

2. RELIGARE key findings

In this section, the main findings that have emerged from the RELIGARE research are briefly discussed. The presentation of each of the four areas of participation studied follows the same structure: after a summary of the key research findings, there follows a series of recommendations. The key insights and recommendations differ in various ways. These differences may be attributed to various reasons, such as the specificity of the challenges addressed in each of the areas, the existence of a (EU) legal framework and the prominence of the relevant challenges in the (155) sociological interviews conducted by the project team members. Underlying the entire project was the search for a balance between the protection of the freedom of religion and belief, on the one hand, and the principle of equal treatment and non-discrimination on the other, combined with an attempt to engage with the two yardsticks of ‘inclusive State neutrality’ and ‘justice as even-handedness’.

2.1 Employment: Protecting the freedom of religion and right to equality of employees and employers in the workplace

2.1.1 Religious diversity and the workplace – two clusters

The RELIGARE findings regarding the workplace can be divided into two clusters: the individual and the collective cluster. The individual cluster looks at a number of mechanisms that have been implemented in the workplace to protect and to various degrees accommodate (or not) religious or non-confessional beliefs, practices and identity. These mechanisms are mainly grounded in human rights reasoning and anti-discrimination legislation. They also include ‘voluntary’ good practices.

*Under the individual cluster, the distinction was made between discrimination cases *sensu stricto* (dismissal because of religious affiliation¹⁸), and various accommodation cases involving private employees and civil servants:*

- (a) Conflicts or requests relating to religious dress (including wearing turbans, not cutting hair, covering hair, etc.) in both front-office and back-office positions.
- (b) Requests motivated by a need to reconcile conflicting religious time and working time obligations.
- (c) Requests for exemptions or alterations of particular job duties or circumstances, including socialising customs.
- (d) Requests to use certain (often already existing) facilities or space, typically for prayer or meditation.¹⁹

Only some of these cases involve conflicts with other fundamental rights and can thus be regarded as ‘hard cases’. ‘Soft cases’, where accommodations harm no compelling interests and are (nearly) cost-

free, have also been identified. Contrary to what one may think, even these ‘soft cases’ have not been unequivocally successful in court.²⁰

- With regard to religious dress and symbols, the main issue is generally the Islamic headscarf (and to a lesser extent, the Sikh turban). Noticeably, most instances identified from the data relate to front-office workers (e.g. cashiers, bus drivers, and also – in the public sector – teachers); this points to the fact that the *visibility* of distinctive religious dress is regarded as problematic by many private sector employers (the same can be said for public sectors that regulate the dress of public school teachers). The case law, combined with the sociological country reports, confirm a pattern whereby religiously distinct workers are routed to the back office, a tendency that may be symptomatic of a European discomfort with public statements of religious commitment.
- In conflicts between religious duties or observances and working time, objections to accommodation are often justified on the grounds that formal equal treatment is sufficient. Yet those who raise such objections tend to ignore the fact that, for example, the organisation of working time in Europe adheres to a calendar strongly inspired by the dominant religions, with only a few instances of structural accommodation for minority groups. In this context, maintaining a regime of formal (or strict) equal treatment under a non-neutral standard (in the sense of being inspired by a dominant religious tradition which it privileges) may turn out to be discriminatory.
- The RELIGARE findings further point to a wide variety of issues such as workers refusing to perform certain job functions (registering same-sex partnerships; handling alcohol or pork), refusing to adhere to dominant socialising customs (e.g., shaking hands with people of the opposite sex), workers challenging the position of women in managerial positions in the workplace, workers seeking to be excused from parties at work, amongst others. In the RELIGARE research the focus has been on ‘hard cases’ where religious freedom appears to conflict with gender equality, equal treatment of sexual minorities, etc. In the sociological interviews conducted, the overwhelming consensus amongst respondents was that in the workplace employers should try to accommodate the religious practices of employees (notably, also of secular respondents), but they do not all agree that a duty to do so should be enshrined in law.

Under the collective cluster, the following was addressed: (a) hiring and dismissal practices involving the ‘religious ethos’ exception (Article 4.2 Directive 2000/78/EC); (b) balancing job requirements with employees’ privacy and family rights.

With regard to faith-based employers, there are two main issues to be mentioned here.

- First, there are tensions between the claims of collective autonomy and the rights of individual workers. In this regard, ‘more protection’ for one translates into more restrictive rights for the

other. In order to determine the appropriate response, one must therefore look at broader societal goals, e.g., a wide leniency in the area of autonomy rights will limit access and inclusion.

- Second, the current legal framework with a limited exemption for religious ethos companies has created misunderstandings and complexities of its own. This is an area where the legal framework could be fine-tuned and/or good practices in the national approaches could be helpful to other Member States struggling with similar issues.

2.1.2 Two relevant legal frameworks

Two legal frameworks are relevant when it comes to the protection of religion and belief in the workplace: the human rights framework and the non-discrimination framework. The first has been the purview of the European Convention on Human Rights and the European Court of Human Rights in Strasbourg, while the EU has taken the lead in formulating non-discrimination standards under a series of directives, in particular EU Directive 2000/78/EC, in the area of employment, occupation and vocational training. The interaction between these two frameworks is reciprocal and complex: sometimes complementary in their operation, sometimes in tension.²¹

The RELIGARE data show that there are gaps in the existing legal protection that make it difficult adequately to address (even modest) claims for religious accommodation in Europe²² and, in particular, that the tool of human rights “allows for diversity only under certain limitations, thereby conditioning and at times even distorting these religious experiences based on interpretations that form, what some do not hesitate to call, the core of a (contentious) ‘Eurocentric approach’. Freedom of religion derives its language and working categories from historical and dominant values.”²³ **This is one of the reasons why the RELIGARE project makes a case for using the important additional tool of legally enshrined reasonable accommodation on the basis of religion and belief in the workplace.** At the same time, it must be recognised that the two legal frameworks are not static but developing; thus the full potential of these instruments has arguably not been tapped. The proposal for a duty of reasonable accommodation, thus, should not be seen as a replacement of but rather a supplement to the protections in place.

With regard to the workplace, the RELIGARE data reveal various conceptions of ‘equality’, and the tensions between these conceptions and freedom and other values. More specifically, the idea of substantial equality may conflict with formal equal treatment: while under formal equality, the focus is on identical or similar treatment *irrespective* of particular personal characteristics, including religion, under substantive equality, context-relevant religious or belief-based identities, beliefs and practices of employees sometimes *are* to be taken into account. This is a multifaceted exercise and entails: **inclusiveness (full enjoyment of citizenship rights), redistribution (problematic socio-economic status of some ethno-religious communities), recognition (signal function), and symmetrical protection (procedural even-handedness applies to everyone, and is not conceptually limited to particular minorities).** Within this conception of equality there is a clear role for reasonable accommodation,²⁴ which questions the existing anti-discrimination paradigm. The idea behind reasonable accommodation is that “by failing to accommodate, the characteristic can result in denying

an individual equal employment opportunities.”²⁵ Therefore: “Instead of requiring ... people to conform to existing norms, the aim is to develop a concept of equality which requires (mutual) adaptation and change.”²⁶ In light of these normative choices, the mode of handling issues/conflicts (judicial, legislative or regulatory means, or simply through the use of certain voluntary (good) practices) is not irrelevant. Soft measures should be complementary to more ambitious proposals for legislative change in a volatile environment.

2.1.3 Redefining the reasonable accommodation debate

The 200 national employment cases collected in this research point to the divergent approaches among Member States. For instance, the meaning of ‘indirect discrimination’ on the basis of religion or belief (and to what extent the prohibition of discrimination requires employers to offer reasonable adjustments) varies considerably despite the fact that all Member States must implement the Employment Equality Directive in an effective fashion. In the Dutch cases, the efforts of employers to look for alternative solutions to keep the employee on the job are taken into consideration. For instance, when the job application of a Muslim woman was refused by a call centre because the employer was of the opinion that the sound transition over the headset would be of lesser quality when worn over a headscarf (thus lowering the quality of the communication between phone operator and customers), a (cost-free) alternative that would satisfy both employer and employee was available. Namely, the headset could be worn *under* the headscarf (ETC no. 2006-215), 27 October 2006). In contrast, in an employment dispute between a private employer and a saleswomen who sought to wear a headscarf on the job, a Belgian judge found it pointless to look into whether the parties considered a possible transfer to a ‘back office position’ since ‘there exists no duty of reasonable accommodation’. (Labour Court of Appeal (4th chamber) no. 48.695, 15 January 2008). A recent German decision takes a similar approach as in the Dutch cases. When a Muslim employee was dismissed from a supermarket because of his refusal to work with alcoholic drinks, the German Federal Labour Court held that the dismissal would be invalid if the employee could have been reassigned to other tasks (e.g., transferred to the fresh food department) (Federal Labour Court of 24 February 2011, no. 2 AZR 636/09).

Labour issues related to the accommodation of religious practices in the workplace also may come up in the unemployment context. The Brussels Labour Court of Appeal in 2002 considered the case of a young Muslim teaching trainee who had started to work on a 6-month internship contract. A few months into her contract she felt obliged to resign after the employer instituted the summer uniform earlier than expected. This uniform entailed wearing Bermuda shorts that revealed her calves, which the trainee felt would violate her Islamic duty of modesty in dress. And despite earlier verbal assurances that the winter uniform would be in place until her contract’s end, the employer was not willing to make any adjustments for her. Her request for unemployment benefits was initially denied because she was considered to have voluntarily abandoned a suitable position without legitimate

cause. The Court ruled in her favour, holding that she had a legitimate reason for resigning as the position had become incompatible with her religious beliefs and thus unsuited to her. (Brussels Labour Court of Appeal (7th Chamber) 17 October 2002) The unemployment case reveals the consequences of exclusion from the workplace, under a system which rejects any duty of reasonable accommodation to religious needs. Such refusal plays into the hands of employers who invoke grounds of cost considerations. However, our research shows that this approach not only pushes the religious employee on to the unemployment line, but also fails to recognize that under this approach employees carry the burdens disproportionately and that offering an existing employee some accommodation can also be in the employer's advantage (e.g. someone familiar with and already trained in the company can remain a valued employee in an alternative position within the firm), i.e. it is not a zero-sum game.

To the extent that the debate on reasonable limits to accommodation is centred on the issue of 'cost' (economic or otherwise), either under the existing human rights and non-discrimination regimes or under a new form of protection, the RELIGARE team argues that the question needs to be redefined. One must also take into account the various (hard/soft) 'costs' to minorities and to the social welfare system. From the question "How much can it cost the employer?" and "When is it (dis)proportionate for the distributive agent (employer) to carry the cost?" we should move to asking "*Who* should carry the various burdens?" and "What is a fair distribution of burdens?" but also "Are there ways to reconcile various interests?". **This provides an alternative way to consider the occurrence of religious 'claims'; in other words, we argue that the process of accommodation is always a two-way street and often the concessions made by the employees in question are not duly recognised.**

There should be a genuine and meaningful right to freedom of religion, including for employees in the workplace.²⁷ It can further be argued that the collective aspect of freedom of religion requires a level of autonomy granted to churches and religiously-oriented organisations, possibly justifying exemptions to general non-discriminatory hiring and dismissal practices. More questionable, however, are approaches to freedom of religion in the workplace that relegate religion to the private domain or hold that an employee can always resign from a 'voluntary position' in the event of a conflict between professional and religious commitments.

One particular challenge when it comes to the management of diversity in the workplace has to do with 'avoiding conflict' behaviour. **Discomfort with issues of religion, and especially minority religion, may indeed lead to avoidance of confrontation, either by employees staying away from the workplace or by decision-makers diluting the ban on discrimination on the basis of religion or belief.** Pursuing protection often exposes contentious issues which in turn can lead to even more conflicts. The wish to avoid problems might then be a reason for upholding the status quo. The RELIGARE project argues that the idea of inclusiveness should not be seen as a way to 'contain' minorities and those who do not conform to the prevailing workplace standards. The idea is, rather, to give individuals adequate room to reconcile their various identities and commitments; certainly a

degree of adaptation to the workplace setting is necessary, but the integration of a widely diverse workforce in **Europe should not require an assimilative approach to religion in the workplace**, where ‘passing’ and coping (or even hiding) are routine requirements for employment participation. Sometimes, confrontations are not only inevitable but also necessary on the way to achieving sustainable long-term justice.

Similarly, there is a real danger that initial ‘good practices’ of accommodating religious diversity in the longer term may trigger restrictive responses in society and in the case law, and may even lead to restrictive legislation. To give an example, in Denmark, a Muslim trainee was turned down because she did not comply with the dress code prevailing in the Danish department store Magasin. The Eastern High Court of Denmark in 2000 found that the negative treatment of the trainee based on her religious garb constituted indirect discrimination. In particular, the court noted that Magasin did not have a clear dress code. The ruling in this case initially led many companies to change their employee clothing policies to accommodate religious dress. However, the first case prompted a chain of Danish supermarkets, including a group called Føtex, to adopt a restrictive dress code and strictly enforce it. When a case against Føtex came before the Danish Supreme Court in 2005, involving the claim of a Muslim employee who had been fired for wearing a headscarf on the job, her claim was rejected. The reasons were formalistic: unlike the Magasin trainee, this employee had been aware of company policy regarding clothing and had signed a document saying that she would adhere to these rules. The Føtex case thus established the right of employers to set requirements for employee clothing, without a need to make room for dress mandated by employees’ religions, as long as these applied to all employees in the same position, i.e., as long as there was formal equality or strictly equal treatment.

There are both economic arguments (cost-benefit) and rights-based perspectives for accommodating religion and belief in the workplace; at the EU level both arguments are relevant. There are arguments at an individual level: freedom and accommodation would allow the self-realisation of workers belonging to minority religions who live in a society based on traditional Christian values where they are already disadvantaged in various ways, but it also allows for more (macro)economic arguments providing the ‘business case for diversity’ (the fact that the ageing European workforce cannot afford to place certain groups and individuals on stand-by but must give them meaningful opportunities to engage, build skills and succeed).

2.1.4 Policy recommendations with regard to employment issues

Three main topics have been identified for concrete policy recommendations, in particular at the EU level, as relevant for future policy initiatives:

- (a) Enforcement of *human rights and equality legislation*, in particular as it relates to religion (i.e., through Human Rights Commissions/Equality Bodies for religious inequalities).
- (b) This may require that religious employers/organisations be granted exemptions from anti-discrimination laws and labour laws.
- (c) *Reasonable accommodation* for religious observances in the workplace.

Recommendations addressed to EU policymakers

- (1) Track the legislative and judicial implementation of the Employment Equality Directive, in particular through available national case law applying the prohibition against discrimination on the basis of religion or belief. Develop a coherent and clear policy to address national decisions or developments that (often inadvertently) undermine the purposes of an anti-discrimination policy.
- (2) Include the aspect of *religious and philosophical* diversity more clearly in the EU's discourse on the value of diversity.
- (3) Adopt explicit strategies accommodating EU employees from diverse religious backgrounds, promoting such strategies in other public and private workplaces through example.
- (4) Create or encourage platforms for exchange of 'good business' practices in respect of accommodating requests for religious accommodation, and promote these national or cross-national practices across EU Member States.
- (5) Amend the Employment Equality Directive to add a right for public and private employees to request reasonable accommodation on the basis of religious beliefs, practices and observances, unless such accommodation would result in a demonstrated disproportionate distribution of burden or cost.

Recommendations addressed to national governments

- (1) Establish an advisory service (helpline) for employers and other decision-makers with questions about religious accommodations in various work settings, possibly operated by an equality body.
- (2) Encourage the inclusion of workers from diverse religious backgrounds in the workplace through a variety of policy tools: e.g., encourage and incentivise company diversity plans, which also touch on *religious* diversity, address legitimacy of company 'neutrality policies'.
- (3) Adopt national legislation that gives employees a legal right to request reasonable accommodation for religious beliefs, practices and observances in public and private workplaces, unless doing so would impose a demonstrably disproportionate burden or cost on employers.

Recommendations addressed to local governments, trade unions, equality bodies and NGOs

- (1) Demystify the concept of indirect discrimination using information campaigns and informational resources directed at employers and employees.
- (2) Voluntary accommodations that help employees reconcile professional and religious duties and do not cause any organisational hardship should be privileged and proffered as good examples.
- (3) Educate labour market stakeholders and the general public on common religious practices and observances of religious minorities in the country.
- (4) Emphasise the unacceptability of disadvantaging, negative treatment or discrimination against employees on the basis of their religion or belief as well as their religious or philosophical practices and observances.