

The Headscarf Debate Returns to Luxembourg: A Second Chance for Religious Freedom?

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ABSTRACT

The CJEU's July 2021 judgment in WABE and Müller (Joined Cases C-804/18 and C-341/19) was anticipated by observers as a sequel to two earlier, highly controversial decisions regarding EU anti-discrimination law and workplace bans on religious dress, Achbita and Bougnaoui. In Achbita, the Court held that EU law permitted employers to prohibit employees from wearing Islamic headscarves and other religious symbols as part of a corporate neutrality policy. These earlier judgments were roundly criticised by commentators as weakening the protection from religious discrimination in the workplace. This contribution will engage with the Court's recent judgments, summarising first the decisions in Achbita and Bougnaoui and the criticism directed at them. It will then consider the framing of the preliminary references in WABE and Müller before turning to the Opinion of Advocate General Rantos and the Court's judgment. This contribution concludes that the Court's recent judgment addresses many of the key problems with Achbita and Bougnaoui - in particular, the role of fundamental rights in the proportionality assessment as well as the ability of Member States to go beyond the minimum standard set by Union law. However, other issues remain open, so these decisions represent an important but cautious step forward from the perspective of religious freedom and non-discrimination in the workplace.

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INTRODUCTION

In July 2021, the CJEU's judgment in *W/ABE and Müller*¹ was handed down. Both cases arrived as preliminary references from German courts and concerned Muslim women who had been disciplined by their employers for wearing headscarves to work. Those cases in many ways represented a sequel to the Court's 2017 judgments in *Achbita*² and *Bougnaoui*³ in which the CJEU interpreted the meaning of religious discrimination for the purposes of the Employment Equality Directive⁴ for the first time.

In *Achbita*, the Court found that an employer's corporate neutrality policy prohibiting employees from wearing any visible signs of their religious, philosophical, or political convictions and beliefs may justify indirect discrimination on the basis of religion or belief, within the meaning of Article 2(2)(b) of the Employment Equality Directive. In *Bougnaoui*, it ruled that a customer's wish not to be served by a headscarved employee could not constitute a 'genuine and determining occupational requirement' - a defence to direct discrimination - within the meaning of Article 4(1) of the Directive.

The twin judgments in *Achbita* and *Bougnaoui* made waves far beyond the world of EU lawyers. As they related to debates about pluralism, tolerance, integration, and diversity which were then and are now a cause of contention across Europe, the rulings were widely reported in the press and discussed in academia. Both the reach of the decisions and the tenor of the relevant responses to them are perhaps best illustrated by the fact that the *New York Times* editorial

¹ Joined Cases C-341/19 and C-804/18 *IX v W/ABE eV and 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 and Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*, EU:C:2017:204.

⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16 (Employment Equality Directive).

board decided to comment on the cases under the headline ‘Legalizing Discrimination in Europe.’⁵

The two preliminary references from German courts presented the CJEU with an opportunity to answer its critics. This article aims to evaluate whether the Court took up this invitation to revisit its case-law. Section II will consider the prelude to the current cases, i.e., the CJEU’s 2017 judgments in *Achbita* (C-157/15) and *Bougnaoui* (C-188/15), and the academic criticism they triggered. Section III will summarise the context and questions referred from the Hamburg Labour Court and the Federal Labour Court in *WABE* and *Müller*. Section IV deals with the Opinion issued by Advocate General Rantos in those two cases, while Section V considers the Court’s judgment of 15 July 2021. The judgment will be analysed in Section VI, concluding in Section VII that it represents an incremental step forward from the contested *Achbita* and *Bougnaoui* decisions, with both positive and negative aspects present in the current judgments concerning religious freedom in the workplace.

I. THE PRELUDE: *ACHBITA* AND *BOUGNAOUI*

Achbita concerned a Muslim woman who worked as a receptionist with G4S in Belgium. Three years into her employment, she informed her line managers that she intended to wear an Islamic headscarf to work. Her employer notified her that this violated a company rule - unwritten at the time but later codified - prohibiting employees from wearing any visible signs of religious, philosophical, or political convictions. Ms Achbita was dismissed in June 2006 after she insisted on wearing her headscarf. The Belgian Court of Cassation referred the case to the CJEU, asking whether Article 2(2)(a) of the Employment Equality Directive meant that Ms Achbita did not suffer direct discrimination where her employer’s rule covered *all* signs of political, religious, or philosophical beliefs.

The second case, *Bougnaoui*, was referred to Luxembourg by the French Court of Cassation. It concerned a young woman who had been dismissed from her job as a design engineer after a client complained about her headscarf, while

⁵ Editorial, ‘Legalizing Discrimination in Europe’ New York Times (New York, 15 March 2017) <<https://www.nytimes.com/2017/03/15/opinion/legalizing-discrimination-in-europe.html>> accessed 5 November 2021.

she insisted on wearing it. The French court inquired whether the client's wishes in this case could constitute a 'genuine and determining occupational requirement', as per Article 4(1) of the Directive.

In both cases, the Court began by interpreting the term 'religion' in Article 1 of the Directive. Following the case-law of the European Court of Human Rights (ECtHR) on Article 9 of the European Convention on Human Rights (ECHR), it determined that the term 'religion' encompassed both the *internal* and *external* elements of religion, i.e., having a belief as well as expressing it in public.⁶ In the *Achbita* judgment, the Court concluded that G4S's neutrality policy could not constitute direct discrimination given that it caught political, philosophical and religious beliefs all equally and in a 'general and undifferentiated' manner, there being nothing in the file to suggest the rule was applied differently to Ms Achbita than to other workers.⁷

The Court then went on to consider whether there might have been indirect discrimination, which arises 'where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief [or other protected characteristic] at a particular disadvantage compared with other persons', according to Article 2(2)(b) of the Directive. However, such differential treatment is permissible if it pursues a legitimate aim and is an appropriate and necessary way of achieving that aim.⁸ The Court found the desire to display an image of neutrality to be a legitimate aim for an employer, linking it to the protection of the freedom to conduct a business in Article 16 of the EU Charter of Fundamental Rights ('the Charter') as well as referring to case-law of the European Court of Human Rights to that effect.⁹ With respect to appropriateness, the Court considered that the policy had to be consistently and systematically applied.¹⁰ The policy would qualify as necessary if it was applied only to employees in customer-facing roles, and the referring court should consider whether it would have been possible for G4S, 'without being required to

⁶ *Achbita* (n 2), paras 25-28; *Bougnaoui* (n 3), paras 27-30.

⁷ *Achbita* (n 2), paras 29-32.

⁸ Employment Equality Directive (n 4), art 2(2)(b)(i).

⁹ *Achbita* (n 2), paras 37-39.

¹⁰ *ibid* paras 38-40.

take on an additional burden', to move Ms Achbita into a position without customer exposure instead of dismissing her.¹¹

In *Bougnaoui*, the Court repeated its conclusion from *Achbita* that an employee's dismissal for breaching a rule prohibiting religious, political or philosophical items in the workplace *could* constitute indirect discrimination, but would not do so if Ms Bougnaoui's employer was pursuing a legitimate aim - such as maintaining neutrality towards customers - and the means were appropriate and necessary.¹² If no such rule were in place, the question remained whether a customer's desire not to be served by a headscarved employee could constitute a genuine occupational requirement within the meaning of Article 4(1) of the Directive. The Court ruled that this concept should be construed to encompass only those requirements which were 'objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out', and not subjective considerations such as an employer's willingness to take account of a customer's wishes.¹³

In academia, the judgments were criticised on a variety of points. Commentators were split on whether the Court had correctly approached the issue of direct discrimination. The source underlying this disagreement is which category of people is chosen as the comparator.¹⁴ Thus, some argued that rather than comparing Ms Achbita's position to that of other employees wishing to express their belief, the Court should have compared hers with that of an employee expressing *no* belief.¹⁵ The Court's acceptance of corporate neutrality as a legitimate aim was another point of contention: while neutrality in the *public* sector had been recognised as a legitimate aim, its extension into the private sphere seemed to some 'a big leap'.¹⁶ The reference to Article 16 of the Charter -

¹¹ *ibid* paras 42-43.

¹² *Bougnaoui* (n 3), paras 32-33.

¹³ *ibid* paras 34-40.

¹⁴ Erica Howard, 'Islamic headscarves and the CJEU: Achbita and Bougnaoui' (2017) 24 *Maastricht Journal of European and Comparative Law* 348, 352.

¹⁵ Stéphanie Hennette-Vauchez, 'Equality and the Market: the unhappy fate of religious discrimination in Europe' (2017) 13 *European Constitutional Law Review* 744, 747.

¹⁶ Eva Brems, 'European Court of Justice Allows Bans on Religious Dress in the Workplace', (IACL-AIDC Blog, 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>> accessed 27 July 2021.

freedom to conduct a business - was perceived by many observers as one-sided. The CJEU had cited the ECtHR judgment in *Eweida*¹⁷ as proof that the Strasbourg judges accepted corporate neutrality as a legitimate aim capable of justifying restrictions of religious freedom. However, in that decision, the ECtHR had carefully balanced this legitimate interest against the employee's rights under Article 9 ECHR, ultimately finding that the latter ought to prevail:

[T]he Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight.¹⁸

By contrast, the CJEU in *Achbita* omitted any reference to Charter rights which might support the employee's case—such as Article 10 (freedom of religion)¹⁹ or Article 31(1) (the right to work in conditions respecting of a worker's dignity).²⁰ As a result, in Weiler's words, 'the comparison between *Eweida* and *Achbita* is nothing less than embarrassing',²¹ while Jolly writes that in the absence of any element counterbalancing the employer's commercial freedom, 'the proportionality exercise becomes almost superficial'.²² Beyond the technical issue of how the two courts carried out the proportionality assessment, it is striking to

¹⁷ *Eweida and Others v United Kingdom* [2013] 57 EHRR 8.

¹⁸ *ibid* para 94.

¹⁹ Joseph Halevi Hurwitz Weiler, 'Je Suis Achbita' (2017) 15 International Journal of Constitutional Law 879, 887 <<https://doi.org/10.1093/icon/moy001>>.

²⁰ Monique Steijns, 'Achbita and Bougnaoui: Raising more Questions than Answers' (Eutopia Law, 18 March 2017) <<https://eutopialaw.wordpress.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>> accessed 26 July 2021.

²¹ Weiler (n 19), 888.

²² Schona Jolly QC, 'Achbita & Bougnaoui: A strange kind of equality' (Cloisters.com, 15 March 2017) <<https://www.cloisters.com/achbita-bougnaoui-a-strange-kind-of-equality/>> accessed 26 July 2021.

note how the ECtHR discusses the importance of religious freedom both to the believer and to society as a whole. This contextualisation is entirely absent from the *Achbita* judgment, raising the question of whether the CJEU failed to fully appreciate the sensitive nature of the fundamental rights issue at stake in the case. And while *Boungaoui* makes clear that a customer's wish not to see headscarved employees is not a genuine occupational requirement, *Achbita* appeared to permit employers to *anticipate* those very wishes by putting in place a neutrality policy.²³ In other words, the practical effect of the decision in *Boungaoui* was blunted by that in *Achbita*.

Finally, there was concern that the outcome in these cases effectively imposed the French tradition of *laïcité*, a conception of the separation of church and state that imposes strict neutrality duties in the public sector,²⁴ on all Member States. While the principle of *laïcité* is not as such applicable to the private sector, a sceptical attitude towards public expressions of religious belief carries over and influences the legal position.²⁵ Thus, the French Court of Cassation had previously accepted that a private nursery could require an employee to remove her *hijab* pursuant to a neutrality policy.²⁶ The French tradition also wields some influence in Belgium, from where the *Achbita* reference originated. However, the position in these countries stands in stark contrast to that in other European nations, such as the Netherlands or the UK, which are more permissive of religious expression in both the public and private sectors.²⁷

The CJEU was thus faced with a diversity of approaches in the Member States. As Advocate General Kokott had rightly pointed out in her Opinion in

²³ Steve Peers, 'Headscarf Bans at Work: Explaining the ECJ Rulings' (EU Law Analysis, 14 March 2017) <<http://eulawanalysis.blogspot.co.uk/2017/03/headscarf-bans-at-work-explaining-ecj.html>> accessed 26 July 2021.

²⁴ On the trajectory of *laïcité* in recent years, see Stéphanie Hennette Vauchez, 'Is French *laïcité* Still Liberal? The Republican Project Under Pressure (2004-15)' (2017) 17 Human Rights Law Review 285.

²⁵ *ibid.*

²⁶ In the so-called Baby Loup case, Cour de cassation (Assemblée Plénière), Arrêt n° 612 du 25 juin 2014 (13-28.369), FR:CCASS:2014:AP00612. To Hennette Vauchez (n 24 above), this case exemplifies the illiberal turn *laïcité* has taken in recent years, no longer imposing obligations on public authorities only but on private individuals too.

²⁷ Titia Loenen, 'In Search of an EU Approach to Headscarf Bans: Where to Go After *Achbita* and *Boungaoui*' (2017) 10 Review of European Administrative Law 47, 49-55.

Achbita, the EU is bound to respect the national identities of the Member States by virtue of Article 4(2) Treaty on European Union.²⁸ She wrote this in the context of demanding respect for French *laïcité*. In the eyes of many observers, however, the Court ultimately went much further than this. Cloots wrote that the judgment appeared to have ‘elevated the Franco-Belgian tradition to Charter level’²⁹: since an employer’s desire to pursue a policy of neutrality was backed up by Article 16 of the Charter, it would be hard to restrict. It seemed like the Court had comprehensively interpreted the Employment Equality Directive, determining for all Member States alike how the interests of employer and employee ought to be weighed. While this might be welcomed in France and Belgium, it could cause problems in those other Member States which are more tolerant or protective of religious expression.

All in all, the outcome of the first cases on religious discrimination and the Employment Equality Directive was underwhelming. From the unquestioning acceptance of corporate neutrality as a legitimate aim to the omitted balancing exercise and the lack of understanding of how important religious expression can be for believers, the *Achbita* and *Bougnaoui* judgments were a missed opportunity for the Court to ensure the effectiveness of EU equality law. Even more problematically, the judgments seemed to have significantly restricted the leeway available to Member States to provide a higher standard of protection, despite this being foreseen in Article 8(1) of the Employment Equality Directive. In other words, not only did EU law offer little protection to the employee in these situations, it also prevented Member States from doing so, casting doubt on the very idea of minimum harmonisation.³⁰ The questions referred to the Court from Germany less than two years after *Achbita* and *Bougnaoui* attest to the concerns that existed about these judgments.

²⁸ Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, EU:C:2016:382, Opinion of AG Kokott, para 125.

²⁹ Elke Cloots, ‘Safe haven or open sea for corporate headscarf bans: Achbita and Bougnaoui’ (2018) 55 *Common Market Law Review* 589, 621. Interestingly, in their interventions in Achbita, both the French and the Belgian governments sided with the employee: see AG Kokott’s Opinion (n 28), para 63.

³⁰ This is the point made by Spaventa: Eleanor Spaventa, ‘What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case’ (EU Law Analysis, 21 March 2017) <<http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html>> accessed 30 July 2021.

II. THE REFERENCES IN WABE AND MÜLLER

WABE is a charitable, non-denominational entity which runs childcare centres across Germany. IX worked as a special needs carer for WABE from 2014, and in 2016 decided to start wearing an Islamic headscarf to work. In March 2018, WABE adopted a neutrality policy that required all employees in contact with children and their parents to refrain from wearing any visible signs of their political, philosophical, or religious beliefs in the workplace. An information sheet issued by WABE confirmed that the Christian cross, Islamic headscarf, and Jewish kippah were all caught by this policy. When IX insisted on wearing her headscarf after this policy was issued, she was temporarily suspended and received warnings from her employer. The Hamburg Labour Court (*Arbeitsgericht Hamburg*) first asked whether the neutrality policy might constitute direct discrimination on the basis of religion or belief as per Article 2(2)(a) of Directive 2000/78. It is clear from the reference decision that the court was unconvinced by the logic deployed in *Acbbita*:

[D]irect discrimination based on religion or belief cannot become indirect by virtue of the fact that non-religious employees are also prohibited from certain behaviours. Whether the disadvantaged group consisted exclusively of individuals with the protected characteristic is, on the contrary, irrelevant to the question of direct discrimination.³¹

Secondly, it asked whether indirect discrimination on the grounds of religion and/or gender could be justified where an employer wanted to implement a neutrality policy in order to meet the subjective desires of customers. In other words, clarification was needed on the interplay of *Acbbita* and *Bougnaoui*.

The third question asked whether the Directive and Article 16 of the Charter precluded national provisions requiring that the existence of a specific risk to the employer, such as an economic disadvantage, be demonstrated before a ban on religious clothing was permissible. This question was framed with reference to Article 8(1) of the Directive, which permits Member States to adopt more favourable standards of protection than those in the Directive. It aimed at the

³¹ *Arbeitsgericht Hamburg* 8. Kammer, EuGH-Vorlage vom 21.11.2018, 8 Ca 123/18, para 83. The quote is the author's translation from the original German text.

tension between the CJEU's acceptance of neutrality in the abstract as a legitimate aim and the German Constitutional Court's jurisprudence, which requires a specific risk or disadvantage before a restriction of freedom of religion is permissible.³²

The second reference, *MH Müller Handels GmbH v MJ*, came from Germany's Federal Labour Court (*Bundesarbeitsgericht*). Müller owns a chain of drugstores across Germany and other countries. MJ had been working at one of Müller's stores since 2002. In 2014, upon return from parental leave, she started wearing a headscarf to work. After refusing her employer's instruction to remove it, she was first assigned to a different post where she was permitted to wear it, before later being sent home when she refused to take it off. She was instructed by her employer to comply with a company rule which—unlike the policies at issue in *Achbita* and *WABE*—prohibited only 'conspicuous' or 'large-scale' signs of religious, philosophical or political convictions.

The *Bundesarbeitsgericht* therefore asked, first, whether indirect discrimination could only be justified by a neutrality policy that covered *all* visible signs of religious, philosophical, or political convictions. If this question was answered in the negative, the referring court inquired whether, in the examination of the appropriateness of the measure under Article 2(2)(b)(i) of the Directive, Article 16 of the Charter may be weighed against freedom of religion in Article 10 of the Charter and Article 9 ECHR. Echoing the Hamburg Labour Court's third question, it further asked whether national constitutional rules on freedom of religion could also be taken into account in the balancing exercise, as more favourable provisions within the meaning of Article 8(1) of the Directive. If neither of these factors could be considered, the referring court finally asked whether, in examining the validity of an employer's instruction pursuant to a neutrality policy, EU law required that national constitutional provisions on freedom of religion be disapplied, even where the relevant provisions of EU law—such as Article 16 of the Charter—referred to national laws and practices.

Taken together, the questions referred by the German courts in *WABE* and *MH Müller* were perceived as an invitation to the CJEU to revisit its controversial

³² *ibid* para 98. Religious freedom is protected by Articles 4(1) and 4(2) of the Basic Law (*Grundgesetz*) for the Federal Republic of Germany.

Achbita/Bouagnaoui judgments and clarify the questions that the Court had then left unanswered.³³

III. AG RANTO'S OPINION

AG Rantos delivered his Opinion in the cases on 25 February 2021.³⁴ On the first question in *WABE*, the Advocate General follows the logic of *Achbita*, with which he ‘fully concurs’ despite the criticisms levelled at it:

[D]irect discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 cannot occur where all religions or beliefs are covered in the same way by the internal rule.³⁵

On the second question, whether employers are entitled to anticipate customer desires through neutrality policies, AG Rantos affirms *Bouagnaoui*: where no neutrality policy exists, a customer’s desire not to be served by a headscarved employee is not a genuine occupational requirement, and it is not capable of justifying indirect discrimination.³⁶ He then writes that there may be other reasons to introduce such a policy, including customers’ wishes.³⁷ In *WABE*’s case, this may be the desire of parents that their children’s teachers not express their beliefs, which the Advocate General links to Article 14(3) of the Charter, the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.³⁸ More broadly, the freedom to conduct a business extends to a company’s ‘willingness to respect customers’ wishes, in particular for commercial reasons’.³⁹

Thus, AG Rantos takes the step that many commentators saw implied in *Achbita/Bouagnaoui*: the *anticipation* of the subjective wishes of customers via a neutrality policy is legitimate. He fails to explain *why* this is the case, if it is equally

³³ Erica Howard, ‘Headscarves return to the CJEU: Unfinished business’ (2020) 27 *Maastricht Journal of European and Comparative Law* 10.

³⁴ Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MfJ*, EU:C:2021:144, Opinion of AG Rantos.

³⁵ *ibid* para 55.

³⁶ *ibid* para 64.

³⁷ *ibid* para 65.

³⁸ *ibid*.

³⁹ *ibid* para 67.

not legitimate for an employer to bow to a customer's request that there should be 'no veil next time'.⁴⁰ McCrea has suggested that the seeming discrepancy between the two judgments is simply a result of the different legal frameworks in the Employment Equality Directive for indirect and direct discrimination.⁴¹ Another explanation is that in one case, the customer is clearly opposed to a particular expression of faith, while in the other the customers' preferences remain hypothetical and in the abstract. However, it is not unrealistic to assume that employers who enshrine workplace neutrality policies are in fact thinking of the kind of customer views that were expressed in *Bougnaoui*. Is there a practical difference, then, between the two situations? If the distinction hinges only on whether a particular sentiment is spoken out loud or not, it would be hard to disagree with Peers' argument that it is no more than a 'legal fiction'.⁴² Unfortunately, the Opinion does not seize the opportunity to clarify and shed more light on this matter.

Advocate General Rantos then turns to the first question in *Müller*, whether a rule that prohibits only large-scale and conspicuous signs of religious or other convictions can be justified. The Advocate General thinks it does, but not all of his arguments are convincing. While conceding that even small-scale signs may be noticed by the attentive customer, he takes the view that they would be incapable of causing 'upset' to the customer of another faith.⁴³ This logic is problematic. Firstly, by using the capacity to *upset* customers as a relevant criterion, the Advocate General seems to confirm that this is what neutrality policies are primarily about, rather than projecting a certain brand image. Secondly, since all four references discussed here related to Islamic headscarves, which were deemed 'large-scale' symbols by *Müller*, and the typical example used for a small-scale religious sign is a Christian cross necklace or pendant, Rantos further appears to confirm that only *certain* religions upset European customers. Finally, the broad assertion that small-scale expressions of one's belief or convictions could never upset other people must be questioned.

⁴⁰ As the client had told Ms Bougnaoui's employer: Bougnaoui (n 3), para 14.

⁴¹ Ronan McCrea, 'Faith at Work: the CJEU's headscarf rulings' (EU Law Analysis, 17 March 2017) <<http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeu-headscarf-rulings.html>> accessed 30 August 2021.

⁴² Peers (n 23).

⁴³ Opinion of AG Rantos (n 34), para 74.

AG Rantos goes on to argue that it is not impossible for such a limited policy to be applied in a consistent and systematic manner, which is for the referring court to ascertain.⁴⁴ He then responds to the applicant and the Greek and Swedish governments, who argued that a rule like the one in place at *Müller* disproportionately affects those groups who wear particularly visible religious signs. Rantos writes that to follow this logic would mean that only a ban on any signs of religious or other convictions would be appropriate, an outcome that is ‘paradoxical in the light of the objective of Directive 2000/78, which seeks to combat discrimination on the grounds of religion or belief’.⁴⁵ He goes on to state:

[O]therwise the total prohibition – without exception – on the visible wearing of any sign of political, philosophical or religious beliefs would go beyond what is necessary and would, in respect of those who have chosen to wear a small-scale sign, be punitive, solely because other persons have chosen to wear conspicuous signs.⁴⁶

As Howard points out, this contradicts the Advocate General’s endorsement of *Achbita* and his conclusion that there is a spectrum of permissible approaches by employers, from complete freedom to wear religious symbols to a total prohibition.⁴⁷ If a total ban extending to even small-scale, inconspicuous signs goes beyond what is strictly necessary, then *Achbita* cannot stand. On the other hand, policies like the one at stake in *Müller* raise the issue of whether it is at all possible to draw a line between conspicuous and inconspicuous signs of beliefs without arbitrariness, a matter which the Advocate General leaves to the national courts.⁴⁸

Then, combining the similar questions referred by the two courts, Rantos turns to the issue of whether Article 8(1) of the Directive permits national courts to take into account national constitutional rules as more favourable provisions when examining indirectly discriminatory measures. He concludes that it does not, as the purpose of Article 4(1) of Germany’s Basic Law is to protect freedom

⁴⁴ *ibid* para 77.

⁴⁵ *ibid* para 79.

⁴⁶ *ibid*.

⁴⁷ Erica Howard, ‘Headscarves and the CJEU: protecting fundamental rights or pandering to prejudice’ (2021) 28 *Maastricht Journal of European and Comparative Law* 1, 18.

⁴⁸ Opinion of AG Rantos (n 34), para 76.

of religion rather than strengthen the principle of equal treatment. This provision of national law thus falls outside the scope of Article 8(1) according to the Advocate General.⁴⁹

Next, he responds to the Federal Labour Court that Article 10 of the Charter and Article 9 ECHR are irrelevant to the determination of the appropriateness and necessity of a private company's neutrality rules. To the Advocate General, a balancing of competing rights need only take place during the legitimate aim stage of the proportionality test - the point at which the *Acbbita* judgment refers to Article 16 of the Charter and Article 9 ECHR.⁵⁰ After this point, the freedom to conduct a business is no longer relevant, and neither are any other rights.⁵¹ Then, the Advocate General draws a sharp distinction between freedom of religion or belief and the prohibition of discrimination on the basis of religion or belief, which removes the need to keep considering Article 10 of the Charter.⁵² The Advocate General therefore follows *Acbbita* in entirely skipping the stage of proportionality *stricto sensu*. As van den Brink points out, this is all the more surprising because Rantos cites, and thus must have been aware of, this precise criticism of the *Acbbita* decision.⁵³ The Advocate General, however, seems to fear for the effectiveness of the Employment Equality Directive:

if all the rights enshrined in the Charter are applied simultaneously with a view to interpreting Directive 2000/78, the end result could be that it is impossible to implement fully and uniformly the provisions of that directive, whilst respecting the objectives of the Directive.⁵⁴

This logic is not quite comprehensible. In what way are fundamental rights incompatible with the purposes of an anti-discrimination Directive, which are furthermore referred to in the very first Recital to that Directive? The idea that all

⁴⁹ *ibid* paras 87-89.

⁵⁰ *ibid* paras 93-94.

⁵¹ *ibid* para 95.

⁵² *ibid* para 97.

⁵³ Martijn van den Brink, 'Preserving Prejudice in the Name of Profit: AG Rantos' Opinion in *IX v Wabe and MH Müller Handels GmbH*' (Verfassungsblog, 1 March 2021) <<https://verfassungsblog.de/preserving-prejudice-in-the-name-of-profit/>> accessed 28 July 2021. The AG cites publications by Howard, Weiler and Cloots in footnote 16 to his Opinion.

⁵⁴ Opinion of AG Rantos (n 34), para 99.

the Charter rights would be applied simultaneously also does not ring true – of course, only the rights relevant to a particular situation are applicable, and it is precisely in the full proportionality test that any conflicts between them are ultimately resolved. Provisions of the Charter such as Articles 14(3) and 16 assisted the Advocate General in his analysis of the legitimacy of corporate neutrality policies. How does that align with his scepticism regarding Article 10 of the Charter and Article 9 ECHR, rights which weigh on the employee’s side of the scales?

Only the Advocate General’s answer to the Federal Labour Court’s third question provides some respite for the applicants: national constitutional rules protecting freedom of religion can be applied as long as the principle of non-discrimination, enshrined in Article 21 of the Charter and expressed by the Directive, is not undermined.⁵⁵ The *Melloni* doctrine, which subordinated the right of Member States to adopt higher standards of fundamental rights protection than those provided by Union law to the primacy, effectiveness and unity of EU law,⁵⁶ was inapplicable because the provisions of EU and national law in this case had different purposes.⁵⁷ Therefore, while the AG had ruled that the relevant German provisions did not come within the scope of the Employment Equality Directive, he also held they could be applied as long as they did not conflict with it. The concern expressed following *Achbita* and *Bouygnaoui* that the judgments might prevent Member States from being more protective of religious freedom⁵⁸ was thus seemingly dispelled by the AG’s Opinion.

IV. THE JUDGMENT

The Court delivered its judgment on 15 July 2021. On the question of direct discrimination, it was not swayed by the reasoning of the Hamburg Court or its academic critics. Neutrality policies such as those in place at G4S or WABE prohibiting the manifestation of all beliefs equally cannot be direct

⁵⁵ *ibid*, paras 104-106.

⁵⁶ Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para 60.

⁵⁷ Opinion of AG Rantos (n 34), footnote 45.

⁵⁸ Elke Cloots, ‘The CJEU’s headscarf decisions: Melloni behind the veil?’ (Verfassungsblog, 17 March 2017) <<https://verfassungsblog.de/the-cjeu-headscarf-decisions-melloni-behind-the-veil/>> accessed 28 July 2021.

discrimination.⁵⁹ ‘Since every person may have a religion or belief’, such rules, as long as they are applied in a general and undifferentiated manner, cannot establish unequal treatment based on a criterion inextricably linked to religion or belief.⁶⁰ Although the Court admits that such a rule could have a greater effect on workers observing religious precepts requiring certain clothing to be worn, this has no impact on its finding that there was no ‘difference of treatment between workers based on a criterion that is inextricably linked to religion or belief’, and therefore no direct discrimination.⁶¹

However, when it comes to the policy in *Müller* prohibiting only large-scale and conspicuous signs of religious and other beliefs, the Court reaches the opposite conclusion. Even though the *Bundesarbeitsgericht* had only referred questions on indirect discrimination, the Court concurs with the Commission’s observations that Müller’s policy was ‘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’.⁶² It goes on to state:

[W]here the criterion of wearing conspicuous, large-sized signs of political, philosophical or religious beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition imposed by an employer on its employees on wearing those signs on the basis of that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, and that direct discrimination, within the meaning of Article 2(2)(a) of Directive 2000/78, may therefore be established.⁶³

On the second question referred by the *Arbeitsgericht Hamburg* in *WABE*—the legitimacy of employers anticipating their customers’ wishes by implementing a neutrality policy—the Court takes up the opportunity to fine-tune its jurisprudence. The concepts of legitimate aim, appropriateness and necessity in the justification of indirect discrimination under Article 2(2)(b)(i) of the Directive

⁵⁹ *WABE and Müller* (n 1), para 52.

⁶⁰ *ibid.*

⁶¹ *ibid* para 53.

⁶² *ibid* para 72.

⁶³ *ibid*, para 73.

must be ‘interpreted strictly’.⁶⁴ The Court now pays far more attention to the purpose and context of the Employment Equality Directive, finding that it expresses the general principle of non-discrimination enshrined in Article 21 of the Charter. The judges refer to Recital 4, which emphasises that equality and non-discrimination feature in several international human rights treaties, as well as Recitals 11 and 12, concluding that the EU legislature considered discrimination to be capable of undermining the objectives of the Treaties and that it therefore resolved to prohibit direct or indirect discrimination based on religion or belief in the areas covered by the Directive.⁶⁵ The Court then reaffirms the key elements of its *Achbita* decision: an employer’s desire to maintain an image of neutrality, whether towards public or private sector customers, is legitimate, as it is linked to the employer’s freedom to conduct a business as protected by the Charter, and particularly where only customer-facing employees are affected by such a policy.⁶⁶

However, an employer’s ‘mere desire’ to pursue a neutrality policy, while a legitimate aim, cannot by itself *justify* indirect discrimination: rather, indirect discrimination can only be objectively justified if the employer demonstrates a ‘genuine need’ for such a policy.⁶⁷ This is more than the Court ever required of employers in *Achbita*. The Court considers that such a genuine need may be found in the rights and legitimate wishes of customers, such as in this case - following the Advocate General - the parents’ right to have their children educated in conformity with their own convictions and beliefs, enshrined in Article 14 of the Charter, or their desire not to have them supervised by employees manifesting their own beliefs.⁶⁸

To the Court, such a scenario must be distinguished from the facts of *Bougnaoui* as well as those in *Feryn*,⁶⁹ which related to an employer’s catering to the racially and ethnically discriminatory wishes of customers.⁷⁰ The judgment then

⁶⁴ *ibid* para 61.

⁶⁵ *ibid* para 62.

⁶⁶ *ibid* para 63.

⁶⁷ *ibid* para 64.

⁶⁸ *ibid* para 65.

⁶⁹ Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, EU:C:2008:397.

⁷⁰ *WABE and Müller* (n 1), para 66.

gives further guidance on how the assessment of a genuine need ought to be carried out: particular weight is to be given to an employer's evidence that the absence of a neutrality policy would undermine their freedom to conduct a business because, 'given the nature of its activities or the context in which they are carried out', the undertaking would suffer 'adverse consequences'.⁷¹ Furthermore, a neutrality policy must be appropriate, that is 'genuinely pursued in a consistent and systemic manner', and limited to what is strictly necessary.⁷² In determining whether such a policy is strictly necessary, the adverse consequences feared by the employer must be weighed against the restriction of the worker's freedom of thought, conscience and religion, guaranteed in Article 10(1) of the Charter.⁷³

The Court's new, more scrutinising approach to neutrality policies also becomes evident in its examination of Müller's neutrality policy. After its conclusion that the ban on large-scale symbols of belief constitutes direct discrimination, the Court goes on to consider the issues of legitimate aim, appropriateness, and necessity, should the policy nevertheless be found to be *indirectly* discriminatory. It notes that both the desire to portray an image of neutrality and the justification put forth by Müller—preventing conflicts within the business—may establish a real need on the side of the employer.⁷⁴ However, in a clear departure from the Advocate General's logic, the aims of such a policy can only be achieved if *all* visible manifestations of religious, political or philosophical beliefs are banned.⁷⁵ A prohibition only on conspicuous or large-scale signs 'calls into question the consistency of that policy'.⁷⁶

Finally, the Court turns to the applicability of national constitutional rules as more favourable provisions within the meaning of Article 8(1) of the Directive. It explains that the *Bundesarbeitsgericht's* query arose from its doubt as to whether it could take account of the various competing Charter rights in examining the appropriateness of a neutrality policy.⁷⁷ The Court first explains that the

⁷¹ *ibid* para 67.

⁷² *ibid* para 68.

⁷³ *ibid* para 69.

⁷⁴ *ibid* para 76.

⁷⁵ *ibid* para 77.

⁷⁶ *ibid*.

⁷⁷ *ibid* para 80.

protection of freedom of religion in Article 10 of the Charter is drawn from Article 9 ECHR (those two provisions having the same meaning and scope, as per Article 52(3) of the Charter) as well as the common constitutional traditions of Member States.⁷⁸ Accordingly, in the examination of the appropriateness of the restriction resulting from a neutrality rule, ‘the various rights and freedoms in question’ must be taken into account.⁷⁹ In *Achbita*, the CJEU told the referring court to ‘take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary’.⁸⁰ The Court elaborates on this by explaining that, since the only freedom concerned in that case was the freedom to conduct a business, the other freedom alluded to in that sentence must be the freedom of thought, conscience and religion.⁸¹

The Court states that this interpretation of the Employment Equality Directive is in conformity with its case-law and ensures that, observing the principle of proportionality, a fair balance is struck between the rights and freedoms competing here, namely Articles 10 and 21 of the Charter on one hand and Articles 14(3) and 16 on the other.⁸² As for the requirement, elaborated in the German Constitutional Court’s jurisprudence, that employers demonstrate a sufficiently specific risk to their interest before a restriction of their employees’ religious freedom can be justified, the Court finds that it ‘forms part of the context’ of the test for justifying indirect discrimination in the Directive.⁸³

Turning to the actual issue of Article 8(1), the Court notes that the Directive creates only a general framework for equal treatment in employment and occupation, thus affording a ‘margin of discretion’ to Member States in light of the diversity of their approaches to the protection of religion and belief.⁸⁴ The EU legislature therefore left it to the Member-States and their courts to find the right balance between freedom of religion and any legitimate aims that may justify unequal treatment.⁸⁵ Mentioning further that national provisions on freedom of

⁷⁸ *ibid*, para 81.

⁷⁹ *ibid*, para 82.

⁸⁰ *Achbita* (n 2), para 43.

⁸¹ *WABE and Müller* (n 1), para 83.

⁸² *ibid* para 84.

⁸³ *ibid* para 85.

⁸⁴ *ibid* para 86.

⁸⁵ *ibid* para 87.

thought, conscience and belief constitute ‘a value to which modern democratic societies have attached great importance for many years’, the Court affirms that they may indeed be taken into account as more favourable provisions within the meaning of Article 8(1) of the Directive.⁸⁶ This includes rules such as the one originating in German constitutional jurisprudence containing a higher justificatory burden for indirect religious or belief discrimination.⁸⁷

V. ASSESSMENT

To many observers, the two preliminary references that made their way to Luxembourg from Germany presented the CJEU with an opportunity to revisit one of its most controversial lines of case-law in recent years. It appears that the Court was eager to deal with some of the key lines of criticism that were levelled at it. It did not, however, depart from its conception of direct discrimination. Howard argues that all neutrality policies prohibiting signs of religious, philosophical or political beliefs should be classified as direct discrimination, since ‘some workers will be treated less favourably than others on the basis of their religion or belief’.⁸⁸ Van den Brink, by contrast, believes that the conclusion that a neutrality policy does not amount to direct discrimination may be correct, but that the Court’s finding in *Müller* undermines it. He argues that if the rule in *Müller* is directly discriminatory because the ban on large-scale symbols affects some religious people more, then the same conclusion ought to be drawn in respect of WABE’s neutrality policy, which also has such a disparate impact.⁸⁹

It is submitted that the Court’s analysis of WABE’s neutrality policy is plausible. When assessing whether a Muslim woman wishing to manifest her belief in the workplace has been discriminated against on the basis of her *particular* belief, it seems appropriate to compare her situation to that of an employee of another faith wishing to express the same. And when assessing whether religious

⁸⁶ *ibid* para 89.

⁸⁷ *ibid*.

⁸⁸ Erica Howard, ‘German headscarf cases at the ECJ: a glimmer of hope?’ (European Law Blog, 26 July 2021) <<https://europeanlawblog.eu/2021/07/26/german-headscarf-cases-at-the-ecj-a-glimmer-of-hope/>> accessed 26 July 2021.

⁸⁹ Martijn 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/>> accessed 28 July 2021.

employees have been discriminated against on the basis of holding a religious belief *in general*, it seems equally permissible to compare their situation to that of employees desiring to express a political or philosophical view.⁹⁰ The relevant criterion is therefore not *having* such beliefs or convictions, but instead the desire to *manifest* them. A neutrality rule like that in place at G4S or WABE treats all those manifestations equally.

Some scholars have argued that a distinction is necessary between expressions of religious beliefs deemed mandatory in the relevant faith and those that are a choice, distinguishing for instance between Islamic headscarves and Christian crosses.⁹¹ Howard's argument in favour of a finding of direct discrimination in *WABE* proceeds along those lines, following the reasoning of former Advocate General Sharpston, who has written a 'Shadow Opinion' on *WABE* and *Müller*. The ex-Advocate General argued that WABE's policy discriminates 'against all religious groups who consider themselves to be obliged to wear mandated religious apparel as compared with (i) members of religions in which specific apparel is not mandated and (ii) those employees who are atheist or agnostic'.⁹² Cast in this light, the rule appears directly discriminatory against those believers who believe they are *required* by their faith to wear certain items of clothing.⁹³ But the question of whether a particular practice is mandatory may well be the subject of controversial debates within a faith, and it would be unwise for a court to have to take a side on these matters. On this issue, Sharpston refers to the Opinion of Advocate General Hogan in a recent case relating to the compatibility of limitations imposed by the regional authorities in Flanders (Belgium) on the ritual slaughter of animals with EU law, in which he wrote:

A secular court cannot choose in relation to the matters of religious orthodoxy: it is, I think, sufficient to say that there is a significant body of adherents to both the Muslim and Jewish faiths for whom the

⁹⁰ Admittedly, if a company were to prohibit only manifestations of religious beliefs, while permitting employees to manifest their political or philosophical convictions, the issue of direct discrimination would be more pertinent.

⁹¹ This point is made by Weiler (n 19), 881-883.

⁹² Eleanor Sharpston QC, '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>> accessed 17 September 2021, para 122.

⁹³ *ibid*, para 123.

slaughter of animals without such stunning is regarded by them as an essential aspect of a necessary religious rite. I propose, accordingly, to proceed on that basis.⁹⁴

It certainly is an empirical fact that to many Muslim women, the hijab is an essential and required element of their faith, as the kippah is to many Jews. However, it is not clear in what way this should influence the legal assessment, and whether a legally relevant distinction exists between religious signs or clothing items deemed mandatory and those that are optional. Sharpston argues that the ‘optional’ expression of, for instance, Christian faith through a cross should not be taken lightly either and that it would be wrong to permit an employer to prohibit such optional expressions.⁹⁵ It is submitted that this line of analysis causes some difficulty with the established distinction between the *internal* and *external* elements of freedom of religion and belief. Where a particular item is deemed mandatory, does it become part of the *forum internum* of religious freedom—i.e., *having* the belief, rather than the *forum externum*, expressing or manifesting said belief? Later on in her Shadow Opinion, the former Advocate General argues for an enlarged definition of direct discrimination. In her suggestion, whenever an employer instituting an apparently neutral policy “knows or ought reasonably to have known will inevitably place a member of a particular group in a less favourable position on the basis of any of the grounds referred to in Article 1,”⁹⁶ it should be classified as direct discrimination. However, Sharpston also concedes that this is a ‘bold step’ for which the Court may not yet be ready.⁹⁷

It is submitted that in terms of the *current* analytical framework, the Court did assess the two policies correctly. The rule in *WABE* is framed neutrally, but it does affect different groups in different ways. Arguably, it affects people holding *religious* beliefs more, since people are more likely to express religious rather than philosophical or political beliefs through their dress. It then affects persons adhering to *particular* faiths more than others. It is submitted that this matter is best dealt with under the heading of indirect discrimination, which is,

⁹⁴ Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:695, Opinion of AG Hogan, para 47.

⁹⁵ Sharpston (n 92), para 124.

⁹⁶ *ibid* para 263.

⁹⁷ *ibid* para 266.

after all, defined as the disparate or disproportionate impact on certain groups of a neutral rule. As Vickers pointed out, the CJEU's reasoning echoes that adopted by both UK courts and the ECtHR in comparable cases.⁹⁸

But what about the criticism that the conclusions regarding *WABE*'s and *Müller*'s policies do not fit together? It would indeed be odd if the Court had, as van den Brink suggests, deemed *Müller*'s policy as directly discriminatory *based on* its disparate impact on certain groups. The language of the judgment, however, reveals a more nuanced line of argument: a rule is directly discriminatory if it is 'based on a criterion that is inextricably linked to religion or belief'.⁹⁹ A general neutrality policy covering *all* manifestations of *all* kinds of belief does not establish a criterion inextricably linked to religion or belief. By contrast, it is clear that a rule banning 'large-scale', 'conspicuous' signs of belief will *always* catch particular beliefs. The Islamic headscarf or the Sikh turban will always fall foul of such a rule, whereas a Christian cross would have to be particularly prominent and large to do so. Therefore, the policy pursued by *Müller* establishes a criterion inextricably linked to *certain* religions or beliefs. It is this link that makes the rule directly discriminatory, and not the disparate impact it has, which, as van den Brink and others rightly suggested, exists in respect of *WABE*'s policy as well. In this context, the Court should be commended for taking up the question of direct discrimination in *Müller* despite the Federal Labour Court having only referred to indirect discrimination in its analysis. This was a radically different starting point from that used by the Advocate General, who appeared to prefer *Müller*'s policy because it only banned some rather than all signs of belief. But it is precisely this *singling out* that led to the Court's conclusion that the policy was directly discriminatory.

There is, however, another compelling question regarding the way the CJEU approaches the definition of direct and indirect discrimination. That question is whether there should have been an inquiry into the *motivations* of employers in adopting neutrality policies, and the possibility that they might be seeking to pander to real or assumed prejudices among their customers. The *Achbita* judgment was heavily criticised for failing to acknowledge the rise of

⁹⁸ Lucy Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8 European Labour Law Journal 232, 250.

⁹⁹ *WABE and Müller* (n 1), para 52.

Islamophobia as the lived reality behind the legal questions at stake.¹⁰⁰ If an apparently neutral policy is adopted on the basis of the (assumed) prejudices of customers, could that transform indirect into direct discrimination?

It is true that indirect discrimination for the purposes of the Employment Equality Directive is defined by virtue of the *impact* of an apparently neutral policy, and thus an objective criterion, rather than through a subjective analysis of the possible motive behind a policy. However, as Cloots pointed out, the Court has at times strayed from a strict impact-based assessment and included such a subjective analysis.¹⁰¹ This was the case in *CHEZ*,¹⁰² a widely lauded decision on the Race Equality Directive.¹⁰³ That case concerned a Bulgarian electricity company's practice of installing electricity meters at a higher level in majority-Roma areas, purportedly on account of higher rates of tampering. In that case, the CJEU had concluded that:

[A] measure such as the practice at issue constitutes direct discrimination within the meaning of that provision *if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned, a matter which is for the referring court to determine by taking account of all the relevant circumstances of the case.*¹⁰⁴ [emphasis added]

In other words, where there was reason to believe a contested policy supposedly based on a neutral consideration (such as the tampering rates) was really introduced with discriminatory intentions, the referring court was asked to consider all the evidence available to determine the true motivation behind it. In a similar vein, the Court could have used the references in *WABE* and *Müller* to confront the question of whether the wishes of customers to which employers feel obliged to respond to, might themselves be based on prejudice against particular groups, and to what extent this should factor into the legal assessment.

¹⁰⁰ For example, see Brems (n 16).

¹⁰¹ Cloots (n 29), 611.

¹⁰² Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, EU:C:2015:480.

¹⁰³ Council 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.

¹⁰⁴ *CHEZ* (n 102), para 91.

It did not do so, or at least not directly. McCrea has argued that the finding of direct discrimination in *Müller* represents a recognition that the rule at issue likely constituted a form of ‘hidden targeting’ of certain religions.¹⁰⁵ While the idea of hidden targeting may well have been on the minds of judges when they found that the rule in *Müller* was inextricably linked to certain beliefs, the language of the judgment does not in any way refer to this. Indeed, McCrea also writes that the way the Court expresses this conclusion ‘is liable to cause confusion in the future’.¹⁰⁶ And so the CJEU missed an opportunity to make a strong statement that employers cannot abuse the notion of neutrality to blatantly target particular faiths.

In addition to this, the judgment also raises new questions: at paragraph 85, the Court appears to suggest that the risk of a loss of income might justify a neutrality policy. Could an employer therefore succeed by providing statistical evidence that customers are prejudiced, and that they would lose business without a neutrality policy keeping ‘unwanted’ religious manifestations hidden? And would such an outcome be compatible with the very *raison d’être* of anti-discrimination law? In *Feryn*,¹⁰⁷ it was unacceptable to the Court that an employer should cater to the racist prejudices of his customers. In *WABE* and *Müller*, the judges—for a second time—neglected to ask *why* employers might feel that neutrality policies are necessary to protect their bottom lines.

As van den Brink correctly submits, neutrality policies can serve a variety of aims: in the judiciary to ensure an impression of impartiality, or in teaching and education to ensure children are not influenced by the beliefs of those who teach them.¹⁰⁸ The Court could have restricted its acceptance of neutrality policies to particular contexts, such as childcare and education, where the rights of parents under Article 14(3) of the Charter are at play. Indeed, the Court suggests at paragraph 67 of the judgment that the ‘nature’ of the employer’s activities or the ‘context’ in which they are carried out are relevant to assessing whether there is a

¹⁰⁵ Ronan 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>> accessed 30 July 2021.

¹⁰⁶ *ibid.*

¹⁰⁷ *Feryn* (n 69).

¹⁰⁸ Van den Brink, ‘Pride or Prejudice’ (n 89).

genuine need. One might infer from this that the judges considered that not *all* businesses might legitimately require neutrality policies. Yet the Court also says, at paragraph 65, that a genuine need might be demonstrated by considering ‘the rights and legitimate wishes of customers or users’. This broad language makes it hard to argue that the Court was seeking to restrict neutrality policies to *specific* instances in which they are necessary to serve another legitimate aim, such as judicial impartiality or the value-neutral education of children. And, crucially, it neglects to define when customer wishes should be deemed ‘legitimate’ and when they should not. The conceptual boundaries of ‘neutrality’ as a legitimate aim thus await further clarification.

However, there are also clear steps forward in this judgment. The first is the markedly improved proportionality test. By seriously considering the employee’s religious freedom under Article 10 of the Charter, the Court recognises the fundamental rights element of the cases that it had previously neglected. It rightly rejects the supposed conflict between fundamental rights and non-discrimination set up in the Advocate General’s Opinion, instead finding that Article 10 ‘forms an integral part of the relevant context in interpreting’ the Employment Equality Directive.¹⁰⁹ In a further improvement from *Achbita*, the Court now refers to the *value* and *importance* of this right, using dicta of the European Court of Human Rights as a reference point:

In accordance with the case-law of the European Court of Human Rights (‘the ECtHR’), the right to freedom of thought, conscience and religion, enshrined in Article 9 of the ECHR, “represents one of the foundations of a “democratic society” within the meaning of [that] Convention” and constitutes, “in its religious dimension, ... one of the most vital elements that go to make up the identity of believers and their conception of life” and “a precious asset for atheists, agnostics, sceptics and the unconcerned”, contributing to “the pluralism indissociable from a democratic society, which has been dearly won over the centuries.”¹¹⁰ [references omitted]

This contextual element and the Court’s acknowledgement that the employee’s religious freedom must factor into the proportionality assessment

¹⁰⁹ *WABE and Müller* (n 1), para 48.

¹¹⁰ *ibid.*

must be applauded. Nonetheless, its attempt to suggest that this balancing test was already implied in *Achbita* (compare paragraph 83 of the current judgment) is not convincing. After all, AG Rantos believed that he was upholding the judgment in *Achbita* when he denied the relevance of fundamental rights in the later stages of proportionality analysis. It therefore seems that the Court was attempting to reverse itself without having to admit as much.

A more charitable interpretation can be found in Loenen's argument that one should see the rather terse judgments in *Achbita* and *Boungaoui* as 'intermediate' steps towards a later, more comprehensive answer to the issues raised by the cases.¹¹¹ According to this reading, then, the Court always intended to return to these judgments, and that is what it did in *WABE* and *Müller*. However, even if this interpretation were accepted, one must ask whether it is desirable for a court to decide cases involving fundamental rights in an open-ended and ambiguous way just so it can return to the question at some point in the future.

It is also relevant at this point to return to former Advocate General Eleanor Sharpston's proposals for an *enlarged* definition of direct discrimination. It becomes clear from her Shadow Opinion that this suggestion is motivated by a sense that 'the very nature of *indirect* discrimination perhaps tempts us, unwittingly and wrongly, towards setting the bar lower'.¹¹² In other words, a broader definition of direct discrimination might be necessary if indirectly discriminatory policies are insufficiently scrutinised by the courts. After the *Achbita* decision, this was indeed a legitimate concern. It is submitted that *WABE* and *Müller* justifies a sense of optimism that the Court is raising the bar indirectly discriminatory policies have to clear. At a minimum, an employer's desire to portray an image of neutrality will no longer automatically trump the employee's interests in expressing their faith. If the Court polices indirect discrimination strictly, broadening the definition of direct discrimination might no longer seem like a necessary step. However, as discussed above, the judgment did not answer all open questions, so it remains to be seen how far the Court might be willing to go in the future.

¹¹¹ Loenen (n 27), 48.

¹¹² Sharpston (n 92), para 206.

The second welcome development in these judgments is the clear permission for Member States to chart their own path when it comes to the right balance between religious freedom and commercial interests. As mentioned, the *Acbbita* ruling led many observers to conclude that the Court had imposed a particular conception of religious neutrality on all Member States. In *WABE* and *Müller*, the Court attempts to alleviate this concern. Referring to the varied approaches taken by Member States, the Court finds that the Directive leaves a margin of discretion to Member States in striking a fair balance between the competing rights at stake. It seems to acknowledge that a one-size-fits-all approach is misplaced in a policy area that is so sensitive and characterised by such a diversity of approaches among the different Member States. Arguably, the Court has now even incorporated parts of the German courts' approach in finding that the need to demonstrate a specific risk to the employer's interests 'forms part of the context' of the assessment of the justification for an indirectly discriminatory rule.¹¹³ Van den Brink criticises the Court for insisting that where more favourable national rules are applied, they still require balancing against the employer's interests.¹¹⁴ It is submitted that the Court decided correctly. Its reasoning is in line with the ECtHR's case-law in recognising that an employer's interests in restricting the religious expression of employees may be legitimate. There *are* competing interests that must be balanced in such a scenario. The key questions that arose for the Court after *Acbbita* was whether it should accord more weight to the employee's side in this balancing exercise, and/or whether it should at least permit Member States to strike that balance differently. On both of those counts, the current judgment has improved on its predecessors.

CONCLUSION

Where do these judgments leave us, then? They represent a notable step forward from *Acbbita* and *Boungnaoui*, indicating the Court is willing to listen to its critics and engage in a much more nuanced analysis of the sensitive issues at stake in cases like these. The judges do reaffirm their concept of direct discrimination, but their reasoning is made much more explicit. The Court now demands more of employers by way of justification for neutrality policies. Crucially, it requires a

¹¹³ *WABE and Müller* (n 1), para 85.

¹¹⁴ Van den Brink, 'Pride or Prejudice' (n 89).

stricter proportionality analysis, in which the employee's religious freedom is a relevant factor. Finally, the judgment does not attempt to impose a particular vision of religion's place in the public sphere on the entire Union but explicitly allows Member States to chart their own path. For all these reasons, the judgment compares favourably with the rather one-sided Opinion delivered by Advocate General Rantos. It appears balanced and carefully considered. At times, this cautiousness disappoints, as it would have been desirable for the CJEU to critically engage with the *legitimacy* of catering to customer preferences and address the prejudice and exclusion faced by certain groups in the labour market. But in the context of very divergent approaches to religion across Europe and the political salience of the issue, this was, in McCrea's words, 'probably as big a step as it is wise for a multi-national court to take'.¹¹⁵

¹¹⁵ McCrea (n 105).