

Headscarves and the CJEU: Protecting fundamental rights and pandering to prejudice, the CJEU does both

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Abstract

The CJEU judgment in the two latest Islamic headscarf cases was handed down in July 2021. The judgment allows employers to ban the wearing of religious and other symbols by employees, but it does specify under what conditions this can be done. This article builds on a previous article on the opinion of AG Rantos and the Shadow Opinion of former AG Sharpston and analyses the judgment in detail. It argues that the judgment is an improvement on the previous CJEU headscarf judgments in that it provides more protection for fundamental human rights. However, the CJEU also appears to allow employers to a certain extent to pander to the prejudicial wishes of their customers. The article concludes that the judgment presents a small glimmer of hope that the CJEU might be moving – albeit very slowly - towards more protection of Muslim women who want to wear headscarves at work for religious reasons.

Keywords

Islamic headscarves, employment, religion or belief discrimination, direct and indirect discrimination, justification

1. Introduction

In an earlier article published in this journal in 2021,¹ the Opinion of Advocate General (AG) Rantos in two cases, referred by German courts, concerning the wearing of Islamic headscarves

1. E. Howard, 'Headscarves and the CJEU: Protecting Fundamental Rights or Pandering to Prejudice', 28 *Maastricht Journal of European and Comparative Law* (2021), p. 648, written and accepted for publication before the CJEU judgment was handed down.

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at work – *IX v. Wabe eV* and *MH Müller Handels GmbH v MJ* – was examined.² The article also analysed the Shadow Opinion of former AG Sharpston in these cases.³ It was argued that the opinion of AG Rantos appeared to give both public and private employers almost carte blanche to adopt neutrality policies in their workplaces based on the wishes (or prejudices) of their customers. This left the Court of Justice of the European Union (CJEU) with two choices: protecting the fundamental rights of employees or allowing employers to pander to prejudice.

The Grand Chamber of the CJEU handed down its judgment in these two joint cases on 15 July 2021,⁴ building on the CJEU's earlier two judgments concerning Muslim women who wanted to wear headscarves at work for religious reasons.⁵ Former AG Sharpston explains that the CJEU joined these two cases and allocated them to the Grand Chamber because the references in *Wabe* and *Müller* showed that the judgment in *Achbita* was unclear and left national courts and employers wondering how it should be applied.⁶ The CJEU judgment in *Wabe and Müller* can be said to explain that, although employers can ban employees from wearing religious, philosophical and political symbols at work, they can only do so under certain conditions specified in the judgment. It will be argued here that the CJEU appears to have done a little of both: on the one hand, it gives more protection to fundamental rights but, on the other hand, it appears to allow employers to pander to the prejudices of customers against employees wearing headscarves for religious reasons. It must be noted that the CJEU comes to different conclusions to AG Rantos on a number of points and that it makes very little reference to the Opinion in its judgment.

This article starts with a short recap of the earlier CJEU judgments in *Achbita* and *Bouagnaoui*, which is followed by a summary of the facts and the questions asked by the referring courts in *Wabe and Müller*. The judgment of the CJEU is then analysed and a number of issues highlighted: the definition of religion or belief in EU law; whether there was direct or indirect discrimination; what needs to be taken into account when assessing whether the latter is objectively justified; and the status of national provisions when these give wider protection.

2. *Achbita and Bouagnaoui*

Achbita, a Muslim woman, worked for G4S as a receptionist who was permanently contracted out to a third party. After she worked for G4S for three years, *Achbita* expressed her wish to wear an Islamic headscarf at work, but was told that she could not do so as this was against the strict neutrality rule which prohibited the wearing of any visible signs of political, philosophical or religious

2. Opinion of AG Rantos in Joined Cases C-804/18 *IX v. Wabe eV* and C-341/19 *MH Müller Handels GmbH v. MJ*, EU: C:2021:144. On these preliminary references see: E. Howard, 'Headscarves Return to the CJEU: Unfinished Business', 27 *Maastricht Journal of European and Comparative Law* (2020), p. 10.

3. The cases were allocated to AG Sharpston in 2019, but after she left office in September 2020, they were reallocated to her successor, AG Rantos. Because the former AG and her team had already done much of the work for the opinion, she wrote a Shadow Opinion to contribute to the debate in this area, see: E. Sharpston, 'Shadow Opinion of Former Advocate General Sharpston: Headscarves at Work (Cases C-804/18 and C-341/19)', *EU Law Analysis*, 23 March 2021, <http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html>.

4. Joined Cases C-804/18 *IX v. Wabe eV*. and C-341/19 *MH Müller Handels GmbH v. MJ*, EU:C:2021:594. See on these cases also: E. Howard, 'Headscarf Wearing Employees and the CJEU: What Employers Can or Cannot Do' *ERA Forum* (published online 22 September 2021).

5. Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4S Secure Solutions NV*, EU:C:2017:203; Case C-188/15 *Asma Bouagnaoui, Association de Défense des Droits de l'Homme (ADDH) v. Micropole Univers SA*, EU:C:2017:204.

6. E. Sharpston, *EU Law Analysis* (2021), para. 79.

beliefs in the workplace. When she refused to remove her headscarf, she was dismissed. Bougnaoui was a design engineer who sometimes went out to work at customers' sites and wore an Islamic headscarf for religious reasons. After a member of staff of one client complained about this, she was told to remove the headscarf whenever she was visiting clients. She was also dismissed when she refused to do so. Both employees challenged this as religion or belief discrimination. These cases presented the first opportunity for the CJEU to interpret Directive 2000/78/EC⁷ in relation to discrimination on the ground of religion or belief.⁸

In *Achbita*, the referring court asked whether Achbita's dismissal constituted direct religion or belief discrimination against Article 2(2)(a) of Directive 2000/78/EC, which defines direct discrimination as occurring where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on, in this case, the ground of religion or belief. The Grand Chamber of the CJEU held that there was no direct discrimination because the internal rule referred 'to the wearing of visible signs of political, philosophical or religious beliefs' and thus covered 'any manifestation of such beliefs without distinction'. The rule treated all workers the same and there was no evidence that it was applied differently to Achbita.⁹

The CJEU held that it was for the national court to decide whether there was direct or indirect discrimination, but it gave guidance on the interpretation of indirect discrimination and objective justification. According to Article 2(2)(b) of Directive 2000/78/EC, indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular protected ground of discrimination at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Indirect discrimination is thus not unlawful if it is objective justified. In contrast, direct discrimination can generally not be justified except in limited circumstances expressly laid down by law.

In *Achbita*, the CJEU also concluded that a workplace neutrality policy was a legitimate aim as it was part of the freedom to conduct a business, guaranteed by Article 16 of the Charter of Fundamental Rights of the European Union (the Charter).¹⁰ The CJEU did not really explain any further why neutrality must be considered as a legitimate aim, especially considering that the employers in both *Achbita* and *Bougnaoui*, and also in *Wabe and Müller*, were private employers, not public authorities: it can be argued that a duty to show a neutral image might be more acceptable for employees in public employment where it could affect the neutrality of the state.¹¹

Further, the CJEU, in *Achbita*, held that a ban on the wearing of visible political, philosophical or religious signs was appropriate to achieve the aim of the employer's policy of neutrality as long as that policy was 'genuinely pursued in a consistent and systematic manner' and was limited to what is strictly necessary. The latter would be the case if the employer's neutrality policy covered only those workers who interacted with customers and as long as the employer had considered whether

7. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. This Directive covers discrimination on the grounds of disability, religion or belief, age and sexual orientation.

8. For an analysis of these cases and the critique raised against the judgments see E. Howard, 'Islamic Head Scarves and the CJEU: *Achbita* and *Bougnaoui*', 24 *Maastricht Journal of European and Comparative Law* (2017), p. 348.

9. Case C-157/15 *Achbita*, para. 30.

10. *Ibid.*, para. 37.

11. See: E. Howard, 27 *MJECL* (2020), p. 12; E. Howard, 24 *MJECL* (2017), p. 356, and the literature referred to there; E. Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf bans? *Achbita* and *Bougnaoui*', 55 *Common Market Law Review* (2018), p. 613; E. Sharpston, *EU Law Analysis* (2021), para. 53.

the employee could be moved to a job without contact with customers.¹² This suggests that it would be acceptable for both public and private employers to ban headscarf-wearing workers to the back office where they could not offend or upset customers. This was criticized because it leaves a large group of workers exposed to the negative effects of a ban on the wearing of religious symbols at work, severely affecting their employment prospects, and this does not promote equality for minority groups who are often already vulnerable to discrimination.¹³

In *Boungaoui*, the CJEU held that the wish of a customer not to be served by someone wearing a headscarf was not a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC because such a requirement must be objectively dictated by the nature of the occupational activities concerned, or by the context in which they are carried out, not by subjective considerations.¹⁴ This appears to be the right decision because it is hard to argue that the wearing of a headscarf affected Boungaoui's ability to do her job as design engineer.¹⁵ However, it can be argued that there is a tension between the judgment in *Boungaoui* and the acceptance, in *Achbita*, that a neutrality policy can be a legitimate aim. Is such a policy not specifically created because of the real or anticipated wishes of customers?¹⁶

3. Facts and referred questions

In *Wabe*, IX worked as a special needs carer in one of the nurseries run by Wabe. After her return from parental leave, she was asked to no longer wear her headscarf at work. During her leave, Wabe had introduced a neutrality policy prohibiting employees from wearing any visible signs of political, ideological or religious beliefs. This did not apply to those employees who did not come into contact with customers, but IX had contact with the children and their parents. IX had worn the headscarf for about nine months before she went on parental leave without any objections from her employer. She refused to remove her headscarf and, after two official warnings, was released from work. Wabe had also required another female employee to remove a cross she wore around her neck. IX challenged her treatment: as direct religion or belief discrimination because the rule directly targeted the wearing of the Islamic headscarf; as gender discrimination, as the neutrality rule exclusively affected women; and as ethnic origin discrimination, because the rule had a greater impact on women with migration backgrounds.¹⁷

The referring court asked the CJEU: does Wabe's neutrality policy constitute direct religion or belief discrimination against workers who wear certain items of clothing for religious reasons; does it amount to indirect discrimination on the grounds of religion and/or gender of a worker who wears a headscarf for religious reasons; and, if it constitutes indirect religion and/or gender discrimination, can such discrimination be justified by an employer's subjective wish to pursue a policy of political, ideological and religious neutrality even where the employer thereby seeks to meet the subjective wishes of its customers? Because the German Constitution provides that an employer's wish to

12. Case C-157/15 *Achbita*, para. 40.

13. T. Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to go After *Achbita* and *Boungaoui*?', 10, *Review of European Administrative Law* (2017), p. 67; L. Vickers, '*Achbita* and *Boungaoui*: One Step Forward and Two Steps Back for Religious Diversity in the Workplace', 8 *European Labour Law Journal* (2017), p. 252; E. Relano Pastor, 'Religious Discrimination in the Workplace: *Achbita* and *Boungaoui*', in U. Belavusau and K. Henrard (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing, 2018), p. 197; E. Howard, 28 *MJECL* (2021), p. 8.

14. Case C-188/15 *Boungaoui*, para. 40.

15. T. Loenen, 10 *Review of European Administrative Law* (2017), p. 64.

16. See: E. Howard, 24 *MJECL* (2017), p. 364 and the literature referred to there.

17. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 30.

pursue a policy of religious neutrality towards its customers, which restricts an employee's right to freedom of religion, is, in principle, legitimate only if the company suffers economic harm if such neutrality did not exist, the referring court asked, in question 2b, whether these national (constitutional) rules could be seen as a more favourable provision under Article 8(1) of Directive 2000/78/EC or whether the Directive and Article 16 of the Charter prevented this.¹⁸

MJ, a Muslim employee of *Müller*, a company which runs a number of chemist shops, started wearing a headscarf for religious reasons when she returned from parental leave in 2014. She had worked for *Müller* since 2002 without wearing a headscarf. She was asked to remove her headscarf because this was against the company policy which prohibited the wearing of any prominent and large-scale signs of religious, philosophical and political convictions. This company policy applied to all shops and aimed to preserve neutrality and avoid conflicts between employees, because conflicts had happened in the past. For a while, MJ carried out a different activity for which she did not have to remove her headscarf, but in 2016 she was instructed to come to work without the headscarf. After twice refusing to do so, she was sent home. MJ challenged this, invoking her right to freedom of religion.¹⁹

The referring court asked the CJEU whether indirect discrimination on the ground of religion can be justified only by a rule which prohibits all visible signs of religious, political or other philosophical beliefs rather than just those which are prominent and large-sized. If the answer to this question was negative, the second question was whether the right to freedom of religion as guaranteed in Article 10 of the Charter and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) should be taken into account in determining justification. The last question was similar to the last question in *Wabe* regarding more favourable national constitutional provisions.²⁰

4. CJEU judgment

A. Definitions

The judgment of the CJEU in *Wabe and Müller* begins with explaining how religion or belief in Directive 2000/78/EC must be interpreted. First, and following its judgments in *Achbita* and *Bougnaoui*,²¹ the CJEU accepts that the wearing of an Islamic headscarf is a manifestation of the wearer's religion or belief, covered by the concept of religion in the Directive and by the freedom of religion guaranteed in Article 10 of the Charter.²² Second, the CJEU points out that 'religion or belief' as a discrimination ground must be interpreted widely to cover both religious beliefs and philosophical or spiritual beliefs and that the term must be interpreted in accordance with Article 10 of the Charter and Article 9 ECHR.²³ Third, the CJEU states that the prohibition of religion or belief discrimination in Directive 2000/78/EC is not limited to differences in treatment between persons having a particular religion or belief and those who do not; and that the less favourable treatment must be experienced as a result of the religion or belief.²⁴ This suggests that

18. *Ibid.*, para. 34.

19. *Ibid.*, para. 35.

20. *Ibid.*, para. 42.

21. Case C-157/15 *Achbita*; Case C-188/15 *Bougnaoui*.

22. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 45.

23. *Ibid.*, para. 47.

24. *Ibid.*, para. 49. The CJEU refers to Case C-16/19 *VL v. Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* EU:C:2021:64, para. 29.

discrimination between people with a certain belief and those with another belief is also covered by the Directive. In other words, prohibiting Muslim headscarves but allowing Sikh turbans, Jewish skullcaps and Christian crosses would constitute religion or belief discrimination against Muslims. This would be experienced as a result of the individual's religion or belief and thus amount to direct discrimination. The guidelines accompanying the neutrality policy in *Wabe* show an awareness of this as they explained that the policy meant that the wearing of Christian crosses, Jewish skullcaps and Muslim headscarves was not allowed.²⁵

B. Direct or indirect discrimination

The referring court in *Wabe* considered that the treatment of IX, as a result of her refusal to remove her Islamic headscarf, may have been direct discrimination against Directive 2000/78/EC because of the connection between the unfavourable treatment suffered by IX and the protected characteristic of religion.²⁶ However, the referring court in *Müller* held that there was indirect discrimination in that case.²⁷

The CJEU comes to the opposite conclusion in both cases. Following its judgment in *Achbita*,²⁸ it holds that the neutrality rule in *Wabe* does not constitute direct religion or belief discrimination under Article 2(2)(a) of Directive 2000/78/EC as long as it covers any manifestation of such beliefs without distinction and treats all workers of the undertaking in the same way. Such a rule is not, according to the CJEU, inextricably linked to religion or belief.²⁹ The CJEU recognizes that the application of such a neutrality rule can cause particular inconvenience for those workers who observe religious precepts requiring certain clothing to be worn, but this does not mean that there is a difference in treatment inextricably linked to religion or belief.³⁰ According to the CJEU, IX was not treated differently in comparison with any other employee and, thus, there is no direct discrimination. However, it stated that it is up to the referring court to make the necessary factual assessment and to determine whether the internal rule adopted by *Wabe* was applied in a general and undifferentiated way to all workers.³¹

In contrast, the CJEU holds that the neutrality rule in *Müller* constitutes direct religion or belief discrimination because it only prohibits the wearing of conspicuous, large-scale signs and this means that some workers will be treated less favourably than others on the basis of their religion or belief.³² The CJEU refers to the observation of the European Commission that the rule in this case 'is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering'.³³ This suggests that the CJEU (and the Commission) sees an Islamic headscarf as a conspicuous and large-scale sign of the wearer's religion or belief. AG Rantos concluded that the neutrality in *Müller* amounted

25. Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 22.

26. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 32.

27. *Ibid.*, para. 39.

28. Case C-157/15 *Achbita*.

29. *Ibid.*, para. 52.

30. *Ibid.*, para. 53. The CJEU refers to AG Rantos here, who comes to this same conclusion: Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 54.

31. Joint cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 54.

32. *Ibid.*, para. 73.

33. *Ibid.*, para. 72.

to indirect discrimination, but he also expressed his view that an Islamic headscarf is not a small-scale religious symbol.³⁴

However, it can also be questioned whether this is not inconsistent with the conclusion in *Wabe* that there is no direct discrimination in that case: the neutrality rule there can also be said to be liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of particular symbols than on those without a religion or those whose religion does not prescribe the wearing of certain symbols.³⁵ As van den Brink writes: 'If the CJEU is of the view that a policy amounts to direct discrimination if it is liable to have a greater effect on some religious people, one has to wonder why it does not classify all neutrality policies as directly discriminatory'.³⁶

The judgment in *Achbita*³⁷ that there was no direct discrimination was criticized in the literature and many authors have argued that the neutrality rule in that case constituted direct discrimination.³⁸ This would apply in the same way to *Wabe*'s neutrality policy.³⁹ However, it must be noted that opinions on whether there was (in *Achbita* and in *Wabe*) direct or indirect discrimination were divided.⁴⁰ In her analysis of *Wabe and Müller*, Vickers writes that the position that a generally applicable neutrality-based dress code is not direct discrimination is uncontroversial: 'the application of a neutral rule which has differential impact on different groups, is, after, all the archetype of indirect discrimination'.⁴¹

However, for a number of reasons, it is argued here that neutrality policies like those applying in *Achbita* and *Wabe* as well as the one applicable in *Müller*, all amount to direct discrimination. First, the CJEU argued that there was direct discrimination in *Müller*, because the unequal treatment resulting from the neutrality rule in that case was inextricably linked to the protected ground of religion or belief and this meant that some workers would be treated less favourably than others on the basis of their religion or belief. In relation to this, the CJEU referred to the observation of the EU Commission that the rule in that case 'is liable to have a greater effect' on certain religious people.⁴² As mentioned above, all this can be equally applied to the neutrality rules in *Wabe* and *Achbita*.

Second, the CJEU pointed out that the prohibition of religion or belief discrimination in Directive 2000/78/EC is not limited to differences in treatment between persons having a particular religion or belief and those who do not, as mentioned above.⁴³ This is what former AG Sharpston, in her Shadow Opinion on *Wabe and Müller*, applies where she writes that the neutrality policies in both these cases very likely constitute direct discrimination: the rule in *Wabe* discriminates between religious groups who consider themselves mandated by their religion to wear certain clothing in

34. Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 76.

35. Van den Brink argues the same, see: M. van den Brink, 'Pride or Prejudice?: The CJEU Judgment in IX v Wabe and MH Müller Handels GmbH', *Verfassungsblog*, 20 July 2021, <https://verfassungsblog.de/pride-or-prejudice/>.

36. *Ibid.*

37. Case C-157/15 *Achbita*.

38. See E. Howard, 24 *MJECL* (2017), p. 351; E. Howard, 27 *MJECL* (2020), p. 15, and the literature referred to there; J. Weiler, 'Je Suis Achbita!', 15 *International Journal of Constitutional Law* (2017), p. 894; E. Cloots, 55 *CMLR* (2018), p. 611.

39. E. Howard, 28 *MJICL* (2021), p. 5.

40. E. Howard, 24 *MJECL* (2017), p. 351.

41. L. Vickers, 'Religious Discrimination and Headscarves – Take Two', *Oxford Human Rights Hub*, 29 July 2021, <https://ohrh.law.ox.ac.uk/religious-discrimination-and-headscarves-take-two/>.

42. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 72.

43. *Ibid.*, para. 49.

comparison with members of religions who do not mandate specific apparel and with employees who do not have a religion. A partial ban, like the rule in *Müller*, discriminates between religions.⁴⁴

Third, further support for accepting that all these neutrality policies amount to direct discrimination can also be found in the CJEU's own case law. In *Feryn*, a statement by an employer that they would not employ 'immigrants' because their customers did not want to give them access to their private residences, was held to amount to direct racial or ethnic origin discrimination under Directive 2000/43/EC.⁴⁵ The CJEU considered that such a statement was likely to dissuade some candidates from applying.⁴⁶ Following this, the neutrality policies in *Achbita* and in *Wabe and Müller* would also amount to direct discrimination, because it would dissuade some candidates from applying to these employers.

Fourth, in *Chez*, the CJEU held that a practice constitutes direct discrimination if the protected discrimination ground determined the decision for the discriminatory treatment or if a measure was introduced and/or maintained for reasons relating to a protected discrimination ground.⁴⁷ The referring court in *Wabe* mentioned *Chez* and argued that *Wabe's* neutrality policy explicitly referred to the characteristic of religion by prohibiting religious signs. The employee would have been treated differently if she had not been religious and had not wanted to express her religion or if she had wanted to wear a headscarf not for religious reasons but for reasons of fashion. Thus, according to the referring court, the neutrality policy had an explicitly negative effect linked to the characteristic of religion and constituted direct discrimination.⁴⁸

A fifth argument supporting a finding that the neutrality policies in *Achbita* and *Wabe and Müller* constitute direct discrimination is that the CJEU, in *Chez*, explicitly expressed that the fact that a practice was based on stereotypes and prejudice should be taken into account when deciding whether that practice amounted to direct discrimination.⁴⁹ It can be asked whether, in all the CJEU headscarf cases, the wish of the employer to have a strict policy of neutrality is not based on the prejudicial views of their customers towards Muslims and specifically towards Muslim women wearing headscarves? The CJEU acknowledged this in *Bouagnaoui*, but it did not consider this in *Achbita*,⁵⁰ despite AG Kokott, in her opinion in *Achbita*, recognizing that, if a neutrality policy was based on stereotypes and prejudice against one religion or against religions in general, then it would constitute direct discrimination.⁵¹ The CJEU should have at least examined whether stereotypes and prejudice were involved in *Achbita*, *Bouagnaoui* and *Wabe and Müller*, not

44. E. Sharpston, *EU Law Analysis* (2021), para. 122.

45. Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. The definition of direct discrimination in this Directive is the same as the definition in Article 2(2)(a) of Directive 2000/78/EC.

46. Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, EU:C:2008:397, para. 23.

47. Case C-83/14 *Chez Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, EU:C:2015:480, para. 76.

48. Arbeitsgericht Hamburg 8. Kammer, EUGH-Vorlage vom 21.11.2018, 8 CA 123/18, para. 78 (in German), <http://www.rechtsprechung-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE190001061&st=ent> (in German). See also E. Howard, 27 *MJECL* (2020), p. 16.

49. Case C-83/14 *Chez*, para. 82. See also: E. Howard, 24 *MJECL* (2017), p. 353; E. Sharpston, *EU Law Analysis* (2021), footnote 208.

50. Case C-157/15 *Achbita*; see: E. Howard, 24 *MJECL* (2017), p. 353, E. Cloots, 55 *CMLR* (2018), p. 611.

51. Opinion of AG Kokott in Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4S Secure Solutions NV*, EU:C:2016:382, para. 55. Kokott concluded that there was nothing to indicate that this was the case. Many commentators did not agree with this conclusion, see E. Howard, 24 *MJECL* (2017), p. 353 and the authors referred to there; E. Cloots, 55 *CMLR* (2018), p. 611.

only because of ‘the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress’;⁵² but also because anti-discrimination law, including Directive 2000/78/EC, intends to combat prejudice and bigotry, as Weiler points out.⁵³ He also writes:

Some of our customers don’t want to be served by a Jewess; some don’t want to be served by a Muslim. Let’s call it neutrality and either fire those employees or hide them in the back office. Not a particularly appealing way for our society, in whose name the Directive was enacted, to combat the prejudice which feeds – and in this case even results – in discrimination as well as exclusion.

It must be noted that the CJEU will get another chance to examine whether an employer’s neutrality policy banning a female worker from wearing a headscarf at work constitutes direct or indirect discrimination in *LF v. SCRL*, where the questions referred explicitly mention direct discrimination and a number of different comparators for a female worker who wears a headscarf for religious reasons. The Belgian referring court asks whether there is direct discrimination if a female worker is treated less favourably than: another worker who adheres to no religion, has no philosophical beliefs and no political allegiance and who, therefore, harbours no need to wear any political, philosophical or religious sign; another worker who holds any philosophical or political beliefs but whose need to display them publicly by wearing a sign is less, or even non-existent; another worker who adheres to another or the same religion, but whose need to display it publicly by wearing a sign is less, or even non-existent; another worker who holds beliefs other than religious, philosophical or political beliefs, and who manifests them through clothing, given that beliefs are not necessarily religious, philosophical or political and that they may be of another kind (artistic, aesthetic, sporting, musical, etc.); and another worker with the same beliefs who chooses to manifest them by wearing a beard (which is not specifically prohibited by the terms of employment, unlike manifestation through clothing).⁵⁴

The CJEU will thus have to consider again the question whether employers’ neutrality policies amount to direct religion or belief discrimination. But the referring court also raises a new issue: does a female worker who wears a headscarf for religious reasons have to reveal her religion to her employer, as the headscarf in itself is not an unambiguous symbol: another female worker might wear it for aesthetic, cultural or even health reasons and it is not necessarily distinguishable from a simple bandana? And, if she does need to reveal it, would this not be an infringement of the negative aspect of her freedom to manifest religious beliefs under Article 9(1) ECHR? The referring court mentions that ‘unless prejudice is prevalent, the religious significance of a headscarf is not manifest and, more often than not, can only be brought to light if the person who is wearing it is required, if only implicitly, to reveal her reasons to her employer’.⁵⁵

52. E. Brems, ‘European Court of Justice Allows Bans on Religious Dress in the Workplace’, *Blog of the IACL, AIDC* 26 March 2017, <https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace>, writing about *Achbita* and *Bouagnaoui*. The judgment in *Wabe and Müller* has also been said to fuel Islamophobia, see: B. Waterfield, ‘Hijab Can Be Banned at Work, Rules EU Court’, *The Times*, 15 July 2021, <https://www.thetimes.co.uk/article/hijab-can-be-banned-at-work-rules-eu-court-g8px0mlms>; A. Rettman, ‘EU Court Gives Green Light to Headscarf Bans’, *EU Observer*, 16 July 2021, <https://euobserver.com/democracy/152467>.

53. J. Weiler, 15 *International Journal of Constitutional Law* (2017), p. 894.

54. Case C-344/20 *LF v. SCRL*, preliminary reference.

55. *Ibid.*

C. Gender and/or ethnic origin discrimination

It is disappointing that the CJEU does not engage in any meaningful way with the argument of the referring court in *Wabe*, that there is indirect discrimination on the ground of gender. It makes clear that it is up to the national court to verify whether the conditions for indirect discrimination in Article 2(2)(b) of Directive 2000/78/EC are fulfilled. It then repeats the statement of the same referring court that the neutrality rule in that case concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith. Based on this statement, the CJEU starts from the premise that *Wabe*'s neutrality policy constitutes a difference of treatment indirectly based on religion.⁵⁶ However, why only on the ground of religion? If a rule statistically concerns almost exclusively female workers, then that would clearly constitute indirect gender discrimination as it put persons of one sex (in this case females) at a particular disadvantage compared with persons of the opposite sex.⁵⁷ In fact, a statistical difference between men and women is the classic example of indirect gender discrimination. It has also been argued that bans on the wearing of religious clothing and symbols generally affect women more than men.⁵⁸ It is submitted that the CJEU, for these reasons, should have examined whether there was indirect gender discrimination and whether there was an objective justification for this.

Instead, the CJEU refers to the Opinion of AG Rantos and concludes, like the AG does, that gender discrimination does not fall within the scope of Directive 2000/78/EC, and, as that is the only EU law measure to which this question relates, it finds that it is not necessary to examine whether there is gender discrimination.⁵⁹ It is argued that the CJEU could have (and should have) examined whether there was gender discrimination and whether this was justified, as it is settled case law that it may provide guidance on the interpretation of provisions of EU law whether or not the referring court mentions these in its questions, as the CJEU itself pointed out in *Achbita*.⁶⁰ It might be prudent for future applicants to challenge workplace neutrality policies in national courts explicitly as gender discrimination under Directive 2006/54/EC⁶¹ as well as religion or belief discrimination under Directive 2000/78/EC. A challenge for racial or ethnic origin discrimination under Directive 2000/43/EC might also be possible, as the ban affects mainly women with a migrant background, as IX pointed out in *Wabe*.⁶²

Former AG Sharpston points out that there could be triple discrimination: discrimination on the grounds of gender, religion and ethnic origin, but that this is for the national court to investigate.⁶³ It is submitted that national courts should examine the facts regarding all possible grounds of

56. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 59.

57. See: Case C-170/84 *Bilka Kaufhaus v. Karin Weber von Harz*, EU:C:1986:204, para. 31.

58. A. Blair, 'Case Commentary: *R (SB) v Headteacher and Governors of Denbigh High School* – Human Rights and Religious Dress in Schools', 17 *Child and Family Law Quarterly* (2005), p. 411; A. McColgan, 'Class Wars? Religion and (In)equality in the Workplace', 38 *Industrial Law Journal* (2009), p. 18; T. Loenen, 10 *Review of European Administrative Law* (2017), p. 67.

59. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller* para. 58, referring to Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 59.

60. Case C-157/15 *Achbita*, para. 33.

61. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204, 23. This Directive prohibits gender discrimination in employment.

62. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 30.

63. E. Sharpston, *EU Law Analysis* (2021), para. 267, and footnote 239. The argument has also been put forward in academic literature, see the authors referred to in E. Howard, 27 *MJECL* (2020), footnote 45.

discrimination and should mention all EU legislation against these forms of discrimination when referring questions to the CJEU. This would force the CJEU to examine the issue of possible gender and racial or ethnic origin discrimination. The preliminary reference in *LF v. SCRL* mentions comparators for a female worker, but the referred questions do not mention gender discrimination, despite the fact that the applicant claimed direct or indirect discrimination on the grounds of religion or belief and gender/sex.⁶⁴ Claiming indirect gender and racial or ethnic origin discrimination as well as indirect religion or belief discrimination is important because, based on the CJEU judgments in *Achbita* and *Wabe and Müller* and the case law on gender and racial or ethnic origin discrimination, the CJEU appears to apply a less strict justification and proportionality test in cases of indirect religion or belief discrimination than it does in cases of indirect discrimination because of gender and racial or ethnic origin or other grounds of discrimination covered by EU anti-discrimination law. This is further examined after the analysis of the judgment in *Wabe and Müller* regarding this justification test.

D. Justification of indirect discrimination – legitimate aim

Although the CJEU does not really engage with the issue of gender discrimination, it does examine the issue of objective justification in relation to religion or belief discrimination extensively. However, the CJEU can be criticized for the way it applies the justification test in relation to both the legitimate aim and the appropriate and necessary means. The CJEU follows its own judgment in *Achbita*⁶⁵ and holds that an employer's desire to display, 'in relations with both public- and private-sector customers', a policy of political, philosophical or religious neutrality is a legitimate aim and is covered by the freedom to conduct a business in Article 16 of the Charter, particularly if it only applies to workers who come into contact with customers.⁶⁶ As in *Achbita*, the CJEU does not further explain why a neutrality policy is a legitimate aim, nor does it differentiate between public and private employers, something it was, as mentioned above, also criticized for in *Achbita* and *Bouagnaoui*. The CJEU then goes beyond what was held in *Achbita*, in that it qualifies its statement on the legitimate aim by determining that the mere desire of an employer to pursue a policy of neutrality is not sufficient to justify indirect religion or belief discrimination and that the employer must demonstrate that there is a genuine need for such a policy.⁶⁷ In other words, if the employer cannot show that there is a genuine need for a neutrality policy, such a policy will not be seen as a legitimate aim for justification.

In establishing that there is a 'genuine need', the rights and legitimate wishes of customers or users must be taken into account, according to the CJEU. As an example of such rights and wishes it refers to the rights of parents, recognized by Article 14(3) of the Charter, to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs or their wish to have their children supervised by persons who do not manifest their religion or belief.⁶⁸ The CJEU distinguishes this from the situation in *Bouagnaoui*,⁶⁹ where the

64. Case C-344/20 *LF v. SCRL*, preliminary reference.

65. Case C-157/15 *Achbita*.

66. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 63.

67. *Ibid.*, para. 64.

68. *Ibid.*, para. 65. The CJEU follows AG Rantos's opinion although it does not refer to this, see: Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 65.

69. Case C-188/15 *Bouagnaoui*.

employee was dismissed following a complaint by a customer and in the absence of a general ban on all visible signs of political, philosophical and religious beliefs; and from the situation in *Feryn*,⁷⁰ where direct racial discrimination arose from the discriminatory requirements of customers.⁷¹ However, it can be questioned whether taking account of the wishes of customers in *Wabe and Müller* is so different from what happened in *Bouagnaoui* and *Feryn*? Is the CJEU suggesting that, if there had been a general ban on the wearing of all visible signs of religion or belief in *Bouagnaoui*, then the wish of a staff member of a customer would have been sufficient to justify the dismissal? And what is the difference between customers in *Feryn* not wanting to have the work on their premises done by immigrants and customers in *Wabe and Müller* not wanting the service provided by people expressing their belief by wearing an Islamic headscarf? Van den Brink writes in relation to the latter judgment that ‘whether it should be acceptable to accommodate discriminatory customer wishes is not a question the CJEU seems to find relevant’.⁷² In *Feryn*, the discriminatory wishes of customers against ethnic minorities were not accepted and led to a finding of direct discrimination, so why are these wishes accepted here? It is also highly unlikely that the CJEU would accept customers wishes not to be served by, for example, a disabled person as justifying disability discrimination, so, again, why allow it for religion or belief discrimination? As Cloots writes, ‘it would defeat the very purpose of discrimination law if individual employers were permitted to invoke customer pressure to legitimize an interference with their anti-discrimination duties’.⁷³ Allowing customer wishes to play a role in establishing a legitimate aim for indirect religion or belief discrimination would not only do just that, but it would also mean that the protection against this form of discrimination is weaker than the protection against discrimination on the other grounds covered by EU law. It can also be argued that Article 16 of the Charter should not be applied in cases of religion or belief discrimination at all, as it is not applied in cases concerning discrimination on other prohibited grounds of discrimination.

E. Justification of indirect discrimination – appropriate and necessary means

In relation to the genuine need, the CJEU also holds that the employer must prove that, without a neutrality policy, they would suffer adverse consequences given the nature of their activities or the context in which they are carried out.⁷⁴ Therefore, the burden of proof of the genuine need is on the employer. This goes beyond establishing a legitimate aim and moves on to the second part of the justification test for indirect discrimination: whether appropriate and necessary means are used to achieve this aim, as this includes proving that the neutrality policy is properly applied and pursued in a consistent and systematic manner and that it is limited to what is strictly necessary. The CJEU explains that the employer must ascertain whether, in the case of a restriction on the freedom of religion in the form of prohibiting a worker from observing a religious precept requiring them to wear a visible sign of their religious beliefs, that restriction appears strictly necessary in view of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.⁷⁵ Therefore, according to the CJEU, the employer must do a balancing exercise: the interests

70. Case C-54/07 *Feryn*.

71. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 66.

72. M. van den Brink, *Verfassungsblog*, 20 July 2021.

73. E. Cloots, 55 *CMLR* (2018), p. 613.

74. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 67.

75. *Ibid.*, para. 68.

of the employer in conducting their business, as guaranteed by Article 16 of the Charter, must be weighed against the restriction on the freedom of religion of the employee, guaranteed by Article 10. This balancing exercise must include all fundamental rights involved: the CJEU holds that, when several fundamental rights and principles enshrined in the Treaties are at issue, such as in the present case, the principle of non-discrimination in Article 21 of the Charter, the right to freedom of religion in Article 10, the rights of parents in Article 14(3) and the freedom to conduct a business in Article 16, the proportionality test must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles, striking a fair balance between them. Therefore, the rights on both sides must be weighed against each other.⁷⁶ Above it was already questioned whether Article 16 should play a role here at all.

The referring court in *Müller* asked whether the right to freedom of religion in Article 10 of the Charter and Article 9 ECHR should be taken into account in determining justification. AG Rantos expressed his opinion that Articles 10 and 16 of the Charter only needed to be taken into account in relation to the first part of the justification test (legitimate aim) and not in relation to the two further parts (appropriate and necessary means).⁷⁷ The CJEU judgment makes clear that this is not correct and that all rights on both sides need to be taken into account and this is a very welcome development because it shows not only that the CJEU protects fundamental rights, including those of groups vulnerable to discrimination;⁷⁸ but also that the CJEU requires more rigorous justification for employer's neutrality policies than it had done in *Achbita*,⁷⁹ where the right to freedom of religion of the employee did not appear to play any significant role.

In *Müller*, the CJEU holds that there is direct discrimination but, in case the referring court decides that this is not the case, it also analyses the issue of justification for indirect discrimination.⁸⁰ The CJEU refers to the aim of the neutrality rule, which, in this case, was to avoid social conflicts between employees, particularly in view of incidents that had taken place in the past. It holds that both the prevention of social conflicts and the presentation of a neutral image of the employer vis-à-vis customers may correspond to a real need on the part of the employer, but that this is for the employer to demonstrate. The CJEU continues that the neutrality rule must also be limited to what is strictly necessary and that this can only be the case if no visible manifestations of political, philosophical or religious beliefs are allowed at all. Allowing the wearing of small-sized symbols undermines the ability of the measure to achieve the aim pursued.⁸¹ Therefore, even if the referring court in *Müller* concludes that there is no direct discrimination but indirect discrimination, this would not be justified.

The judgment of the CJEU in *Wabe and Müller* does, therefore, give more protection to fundamental human rights of people who are discriminated against, but it also allows employers to ban employees from wearing religious symbols at work based on their customers' wishes, although it does lay down certain conditions and prescribes a stricter justification test for such work rules. Despite the latter, it is suggested that, by allowing the wishes of customers to be taken into

76. *Ibid.*, para. 84, referring to Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:1031, para. 65 and the case law cited there.

77. Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 95.

78. See for a number of arguments to support that all fundamental rights on both sides need to be taken into account in all parts of the justification and proportionality test: E. Howard, 28 *MJECL* (2021), p. 661.

79. Case C-157/15 *Achbita*.

80. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 73.

81. *Ibid.*, para. 76.

account in relation to the justification test, the CJEU allows employers to pander to the prejudices of these customers, even if they need to provide evidence of a genuine need. This appears to go against what the CJEU itself states in the judgment, that ‘the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it must be interpreted strictly’.⁸² However, in both *Wabe* and *Müller*, there was more to neutrality as a legitimate aim than just the wishes of customers: in *Wabe*, the right of parents under Article 14(3) of the Charter to ensure the education of their children in accordance with their religious, philosophical and teaching beliefs played a role;⁸³ in *Müller*, there was an additional legitimate aim in avoiding conflicts between employees as conflicts between employees due to differences in religion and culture had occurred several times.⁸⁴ Whether the CJEU would have accepted that the neutrality policies had a legitimate aim without this, is not clear. And, although Vickers writes that ‘second time around, the court is much clearer that customer preference is not a readily-available justification for indirect discrimination’,⁸⁵ it is suggested that the judgment in *Wabe* and *Müller* does allow employers to pander to the prejudice of their customers to a certain extent.

Meeting discriminatory preferences of customers because otherwise those customers will go elsewhere cannot, and should not, serve as a ground of justification for discrimination. In her opinion in *Bouagnaoui*, AG Sharpston gave a salutary warning:

Here, I draw attention to the insidiousness of the argument, ‘but we need to do X because otherwise our customers won’t like it’. Where the customer’s attitude may itself be indicative of prejudice based on one of the ‘prohibited factors’, such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice. Directive 2000/78 is intended to confer protection in employment against adverse treatment (that is discrimination) on the basis of one of the prohibited factors. It is not about losing one’s job in order to help the employer’s profit line.⁸⁶

Cloots also argues that meeting customer preferences for economic reasons cannot serve as a ground for justification of discrimination.⁸⁷ She gives two reasons for this: first, if it is morally wrong for an employer to discriminate against a worker on a protected ground, then that wrongfulness will not suddenly disappear where the act of discrimination is based on prejudices and stereotypes of third parties rather than of the employer. Second, an important function of anti-discrimination law is precisely to free employers from this type of pressures and from the discriminatory whims of customers in the market.⁸⁸ Therefore, it is submitted that the discriminatory wishes of customers should not easily be accepted as justifying religion or belief discrimination. As mentioned above, the CJEU did not accept customers wishes as an argument for discrimination in

82. *Ibid.*, para. 61, with a reference to Case C-83/14 *Chez*, para. 112.

83. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 65 and para. 84.

84. *Ibid.*, para. 36.

85. L. Vickers, *Oxford Human Rights Hub*, 29 July 2021.

86. Opinion of AG Sharpston in Case C-188/15 *Asma Bouagnaoui, Association de Défense des Droits de l’Homme (ADDH) v. Micropole Univers SA*, EU:C:2016:553, para. 133. This is repeated in her Shadow Opinion in *Wabe and Müller*, see E. Sharpston, *EU Law Analysis* (2021), para. 310.

87. E. Cloots, 55 *CMLR* (2018), p. 613. Van den Brink also argues that the wishes of customers should not be regarded as a legitimate aim in the context of non-discrimination law: M. van den Brink, *Verfassungsblog*, 20 July 2021.

88. E. Cloots, 55 *CMLR* (2018), p. 613. referring to C. Sunstein, *Free Markets and Social Justice* (Oxford University Press, 1997), p. 151 and to the Opinion of Advocate General Poiares Maduro in Case C-54/07 *Feryn*, EU:C:2008:155, para. 18.

*Feryn*⁸⁹ and it is very unlikely that it would accept this for the other grounds of discrimination covered by EU anti-discrimination law.

F. More favourable national provisions

The CJEU decision in *Achbita*⁹⁰ led to uncertainty about the question whether Member States can provide more protection against religious discrimination. Some academic commentators argued that Member States could do so, while others expressed the opinion that *Achbita* meant that they could not.⁹¹ Because of this uncertainty and because the German Constitution gives stronger protection to the freedom of religion of an employee when an employer wants to restrict this freedom by pursuing a policy of neutrality, both referring courts asked the CJEU whether the provisions on indirect discrimination in Directive 2000/78/EC must be interpreted as meaning that such national constitutional provisions may be taken into account as more favourable provisions under Article 8(1) of that directive in examining the appropriateness of a difference of treatment indirectly based on religion or belief or whether the Directive and Article 16 of the Charter prevent this.⁹²

In *Wabe and Müller*, the CJEU made clear that Member States can take account of more favourable national provisions within the meaning of Article 8(1) of Directive 2000/78/EC. The CJEU based this on the following reasoning. As was already mentioned, the CJEU holds that the justification and proportionality test in Article 2(2)(b) of Directive 2000/78/EC must be carried out in accordance with the need to reconcile the requirements of the protection of all the various rights applicable in a case and must strike a fair balance between them.⁹³ According to the CJEU, the EU legislature, in the Directive, did not itself effect the necessary reconciliation between the freedom of thought, conscience and religion and the legitimate aims that may be invoked in order to justify indirect discrimination, but left it to the Member States and their courts to achieve that reconciliation.⁹⁴ The CJEU continues that this means that Directive 2000/78/EC allows account to be taken of the specific context of each Member State and allows each Member State a margin of discretion in achieving the necessary reconciliation.⁹⁵ Therefore, national provisions protecting the freedom of religion may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of the Directive.⁹⁶ Both AG Rantos and former AG Sharpston came to the same conclusion.⁹⁷

This is a welcome clarification by the CJEU, but the way the CJEU has done this, by referring to the ‘margin of discretion’ left to the Member States can be and has been criticized, although not every commentator is critical of this. For example, McCrea expresses the view that the CJEU was right in granting Member States a margin of discretion and to allow states to continue to experiment with different ways of managing this situation, because of the very different views among the

89. Case C-54/07 *Feryn*.

90. Case C-157/15 *Achbita*.

91. For a discussion of this see: E. Howard, 27 *MJECL* (2020), p. 23.

92. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 34 and para. 42.

93. *Ibid.*, para. 84.

94. *Ibid.*, para. 87, referring to Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others*, para. 47.

95. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 88.

96. *Ibid.*, para. 89.

97. Opinion of AG Rantos in Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 112; E. Sharpston, *EU Law Analysis* (2021), para. 109. She refers to Case C-617/10 *Aklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105.

Member States on issues of religion and belief.⁹⁸ However, as Vickers points out, although understandable that the CJEU may want to allow for different national approaches to such a ‘vexed and often politicised question’, ‘this approach differs from that taken in respect of other equality grounds, where the CJEU has taken a stronger line in standard setting’, or, in other words, set higher standards for justification of indirect discrimination.⁹⁹ The judgment in *Achbita*,¹⁰⁰ which appeared to be introducing such a margin, was also criticized for this.¹⁰¹ As Vickers pointed out in her analysis of that judgment, ‘it would seem inconceivable that a Court would allow a state to argue that national traditions should be allowed to justify sex or race discrimination in employment’.¹⁰² Van den Brink is even more critical of the margin of appreciation, as he calls it, pointing out that ‘this margin of appreciation can be used just as well to tolerate discrimination – *Achbita* is the case in point - and thus undermine the aims EU non-discrimination law seeks to achieve’. He also argues, that ‘the CJEU would not have to grant a margin of appreciation doctrine if it had simply accepted that the Directive 2000/78 sets minimum rules and allows more favourable national provisions’.¹⁰³ It is submitted that the CJEU should not have referred to a ‘margin of discretion’ but indeed should simply have accepted that the Directive lays down minimum requirements only, as Article 8(1) and Recital 28 make clear. Allowing Member States a ‘margin of discretion’ could lead to tolerating discrimination in other situations and on other protected grounds as well. In other words, it could lead to the lowering of protection for all grounds covered by EU anti-discrimination law.

Another welcome clarification is the following: as mentioned, the German Constitution provides that an employer’s wish to pursue a policy of religious neutrality which restricts an employee’s right to freedom of religion, is legitimate only if the employer can show ‘a sufficiently specific risk of that aim being undermined, such as the risk of specific disturbances within the undertaking or the specific risk of a loss of income’.¹⁰⁴ The CJEU holds that such a requirement forms part of the justification test for indirect discrimination based on religion or belief.¹⁰⁵ This suggests that, unless the employer shows evidence that they would suffer real and specific harm, a general neutrality rule would not be considered justified under Article 2(2)(b)(i) of Directive 2000/78/EC.¹⁰⁶ This also makes the justification test for indirect religion or belief discrimination stricter than the test applied in *Achbita*.¹⁰⁷

It can be concluded from all this that the justification and proportionality test applied to indirect religion and belief discrimination is less strict than the test applied to indirect discrimination on the

98. R. McCrea, ‘Headscarves at Work: The Court of Justice Clarifies When Employers Can Ban Them’, *EU Law Analysis*, 17 July 2021, <http://eulawanalysis.blogspot.com/2021/07/headscarves-at-work-court-of-justice.html>; R. McCrea, ‘Hijab Ruling Presents the Thorny Problem of Legislating for All EU Member States’, *The Conversation*, 21 July 2021, <https://theconversation.com/hijab-ruling-presents-the-thorny-problem-of-legislating-for-all-eu-member-states-164722>.

99. L. Vickers, *Oxford Human Rights Hub*, 29 July 2021.

100. Case C-157/15 *Achbita*.

101. E. Howard, 24 *MJECL* (2017), p. 361.

102. L. Vickers, ‘Blog Series 2: The Role of Choice; and the Margin of Appreciation’, *Strasbourg Observers*, 8 September 2016, <https://strasbourgothers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/>.

103. M. van den Brink, *Verfassungsblog*, 20 July 2021. See also the discussion in E. Howard, 27 *MJECL* (2020), p. 23.

104. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 85.

105. *Ibid.*

106. See on this: E. Howard, 28 *MJECL* (2021), p. 17.

107. Case C-157/15 *Achbita*.

other grounds covered by EU anti-discrimination law, although the CJEU has applied a stricter test in *Wabe and Müller* than it had applied in *Achbita* and now requires the employer to show a genuine need for a neutrality policy and evidence of real harm to their business without such a policy. This is a step forward, but the CJEU still allows the wishes of customers to play a role in the justification test for indirect religion or belief discrimination and grants the Member States a margin of discretion, while it does not appear to do either for the other grounds of discrimination. Applying a less strict standard to religion or belief discrimination has ‘the effect of demoting religious discrimination among a hierarchy of protected characteristics’¹⁰⁸ by lowering the protection provided against this form of discrimination. This not only goes against what the CJEU has consistently held in its case law: that restrictions and limitations on individual rights in EU law, which include the right not to be discriminated against, should be interpreted strictly.¹⁰⁹ Justification of indirect discrimination is such an exception: an exception on the individual right not to be discriminated against. But it could also risk a ‘levelling down’, a lowering of standards and of the level of protection against indirect discrimination for other grounds of discrimination, which would undermine the aims of EU anti-discrimination law.¹¹⁰

5. Conclusion

The judgment of the CJEU in *Wabe and Müller* has clarified a number of issues which were left open by the earlier headscarf judgments in *Achbita* and *Bougnaoui*¹¹¹ and has provided for a stricter justification test for indirect religion and belief discrimination and this is to be welcomed. In *Achbita*, the CJEU held that a workplace neutrality policy must be genuinely pursued in a consistent and systematic manner and must be limited to what is strictly necessary.¹¹² The judgment in *Wabe and Müller* follows this and also allows employers to prohibit their employees from wearing religious, philosophical or political symbols at work, but the CJEU adds that this can only be done under certain conditions: the employer has to provide evidence that there is a genuine need for a neutrality policy; and, that they would suffer real harm without such a policy. The employer will also have to take account of the effect of such a policy on the right to freedom of religion of their employees who want, and often feel mandated by their religion, to manifest their religion through the wearing of religious symbols. So the judgment imposes a higher burden of proof on the employer to justify a neutrality policy and this is a positive development. The decision that national provisions protecting the freedom of religion may be taken into account as more favourable provisions in Article 8(1) of the Directive, is also a positive development.

In the earlier article on the opinion of AG Rantos and the Shadow Opinion of former AG Sharpston, it was argued that the CJEU had two choices in deciding *Wabe and Müller*: the

108. S. Jolly, ‘Islamic Headscarves and the Workplace Reach the CJEU: the Battle for Substantive Equality’, 6 *European Human Rights Law Review* (2016), p. 677.

109. See for example, Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para. 36; Case C-273/97 *Sirdar v. the Army Board and Secretary of State for Defence*, EU:C:1999:523, para. 23; Case C-285/98 *Kreil v. Bundesrepublik Germany*, EU:C:2000:2, para. 20; (all three concerned sex discrimination); Case C-341/08 *Domnica Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, EU:C:2010:4, para. 60; Case C-447/09 *Prigge and Others v. Deutsche Lufthansa AG*, EU:C:2011:573, para. 56 and para. 72 (the latter two cases concerned age discrimination).

110. E. Howard, 24 *MJECL* (2017), p. 361.

111. Case C-157/15 *Achbita* and Case C-188/15 *Bougnaoui*.

112. Case C-157/15 *Achbita*, para. 40.

CJEU could choose to protect the fundamental human rights of everyone in the EU by protecting those vulnerable to discrimination on religious or other grounds; or, it could choose to make a populist decision and follow AG Rantos by allowing employers to pander to the prejudicial and stereotypical views of their customers.¹¹³ It is submitted that the CJEU has done a little of both: it has protected and strengthened human rights by making the justification test for indirect religion or belief discrimination stricter; by determining that the employer must take account of the effect of neutrality policies on the employee's right to freedom of religion; and, by determining that all relevant fundamental rights must be considered and a fair balance must be struck between them. In this way, the CJEU improves the protection for religious employees against discrimination at work. On the other hand, it still allows employers to pander to the prejudice of their customers by taking their wishes not to be confronted by employees wearing religious, philosophical or other symbols into account. By doing this and by allowing Member States a margin of discretion, the CJEU gives less protection to victims of religion or belief discrimination than it does to victims of other forms of discrimination prohibited by EU law. This will hinder the employment chances and the wider inclusion in society of people who want to manifest their religion at work, and especially Muslim women.

The CJEU could have provided more protection against religion or belief discrimination by considering the arguments that there was direct, rather than indirect discrimination, especially because the employer in both these cases were private employers and because the wishes of customers could well have been based on stereotypes about and prejudices against Muslims. It was argued that, if this was the case, direct discrimination should have been found. The argument of the CJEU that there was direct discrimination in *Müller*, because the neutrality rule there meant that some workers would be treated less favourably than others on the basis of their religion or belief,¹¹⁴ would, if it was applied to *Wabe*, also lead to the conclusion that the neutrality rule amounted to direct discrimination. A finding of direct discrimination would mean that the employer cannot argue that this is justified. However, it is suggested that, even if direct religion or belief discrimination is not found, the fact that stereotypes and prejudices might have played a role in customer preferences should also have been examined in relation to the legitimate aim for justification of indirect discrimination.

The CJEU could also have engaged with the issues of indirect gender and indirect racial or ethnic origin discrimination because the neutrality policies in both *Wabe* and *Müller* affected a larger number of female workers from a migrant background. It was suggested that future preliminary references regarding workplace headscarf bans should argue that these amount to religion and gender and racial or ethnic origin discrimination and should refer to Directives 2000/78/EC, 2006/54/EC and 2000/43/EC as this would mean that the CJEU would have to examine these issues.

Despite this criticism, the positive points in the judgement in *Wabe and Müller* present a small glimmer of hope that the CJEU is moving, albeit very tentatively, towards more protection of employees who want to manifest their religion at work, including Muslim women who want to wear headscarves for religious reasons.

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113. E. Howard, 28 *MJECCL* (2021), p. 648.

114. Joined Cases C-804/18 *Wabe* and C-341/19 *Müller*, para. 73.