

The freedom of religion in the workplace in the latest case law of the Court of Justice of the European Union: the Cresco Investigation case and religious holidays.

Giulia Cassano

Dottoranda di ricerca in diritto del lavoro presso Università degli Studi di Milano

ABSTRACT

The present paper studies the freedom of religion in the workplace taking into consideration the latest case law of the CJEU. In particular, the Cresco Investigation case gives the chance to investigate the connection between anti-discrimination law on religious grounds and religious holidays. In fact, there can be some faiths that need to celebrate particular days – relevant for their religion – not taken into consideration by the official national calendar, for cultural and historical reason. The paper, therefore, aims to show the possible ways to face the issue, that can involve an intervention of national legislators or of the EU or can be regulated by private agreements.

Keywords: *freedom of religion in the workplace – EU anti-discrimination law – official holidays calendar – religious holidays – reasonable accommodation on religious grounds*

SOMMARIO:

1. The Cresco Investigation case and the freedom of religion in the work-place under European non-discrimination law. – 2. The justifications to the principle of non-discrimination: Article 2(5) and 7 of the Directive 2000/78/EC. – 3. The configurability of a right to reasonable accommodation on religious grounds. – 4. Final remarks.

1. The Cresco Investigation case and the freedom of religion in the work-place under European non-discrimination law.

The freedom of religion in the workplace is one of the most important issue of modern times, arisen as a result of the increasing multiculturalism,

integration and migration in Europe¹. There are many situations in which religion and employment may intersect².

The Court of Justice of the European Union (below “CJEU”) has ruled in several occasions recently about discrimination on religious grounds in the workplace, thus providing a fundamental guideline for the interpretation and the study of the matter (i.e. CJEU 14 March 2017, C-157/2015, Ahbita; CJEU 14 March 2017, C-188/2015, Bougnaoui; CJEU 17 April 2018, C-414/2016, Egenberger; CJEU 11 September 2018, C-68/2017, IR; CJEU 22 January 2019, C-193/2017, Cresco Investigation).

The present paper focuses on the Cresco Investigation case (CJEU 22 January 2019, C-193/2017, Cresco Investigation) and on the issues that it arises.

In this recent decision the CJEU ruled on an Austrian legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled – if required to work on that day – to a payment in addition to their regular salary.

This ruling offers the chance to explore the legal status of religious holidays in employment relationship and its connections with the EU anti-discrimination law³.

At a European level, the freedom of religion is granted in Article 10 of the Charter of Fundamental Rights of the European Union (below “CFR”), as a right that «includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance».

¹ E. RELAÑO PASTOR, *Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational European Courts, Two Different Approaches*, in *Oxford Journal of Law and Religion*, 2016, 5, 279; S. MESEGUER VELASCO, *La integración de la diversidad religiosa en el ámbito de las relaciones laborales: la cuestión de las prácticas religiosas*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 2012, 28, 27; M. ELOSEGUI ITXASO, *El concepto jurisprudencial de acomodamiento razonable*, Editorial Aranzadi, Navarra, 2013, 202.

² S. H. VAUCHEZ, *Religious holidays in employment – Austria, France & Spain*, in *European Equality Law Review*, 2018, 2 63; K. ALIDADI, *Religion, Equality and Employment in Europe: the Case for Reasonable Accommodation*, Hart Publishing, Oxford, 2017; E. HOWARD, *Religious clothing and symbols in employment. A legal analyses of the situation in the EU Member States*, *European Network of Legal Experts in gender equality and non-discrimination*, 2017, available at https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48810; S. H. VAUCHEZ, *Equality and the Market: the Unhappy Fate of religious discrimination in Europe*, in *European Constitutional Law Review*, 2017, 13, 744.

³ S. H. VAUCHEZ, *cit.*, 63.

As the extent of its content is not well defined⁴, the interpretation of the term “religion” is given in light of the international human rights instruments as elaborated in the case law of the European Court of Human Rights under Article 9 ECHR⁵. Therefore, this right covers theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief⁶.

In addition, as stated in the consistent CJEU jurisprudence, the freedom of religion protects both the *forum internum* – i.e. a person’s right to form, to hold and to change serious inner convictions and beliefs and that has absolute protection – and the *forum externum* – i.e. a person’s right to manifest or outwardly display a religion or belief, either alone or as part of a community⁷.

The freedom of religion is also taken into consideration as a risk factor in Article 21 of the CFR as well as in Article 19 TFEU, that state the non-discrimination principle, a cornerstone of the European law⁸. The aim of this principle is to allow all individuals an equal and fair prospect to access opportunities available in a society – and, for what matters here, in the workplace – so that individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular protected characteristic that they possess⁹.

⁴ M. GATTI, *The Log in Your Eye: Is Europe’s External Promotion of Religious Freedom Consistent With its Internal Practice?*, in *European Law Journal*, 2016, 22, 2, 250; L. VICKERS, *Religion and Belief Discrimination in Employment—the EU Law*, European Network of Legal Experts in the Non-discrimination Field, European Commission, 26; E. RELAÑO PASTOR, cit., 258.

⁵ See the case law mentioned in E. HOWARD, *Study on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief*, in *European Parliamentary Research Service*, 2016.

⁶ Human Rights Committee, General Comment 22, *The Right to Freedom of Thought, Conscience and Religion (on Art. 18)*, 1993; the Committee also states that the terms “religion” and “belief” are to be broadly construed and that Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.

⁷ S. CAÑAMARES ARRIBAS, *Igualdad religiosa en las relaciones laborales*, Editorial Aranzadi, Navarra, 2018, 22; see, to that effect, CJEU 14 March 2017, G4S Secure Solutions, C-157/15; CJEU 14 March 2017, Bougnaoui and ADDH, C-188/15; CJEU 22 January 2019, C-193/2017, Cresco Investigation.

⁸ J. CROON, *Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination—or—Alternative Tales on Equality Reasoning*, in *European Law Journal*, 2013, 19, 2, 153. For a detailed history P. CRAIG, G. DE BURCA, *The Evolution of EU law*, Oxford University Press, 2011, 611.

⁹ For an overview on the topic see G. ZICCARDI, *Il principio di non discriminazione nel*

As it is well known, the European legislator has had a crucial role for the development of the non-discrimination rules, according to a social integration policy¹⁰. With this extent, the fundamental European rule regarding the discrimination on religious grounds is the Council Directive 2000/78/EC of 27 November 2000 (below “Employment Equality Directive”) that establishes a general framework for equal treatment in employment and occupation, in order to fight discrimination on the grounds of – for what here matters – religion or belief¹¹.

The structure of the Directive 2000/78/EC is based on the identification of risk factors, relevant for the scope of the law, and on the provision of different forms of conduct prohibited under the Directive. Moreover, some exceptions (also called justifications) to the prohibition of discrimination are allowed in situations prescribed in the Directive itself.

Among the conducts prohibited by the Directive at issue, direct discrimination on the ground of religion or belief – according to Article 2(2)(a) Employment Equality Directive – occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the ground of religion or belief.

Secondly, indirect religion or belief discrimination occurs where a neutral provision, criterion or practice, applicable to everyone, puts persons of a particular religion or belief at a disadvantage because they cannot, due to their religion or belief, follow the rule¹². It is worth noting that indirect discrimination can be objectively justified if the provision, criterion or practice has a legitimate aim and the means used to achieve that aim are appropriate and necessary, to be

rapport di lavoro, in *Questione giustizia*, 2014, 1, 173.

¹⁰ F. MARINELLI, *Il licenziamento discriminatorio e per motivo illecito: contributo allo studio delle fattispecie*, Giuffrè, Milano, 2017, 55; G. CHITI, *Il principio di non discriminazione e il Trattato di Amsterdam*, in *RIDPC*, 2000, 3-4, 851; P. BELLOCCHI, *Divieti di discriminazione, interventi di contrasto e sanzioni specifiche contro gli atti discriminatori*, in G. SANTORO PASARELLI, *Diritto e processo del lavoro e della previdenza sociale. Privato e pubblico*, Utet, Torino, 2017, 697.

¹¹ In the same year, the EU adopted also the Directive 2000/43/EC, prohibiting racial and ethnic origin discrimination and this was the first time the EU legislated against these grounds of discrimination; on the topic see E. HOWARD, *EU Anti-discrimination Law: Has the CJEU Stopped Moving Forward?*, in *International Journal of Discrimination and the Law*, 2018, 18, 60.

¹² Article 2(2)(b) of the Employment Equality Directive; for more information about the topic E. HOWARD, *Indirect Discrimination 15 Years on*, in *E-Journal of International and Comparative Labour Studies*, 2015, available at http://www.adapt.it/EJCLS/index.php/ejcls_adapt/article/view/321.

proved in the justification test. Moreover, this justification test includes a consideration of the question whether there is an alternative, less far-reaching and less discriminatory way of achieving the aim pursued. If there is an alternative which affects the individual less, than that should be chosen and, if it is not chosen, then the rule will be held not to be justified¹³.

Note that both direct and indirect discrimination requires a comparison to be made with another person¹⁴.

Regarding the derogations to the non-discrimination principle, some of these are: the genuine occupational requirements (Article 4(1)); the difference of treatment imposed by churches and other public or private organisations the ethos of which is based on religion or belief (Article 4(2)); the exceptions based on Articles 2(5) and 7(1) of the Directive, that will be deeper discussed below.

Given the above concerning the European framework on the issue, the Cresco Investigation case arises questions on the connection between religious discrimination in the workplace and the official holidays calendar, provided that it concerns an Austrian legislation that granted holiday (or additional salary) on Good Friday only to employees members of certain churches.

It must be noted that most EU countries have an official calendar of holidays that includes some religious holidays, because of historical development. Given the overall predominance of Christianity in Europe, these official calendars unsurprisingly include Christian holidays as religious holidays¹⁵.

About the point, considering how deeply socially and culturally embedded the social organization of time is, some interpreters expressed the need for more attention on the eventual configurability of forms of discrimination due to choices such as a predominant rule of Sunday rest or official annual calendars, considering that official holidays constitute rest for all the employees, regardless of their religion¹⁶.

In fact, it must be considered that such official calendars have several effects in the workplace, as long as it creates a conflict between the worker's

¹³ E. HOWARD, *Study on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief*, in *European Parliamentary Research Service*, 2016, 35.

¹⁴ E. HOWARD, *cit.*, 26.

¹⁵ S. H. VAUCHEZ, *cit.*, 67; S. MESEGUER VELASCO, *La integración de la diversidad religiosa en el ámbito de las relaciones laborales: la cuestión de las prácticas religiosas*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 2012, 28, 5.

¹⁶ S. H. VAUCHEZ, *cit.*, 67.

need to follow religious prescriptions and the fulfilment of obligations arising from the employment contract¹⁷.

Therefore, there is an emerging discussion about the grant of days or other entitlements (such as a certain adjustment of the working time) that can be reserved for believers of faiths not taken into consideration by official calendar. Actually, this outcome can be achieved with provisions in national legislation, as in the Cresco Investigation case, or with private agreements between employees and employers.

Therefore, for the purposes of the present research, the topic can be studied from two different perspectives.

Firstly, one that focuses on the issues that can arise when the needs of a particular church are taken into consideration by a national law. With this extent, the Cresco Investigation case is a guideline for the identification of situations that legitimate Member States to adopt measures that constitute a difference of treatment among comparable workers but fall under the above-mentioned justifications that can derogate the non-discrimination principle.

Secondly, when there are no such provisions in the national legislation, some of the interpreters investigated the configurability of a right to reasonable accommodation of the employees towards employers, in order to protect the freedom of religion of workers that are members of churches that impose celebrations or rituals not taken into consideration by the public holidays calendar.

In the analysis of the two perspectives, the difference between the prohibition of discrimination and the reasonable accommodation must be taken into consideration. On the one hand, the principle of non-discrimination constitutes a limit to employer's powers; on the other hand, reasonable accommodation is a specific right guaranteed to employees in certain situations provided by law¹⁸.

2. The justifications to the principle of non-discrimination: Article 2(5) and 7 of the Directive 2000/78/EC.

For what concerns the first perspective under which the Cresco Investigation case can be studied, the analysis of the exceptions to the principle of non-discrimination prescribed in Articles 2(5) and 7 of the Directive can be conducted following the steps of the CJEU in the decision of the case at issue.

¹⁷ S. MESEGUER VELASCO, cit., 5.

¹⁸ M.T. CARINCI, *Il licenziamento discriminatorio alla luce della disciplina nazionale: nozioni e distinzioni*, in *RIDL*, 2016, III, 720.

To begin, as already said, the Court of Justice of the European Union was required to rule on the compliance with the European anti-discrimination legislation of an Austrian legislation (below “ARG”) under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to public holiday pay.

In the decision-making process, the CJEU, firstly, established that such a legislation could give rise to a difference in treatment between comparable workers, directly based on the religion of employees. And this in view of the fact that the grant of a public holiday on Good Friday is subject only to the condition that such an employee must formally belong to one of those churches and not to the condition that the employee must perform a particular religious duty during that day, thus making this situation entirely comparable to the one of other employees who wish to have a rest or leisure period on Good Friday¹⁹.

Given that the Austrian legislation at issue has the effect of treating comparable situations differently on the basis of religion, the Court questioned whether such direct discrimination may be justified on the basis of Article 2(5) of Directive 2000/78 or Article 7(1) of that Directive²⁰.

In particular, Article 2(5) contains a general exception and states that «This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others».

In the first interpretation of the provision, it was pointed out that the purposes that allowed to derogate the principle of non-discrimination were not well defined, thus creating a wide area of lawful discrimination for the Member States, under the cover of the needs of a democratic society²¹.

However, the CJEU has stated – in the Cresco Investigation Case as well as in other occasions²² – that Article 2(5) of the Directive must be interpreted

¹⁹ CJEU 22 January 2019, C-193/2017, Cresco Investigation, par. 38 – 51.

²⁰ CJEU 22 January 2019, C-193/2017, Cresco Investigation, par. 51 – 69.

²¹ P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *RIDL*, 2002, I, 95.

²² As stated in earlier rulings: CJEU 12 January 2010, C-341/08 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe; CJEU 13 September 2011, C-447/09, Prigge and Others v Deutsche Lufthansa AG.

strictly, thus reassuring the interpreters' concerns that thought that the exception at issue was formulated too broadly²³.

In particular, the Court, in the discussed decision, recognised the ARG as a national law set out in order to protect the freedom of religion, objective, thus, included among those listed in Article 2(5) of Directive.

However, the CJEU noted that the right of employees not belonging to churches covered by the ARG to celebrate a religious festival not included in any public holidays, could be protected only by a permission given by the employer, which allows the worker to obtain the right to be absent from their work for the amount of time necessary to perform certain religious rites.

As a result, the Court established that national measures such as the ARG cannot be considered necessary for the protection of freedom of religion, within the meaning of Article 2(5) of Directive 2000/78.

Regarding Article 7(1) of Directive, entitled "*Positive Action*", it provides that, with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds covered by the Directive²⁴.

As the initial words of the Article suggest, positive action can be set out in order to aim at substantive or factual equality rather than mere formal equality²⁵.

The measures in question are therefore authorised, although discriminatory in appearance, if in fact intended to eliminate or reduce actual instances of inequality which may exist in society.

Nevertheless, in determining the scope of this derogation to the principle of equal treatment, due regard must be given to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued²⁶.

By failing to comply with the above requirements, a law like the one at issue in the discussed judgement of the CJEU could unexpectedly benefit the alleged

²³ E. ELLIS, P. WATSON, *EU Anti-discrimination Law*, Oxford University Press, Oxford, 2012, 402.

²⁴ P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *RIDL*, 2002, I, 114.

²⁵ E. RELANO PASTOR, cit., 261; E. HOWARD, cit., 55.

²⁶ P. CHIECO, cit., 115.

disadvantaged groups of employees and, at the same time, result discriminatory towards the other employees not carrying the risk factor.

In fact, in the Cresco Investigation Case, the Court stated that the measures set out in the Austrian legislation went beyond what was necessary to compensate for that alleged disadvantage and established a difference in treatment among employees subjected to comparable religious duties.

Regarding the application of Article 7 of the Directive, it must be pointed out that many EU Member States have put in place positive action measures, most often in relation to disabled people. There are very few examples of positive action measures in relation to religion and belief²⁷.

On this point, part of the doctrine²⁸ noted that positive actions could hardly be used in religious matters by a Member State that claims to be a secular state. In fact, a positive action pursued by a Member State in favour of a certain religious community could be seen as undue support to a religious conviction rather than another.

Generally, it must be said that the concept of positive actions (also called positive discrimination) is often demanded by the increase of religious pluralism in the Member States²⁹.

In conclusion, the legitimacy of a national legislation that grants additional holidays to particular churches must be examined in light of the boundaries of the exceptions to the principle of non-discrimination, as last pointed out by CJEU in the Cresco Investigation case.

3. The configurability of a right to reasonable accommodation on religious grounds.

After considering the Cresco Investigation case and the justifications to the principle of non-discrimination as examined by the CJEU, it is now necessary to refer to the concept of reasonable accommodation in order to investigate its relevance for the topic at issue (i.e. discrimination on religious grounds in the workplace).

²⁷ E. HOWARD, cit., 56.

²⁸ S. CAÑAMARES ARRIBAS, *Igualdad religiosa en las relaciones laborales*, Editorial Aranzadi, Navarra, 2018, 41; A. LOPEZ-SIDRO, R. PALOMINO, *¿Cabe la discriminación positiva en relación con el factor religioso?*, in *Revista General de Derecho Canónico y de Derecho Eclesiástico del Estado*, 2011, 25, 18.

²⁹ A. LOPEZ-SIDRO, R. PALOMINO, cit., 18.

Reasonable accommodation is related to quest for substantive equality and to the concept of indirect discrimination³⁰. It is based on the fundamental observation that some individuals, because of an inherent characteristic (religion, for instance), face barriers to full participation in society³¹.

The right to reasonable accommodation was firstly recognised in Canada and in the United States³², where it constituted a real obligation of the employer towards employees³³. It must be noted that, in these countries, the concept emerged in equality law precisely as a means of handling religious diversity and was then applied to other grounds of discrimination.

For the development of the debate at a European level, it is worth mentioning that the jurisprudence of the European Court of Human Rights (below “ECHR”) on equality provided cases in which the device of reasonable accommodation has been at issue³⁴, even if the Court doesn’t have a favourable approach for its recognition.

In the reasoning of the ECHR – and in the common understanding – the idea of reasonable accommodation is closely linked to a pluralist conception of religious freedom, based on the genuine recognition of, and respect for, diversity

³⁰ M. ELOSEGUI ITXASO, cit., 203.

³¹ E. BRIBOSIA, I. RORIVE, *Reasonable accommodation beyond disability in Europe*, report of the European Network of Legal Experts in Non-discrimination field, available at <https://publications.europa.eu/en/publication-detail/-/publication/d7715f13-cd38-428e-873b-e21b8c6ecb71/language-en>.

³² J. MACLURE, C. TAYLOR, *Laïcité et liberté de conscience*, La Découverte, Paris, 2010; M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *JUS*, 2015, 3, 307; S. CAÑAMARES, *Igualdad religiosa en las relaciones laborales*, Editorial Aranzadi, Navarra, 2018, 57.

³³ To that extent, it was crucial the judgement *Ontario Human Rights Commission [and O’Malley] v. Simpsons-Sears Lts.* (1985), 9 C.C.E.L. 185 (S.C.C.).

³⁴ For a deeper study M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *JUS*, 2015, 3, 307 and the jurisprudence there examined; E. BRIBOSIA, I. RORIVE, *Reasonable accommodation beyond disability in Europe*, report of the European Network of Legal Experts in Non-discrimination field, available at <https://publications.europa.eu/en/publication-detail/-/publication/d7715f13-cd38-428e-873b-e21b8c6ecb71/language-en>; C. EVANS, *Freedom of religion under the European Convention of Human Rights*, Oxford University Press, 2001; K. HENRARD, *Duties of reasonable accommodation in relation to religion and the European Court of Human Rights: a closer look at the prohibition of discrimination, the freedom of religion and related duties of state neutrality*, in *Erasmus Law Review*, 2012, 5, 1.

and the dynamics of cultural traditions, ethnic and cultural identities³⁵, that can be achieved ensuring that competing groups tolerate each other³⁶.

Regarding the European Union, the notion of reasonable accommodation was explicitly established in the Directive 78/2000/CE in Article 5, but only with respect to disability³⁷.

For this reason, the question of whether the right to reasonable accommodation can be extended also to the other discrimination grounds – and, for what here matters, religion – laid down in the Employment Equality Directive and, in particular, if it can be derived from the prohibition of indirect discrimination has arisen among the interpreters³⁸.

The concept of reasonable accommodation for religious reasons means any modification or adjustment to a job that would enable an employee, of a cultural or religious background which is different from the majority population, to perform essential job functions on an equal basis with others and in accordance of his or her convictions³⁹.

In particular, reasonable accommodation for religious grounds, relevant in the workplace, could be like adapting working time or dietary requests of employees according to the duties imposed by a certain religion or again – for what specifically concerns the Cresco Investigation case – adjusting holidays in case that some churches impose celebrations or rituals not taken into consideration by the public holidays calendar or by the national legislation.

There are some issues for the extension of the notion of reasonable accommodation beyond disability.

³⁵ See among others ECHR, *Gorzelik and others v. Poland*, App. N. 44158/98, 17 February 2004, par. 92; M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *JUS*, 2015, 3, 307.

³⁶ See ECHR, *Serif v. Greece*, App. N. 38178/97, 14 December 2000, par. 53.

³⁷ In 2000, the concept of reasonable accommodation was relatively new and unexplored in the European arena, at least in the field of non-discrimination law, as pointed out by L. WADDINGTON, *Implementing and interpreting the reasonable accommodation provision of the framework employment directive: learning from experience and achieving best practice*, in *EU network of experts on disability discrimination*, 2004, 6.

³⁸ S. H. VAUCHEZ, *Religious holidays in employment – Austria, France & Spain*, in *European Law Review*, 2018, 2, 72; L. VICKERS, *Religion and Belief Discrimination in Employment – the EU law*, European Commission, 2006, 22; K. ALIDADI, *cit.*, 693; see also: E. BRIBOSIA, J. RINGELHEIM, *Aménager la diversité: le droit de l'égalité face à la pluralité religieuse*, in *Revue trimestrielle de droit européen*, 2009, 78, 319.

³⁹ E. RELAÑO PASTOR, *cit.*, 256.

In particular, as the reasonable accommodation duty requires an analysis of an individual's situation, it suits discrimination on disability grounds very well, but it could be more difficult in case of religion, that is a group phenomenon⁴⁰.

Moreover, if reasonable accommodation would be applicable for discrimination of religious grounds, there could be problems related to the volatility of the definition of religion. In fact, the question could be whether reasonable accommodation could be granted only to employees that follow the official orthodoxy of a certain religious conviction or also to employees that behave in a more autonomous but are still member of a religious community⁴¹.

Other issues are connected to the principle of secularism in a democratic society: in fact, also employees that don't belong to a particular religion could have demands that could be protected with a reasonable accommodation by the employer (such as adapting working time for family needs)⁴².

Therefore, it would be difficult to select which kind of requires should be covered by the reasonable accommodation duty and which ones not.

Furthermore, in case of discrimination grounds different than disability, meeting the special needs of vulnerable or disadvantaged groups to ensure their effective participation is usually considered to be adequately tackled by applying the indirect discrimination device (i.e. the justification test). And this even if reasonable accommodation and indirect discrimination are not overlapping concepts⁴³.

However, the debate around the application of reasonable accommodation for religious grounds at a European Union level is still open.

In the topic at issue, i.e. adjusting public holidays of the official calendar to the needs of particular religious convictions, it can be mentioned – as well as the European Commission did in a recent report⁴⁴ – the solution adopted in Spain, where there are no additional public holidays based on the beliefs of workers. However, it is worth pointing out that Spain has reached cooperation agreements with three religious convictions⁴⁵, that include rules on public

⁴⁰ S. CAÑAMARES ARRIBAS, cit., 59.

⁴¹ S. CAÑAMARES ARRIBAS, cit., 60.

⁴² S. CAÑAMARES ARRIBAS, cit., 61.

⁴³ E. HOWARD, cit., 56.

⁴⁴ European Commission, *Flash Reports on Labour Law*, 2019, 1, 53 available at <https://ec.europa.eu/social/BlobServlet?docId=20744&langId=en>.

⁴⁵ Law 25/1992 (Cooperation Agreement with the Federation of Israelite Communities of

holidays.

For example, the agreement with the Islamic Religious Community⁴⁶ allows the deals between employers and workers to replace the public holidays mentioned in the Labour Code⁴⁷ for dates with greater meaning for that religion. Therefore, the total amount of public holidays does not change, but the date for taking public holidays may differ for religious motives.

It must be underlined that, even with these cooperation agreements between the State and the religious conviction, the right for a certain holiday must be expressly agreed upon by the employer⁴⁸.

In view of this consideration, it can be underestimated the difference between employees members of religious convictions with cooperation agreements and employees belonging to other churches.

In fact, also workers of faiths without the agreements can ask the employer a day-off on religious grounds, given that it's a require covered by the general freedom of religion.

The only advantages for Spanish employees members of religious convictions with a cooperation agreement can be seen in the burden of proof⁴⁹: if there is no agreement, an employee must, as a matter of fact, prove that the required day is relevant for its confession; if there is an agreement, the employee must only ask the employer for the permission, without being burdened by the proof

Spain); Law 26/1992 (State Cooperation Agreement with the Islamic Commission of Spain); Law 24/1992 (Cooperation Agreement with the Protestants). For an analysis of the agreements see: S. MESEGUER VELASCO, *La integración de la diversidad religiosa en el ámbito de las relaciones laborales: la cuestión de las prácticas religiosas*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 2012, 28, 16; A. FERNÁNDEZ-CORONADO, *Estado y confesiones religiosas: un nuevo modelo de relación (los pactos con las confesiones: leyes 24, 25 y 26 de 1992)*, S.L. Civitas ediciones, Madrid, 1995, 64.

⁴⁶ S. MESEGUER VELASCO, cit., 5; G. BARRIOS, I. JIMENEZ AYBAR, *La conciliación entre la vida laboral y la práctica de la religión musulmana en España: un estudio sobre la aplicación del Acuerdo de cooperación con la Comisión Islámica de España y otras cuestiones relacionadas*, in *Estudios financieros. Revista de Trabajo y Seguridad Social*, 2006, 274, 3.

⁴⁷ In particular, the general framework is provided by “Estatuto de los Trabajadores” combined with Royal Decree 2001/1983.

⁴⁸ It is an option and not a right for employees, as stated by S. H. VAUCHEZ, *Religious holidays in employment – Austria, France & Spain*, in *European Law Review*, 2018, 2, 73; S. MESEGUER VELASCO, *La integración de la diversidad religiosa en el ámbito de las relaciones laborales: la cuestión de las prácticas religiosas*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 2012, 28, 16.

⁴⁹ S. CAÑAMARES ARRIBAS, cit., 62.

of the religious relevance of the particular day, that is already taken into account by the agreement.

In any case, the provisions of Spanish cooperation agreements regarding holidays can be considered an example of reasonable accommodation.

3. Final remarks.

In conclusion, the issues related to the connections between the freedom of religion and the non-discrimination principle in the workplace are an emerging debate that will concern both national legislators and employers.

The topic of the adjustment of the official calendar according to religious needs of workers members of minority confessions is only one of the problems that, in practice, employers and employees will face.

Therefore, it seems relevant for interpreters investigating which could be the best device to give a legal framework to these situations and, in particular, whether the issue should be faced within the anti-discrimination law system or with the provision of a right to reasonable accommodation.

The difference between the two presented perspectives is based on the above-mentioned different legal qualification of the non-discrimination principle and reasonable accommodation: the first is a limit to an employer's power; the second is an effective right of the employee to demand an organizational change from the employer⁵⁰.

This legal distinction brings with it an economic one, since the right to reasonable accommodation requires a greater effort by the employer than the compliance with the non-discrimination principle.

Moreover, from a different side, a further point to consider is the question at what level is preferable to have a regulation of the topic, whether national, private or European.

As demonstrated by the Cresco Investigation case, adopting a national law that takes care of the needs of the religious minorities can lead to discriminatory issues as well as dilemmas linked to the principle of secularism of the state.

On the other hand, private agreements at company level may be the best option to find the right balance between religious requires of employees and business needs of the employer. In this way, the parties could also give a specific regulation for the right of reasonable accommodation of workers towards

⁵⁰ M.T. CARINCI, cit., 720.

employers, providing its extension and limits.

Even if this solution has the disadvantages of being based on free private initiative, it must be pointed out that employers will be encouraged to negotiate, in order to prevent conflicts among employees, given the increasing multiculturalism of European society.

In any case, also a framework regulation from the EU could be desirable, since it could mean, at least, an awareness of the emerging phenomenon and it could increase the public consideration of the issue.