



Maastricht Centre
for European Law



Maastricht University

*MCEL Thesis Project 2021-2022:
The impact of COVID-19 on EU law*

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**National compulsory COVID-19 vaccination
obligations for workers and the prohibition of
discrimination in EU law**

An examination of the compliance of the Greek COVID-19 vaccination obligation
with the fundamental rights standards of Directive 2000/78/EC and Article 21

CFR

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Table of abbreviations

AG	Advocate General
CFR/Charter	Charter of Fundamental Rights of the European Union
ECHR/Convention	European Convention on Human Rights
CJEU	Court of Justice of the European Union
EU	European Union
Directive 2000/78/EC or 'Directive'	Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation
ECtHR	European Court of Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

I. Introduction

For the mitigation of the effects of the COVID-19 pandemic on both human life and the organisation of States as a whole, Member States resorted to the adoption of measures capable of interfering with fundamental rights. Interferences with fundamental rights are permissible under the Charter of Fundamental Rights of the EU, insofar as interferences respect the essence of the right, are provided for by law, and pursue a legitimate aim the means of achieving which are necessary and proportional.¹ As routine immunisation efforts have been hindered by persons resisting vaccination, the ultimate goal of achieving herd immunity is severely compromised. Consequently, in the pursuit of the legitimate aim of protecting the public health, a number of Member States has opted for compulsory vaccination against COVID-19. Due to the lack of a Union-wide competence on vaccination, the designation of national vaccination policies remain a matter purely regulated by Member States. As such, Article 206 of Law 4820/2021 introduces an obligation to vaccinate against COVID-19 for healthcare workers in Greece in the public and private sector. In September 2021, the ECtHR has received two separate applications originating from Greece, alleging that Article 206 interferes with, among other provisions, the prohibition of discrimination as codified in Article 14 ECHR.²

As more countries opt for compulsory vaccination, especially regarding healthcare workers, numerous complaints of discrimination in the workplace have started to emerge.³ Allegations of discrimination are based on the premise that unvaccinated workers are dismissed from employment, and hence are subjected to differential treatment, in contrast to employees who are vaccinated, and in turn, do not face sanctions. For discrimination to occur, the differential treatment must stem from one of the protected characteristics as prescribed in Directive 2000/78/EC and Article 21 CFR. Due to the fact that vaccination status does not constitute one of the protected characteristics under EU anti-discrimination law, it is disputed whether the differential treatment can amount to discrimination. Notwithstanding said absence, to the extent that vaccination refusal is directly linked to one of the protected characteristics as underlined in the Directive and the Charter, dismissals on that basis can be considered

¹ Charter of Fundamental Rights of the European Union [2000] OJ C 364/9 art 52.

² Press Release ECHR 266(2021), ‘Refusal of requests for interim measures in respect of the Greek law on compulsory vaccination of health-sector staff against Covid-19’.

³ Lauren Chadwick, ‘Mandatory vaccines: Which countries in Europe are making people get the COVID jab?’ (*Euronews*, 1 February 2022)

<<https://www.euronews.com/2022/01/06/are-countries-in-europe-are-moving-towards-mandatory-vaccination>> ‘accessed 1 March 2022’.

discriminatory. Hence, the dismissal of unvaccinated workers owing a protected characteristic within the meaning of the Directive and the Charter is to be considered discriminatory, to the extent that workers not exhibiting such a characteristic, do not run the same risk.

This master's thesis aims to fill the gap in relation to the existence of discrimination between vaccinated and unvaccinated workers. Hence, the research question explored by this thesis is the following: *to what extent are COVID-19 vaccination obligations discriminatory under the Directive 2000/78/EC and Article 21 CFR?* In order to answer the research question, emphasis is allocated to two further sub-questions: first, which protected characteristics are interfered with by virtue of the compulsory COVID-19 vaccination obligation, and second, whether said infringement can be justified under the provisions of the Directive and the Charter. With a view to demonstrate whether fundamental rights standards are undermined by compulsory COVID-19 vaccination obligations, the Greek Article 206 Law 4820/2021 is to be assessed in light of the standards stemming from the Directive and the Charter.

The thesis seeks to examine whether national laws compelling the compulsory vaccination of workers infringe the prohibition of discrimination as advanced by the EU. In order to do so, the paper predominantly employs the doctrinal methodology of research. The doctrinal research aims to systematise, rectify, and clarify the law on a particular topic by a distinctive mode of analysis of authoritative texts that consist of primary and secondary sources.⁴ The primary aim of this paper is not to merely underline the legal action of the EU and the Member States for the mitigation of the pandemic, but to provide an in-depth perspective on the fundamental rights implications on the basis of external factors and considerations. The sources utilized for the commencement of the present research include EU, international, and national legislation and case law, academic literature, news reports, and human rights' organizations reports. Due to the fact that the thesis examines a case study in Chapter 3, in order to illustrate the compatibility of a national compulsory vaccination obligation with the prohibition of discrimination, the normative methodology of research is to be partially employed. Therefore, the paper is doctrinal in nature, but it also entails an evaluative aspect in order to sufficiently cover all elements necessary for a coherent answer to the research question.

First, the relevant legal framework employed for the research is to be explored. Emphasis is placed on the applicability of the Directive, and consequently, the Charter of

⁴ Mike McConville, Wing Hong Chui (eds), *Research Methods for Law* (2nd edn EUP 2017) 4.

Fundamental Rights. The second chapter examines the potential existence of either direct or indirect discrimination and is to determine the specific protected characteristics which would give rise to discrimination. It is to be assessed whether discrimination can be justified on the basis of Article 2(b)(i) Directive, and Article 52(1) CFR. The third chapter focuses solely on Article 206 Law 4820/2021, with a view to establish whether the provision constitutes discrimination, and whether its effects could be justified.

II. Chapter 1: Legal framework

1. The applicability of Directive 2000/78/EC

The principle of non-discrimination in the EU legal order has been given specific expression and effect by Directive 2000/78/EC. The Directive contains a framework of norms which guide the Member States in respecting the equal treatment principle in the context of employment, within the areas that fall under the Directive's scope.⁵ In turn, this framework aims at prohibiting discrimination on the grounds of religion or belief, disability, age or sexual orientation.⁶ This section aims to examine the scope of applicability of the Directive, in order to examine in turn the applicability of the Charter.

1.1 Scope and grounds of discrimination

Directive 2000/78/EC is confined to discrimination based on the above-mentioned grounds, occurring in employment; it does not extend to cover discrimination on the basis of nationality or ethnic origin.⁷ Importantly, discrimination occurring on the basis of a certain status which is directly linked to one of the protected grounds explicitly mentioned in Article 1 Directive constitutes direct discrimination and is covered by the Directive.⁸ Article 3(1) provides that the Directive is applicable to all persons in public or private sectors, in relation to the specific instances mentioned therein. By virtue of the fact that vaccination obligations for workers foresee the dismissals for workers who refuse to comply with the vaccination obligation, the relevant ground for the

⁵ Colm O'Cinneide, 'The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC' (2021) European Commission Directorate General for Justice 20.

⁶ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 (Framework Equality Directive) art 1.

⁷ Uladzislau Belavusau, Kristin Henrard 'A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives' (2019) 20 German L J 626.

⁸ Colm O'Cinneide, 'The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC' European Commission Directorate General for Justice (2012) 42.

applicability of the Directive is found in Article 3(1)(c): employment and working conditions, including dismissals.

1.2 Forms of discrimination

The Directive offers protection against the specific forms of discrimination as defined in Article 2(2), including direct discrimination and indirect discrimination. Accordingly, direct discrimination exists where an individual is treated less favourably than another in the same situation, based on the abovementioned grounds. In principle, such treatment cannot be excused in any situation, unless the treatment constitutes a genuine and determining occupational requirement or a measure of positive action.⁹ Indirect discrimination is deemed to occur where, according to Article 2(2)(b), an apparently neutral provision, criterion, or practice results in a particular disadvantage for persons pertaining to one of the grounds of Article 1 Directive 2000/78.¹⁰ The ensuing disadvantage ought to reach a certain detrimental effect in order for the neutral provision to qualify as indirect discrimination.¹¹ Nonetheless, the seemingly neutral provision ought to be unrelated to discrimination.¹²

In contrast to direct discrimination, indirect discrimination can be objectively justified by a legitimate aim and the means of its achievement are appropriate and necessary, pursuant to Article 2(b)(i) Directive 2000/78. To illustrate the differences between the two categories, relevant case law of the CJEU is to be analysed.

Indirect discrimination was determined in the *Achbita* case, in which the applicant was dismissed from her employment because of her choice to wear an Islamic headscarf. The CJEU did not consider the internal prohibition of visible religious signs as direct discrimination, due to the fact that the prohibition applied to all employees without making a distinction on the basis of religion.¹³ Nonetheless, the prohibition constituted a difference in treatment indirectly based on religion or belief, by virtue of the fact that the result introduced by said prohibition put persons of a particular religion or belief at disadvantage.¹⁴ Since the case concerned indirect discrimination, the CJEU determined that the prohibition was justified because it pursued a legitimate aim and the aims for achieving it were appropriate and necessary.

⁹ Angela Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?' (2018) CUP 57.

¹⁰ C-16/19 *VZ* ECLI:EU:C:2021:64 para 28.

¹¹ Christa Tobler 'Limits and Potential of the Concept of Indirect Discrimination' (2008) European Communities 30.

¹² C-167/97 *Regina v Secretary of the State for Employment* ECLI:EU:C:1999:60 para 72.

¹³ C-157/15 *Samira Achbita v G4S Secure Solutions NV* ECLI:EU:C:2017:203 para 30-32.

¹⁴ *Ibid* para 34.

1.3 Justification of indirect discrimination

The concept of 'legitimate aim' is open-ended, *id est*, an exhaustive list of acceptable aims does not exist and it is not to be established.¹⁵ The aim pursued resulting to indirect justification must be founded on objective reasons of general public and social interest.¹⁶ Instead of drawing an extensive list of aims qualified as legitimate, the CJEU has drawn one main ground which cannot constitute a legitimate aim: budgetary considerations.¹⁷ In general, the protection of the interests of the employer as regards the good functioning or inserting a specific status or image for the respective workplace are often respected by the CJEU. This is illustrated by the *Achbita* case, in which the CJEU upheld the legitimate aim of the employer to pursue an image of neutrality in contacts with customers.¹⁸ In the *Kachelmann* judgement, the CJEU upheld the aim of the employer to protect workers facing dismissal and considering at the same time the undertaking's operational and economic needs.¹⁹ The abstention of the CJEU from composing an exhaustive list of legitimate grounds has been criticised as providing leeway to employers to discriminate in the name of a legitimate aim.²⁰ Member States are granted a wide margin of discretion in assessing the necessity and appropriateness of the means used to achieve the legitimate aim.²¹ Nonetheless, the margin afforded to the Member States cannot have the effect of frustrating the implementation of equal treatment.²²

2. The applicability of the Charter of Fundamental Rights of the EU

The Charter constitutes the EU's own bill of rights, which concretises the Union's commitment to its values stemming from Article 2 TEU, such as human dignity, freedom, and respect for human rights. The scope of application of the Charter is found in Article 51 CFR. The addressees of the Charter are the Union institutions, bodies, offices, or agencies, as well as the EU Member State when implementing EU law.²³ The addressees are required to respect and promote the fundamental rights and principles as

¹⁵ Christa Tobler 'Limits and Potential of the Concept of Indirect Discrimination' European Communities (2008) 32.

¹⁶ C -196/02 *Vasiliki Nikoloudi v OTE AE* ECLI:EU:C:2005:141 para 51.

¹⁷ C-16/19 *VL* ECLI:EU:C:2021:64 para 59. *See also*: C-196/02 *Vasiliki Nikoloudi v OTE AE* ECLI:EU:C:2005:141 para 53.

¹⁸ C-157/15 *Samira Achbita v G4S Secure Solutions NV* ECLI:EU:C:2017:203 para 38.

¹⁹ C-322/98 *Barbel Kachelmann* ECLI:EU:C:2000:495 para 31.

²⁰ Joseph Weiler, 'Je Suis Achbita!' (*EJIL: Talk!* 19 February 2018) <<https://www.ejiltalk.org/je-suis-achbita/>> 'accessed 4 May 2022'.

²¹ C-144/04 *Mangold* ECLI:EU:C:2005:709 para 63.

²² C-167/97 *Regina v Secretary of the State for Employment* ECLI:EU:C:1999:60 para 75.

²³ C 303/17 Explanations relating to the Charter of Fundamental Rights OJ C 303.

contained in the Charter. The Member States are bound by the Charter and required to comply with it, in three situations: when Member States are implementing or derogating from EU law, and when a national act falls otherwise within the scope of EU law.²⁴ When Member States are implementing EU law, the obligation rests upon them to respect the Charter and promote its application. Such duty rests upon all organs of the Member States, including the national lawmakers and the judiciary.²⁵ Conversely, when Member States are derogating from their obligations under EU law, such a derogation can be justified only when the fundamental rights of the Charter are respected.²⁶ If the applicability of the Charter is determined, its provisions are capable of being invoked and relied upon individuals in their relations with the Member State or the EU.²⁷ The present section aims first to examine the scope of application of the Charter, and second, to interpret Article 21 of the Charter, which contains the prohibition of discrimination. For the purpose of this thesis, the first situation in which the applicability of the Charter is established, i.e., implementation of EU law, is to be considered.

The Charter is applicable where Member States are acting within the scope of EU law. According to the CJEU, the fundamental rights guaranteed by the Union legal order are applicable in all situations governed by EU law; thus, situations cannot exist where EU law applies without the fundamental rights being applicable.²⁸ In situations where the Member States are implementing EU law, they are acting as agents of the Union, and hence, the Member States are bound by the Charter.²⁹ The agency situation exists where Member States are executing or transposing legal acts taken by the Union institutions, such as Directives and Regulations.³⁰ In that context, the Member States are as bound by the Charter, as the institutions themselves.³¹

²⁴ Mirjam de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU law?' (2011) 18 MJ 1-2 126.

²⁵ European Union Agency for Fundamental Rights, 'Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance' (2020) Publications Office of the European Union 25.

²⁶ Ibid 64.

²⁷ European Union Agency for Fundamental Rights, 'Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance' (2020) Publications Office of the European Union 20.

²⁸ C-617/10 *Akerberg Fransson* ECLI:EU:C:2013:105 para 33.

²⁹ Mirjam De Mol, 'Article 51 of the Charter in the Legislative Processes of the Member States' (2016) 23 MJ 4 646.

³⁰ European Union Agency for Fundamental Rights, 'Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level: Guidance' (2020) Publications Office of the European Union 41.

³¹ Monica Claes, 'Fundamental Rights', in PJ Kuyper et al (eds), *The Law of the European Union* (5th edn Wolters Kluwer 2018) 110.

In order for the execution of an act to be qualified as ‘implementing EU law’, a sufficient link must be established between the executing act and EU law.³² In situations where the Member States are giving effect to EU law, the Charter applies in order to assess whether the EU fundamental rights are respected in the national legal order. In any other situation which is purely internal the Charter is inapplicable.³³ In cases where the national measures are not executing or enforcing an EU rule per se, but regulate a field which is closely related to, or occupied by EU law, the *Siragusa* criteria as formulated by the CJEU are to be assessed.³⁴ Accordingly, for a rule to be qualified as implementing EU law, the former must be intended to implement EU law, the nature of the rule and its objectives must be covered by EU law, even if its effects are indirect, or where EU law rules are capable of having an effect on that matter.³⁵

3. Article 21 CFR

The prohibition of discrimination constitutes a general principle of the EU legal order, which is codified in Article 21 CFR.³⁶ Article 21 CFR contains the prohibition of discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. The Article corresponds to and applies in compliance with Article 14 ECHR and draws on Article 19 TFEU.³⁷ In contrast to the latter, Article 21 CFR does not allocate competence to the Union or the Member States to enact anti-discrimination legislation nor does it provide for a ban on discrimination in the abovementioned areas.³⁸ The Article is addressed to the institutions and bodies of the EU, but also to the Member States when implementing EU law.³⁹ Furthermore, it has been established by the CJEU that Article 21 CFR produces direct horizontal effect: private individuals can invoke the right contained therein directly before a national court.⁴⁰

³² Mirjam De Mol, ‘Article 51 of the Charter in the Legislative Processes of the Member States’ 23 MJ 4 (2016) 645.

³³ Ibid 647.

³⁴ Eleanor Spaventa ‘The Interpretation of Article 51 CFR: The Dilemma of Stricter or Broader Application of the Charter to National Measures: Study for the PETI Committee’ (2016) European Parliament 21.

³⁵ C-206/13 *Cruciano Siragusa v Regione Sicilia* ECLI:EU:C:2014:126 para 25.

³⁶ C-144/04 *Mangold* ECLI:EU:C:2005:709 para 75.

³⁷ C 303/17 Explanations relating to the Charter of Fundamental Rights OJ C 303.

³⁸ Ibid.

³⁹ C 303/17 Explanations relating to the Charter of Fundamental Rights OJ C 303.

⁴⁰ C-555/07 *Kucukdeveci* ECLI:EU:C:2010:21 paras 21-25.

Article 21 CFR applies to all persons in the EU who have allegedly been subjected to discriminatory treatment. The CJEU has underlined the mandatory nature of Article 21 CFR in numerous judgements, predominantly in cases concerning employment. Specifically, it was held that Article 21 CFR is in itself specific enough to confer a right upon individuals which can be relied on before national courts of Member States, regarding disputes in a field pertaining to EU law.⁴¹ The Article has the same status as Article 19 TFEU, in that it requires no additional implementing measures in the national legal order of the Member States, but it is directly effective for individuals.⁴² Hence, national courts are required to ensure within their jurisdiction the judicial protection stemming from Article 21 CFR, but also to disapply conflicting provisions of national law.⁴³

III. Chapter 2: Infringement of the prohibition of discrimination and justification

Due to the unpredictable and rapid expansion of the virus, the obligation of States stemming from international and European human rights instruments to take all measures possible for the mitigation of the pandemic has extended to private actors as well, such as employers. Rules foreseeing the dismissal of unvaccinated workers constitute one of the common means adopted by Member States, such as Greece.⁴⁴ Vaccination mandates and the ensuing restriction of services are likely to conflict with the right aimed to be limited, such as the right to work.⁴⁵ Rendering access of establishments conditional upon the presentation of a vaccination certificate, leads to the differential treatment of those who, by virtue of a qualified interest such as religion, are unable to obtain such certificate. Hence, claims of discrimination on the basis of vaccination status have occurred before European and national courts.⁴⁶

This section aims to examine the extent to which national laws requiring the dismissal of unvaccinated workers comply with Directive 2000/78/EC and Article 21

⁴¹ C-414/16 *Egenberger* ECLI:EU:C:2018:257 para 76.

⁴² *Ibid* para 78.

⁴³ *Ibid* para 79.

⁴⁴ Maria Diaz *et al*, 'Legal issues surrounding compulsory COVID-19 vaccination' (2022) EPRS Briefing PE 729.309.

⁴⁵ *Ibid*.

⁴⁶ Press Release ECHR 266(2021), 'Refusal of requests for interim measures in respect of the Greek law on compulsory vaccination of health-sector staff against Covid-19'. *See also*: Bundesverfassungsgericht 'Unsuccessful constitutional complaint challenging the obligation for staff in the health and care sectors to provide proof of vaccination against COVID-19' (2022) Press Release No 42/2022.

CFR. For this purpose, in the following sections the approach utilised by both the ECtHR and the CJEU in determining the existence of discrimination is to be analysed.

1. Direct discrimination

Direct discrimination exists where a person is treated less favourably than another in a comparable situation, on the basis of the grounds referred to in Article 21 CFR, and Article 1 Directive 2000/78/EC. The grounds correspond to a characteristic which ought not to be considered as relevant for the enjoyment of a benefit, or for inducing differential treatment.⁴⁷ It is argued that by including the term “such as” in Article 21(1) CFR, the scope of the prohibition of discrimination can be extended to include characteristics not explicitly mentioned therein.⁴⁸ AG Jääskinen has interpreted the wording of the Article as implying characteristics pertaining to one’s psychological conditions and features, such as appearance or size, and social factors such as status.⁴⁹

In the absence of public health crises, qualifying vaccination status as a protected characteristic would seem meaningless, since providing a vaccination certificate has never been a prerequisite for enjoyment of social life and for the continuance of daily functions, to such a noticeable extent. During the COVID-19 pandemic, vaccination status has gained significant attention, and has become a ground for differentiation between two classes of persons; those in possession of a certificate, and those without such certificate. The former group is entitled to continue participating in social functions and to access facilities, while the latter is obligated to provide a negative test daily or is not allowed entrance at all. Establishing the compatibility of the two classes requires an assessment in light of all elements which characterise them. For instance, the CJEU has determined that homosexual life partners and heterosexual spouses find themselves in a comparable situation.⁵⁰ In the depicted scenario, it cannot be disputed that unvaccinated and vaccinated persons, as two categories, are comparable to each other. This is by virtue of the fact that Member States have been equipped with large quantities of COVID-19 vaccines, capable of immunising their population, and in turn, all adult EU citizens have been offered equal opportunities to get vaccinated.⁵¹

⁴⁷ European Union Agency for Fundamental Rights, European Court of Human Rights, ‘Handbook on European non-discrimination law’ EU publications 89.

⁴⁸ Angela Ward, ‘The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?’ (2018) CUP 57.

⁴⁹ C-354/13 Opinion of Advocate General Jääskinen ECLI:EU:C:2014:2106 para 17.

⁵⁰ C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, ECLI:EU:C:2008:179 para 73.

⁵¹ European Commission, ‘EU Vaccines Strategy’ (Europa) <https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en#securing-access-to-vaccines> ‘accessed 28 January 2022’.

Additionally, it has been argued that vaccination status is an innate biological characteristic, and discrimination occurring on the basis of such a characteristic, is unethical.⁵² More importantly, due to the fact that compulsory vaccination obligations often take the form of neutral provisions applicable to all employees collectively, it cannot be established that said provisions are directly discriminatory, as they do not entail any explicit differentiation. Therefore, national compulsory COVID-19 vaccination obligations cannot be regarded as directly discriminatory within the meaning of Article 2(a) Directive 2000/78/EC.

2. Indirect discrimination

Indirect discrimination presupposes the existence of a formally neutral provision which affects disproportionately persons pertaining to one of the protected interests under the Directive and the Charter. In order to qualify the neutral provision as indirectly discriminatory, the provision must impact a specific group of persons in an unfavourable manner in comparison to others. In contrast to direct discrimination, indirect discrimination can be justified if the underlying deliberations aim to achieve a legitimate aim, and the means of achieving said aim are appropriate and necessary.⁵³

2.1. Protected characteristic

Article 21 CFR and Article 1 Directive 2000/78/EC prohibit discrimination occurring on the basis of a number of specified grounds. Pursuant to the CJEU, a difference in treatment related to a certain status which is directly linked to one of the protected characteristics, amounts to discrimination on the basis of the connected ground.⁵⁴ It is advocated that national rules compelling the dismissal of unvaccinated employees are liable of adversely impacting certain groups of employees pertaining to one of the protected characteristics. For the purpose of the assessment of the Greek vaccination obligation, the grounds relevant for the answer to the research question are the following: religious beliefs, disability, and political opinion. Said grounds are considered relevant, due to the fact that research has shown that the three protected characteristics constitute the main ground for vaccination against COVID-19 opposition in Greece.⁵⁵

⁵² Michael Kowalik, 'Ethics of vaccine refusal' (2021) 48 J Med Ethics 242.

⁵³ Joined cases C-804/18 and C-341/19 *IX v WABE*, ECLI:EU:C:2021:594 para 60.

⁵⁴ C-177/88 *Elisabeth Johanna Pacifica Dekker v VJV Centrum*, ECLI:EU:C:1990:383 para 12.

⁵⁵ Ioanna Avakian *et al*, 'Prevalence and Predictors of COVID-19 Vaccination Acceptance among Greek Health Care Workers and Administrative Officers of Primary Health Care Centers: A Nationwide Study Indicating Aspects for a Role Model (2022) 10 Vaccines 13.

2.1.1. Religious beliefs

The juxtaposition of vaccination and religion has been the subject matter of numerous literary debates, which reached their culmination with the promulgation of COVID-19 vaccines. Notwithstanding the general perception that no major religious beliefs are opposed to vaccination, two remarks are relevant in this context; the equal treatment of religious freedom as an exemption vis-à-vis other protected characteristics, and the influence and opposition of the (Christian) Church towards vaccination.⁵⁶

Religious freedom, as provided for by Articles 9 ECHR and 10(1) CFR, is interpreted as comprising both the internal and external forum.⁵⁷ The right presupposes the observance, practice and manifestation of one's religion both in public and in private.⁵⁸ Pursuant to the CJEU, the freedom of religion and belief under Article 21(1) CFR produces direct horizontal effect and can be invoked by religious employees vis-à-vis their employer.⁵⁹ In addition, AG Kokott endorses the view that national legislation contrary to the prohibition of discrimination established as a fundamental right, shall be disappplied in a dispute between private individuals.⁶⁰

Resistance to vaccination obligations, particularly in Eastern Orthodox countries has been advocated and even compelled on the religious public by the Church.⁶¹ Similar opposition has been observed in the Orthodox Protestant Church, which had begun its resistance to vaccination practices since 1823 and the small-pox vaccine.⁶² Although there is no formal prohibition towards vaccination and medical treatments prescribed in central Christian religious texts, said resistance often stems from scientific inaccuracies advocated by priests, especially in countries where the influence of the Church on politics is tremendous, such as Greece. Vaccines which might contain animal traces are

⁵⁶ Danae King, 'Faith and the COVID vaccine: What religions have doctrinal reasons for being unvaccinated?' (*The Columbus Dispatch*, 11 September 2021) <<https://eu.dispatch.com/story/news/2021/09/11/covid-19-few-religions-have-doctrinal-reasons-a-void-vaccine/8271710002/>> 'accessed 10 June 2022'. See also: France24, 'Mark of the Antichrist: Greek holy men sow vaccine mistrust' (*France 24*, 2022), <<https://www.france24.com/en/live-news/20220130-mark-of-the-antichrist-greek-holy-men-sow-vaccine-mistrust>> 'accessed 10 June 2022'.

⁵⁷ C-157/15 *Samira Achbita v G4S Secure Solutions*, ECLI:EU:C:2017:203 para 28.

⁵⁸ C 303/17 Explanations relating to the Charter of Fundamental Rights OJ C 303.

⁵⁹ C-414/16 *Egenberger*, ECLI:EU:C:2018:257 paras 78-81

⁶⁰ Opinion of AG Kokott in C-83/14 *CHEZ*, ECLI:EU:C:2015:170 para 146.

⁶¹ France24, 'Mark of the Antichrist: Greek holy men sow vaccine mistrust' (*France 24*, 2022), <<https://www.france24.com/en/live-news/20220130-mark-of-the-antichrist-greek-holy-men-sow-vaccine-mistrust>> 'accessed 10 June 2022'.

⁶² Wilhelmina L M Ruijs *et al*, 'How orthodox protestant parents decide on the vaccination of their children: a qualitative study' (2012) 12 *BMC Public Health* 408.

commonly objected by Muslims and Hindus, as the former are prohibited from consuming pork, and the latter advocate vegetarianism.⁶³ Regardless of the soundness of the opposing arguments, such views directly stem from religious beliefs, and hence, qualify for protection under the Charter and the Convention. Pursuant to the CJEU, the establishment of discrimination on the grounds of religion can only be substantiated where the difference in treatment is experienced as a result of said religion.⁶⁴ Therefore, the dismissal of an employee who refuses to be immunised on the basis of their religious beliefs, is capable of being reckoned as indirectly discriminatory towards religious employees, in contrast to employees who do not encounter the same religious constraints.

The *Vavříčka* judgement of the ECtHR has afforded clarity as regards the compatibility of vaccine mandates for employment with the observance of the freedom of religion. In conjunction with the *Boffa* judgement, the ECtHR reached the conclusion that objections to compulsory vaccinations are capable of being protected under Article 9 ECHR, if the opinions on vaccination are of sufficient cogency, seriousness, cohesion and importance.⁶⁵ When the objection against vaccination is deemed to fall under Article 9(1) ECHR, Contracting Parties are under positive obligations to safeguard said right in their respective territories.⁶⁶ The applicants of the *Vavříčka* judgement failed to demonstrate that their opposition stemmed from any kind of religion. Nonetheless, the ECtHR has left unanswered the question whether opposition stemming from an established religion could be afforded protection under Article 9 ECHR.

To conclude, the ECtHR has established that compulsory vaccination could potentially amount to an interference with the freedom of religion as provided for in Article 9(1) ECHR. Nonetheless, the *Vavricka* judgement dictates that said interference is capable of being justified if it pursues a legitimate aim, it is necessary in a democratic society, and it complies with the principle of proportionality.⁶⁷

⁶³ BMA Law: Blog ‘Covid-19: vaccinations, employees, and the law (*BMA Law*, 26 January 2021) <<https://bmalaw.co.uk/covid-19-vaccinations-employees-and-the-law/>> ‘Accessed 10 June 2022’.

⁶⁴ Joined cases C-804/18 and C-341/19 *IX v WABE*, ECLI:EU:C:2021:594 para 49.

⁶⁵ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 335.

⁶⁶ Maria Diaz *et al*, ‘Legal issues surrounding compulsory COVID-19 vaccination’ (2022) EPRS Briefing PE 729.309.

⁶⁷ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) paras 300-305.

2.1.2. Disability

The present section places the emphasis to persons, for whom vaccination would potentially cause health implications, due to underlying medical conditions or certain types of disability. The former group is to be distinguished from persons with disabilities or underlying medical conditions, who, in contrast to the former, would be subjected to a significant risk of health implications if exposed to a COVID-19 infection, and ought to be treated as priority groups in vaccination strategies.⁶⁸ A number of Member States has provided for vaccine exemptions for persons whose immune system would be seriously compromised if subjected to COVID-19 vaccination. For instance, the German Protection against Infection Act in Section 20(6) exempts from the vaccine requirement persons whose life would be endangered if subjected to vaccination.⁶⁹ Therefore, persons with underlying medical conditions who refrain from vaccination, bear the risk of being dismissed from employment, insofar as an explicit exception from the vaccination mandate is absent. The present section seeks to determine whether such a dismissal would qualify as indirect discrimination on the grounds of disability.

Article 21 CFR and Directive 2000/78/EC do not stipulate a definition for the term ‘disability’. A definition has been formulated by the CJEU in the landmark case of *Chacon Navas*, as: “a limitation, which results in particular from physical, mental, or psychological impairments and which hinders the participation of the person concerned in professional life”.⁷⁰ Manifested by the later *HK Danmark* case, the CJEU promulgates the individual or medical model of disability, as opposed to the socio-contextual model of disability.⁷¹ Hence, in accordance with the CJEU, for a condition to be qualified as a disability, the impairment stemming from said condition must be long-term, and the hindrance to the exercise of a person’s professional life must be attributable to said condition.⁷² Such definition is in opposition to the position of the CRPD in the legal hierarchy; as a mixed agreement, the CRPD constitutes an act of EU law, ranking above EU secondary law, which entails that the CJEU ought to interpret the convention as

⁶⁸ DH-BIO, ‘COVID-19 and vaccines: Ensuring equitable access to vaccination during the current and future pandemics’ (2021) 2.

⁶⁹ Infektionsschutzgesetz, IfSG Gesetz zur Neuordnung seuchenrechtlicher Vorschriften (Seuchenrechtsneuordnungsgesetz – SeuchRNeuG) of 20 July 2000.

⁷⁰ C-13/05 *Chacon Navas*, ECLI:EU:C:2006:456.

⁷¹ Lisa Waddington, ‘Saying all the right things and still getting it wrong: The Court of Justice’s definition of disability and non-discrimination law’ (2015) 22(4) MJ 576-591.

⁷² C-335/11 *HK Danmark*, ECLI:EU:C:2013:222. *See also*: Mark Bell, Lisa Waddington, ‘The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace’ (2016) Publications Office of the EU 36.

EU law and ensure that EU secondary law is compatible with its provisions.⁷³ Said incompatibility has been underlined by AG Kokott, who reckons that the CJEU definition of disability falls short of the scope of protection provided for by the CRPD.⁷⁴

Pursuant to the *HK* judgement, an illness does not pertain to the concept of disability, and thus, is not qualified for protection from discrimination, unless said illness confers a limitation hindering a person's access and participation to professional life.⁷⁵ The CJEU places the emphasis on the limitations resulting from the impairment; in the absence of limitations preventing the person concerned from having access to, participating in, or advancing in employment, a medical condition does not constitute a disability within the meaning of the Directive.⁷⁶

In relation to vaccination obligations, persons with certain medical conditions and/or disabilities, might be at risk of severe side effects if vaccinated. If the situation of those persons is not taken under advisement, laws requiring the dismissal of unvaccinated workers could potentially qualify as indirectly discriminatory when the refusal to vaccination stems from the worker's disability. As such, the personal scope of Directive is fulfilled, and Article 21 CFR applicable. Nonetheless, cases of long-term and chronic illnesses do not fall under the definition of disability as formulated by the CJEU.⁷⁷ Thus, workers with underlying health conditions, which do not pose a limitation capable of affecting the worker's access and participation to professional life pursuant to the CJEU definition of disability, cannot be protected either from dismissal or discrimination. In the absence of a visible disability which entails a limitation, the Directive is inapplicable, and hence, Article 21 CFR cannot afford protection. Said finding is further substantiated by the CJEU, which declared that sickness cannot be added to the list of grounds explicitly mentioned in the TFEU and Directive 2000/78/EC.⁷⁸

It is established that the CJEU has promulgated a narrow interpretation of the concept of disability, utterly excluding illnesses. Said definition could be proved problematic in light of the prohibition of discrimination, due to the fact that persons with

⁷³ Lisa Waddington, 'The European Union' in Lisa Waddington, Anna Lawson (eds) *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (2018 OUP). See also: C-341/95 *Bettati*, ECLI:EU:C:1998:353 para 20.

⁷⁴ Opinion of Advocate General Kokott C-335/11 and C-337/11 *HK Danmark*, ECLI:EU:C:2012:775 para 27.

⁷⁵ C-354/13 *Kaltoft*, ECLI:EU:C:2014:2463 paras 58-59.

⁷⁶ C-363/12 *Z v A Government Department*, ECLI:EU:C:2014:159 paras 81-82.

⁷⁷ Lisa Waddington, "'Not disabled enough": how European Courts filter non-discrimination claims through a narrow view of disability' (2015) 1 *European Journal of Human Rights* 16.

⁷⁸ C-335/11 *HK Danmark*, ECLI:EU:C:2013:222.

illnesses falling short of the definition of disability are not afforded protection. Hence, vaccination mandates for employment could only be qualified as indirectly discriminatory for workers with disabilities, in the absence of an objective justification. Nonetheless, no protection from discrimination is afforded to persons unable to undergo vaccination, due to underlying health conditions, as the scope of applicability of Directive 2000/78/EC is not fulfilled.

2.1.3. Political opinion

The COVID-19 pandemic has revealed the strong interconnection between politics and vaccination. This phenomenon was principally observed in the United States, where surveys and statistical data indicated that political views determine, to a certain extent, the degree of vaccine resistance of Americans.⁷⁹ Vaccine resistance has been associated with persons pertaining to conservative and republican partisan labels, due to feelings of hostility towards the scientific community.⁸⁰ On the contrary, the European continent has remained to a large extent unaffected from the impact of right-wing ideology on the choice to vaccinate.⁸¹ Although insignificant, instances of vaccine rejection due to political beliefs have also been detected in Europe.⁸² Scepticism towards vaccination—and on the existence of the pandemic as a whole—has been particularly observed in European countries, such as Italy, paradoxically, one of the most severely affected countries.⁸³ Therefore, to the extent that vaccination resistance stems from one's pursuance of, and association to, a political party, the choice to refuse vaccination is to be considered as a political opinion.

Article 21 CFR prohibits discrimination based on the ground of political or any other opinion. Said ground is absent from Article 1 Directive 2000/78/EC, which solely refers to “religion or belief”. The Treaties are also silent with respect to discrimination on the basis of political or any other opinion. In the absence of EU law implementation, *id est*,

⁷⁹ Don Albrecht, ‘Vaccination, politics, and COVID-19 impacts’ (2022) 22 BMC Public Health 96.

⁸⁰ Matthew Motta, ‘Republicans, Not Democrats, Are More Likely to Endorse Anti-Vaccine Misinformation’ (2021) 49(5) American Politics Research.

⁸¹ Marc Debus, Jale Tosun, ‘Political ideology and vaccination willingness: implications for policy design’ (2021) 54 Policy Sciences 477-491.

⁸² Jeremy K Ward, Caroline Alleaume et al, ‘The French public’s attitudes to a future COVID-19 vaccine: The politicization of a public health issue’ (2020) 256 Social Science & Medicine.

⁸³ Jakub Wondreys, Cas Mudde, ‘Victims of the Pandemic? European Far-Right Parties and COVID-19’ (2022) 50 1 Nationalities Papers 88. *See also*: Aleks Szczerbiak ‘Why is Poland’s ruling party building closer links with right-wing Eurosceptic groups?’ (*LSE Blog*, 6 January 2022)

<<https://blogs.lse.ac.uk/europpblog/2022/01/06/why-is-polands-ruling-party-building-closer-links-with-right-wing-eurosceptic-groups/>> ‘Accessed 11 June 2022’.

if a situation falls outside the scope of EU law, the Charter is inapplicable, and its provisions cannot be invoked. Nonetheless, the CJEU has inaugurated the direct horizontal effect of the prohibition of discrimination, which also stems from Article 21 CFR.⁸⁴ Accordingly, Article 21 CFR can be relied upon as an autonomous ground for review before national courts, in proceedings between private parties.⁸⁵ Hence, it is to be examined whether the dismissal of employees who refuse vaccination on the basis of their political beliefs can be regarded as discriminatory within the meaning of Article 21 CFR.

The CJEU has yet to provide an interpretation as to what constitutes a political opinion. Since the prohibition of discrimination contained in Article 21 CFR corresponds to Article 14 ECHR, the former is to be interpreted in light of the Convention in accordance with Article 52(3) CFR.

According to the ECtHR, political opinions fall under the realm of the freedom of expression.⁸⁶ As such, the ECtHR noted that there is little scope for restrictions on political expression or debate on questions of public interest.⁸⁷ Insofar as the refusal to vaccination can be directly and unequivocally attributable to the partisan of a political party, the latter advocating distrust towards the scientific community, said refusal may amount to a political opinion. As such, the dismissal of employees exhibiting such a political opinion can amount to indirect discrimination. In the depicted scenario, a comparable situation exists between persons adhering to particular, anti-vaccine political ideologies, in contrast to persons who do not. In accordance with Article 10 ECHR, and the corresponding right to free expression found in Article 11 CFR, limitations to the freedom of expression are permissible if compliant with Article 52(1) CFR. Accordingly, limitations must be prescribed by law, ought not to undermine the essence of the right, and respect the principle of proportionality which entails that the limitations may only be made if they are necessary and meet the objectives of general interest recognised by the EU.

It is disputed whether opposition to vaccination stemming from the partisan to a political party could qualify as protected against discrimination within the meaning of

⁸⁴ C-144/04 *Mangold*, ECLI:EU:C:2005:709. See also: C-555/07 *Kukudeveci*, ECLI:EU:C:2010:21.

⁸⁵ Mirjam de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18 MJ 1-2 109-110.

⁸⁶ *Handyside v The United Kingdom* App no 5493/72 (ECtHR 7 December 1976) para 49.

⁸⁷ *Kurski v Poland* App no 26115/10 (ECtHR 5 October 2016) para 47.

the Charter. By virtue of the absence of said ground from the scope of application of Directive 2000/78/EC, the applicability of the Charter is also questionable.

3. Justification for indirect discrimination

Vaccination mandates are prone to produce discrimination on one of the aforementioned grounds: religious beliefs, disability, and political beliefs. Accordingly, the dismissal of employees unable to undergo vaccination, solely by reason of the abovementioned grounds, constitutes less favourable treatment in comparison to employees not pertaining to said characteristics. Therefore, an internal rule asserting the dismissal of each and every unvaccinated employee, constitutes indirect discrimination within the meaning of Directive, Article 2(b). Indirect discrimination is capable of being justified, under the condition that the discriminatory provision is prescribed by law, is objectively justified by a legitimate aim, and the means of achieving said aim are appropriate and necessary.⁸⁸ The Charter tolerates limitations on fundamental rights, insofar as those limitations adhere to the specifications prescribed by Article 52(1) CFR. The latter provides that any limitation on the rights and freedoms contained in the Charter must be provided by law and respects the essence of those rights and freedoms.

3.1. Provided for by law

The first condition for limiting fundamental rights and freedoms as interpreted by the CJEU, dictates that said limitation ought to be provided for by law.⁸⁹ The underlying aim of this requirement is to ensure that limitations on rights are not arbitrary, and are in compliance with the rule of law.⁹⁰ The ECtHR has determined that the limiting legislation ought to be sufficiently precise, and to be adequately accessible and foreseeable, in the sense that citizens are aware of the consequences an action may entail.⁹¹ In contrast, the CJEU has not imposed in its case law requirements of equivalent effect. A quality test, similar to the one practiced by the ECtHR is absent from the fundamental rights jurisprudence of the CJEU.⁹² Pursuant to AG Saugmandsaard Oe, in a case concerning the infringement of the right to respect for private life, any regulation interfering with the rights of the Charter ought to prescribe clear and precise rules

⁸⁸ Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16 Art 2(b)(i).

⁸⁹ C-201/15 *AGET Iraklis*, ECLI:EU:C:2016:972 para 71.

⁹⁰ Tobias Lock 'Article 52 CFR' in Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, (OUP 2019) 2250.

⁹¹ *Sunday Times v UK* App no 6538/74 (ECtHR 26 April 1979) para 49.

⁹² Steve Peers *et al*, *The EU Charter of Fundamental Rights: A Commentary*, (Bloomsbury Publishing Plc 2014) para 52.42.

governing the scope and application of the measure at issue and imposing a minimum of requirements.⁹³

Scholars advocated that the interpretation of the ‘provided for by law’ requirement imposed by the two European Courts differ regarding the source of the impugned law.⁹⁴ On the one hand, non-legislative acts such as judge-made law and executive acts are accepted by the ECtHR as covered under the scope of the legality principle. On the other hand, the scope of the legality principle is narrower in the case law of the CJEU, as it applies solely to acts of the EU and national legislature.⁹⁵

3.2. Legitimate aim

The foundation of emergency measures promulgated during the course of the pandemic, lies in the legitimate aim of protecting the public health.⁹⁶ States are afforded discretion to determine the existence of a public health emergency in their respective territories, on the basis of the ‘best-placed argument’.⁹⁷ Since the spring of 2020, Member States have resorted to emergency legislation, declaring “state of health emergency”, or “state of danger”, on the basis of either their respective constitutional requirements, or under ordinary laws.⁹⁸ Having recourse to the ground of protecting public health serves for fulfilling the first step of the CJEU’s balancing of rights test.

The protection of public health is established as a legitimate aim, employed for the promulgation of laws capable of limiting fundamental rights and freedoms.⁹⁹ The effect of said legitimate ground has been recognised by the Siracusa Principles, which dictate that invoking the ground of public health is permissible insofar as the impugned measures are specifically aimed at preventing disease or injury.¹⁰⁰ The definition of a public health emergency as formulated by the ECtHR is comprised of four elements: first, the emergency must be actual or imminent, second, the effects of the emergency must involve the nation as a whole, third, a threat exists towards the continuation of the

⁹³ Opinion of Advocate General Saugmandsaard Oe C-311/18 ECLI:EU:C:2019:1145 para 263.

⁹⁴ Steve Peers *et al*, *The EU Charter of Fundamental Rights: A Commentary*, (Bloomsbury Publishing Plc 2014) para 52.39.

⁹⁵ *Ibid*.

⁹⁶ European Union Agency for Fundamental Rights, ‘The Coronavirus Pandemic and Fundamental Rights: A Year in Review’ 2021 Publications Office of the EU 13.

⁹⁷ *The Greek Case App nos 3321/67, 3322/67, 3323/67, 3344/67* (ECtHR) para 50.

⁹⁸ European Union Agency for Fundamental Rights, ‘The Coronavirus Pandemic and Fundamental Rights: A Year in Review’ 2021 Publications Office of the EU 9.

⁹⁹ Alessandra Spadaro, ‘COVID-19: Testing the Limits of Human Rights’ (2020) 11(2) *Eur Risk J Regulation* 320.

¹⁰⁰ UNESCO, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 (1984) para 25.

ordinary life of the community, and fourth, the emergency must be exceptional and the established measures stemming from the Convention are inadequate.¹⁰¹ It is acknowledged beyond doubt, that the COVID-19 pandemic constitutes a public health emergency, adversely impacting the health and lives of the whole world population, as well as State organisation and economy.¹⁰² Therefore, State measures such as vaccine mandates are capable of being justified by invoking the legitimate aim of protecting public health. Notwithstanding the acknowledgement of the COVID-19 virus as a public health emergency by the Union, the case law of the CJEU has remained silent thus far as to what constitutes a public health emergency, as said ground has not been invoked by national authorities yet.

Governmental interventions on the ground of public health ought to strike a fair balance between the collective interest to public health vis-à-vis individual rights and freedoms, such as the prohibition of discrimination.¹⁰³ The controversy concerning which rights prevail is particularly relevant regarding vaccination mandates. The imposition of mandatory vaccination serves to protect public health by reducing risk of transmission, and by contributing to the ultimate goal of achieving herd immunity.¹⁰⁴ This is particularly observed in the context of employment, where in the absence of a vaccination certificate, employees are dismissed from workplace. Hence, vaccine mandates implemented for the protection of public health have the effect of depriving citizens of (among others) their right to work. Compulsory vaccination programmes are capable of justification as long as their implementation is intended solely for the protection of public health.¹⁰⁵ States are afforded a wide margin of appreciation in contemplating compulsory vaccination mandates, due to the absence of a European consensus on the matter.¹⁰⁶

¹⁰¹ Christopher Schreuer, 'Derogations of Human Rights in Situations of Public Emergency: The Experience of the European Convention on Human Rights' (1982) 9 Yale J World Pub Ord 125.

¹⁰² WHO, 'COVID-19—Global' (2020)

<<https://www.who.int/emergencies/disease-outbreak-news/item/2020-DON305>> 'Accessed 11 June 2022'.

¹⁰³ Alberto Giubilini, Julian Savulescu, Dominic Wilkinson, 'Which vaccine? The Cost of Religious Freedom in Vaccination Policy' (2021) 18 Bioethical Inquiry 615.

¹⁰⁴ Marko Milanovic, 'The Compatibility of COVID Passes with the Prohibition of Discrimination' (2021) Union Uni L Rev 363.

¹⁰⁵ Dolores Utrilla, 'Op-ed: "It's about proportionality! Strasbourg clarifies human rights standards for compulsory vaccination programmes"' (*EULawLive*, 8 April 2021)

<<https://eulawlive-com.mu.idm.oclc.org/op-ed-its-about-proportionality-strasbourg-clarifies-human-rights-standards-for-compulsory-vaccination-programmes-by-dolores-utrilla/>> 'Accessed 19 May 2022'.

¹⁰⁶ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 203.

3.3. Proportionality –appropriateness and necessity

The question of whether the public health interventions enforced by States are genuinely appropriate and necessary, remains subject to debate. On the one hand, it is advocated that vaccination is not the sole intervention capable of reducing COVID-19 infections. Since vaccination constitutes a medical treatment subject to the consent of the receiver, arguments supporting individualism and self-autonomy, as opposed to collectivism, maintain that vaccination mandates are unnecessary.¹⁰⁷ On the other hand, it is substantiated that vaccination comprises the most powerful and cost-effective means of combatting and preventing communicable diseases.¹⁰⁸

The principle of proportionality applies both for acts of the EU, and acts of the Member States. The proportionality principle dictates that for the attainment of the legitimate objectives pursued, the measures adopted ought to be appropriate, necessary, and the ensuing disadvantages ought not be disproportionate to the aims pursued.¹⁰⁹ In a situation in which numerous options are available to the decision-maker, recourse must be had to the least intrusive means. In accordance with the case law of the CJEU, indirect discrimination is deemed justified, if the legitimate aim pursued by the impugned national law respects the principle of proportionality, by the utilisation of solely the appropriate and necessary means.¹¹⁰ The requirement of necessity entails that the measures in question are first, the only suitable measures for achieving that aim, and second, the measures do not exceed what is strictly necessary for the attainment of the legitimate objective.¹¹¹ This practice emphasises on the reasonableness of the impugned measure, in order to ensure the absence of arbitrariness.¹¹²

Appropriateness relates to the suitability of the measure for the achievement of said objective.¹¹³ The CJEU examination takes under advisement several factors relevant for determining the necessity of the measure in question. For instance, in a case concerning

¹⁰⁷ F.K Cheng, 'Debate on mandatory COVID-19 vaccination' (2022) 21 Ethics, Medicine and Public Health 2.

¹⁰⁸ Dolores Utrilla, 'Compulsory Vaccination and European Law: Balancing Opposing Principles' (2020) 27 EU Law Live 3.

¹⁰⁹ C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, ECLI:EU:C:1990:391 para 13.

¹¹⁰ C-161/18 *Villar Laiz*, ECLI:EU:C:2019:382 para 37.

¹¹¹ C-78/18 *Commission v Hungary*, ECLI:EU:C:2020:476 para 76.

¹¹² Takis Tridimas, 'The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration' (1996) 31 Irish Jurist 86.

¹¹³ Alexia Herwig, Asja Serdarevic, 'Standard of Review for Necessity and Proportionality Analysis in EU and WTO Law: Why Differences in Standards of Review Are Legitimate' in Lukasz Gruszczynski, Wouter Wener (eds) *Deference in International Courts and Tribunals* (OUP 214) 211.

a policy of neutrality towards customers, prohibiting the exhibition of visible signs of religious beliefs in the workplace, the Court had regard to the legitimate wishes of the customers and the adverse consequences stemming from the policy for the employer (instead of the religious persons discriminated against).¹¹⁴ In a case concerning the infringement of the right to property the CJEU considered the particular economic context underlying the legislation at issue, as well as the discretion afforded to Member States when adopting economic decisions.¹¹⁵

Concerning the ensuing disadvantages stemming from the impugned legal act, the Charter does not stipulate a hierarchy of rights; thus, it falls under the responsibility of the CJEU to conduct a balancing exercise between the competing interests.¹¹⁶ In relation to compulsory vaccination for employment, a balancing exercise would commence between the prohibition of discrimination, and the interest of the Member States in protecting public health. In determining the appropriateness of national laws compelling vaccination, it is advocated that said law is only appropriate if vaccination is the sole measure capable of effectively addressing infections and reducing transmissions. Regarding the necessity of vaccination mandates, the existence of less intrusive measures capable of having an equivalent effect would render vaccination mandates unnecessary. In the process of balancing the competing interests, the existence of safeguards would prove of fundamental importance.¹¹⁷ First, the scope of application of the vaccine mandate, i.e., whether the obligation to vaccinate is general and all-encompassing, or whether the obligation is targeted on selected groups of persons or specific workplaces.¹¹⁸ Second, the existence of exemptions for individuals having a qualified interest against vaccination, such as religious exemptions, would entail that the prohibition of discrimination is not infringed.¹¹⁹ Third, the sanctions imposed for the infringement of the mandate ought to be proportional. Fourth, employers should be given the opportunity to consider other alternatives, if possible, such as ordering the unvaccinated employees to work from home, reassignment of duties, or relocation.¹²⁰

¹¹⁴ Joined cases C-804/18 and C-341/19 *IX v WABE*, ECLI:EU:C:2021:594 para 70.

¹¹⁵ C-258/15 *Florescu*, ECLI:EU:C:2017:448 para 57.

¹¹⁶ Allan Rosas, 'Balancing Fundamental Rights in EU Law' (2017) 23 CUP 350.

¹¹⁷ Applying by analogy the reasoning of the CJEU in the case C-493/17 *Weiss*, ECLI:EU:C:2018:1000 para 99.

¹¹⁸ Stefan Braum, 'On the Right to Compulsory Vaccination' (*Verfassungsblog*, 2 February 2022) <<https://verfassungsblog.de/on-the-right-to-compulsory-vaccination/>> 'Accessed 5 March 2022'.

¹¹⁹ Javier Martinez-Torron 'COVID-19 and Religious Freedom: Some Comparative Perspectives' (2021) 10 *Laws* 39.

¹²⁰ Jeff King, Octavio Luiz Motta Ferraz, 'Legal, Constitutional, and Ethical Principles for Mandatory Vaccination Requirements for Covid-19' (*Lex-Atlas*, 1 November 2021) <<https://lexatlas-c19.org/vaccination-principles/>> 'Accessed 18 May 2022'.

Fifth, the vaccination obligation should apply as long as COVID-19 persists to pose an imminent and direct threat to human life. Extending the vaccination requirement after the return to normalcy, would be disproportionate.

The corresponding requirement under the ECtHR case law, referenced as “necessary in a democratic society”, presupposes the existence of a pressing social need deeming the act in question indispensable.¹²¹ In contrast to the CJEU, the ECtHR examines the necessity of a measure by taking into account the European consensus around the topic under scrutiny, in order to determine the margin of appreciation afforded to Contracting Parties.¹²² In addition, the form and aim of the measure play a particular role for establishing its necessity.¹²³ In other cases, the reasons adduced by the national government to justify the interference were of importance for the ECtHR.¹²⁴ Further clarification regarding the matter of compulsory vaccination is offered by the *Vavricka* judgement. First, the ECtHR determined that Contracting Parties are afforded a certain margin of appreciation on matters of health and vaccination policy.¹²⁵ Second, the ECtHR highlighted that national governments are best placed to assess priorities of healthcare policy.¹²⁶ In relation to the existence of a pressing social need, the ECtHR considered the positive obligation of Contracting Parties to safeguard the right to life and health to those within their jurisdiction.¹²⁷ Consequently, the Court ruled that compulsory childhood vaccination can be considered as necessary for the protection of public health.

In light of the *Vavricka* judgement, national vaccination mandates are likely to be considered necessary and appropriate insofar as a pressing social need is present necessitating governmental intervention. Nonetheless, it cannot be deduced whether the CJEU would establish the compatibility of vaccination requirements with the principle of proportionality. On the one hand, it is presumed that vaccination mandates could be considered proportional, in light of the imminent threat posed by the pandemic. On the other hand, the justification of vaccination mandates depends largely on whether the legislator (or the employer) can substantiate their decision in light of objective factors, and whether the ensuing disadvantages on affected individuals are more severe. Consequently, if the employer desires to provide for a healthy and safe work

¹²¹ *Polat v Austria* App no 12886/16 (ECtHR 20 October 2016) para 76.

¹²² *Carlo Boffa and others v San Marino* App no 26536/95 (ECtHR 15 January 1998) para 4.

¹²³ *Ibid.*

¹²⁴ *Kautzor v Germany* App no 23338/09 (ECtHR 22 March 2012) para 64.

¹²⁵ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 273.

¹²⁶ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 274.

¹²⁷ *Ibid* para 282.

environment, protected against COVID-19, vaccination mandates are to be assumed necessary only insofar as the threat of infection is imminent.

IV. Compatibility of Article 206 Law 4820/2021 with the prohibition of discrimination

In September 2021, the ECtHR has rejected a request for interim measures sought by 30 health professionals who complained about Article 206 of the Greek Law before the Court. The applicants claimed that the impugned law violated, among others, the prohibition of discrimination enshrined in Article 14 ECHR. The present section aims to examine the provisions of Article 206 of Law 4820/2021, in order to determine whether it infringes the prohibition of indirect discrimination under EU law, as formulated in both Article 21 CFR and Directive 2000/78/EC, and if any potential infringement is capable of being justified. By virtue of the fact that Article 206 Law 4820/2021 is a neutral provision which applies to all healthcare workers collectively, without differentiating between them, the notion of direct discrimination is irrelevant in this context, and hence, the analysis provided below focuses solely on claims of indirect discrimination.

1. The provisions

Law 4820/2021, promulgated by the Independent Labour Inspection Authority and voted by the Greek Parliament, contains a number of provisions regulating reforms in labour relations. Predominantly, its provisions foster the transposition of Union legislation in the labour area, such as Directive 2019/1158.

Article 206 is placed under ‘Chapter C’, regulating urgent procedures for combatting COVID-19. Paragraph 1a underlines that the mandatory vaccination against COVID-19 requirement within the meaning of the Article, is imposed for the protection of public health. The scope of application of Article 206 is prescribed in paragraph 1. Accordingly, compulsory vaccination applies to all workers in the public or private sector, including facility care units, hospitals, retirement homes, etc. The law includes in its scope interns, visitors, practitioners, and temporary workers.¹²⁸

Article 206 provides a list of exemptions from the vaccination obligation for workers who had transmitted the virus in the last 90 days, and for workers with certain

¹²⁸ Law no 4820 ‘Procedural Law of the Independent Labor Inspection Authority’ 2021 Article 206 para 1.

health conditions, as specified by the Greek National Vaccination Committee.¹²⁹ Workers pertaining to the latter category are obligated to undergo an additional medical examination by an established committee appointed by the National Vaccination Committee.¹³⁰ The list of exemptions as underlined in a separate National Decision foresees as exempted, workers running the risk of anaphylactic shock if vaccinated, workers allergic to vaccine ingredients, workers with thrombosis and specific liver abnormalities. Workers with “such a visible disability which constitutes their vaccination objectively impossible”, for example autism and epilepsy, are automatically exempted.¹³¹ For workers who do not qualify as having a “visible” disability, an additional medical examination is required for their exemption. The Article does not provide for exemptions on the basis of religious beliefs.

In accordance with Article 206(6), employees who do not comply with the vaccination requirements are to be dismissed from employment with no remuneration, until compliance. In the meantime, the employees are not allowed to seek employment in the same sector nor initiate external employment contracts with private employers. The Article foresees burdensome fines ranging from 10.000 euros to 200.000 euros for employers who do not enforce vaccination upon their employees.¹³²

Paragraph 7 of Article 206 grants the Committee of Ministers the discretion to determine by a Ministerial Decision, any additional categories of workers that might be subjected to the vaccination requirement, any additional sanctions, as well as to determine the “procedure and time frame” for vaccination.

2. Indirect discrimination

Indirect discrimination exists in situations in which a person is discriminated against a status which is directly related to the characteristics mentioned in the Charter and the Directive.¹³³ As demonstrated above, COVID-19 vaccination obligations are capable of particularly infringing the protected grounds of religion, disability, and political opinion, as referred to in the Charter. It is to be assessed whether Article 206 is indirectly discriminatory towards workers pertaining to those characteristics.

¹²⁹ Law no 4820 ‘Procedural Law of the Independent Labor Inspection Authority’ 2021 Article 206 para 4.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Law no 4820 ‘Procedural Law of the Independent Labor Inspection Authority’ 2021 Article 206 para 6.

¹³³ C-177/88 *Elisabeth Johanna Pacifica Dekker v VJV Centrum*, ECLI:EU:C:1990:383 para 12.

At the outset, Article 206 constitutes a formally neutral provision, in the sense that it provides a general obligation applicable to all healthcare workers, in both the public and private sector.¹³⁴ The personal scope of the law is underlined in paragraph 3, as applicable to any natural person who provides remunerated or voluntary services, by being physically present to the healthcare institutions. Therefore, Article 206 constitutes an ostensibly, non-discriminatory provision, the scope of application of which does not differentiate between different categories of persons. The following sections aim to establish whether Article 206 produces a differential effect to workers pertaining to one of the protected characteristics of religion, disability, and political opinion.

2.1. Protected characteristic

2.1.1. Religious beliefs

The endorsement of anti-vaccination by the Greek Orthodox Church constitutes a significant reason for vaccine resistance and hesitancy among Greek citizens.¹³⁵ The religious convictions of Greek citizens could be protected under Article 9 ECHR and the corresponding Article 10(1) CFR, if said convictions are of sufficient cogency, seriousness, cohesion, and importance.¹³⁶ Whilst it falls outside the scope of this thesis to examine the cogency of the arguments advocated by the Greek Orthodox Church against COVID-19 vaccination, it is undisputed that a great portion of the Greek population refuses to vaccinate on the basis of their religious beliefs.¹³⁷ The prominence of the Church in Greece is of constitutional significance, as the preamble to the Constitution of Greece, and Article 3 of the Constitution refer to and highlight the relationship between the Greek Orthodox Church and the State.¹³⁸ Infringements to the freedom of religion are prohibited by the Constitution. Pursuant to Article 13 of the Greek Constitution, the freedom of religion is inviolable, and no citizen should be discriminated against and deprived of the enjoyment of their rights on the basis of their religion.

¹³⁴ Law no 4820 ‘Procedural Law of the Independent Labor Inspection Authority’ 2021 Article 206 para 1.

¹³⁵ Nektaria Stamouli, ‘Science vs. religion as Greek priests lead the anti-vax movement’ (*Politico*, 20 July 2021) <<https://www.politico.eu/article/science-vs-religion-greece-priests-anti-vaccine-coronavirus-movement/>> ‘Accessed 10 June 2022’.

¹³⁶ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 335.

¹³⁷ Ioanna Avakian *et al.*, ‘Prevalence and Predictors of COVID-19 Vaccination Acceptance among Greek Health Care Workers and Administrative Officers of Primary Health Care Centers: A Nationwide Study Indicating Aspects for a Role Model (2022) 10 Vaccines 13.

¹³⁸ The Constitution of Greece 1975 (as amended) Article 3.

Notwithstanding the resistance advocated by the Greek Orthodox Church, the Greek Parliament paid no attention to religious considerations and conscientious objections in discussing Article 206 Law 4820/2021.¹³⁹ According to the opinion of Judge Wojtyczek, the existence of religious exemptions from the vaccination mandate constitutes a decisive factor in determining the compatibility of the national mandate with Article 9 ECHR.¹⁴⁰ While the applicants in the *Vavricka* case argued that opposition to vaccination and “parental conscience” in themselves constitute a belief of sufficient cogency, as required by Article 9 ECHR, it has not been examined whether opposition stemming from an established religion, such as the Christian Orthodox Church, is afforded protection under Article 9 ECHR.¹⁴¹ Therefore, the vaccination obligation can lead to the unfavourable treatment of religious observers who refuse COVID-19 vaccination, as opposed to Greek workers who do not observe at all, or to a lesser extent, the convictions of the Greek Orthodox Church. In addition, the Article leads to the unfavourable treatment of observers of religions other than the one endorsed by the Constitution. Hence, it is advocated that Article 206 Law 4820/2021 constitutes indirect discrimination on the grounds of religion, by virtue of the fact that religious observers unable to undergo vaccination against COVID-19, are subject to sanctions and dismissal from employment.

2.1.2. Disability

The Kilkis District Court has dismissed the action brought by a worker, claiming that vaccination would deteriorate her health condition, as the applicant was suffering from adverse medical conditions. The District Court justified its stance towards the applicant by referring to the list of exemptions of Article 206, stating that the list found therein is exhaustive, and hence her claim was manifestly unfounded.¹⁴² It is to be

¹³⁹ Βουλή των Ελλήνων, ‘Οργανικός Νόμος του Ελεγκτικού Συνεδρίου και άλλες ρυθμίσεις’ <https://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=8c3871c1-aa1e-4b13-99b0-ad640152ac3f> ‘Accessed 5 May 2022’.

¹⁴⁰ Dissenting Opinion of Judge Wojtyczek *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 17. See also: Spyridoula Katsoni, ‘How Greece Set the Wrong Example for Compulsory Vaccinations Against COVID-19’ (*OpinioJuris*, 30 November 2021) <<http://opiniojuris.org/2021/11/30/how-greece-set-the-wrong-example-for-compulsory-vaccinations-against-covid-19/>> ‘Accessed 28 January 2022’.

¹⁴¹ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) paras 322-324.

¹⁴² ΤοΒΗΜΑ, ‘Κιλκίς – Δικαστήριο έκρινε συνταγματικό τον υποχρεωτικό εμβολιασμό’ (*ToBHEMA Team*, 21 August 2021) <[https://www.tovima.gr/2021/08/21/society/kilkis-dikastirio-ekrine-syntagmatiko-ton-yποchreotik-o-emboliasmo/](https://www.tovima.gr/2021/08/21/society/kilkis-dikastirio-ekrine-syntagmatiko-ton-yποχρεotik-o-emboliasmo/)> ‘Accessed 9 January 2022’.

examined whether the dismissals of workers with an illness or disability constitute indirect discrimination within the meaning of the Directive. Essentially, illnesses as such do not constitute a ground protected by the Directive.

The District Court judgement proves that the list of exemptions in paragraph 4 Article 206 is exhaustive, and no other legitimate reason for refusing vaccination is accepted. In relation to the ground of disability, the Article refers to “visible disability”, although the term is not explained nor interpreted. It is disputed whether the term conforms with the CJEU definition of disability as a limitation from physical, mental, or psychological impairments and which hinders the participation of the person concerned in professional life.¹⁴³ Although the scope of the disability exemption is vague, it evidently does not cover severe illnesses, as it was the case with the worker before the District Court. A number of illnesses considered sufficiently severe are listed as exemptions. Nonetheless, the fact that an employee was dismissed by virtue of her inability to undergo vaccination due to her illness, proves that workers running the same risk of deteriorating their health condition are not legally protected. In contrast, the German Protection Against Infection Act exempts from the vaccination mandate individuals whose life or health would be endangered if subjected to it.¹⁴⁴

Conclusively, Article 206 does not constitute indirect discrimination within the meaning of the Directive and Article 21 CFR, insofar as it exempts from mandatory vaccination workers who are unable to undergo vaccination on the basis of their disability. By contrast, persons with severe illnesses whose life would be endangered if subjected to vaccination, are not protected from sanctions foresaw by Article 206, nor under the prohibition of discrimination under the Directive and the Charter.

2.1.3. Political opinion

Opposition towards vaccination manifests in Greece through demonstrations and assemblies. Polls have revealed that political extremists belonging to both sides of the political spectrum show the strongest opposition.¹⁴⁵ Such opposition stems from conspiracy theories and vaccination scepticism advocated by both the Greek right-wing

¹⁴³ C-13/05 *Chacon Navas*, ECLI:EU:C:2006:456.

¹⁴⁴ Infektionsschutzgesetz, IfSG Gesetz zur Neuordnung seuchenrechtlicher Vorschriften (Seuchenrechtsneuordnungsgesetz – SeuchRNeuG) of 20 July 2000, section 20(6).

¹⁴⁵ Aleksandar Brezar, ‘How a fake jabs probe highlights Greece’s deep vaccine scepticism’ (*euronews.*, 20 November 2021)

<<https://www.euronews.com/my-europe/2021/11/20/how-a-fake-jabs-probe-highlights-greece-s-deep-vaccine-scepticism>> ‘Accessed 9 January 2022’.

and left-wing parties.¹⁴⁶ To the extent that vaccination refusal stems from the partisan to a political party advocating anti-vaccination, COVID-19 vaccination obligations can be considered as indirectly discriminatory on the basis of political opinion, within the meaning of Article 21 CFR.

Consequently, as the ECtHR has established that political opinions fall under the realm of the freedom of expression, vaccination mandates which do not provide sufficient consideration on the issue are likely to be considered as contrary to Article 10 ECHR, and the corresponding Article 11 CFR.¹⁴⁷ Nonetheless, Article 1 Directive 2000/78/EC does not prescribe said characteristic as one of the grounds of discrimination. In addition, the CJEU has not yet examined whether the ground of having a specific political opinion under Article 21 CFR can be relied upon in horizontal relationships and invoked in private disputes. If that is the case, workers refusing COVID-19 vaccination merely by virtue of their political opinion are subject to indirect discrimination.

To conclude, Article 206 Law 4820/2021 is considered to be in part indirectly discriminatory. On the one hand, the Article provides an exhaustive list of exemptions from the vaccination obligation, for workers having a disability and for workers with the specific health conditions mentioned therein. Hence, it cannot be argued that the provision constitutes indirect discrimination on the ground of disability. On the other hand, the fact that the list of exemptions of Article 206 is exhaustive, precludes workers with a legitimate reason to object to vaccination from protection from dismissal or sanctions. Thus, it is advocated that the provision is indirectly discriminatory on the basis of religion or political opinion, as workers pertaining to one of the latter grounds are treated unfavourably in comparison to workers who do not observe those grounds.

3. Justification for indirect discrimination

Limitations on the fundamental rights prescribed by the Charter are permissible insofar as compliance with the specifications of Article 52(1) CFR is observed. Specifically, limitations ought to respect the principle of proportionality for the pursuit of the objectives of general interest of the Union. To this effect, Directive 2000/78/EC prescribes that indirectly discriminatory provisions can be justified if their imposition is

¹⁴⁶ Fani Papageorgiou, 'Athens diary: anti-vax, non-facts and positive vibes as Greeks ring in the new year' (*Financial Times*, 8 January 2022) <<https://www.ft.com/content/04437c7d-fd27-41b8-9c78-e2b31eab2f6f>> 'Accessed 10 June 2022'.

¹⁴⁷ *Feret v Belgium* App no 15615/07 (ECtHR 16 July 2009) para 63.

necessary for the achievement of a legitimate aim, and where the means of achieving that aim are appropriate and necessary.¹⁴⁸

3.1. Provided for by law

The categories of persons subjected to the mandatory vaccination requirement are specified under Article 206, as well as the type of sanctions for non-compliance. Nonetheless, the Article provides discretion to the Committee of Ministers to decide for the addition of different categories of workers that might be subjected to the vaccination requirement, the addition of more sanctions, as well as changes in the procedure and time frame for vaccination. It is advocated that insofar as the list of sanctions and the categories of workers required to undergo vaccination is not exhaustive, and likely to change, Article 206(7) is capable of leading to legal uncertainty.

It might be the case that the legal basis for the imposition of mandatory COVID-19 vaccination is not sufficiently foreseeable, as additional sanctions for non-compliance can be established and imposed at any point in time. This claim is substantiated with reference to the case law of the ECtHR which dictates that a valid legal basis ought to be sufficiently precise, accessible and foreseeable, meaning that the consequences of non-compliance are well demonstrated by the provision.¹⁴⁹

3.2. Legitimate aim

The preamble to Article 206 states that the vaccination obligation serves the legitimate aim of protecting the public health. Especially in the context of employment, the legitimate aim of the protection of public health and the protection of the rights of others can be invoked in situations where such an interference is capable of enhancing the right to life, instead of lessening it.¹⁵⁰

In the *Vavricka* case, the mere fact that the impugned legislation aimed at the protection against diseases was considered satisfactory for the ECtHR to determine that it pursued the legitimate aim of protecting the public health.¹⁵¹ Thus, there is no indication in Article 206 to suggest that the legitimate aim of public health is inapplicable, and that the measure could have been founded on another aim.

¹⁴⁸ Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303 (Framework Equality Directive) art 2(b)(i).

¹⁴⁹ *Sunday Times v UK* App no 6538/74 (ECtHR 26 April 1979) para 49.

¹⁵⁰ *Jehovah's Witnesses of Moscow and Others v Russia* App no 302/02 (ECtHR 22 November 2010) para 136.

¹⁵¹ *Vavricka and Others v The Czech Republic* App nos 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, 43883/15 (ECtHR 8 April 2021) para 272.

3.3. Proportionality

A proportionality assessment would require the CJEU to commence a balancing exercise between the main competing interests of the case, those being, the prohibition of discrimination and the collective right to public health.¹⁵² While the opinion of scholars on the matter remains divided, literature has revealed a number of pertinent factors to be taken under advisement. Those factors include: the scope of application of the vaccination mandate, the existence of exemptions, the existence of sanctions, the existence of possible alternatives, and the duration of the obligation.¹⁵³

First, Article 206 Law 4820/2021, does not contain an absolute and all-encompassing obligation for all workers; rather, it obliges exclusively workers of the healthcare sector, who come in contact with groups vulnerable to COVID-19. In the absence of a vaccination obligation, the medical conditions of the vulnerable groups would be at a great risk if exposed to a COVID-19 infection. Therefore, the imposition of a mandatory vaccination requirement for healthcare workers constitutes a necessary measure for the protection of public health, and for the protection of the life of others. Second, the exemption list prescribed by the Article signifies the existence of safeguards for workers with a qualified right to refuse vaccination against COVID-19. Nonetheless, it is disputed whether the exemptions of Article 206(4) are sufficient to safeguard all competing rights. While the Article exempts persons with specific medical conditions from the vaccination mandate, the Kilkis District Court case proves the existence of medical conditions which would be exacerbated if vaccinated against COVID-19, which were not considered by the legislator. Furthermore, the high threshold of proving a “such visible disability” is capable of depriving persons with a disability—which is not considerably obvious—of claiming an exemption and consequently, of their right to work. Hence, Article 206 does not provide sufficient safeguards to protect disabled workers. As regards persons pertaining to a religion or adhere to political opinions opposing vaccination, either in general or specifically vaccination against COVID-19, safeguards are non-existent. It can be inferred from the *Vavricka* judgement that the ECtHR has not excluded the possibility that vaccination mandates could infringe Article 9 ECHR.¹⁵⁴ Nonetheless, interferences with the freedom of religion are capable of being

¹⁵² Allan Rosas, ‘Balancing Fundamental Rights in EU Law’ (2017) 23 CUP 350.

¹⁵³ Jeff King, Octavio Luiz Motta Ferraz, ‘Legal, Constitutional, and Ethical Principles for Mandatory Vaccination Requirements for Covid-19’ (2021) Lex-Atlas <<https://lexatlas-c19.org/vaccination-principles/>> ‘Accessed 18 May 2022’.

¹⁵⁴ Spyridoula Katsoni, ‘How Greece Set the Wrong Example for Compulsory Vaccinations Against COVID-19’ (*OpinioJuris*, 30 November 2021)

justified under Article 9 paragraph 2 ECHR. Applying the reasoning of the CJEU in the *Achbita* case, it is presumed that the European Courts, especially in the midst of a pandemic which considerably impacted the health and life of people, would allocate greater consideration for the right to health, and would allow for a temporary limitation on both respective rights, i.e., the freedom of religion and the freedom to hold political opinions as stemming from the freedom of expression. In determining the proportionality, it is necessary to consider the sanctions foreseen by Article 206 Law 4820/2021. Article 206(6) dictates that employees who did not receive a COVID-19 vaccine within the set time frame, are to be suspended without pay from employment until the fulfilment of the vaccination obligation. If a worker denies being subjected to vaccination against COVID-19, the worker is to be dismissed from employment. Furthermore, the paragraph foresees fines ranging from 10.000 euros to 200.000 euros for employers who allow unvaccinated employees to work in their establishment.¹⁵⁵ It is advocated that the sanctions imposed by Article 206 are excessive, especially when considering the particular economic context of Greece, where the unemployment rate is considerably high, and the remuneration is too low.¹⁵⁶ Eventually, the duration of the vaccination mandate is of importance. The necessity doctrine dictates that limitations on fundamental rights ought to stay in place only as long as a direct and imminent threat exists on the value the State seeks to safeguard.¹⁵⁷ Whilst it is stated in Article 206 Law 4820/2021 that the Article in itself was to be reevaluated in October 2021, the vaccination obligation continues to be in place in Greece. In the absence of an amendment to the Law, it seems to be the case that the limitation produced by Article 206 is not of a temporary character. Rather, the limitation on the rights interfered with by the introduction of compulsory vaccination against COVID-19, seems to have become permanent. Hence, it could be assumed that the limitation stemming from Article 206 Law 4820/2021 is to continue to be in force, even if such limitation is no longer necessary.¹⁵⁸

<<http://opiniojuris.org/2021/11/30/how-greece-set-the-wrong-example-for-compulsory-vaccinations-against-covid-19/>> ‘Accessed 28 January 2022’.

¹⁵⁵ Law no 4820 ‘Procedural Law of the Independent Labor Inspection Authority’ 2021 Article 206 para 6.

¹⁵⁶ D. Clark, ‘Unemployment rate in the European Union as of April 2022, by country’ (*Statista*, 2022)

<<https://www.statista.com/statistics/1115276/unemployment-in-europe-by-country/#:~:text=Among%20European%20Union%20countries%20in,in%20Europe%2C%20at%202.4%20percent>> ‘Accessed 9 July 2022’.

¹⁵⁷ *Polat v Austria* App no 12886/16 (ECtHR 20 October 2016) para 76.

¹⁵⁸ No information as to the number of dismissals and number of pending cases.

Consequently, it cannot be established that Article 206 Law 4820/2021 does not unjustifiably limit the right contained in Article 21 CFR and Article 1 Directive 2000/78. While it is of general understanding that the collective right to public health ought to be safeguarded, especially during a pandemic, it is advocated that Article 206 failed to sufficiently consider and safeguard the rights infringed by the introduction of compulsory vaccination. On the one hand, Article 206 aims at protecting the health and life of vulnerable persons, by requiring workers who come in contact with the former, to be protected against a COVID-19 infection. On the other hand, Article 206 is prone to constant amendments by the Ministerial Committee of Greece, which is entitled to adopt additional sanctions and to expand the scope of application of the vaccination requirement. The Article is enforced for an unlimited duration of time, which could be potentially extended after the demise of the direct threat posed by COVID-19. Last, the sanctions foresaw by the Article are excessive, and no alternatives are considered for workers who are truly unable to get vaccinated, but do not pertain to the exemptions listed therein. Workers observing religious beliefs or workers exhibiting strong political opinions against vaccination, are not exempted from the vaccination requirement. Hence, those workers are subjected to indirect discrimination within the meaning of Article 2(b) Directive 2000/78, and Article 21 CFR.

V. Conclusion

The protection of public health has been the main priority of the Member States during the COVID-19 pandemic. To this effect, the introduction of legislation compelling the mandatory vaccination of workers has become the practice in a number of Member States of the EU. Whilst it is acknowledged that mandatory vaccination effectively limits other fundamental rights, said legislation is commonly introduced and justified on the basis of the legitimate aim of protecting the public health. This thesis places the emphasis on the prohibition of discrimination and a number of protected characteristics which are considered likely to be interfered with by compulsory COVID-19 obligations. The choice of examining the protected grounds of religion, disability, and political opinion is mainly based on research revealing that the three aforementioned grounds are the ones mostly invoked by Greek citizens against COVID-19 vaccination. The scope of Directive 2000/78/EC has been examined in order to determine the applicability of the Charter. Hence, it is established that Article 21 CFR is indeed applicable. By examining the case law of the two European Courts regarding the interpretation and scope of application of the affected fundamental rights, the thesis aims at applying those standards to the Greek Article 206 Law 4820/2021.

Consequently, it is argued that the latter fails to adequately accommodate fundamental rights considerations in designating the compulsory COVID-19 vaccination obligation for healthcare workers.

First, arguments of direct discrimination are unfounded insofar as the vaccination obligation is contained in a neutral provision which applies to all employees collectively, without introducing a differentiation. Second, it has been concluded that vaccination mandates are indirectly discriminatory, insofar as workers pertaining to one of the protected interests are treated unfavourably, such as being subjected to dismissals and sanctions, in contrast to workers who do not. As such, it has been assessed whether vaccination obligations are capable of being justified in accordance with the requirements of Article 2(b)(i) Directive 2000/78/EC and Article 21 CFR. For determining the justification of the interference, an examination of the legality principle, the legitimate aim pursued, and the proportionality of the measures was commenced.

The choice of the Greek vaccination obligation against COVID-19 as a case study, revealed that fundamental rights were not observed in the adoption and promulgation of the specific law. Not only the Article was supposed to be of a temporary nature, but is still applicable in Greece, the exemptions provided for by the Article fail to account for religious freedom and the freedom to have and pursue a political opinion. The Kilkis District Court judgement has demonstrated that exemptions from the vaccination obligation are not allowed for workers who can prove their inability to undergo vaccination without endangering their life or health. In addition, the burdensome fines foresaw for non-compliance with the vaccination obligation, and the existence of no alternatives other than dismissal, highlight that the sanctions are disproportionate.

To conclude, the purpose of the present thesis is to examine the extent to which national compulsory COVID-19 vaccination obligations for workers are likely to interfere with the prohibition of discrimination in EU law, and whether such an interference is justified. Due to the existence of literature as regards the infringement of a number of fundamental rights, this thesis chose to tackle the prohibition of discrimination. As such, it might be the case that vaccination mandates are indirectly discriminatory against certain groups of workers. Nonetheless, indirect discrimination in this context can be justified for the legitimate aim of protecting the public health, as the effects of the COVID-19 pandemic on human life and health were formidable.

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