



## Occupational requirements within Churches or religious organisations in Germany

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### 1. Introductory remarks

Religion in the workplace has been an issue that arose in different legal arenas within German law. The most discussed question seems to be the right to wear an Islamic veil at work.<sup>1</sup> And it is only a few months ago that the Federal Labour Court, following the CJEU's decisions of 14 March 2017<sup>2</sup>, submitted a further request for a preliminary ruling to the CJEU, concerning, inter alia, the relationship between EU anti-discrimination law and freedom of religion such as guaranteed by Article 4 of the Grundgesetz.<sup>3</sup> But the question of accommodation of working conditions to allow time for ritual prayers<sup>4</sup> and the justification of a refusal of certain tasks for religious reasons<sup>5</sup> have been discussed as well.

Surprisingly (from a non-German point of view), the questions that have garnered more attention in the past years concern occupational requirements within churches, religious communities and their charitable organisations<sup>6</sup> concerning the affiliation to a church or loyalty to religious rules by its employees. These cases have challenged the German labour courts<sup>7</sup> and led to controversial

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<sup>1</sup> BAG, 10 October 2002 – 2 AZR 472/01 –, BAGE 103, 111–123; BAG, 20 August 2009 – 2 AZR 499/08 –, BAGE 132, 1–9; BVerfG, 27 January 2015 – 1 BvR 471/10, 1 BvR 1181/10 – [ECLI:DE:BVerfG:2015:rs20150127.1bvr047110]; BVerfG, 18 October 2016 – 1 BvR 354/11 –, [ECLI:DE:BVerfG:2016:rk20161018.1bvr035411].

<sup>2</sup> CJEU, 14 March 2017, G4S Secure Solutions – C-157/15 – [EU:C:2017:203] and Bougnaoui and ADDH – C-188/15 – [EU:C:2017:204].

<sup>3</sup> Basic Law, the German constitutional act; hereafter GG. BAG, 30 January 2019 – 10 AZR 299/18 (A) [ECLI:DE:BAG:2019:3001.9.B.10AZR299.18A.0].

<sup>4</sup> LAG Hamm (Westfalen), 26 February 2002 – 5 Sa 1582/01 –, juris.

<sup>5</sup> ArbG Freiburg (Breisgau), 14 January 2010 – 13 Ca 331/09 –, juris, [ECLI:DE:ARBGFRE:2010:0114.13CA331.09.0A]; BAG, 24 February 2011 – 2 AZR 636/09 –, BAGE 137, 164–177.

<sup>6</sup> Hereafter “churches”. In general, the expression “church” used in this article will include other religious communities and also organisations that participate in their mission, cf. infra 3.1.

<sup>7</sup> See Sascha KNEIP – Josef HIEN: The times, are they a-changin'? Die besondere Stellung konfessioneller Wohlfahrtsverbände in Zeiten gesellschaftlicher Pluralisierung. *Leviathan*, 45. Jg., 1/2017. 81, 90–102, for an empirical approach.

decisions of the Federal Labour Court and the Federal Constitutional Court. Three of these cases were brought against Germany before the European Court of Human Rights (ECHR).<sup>8</sup> Recently, two decisions have been taken by the Court of Justice of the European Union (CJEU) following requests for preliminary rulings from the Bundesarbeitsgericht (German Federal Labour Court). The two cases of Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.<sup>9</sup> and IR vs. JQ<sup>10</sup> can be considered to be an illustration of an ongoing disagreement between the Federal Labour Court on the one hand, and the Federal Constitutional Court on the other hand, concerning the special status of churches and religious communities as employers.

The decisions of the CJEU raise a number of legal questions in EU Law, for example concerning Article 17 TFEU and the status of the churches<sup>11</sup> or the conception of anti-discrimination law under Article 27 CFR.<sup>12 13</sup> They also provoke reflections on a possible horizontal effect of the provisions of European Directives between private persons. These issues are beyond the scope of this article.

The aim of this paper is to analyse the ongoing discussion in German national labour law and constitutional law, in order to allow a deeper understanding of how the two decisions taken by the CJEU challenge the German conception of the application of labour law by churches or religious communities and its judicial control. After a brief summary of the two decisions of the CJEU (2.), the protection of the freedom of religion and the special status of churches and religious communities under the Grundgesetz<sup>14</sup> are explained (3.). Considering these facts, the special issues of churches and religious communities as employers can be discussed (4.), before drawing some conclusions.

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<sup>8</sup> ECHR, *Schüth v. Germany*, no. 1620/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000162003]; ECHR, *Obst v. Germany*, no. 425/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000042503]; ECHR, *Siebenhaar v. Germany*, no. 18136/02, 3 February 2011, [ECLI:CE:ECHR:2011:0203JUD001813602].

<sup>9</sup> CJEU, *Egenberger*, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257]; CJEU, *Egenberger*, C-414/16, Opinion of the Advocate General Evgeni TANCHEV, 9 November 2017, [ECLI:EU:C:2017:851].

<sup>10</sup> CJEU, *IR v. JQ*, C-68/17, 11 September 2018, [ECLI:EU:C:2018:696]; CJEU, *IR v. JQ*, C-68/17, Opinion of the Advocate General Melchior Wathelet, 31 May 2018, [ECLI:EU:C:2018:363]; The case has been known as *Chefarzt-Entscheidung* in Germany.

<sup>11</sup> See Claus Dieter CLASSEN, in: GRABITZ–HILF–NETTESHEIM (eds.): *Das Recht der EU*. 65th ed. August 2018. AEUV Art. 17 para. 11 with further references; Jacob JOUSSEN: § 9 Abs. 1 AGG – Der EuGH und die Kirchengliederung von Beschäftigten. *EuZA*, 2018. 421, 432–435.; and Steffen KLUMPP: Anmerkung zu EuGH 17.4.2018, C-414/16, AP Richtlinie 2000/78/EG Nr. 42, section II.

<sup>12</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26. 10. 2012, p. 391–407.

<sup>13</sup> Friedemann KAINER: Rückkehr einer unmittelbar-horizontalen Grundrechtswirkung aus Luxemburg? *NZA*, 2018. 894.; Sylvaine LAULOM: Le contentieux de l'interdiction des discriminations, *L'actualité du droit social européen. Semaine Sociale Lamy*, N° 1841, 17 December 2018, Supplément, 13–16.

<sup>14</sup> Basic Law, the German constitutional act; hereafter GG.

## 2. CJEU Case law – Egenberger and IR

### 2.1. *The Egenberger Case (CJEU, C-414/16)*

Vera Egenberger had applied for a job at the Evangelisches Werk für Diakonie und Entwicklung. This is an auxiliary organisation for social and welfare services of the Evangelische Kirche in Deutschland (EKD, Protestant-Lutheran Church), constituted as an association under private law with formal ties to the Protestant-Lutheran Church, pursuing exclusively charitable and religious purposes. The job was to prepare a report on Germany's compliance with the UN Human Rights Conventions, including public and professional representation of the employer. In the advertisement, the membership in a protestant church or a member-church of the *Arbeitsgemeinschaft Christlicher Kirchen* (consortium/cooperative of Christian churches in Germany) was required. Egenberger applied for the job and was rejected because she wasn't a church member. She claimed compensation under Article 15(2) of Allgemeines Gleichbehandlungsgesetz<sup>15</sup> because of an unjustified discrimination on the basis of religious belief before the German labour courts.

She won the case in the first instance<sup>16</sup> and lost it in the second. The appellate Higher Labour Court of Berlin-Brandenburg only examined the plausibility of the employer's requirements with regard to the constitutionally guaranteed right of self-determination of churches and religious organisations. The court stated that there were no signs of an abuse of rights and the claim was rejected.<sup>17</sup> The Federal Labour Court as highest appellate instance introduced a request for a preliminary ruling at the CJEU in order to determine whether the occupational requirements that constitute a difference of treatment can be justified under Article 4(2) of Directive 2000/78/EC.<sup>18</sup>

The CJEU stated that the national courts had to exercise an efficient, i.e. extensive review when examining the justification of the occupational requirement. Article 4(2) of the Directive 2000/78/EC read in conjunction with Articles 9 and 10 of the Directive and Article 47 CFR requires that in a case where the Church claims the application of this exception and pretends that religion constitutes a genuine, legitimate and justified occupational requirement, the assertion needs to be the subject of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of that Directive are satisfied in the particular case. The Court defines the character of a genuine, legitimate and justified occupational requirement in the sense of Article 4(2) of the Directive in detail, considering that it refers to a requirement that is necessary and objectively dictated, having regard to the ethos

<sup>15</sup> General Act on Equal Treatment, hereafter AGG.

<sup>16</sup> ArbG Berlin, 18 December 2013 – 54 Ca 6322/13 –, juris, [ECLI:DE:ARBGBE:2013:1218.54CA6322.13.0A].

<sup>17</sup> LAG Berlin-Brandenburg, 28 May 2014 – 4 Sa 157/14, 4 Sa 138/14 –, juris.

<sup>18</sup> BAG, 17 March 2016 – 8 AZR 501/14 (A) –, BAGE 154, 285–302 [ECLI:DE:BAG:2016:170316.B.8AZR501.14A.0]. For the questions in detail see para. 41, 60 and 70.

of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out.

In this regard, ‘genuine’ means that, professing the religion or belief on which the ethos of the church is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church of its right of autonomy.<sup>19</sup> The requirement must be ‘legitimate’ to avoid that the employer pursues an aim without any connection with the ethos or with the churches right of autonomy.<sup>20</sup>

The requirement has to be justified. Therefore, the compliance with the criteria has to be subject to judicial review by a national court. Furthermore, the church has to be able to show, in the light of the factual circumstances of the case, that imposing such a requirement is indeed necessary to avoid a probable and substantial risk of causing harm to its ethos or to its right of autonomy.<sup>21</sup> Furthermore, the requirement must comply with the principle of proportionality that is considered to be a general principle of Community law.<sup>22</sup>

Finally, the CJEU advises national courts to disapply provisions of national law if they cannot be interpreted in conformity with Article 4(2) of Directive 2000/78/EC, to ensure the judicial protection deriving for individuals from Articles 21 and 47 of the CFR and to guarantee the full effectiveness of those articles.<sup>23</sup>

## 2.2. *IR (Physician-in-Chief) (CJEU, C-68/17)*

JQ was employed as Physician-in-Chief in a catholic hospital, run by IR, a non-profit organisation in form of a limited company. He is of Roman-Catholic faith. His employment contract had been concluded on the basis of Catholic labour law.<sup>24</sup> During his employment, he got divorced and entered a new civil marriage. He was dismissed by the employer, even though the hospital employed other remarried persons who were protestants or not affiliated with a church. The cause of his termination was named to be a violation of his duty of loyalty, as his religious marriage had not been annulled, thereby violating the Catholic Church’s Basic Regulations by remarrying. JQ claimed the dismissal caused unjustified discrimination as the hospital employed remarried persons of other or no faith.

The Arbeitsgericht (Labour Court) ruled in the employee’s favour, considering that the facts did not constitute a serious breach of the obligation of loyalty that could justify a dismissal under the KSchG

<sup>19</sup> CJEU, Egenberger, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 65.

<sup>20</sup> CJEU, Egenberger, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 66.

<sup>21</sup> CJEU, Egenberger, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 67.

<sup>22</sup> CJEU, Egenberger, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 68.

<sup>23</sup> CJEU, Egenberger, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 75 et seqq.

<sup>24</sup> For the rules in detail, especially Article 5 of the Grundordnung that comprises the obligation of loyalty, see CJEU, IR v. JQ, C-68/17, Opinion of the Advocate General Melchior Wathelet, 31 May 2018, [ECLI:EU:C:2018:363], para. 16–23.

(Kündigungsschutzgesetz, Law on Protection against Dismissal).<sup>25</sup> On appeal, the Landesarbeitsgericht (Higher Labour Court) argued that even if the new marriage were to be considered a serious breach of the obligation of loyalty, it would not justify the dismissal. On the one hand, the differing treatment of persons of various religious faiths concerning dismissal in case of remarriage violated the principle of equal treatment in labour law. On the other hand, the employer was acting against the principle of good faith (Article 242 of the BGB, German Civil Code) to dismiss JQ for being remarried, having tolerated the extra-marital cohabitation of JQ for several years.

The Federal Labour Court received JQ's claims.<sup>26</sup> The court considered that the new marriage could be considered as a severe breach of the loyalty obligation. But balancing the rights of both parties, the court considered that the employee's interest outweighed those of the employer with regard to the tolerance of JQ's extra-marital cohabitation and other employee's remarriage.

However, following the constitutional complaint filed by the catholic employer's organisation, the Federal Constitutional Court decided that the decision of the Federal Labour Court violated the rights of the employer as guaranteed by Article 140 GG in conjunction with Article 137 of the Weimar Constitution.<sup>27</sup> The Federal Constitutional Court stated that the Federal Labour Court did not sufficiently respect the churches' autonomy and the so called *self-perception (Selbstverständnis)* of the church.<sup>28</sup> After the case was referred back to the Federal Labour Court, the judges introduced the request for a preliminary ruling at the CJEU.<sup>29</sup>

“The question raised is whether respect for the concept of marriage under the canon law of the Catholic Church constitutes a genuine, legitimate and justified occupational requirement, within the meaning of Article 4(2) of Directive 2000/78/EC, that can justify a difference of treatment, in terms of dismissal, between Catholic employees and those who belong to another faith or none at all.”<sup>30</sup>

The CJEU ruling in this case mirrored the decision in the Egenberger case<sup>31</sup>. The CJEU stated that the Directive requires effective judicial review of the church's decision to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that

<sup>25</sup> ArbG Düsseldorf, 30 July 2009 – 6 Ca 2377/09 –, juris.

<sup>26</sup> BAG, 8 September 2011 – 2 AZR 543/10 –, BAGE 139, 144–155.

<sup>27</sup> BVerfG, 7 March 2002 – 1 BvR 1962/01 –, juris, [ECLI:DE:BVerfG:2002:rk20020307.1bvr196201]; BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112]; BAG, 11 March 1986 – 1 ABR 26/84 –, BAGE 51, 238–246.

<sup>28</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], see *infra*.

<sup>29</sup> BAG, 17 March 2016 – C-63/15 ECLI:DE:BAG:2016:170316.B.8AZR501.14A.0].

<sup>30</sup> CJEU, IR v. JQ, C-68/17, Opinion of the Advocate General Wathelet, 31 May 2018, [ECLI:EU:C:2018:363], para 3.

<sup>31</sup> See *supra*.

differs according to the faith or lack of faith of such employees, to ensure that it fulfils the criteria laid down in Article 4(2) of that Directive.

Furthermore, a difference of treatment as described is only consistent with the Directive, if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church and is consistent with the principle of proportionality, which is a matter to be determined by the national courts. Finally, the CJEU repeats that national courts are obliged to disapply provisions of national law when unable to interpret them in a manner that is consistent with the understanding of Article 4(2) of Directive 2000/78/EC, as developed before.

### 3. Churches as employers

To fully understand the extent of the issues in question, one has to be aware of the impact of the subject on the labour market from an empirical perspective. The protestant and catholic churches and their organisations employ about 1.5 million people altogether.<sup>32</sup> These organisations have an important role and are major employers in the field of social services, such as childcare and education, medical and elder care, and care for persons with disabilities.<sup>33</sup>

At the same time, religion is becoming less important for wide parts of the German population.<sup>34</sup> Membership in churches and religious communities is declining. About 37% of the population consider themselves secular or non-confessional. About 28% are Roman-Catholic, about 26 % Protestant. 5% are affiliated to a Muslim community; another 4% are affiliated to other religious communities.<sup>35</sup> Like other employers, especially in the field of social welfare, social work, health care, elder care and childcare, churches and religious communities and their welfare organisations are desperately searching for qualified employees. At the same time, occupational requirements concerning religious belief or faith, evidenced by membership in a church or religious community, today are less commonly fulfilled by applicants or potential employees. That is why, subsequently, the requirements are being eased and exceptions have been introduced to be able to hire new personnel.<sup>36</sup> Such exceptions of course, were not applicable in the cases described above.

<sup>32</sup> Roman-Catholic Churches and organisations (around 797.000 employees; 180.000 in the Church and 617.000 in the Caritas (Catholic non-profit/welfare organisation), cf. Katholische Kirche in Deutschland, Zahlen und Fakten 2016/17, Arbeitshilfen 294, <https://bit.ly/2SH3t6H>. Protestant Churches and organisations (around 700.000 employees; 236.000 in the Church and 525.000 in the Diaconie (Protestant non-profit/welfare organisation), cf. Evangelische Kirche Deutschland, Zahlen und Fakten zum kirchlichen Leben, 2017, <https://archiv.ekd.de/statistik/105153.html>.

<sup>33</sup> KNEIP–HIEN op. cit. 81, 85–86.

<sup>34</sup> KNEIP–HIEN op. cit. 81, 85.

<sup>35</sup> FOWID: Religionszugehörigkeiten in Deutschland 2017, 8.10.2018; <https://fowid.de/meldung/religionszugehoerigkeiten-deutschland-2017> (retrieved 3 January 2019).

<sup>36</sup> For an overview see JOUSSEN (2018) op. cit. 421, 425.; KNEIP–HIEN op. cit. 81, 105.

### 3.1. *The freedom of religion and the special status of churches and religious communities in German Constitutional Law*

The fundamental rights and freedoms guaranteed by the German Grundgesetz (GG) are of high importance within the German legal context. The freedom of religious faith and of conscience (forum internum) and their expression (forum externum) are guaranteed by Article 4 GG.<sup>37</sup> According to Article 1(3) GG, the fundamental rights and freedoms are binding for all public authorities and their observance is controlled by the Federal Constitutional Court<sup>38</sup>. However, the fundamental rights have no direct effect and are not binding between private persons. But their content and objective value have an important impact when applying and interpreting the rules of private law, especially labour law.<sup>39</sup>

In contrast, the importance of international and European legal sources regarding fundamental and human rights is relatively weak, especially in German labour law.<sup>40</sup> This has a number of different reasons. Primarily, there is no need to rely on them when the level of protection, i.e. the content and/or extend of the fundamental rights in the constitution and the international sources are similar.<sup>41</sup> Furthermore, the international conventions are considered inferior legal sources compared to constitutional law. Nevertheless, they are used increasingly as guidelines for the interpretation of basic rights under the Basic Law.<sup>42</sup>

Germany is a secular state in the sense that there is no State church.<sup>43</sup> The relationship between State and churches is characterised by several principles, inter alia, the institutional separation of State and churches and the primacy of the state's law. Furthermore, the constitution requires religious and ideological neutrality of the state.<sup>44</sup> However, the German understanding of secularism is not comparable with, for example, the French conception of laicism.<sup>45</sup> Churches and religious communities

<sup>37</sup> BVerfG, 08 November 1960 – 1 BvR 59/56 –, BVerfGE 12, 1-5; BVerfG, 16 Oktober 1968 – 1 BvR 241/66 –, BVerfGE 24, 236–252. Hans HOFMANN, in: SCHMIDT-BLEIBTREU – HOFMANN – HENNECKE: *Grundgesetz Kommentar*. 14th ed. 2018. Art. 4 para. 1; Juliane KOKOTT, in: SACHS (ed.): *Grundgesetz Kommentar*. 7th ed. 2014. Art. 4 para. 4–10, both with further references.

<sup>38</sup> Bundesverfassungsgericht, BVerfG.

<sup>39</sup> Cf. only Michael SACHS, in: SACHS (ed., 2014.) op. cit. vor Art. 1 para. 32.; Wolfram HÖFLING, in: SACHS (ed., 2014.) op. cit. Art. 1 para. 116; Rudi MÜLLER-GLÖGE: *Münchener Kommentar zum BGB*. 7th ed. 2016. BGB § 611 para. 278–293, all with further references.

<sup>40</sup> Sophie ROBIN-OLIVIER: Questions posées par la multiplication des normes internationales, européennes et nationales et les rapports entre juridictions. *Droit social*, 2017. 419.

<sup>41</sup> Christian TOMUSCHAT: § 226 Staatsrechtliche Entscheidung für internationale Offenheit. In: ISENSEE – KIRCHOF (eds.): *Handbuch des Staatsrechts*. 3rd ed. 2013. para. 90 with further references. In the context of European labour law see Steffen KLUMPP: Die EMRK und das deutsche Arbeitsrecht am Exempel des Wiedereinstellungsanspruchs: Neue Facetten des Falles Schüth. *EuZA*, 2017. 114, 124–125; Claudia SCHUBERT: EuArbR, EMRK Art. 1 para. 43 on the subsidiarity of the ECHR compared to the German Basic Law and Claudia SCHUBERT: EuArbR, GRC Article 52 para. 21 et seqq. on the principle of subsidiarity concerning the application of the European Charter of Fundamental rights.

<sup>42</sup> See Torsten KINGREEN: § 263 Vorrang und Vorbehalt der Verfassung. In: ISENSEE–KIRCHOF (eds.) op. cit. para. 93 with further references.

<sup>43</sup> See Article 140 GG in conjunction with Article 137 WRV.

<sup>44</sup> Dirk EHLERS, in: SACHS (ed., 2014) op. cit. Art. 140 para. 9.

<sup>45</sup> See Claus Dieter CLASSEN, in: GRABITZ–HILF–NETTESHEIM (eds.) op. cit. Art. 17 para. 9 with further references; Patrik REMY: Religion und Weltanschauung im Arbeitsleben – eine Betrachtung aus Sicht des französischen Arbeitsrechts. *NZA-Beilage*, 2018. 55, 56 on the consequences in labour law.

are themselves protected by the rights guaranteed in Article 4 GG, so the freedom has not only an individual but also a collective dimension. That is why churches and religious communities can obtain a special status with special rights and special protection under constitutional law, i.e. Article 140 GG in conjunction with Article 137 of the Weimar Constitution.<sup>46</sup> The procedures are determined by the Laender (Federal States).<sup>47</sup> The public authorities and the administrative courts have to control whether all constitutional requirements are fulfilled,<sup>48</sup> especially whether the aims of the organisation are truly religious and not profane (e.g. economic).<sup>49</sup>

Once this status is obtained, the churches have, inter alia, the right to autonomously edict their own statutes and constitutions and to set up their own internal legal rules. Also, they are allowed to levy taxes from their members. This rule is often cited to stress the connection between State and Church. In my point of view, this is overrated, in particular because traditionally there was not one church that was privileged, at least not at the federal level. Both Catholic and Protestant Churches benefited from this taxation system and other religious communities can obtain and actually obtained the special status under Article 140 GG in conjunction with Article 137 of the Weimar Constitution.

Historically speaking, the influence of Christianity on various constitutional rules can hardly be denied.<sup>50</sup> However, the State has an obligation of neutrality in a sense that it has to abstain from religious activities or taking sides. As the Federal Constitutional Courts puts it: “The duty to remain neutral in ideological and religious matters (*Pflicht zur weltanschaulichen Neutralität*) bars the state from judging a religious community’s faith and its teachings per se; [...]”<sup>51</sup>. Instead it has to tolerate and even promote religious diversity to enable individuals and religious communities to exercise their religious rights and freedoms. As the Federal Constitutional Court states, “the religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs.”<sup>52</sup> So neutrality is not conceived in the sense of indifference, but of a “comprehensive, open and respectful neutrality”<sup>53</sup> and cooperation on the basis of freedom guaranteed by the fundamental rights.

<sup>46</sup> See BVerfG, 13 October 1998 – 2 BvR 1275/96 –, BVerfGE 99, 100 (119) [ECLI:DE:BVerfG:1998:rs19981013.2bvr127596], para. 80 and BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], paras. 81–85 both with further references to the case law.

<sup>47</sup> Once the status is obtained in one Land, the practice is to award it by so-called secondary award proceedings in the other Laender, cf. BVerfG, 11 August 2015 – 2 BvR 1282/11 –, juris.

<sup>48</sup> See BVerfG, 19 December 2000 – 2 BvR 1500/97 –, BVerfGE 102, 370, [ECLI:DE:BVerfG:2000:rs20001219.2bvr150097]; BVerfG, 11 August 2015 – 2 BvR 1282/11 –, juris.

<sup>49</sup> BVerfG, 28 August 1992 – 1 BvR 632/92 –, NVwZ 1993, 357–358, 358.

<sup>50</sup> BVerfG, 27 October 2016 – 1 BvR 458/10 –, BVerfGE 143, 161–216, [ECLI:DE:BVerfG:2016:rs20161027.1bvr045810], para. 61.

<sup>51</sup> BVerfG, 30 June 2015 – 2 BvR 1282/11 – [ECLI:DE:BVerfG:2015:rs20150630.2bvr128211], Press Release No. 59/2015 of 11 August 2015 [in English], available on <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2015/bvg15-059.html> (retrieved 3 January 2018).

<sup>52</sup> BVerfG, 27 January 2015 – 1 BvR 471/10 –, BVerfGE 138, 296–376, [ECLI:DE:BVerfG:2015:rs20150127.1bvr047110], English translation available at [http://www.bverfg.de/e/rs20150127\\_1bvr047110en.html](http://www.bverfg.de/e/rs20150127_1bvr047110en.html), para. 100.

<sup>53</sup> BVerfG, 24 September 2003 – 2 BvR 1436/02 –, BVerfGE 108, 282–340, [ECLI:DE:BVerfG:2003:rs20030924.2bvr143602], english translation available at [http://www.bverfg.de/e/rs20030924\\_2bvr143602en.html](http://www.bverfg.de/e/rs20030924_2bvr143602en.html), para. 18.



### 3.2 Ecclesiastical labour law, general labour law and accommodations

Following the traditional understanding of the protection of the autonomy of churches, the right to determine internal rules comprises the right to autonomously regulate the collective labour relations and to create an ecclesiastical labour law.<sup>54</sup>

The Churches may also choose to employ their personnel under a special status comparable to public agents. But if the churches and their religious organisations decide to conclude private employment contracts, the contracts and the individual contractual relationships between a church or its welfare organisation and their employees are governed by general labour law. However, the application of general labour law is subject to modifications due to the special protection granted under the constitution. This protection is not limited to the officially recognized churches (*verfasste Kirchen*) or religious communities themselves, but extended to any organisation that is formally bound by the churches' ethos, i.e. by their statutes. Therefore, private associations or so called charitable limited companies (*gemeinnützige GmbH*) may also invoke it and apply the ecclesiastical rules.

#### 3.2.1. Collective labour law: Industrial relations and employees' representation

As a result, the churches may decide to apply the general legal system of industrial relations and negotiate collective agreements, or they may opt for another system of internal labour law regulation (so called "third way"). In both cases, the right to strike can be excluded as long as the exercise of the rights of workers' unions is ensured by other means.<sup>55</sup>

For the same reason, churches, religious communities and their welfare organisations are excluded from the application of the Betriebsverfassungsgesetz.<sup>56</sup> Instead, both the Catholic and the Protestant Churches adopted their own workers representation acts (MAVO<sup>57</sup> and MVG.EKD<sup>58</sup>), that provide for procedures and rights of representation and employees' participation as well as a special jurisdiction pertaining to church organisations which render them competent to adjudicate conflicts between the employees' representation and the employer.

<sup>54</sup> See Peter STEIN: Diskriminierungsschutz und Kirchenautonomie. In: ZESAR (2018) op. cit. 277–283 for a critical appreciation in detail.

<sup>55</sup> BVerfG 15 July 2015 – 2 BvR 2292/13 [ECLI:DE:BVerfG:2015:rs20150715.2bvr229213], BAG, 20 November 2012 – 1 AZR 179/11 –, BAGE 143, 354–406; BAG, 20 November 2012 – 1 AZR 611/11 –, BAGE 144, 1–35.

<sup>56</sup> BetrVG – German Works Council Constitution Act; cf. Article 118 (2) BetrVG.

<sup>57</sup> Rahmenordnung für eine Mitarbeitervertretungsordnung (Rahmen-MAVO) as adopted by the Vollversammlung des Verbandes der Diözesen Deutschlands, 19 June 2017, available at <https://dbk.de/themen/kirche-staat-und-recht/kirchliches-arbeitsrecht/kirchliches-mitarbeitervertretungsrecht/> (retrieved 4 January 2019).

<sup>58</sup> Zweites Kirchengesetz über Mitarbeitervertretungen in der Evangelischen Kirche in Deutschland 2013. (Mitarbeitervertretungsgesetz der EKD – MVG-EKD), as of 1 January 2019, ABl. EKD 2019 p. 1, available at <https://www.kirchenrecht-ekd.de/document/28404> (retrieved 6 May 2019).

### 3.2.2. Application of common labour law on employment contracts

As the common labour law is applicable to individual employment contracts concluded by churches and religious organisations, this is also true for the Law on Protection against Dismissal (KSchG) and anti-discrimination legislation set out in the AGG.

The KSchG does not contain any special provisions with regard to churches or religious communities. However, the case law of the Federal Constitutional Court demands to consider the particularities of the special protection of the churches and religious communities under the Basic Law, when applying the rules. In this sense, it has traditionally been accepted that religious communities were competent to impose special professional requirements or obligations of loyalty to their employees.<sup>59</sup>

The AGG applies to all employers and employees, whether the employers are public or private bodies, including churches, religious communities and their organisations, regardless of their legal status. The AGG has been conceived to implement the Directive 2000/78/EC<sup>60</sup>. As a general rule, discrimination because of religious beliefs or their expression is prohibited under the German AGG as under the Directive. However, according to Article 4(2) of the Directive 2000/78/EC, “[a] difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.”

Consequently, Article 9 of the AGG provides exceptions for justified occupational requirements due to a given religion or belief:

“(1) Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination or because of the type of activity.

(2) The prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or

<sup>59</sup> In detail see Jacob JOUSSEN: Arbeitsrechtliche Anforderungen an die Mitarbeit in Kirche und Diakonie – Das Kriterium der Kirchenzugehörigkeit. *ZevKR*, Vol. 60. (2015) 63–93.

<sup>60</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2. 12. 2000, 16–22.

belief, mentioned in subparagraph 1, to be able to require their employees to act in good faith and loyalty in accordance with their self-perception.”<sup>61</sup>

It has been constantly discussed, whether Article 9(1) of the AGG respects the requirements of Article 4(2) of the Directive 2000/78/EC.<sup>62</sup> It was previously argued that the provisions of Article 4(2) of the Directive 2000/78/EC had been negotiated in such a way as to allow Germany to continue to apply the ecclesiastical labour law in the interpretation of the BVerfG;<sup>63</sup> this has been doubted not only by legal scholars, but also by the European Commission.<sup>64</sup> The Advocate General in *Egenberger* stated that there was no evidence to support this narrative.<sup>65</sup>

In this regard, the position taken by the CJEU is very clear. Following the decisions, Article 4(2) of the Directive 2000/78/EC implies that “by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation”.<sup>66</sup> And this assertion has to be the subject to effective judicial review.<sup>67</sup>

According to this rule set out, the national understanding, that Article 4(2) of the Directive 2000/78/EC allowed the German legislator to leave the determination of occupational requirements to the autonomous decision of churches or other religious communities as employers can be considered obsolete. It seems hardly possible to interpret Article 9(1) in its first alternative<sup>68</sup> in accordance with the requirements set out by the CJEU.<sup>69</sup>

### 3.3. *The scale and intensity of judicial review of ecclesiastical decisions by the German jurisdiction*

When it comes to the intensity of judicial review of occupational requirements or obligations of loyalty, the Federal Constitutional Court has always put forward the autonomy and right to self-determination

<sup>61</sup> CJEU, *Egenberger*, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 16 (for the translation).

<sup>62</sup> JOUSSEN (2018) op. cit. 421, 423–425 with further references.

<sup>63</sup> Cf. Explanatory memorandum – Entwurf eines Gesetzes zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung, BT-Drs. 16/1780 as of 06 July 2006, 35.

<sup>64</sup> See Sabine BERGHAHN–Micha KLAPP–Alexander TISCHBIREK: *Evaluation des AGG, erstellt im Auftrag der Antidiskriminierungsstelle des Bundes*. Baden-Baden, 2016. 91 et seqq. with further references.

<sup>65</sup> CJEU, *Egenberger*, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257]; CJEU, *Egenberger*, C-414/16, Opinion of the Advocate General Evgeni TANCHEV, 9 November 2017, [ECLI:EU:C:2017:851], para. 85.

<sup>66</sup> CJEU, *Egenberger*, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 59.

<sup>67</sup> CJEU, *Egenberger*, C-414/16, 17 April 2018, [ECLI:EU:C:2018:257], para. 59.

<sup>68</sup> “A difference in treatment based on religion or belief shall also be admitted in the case of employment by religious societies, by institutions affiliated therewith, regardless of legal form, or by associations whose purpose is to foster a religion or belief in the community, where a given religion or belief constitutes a justified occupational requirement, having regard to the employer’s own perception, in view of the employer’s right of autonomy”.

<sup>69</sup> Johannes HEUSCHMIDT – Johannes HÖLLER: Kirchliches Sonderarbeitsrecht unionsrechtswidrig, comment on CJEU, 17 April 2018 (*Egenberger*). *AuR*, 2018. 586 et seqq.

of churches and religious communities. It was in the context of a constitutional complaint following the first decision of the BAG in the IR case, that the BVerfG once again very clearly reaffirmed its position.

Following the Federal Constitutional Court, occupational requirements or obligations of loyalty on the ground of the Churches' ethos were not to be reviewed in extenso by secular jurisdiction. The State Courts had to respect the 'self-perception of the Church'.<sup>70</sup> The review should be limited and follow a plausibility criterion.

Therefore, the proceeding should be twofold. In a first step, the Courts shall apply a plausibility criterion. They have to examine whether the employer participated in implementing the fundamental mission of the church; whether a specific obligation of loyalty was an expression of a tenet of the church's faith; and what weight this obligation of loyalty and an infringement should be given in accordance with the 'self-perception' of the church.<sup>71</sup>

As a second step, an overall balancing exercise is required to determine the justification of the measure (i.e. dismissal or professional requirement). In this context, the basic rights of the employee should be considered, together with the concerns of the church. In doing so, the conflicting rights should be enforced to the greatest extent possible, to obtain "practical concordance". However, special weight should be given to the Churches' self-perception.<sup>72</sup>

The Federal Constitutional Court admits a control of constitutionality of the balancing exercise. At the same time, the control should only concern the misapprehension of fundamental elements of the churches' right to self-determination and of corporate freedom of religion on the one hand, and fundamental rights of the employee on the other.<sup>73</sup>

The Federal Constitutional Court considers that a limited judicial review following these principles satisfies the requirements set out by the European Court of Human Rights (ECHR) with regard to the European Convention of Human Rights<sup>74</sup>. In fact, the general restrictions of the judicial review of the application of occupational requirements and the special obligations of loyalty have already resulted in three cases against Germany before ECHR, namely the cases Schüth<sup>75</sup>, Obst<sup>76</sup>, and Siebenhaar<sup>77</sup>. The ECHR has stressed the importance of the opportunity to bring cases before secular jurisdiction

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<sup>70</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], para. 112 et seqq.

<sup>71</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], para. 113 to 119.

<sup>72</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], para. 120 to 125.

<sup>73</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], para. 126.

<sup>74</sup> Hereafter the Convention.

<sup>75</sup> ECHR, Schüth v. Germany, no. 1620/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000162003].

<sup>76</sup> ECHR, Obst v. Germany, no. 425/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000042503].

<sup>77</sup> ECHR, Siebenhaar v. Germany, no. 18136/02, 3 February 2011, [ECLI:CE:ECHR:2011:0203JUD001813602].

and the need for efficient judicial control.<sup>78</sup> The ECHR has underlined the necessity to weigh the competing rights of the parties concerned.<sup>79</sup>

Following the ECHR, the balancing test needs to consider, *inter alia*, the nature of the position, the duration of employment, the seniority of the employee, circumstances and extend of knowledge the employer had of the employees' personal situation, the publicity and medialisation of the case and the job opportunities in case of a termination of contract.<sup>80</sup> Loyalty requirements need to be appreciated with regard to the organisation's ethos and the proximity of the activity in question to the proclamatory mission of the Church or organisation. Also, the employees' knowledge and awareness of the material scope, extend, and importance of the obligation should be considered.<sup>81</sup> The Federal Constitutional Court qualifies the Convention as a source of interpretive value when applying the GG and refers to the States' obligation of neutrality towards Churches to justify limited judicial review.<sup>82</sup>

#### 4. Consequences in German national law

The CJEU's decision in the Egenberger case is binding for the Federal Labour Court that introduced the request for a preliminary ruling under Article 267 TFEU. Consequently, the Federal Labour Court applied the CJEU's interpretation of the Directive 2000/78/EC (6.1). This results in a decision that is in contradiction with the relevant case law of the Federal Constitutional Court. In view of a constitutional complaint lodged by the Diakonie, it remains to be seen how the Constitutional Court will solve the tension between German constitutional law and Union law (6.2.).

<sup>78</sup> ECHR, *Schüth v. Germany*, no. 1620/03, 23 September 2010 [ECLI:CE:ECHR:2010:0923JUD000162003], para. 59; ECHR, *Obst v. Germany*, no. 425/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000042503], para. 45; ECHR, *Siebenhaar v. Germany*, no. 18136/02, 3 February 2011, [ECLI:CE:ECHR:2011:0203JUD001813602], para. 43.

<sup>79</sup> Depending on the cases these were the individual right to respect of the private and family life under Article 8 of the Convention (for dismissal with regard to the marital situation, especially divorce and remarriage) and the individual freedom of religion under Article 9 of the Convention (for occupational requirements concerning the membership in a church or religious organisation) of the employees on the one hand, cf. ECHR, *Siebenhaar v. Germany*, no. 18136/02, 3 February 2011, [ECLI:CE:ECHR:2011:0203JUD001813602], para. 40. On the other hand, the employers', i.e. the churches' collective freedom of religion (Article 9 together with Article 11 of the Convention) had to be considered. ECHR, *Schüth v. Germany*, no. 1620/03, 23 September 2010 [ECLI:CE:ECHR:2010:0923JUD000162003], para. 67 to 73; ECHR, *Obst v. Germany*, no. 425/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000042503], para. 47 to 48.

<sup>80</sup> ECHR, *Schüth v. Germany*, no. 1620/03, 23 September 2010 [ECLI:CE:ECHR:2010:0923JUD000162003], para. 67–73; ECHR, *Obst v. Germany*, no. 425/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000042503], para. 47–48.

<sup>81</sup> ECHR, *Schüth v. Germany*, no. 1620/03, 23 September 2010 [ECLI:CE:ECHR:2010:0923JUD000162003], para. 69; ECHR, *Obst v. Germany*, no. 425/03, 23 September 2010, [ECLI:CE:ECHR:2010:0923JUD000042503], para. 51; *Siebenhaar v. Germany*, no. 18136/02, 3 February 2011, [ECLI:CE:ECHR:2011:0203JUD001813602], para. 46.

<sup>82</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112], para. 127 to 144.

#### 4.1. The Federal Labour Court's decision in the Egenberger Case

Recently, the Federal Labour Court ruled on the Egenberger Case.<sup>83</sup> The Federal Labour Court assigned the claimant a compensation under the AGG because of discrimination on the grounds of her religious belief, applying the principles set by the CJEU's preliminary ruling.

In a first step, the Federal Labour Court examines whether or not the provision of Article 9(1) AGG in its first alternative<sup>84</sup> can be interpreted in conformity with the Directive 2000/78/EC. According to the Court's decision, this is impossible with regard to the affirmed approach of interpretation of the law. It concludes that the legislator intended to justify unequal treatment on the basis of the churches' right to self-determination, irrespective of the type of activity.<sup>85</sup> Therefore, an interpretation in the sense of the CJEU ruling would be an inadmissible interpretation *contra legem*.<sup>86</sup> Thus, the provision has to be disapplied.<sup>87</sup>

In a second step, the Court examines a possible exception under Article 9(1) AGG in its second alternative<sup>88</sup>, interpreted in conformity with the Directive 2000/78/EC. According to this rule, a difference of treatment due to religious belief could only be justified if by reason of the nature of the activities or of the context in which they are carried out, the applicant's or employee's religion or belief constitute a genuine, legitimate and justified occupational requirement, in regard to the organisation's ethos.<sup>89</sup> The Court recognises that it was the responsibility of the post holder to ensure credible external representation.<sup>90</sup> However, the Federal Labour Court expresses considerable doubts as to the materiality of the occupational requirement, following the CJEU's definition of a 'genuine' occupational requirement.<sup>91</sup>

Finally, the Court states that, in any event, the professional requirement was not justified. In the light of the factual circumstances of the individual case, no probable and substantial risk could be

<sup>83</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0].

<sup>84</sup> „Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, *in view of its right of self-determination* or because of the type of activity.”

<sup>85</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 25 to 31.

<sup>86</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 38 to 41.

<sup>87</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 42 to 43.

<sup>88</sup> „Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, *in view of its right of self-determination* or *because of the type of activity*.”

<sup>89</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 59 to 70.

<sup>90</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 72 to 79.

<sup>91</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 80 to 93.

established that the organisation's ethos or right to self-determination would be compromised by employing a person that was not affiliated to a Christian church.<sup>92</sup>

#### 4.2. *The constitutional dimension*

Recently, the Diakonie filed another constitutional complaint, claiming that the last decision of the Federal Labour Court<sup>93</sup> violated the freedom of religion and the right to self-determination of the churches and religious bodies such as guaranteed by Articles 4 and 140 GG in conjunction with Article 137 of the Weimar Constitution.<sup>94</sup>

It is hardly predictable how the Federal Constitutional Court will react. Obviously, the requirements formulated by the CJEU are in tension with the established jurisprudence of the Federal Constitutional Court on the right of self-determination of the churches. On the material level, it has been argued that the primacy of EU law was applicable to the German Constitution, as the rules concerning the Churches' status were not unchangeable under the Basic Law.<sup>95</sup>

Finally, the decision of the Federal Constitutional Court merely depends on procedural questions.<sup>96</sup> The Court is competent to decide on constitutional matters (such as the fundamental rights guaranteed by Articles 4 and 140 GG in conjunction with Article 137 of the Weimar Constitution), but traditionally, the Federal Constitutional Court would abstain from judging European Union law.<sup>97</sup> As the decision of the CJEU is binding for the Federal Labour Court under Article 267 TFEU, the review of the Federal Constitutional Court would not consider the interpretation of the Directive and the rules set out by the CJEU, but only review their application by the Federal Labour Court. This should lead to very limited control. Otherwise, the Federal Constitutional Court would have to declare itself competent by considering *ultra vires* control or arguing that the core of the national constitutional identity was touched<sup>98</sup> or that the German constitutional order would be put at risk when accepting the competence of the CJEU.<sup>99</sup>

<sup>92</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0], para. 95 to 102.

<sup>93</sup> BAG, 25 October 2018 – 8 AZR 501/14 –, [ECLI:DE:BAG:2018:251018.U.8AZR501.14.0].

<sup>94</sup> Diakonie Deutschland, Pressrelease: EWDE erhebt Verfassungsklage gegen Urteile des BAG und EuGH, 19 March 2019, <https://www.diakonie.de/pressemitteilungen/ewde-erhebt-verfassungsklage-gegen-urteile-des-bag-und-eugh/>; Statement of Ulrich LILIE, the Diakonie's president, Diakonie braucht Rechtssicherheit, 22 March 2019, <https://praesident.diakonie.de/2019/03/22/diakonie-braucht-rechtssicherheit/> (both retrieved 8 May 2019).

<sup>95</sup> Mehrdad PAYANDEH: Europarecht: Grenzen des Selbstbestimmungsrechts von Religionsgemeinschaften – Gerichtliche Überprüfbarkeit und inhaltliche Voraussetzungen für das Erfordernis konfessioneller Zugehörigkeit für Beschäftigungsverhältnisse einer Religionsgemeinschaft. *JuS*, 2018. 593–596, 596.

<sup>96</sup> Cf. Heiko SAUER: Kirchliche Selbstbestimmung und deutsche Verfassungsidentität: Überlegungen zum Fall „Egenberger“. *VerfBlog*, 2019/5/03, <https://verfassungsblog.de/kirchliche-selbstbestimmung-und-deutsche-verfassungsidentitaet-ueberlegungen-zum-fall-egenberger/> (retrieved 8 May 2019).

<sup>97</sup> See SAUER op. cit., as well as HEUSCHMIDT–HÖLLER op. cit. 586, 588; on the relevant case law of the Federal Constitutional Court.

<sup>98</sup> In this sense Gregor THÜSING – Regina MATHY, *RIW*, 2019. 559–564.

<sup>99</sup> Cf. HEUSCHMIDT–HÖLLER op. cit. 586, 588; SAUER op. cit.

## 5. Preliminary Conclusions

One of the core questions after the decisions of the CJEU in the Egenberger and IR v. JQ cases is whether or not it is possible for the German labour courts to apply and interpret the rules of Article 9 AGG in accordance with EU law. As it has been shown, the issue goes far beyond. It has a constitutional dimension and may have consequences in this regard.

Even if the labour law matters may have been clarified by the recent ruling of the Federal Labour Court for the time being, the conflict of competing fundamental rights of the Churches on the one hand and the individuals – candidates or employees – on the other hand are far from being solved. The constitutional dimension of the case remains undefined and the Federal Constitutional Court's decision can be awaited with a certain excitement.

It is doubtful that the Federal Constitutional Court will go so far as to raise the exception of constitutional identity to disapply the jurisprudence of the CJEU,<sup>100</sup> even if it cannot be excluded with regard to the grounds given in the first IR-decision.<sup>101</sup> However, we can expect the Court to comment on the relationship between constitutional and European Union law with regard to the right to self-determination and its traditional conception as defended until now in its settled case law. Although this will require softening the strong principles established by the Federal Constitutional Court, it does not mean the immediate end of ecclesiastical labour law.<sup>102</sup> But it might lead to a – welcome – convergence of general and ecclesiastical labour law, in which exceptions to the general rules are applied rather restrictively. In this regard it would be desirable for the legislator, to reform the rule of Article 9(1) AGG.<sup>103</sup>

Furthermore, the decisions may have an impact on the strategic behaviour of the churches as employers. They may not only reconsider and ease occupational requirements, as they did in the past.<sup>104</sup> The Roman Catholic as well as the Protestant Church in Germany softened the requirements concerning the affiliation to the churches and the respect of ecclesiastical rules in recent years. They may also reconsider genuine, legitimate, and justified occupational requirements, in order to consolidate the explanation of the importance of their requirements with regard to their ethos to improve the justification.<sup>105</sup>

<sup>100</sup> Ronan MCCREA: Salvation outside the church? The ECJ rules on religious discrimination in employment. <http://eulawanalysis.blogspot.com/2018/04/salvation-outside-church-ecj-rules-on.html>; Cf. SAUER op. cit.

<sup>101</sup> BVerfG, 22 October 2014 – 2 BvR 661/12 –, BVerfGE 137, 273–345, [ECLI:DE:BVerfG:2014:rs20141022.2bvr066112].

<sup>102</sup> Cf. Andrea EDENHARTER: „Doomsday“ für das kirchliche Arbeitsrecht? *VerfBlog*, 2018/4/18, <https://verfassungsblog.de/doomsday-fuer-das-kirchliche-arbeitsrecht/>, DOI: <https://dx.doi.org/10.17176/20180419-201727>.

<sup>103</sup> HEUSCHMIDT–HÖLLER op. cit. 586, 587.

<sup>104</sup> JOUSSEN (2018) op. cit. 421–435.

<sup>105</sup> In this sense, Hermann REICHOLD – Peter BEER: Eine “Abmahnung” des EuGH mit Folgen. *NZA*, 2018. 681–686, 683 et seqq.