and is especially pertinent to the issues of indirect discrimination addressed in Section IV of this submission. For its part, the Employment Equality Directive prohibits discrimination on grounds of religion or belief, disability, age, and sexual orientation in employment and is especially pertinent to the issues of direct discrimination addressed in Section III. Both Directives define and prohibit direct and indirect discrimination and provide that if plaintiffs establish facts from which discrimination can be presumed, the burden of proof lies with the respondent employer to establish that discrimination did not occur.

III. Contentions Between The Parties As Regards Direct Discrimination On Grounds Of Religion

10. The position argued in this section is that the Respondent was a victim of direct discrimination on religious grounds since she, as a non-religious individual, was excluded on the grounds that she was not a Christian from employment in a position that has no genuine religious requirement. As we will argue in Section IV, the substantial issues concerning direct discrimination raised by this case are such as to warrant a referral to the ECJ.

The Appellant has directly discriminated against the Respondent on religious grounds

11. In the present case, the Appellant has acknowledged before the Hamburg Labor Court that the Respondent was not further considered for the job of migration integration counselor[7] for the reason that she does not belong to a Christian church.[8] This action

[7] The job advertisement for which the Respondent applied states:
„[t]his project is an education and information provision for the multiplicators in the area of professional integration of adult immigrants.
The tasks related to this position involve the elaboration of contents in the column "professional information", compilation of information material, preparation and implementation of programs as well as working in the structures and committees of the professional area for migration and securing of subsistence. The candidates should possess completed studies in sociology, social pedagogy (or similar), experience in project work as well as experience and competence in the fields of migration, labour market and inter-culturalism. They also have solid IT and internet skills. They should be able to work independently as well as constructively in a team.
As a Church Municipality organisation we stipulate the affiliation to a Christian church.
…" (emphasis added).

constitutes direct discrimination on grounds of religion or belief in violation of the Employment Equality Directive.

12. The Employment Equality Directive, whose requirements apply to "all persons, as regards both the public and private sectors, including public bodies" (Article 3), prohibits both direct and indirect discrimination on grounds of religion or belief. With respect to direct discrimination, Article 2(1) provides: "For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct . . . discrimination whatsoever on any of the grounds referred to in Article 1," which include "religion or belief."[9]

13. The circumstances of this case fall squarely within the prohibition of direct discrimination set forth in Article 2(1). Article 2(2) provides that "direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation," on grounds that include "religion or belief." A report to the European Commission on Religion and Belief in Employment makes clear that the Appellant's refusal to hire the Respondent because of her "religion or belief" constitutes direct discrimination within the meaning of this provision. The report, prepared by the European Network of Legal Experts in the non-discrimination field, describes direct discrimination on religious grounds as follows:

> "Direct discrimination involves less favorable treatment on grounds of religion or belief. Factual examples will include where employers refuse to employ religious staff altogether, or employ some religious staff, but refuse to employ those of a particular religion. For example, an employer may have Christian staff, but refuse to employ a Scientologist. *Direct discrimination will also arise where religious organizations refuse to employ those who do not share the faith of the organization* (although in some cases such cases may be covered by the genuine occupational requirement exception)."[10]

The Appellant's Reliance On The Special Position Of Religious Organizations With Respect To Genuine Occupational Requirements Is Inconsistent With The Employment Equality Directive

14. As the final part of the above-quoted text suggests, the Employment Equality Directive establishes, in Article 4, an exception to its general prohibition of differential treatment based on religion or belief in respect of employment. Evelyn

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[8] Letter from Appellant do Respondent dated 1 March 2007 in which the Appellant in defence of the discrimination claim argued that it was entitled to set the condition of religious affiliation pursuant to Article 9 GETA.

[9] The 'protected grounds' under Article 1 of the Employment Equality Directive are religion or belief, disability, age and sexual orientation.

[10] Dr. Lucy Vickers, "Religion and Belief Discrimination in Employment - the EU law", p.12 (footnote omitted; emphasis added), available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf

Ellis, Professor of Public Law at the University of Birmingham and an expert on EU discrimination law, explains that this exception is restrictive, applying only in extremely limited circumstances.[11] For reasons set forth below, the Applicant's refusal to hire the Respondent does not fall within the scope of this exception. As our analysis of this issue makes clear, the question of whether the Appellant's conduct in the present case falls within the scope of this exception, while straightforward under the facts of this case, is sufficiently substantial, novel and of general interest for the uniform application of Community law as to merit referral to the ECJ.

Article 4(1) of the Employment Equality Directive provides:

> Notwithstanding Article 2(1) and (2), [which generally prohibit direct discrimination in employment on grounds that include religion or belief,] 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 [which include "religion or belief"] 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.

15. As regards discrimination on grounds of religion or belief in particular, Article 4 further clarifies the scope of permissible distinctions in respect of employment by "churches and other public or private religious organizations the ethos of which is based on religion or belief." Article 4(2) provides:

> 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 organizations 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 organization's ethos*. [Emphasis added.] This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community 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 organizations, 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 organization's ethos.

[11] See Evelyn Ellis, *EU Anti-Discrimination Law*, pp. 272-285 (Oxford University Press 2005).

16. Under this provision, a church and its affiliated organizations may condition employment on a job applicant's religion or belief only when the position is such that adherence to a particular belief is "a genuine, legitimate and justified occupational requirement." Pursuant to this standard, an employment condition of adherence to a particular faith is permissible only when such adherence is directly linked to performance of the job in question.[12] Professor Ellis emphasizes that Article 4(2) applies only where the requirement of a specific religious adherence is necessary to carry out religious and/or missionary tasks and to preserve the religious ethos of the employing organization.[13] In her view, a requirement of membership in a certain religious community/congregation is permissible under the Equal Employment Directive only if the job responsibilities are religious in nature, as in those of a religious teacher or cleric.

17. Similarly, interpreting Article 4(2) of the Employment Equality Directive, Professor María Fernanda Fernández López (University of Seville) and Professor Francisco Javier Calvo Gallego (University of Huelva) note that "not all pejorative treatment on grounds of religion or conviction is admissible for this type of [*religious*] entity."[14] If the position in question is one that is closely linked to a religious organization's substantive beliefs, the employer may require an employee to hold particular beliefs. In determining whether religious requirements for a specific job constitute discrimination or instead fall within the exception set forth in Article 4(2), consideration may be given to the potential adverse impacts of employing a person who does not adhere to the religion of the employing organization, such as the damage this could do to the religious ethos of that organization.[15]

18. In short, differential treatment on the basis of religion may be permitted only when based on a failure or reasonably anticipated failure to fulfill the obligations set forth in the job description. Where a job is neither inherently religious in nature nor necessarily part of the core mission of a religious organization, the fact that a religious organization is the employer does not automatically trigger applicability of the exception to the prohibition of differential treatment on religious grounds authorized by Article 4(2) of the Employment Equality Directive.

19. The burden is on the employer to show that a person's religion is an indispensable factor in his or her ability to discharge the duties of his or her job; it is not enough that an employer believes that such religion or belief is fitting in light of the organization's ethos.[16] Finally, it is clear from the way that Article 4(2) of the Employment Equality Directive is drafted that its language allowing some scope for organizations "to

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[12] See Vickers, ibid p.57.
[13] See Ellis , ibid p.272, also for further references.
[14] See M.F. Fernandez Lopez and F.J.C Gallego, 'Directive 2000/78/EC and the Prohibition of Discrimination based on Religion', Trier, ERA, 2005, p. 18, www.era.int.
[15] H. Badger, "The veil case, employment, and religious discrimination", Education Law Update, December 2006.
[16] "A guide for employers and employees; Religion or belief and the Workplace", from the Advisory, Conciliation and Arbitration Service, www.acas.org.uk

require individuals working for them to act in good faith and with loyalty to the organization's ethos" cannot be interpreted to mean that employers have free reign to require all employees to adhere to the convictions and beliefs of the employing entity when such adherence is not pertinent to their job performance.[17] The language of the exception is preceded by the crucial qualifier, "[p]rovided that [this Directive's] provisions are otherwise complied with…"

20. In the context of the present case this point is particularly relevant because the job in question does not include the function of sharing the Appellant's beliefs with clients of the counselor. To the contrary, the role of migration integration counselor is a function performed on behalf of the German state itself rather than on behalf of a church.[18] In this instance the Appellant is actually performing a secular function in its capacity as a civil society organization rather than a religious one specific to a church or other religious entity.

European Case Law Limits Exceptions To The Prohibition Of Direct Discrimination

European Court of Justice

21. To date, the European Court of Justice (ECJ) has not had occasion to clarify the meaning of "genuine [determining] occupational requirement" as that phrase is used in Article 4 of the Equal Employment Directive. It has, however, had opportunities to interpret similar language in the area of gender-based discrimination.[19] Principles may be extracted from that case law that are pertinent to the present case. In particular, ECJ precedents adopt the principle that justifications for provisions that apply differential treatment and the appropriateness of a specific form of differential treatment should be assessed according to the rule of *strict scrutiny*, which narrows considerably the circumstances under which an exemption from the general principle of equal treatment is permissible.

22. According to the ECJ's case law, proportionality and strict scrutiny requirements are central to determining the validity of exceptions to the principle of equal treatment of men and women. In the *Johnston* case the ECJ ruled that any derogation from an

[17] Lopez et al, ibid p. 20.
[18] The project for which the job was posted a was an EU EQUAL project for Development Partnership of the North German Network for Professional Integration of Migrants. The EQUAL program is aimed at the professional integration of unprivileged groups. It was co-financed by the European Social Fund. The development partnership had participated in a tender for various EU-funded projects coordinated and administered by the Federal Labour and Social Affairs Ministry. The distribution of funds was realised through a grant of the ministry to the Development Partnership (as established by the Hamburg Labor Court in its judgment of 4 December 2007).
[19] Under Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) (hereafter: Gender Equality Directive).

individual right to equal treatment must be interpreted strictly.[20] It emphasized that a derogation which is general in its scope, rather than being related to particular occupational activities or their nature or the context in which they are carried out, made on the sole ground that the discriminatory measure in question was adopted for the purpose of safeguarding national security or protecting safety or public order, is not permitted by Article 2(2) of the Gender Equality Directive.[21]

23. In the *Kreil* case,[22] which concerned the exclusion of women from almost all military posts of the *Bundeswehr* in the Federal Republic of Germany, the ECJ adopted the same approach. Such an exclusion, the ECJ explained, could only be justified by the specific nature of the posts in questions or by the particular context in which the activities in question were carried out.[23]

24. The ECJ has emphasized that the principle of proportionality, one of the general principles in Community law that governs interpretation of Article 4(2) of the Employment Equality Directive, must be respected in each case. In the *Sirdar* case, for example, the ECJ found:

> "In determining the scope of any derogation from an individual right such as the equal treatment [of men and women], the principle of proportionality, one of the general principles of Community Law, must also be observed (…) That principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of [public security] which determine the context in which the activities in question are to be performed." [24]

25. The above precedents established by the ECJ in the context of gender equality set clear standards and general principles of EU non-discrimination law which apply *mutatis mutandis* in the present case.[25] These principles are:

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[20] ECJ, Johnston v Chief Constable of the Royal Ulster Constabulary, C-222/84, 15 May 1986, European Court Reports 1986, p. 01651 (case concerning the carrying of fire-arms exclusively by male police officers in the performance of their police duties in Northern Ireland).

[21] See footnote 19.

[22] ECJ, Tanja Kreil v Bundesrepublik Deutschland C-285/98, 11 January 2000, European Court Reports 2000, Page I-00069.

[23] The ECJ concluded: "Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services."

[24] ECJ, Angela Maria Sirdar v. The Army Board and Secretary of State for Defence, C-273/97, 26 October 1999, European Court Reports 1999, page I-7403.

[25] Dr. S. Burri, University of Utrecht, The Netherlands, argues that "It is likely that this jurisprudence [on gender equality], which to some extent has already been integrated into the new provisions of Directives 2000/43/EC, 2000/78/EC […] will also be used to interpret these clauses [concerning genuine occupational requirements]." 'How to interpret the concept of genuine occupational requirements?', Trier, 31 October 2006, pp 4-5, www.era.int.

- No general derogations from the principle of non-discrimination on protected grounds are permissible;
- Permissible exceptions to the general principle of equal treatment—which do not constitute discrimination—should in each individual case be subjected to strict scrutiny in applying the tests of legitimate aim, proportionality and necessity;
- Derogations for occupational activities can only be justified by the specific nature of the posts in questions or by the particular context in which the activities in question were carried out.

26. As the following section explains, ECtHR precedents provide helpful guidance in interpreting the tests of proportionality and necessity as these principles apply in the context of EU anti-discrimination law, including the law of the Employment Equality Directive.[26] As will be elaborated later, exceptions to the prohibition of differential treatment in German law violate the principles of EU non-discrimination law summarized in this section, as well as those elaborated independently under ECtHR case law.

The treatment suffered by the Respondent contravenes the European Convention of Human Rights

27. Differential treatment based on religious belief is prohibited not only by the Employment Equality Directive but also by the European Convention on Human Rights (ECHR) when it affects the exercise of a right set forth in the Convention. Article 14 of the ECHR provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

28. The rights at issue in the present case are the right to private life, which has been interpreted by the European Court of Human Rights (ECtHR) as the right to personal autonomy and development pursuant to Article 8 of the ECHR, and the freedom to hold or not to hold religious beliefs and to practice or not to practice a religion[27] pursuant to Article 9 of the ECHR.

29. Under the jurisprudence of the ECtHR, distinctions based on grounds such as religion are not invariably discriminatory—and therefore are not necessarily prohibited by Article 14 when they affect the exercise of an ECHR right. The ECtHR has held that differential treatment on grounds of religion must have an objective and reasonable justification, requiring that they pursue a legitimate aim and that there is a reasonable relationship of proportionality and necessity between the means employed and the

[26] Reference to §§ 6-7 above concerning the meaning of EHCR for EU law and vice versa.
[27] ECtHR, Kokkinakis v. Greece, 25 May 1993, Series A no. 260-A, p. 17, § 31.

aim sought to be realized. If the criteria of proportionality and necessity in pursuing a legitimate aim are not met, the differential treatment constitutes impermissible discrimination.

30. For example, in the *Hoffmann* case, in which the Applicant challenged a differential treatment in relation to access to children on the basis of her affiliation with the Jehova's Witnesses, the ECtHR accepted:

> "that there has been a difference in treatment and that that difference was on the ground of religion". ...
>
> [and continued]
>
> "Such a difference in treatment is discriminatory in the absence of an "objective and reasonable justification", that is, if it is not justified by a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised".[28]

31. The *Hoffmann* case shows that an exception to the general prohibition of differential treatment on grounds of religion relating to freedom of religion and autonomy of religious institutions must be applied in a limited way, under strict criteria of proportionality and necessity.

32. The *proportionality* test examines the reasonable relationship between the impugned difference in treatment, the existence of a real pressing need and the realization of the aim sought to be realized.[29] The *necessity* test asks whether the relevant legitimate aim can be achieved without the differential treatment in question. If so, the difference in treatment will not be justified by the alleged exception but instead constitutes discrimination.

33. In the instant case, the question is whether the job of migrant labor counselor can effectively and realistically be undertaken by a person not belonging to a Christian church. The Appellant has not suggested nor has it been part of the job description that that the position entails any spiritual counseling or has any missionary elements. Indeed the EU/State funded character of the job precludes that.

34. Absent any compelling justification for the claim that non-affiliation with a church would make it impossible to exercise the tasks as formulated, the differential treatment on that ground fails the proportionality and necessity test as required under Article 14 of the ECHR and therefore violates that provision.

[28] ECtHR, Hoffmann v Austria, App. Nr. 12875/87, 23 June 1993, Series A 255-C, § 33.
[29] Hoffmann, idem.

The Scope And Application Of The German Equal Treatment Act (GETA) Exceptions To The Prohibition Of Religious Discrimination Undermine The Anti-Discrimination Protections Of The Directives

35. The Applicant has justified its refusal to hire the Respondent as a migrant labor and immigration counselor in part by relying on a German law, the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, hereafter "GETA"), which entered into force on 18 August 2006. The GETA was enacted to implement the Employment Equality Directive and the Race Equality Directive, both of which require EU Member States to ensure that their anti-discrimination norms are fully protected in domestic law.[30]

36. For reasons set forth below, the GETA broadens the scope of permissible grounds for differential treatment on grounds of religion in employment by religious organizations beyond those allowed by Article 4(2) of the Equal Employment Directive. Thus one aspect of this case meriting referral to the ECJ is the question whether Germany has properly transposed the Employment Equality Directive.

37. Article 9(1) of GETA provides that "differential treatment on grounds of religion or belief in employment by religious communities and institutions associated with them is permitted when, bearing in mind the organization's ideological mission,[31] this treatment reflects a genuine occupational requirement *by virtue of their right to "self-determination"* or the kind of activities to be carried out."[32] (Emphasis added). While the second ground for permissible differential treatment ("by virtue of . . . the kind of activities to be carried out") appears broadly consistent with the "genuine occupational requirement" standard set forth in Article 4(2) of the Employment Equality Directive, the highlighted text appears to introduce a separate, autonomous ground—one that is not authorized by Article 4(2).

38. Indeed the European Commission has taken issue with the German Government, arguing that the addition of this separate ground, the "self-determination" of religious

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[30] See Employment Equality Directive, art. 18; Race Equality Directive, art. 16.

[31] *Selbstverständnis*, literally: self-conception.

[32] This approach, which accords religious communities and organizations associated with them a larger degree of freedom than non-religious employers possess to impose requirements for employment related to the ideological mission of the organization, reflects churches' special status in German constitutional law. The aforementioned report by the European Network of Legal Experts in the non-discrimination field describes Germany's constitutional law this way:

> "Churches and institutions related to the church are treated as autonomous as long as they have an inner relationship to the religious mission of the church. The question of whether they have such an inner relationship is determined by the churches themselves: part of their autonomy is that the State cannot determine the scope of the church's religious mission. For Christian churches it is accepted that activities such as running kindergartens and hospitals are part of the religion mission of the Church. Although the legal autonomy of the churches is limited by the laws applicable to all (for example the laws regulating the termination of contracts) these laws are interpreted in the light of their autonomy."

Vickers, ibid. p. 41.

communities, is not permitted under Article 4(2).[33] Yet the Appellant's principal argument turns upon this very ground—i.e., religious freedom and autonomy of churches—in its claim of full autonomy in its recruitment policy aimed at or favoring exclusively persons belonging to a Christian church.[34] In its appeal memorandum, the Appellant asserts that religious communities, and organizations associated with them, enjoy a large degree of freedom to create employment requirements based on their ideological mission or "self conception".[35]

39. While German law must fully accord with the Employment Equality Directive, the Appellant instead claims that Article 4(2) of the Employment Equality Directive must be interpreted in a manner that fully respects the status of churches and religious associations under national law. In support of this claim Appellant relies upon Declaration No. 11 of the Intergovernmental Conference of Amsterdam annexed to the EC Treaty,[36] which provides:

> The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations.

40. This provision must, however, be read in conjunction with Article 24 of the Preamble to the Employment Equality Directive, which makes clear that the guarantees set forth in Declaration No. 11 must be interpreted in light of the standards imposed by Article 4(2) of the Directive:

> 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. (Emphasis added.)

41. The Employment Equality Directive indeed allows for some such exceptions to the general principle of equal treatment that are in line with existing legislation and practices at the time of the adoption of the Directive (first sentence of Article 4(2)). However, Article 4(2) does not constitute blanket permission for religious institutions to continue practices that contravene the principles of equal treatment and the rule that permissible exceptions are allowed only with respect to occupational requirements that are genuine, legitimate and proportionate. Moreover the Declaration's assurance

[33] Letter of 31 January 2008 to the Government of Germany, ref. 2007/2362 K(2008)0103.
[34] Appeal Memorandum Diakonie, pp. 17-33.
[35] Appeal Memorandum Diakonie, pp. 34-41.
[36] Appeal Memorandum Diakonie, pp. 42-45.

of respect for the *status* of churches and religious associations and communities is not the same thing as assuring such organizations unlimited discretion in their employment practices.

42. A further flaw in Germany's transposition of the Employment Equality Directive derives from the fact that GETA, in conjunction with other aspects of German law, accords "religious employers" overly broad discretion to determine if their activities are part of their mission and, in consequence, to require staff to adhere to their religion. The law in Germany provides that non-religious, charitable activities such as running a hospital or, as in the present case, migrant counseling, can be part of the "mission" of the church.[37] In doing so, German law effectively removes any assurance that differential treatment will be genuine, occupational and legitimate as required by Art 4(2) of the Employment Equality Directive.

43. Moreover, while the Employment Equality Directive places the initial burden on employees to make out a *prima facie* claim of discrimination, it then shifts the burden of proof to employers, who must provide an objective justification meeting the relevant criteria to justify the differential treatment. Insofar as the GETA in effect removes these requirements for churches and religious organizations, it does not properly transpose the Employment Equality Directive.

There Is No Common Standard Among EU Member States With Respect To Article 4(2) Of The Employment Equality Directive

44. Transposition of the Employment Equality Directive is required of all EU Member States. However, some have chosen not to include in their national legislation the permissible exceptions on religious grounds to the general principle of prohibition of differential treatment set forth in Article 4(2) of the Directive.[38] Other States have transposed the Directive almost word-for-word. A third group has introduced more far-reaching exemptions than those contained in Article 4(2).[39]

45. Member States that have not introduced religious exceptions in national law in line with Article 4(2) of the Employment Equality Directive include: Belgium, Czech Republic, Estonia, Finland, France, Lithuania, Portugal, Slovenia, Spain and Sweden.[40] Some of these have constitutional safeguards protecting the freedom of

[37] M. Mahlmann, ibid. p. 4: "It is solely up to the churches to determine the scope and limit of its religious mission. For the Christian Churches it is e.g. accepted that due to the principle of charity all charitable activities like running kindergartens, hospitals etc. are encompassed by the religion mission of the Christian faith".

[38] This entails less exemptions from the general prohibition of discrimination and is of course always permissible since the Directive provides a minimum safeguard.

[39] See for further reference: http://www.migpolgroup.com/multiattachments/3077/DocumentName/legal_comparative1_en.pdf

[40] Source, see footnote 39, **Belgium**: The exceptions allowed under 4(1) of the Employment Equality Directive apply to all employers, including churches and organizations with an ethos based on religion or belief. **Czech Republic**: Article 4 (2) of the Employment Equality Directive is not transposed but

religion of groups, which may have an impact equivalent to Article 4(2) Employment Equality Directive. States that have transposed Article 4(2)—with or without alterations—are: Austria, Bulgaria, Cyprus, Denmark, Germany, Greece, Hungary, Italy, Ireland, Latvia, Luxemburg, Malta, the Netherlands, Poland, Romania, Slovakia and the United Kingdom.[41]

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employment by an organized religion (e.g. a priest) does not fall within the scope of anti-discrimination law or labor law in general. **Estonia**: A legal provision on genuine occupational requirements allows employers to make requirements only with regard to age and disability and not any of the other grounds listed in Article 4 (1). However, with respect to age and disability Estonian law does not refer to either the legitimate aim or the principle of proportionality of the occupational requirement. **Finland**: The strict criteria for exceptions under Article 4 (1) apply to all employers including churches and organizations with an ethos based on religion or belief. Finnish legislation also goes beyond the Directive in stipulating that discrimination is not permitted for any reason that pertains to a person's personality/characteristics. **France**: France has not included the occupational requirement exception with reference to the Constitution, which requires that no French law may allow for inequality of treatment on the basis of origin. **Portugal**: Portugal has not transposed the exceptions contained in Article 4 (2) of the Employment Equality Directive in national legislation but permits religious entities to dismiss workers who do not conform to their professed religion and/or religious ethos. **Slovenia**: Slovenia has not transposed the exemptions of Article 4 (2) of the Employment Equality Directive but lists occupations with respect to which different treatment on the grounds of religion, sex, disability and age are permitted, including the police, the judiciary and the army. Insofar as these depart directly from the narrow religious exemptions permitted by the Directive, they constitute a violation of the Directive's non-discrimination principle. **Spain**: Law 62/2003 makes no reference to Article 4 (2) of the Employment Equality Directive but implements Article 4 (1). Article 6 of the Organic Law on Religious Freedom states that churches and religious communities shall be fully independent and may lay down their own organizational rules. However, the ability to exercise this right is restricted by the Constitution which holds that nobody can be compelled to make statements regarding his or her religion and hence religion should not be reason for dismissal/not hiring. In practice, this has not been a sufficient safeguard since discrimination occurs not only because of religion/belief but also for other reasons. Case law in Spain distinguishes between work for a religious organization which is 'neutral' and that which is 'ideological' in character. As a result the Constitutional Court in a 1996 decision annulled the dismissal of a ward assistant from a private Catholic hospital because the job was neutral in relation to the ethos/ideology of the organization. **Sweden**: Swedish law does not have any transposition of Article 4 (2). Occupational requirements associated with sex, religion/belief, race, disability and sexual orientation are permitted under Swedish law when the aim of the rules/criteria/measures is legitimate, and when such rules/criteria/measures are appropriate and necessary.

[41] Source, see footnote 39, **Austria**: Legislation demands that the occupational requirements exception be interpreted narrowly, and also states that legitimate exceptions to the anti-discrimination principle include health and safety considerations (such as the duty to wear uniforms or helmets for reasons of safety, even where these are incompatible with religious practice). **Bulgaria**: Bulgaria has transposed Article 4 (2) but allows religious employers to discriminate on the basis of sex. **Denmark**: Just before the Directive was transposed, a case was brought in Denmark concerning an individual who was dismissed from a job as a cleaner in a Christian organization for not being Christian. The Danish court in this case accepted that under the new law transposing the Directive, this firing would be illegal. **Greece**: Legislation provides for an exception relating to all people working for an organization with a religious/belief ethos and irrespective of the activities that person carries out and the context in which they are carried out. According to a 1988 law, non-Orthodox teachers cannot be appointed to state kindergartens and primary schools unless there is more than one teaching position, since non-Orthodox teachers may only teach religious classes to pupils of the same religion. It is unclear whether this law has been repealed or amended since adoption of the Directive. **Hungary**: Despite implementation of Article 4 (2) of the Employment Equality Directive by adoption of a law that does not go beyond the Directive, recent court cases have shown that there is a tension between freedom of religion and anti-discrimination. The Supreme Court held, on 8 June 2005, that gays and lesbians may be excluded from theological education to prevent their becoming pastors. **Ireland**: The Employment and Equality Act (1998, amended 2004) allows organizations with a religious ethos to discriminate—on any grounds—in order to maintain their religious ethos. This provision violates Article

46. There is no common standard in EU Member States as regards transposition of Article 4(2) of the Employment Equality Directive creating an exception to the prohibition of differential treatment in situations where religion constitutes a genuine and/or determining occupational requirement.[42] Germany, Greece, Portugal, Slovakia, Spain, Ireland and Italy are the Member States with the most extensive allowance for religious institutions to include religious requirements in their employment and recruitment policies. Other EU Member States have either not transposed Article 4 (2) at all or have not made a special exceptions for religious organizations to differentiate on the basis of religion other than under the condition that these be *genuine and determining* occupational requirements. The concrete application of these provisions still remains to be established through national case law in most Member States.

47. The absence of a common standard among Member States as regards genuine occupational requirements in employment by religious employers leads to disparities in implementation of the Employment Equality Directive and hence to legal uncertainty in the common EU legal space. The ECJ has held that exemptions from

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4(2) of the Employment Equality Directive since it is not limited to discrimination on the basis of religion/belief. **Italy**: Italian legislation allows any organization—not only those based on a religious ethos—to discriminate on the basis of religion/belief. Italian law substitutes the broader concept of 'reasonableness' for the Directive's requirement of 'legitimate objective'. Moreover, Italian law allows for 'work suitability tests' in employment cases where religion/belief, age, sexual orientation and disability may be an issue, which can be discriminatory in admission to several specific occupations. **Malta**: The law in Malta closely echoes the Directive in stipulating that the ban on discrimination 'shall not apply to any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be fulfilled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by applicable laws or regulations.' **The Netherlands**: Article 4(2) of the Employment Equality Directive is transposed but the General Equal Treatment Act does not apply to the internal affairs of churches, religious communities and association of spiritual nature. This accords with Article 4(2) of the Employment Equality Directive as long as the exemption is limited to religious staff. But the Act also contains restrictions on discrimination for religious organizations in relation to political opinion, race, sex, sexual orientation, nationality and civil status. Dutch legislation does contain a long list occupations in which requirements based on racial appearance (rather than origin) may be justified (e.g. actresses, dancers, etc.). **Poland**: Discrimination in employment on grounds referred to in the Directive as prohibited is not considered to violate the non-discrimination principle if it is justified on account of the type of work, working conditions and occupational requirements laid down for employees. This exemption is much broader than that which the Directive allows. **Romania**: Romania provides an exception specific to religious education. Article 15(5) of Ordinance 137/2000 states that its provisions 'shall not be interpreted as a restriction on the right of educational institutions that train personnel employed in worship places to deny the application of a person whose religious status does not meet the requirements established for access to the respective institution.' **Slovakia**: The Anti-discrimination Act allows churches and organizations based on a religious ethos to discriminate on the grounds of age, sex, religion/belief and sexual orientation in relation to employment. This is an interpretation that goes well beyond the exemptions provided for religious organizations in the Directive. The legislation also seems to apply to all people working for an organization with a religious/belief ethos, irrespective of the activities an employee carries out and the context of those activities.

[42] See also Vickers, ibid, p. 62.

EU discrimination law which are part of the fundamental rights of EU law[43] are interpreted narrowly by all the Member States, so that there are not large 'carve outs' from protection in different Member States.

48. Guidance by the ECJ is therefore crucial in order to ensure harmonization and uniformity of interpretation of Article 4 of the Employment Equality Directive across EU Member States.

Conclusion As Regards Direct Discrimination

49. The above analysis of the Employment Equality Directive, comparative ECJ and ECtHR case law shows that the permitted exception to the prohibition of discrimination on religious grounds cannot be stretched so far as to permit exclusion of a non-religious individual from employment in a position that has no religious component. There is no evidence that the post is central to the Appellant's religious ethos and no evidence that The Appellant has made efforts at job organization and description which could ensure that the post can be done by someone of another religion or race.

50. Principles that narrow down Article 4 of the Employment Equality Directive should be devised in a coherent way. Accordingly, the 'religious ethos' genuine occupational requirement should be drafted narrowly. The problem with the German legislation, and in the present case the Appellant's blanket reliance on the exception for this particular post that does not relate to religious purpose or ethos, is that it is not sufficiently attentive to the following types of more narrow criteria:

- Having a specific religion or belief should be a central requirement of the job and not just one of many relevant factors;
- The employer should look at each post individually both in terms of the duties of the job and the context in which it is carried out;
- Employers should also be willing to be flexible and consider whether parts of the job can be redesigned and reallocated so that they can be done by a person of any or no religion (this relates to the issues of real need and proportionality);
- Employers should be clear about the link between the requirements of the job and the need to maintain the organization's ethos;
- Employers can reasonably expect their staff to keep to the organizational values and culture and should bear in mind that people may be able to maintain those values and culture without actually belonging to the particular religion or belief.

51. The simple fact that the Appellant is a religious organization does not mean that it can impose the absolute requirement that all its employees belong to a Christian church. The position in question, that of an integration counselor for immigrants, is funded by

[43] ECJ, P v. S and Cornwall County Council Case C-13/94, 30 April 1996, [1996] European Court Reports, p. I-2143, points 18-19.

the EU and the German State because it furnishes a valuable public service. Membership in a Christian church cannot be interpreted as a genuine occupational requirement for a position whose objective is not to represent a religious organization per se but to perform an entirely different, non-religious function for the public.

52. The imposition of a religious requirement for the job is not a legitimate or proportionate means to achieve the aims of integration of immigrants. Thus, the religious requirement for the position discriminates against the Respondent and others in her position. The interpretation which the Appellant would give to the exceptions to the prohibition of differential treatment on religious grounds is too expansive and therefore not compatible with the aforementioned Directive and the relevant provisions of the ECHR.

53. Clarification by the ECJ is now necessary to set the boundaries of the exact scope of the notion of genuine occupational requirement in the context of religious organizations, and the compatibility of current German anti-discrimination law with these fundamental norms.[44]

IV. Indirect Ethnic Discrimination Against A Religious Minority

54. The second claim made by the Respondent is that she was a victim of indirect discrimination on grounds of ethnicity in violation of the Race Directive.[45] In particular, the Respondent argues that the Applicant's requirement that the position of migrant labor and integration counselor must be restricted to a Christian adversely and disproportionately affects the part of the population in Germany to which she belongs, that of Turkish ethnic origin.

Respondent's Treatment Constitutes Indirect Discrimination Under The Race Directive And The ECHR Given Its Disparate Impact On Individuals Of Turkish Ethnic Origin

55. Article 2(1) of the Race Directive categorically affirms that "there shall be no . . . indirect discrimination based on racial or ethnic origin." Article 2(2)(b) of the Directive provides that

> indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision,

[44] See elaboration in questions for referral below, Section V.

[45] As noted earlier, both the Employment Equality and Race Directives prohibit indirect as well as direct discrimination in their respective spheres of application. For reasons set forth in this section, the Race Directive is the more pertinent of these two Directives in respect of the Respondent's claim of indirect discrimination.

criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

56. While Article 2(2)(b) of the Race Directive speaks literally of "apparently neutral" provisions, this phrase encompasses provisions which make distinctions that are on their face unrelated to race or ethnicity, including religious distinctions, but which in practice have a disparate impact on various racial or ethnic groups—a point we address further below.

57. Indirect discrimination can occur as a result of an organizational instruction, a government policy, a standard practice within an organization or the advertised requirements for a job.

58. Indirect discrimination stands in contrast to direct or *overt* discrimination, with which it should not be confused.[46] The decisive element is the impact on the affected group in view of the characteristics of the group to which the individual belongs, not—as in the case of direct discrimination—an intentional and direct differentiation of treatment.[47]

59. The Hamburg Labor Court, in its judgment of 4 December 2007, misunderstood the elements of indirect discrimination when it ruled that the Applicant's refusal to hire the Respondent did not constitute discrimination because the Applicant's determination was made explicitly and only on the basis of the job requirement of affiliation to a Christian church and not in relation to ethnicity. In Germany, excluding non-Christians from consideration for job positions affects the ethnic Turkish population in Germany almost in its entirety. But for a few exceptions, the ethnic Turkish population of Germany—which constitutes the largest ethnic and religious minority in Germany[48]—does not adhere to Christianity.

60. Even if the Hamburg Labor Court accepted that there was direct religious discrimination it should have accepted the action under both direct religious discrimination and indirect race discrimination since in this as in many cases it will be impossible to separate out religious culture from ethnicity and race. It is not fair to victims of discrimination to expect them to make a once and for all choice about the nature of the discrimination.

61. It is well established that religion and ethnicity can be inextricably intertwined. Thus in Great Britain, before religious discrimination was explicitly proscribed, cases were brought arguing successfully that certain instances of discrimination on the basis of religion constituted indirect ethnic discrimination. The way the test was formulated is explained in a United Kingdom Home Office report:

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[46] See below as regards the defence that a non-ethnic German person was ultimately hired for the position.
[47] See Declan O'Dempsey, ibid. § 31.
[48] As of April 2006, the Turkish population constituted 1.87 million out of a total of 82.5 million German residents, i.e. 2.27% of the total population of Germany. See Institut für Gerontologie an der Universität Dortmund, http://www.ffg.uni-dortmund.de

> "[T]he Race Relations Act 1976 (RRA), which prohibits discrimination on "racial grounds", defined as "colour, race, nationality, or ethnic or national origins", makes no express reference to religious discrimination. However, ways have been found to provide limited protection under the Act to some religious groups which have the characteristics of an ethnic group. In this way protection has been offered to Sikhs and Jewish people. The recognition of a religious community as an ethnic group provides them with protection from both direct and indirect discrimination. In the case of Mandla v Dowell Lee the House of Lords accepted that ethnic origin is a wider concept than race and identified several characteristics relevant to identifying an ethnic group"….
> A second way of bringing religious groups within the ambit of the RRA has been through the concept of indirect discrimination. Actions taken by an employer causing detriment to Muslims as a class, such as refusal to allow time off work for religious holidays, might be held to constitute indirect racial discrimination against those from an ethnic or national origin that is predominantly Muslim."[49]

62. More recently, in the *Timishev* case the European Court of Human Rights emphasized that religion can be an intrinsic part of a person's ethnicity:

> "Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, *religious faith*, shared language, or cultural and traditional origins and backgrounds."[50]

The Appellant's treatment of Respondent reflects the 'counterfactual application' features of indirect discrimination

63. To establish indirect discrimination, it is not necessary to produce concrete evidence that particular victims have suffered discrimination, since the very nature of this practice may be such as to discourage the group in question from interacting with the discriminating entity/person.[51] This issue was recently addressed in the *Feryn* case, in which ECJ Advocate General Poiares Maduro stated:

> "[I]n any recruitment process, the greatest 'selection' takes place between those who apply, and those who do not. Nobody can reasonably be expected to apply for a position if they know in advance that, because of their racial or ethnic origin,

[49] B. Hepple and T. Choudhury, "Tackling Religious Discrimination: Practical Implications for Policy Makers and Legislators", London, Home Office Research, Development and Statistics Directorate, February 2001.
[50] ECtHR, Timishev v Russia, Application Nos. 55762/00 and 55974/00, 13 December 2005, § 55, www.echr.coe.int (emphasis added).
[51] ECJ, John O'Flynn v Adjudication Officer, Case C-237/94, 23 May 1996, European Court Reports 1996 Page I-02617, points 20-21.

they stand no chance of being hired. Therefore, a public statement from an employer that persons of a certain racial or ethnic origin need not apply has an effect that is anything but hypothetical. To ignore that as an act of discrimination would be to ignore the social reality that such statements are bound to have a humiliating and demoralising impact on persons of that origin who want to participate in the labour market and, in particular, on those who would have been interested in working for the employer at issue."[52]

64. In the present case, the Appellant announced in advance that only those belonging to a Christian church will be considered for the publicly-funded job of migrant labor and integration counselor, thus surely creating the type of 'humiliating and demoralizing impact' that would disproportionately affect the German Turkish community. Although no proof of this effect is required, the dominant position of the two main Christian churches in Germany makes such an impact inevitable. In a report for the EU Commission Professor Mahlmann describes the dominant position of the two main churches in Germany:

> "[T]he two Christian Churches play an important role in German society. They represent a large proportion of the population. Their voice is heard when their representatives formulate opinions on matters of German social and political life. This is done quite regularly on contentious topics, in the last years e.g. on questions of bioethics and the beginning of life, the limits of research or on the questions of social justice in the context of the ongoing reform of the German systems of social security. In addition, both churches play an important social role in German society by providing various social services like hospitals, kindergartens etc, often re-financed by public funds. They are active in higher education. Both churches are major employers in Germany and provide a wide range of goods and services."[53]

65. It should be emphasized that indirect discrimination has been defined as a legal provision, policy or practice which *has or may have* a prejudicial disparate effect for a protected class of persons.[54] The ECJ, interpreting the notion of indirect discrimination, has ruled that it is not necessary to show which proportion of the group concerned would actually be affected by the impugned law, policy or measure. In the case of *Commission v. Belgium* the ECJ held:

> "[I]t must be borne in mind that a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage. It is not necessary to find that the provision in

[52] ECJ, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV, Case C-54/07, Opinion of Advocate General Poiares Maduro, 12 March 2008, point 15.
[53] Executive Summary – Discriminations based on religion and belief, GERMANY, 23-06-2004 prof. Matthias Mahlmann, Expert in the European Network of Legal Experts in the non-discrimination field, report available at http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/religion_de.pdf.
[54] Ellis, ibid pp. 28, 91.

question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect."[55]

66. The ECtHR has adopted a similar approach to the kind of evidence that is necessary to prove indirect discrimination, which it has found to be implicitly prohibited by Article 14 of the ECHR. In *D.H. and Others v the Czech Republic*, the ECtHR wrote:

> "175. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group and that discrimination potentially contrary to the Convention may result from a *de facto* situation.
> […]
> 186. As mentioned above, the Court has noted in previous cases that applicants may have difficulty in proving discriminatory treatment. In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination."[56]

67. Turning to the present case, indirect discrimination is established by virtue of the fact that a major employer, performing publicly-funded functions that are not explicitly religious, formally excludes a specific, identifiable minority from employment. This practice clearly *would* affect the excluded group in an adverse and disproportionate manner, and it is clear that the Respondent has indeed been affected accordingly.

Indirect Discrimination Experienced By The Respondent Can Be Established Without Proof Of Intent By Appellant

68. By definition, intentions are irrelevant as far as indirect discrimination, as opposed to direct discrimination, is concerned.[57] Only the likely results of a policy or requirement are relevant, insofar as a discriminatory effect has already occurred, or can potentially occur.[58] Intention to discriminate therefore does not have to be established.[59]

69. The ECJ made this point, among many others, in the *Halliburton* case:

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[55] ECJ, Case C-278/94, 12 September 1996, European Court Reports 1996, page I-04307, point 20.
[56] ECtHR GC, D.H. and Others v the Czech Republic, supra § 184.
[57] See Sedler, Robert A. (1999) The Role of 'Intent' in Discrimination Analysis. In Titia Loenen, Peter R. Rodrigues, eds., Non-Discrimination Law: Comparative Perspectives (The Hague: Kluwer Law International, 1999), pp. 91–107.
[58] ECJ, Bilka Kaufhaus GHmb v. Weber von Hartz, Case 170/84, point 31, European Court Reports 1986, p 1607. See also ECJ, Case 96/80, J.P. Jenkins v Kingsgate (Clothing Productions) Ltd, 31 March 1981, European Court Reports 1981, p. 911.
[59] "Concepts of direct and indirect discrimination", Michel Miné, Associate Professor in Private Law at the University of Cergy-Pontoise, www.era.int.

"[T]he rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result."[60]

70. The ECtHR has adopted the same approach in *D.H. and Others v Czech Republic*, bringing its case law into conformity with the EU antidiscrimination law:

> [T]he Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC and the definition provided by the: ECRI [European Commission against Racism and Intolerance], such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent.[61] (Internal references omitted).

71. Contrary to what the Appellant has contended, the relevant question is therefore not whether there was any intention on its part to discriminate against the Respondent on the basis of her ethnic background but whether the restriction of employment to persons belonging to a Christian church would or does disproportionately affect the ethnic group to which the Respondent belongs. Therefore, because as a practical matter barely any members the Respondent's ethnic group could fulfill the requirement of belonging to a Christian Church, this requirement constitutes indirect discrimination against persons of Turkish ethnicity.

Hiring a non-ethnic German person does not mean that indirect ethnic discrimination did not occur

72. The Appellant has put forward the argument that since a woman of non-ethnic German origin (specifically, Indian) was hired for the job that the Respondent was denied, it did not discriminate on ethnic grounds. This position misapprehends the concept of indirect discrimination. The hiring of a person of non-German ethnic origin does not mean that as a result of the impugned religious criterion indirect discrimination against another ethnic group that could not meet that criterion did not occur.

73. The argument that a non-ethnic German was hired might have been relevant to an argument against direct discrimination on grounds of ethnicity. The direct discrimination in this case concerns religion, as described in section II; we argue here that the Appellant's policy has prejudicial effects for members of the ethnic Turkish minority, constituting indirect discrimination.

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[60] ECJ, Halliburton Servs. BV v. Staatssecretaris van Financien, Case C-1/93, 12 April 1994, European Court Reports 1994, p. I-1137, curia.europa.eu.
[61] D.H. and Others v the Czech Republic, supra, § 184.

No Objective Justification For Indirect Discrimination Has Been Adduced By The Appellant

74. As noted earlier, a requirement that by its nature places persons of a particular ethnic origin at a disadvantage compared with other persons constitutes indirect discrimination in violation of the Race Directive "unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."[62]

75. Since the Appellant has denied having indirectly discriminated against the Respondent on ethnic grounds, it has not adduced any justification for its practice of indirect discrimination. Nevertheless, for the sake of completeness and insofar the Appellant may seek to adduce the same justification of a "genuine occupational requirement" that it put forth in respect of its direct discrimination against non-Christians, it must be noted that the justification for indirect discrimination set forth in the Race Directive is not exactly the same as that for direct discrimination. Admittedly, if the genuine occupational requirement is defined sufficiently narrow to meet the test for permissible direct differential treatment on grounds of religion, then the employer would be likely to meet the test for justifying indirect race discrimination as well if he is able to show that there is a real pressing need, legitimate means, and proportionate response.

76. The ECJ set forth the legal test for justification of indirect discrimination in the case of *Bilka-Kaufhaus*. Under that test, a provision, criterion or practice that indirectly and adversely affects an ethnic group is valid only if it:

- corresponds to a real need on the part of the employer;
- is appropriate with a view to meeting that need; and
- is necessary to meet that need.

77. This test includes considering whether the justifications provided by the employer demonstrated a real need. If such a need is established, further explicit consideration of the seriousness of the disproportionate impact of the policy on the group affected must be undertaken, followed by an explicit evaluation of whether the employer's needs are sufficiently weighty to trump the interests of the adversely affected group.[63] All of this is lacking in the Appellant's justification of the differential treatment to which the Respondent was subjected.

Conclusion As Regards Indirect Discrimination On Grounds Of Ethnicity

[62] Article 2 (2)(b) of the Race Directive.
[63] Taken *mutatis mutandis* from http://www.equalityhumanrights.com, E.O.C. Legal Advisers, "The legal test for justification in indirect discrimination cases".

78. It light of the above discussion we conclude that that the Respondent was a victim of indirect ethnic discrimination. The impugned recruitment criterion of belonging to a Christian church adversely affected the ethnic Turkish minority to which the Respondent belongs without an objective justification.

V. Overall Conclusion And Grounds For Referral To The ECJ

79. It has been argued in this Expert Opinion that the Appellant has overstepped the permissible exceptions to the prohibition of differential treatment on religious grounds set out in Article 4(2) of the Employment Equality Directive. It has also been adduced that the Appellant and the Hamburg Labor Court have disregarded the occurrence of indirect ethnic discrimination as prohibited under Article 2(2) of the Race Directive and has thus been denied the protection of EU law.

80. The Hamburg Regional Labor Court is invited to conclude that the Respondent is a victim of both direct discrimination on religious grounds as well as indirect ethnic discrimination.

81. At the same time, the contentions of the parties raise issues under EU law that need clarification and interpretation, which can be obtained by addressing the relevant questions for a preliminary ruling to the ECJ pursuant to Article 234 of the EC Treaty.

82. The ECJ has provided guidance to national courts as to when and how questions should be addressed to it. In its "Information Note on references from national courts for a preliminary ruling" the ECJ has stated:

> 11. **Any court or tribunal may refer a question to the Court on the interpretation of a rule of Community law if it considers it necessary to do so in order to resolve a dispute brought before it.**
> …
>
> 13. …**[A] reference for a preliminary ruling may prove particularly useful, at an appropriate stage of the proceedings, when there is a new question of interpretation of general interest for the uniform application of Community law throughout the Union, or where the existing case-law does not appear to be applicable to a new set of facts**.
> …
> 18. A national court or tribunal may refer a question to the Court of Justice for a preliminary ruling **as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment**; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.
>
> 19. It is, however, **desirable that a decision to seek a preliminary ruling should be taken when the proceedings have reached a stage at which the national**

court is able to define the factual and legal context of the question, so that the Court has available to it all the information necessary to check, where appropriate, that Community law applies to the main proceedings. It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard. [64]

83. In order to enable an EU-law conforming judgment to be given in the present case, we respectfully submit that it would be appropriate for the Hamburg Regional Labor Court to make a request to the ECJ for a preliminary ruling on the interpretation of the relevant EU law in contention here. At this stage of proceedings the Hamburg Regional Labor Court is faced with questions of interpretation of the Employment Equality Directive and the Race Directive raised by both parties to this case. Also at this stage, the Court is able to define the factual and legal context of the questions, and can, following the judgment of the ECJ, correctly resolve the issues in conformity with applicable EU law. The issues raised are new and have not yet been referred to or decided by the ECJ, and a decision by the ECJ will ensure uniformity of interpretation of these issues across EU Member States.

Questions For Referral

84. The proposed questions to put to the ECJ for a preliminary ruling are:

As regards Employment Equality Directive 2000/78/EC

1. A. Is a religious employer such as the Appellant entitled to rely upon the "genuine occupational requirements" provisions of Article 4(2) to exclude on the basis of religion applicants for a public-funded job which is not of a religious/missionary nature?
   B. What is the relationship if any between the limitations surrounding the genuine occupational requirements set forth in Articles 4(1) and 4(2) of the Employment Equality Directive and Declaration No 11 on the status of churches and non-confessional organizations, annexed to the Final Act of the Amsterdam Treaty, referred to in Article 24 of the Preamble of the Employment Equality Directive?

2. Pursuant to Article 4(2) of the Employment Equality Directive, what are the limits on requirements/conditions of service that churches and other public or private organizations whose ethos is based on religion or belief may impose on their employees in terms of the condition to 'act in good faith and with loyalty to the organization's ethos'?

3. Is the ground "by virtue of the right to self-determination" which allows religious communities and institutions associated with them, to differentiate in employment

[64] ECJ, "INFORMATION NOTE on references from national courts for a preliminary ruling", Official Journal of the European Union, 2005/C 143/01. (Emphasis added.)

on grounds of religious affiliation pursuant to Article 9(1) of the GETA a correct transposition of Article 4(2) of the Employment Equality Directive?

As regards the Race Directive 2000/43/EC

4. Under what circumstances does the exclusion from a job of anyone who is or is not affiliated to a Christian church constitute indirect ethnic discrimination against persons of an ethnic origin who, but for very few exceptions, do not adhere to the Christian faith?