

Religious freedom and the right to enjoy religious festivals (of others).

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ABSTRACT

The question at issue is how employees' religious creeds affect the working arrangements decided upon by their employer. The question refers, in particular, to the enjoyment of weekly rest days, religious holidays, if any, and other organisational arrangements (changes in shifts or working hours, etc.) that may be introduced by the law, or during collective bargaining, to guarantee that workers of a given religious creed may observe their religious precepts.

These reflections are occasioned by a recent judgement of the Court of Justice C- 193/2017, on the recognition, by the Austrian legislature, of Good Friday as a day of paid rest for workers belonging to the churches referred to in the ARG. The possible implications, for Italy, of the ruling of the Court are analysed. It is criticised the position of the Court, with regard to the alleged discriminatory nature of national legislation under which, on the occasion of a given religious holiday, which is relevant only to certain confessions, only members of those confessions are entitled to paid rest, or to an additional allowance. On the other hand, it is considered that the recognition in favour of the members of the churches referred to in the ARG of Good Friday as a day of rest requires the State to take similar account of the festivals of other "minor" churches, equally entrenched.

Keywords: religious creed – special religious festivals – paid day off – additional allowance - discrimination -

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disapplication of the national rule which conflicts with the prohibition of discrimination on grounds of religion and the application to members of the disadvantaged group of the same treatment that is reserved for persons of the favoured group..

Introduction.

In the current historical context, the theme of religious freedom and its impact on the organization of work is becoming increasingly important, particularly with reference to working and non-working times¹.

It has been noted that in the labour field, «religious freedom has a dual value: both as a prohibition of discrimination on religious grounds and as a possibility of fulfilling obligations linked to one's own faith»². These two profiles are intimately interwoven, as attested by the recent ruling of the Court of Justice C-193/2017.

This is a decision that is likely to have far-reaching repercussions and it deserves to be discussed and examined in depth.

1. Judgment C-193/17 on the recognition by the Austrian legislature of Good Friday as a day of paid rest for workers belonging to the churches referred to in the ARG.

As is known, this judgement refers to the Austrian case. In Austria, Good Friday is a public holiday only for employees who are members of certain Christian churches. In particular, only for workers who are members of the Evangelical churches of the Augsburg and Helvetic Confessions, the Old Catholic church and the United Methodist church (indicated in the ARG, *Arbeitsruhegesetz*, the law on rest periods). If employees of those Christian churches (the ones “covered by the ARG”) are required to work on Good Friday, they are entitled to a payment in addition to their regular salary, for work done on that day.

The grant of “public holiday” on Good Friday, or of a payment in addition to their regular salary for work done on that day to those employees (“covered by the ARG”) is not conditioned to the circumstance that they perform a

¹ With reference to the Italian legal system, see, in general, v. G. DE VERGOTTINI, T. E. FROSINI (a cura di), *Costituzione e religione*, Cedam, 2013. R. PIN, *Laicità e Islam nell'ordinamento italiano*, Cedam, 2010; M.P. AIMO, *Le discriminazioni basate sulla religione e sulle convinzioni personali*, in M. BARBERA (a cura di), *Il nuovo diritto antidiscriminatorio*, Milano, 2007, 43.

² M. RICCA, *Art. 19, Commentario alla Costituzione*, in www.leggiditalia.it.

particular religious duty during that day. The only requirement is that those employees formally belong to one of those churches (and that have sought prior permission from their employer to be absent from work on that day). While employees belonging to other religions, whose important festivals do not coincide with the public holidays, do not enjoy an equal right.

However, which rule should be applied if a worker, who does not belong to one of these churches, claims the right to public holiday on Good Friday or to an additional pay for work done on Good Friday?

Many were the issues referred for a preliminary ruling to the Court of Justice: does the Austrian provision constitute discrimination prohibited by European law? Can the Austrian rule be regarded as a necessary measure to protect the religious freedom of members of the churches listed in the ARG? Can the Austrian rule be regarded as a positive measure in favour of the members of the churches listed in the ARG?

If discrimination is found to exist, the Court is still asked whether or not the Austrian national provision should be disapplied, in relations between private individuals; and what the consequences are: are workers not belonging to the above churches entitled to receive compensation for all the days of rest on Good Friday not taken, or must the national provision be disapplied in its entirety, and the rights in respect of Good Friday not be granted to any employee?

It's worth mentioning that the worker, in the *Cresco investigation* case, did not belong to any church and merely complained that he had been deprived of the additional allowance paid on Good Friday to members of the churches covered by the ARG (he had not claimed a paid day off, but only the substitute allowance).

This circumstance is strongly emphasized in the argument of the Advocate General, while the judgment makes no mention of it.

According to the Court, the position of employees who do not belong to the above mentioned churches and who ask to be given, on Good Friday, a public holiday, is not different from that of employees who do belong to the above churches (in which Good Friday is particularly important).

This is because the latter are given, on Good Friday, a public holiday regardless of whether they do perform a particular religious duty during that day; and they are entitled to public holiday pay, if they work during Good Friday, regardless of whether they have worked without feeling «any obligation or need to celebrate that religious festival»³.

According to the Court, therefore, these are comparable situations, the

³ CJEU 22 January 2019, C-193/2017.

differential treatment of which results in direct discrimination. Indeed, according to the Court «articles 1 and 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion»⁴.

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

Indeed, according to article 2(5), the directive shall be without prejudice to measures laid down by national law which are necessary for the protection “of the rights and freedoms of others”. The Court holds that the Austrian rule is intended to protect “the rights and freedoms of others” (art. 2, para 5 directive 2000/78/EC) (i.e. the religious freedom of members of the churches referred to in the ARG), however, the measure in question is not “necessary”. This is because the possibility for employees who do not belong to the churches listed in the ARG «to celebrate a religious festival that does not coincide with any of the public holidays listed in Paragraph 7(2) of the ARG» is taken into account in national law by the imposition of a “duty of care” on employers vis-à-vis their employees, «which allows the latter to obtain, if they so wish, the right to be absent from their work for the amount of time necessary to perform certain religious rites»⁵. And such a measure (provision of a duty of care on the employer) would also be sufficient to protect the religious freedom of members of the churches listed in the ARG.

The Court rules out the possibility that the provision in question may be regarded as a positive action (art. 7, para. 1) in favour of members of one of the churches referred to in the ARG. The fact that Austrian national holidays (listed in Article 7(2) of the ARG) do not include Good Friday - which is one of the most important days in the religion of members of the Evangelical churches of the Augsburg and Helvetic Confessions, the Old Catholic church and the United Methodist church constitutes a “disadvantage” in the professional life of

⁴ CJEU 22 January 2019, C-193/2017.

⁵ CJEU 22 January 2019, C-193/2017, para. 60.

workers belonging to the latter. However, since workers «belonging to other religions, whose important festivals do not coincide with the public holidays set out in Paragraph 7(2) of the ARG» can rely - to participate in the rites associated with those festivals - (only) on an authorization granted by the employer «in accordance with the duty of care», it follows that the Austrian national provision (article 7, para. 3 of the ARG) goes beyond what is necessary to compensate for the hypothetical disadvantage and establishes a «difference in treatment between employees who are subject to comparable religious duties that does not guarantee, as far as is possible, the principle of equal treatment».

Moreover, Article 21 of the Charter must be interpreted as meaning that, until the Member State concerned has amended its legislation, a private employer «is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day».

These statements are not entirely convincing.

2. Possible implications, for Italy, of the ruling of the Court. Criticism of the judgment.

The judgement raises some significant questions, and not least for our own country.

In Italy preferential regimes for certain confessions, other than Catholic, have been introduced through "agreements" (art. 8, para. 3 Const.), transposed into law⁶.

See, in particular, the agreements with the Waldensian Table, the Adventist churches (art. 17), with the Assemblies of God in Italy, with the Jewish Communities (art. 4 and 5), with the Orthodox church (art. 10), the Christian Evangelical Baptist union, the Evangelical Lutheran church, the Apostolic, the Mormons, the Buddhist union (art. 24) and the Hindu union (art. 25)⁷.

For example, pursuant to article 25 of law 246 of 2012, members of the Italian Hindu union are allowed to observe the Hindu celebrations of Dipavali, in the framework of flexible working arrangements, without prejudice to the exigencies of essential public services. This prerogative does not, however, require

⁶ Relations with the Catholic Church are instead governed by the Lateran Agreements and subsequent agreements (1984) (art.7 Const.). See F. PASTORE, *Principio costituzionale di laicità della repubblica italiana e trattamento giurisdizionale delle discriminazioni religiose*, in V. BALDINI (a cura di), *Multiculturalismo*, Milano, 2012, 204.

⁷ See F. BUFFA, *Rapporto di lavoro degli extracomunitari, tomo I, Soggiorno per lavoro e svolgimento del rapporto*, Cedam, 2009, 1448.

the members of the Italian Hindu union to actually participate in the religious ceremonies in question.

Similarly, under Law No. 130 of 2016 (art. 22), Buddhists belonging to the IBI-SG are granted, at their request, the right to observe the holidays of 16 February (birth of the Buddha Nichiren Daishonin) and 12 October (registration of the Dai Gohonzon by the same Nichiren Daishonin), in the framework of flexible working arrangements, without prejudice to the exigencies of essential public services.

Article 4 of Law No. 101 of 1989 recognises the right of Jews to sabbatical, within the framework of flexible work organisation and without prejudice to the essential requirements of essential services. The provisions concerning the use of sabbatical rest also apply to various Jewish religious holidays (art. 5).

The Court of Justice's judgement raises serious questions about the right of other workers, of non-Hindu, Buddhist, Jewish faith, who in the wake of this judgement advance a request to enjoy such prerogatives⁸.

However, a more searching analysis reveals the more profound repercussions of this judgement upon our own order. The need or otherwise for an employer - in the organisation of his or her company - to take due account of religious requirements of his/her employees should be considered. These questions arise, in principle, as regards the example of Muslim workers who observe the obligations of fasting and prayer during Ramadan as also their requests for breaks from work to perform ritual prayers, for special hours of work during the month of Ramadan, or for extraordinary leave in order to go on a pilgrimage to the Mecca.

Now, on the one hand, the question has been raised as to whether the failure to provide for such organisational measures in favour of workers with special religious needs might constitute indirect discrimination on grounds of religion. The Court of Justice in the well-known cases of *Achbita* and *Bouagnaoui*⁹ sets out the principles to determine the legitimacy, or otherwise, of the internal working arrangements of a company that does not take account of the obligations to observe the religious precepts of its employees¹⁰. There is no indirect

⁸ See E. GRAGNOLI, *I lavoratori italiani possono chiedere il riposo nel giorno di Indù Dipavali?* in *Labor, Il lavoro nel diritto*, No. 2/2019; A. LASSANDARI, *Le discriminazioni nel lavoro*, Padova, 2010, 170.

⁹ CJEU 14 march 2017, C-157/15, *Achbita*; CJEU 14 march 2017, C-188/15, *Bouagnaoui*. See E. RELAÑO PASTOR, *Religious Discrimination in the Workplace. Achbita and Bouagnaoui*, 183 and A. SLEDINSKA SIMON, *Unveiling the culture of Justification in the European Union. Religious Clothing and the Proportionality Review*, 203, both in U. BELAVUSAN, K. HENRARD, *EU anti-Discrimination Law Beyond Gender*, Hart Publishing, 2019.

¹⁰ There is – it has been noticed - a difference between the wish to manifest one's religious identity

discrimination if the difference in treatment is justified by legitimate aims and the means of achieving that aim are appropriate and necessary, which it is for the national court to verify¹¹. Similar positions have been expressed by the European Court of Human Rights. In essence, taking into account the balance of interests at stake, on several occasions the European Court of Human Rights has considered it legitimate for the state to identify as national holidays only the religious holidays of the majority¹²; and when it has, sometimes, *de facto* recognised the obligation to introduce “reasonable accommodation” aimed at ensuring the right to observe the religious precepts in favour of groups with special religious needs, it has done so only in situations in which such obligations did not have a significant financial impact on the prerogatives of others¹³.

On the other hand, following the judgment of the Court of Justice, in the *Cresco investigation* case, the question arises as to whether the possible recognition of favourable measures (if any) - including by collective bargaining - only in favour of workers belonging to certain confessions constitutes “direct

and the practising and observing of such. See J.H.H. WEILER, *Je suis Achbita*, in *Riv. trim. dir. pubbl.* 4/2018, and in <http://www.ejil.org/pdfs/28/4/2835.pdf>.

¹¹ See S. COGLIEVINA, *Festività religiose e riposi settimanali nelle società multiculturali*, in *Riv. it. dir. lav.*, 2008, 388; C. FAVILLI, *La non discriminazione nell'Unione europea*, Bologna, 2008, 308. See also CJEU 27 October 1976, C-130/75, Prais: «If a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates. On the other hand, if the candidate does not inform the appointing authority in good time of his difficulties the appointing authority would be justified in refusing to afford an alternative date, particularly if there are other candidates who have been convoked for the test».

¹² According to the Court, there is no right as such under Article 9 to have leave from work for particular religious holidays. ECtHR 13 April 2006, *Kosteski v. the former Yugoslav Republic of Macedonia*, 13 April 2006 (according to the Court, when a law provides for a privilege for members of a religious community, it is not contrary to art. 9 of the ECHR to require the worker to demonstrate his belonging to the community). In case of *Kontinen v. Finland*, 3 December 1996 the Court considered legitimate the dismissal of a worker belonging to the Seventh Day Adventist church, who had repeatedly refused to work on the Friday after sunset, in accordance with the precepts of his religion, on the grounds that, in order to comply with these religious obligations, conflicting with contractual obligations, he could have resigned; see also *Stedman v. the United Kingdom*, 9 April 1997. See also ECtHR 24 September 2012, *Sessa v. Italy*. The Court ruled out any violation of Art. 9 of the Convention in the case of the refusal of the judicial authority to postpone a hearing coinciding with a Jewish religious festival, observed by the lawyer of one of the parties.

¹³ K. HENRARD, *Duties of reasonable accommodation on grounds of religion in the jurisprudence of the European Court of Human Rights: A tale of (baby) steps forward and missed opportunities*, *Int J Constitutional Law* (2016) 14 (4): 961. See ECtHR 6 April 2000, *Thlimmenos v. Greece*. In that judgment the Court makes it clear that discrimination occurs when a State, without reasonable justification, fails to treat differently persons whose situation is significantly different. Mr Thlimmenos was not allowed to become an accountant because he was convicted several times for his refusal to serve in the military service because of his religious convictions.

discrimination” on grounds of religion, to the detriment of workers who do not belong to those churches.

What, however, is the legal position when certain advantages, in a corporate context, designed to take account of a religious creed’s needs, are only granted to workers of a Muslim faith? Should the employer, who grants specific work-time breaks to Muslim employees during Ramadan, check that they actually pray during these breaks in order to avoid having to guarantee the same permits to non-Muslim workers who submit this request on the basis of the judgement of the Court of Justice C- 193/2017?

And, what again is the legal position, for example, when a national collective labour agreement makes provision in the context of a continuous working day for the possibility of shorter hours during Ramadan, or when unpaid leave is given to workers «who express their willingness to observe religious holidays not recognised by the current national collective labour agreement» (national collective labour agreement 25 July 2011, Tobacco sector), or where Muslim workers are allowed to enjoy a holiday to mark the end of Ramadan and recover the hours lost in a subsequent work shift¹⁴? It must, in other words, be asked if the principles upheld by the Court of Justice with regard to Austrian legislation (C- 193/2017) should also apply to any provisions giving added advantages to workers holding given religious creeds under national collective labour agreements. Should workers belonging to a religious creed different from the one “protected” in a national collective agreement (independently of whether or not the workers actually practise the cult in question by performing ritual prayers or observing fasting) have the right to enjoy identical prerogatives whenever they advance simple request for them?

It is not sufficient to simply observe that, in the Austrian case, the “discrimination” was introduced by a law, while in the foregoing cases it would have stemmed from a national collective agreement.

Thus, pursuant to article 16, letter b. of Directive No. 78 of 2000, «member states shall take the necessary measures to ensure that (...) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements (...) are, or may be, declared null and void or amended». Given the provisions of article 21 of the Nice Charter, it must, therefore, be asked if, in cases such as those in question - where a “discrimination” might be found to operate against workers not belonging to a “privileged” religious creed

¹⁴ For an overview of the main collective provisions in this area, see F. BUFFA, *Rapporto di lavoro*, cit., 1432 ss. See also U. GARGIULO, *L’identità culturale nella contrattazione collettiva sulla regolazione del tempo*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (a cura di), *Diversità culturali e di genere nel lavoro tra tutele e valorizzazioni*, Milano, 200, 306.

- a national court is required to remove the discrimination at issue by applying to the components of a category “less privileged” by the national labour collective agreement (in this circumstance, workers not of the Muslim faith) the same arrangements as applied to the “privileged” creed¹⁵.

In the face of such important questions (and before going into them) it should be pointed out that the *Cresco investigation* ruling does not appear to be entirely linear. In fact, it differs in several places from the conclusions of the Advocate General¹⁶.

3. Criticism of the position of the Court, with regard to the alleged discriminatory nature of national legislation under which, on the occasion of a given religious holiday, which is relevant only to certain confessions, only members of those confessions are entitled to paid rest, or to an additional allowance

The fact that, in the *Cresco investigation* case, the worker had only complained about his ineligibility for the additional allowance (and had not, instead, claimed the paid day off on Good Friday) had been stressed by the Advocate General in his conclusions, in order to identify what should be the *tertium comparationis*, in the case.

The question arose whether the treatment of workers belonging to the four churches favoured by the ARG (Article 7(3)) should be compared: (i) with the treatment of employees for whom Good Friday is the most important religious festival of the year (“narrow comparator”). In that case, there would have been no discrimination in the *Cresco investigation* case (in the absence of “comparability” between the *Cresco* employee, who was not a member of any church, and the employees of the churches referred to in the ARG); ii) with the treatment of employees whose “special” religious festivals are not recognised by national legislation (“intermediate comparator”); (iii) or with employees who, while working on Good Friday, do not receive the additional allowance because they do not belong to one of the four favoured churches (“broad comparator”, i.e. the situation of the claimant).

The Advocate General, in his Opinion, favours the “broad comparator” precisely because of the “economic” nature of the benefit claimed (the indemnity, not the rest)¹⁷. In essence, according to the Advocate General, if the question

¹⁵ See F. BUFFA, *Rapporto di lavoro*, cit., 1419 ss.

¹⁶ See Opinion of advocate general Bobek, delivered on 25 July 2018, in www.curia.europa.eu.

¹⁷ Opinion of advocate general Bobek, delivered on 25 July 2018, para. 67.

had concerned only the paid holiday benefit, there would have been «solid justifications for having recourse to the intermediate comparator»: in fact, only those who adhere to a confession which provides for a “special” religious festival which does not coincide with a national festival are in a comparable situation (since they have a similar need to abstain from work, during that day, compared with workers belonging to the four churches referred to in the ARG).

On the other hand (according to the Advocate General) with regard to the right to double pay for work done on Good Friday, the position of those who are not members of any church would be comparable (and discriminated against) with the position of those who are members of a church for which that day is considered a particularly important festival, given that «levels of remuneration and faith are, in principle, unconnected».

This explicit distinction (between the right to a paid day off and the right to an additional indemnity for work done on Good Friday) is “lost” in the judgment of the Court of Justice.

The Court, in fact, seems to consider that the situation of a worker who does not belong to any church is “comparable” to that of workers who are not bound by particular religious obligations on Good Friday, both as regards the enjoyment of the right to a paid day off on Good Friday and as regards the enjoyment of the additional allowance¹⁸.

This is, however, an unconvincing position: an atheist worker has no qualified interest in rest, on the day dedicated (by other religions) to the rites of worship.

The argument, put forward by the Court, concerning the lack of control of participation in the rites of worship, on Good Friday, for the members of the churches covered by the ARG, does not seem persuasive: Austrian national law protects the possibility of members of these churches to participate in the rites, and therefore a “qualified need” (whether actual or even potential) that other workers (atheists) do not have¹⁹.

In any case, taking into account the specificity of the case decided by the Court of Justice (referring only to the failure to pay the indemnity to employees not belonging to the churches covered by the ARG), one can perhaps assume that there is room in the future for a new preliminary reference to the Court (if, before a national court, there were a case of refusal, not of the additional allowance, but of the rest on the day dedicated, by other religions, to the rites of

¹⁸ CJEU 22 January 2019, C- 193/2017, para. 47.

¹⁹ See E. GRAGNOLI, *I lavoratori italiani*, cit. who observes that, moreover, members of these confessions can still have a particular interest in rest (regardless of participation in rites of worship) even if only for the sake of family traditions.

worship) and for a substantial “rethinking” of the question: by finding that (at least with regard to the question of the right to a paid day off) the situation of atheist employees is not comparable to that of employees belonging to a confession whose “special” festivals do not coincide with national holidays.

4. Criticism of the Advocate General's position with regard to the alleged discriminatory nature of national legislation under which, on the occasion of a given religious festival, which is relevant only to certain confessions, only members of those confessions are entitled to “additional compensation”

However, the distinction proposed by the Advocate General (between non-recognition of a paid day off and non-payment of the additional indemnity) is not fully convincing either.

In fact, the imposition on the employer of the payment of an additional indemnity in favour of workers (belonging to a church covered by the ARG) who are required to work on Good Friday also seems to be in line with the objective of ensuring that these workers are able to participate in the rites of worship. This is, at least, in so far as the payment is a “deterrent” to the employer in respect of the employment of those workers on Good Friday. From this point of view, the position of the two groups (atheists and those belonging to one of the four churches referred to in the ARG) does not, therefore, once again seem to be comparable.

5. The protection of negative religious freedom cannot grant special permissions to atheists, just because these are granted to employees belonging to another religion.

According to our point of view, it would therefore not be discriminatory to deny an atheist worker (who does not belong to one of the churches listed in the ARG) a holiday rest on Good Friday or an additional indemnity.

This conclusion can't be affected by the observation that European and international sources also protect “negative religious freedom”, i.e. the so-called “freedom of atheism”.

It is well known that, with reference to the ECHR, the question of negative religious freedom (with reference to the right to education) has arisen in relation to the question of the display of the crucifix in classrooms: a question finally resolved by the Grand Chamber in the sense that it is a choice within the margin

of appreciation of each national State²⁰.

It is true that in other judgments, too, the ECHR has, in principle, recognised that the guarantees set out in Article 9 of the Convention (“freedom of thought, conscience and religion”) and the associated Article 14 (prohibiting discrimination on grounds of religion and belief) apply to the various consistent and authentically observed convictions, such as, in particular, the attachment to secularism²¹.

As for the EU sources, they certainly also protect the “negative freedom of religion”; and moreover, they prohibit any discrimination based on personal convictions (such as, atheism).

With specific reference to the Italian legal system, from the reading of the preparatory work for the Constitution one cannot grasp a full equalization between religious freedom and freedom of atheism²²; therefore, the dominant opinion was, at first, that the latter was protected only under art. 21 of the Italian Constitution (as a free expression of atheistic thought). Over time, however, the opposite interpretation has prevailed, which sees the protection of negative religious freedom within the scope of Art. 19 of the Constitution²³.

It has been observed, however, that the question basically boils down to freedom of profession and propaganda²⁴, since a freedom of “atheistic worship” cannot be envisaged.

Nor, it has been said, can the associations in question invoke the protections referred to in Article 20 of the Italian Constitution²⁵ (not having a “religious

²⁰ ECtHR 18 March 2011, *Lautsi and others v. Italy*.

²¹ ECtHR 5 December 2017, final 5 March 2018, *Hamidović c. Bosnia-Erzegovina*. See *Guide on article 9 of the European Convention on Human Rights*, 31 May 2018, in https://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.

²² L. MUSSELLI, *Libertà religiosa e di coscienza*, in *Digesto delle Discipline Pubblicistiche*, Utet, Torino, 1994, vol. IX who mentions how Mr Labriola's proposal for specific constitutional protection of non-religious thought was rejected. See C. CARDIA, *Ateismo e libertà religiosa*, Bari, 1973.

²³ «Everyone has the right to freely profess their religious faith in any form, individual or associated, to propagate it and to practise worship in private or in public, provided that these are not rites contrary to morality». With reference to the Italian legal system, see D. S. ALASTRA, *I diritti inviolabili di libertà*, in S. RUSCIA (a cura di), *I diritti della personalità*, Cedam, 2013: «freedom includes the freedom to choose one's own religious beliefs, spreading them through proselytism and exercising worship in public and in private; the freedom not to be forced to profess a particular religious faith and the freedom not to have one's own religious beliefs (so called freedom of atheism)». Cons. stato 18 November 2011, No. 6083. P. BELLINI, *Ateismo*, in *Dig. Pubbl.*, Torino, 513.

²⁴ See L. MUSSELLI, *Libertà religiosa*, cit.: «Perhaps instead it can legitimately be understood as the right to propagate one's own conception in religious matters, including a negative and atheistic conception».

²⁵ «The ecclesiastical character and the religious purpose of an association or institution cannot be the cause of special legislative limitations, nor of special fiscal burdens for its constitution, legal capacity and any form of activity».

character”), or the coverage provided for in Article 8 of the Constitution, paragraphs 2 and 3, for “religious confessions”²⁶.

In short, denying atheists the right to claim “further paid religious rest” (or the related supplementary allowance), in the event that a paid day off or indemnity are granted to members of certain “favoured” churches for special festivals that do not coincide with national holidays, does not constitute discrimination, to their detriment, since atheists have no specific unmet “worship” needs that make them “comparable” to the members of certain “favoured” churches.

6. Whether the differentiation in question is attributable to the provision in Article 2(5) or Article 7(1) of Directive 2000/78.

Once it is accepted (departing from what the Court of Justice seems to consider) that the Austrian national law does not “discriminate” against atheist workers, since they are not comparable to the employees belonging to one of the churches covered by the ARG, the other questions - which the Court is dealing with - (concerning the possible basis for differentiation in Article 2(5) of Directive 2000/78 or in Article 7(1) thereof) are also taken up.

Anyhow, those questions do not appear to have been resolved by the Court of Justice in a completely convincing manner either.

As the Advocate General once again makes clear in his Opinion, Article 2(5)²⁷ seems to be rather «intended to protect the general public from the nefarious behaviour of certain groups»²⁸: « the “others” in the protection of the rights and freedoms of “others” (referred to in Article 2(5)) are therefore not “members of the group to whom the legislation in question grants some advantages” (in this case, workers who are members of one of the churches referred to in the ARG). Rather, it is a question of striking a “balance” between the “discrimination” suffered by the disadvantaged group “and the general interest of the general public”²⁹.

As to the idea that the measure provided for in Article 7(3) of the ARG could

²⁶ L. MUSSELLI, *Libertà religiosa*, cit.

²⁷ «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». This article was apparently inserted into the directive at the insistence of the United Kingdom, See P. ELLIS, P. WATSON, *EU Anti-Discrimination Law*, 2a ed., Oxford Law library, 2012, 403.

²⁸ Opinion of advocate general Bobek, delivered on 25 July 2018, cit., para. 94. Opinion of advocate general Sharpston in Bougnaoui, C-188/15, 99.

²⁹ Opinion of advocate general Bobek, delivered on 25 July 2018, para. 95.

be regarded as “positive action” in favour of the members of the four churches in question, the Advocate General had complained of its lack of proportionality on account of its selective nature.

In essence, according to the Advocate General, religious “minorities” (other than the churches referred to in the ARG) were not adequately protected under Austrian law: Article 7(3) did not apply to them; nor was collective bargaining “*erga omnes*” (capable of protecting workers in all sectors, and in all minorities). Finally, Article 8 of the ARG (“duty of care”) did not afford them protection comparable to that afforded by Article 7(3) to workers who are members of the churches of the ARG³⁰. For these reasons, according to the Advocate General, the provision of an additional indemnity only to the members of the churches of the ARG must be considered discriminatory. And, indeed, article 8 of the ARG, at first sight, did not seem clearly referable to the festivals (relevant for the “minor” religions, but) not recognized as such by the State.

The judgment in question departs from that argument. In essence, according to the Court, it is precisely the “duty of care” laid down by Austrian law which is sufficient to protect the religious freedom of workers whose religious holidays do not coincide with national holidays. It is for that reason that the protection afforded by the ARG to the members of the four favoured churches is ‘discriminatory’ as it is a disproportionate measure.

In any case, as has already been said, the matter in question has no reason to be considered, if we reject the argument that the Austrian rule is discriminatory to an “atheist” worker.

7. Whether the ineligibility for a day of rest of members of other faiths, which have 'special' religious holidays which do not coincide with a national holiday, is discriminatory, or not.

According to our point of view, in the case decided by the Court, there was therefore no discrimination against workers who did not have any religious obligation (atheists).

³⁰ *Freizeit zur Erfüllung der religiösen Pflichten. § 8. (1) Der Arbeitnehmer, der während der Wochenend- oder Feiertagsruhe beschäftigt wird, hat auf Verlangen Anspruch auf die zur Erfüllung seiner religiösen Pflichten notwendige Freizeit, wenn diese Pflichten nicht außerhalb der Arbeitszeit erfüllt werden können und die Freistellung von der Arbeit mit den Erfordernissen des Betriebes vereinbar ist.* «Leisure time for the fulfilment of religious duties. § (1) Workers employed at weekends or during public holidays rest shall, on request, be entitled to the time off necessary for the fulfilment of their religious duties if these duties cannot be fulfilled outside working hours and if the release from work is compatible with the requirements of the enterprise».

On the other hand, the question whether the recognition in favour of the members of the churches referred to in the ARG of Good Friday as a day of rest requires the State to take similar account of the festivals of other “minor” religions, is a different - and certainly serious - matter.

The case law of the European Court of Human Rights (although referring to the different legal horizons of the European Convention on Human Rights) can be a valid point of reference for any reflection on the subject.

The European Court of Human Rights has on several occasions recognised religious pluralism as a value and has stated that States must exercise their regulatory power in this area and their relations with the various religions in a neutral and impartial manner³¹.

Such a duty of neutrality cannot, however, diminish the role of a faith or a church to which, historically, and culturally, the population of a given country adheres³², provided that in principle, pluralism is also based on the recognition of and respect for the diversity and dynamics of cultural traditions, identities and religious convictions³³, and the choice to preserve and perpetuate a national tradition is a matter for each State's discretion, albeit to the extent of the necessary respect for the rights enshrined in the Convention and its protocols³⁴.

«It is true that freedom of religion does not require the Contracting States to create a particular legal framework in order to grant religious communities a special *status* entailing specific privileges. Nevertheless, a State which has created such a *status* must not only comply with its duty of neutrality and impartiality but must also ensure that religious groups have a fair opportunity to apply for this *status* and that the criteria established are applied in a non-discriminatory manner»³⁵.

It is not the Court's place to impose on a State a particular form of cooperation with the different religious communities. However, whatever form is chosen, the State has a duty to put in place objective and non-discriminatory criteria

³¹ ECtHR 13 December 2001, Metropolitan church of Bessarabia and others v. Moldova, final 23 March 2002, para. 115, 116.

³² ECtHR 3 August 2007, Members of the Gldani congregation of Jehovah's witnesses and four others v. Georgia, para. 132.

³³ ECtHR 26 April 2016, İzzettin Doğan and others v. Turkey, para. 178.

³⁴ ECtHR 18 March 2011, Lautsi and others v. Italy, para. 68.

³⁵ ECtHR 26 April 2016, İzzettin Doğan and others v. Turkey, para. 164. The Court held that Turkey, by rejecting a petition promoted by a group of Alevis, who claimed identical treatment to Sunni Islam, had exceeded the (albeit very wide) margin of appreciation in this matter, given that the Alevis community was deeply rooted in Turkish history and culture and therefore enjoyed the rights under Article 9 of the Convention. See also ECtHR 10 September 2018, Bekatashi community and others v. the former Yugoslav Republic of Macedonia; ECtHR, Supreme Holy Council of the Muslim community v. Bulgaria, para. 80.

«so that religious communities which so wish are given a fair opportunity to apply for a *status* which confers specific advantages on religious denominations»³⁶.

With reference to European Union sources, the interpretation of the case seems to be based on similar principles: in essence, in the face of a provision such as that of Austrian law, under discussion here, it would be discriminatory not to afford similar protection (for “particular” religious festivals) to a worker belonging to a “minor” church, which is also rooted in the context of reference. This is without prejudice to the discretion of the Member State in its assessment (which, however, cannot go so far as to deny the rights enshrined in the Charter of Nice and in secondary legislation).

It would therefore certainly be up to the judge of the Member State to verify on a case-by-case basis whether the *de facto* situation of the two confessions is comparable (in terms of the entrenchment of both confessions) and therefore whether the non-recognition of similar rights is discriminatory.

8. The different protection to be granted to the different churches, in the light of the Italian constitutional framework.

These conclusions certainly seem to fit in with the Italian legal system as well: according to art. 8, subsection 3 of the Italian Constitution, the state may regulate its relations with individual religions through separate and differential agreements, in order to meet specific needs, «or to grant special advantages or to impose special limits»³⁷.

The equal freedom of religious does not prevent «a diversity of normative treatment according to their size and needs»³⁸. «One thing is religious liberty guaranteed to all without any distinctions, another is a system of agreement-based arrangements»³⁹.

The legislator cannot, however, «discriminate between religious creeds simply on the basis of their having or not having regulated their relations with the state through agreements or understandings»⁴⁰.

Ultimately, according to the opinion that seems preferable, the provisions introduced into Italian law in favour of members of certain religious

³⁶ ECtHR 26 April 2016, İzzettin Doğan and others v. Turkey, para. 183.

³⁷ Cass. 23 March 2017, 7468. Cfr. N. COLAIANNI, *Confessioni religiose ed intese. Contributo all'interpretazione dell'art. 8 della Costituzione*, Bari, 1990.

³⁸ Const. Court. No. 52 of 2016. M. RICCA, *Art. 19, Commentario*, cit.

³⁹ Const. Court., No. 67 of 2017.

⁴⁰ Const. Court. No. 52 of 2016.

denominations, in particular with regard to the right to certain religious holidays, not counted among the national holidays (as compatible with the functioning of the essential services), certainly appear legitimate and non-discriminatory towards workers who do not belong to any church.

The organisational measures provided for in collective bargaining agreements, aimed at enabling workers, for example, of the Islamic faith to fulfil their religious obligations (of prayer, fasting), also appear to be perfectly legitimate and non-discriminatory towards those who do not have any religious obligations.

And yet, the State - once it has granted such a differentiated *status* in favour of certain confessions - could not, as has been said, deny the recognition of analogous rights to those confessions which - being equally rooted in the system - are in a comparable situation.

Similar conclusions apply with regard to collective bargaining.

Prayer breaks could not be requested by the atheist worker solely because they are granted to the Muslim worker without effective control of their actual use for prayer. However, similar measures could be invoked by equally entrenched communities, having similar ritual obligations.

However, it should be remembered that the ruling of the Court of Justice in question goes in a completely opposite direction. And that, therefore, a dispute is likely to arise to obtain for “atheist” workers - if not rest on the Dipavali day, or on the day of the Buddha, Nichiren Daishonin’s birth - adaptations of work shifts, or “prayer” breaks similar to those provided for by certain collective agreements, for example, for workers of the Muslim faith. Such a dispute - if it reaches the courtrooms of the Court of Justice - could be a useful opportunity for the Court to “reconsider” its positions.

9. The disapplication of the national rule which conflicts with the prohibition of discrimination on grounds of religion and the application to members of the disadvantaged group of the same treatment that is reserved for persons of the favoured group.

As far as the chapter on protection is concerned, the Court of Justice takes a decisive approach (at least where the discrimination comes from a rule of the Member State) to the disapplication of the conflicting national rule, even in horizontal relations, between private individuals and the recognition to the “disadvantaged” group of the same treatment granted to the “favoured” group.

Disapplication - in the absence of direct effect of the directives in relations between private individuals - is based on the prohibition of any discrimination

on grounds of religion or belief, which constitutes a “general principle of the Union” and is now enshrined in article 21, para. 1 of the Charter of Fundamental Rights.

According to the Court, that prohibition is «sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law»⁴¹. With the consequent application, until measures reinstating equal treatment are adopted, to members of the disadvantaged category of the same advantages as those enjoyed by persons within the favoured category⁴². Therefore, the supplementary allowance is granted to those workers who (as required of the members of the four churches) have previously informed their employer that they do not wish to work on Good Friday.

This is one of the most debated aspects, as evidenced by the numerous national and European rulings that are taking place in this area⁴³. «The ECJ seemed initially to acknowledge a sort of “derivative” horizontal direct effect to some provisions of the Charter, mediated by the directives which give them concrete effect, and anchored to the general principles of EU law or to the constitutional traditions common to the Member States»⁴⁴. This, however, had generated some ambiguity as to the relationship between the rights contained in the Charter and the directives defining its content⁴⁵, which was later clarified by the subsequent pronouncement “*Association de médiation sociale*”⁴⁶. In this pronouncement it was, in essence, specified that it is only the provision of primary law

⁴¹ CJEU 22 January 2019, C-193/2017, para. 76; CJEU 17 April 2018, Egenberger, C- 414/16, para. 76.

⁴² CJEU 22 January 2019, C-193/2017, para. 79-80; CJEU 9 March 2017, Milkova, C-406/15, para. 66 ss.

⁴³ See L. S. ROSSI, *The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations*, in <http://eulawanalysis.blogspot.com/2019/02/the-relationship-between-eu-charter-of.html> and in <https://www.federalismi.it/>. See also G. BRONZINI, *Il “Trittico” della Corte di giustizia sul diritto alle ferie nel rilancio della Carta di Nizza*, M. CONDINANZI, *Le direttive in materia sociale e la Carta dei diritti fondamentali dell’Unione europea: un dialogo tra fonti per dilatare e razionalizzare (?) gli orizzonti dell’effetto diretto. Il caso della giurisprudenza “ sulle ferie”*, F. FERRARO, *Vecchi e nuovi problemi in tema di efficacia diretta orizzontale della Carta*, G. MAMMONE, *Le sentenze della Corte di giustizia sulle ferie: un nuovo corso per la disapplicazione?*, V. PICCONE, *Diritti fondamentali e tutele nel difficile “crossroad” fra le Corti*, S. SCIARRA, *Diritti sociali fondamentali nazionali e europei. A proposito di diritto alle ferie retribuite*, all in www.federalismi.it, 22 May 2019.

⁴⁴ L. S. ROSSI, *The relationship*, cit. CJEU, C-144/04, Mangold, CJEU, C-555/07, Küçükdeveci, CJEU 19 April 2016, C-441/14, Dansk Industri.

⁴⁵ L. S. ROSSI, *The relationship*, cit. points out the risk that the judgment could be interpreted as «to directives giving concrete expression to a general principle codified by the Charter the capacity to be invoked in disputes between private parties».

⁴⁶ CJEU 15 January 2014, C- 176/12.

and not the directive that gives it concrete expression to have direct horizontal effect, where it has the necessary characteristics (missing in the case at hand)⁴⁷.

In the *Cresco investigation* case, like in the previous *Egenberger*, the Court reaffirms that the prohibition of any discrimination on grounds of religion or belief in Article 21 of the Charter is in itself sufficient to confer on individuals a right capable of being relied upon as such in a dispute between individuals in a field covered by EU law (and thus falling within the scope of the Charter)⁴⁸, with the consequent non-application of any differing national provisions⁴⁹.

Article 21 of the Charter is unconditional and mandatory. That is to say, on the one hand, it is “self-sufficient” (since it does not need to be given concrete expression by EU or national law) and, on the other hand, it not only does not allow for derogations, but is also characterised by clarity and precision. Article 51 of the Charter⁵⁰ can't be interpreted as meaning that it would preclude any horizontal direct effect of the Charter, since it cannot be ruled out that private individuals are, where appropriate, directly required to comply with certain provisions of the Charter⁵¹. Moreover, it cannot be ruled out that Member States may introduce limitations on the exercise of the rights recognised by the Charter, provided that the essential content of the Charter is respected. In this case, a balance will have to be struck between conflicting individual rights⁵².

The solution adopted by the Court in the present case (*Cresco investigation*) differs in part from that suggested by the Advocate General, who - confirming the disapplication of the conflicting national provision - had excluded a practical, clear, precise and strict obligation to grant disadvantaged workers the right (to rest, or) to an allowance under Article 21 of the Nice Charter (applied "horizontally").

In the Advocate General's view, the failure to apply the unlawful national provision should rather have resulted in the existence of a right to an effective

⁴⁷ L. S. ROSSI, *The relationship*, cit.

⁴⁸ CJEU 17 April 2018, C- 414/16 *Egenberger*, para. 76, 81. See L. S. ROSSI, *The relationship*, cit. « the Charter cannot confer horizontal direct effects to directives, since the latter, by their very nature, are unable to have such effects. But (...) the existence of a directive can attract a horizontal situation in the scope of the Charter».

⁴⁹ See also CJEU 11 September 2018, C-68/17, IR, CJEU, C- 385/17, Hein.

⁵⁰«1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties».

⁵¹ CJEU 6 November 2018, Max-Planck, C-684/16, para. 76; CJEU 6 November 2018, Bauer e Willmeroth, C- 569/16, C-570/16.

⁵² See L. S. ROSSI, *The relationship*, cit.

remedy (and not in the direct horizontal effect of the Charter). Thus, in particular, the right of a worker who is discriminated against as a result of a national provision contrary to Article 21 of the Charter of Fundamental Rights to obtain compensation from the State for the damage suffered (*Francovich* case-law)⁵³. According to the Advocate's opinion, the worker discriminated against would not be entitled to "levelling up": «that is an approach which the Court has developed in the context of actions against the State mainly in relation to social security benefits, and which is not generally transposable to horizontal disputes»⁵⁴, in particular where 'discrimination' is caused by a national rule which conflicts with the prohibition of discrimination.

Once again, this is a profile that is widely debated in the European case law referred to above, which is currently far from being settled.

⁵³ CJEU 19 November 1991, *Francovich*, C-6/90, C-9/90.

⁵⁴ Opinion of advocate general Bobek, delivered on 25 July 2018.