Headscarf wearing employees and the CJEU: what employers can and cannot do

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Abstract:

In July 2021, the CJEU handed down it's judgment in two cases regarding the wearing of Islamic headscarves at work, which allows employers to ban the wearing of religious and other symbols, but only under certain conditions. This article examines the judgment in detail and argues that it shows some improvements on previous judgments on this issue and present a small glimmer of hope that the CJEU might be moving – albeit very tentatively - towards more protection of Muslim women who want to wear headscarves at work for religious reasons.

Key words:

Religion and belief, direct discrimination, indirect discrimination, justification

1 Introduction

On 15 July 2021, the Grand Chamber of the Court of Justice of the European Union (CJEU) handed down it's judgment in two joined cases regarding the wearing of Islamic headscarves at work, based on preliminary references by two German courts: *IX v Wabe eV. and MH Müller Handels GmbH v MJ*.[1] The judgment can be said to allow employers to ban the wearing of religious and other symbols at work, but only under certain conditions. It builds on two earlier cases regarding the wearing of headscarves at work, *Achbita*[2] and *Bougnaoui,*[3] decided by the Grand Chamber of the CJEU in 2017. Both earlier cases and these joint cases concerned Muslim women who wanted to wear a headscarf at work for religious reasons. Moreover, all four worked for private employers, not public authorities. It is argued that the judgment in *Wabe and Müller* shows some improvements on the previous cases and might present a small glimmer of hope that the CJEU might be moving – albeit very tentatively and very slowly - towards more protection of Muslim women who want to wear headscarves at work for religious reasons.

In *Wabe*, IX was 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, the company had introduced a neutrality policy prescribing that employees refrain from wearing any visible signs of political, ideological or religious beliefs. IX, who had worn the headscarf for about 9 months before her parental leave, refused to remove her headscarf and, after two official warnings, was released from work. The company's neutrality policy did not apply to employees who did not come into contact with customers, but this did not include IX. IX challenged her release from work as direct religion or belief discrimination and as discrimination on the grounds of gender and ethnic origin.[4]

[1] Joint cases C-804/18 *IX v Wabe eV*. and C-341/19 *MH Müller Handels GmbH v MJ*, EU:C:2021:594.
[2] Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV*, EU:C:2017:203.
[3] Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v Micropole Univers SA*, EU:C:2017:204.
[4] *Wabe and Müller,* op. cit. supra, paras 22-29.

Müller concerned MJ, a Muslim employee of a company which runs a number of chemist shops. On her return from parental leave in 2014, the employee started wearing a headscarf based on her religious beliefs. She had worked for *Müller* since 2002 without wearing a headscarf. Her employer asked her to remove the headscarf as it was against the company policy to wear any prominent and large-scale signs of religious, philosophical and political convictions. This policy applied to all shops and aimed to preserve neutrality and avoid conflicts between employees, as there had been such conflicts in the past. For a while, MJ carried out a different activity for which she did not have to remove her headscarf but, in June 2016, she was instructed to come to work without the headscarf. After twice refusing to do so, she was sent home. MJ challenged this treatment a breach of her right to freedom of religion and as religious discrimination.[5]

The main issues the CJEU had to decide, in *Wabe and Müller,* concerned: whether there was direct or indirect discrimination; and, whether national constitutional provisions protecting the freedom of religion could be taken into account as more favourable provisions within the meaning of Art. 8(1) of Directive 2000/78/EC,[6] in examining the appropriateness of a difference of treatment indirectly based on religion or belief under Art. 2(2)(b) of that Directive.

According to Art. 2(2)(a) of Directive 2000/78/EC, direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation because of a protected ground of discrimination, including their religion or belief. An example would be a ban on the wearing of Muslim religious symbols but allowing symbols from another religion, like Sikh turbans. The Directive defines indirect discrimination as occurring where an apparently neutral provision, criterion or practice would put persons having a particular protected ground of discrimination, including religion or belief, 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 (Art. 2(2)(b)). Indirect discrimination is thus not unlawful if it is objective justified. An example of indirect discrimination is a workplace ban on any head covering, which would apply to all workers equally, but which would put religious people who cover their heads for religious reasons at a particular disadvantage. Such a rule would only be allowed if it can be objectively justified. The distinction between direct and indirect discrimination is important because direct discrimination can generally not be justified except in very limited circumstances expressly laid down by law.

This article analyses what the CJEU headscarf decisions mean for employers and employees and whether and under what circumstances workplace neutrality policies, which prohibit the wearing of political, philosophical and religious symbols by employees, are allowed. As the CJEU, in *Wabe and Müller,* referred to and built upon its conclusions in *Achbita* and *Bougnaoui,* these judgments are summarised in part 2. Part 3 contains a detailed examination of the judgment in *Wabe and Müller,* while the conclusion in part 4 suggests what this means in practical terms for employers and employees as well as for national courts.

2 *Achbita* and *Bougnaoui*

Achbita worked as a receptionist for G4S and was permanently contracted out to a third party. After having worked for G4S for three years, she 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 beliefs in the workplace. When she refused to remove her headscarf, she was dismissed. Bougnaoui was a design engineer who occasionally went out to work at customer's sites. She wore a headscarf for religious reasons. After a member of staff of one client complained, she was told to remove the headscarf while visiting clients. She was also dismissed when she refused to do so. Both employees challenged this as religious discrimination. These cases presented the first time the CJEU was asked to interpret Directive 2000/78/EC in relation to discrimination on the ground of religion or belief.[7]

[5] Ibid, para. 35.
[6] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, prohibiting discrimination on the grounds of religion or belief, disability, age and sexual orientation.
[7] For an analysis of these cases and the critique raised against the judgments see Howard, 2017 [3] and Howard 2020 [4]. The latter discusses the preliminary references in joint cases *Wabe and Müller*. For a discussion of the Opinion of Advocate General 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 and the Shadow Opinion of former Advocate General Sharpston [8] in *Wabe and Müller,* see Howard 2021 [5], which was written before the judgment in *Wabe and Müller* was handed down.

In *Achbita,* the CJEU considered whether the neutrality rule constituted direct or indirect religion or belief discrimination. It held that there was no direct discrimination under the Directive 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 was treating all workers the same and there was no evidence that the rule was applied differently to Achbita.[8] Although the CJEU stated that it was for the national court to decide whether there was direct or indirect discrimination, it went on to give guidance on the interpretation of indirect discrimination and objective justification. The CJEU held that a workplace neutrality policy was a legitimate aim as it was part of the freedom to conduct a business, guaranteed by Art. 16 of the Charter of Fundamental Rights of the European Union (EUCFR).[9] The CJEU did not really explain any further why neutrality must be considered as a legitimate aim, especially considering that the employers in both these cases, and also in *Wabe and Müller,* were private employers, not public authorities: 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.[10]

The CJEU then considered whether the ban on visible political, philosophical or religious symbols was appropriate and necessary and held that this was the case: as long as the ban was genuinely pursued in a consistent and systematic manner and thus did not make a distinction between different religions or different (religious, philosophical or political) beliefs; as long as the rule was limited to employees who come into contact with customers; and, as long as the employer had considered whether the employee could be moved to a job without contact with customers.[11]

In *Bougnaoui,* the CJEU held that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement 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.[12] This appears to be the right decision because, it is hard to argue, as Loenen writes, 'that the wearing of the headscarf interferes with the professional performance of Bougnaoui as an IT-engineer'.[13] However, it can be argued that there is a tension between this decision and the acceptance, in *Achbita,* that a neutrality policy can be a legitimate aim. Is such a neutrality policy not created because of the real or anticipated wishes of customers?[14]

3 *Wabe and Müller*

The facts in *Wabe and Müller* were described above. The judgment of the CJEU starts with some useful explanations in relation to the interpretation of religion and belief in Directive 2000/78/EC. First, the CJEU repeats what it said in *Achbita,* that the concept of religion includes the manifestation of religious faith in public. It then explains that this corresponds to the interpretation of Art. 10 of the EUCFR, which guarantees the freedom of religion and which covers the wearing of signs or clothing which manifest one's religion or belief.[15] 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:[16] that the term must be interpreted in accordance with Art. 10 of the EUCFR and Art. 9 of the European Convention on Human Rights;[17] that the prohibition of religion or belief discrimination, as laid down in Directive 2000/78/EC, is not limited to differences in treatment between persons having a particular religion and belief and those who do not; and, that the less favourable treatment must be experienced as a result of the religion or belief.[18] This means that the term 'religion and belief' in Directive 2000/78/EC must be interpreted widely and that the wearing of religious symbols like Islamic headscarves is covered by these terms.

[8] *Achbita,* op. cit. supra, paras 30-32.
[9] Ibid., paras 37-38.
[10] Howard 2017 [3], p. 356; Howard 2020 [4], p. 12.
[11] *Achbita,* op. cit. supra, paras 40-43.
[12] *Bougnaoui,* op. cit. supra, paras 40-41.
[13] Loenen [6], p. 64.
[14] Howard, 2017 [3], p. 364.
[15] *Wabe and Müller,* op. cit. supra, paras 45-46.
[16] Ibid., para. 47.
[17] Ibid., para. 48.
[18] Ibid., para. 49.

3.1 Direct discrimination

The referring court in *Wabe* was of the opinion that there was direct discrimination because the unfavourable treatment suffered by IX, as a result of being issued with a warning for having worn an Islamic headscarf at work, related to a specific characteristic (religion) protected by Art. 1 of Directive 2000/78/EC.[19] However, the referring court in *Müller* held that there was indirect discrimination in that case.[20] In relation to *Wabe,* the CJEU follows it's judgment in *Achbita* and concludes that an internal rule of a private undertaking which prohibits the wearing of any visible sign of political, philosophical or religious beliefs does not constitute direct religion or belief discrimination, as defined in Art. 2(2)(a) of Directive 2000/78/EC, provided that 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 inextricably linked to religion or belief.[21] This is so, according to the CJEU, despite the fact that some workers observe religious precepts which require certain clothing to be worn and that the application of such an internal rule is capable of causing particular inconvenience for such workers.[22] The CJEU takes into account that Wabe also required another employee wearing a religious cross to remove that sign and concludes that IX was not treated differently in comparison with any other employee. Thus there is no direct discrimination. However, 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.[23]

In relation to *Müller,* the CJEU holds that, because the neutrality policy in this case only prohibits the wearing of conspicuous, large-scale signs, this constitutes direct religion or belief discrimination because some workers will be treated less favourably than others on the basis of their religion or belief.[24] The CJEU refers to the argument of the European Commission in its observations in this case that this rule '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'.[25] But this appears inconsistent with the judgment that there is no direct discrimination in *Wabe*, as the neutrality rule in Wabe 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.

Many authors have argued that the neutrality rule in *Achbita* constitute direct discrimination.[26] In *Feryn,* it was held that a statement by an employer that he would not employ 'immigrants' because his customers did not want to give them access to their houses, constituted direct racial discrimination against Directive 2000/43/EC.[27] The CJEU considered that such a statement was likely to dissuade some candidates from applying.[28] Following this, the neutrality rule in *Wabe and Müller* would also amount to direct discrimination, because it would dissuade some candidates from applying to these employers. This is further supported by what the CJEU held in *CHEZ,* 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.[29] The referring court in *Wabe* mentioned CHEZ and argued that Wabe's neutrality rule 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, the neutrality policy had an explicitly negative effect linked to the characteristic of religion.[30]

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[19] Ibid., para. 32.
[20] Ibid., para. 39.
[21] Ibid., para. 52.
[22] Ibid., para. 53.
[23] Ibid., paras 54-55.
[24] Ibid., para. 73.
[25] Ibid., para. 72.
[26] See Howard 2017 [3] pp. 351-354; Howard 2020 [4] pp. 15-17, and the literature referred to there.
[27] 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.
[28] Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn* NV, EU:C:2008:397, paras 23-25.
[29] Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia,* EU:C:2015:480, para. 76.
[30] Arbeitsgericht Hamburg 8. Kammer, EUGH-Vorlage vom 21.11.2018, 8 CA 123/18, paras 78-82, available (in German) at: http://www.rechtsprechung-hamburg.de/jportal/portal/page/bsharprod.psml?showdoccase=1&doc.id=JURE190001061&st=ent See also Howard 2020, [4] p. 16.

In her shadow opinion, former Advocate General Sharpston also argues that the rule in both cases very likely constitutes direct discrimination. This is because the rule in *Wabe* discriminates between religious groups who consider themselves mandated by their religion to wear certain clothing in 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.[31] All this appears to fit in with what the CJEU said about religion or belief discrimination as mentioned above: that this is not limited to differences in treatment between persons having a particular religion and belief and those who do not; and, that the less favourable treatment must be experienced as a result of the religion or belief. Was the discrimination suffered by both IX and MJ not a result of their religion or belief: their wish to manifest their religion through the wearing of a headscarf?

Moreover, in *Chez,* the CJEU also considered that the fact that a practice was based on stereotypes and prejudice should be taken into account when deciding whether that practice constitutes direct discrimination.[32] It can be asked whether, in the present cases and in *Achbita*, the wish of the employer to have a strict policy of neutrality is not based on the prejudicial views of customers towards Muslims and specifically towards Muslim women wearing headscarves. The CJEU was criticised for not considering this in *Achbita*,[33] and it should at least have examined whether stereotypes and prejudice were involved in *Wabe and Müller*.

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 mention direct discrimination and a number of different comparators for such discrimination.[34]

3.2 Indirect discrimination

The CJEU states that it is up to the national court to verify whether the conditions mentioned for indirect discrimination in Art. 2(2)(b) of Directive 2000/78/EC are fulfilled. It mentions that the referring court in *Wabe* has stated 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, the CJEU starts from the premise that Wabe's neutrality rule constitutes a difference of treatment indirectly based on religion.[35] It is disappointing that the CJEU does not find it necessary to examine the question raised by the referring court in *Wabe*, whether there is indirect gender discrimination: if the rule statistically concerns almost exclusively female workers, then that would constitute indirect gender discrimination. However, the CJEU holds, with a reference to the Opinion of Advocate General Rantos,[36] 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.[37] But the CJEU could have examined this as, in *Achbita,* it pointed out that it is settled case law that the Court may provide guidance on the interpretation of provisions of EU law whether or not the referring court mentioned these in its questions.[38] It might be prudent, however, for applicants and their legal advisors to challenge employer's neutrality policies in national courts explicitly as gender discrimination under Directive 2006/54/EC[39] as well as religious 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.[40] National courts should examine the facts regarding all possible grounds of discrimination and should mention all EU legislation against these forms of discrimination when referring questions to the CJEU. This would force the CJEU to address the issue of possible gender and racial or ethnic origin discrimination in more detail. This is important because bans on the wearing of religious clothing and symbols generally affect women from ethnic minorities communities more than men.[41]

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[31] Sharpston [8], paras 122-123.
[32] *CHEZ,* op. cit. supra, para. 82. See also: Howard 2017 [3], pp. 353-354; Sharpston [8] footnote 208.
[33] Howard 2017 [3] p. 353-354, Cloots [2] p. 611.
[34] Case C-344/20 *LF v. SCRL*, preliminary reference.
[35] *Wabe and Müller,* op. cit. supra, para. 58.
[36] Opinion AG Rantos, op. cit. supra, para. 59. In the same vein, Sharpston [8] para. 296.
[37] *Wabe and Müller*, op. cit. supra, para. 58.
[38] *Achbita,* op. cit. supra para. 33.
[39] 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.
[40] Former Advocate 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, see: Sharpston [8] para. 267, and footnote 239. The argument has also been put forward in academic literature, see the authors referred to in Howard 2020 [4] footnote 45.
[41] See: Blair [1] p. 411; McColgan, [7] p. 18; Loenen [6] p. 67.

The CJEU does extensively examine the issue of objective justification in relation to religious discrimination. It holds, like it did in *Achbita,* 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 covered by the freedom to conduct a business in Art. 16 of the EUCFR, particularly if it only applies to workers who come into contact with customers.[42] This suggests that the CJEU does not differentiate between public and private employers, something the CJEU was, as mentioned above, criticised for in *Achbita* and *Bougnaoui.* The CJEU qualifies what it held in *Achbita* in relation to this legitimate aim by stating 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.[43]

This raises some questions: what is a 'genuine need'; and, what must be taken into account in establishing objective justification? The CJEU mentions that, in the first place, the rights and legitimate wishes of customers or users must be taken into account. This is the case, for example, of parents' rights to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs recognised in Art. 14(3) of the EUCFR, or their wish to have their children supervised by persons who do not manifest their religion or belief. The CJEU itself distinguishes this from the situation in *Bougnaoui,* where the 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*, where direct racial discrimination arose from the discriminatory requirements of customers.[44] But is taking account of the wishes of customers here so different from what happened in *Bougnaoui* and *Feryn*? The CJEU appears to suggest that, if there had been a general ban on the wearing of all visible signs of belief in *Bougnaoui,* 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? It is submitted that, in relation to the legitimate aim for the justification of indirect discrimination, the CJEU should also have examined whether stereotypes and prejudice about Muslims were behind the wishes of customers in *Wabe and Müller.* A further objection to the acceptance of customers wishes as a legitimate aim in these cases is that the CJEU creates a difference between discrimination grounds covered by the EU Directives 2000/43/EC and 2000/78/EC: it did not accept the wishes of customers regarding ethnic minorities in *Feryn,* and it is highly unlikely that it would accept customers wishes not to be served by a disabled person as justifying disability discrimination under Directive 2000/78/EC. Moreover, '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', as Cloots writes.[45]

The CJEU holds that, to establish whether there is a genuine need on the part of the employer, courts should take into account whether the employer has provided evidence 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.[46] Therefore, the employer must prove that there is a genuine need, that any rule is properly applied and pursued in a consistent and systematic manner and that it is limited to what is strictly necessary. This means, according to the CJEU, 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.[47] The interests of the employer in conducting his business must thus be weighed against the restriction on the freedom of religion of the employee. Or, to put this differently, the freedom to conduct a business in Art. 16 of the EUCFR must be balanced against the freedom of religion in Art. 10. This is confirmed later in the judgment where 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 Art, 21 of the EUCFR, the right to freedom of religion in Art. 10, the rights of parents in Art. 14(3) and the freedom to conduct a business in Art. 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

[42] *Wabe and Müller*, op. cit. supra, para. 63.
[43] Ibid., para. 64.
[44] Ibid., paras 65-66.
[45] Cloots [2] p. 613-614.
[46] *Wabe and Müller*, op. cit. supra, para. 67.
[47] Ibid., paras 68-69.

between them. Therefore, the rights on both sides must be weighed against each other.[48] This is a more rigorous justification and proportionality test than the CJEU has done in *Achbita,* where the importance of the employee's freedom of religion did not appear to play any role. This is a welcome development.

As mentioned, in relation to *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.[49] 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.[50] Therefore, even if the referring court in *Müller* concludes that there is no direct discrimination but indirect discrimination, this is not justified.

3.3 More favourable national provisions

The last issue which the CJEU examines is the question asked by both referring courts: whether national constitutional provisions protecting the freedom of religion may be taken into account as more favourable provisions within the meaning of Art. 8(1) of Directive 2000/78/EC in examining the appropriateness of a difference of treatment indirectly based on religion or belief under Article 2(2)(b)(i) of that Directive. The CJEU considers that 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.[51] This mean 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.[52]

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. The CJEU holds that such a requirement forms part of the justification test for indirect discrimination based on religion or belief.[53] This suggests that, unless the employer shows evidence that they would suffer specific harm, a general neutrality rule would not be considered justified under Art. 2(2)(b)(i) of Directive 2000/78/EC. This makes the justification test for indirect religion or belief discrimination stricter. The CJEU also holds that 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 Art. 8(1) of the Directive, when examining what constitutes a difference of treatment based on religion or belief.[54]

4. Conclusion

The judgment of the CJEU in *Wabe and Müller* can be criticised for a number of reasons. First, it does allow employers to ban employees from wearing Islamic headscarves under certain circumstances when this is based on the wishes of customers. The CJEU did not really engage with the arguments that there could be direct discrimination in *Wabe,* nor did it consider whether the wishes of the employers to display a neutral image because their customers wanted this were not based on stereotypes and prejudice against Muslims and, in particular, Muslim women wearing headscarves, among the employers or their customers. This is linked to the second point of criticism, that the CJEU accepted that the rights and legitimate wishes of customers must be taken into account

[48] 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.
[49] *Wabe and Müller*, op. cit. supra, para. 73.
[50] Ibid., paras 76-77.
[51] *Wabe and Müller*, op. cit. supra, para. 87, referring to *Centraal Israëlitisch Consistorie van België and Others*, para. 47.
[52] *Wabe and Müller*, op. cit. supra, para. 88.
[53] Ibid., para. 85.
[54] Ibid., para. 89.

in the justification test for indirect discrimination. As mentioned, would the CJEU also apply this when customers ask not to be served by a disabled person or a Black person? *Feryn* suggests that it would not only not accept that, but that it would also hold that that was direct discrimination. Third, the CJEU can be criticised for not engaging with the issues of indirect gender and/or racial or ethnic origin discrimination as the neutrality rule, in *Wabe and Müller* and in *Achbita,* affected a larger number of female workers from a migrant background. In future cases, evidence of prejudice and stereotypes could be used to argue that there is direct discrimination, which would mean that the employer cannot argue that this is justified. Claiming gender and racial or ethnic origin discrimination and referring to Directives 2006/54/EC and 2000/43/EC would also be useful in forcing the CJEU to address these issues.

On the other hand, the judgment introduces a stricter justification test for indirect discrimination in relation to employer's neutrality policies than it had done in *Achbita*: it imposes a higher burden of proof on employers who wish to justify these policies and states that the importance of the freedom of religion of the employee should be taken into account. The decision that national provisions protecting the freedom of religion may be taken into account as more favourable provisions in Art. 8(1) of the Directive, is also a positive development. These issues are all to be welcomed as they present a small glimmer of hope that the CJEU is moving, albeit very tentatively, towards a little more protection of employees who want to manifest their religion at work, including Muslim women who want to wear headscarves at work for religious reasons. Claimants, legal representatives and national courts can play a role in pushing the CJEU further in this direction.

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