Is Egenberger next?

Martijn van den Brink

15.05.2020 doi: 10.17176/20200516-013207-0

When judges must rely on newspapers to clarify a decision they decided a week before (here and here) something seems to have gone wrong. However, while the BVerfG seems to be taken aback by the storm of indignation that burst upon them since last week's PSPP decision, the judges remain adamant in their criticism of the CJEU. Luxembourg should perhaps even fear another *ultra vires* decision. A constitutional complaint is pending against *Egenberger*, in which the CJEU decided—contrary to well-established BVerfG case law—that the autonomy of religious organisations must be narrowly construed and subject to effective judicial review. Critics of *Egenberger* have celebrated the PSPP decision and hope that it will pave the way for a second *ultra vires* decision. I will defend *Egenberger* against such *ultra vires* claims in this post. In my view, critics have failed to place the decision in its proper legal context and overlooked that the CJEU followed increasingly established principles of legal reasoning in EU law. The decision is methodologically sound, consistent with precedent, and does not violate the criteria laid down in the BVerfG's case law that would normally trigger the exercise of *ultra vires* review.

Legal background

Article 140 of the German Constitution in conjunction with Article 137(3) of the Weimar Constitution provide religious organisations extensive freedom to regulate their internal affairs autonomously. The BVerfG has consistently interpreted these provisions to allow religious organisations to determine for themselves whether having a particular religion is a requirement for employment and to enforce on their employees a duty of loyalty to the organisation and its religious doctrines (here and here). *Egenberger* could bring about a paradigm change in the legal regulation of religious organisations within Germany. The CJEU interpreted Article 4(2) of Directive 2000/78 (quoted below) as requiring that decisions of religious organisations on matters of employment should be subject to effective judicial review. Whether religion constitutes a legitimate occupational requirement is not a question that such organisations can determine for themselves. National authorities must ensure that there is 'a direct link between the occupational requirement imposed by the employer and the activity concerned' (*Egenberger*,para 63). The Federal Labour Court that had referred the case to the CJEU subsequently disapplied Paragraph 9 of the German Equal Treatment Act and restricted the autonomy of religious organisations within Germany contrary to established principles of national constitutional law.

Ultra vires review

Critics usually bring two separate but related arguments to support their conclusion that *Egenberger* is *ultra vires*. In the first place, they argue that the CJEU failed to observe the limits of its competences under Article 17(1) TFEU, according to which 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'. The CJEU considered Article 17 in its decision and decided that, because the EU legislature had taken the need to respect and not prejudice the status of religious organisations into account when adopting the Directive, to defer to and enforce Article 4(2) of the Directive (*Egenberger* para 57). Critics contend that Article 4(2) should have been interpreted in light of Article 17(1) TFEU and not the other way around. In the second place, they argue that the CJEU failed to observe the legal constraints laid down in Article 4(2) of Directive 2000/78, which emphasises the Member States' constitutional provisions and principles. Because *Egenberger* reconciles the principle of religious autonomy and the right to non-discrimination differently from BVerfG

case law, the CJEU allegedly failed to take into account these provisions and principles.

Before I assess both points of critique, let's rehearse the BVerfG's standards of *ultra vires* review. It decided in the *OMT* decision that competences must be 'exceeded in a sufficiently qualified manner' (para 147). The actions of EU institutions must be of 'structural significance for the distribution of competences' (para 147). CJEU decisions are *ultra vires* when they 'cannot be justified under any legal standpoint' and 'when an interpretation of the Treaties is manifestly utterly incomprehensible and thus objectively arbitrary' (para 149). Earlier, the BVerfG had already specified the limits of proper legal interpretation in *Honeywell*: all courts can refine and develop law via 'methodically bound case-law' (para 62), but a court should not change 'clearly recognisable statutory decisions which may even be explicitly documented in the wording (of the Treaties)' or create 'new provisions without sufficient connection to legislative statements' (para 64). The *PSPP* decision affirmed these points and emphasised that the BVerfG would respect the CJEU as long as it 'applies recognised methodological principles and the decision it renders is not objectively arbitrary from an objective perspective' (para 112).

Assessed against these standards, *Egenberger* seems largely unobjectionable. According to established legal principles, Member States must 'have due regard' to EU law when exercising their competences (*Rottmann*, para 32). Thus, it is possible that the EU, when acting within the limits of its own competences, affects areas that lie within the Member States' competences [eg, *Kreil*]. It seems unsurprising that these principles apply to national conceptions of the relationship between religion and the state as well. The EU has legislated on religious slaughter, and EU state aid rules apply to tax exemptions given to the Catholic Church. The EU is neutral towards different religions and it is, in principle, for the Member States to define the status of religious organisations, but matters falling within the competences of the EU might affect their decisions.

The first line of criticism questions the decision not to apply Article 4(2) of the Directive in light of Article 17 TFEU. However, *Egenberger*'s legal reasoning is far from unprecedented: the CJEU has in the last few years recognised the normative significance of legislation in different areas of EU law and refrained from interpreting legislative provisions in light of the Treaties. First, after years of expanding the boundaries of social inclusion by interpreting EU citizenship legislation in light of the Treaties, the CJEU put this practice to a halt in *Dano*, *Alimanovic*, *García-Nieto*(note that Germany was the direct beneficiary of these decisions). In *Dano*, the CJEU favoured deference to Directive 2004/38/EC because 'the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression' in the Directive (para 61). Second, it followed the same logic in recent case law on the accommodation of national identities. In *Melloni*, it refused to accommodate Spain's national identity because that would affect the applicability of legislative norms that reflected '*the consensus reached by all the Member States*' (para 62). In *Taricco II*, by contrast, it permitted Italy 'to apply national standards of protection of fundamental rights' because 'the limitation rules applicable to criminal proceedings relating to VAT *had not been harmonised by the EU legislature*' (para 44).

A long debate can be had about the proper relationship between the CJEU and the EU legislature and the appropriateness of letting the latter determine the meaning of EU primary law. However, such normative considerations are largely irrelevant in the context of *ultra vires* review. The relevant question, according to BVerfG case law, is whether the CJEU refines and develops the law via methodically bound case law. Clearly, the reasoning in *Egenberger* with respect to the status of the EU legislature in relation to EU primary law was methodically bound and consistent with the case law just discussed. In addition, it is worth pointing out the emphasis placed by the BVerfG on the importance of judicial decisions having a statutory foundation in the *Honeywell* decision. From this perspective, *Egenberger* is irreproachable. Of course, as is so often the case, the CJEU can be criticised for failing to substantiate its

decision, in particular as regard the principles that informed its decision not to interpret legislation in light of the Treaties. However, this shortcoming hardly seems sufficient to justify the conclusion that the CJEU has manifestly exceeded its competences and that *Egenberger* should trigger *ultra vires* review.

The second line of criticism questions the interpretation of Article 4(2) of Directive 2000/78. Be warned that Article 4(2) is a product of legislative compromise rather than quality legislative drafting:

> *Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.*
>
> *Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.*

Critics emphasise the sentences in bold and accuse the CJEU of prejudicing the right of churches and of not taking into account the constitutional traditions of the Member States in its interpretation of this provision. However, such criticism is somewhat misleading. First, the second paragraph begins with: 'provided that its provisions are otherwise complied with …'. This suggests that the legislature intended to uphold the effectiveness of the provisions of the Directive also in case these would prejudice the right of religious organisations. Second, the underlined sentence in the first paragraph merely states that it 'shall be implemented taking account of Member States' constitutional provisions and principles', not that these provisions and principles cannot be restricted. Third, we should not overlook the italicised sentence. Article 4(2) provides detailed criteria that religious organisations must satisfy if they want to use religion as an occupational requirement. These criteria suggest that the legislature's intention in enacting this provision must have been that the autonomy of religious organisations is subject to certain limitations.

The problem that Article 4(2) poses is how to reconcile these detailed criteria with the emphasis the provision puts on the constitutional principles of the Member States. In my view, we must grant critics of *Egenberger* that principles of German constitutional law were given short shrift in the decision. The CJEU should have confronted the difficulties of interpreting a convoluted provision like Article 4(2) more openly. The provision is subject to more than one reasonable interpretation, so certainly given the constitutional issues at stake, the CJEU should have felt obliged to justify its decision in greater detail. However, we must also recognise that the CJEU could not have respected the constitutional principles of Germany and enforced the detailed criteria laid down in Article 4(2) at once. It gave greater emphasis to these detailed criteria than to principles of domestic constitutional law in its decision. Whatever we think of this, it did not change a 'clearly recognisable statutory decision' or create 'new provisions without sufficient connection to legislative statements'. This should suffice to reject the second argument for the exercise of *ultra vires* review.

An assessment of *Egenberger* must place the decision in its wider EU law context and bear in mind the difficulties of interpreting Article 4(2). From this perspective, the conclusion should be that the decision

applies recognised methodological principles and is not objectively arbitrary. In other words, there is no ground for *ultra vires* review.

ABOUT THE AUTHOR
Martijn van den Brink
Dr. Martijn van den Brink is Assistant Professor in EU Law at Leiden University.

SUGGESTED CITATION
van den Brink, Martijn: Is Egenberger next?, Verfassungsblog, 15.05.2020, doi: 10.17176/20200516-013207-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200516-013207-0.