

# Recent CJEU decisions on religious headscarves at the workplace: The *WABE* and *Müller* cases

Prof. Dr. Christa Tobler, LL.M.  
Universities of Basel (Switzerland) and Leiden (the Netherlands)

Non-Discrimination: Recent CJEU and ECtHR Case Law  
ERA online seminar, 14 December 2022

## The topic of this presentation

### Our focus: an important decision by the CJEU

- Joined Cases C-804/18 and C-341/19 *IX v WABE eV* and *MH Müller Handels GmbH v MJ*, ECLI:EU:C:2021:594, decision handed down on 15 July 2021.
- «Grand Chamber» decision, which indicates its importance.
- Issue: rules of employers about the wearing of political, philosophical or religious signs in the workplace.



- Note therefore: the decision is **not just about the Islamic headscarf**.
- However, in such cases, there is always the **suspicion that the real target is**, in fact, the Islamic headscarf ...

## Structure of this presentation

### Order of issues discussed

- Facts of the two cases.
- Legal arguments before the national courts.
- Questions asked to the CJEU in the preliminary ruling procedure.
- Answers by the Court:
  - CJEU on direct and indirect discrimination on grounds of religion or belief;
  - CJEU on justification for indirect discrimination;
  - CJEU on minimum protection under EU law.
- Finally: what about multiple discrimination?



## Facts of the two cases

### The *WABE* case (C-804/18)

- WABE: an association that operates child care centres.
- Employee IX, a special needs carer, decides to wear the Islamic headscarf in 2016.
- In 2018, WABE instructs all employees who are in contact with children or parents:
  - not to make any political, philosophical or religious statements or to give expression of any related customs vis-à-vis children, parents and third parties;
  - **not to wear any visible signs of their political, philosophical or religious beliefs.**
- When still wearing her headscarf, IX is given a warning and then temporarily suspended. She goes to court.

### The *Müller* case (C-341/19)

- Müller: a chain of drugstores.
- Employee MJ, a sales assistant, decides to wear the Islamic headscarf in 2014.
- In 2016, Müller instructs MJ to attend her workplace **without conspicuous, large-sized signs of any political, philosophical or religious beliefs.**
- According to Müller, there is a general, internal directive to that effect.
- Faced with the above-mentioned instruction, MJ goes to court.

## Legal arguments in the national courts

### The *WABE* case (C-804/18)

- According to employee IX:
  - There is threefold discrimination:
    - Direct discrimination on grounds of **religion**, since the rule directly targets the wearing of the Islamic headscarf;
    - Direct discrimination on grounds of **gender (sex)**;
    - Indirect discrimination on grounds of **ethnic origin**, since the rule has a greater impact on women with migration backgrounds.
  - CJEU case law on the relevant EU law relates to **minimum standards** only. German law demands an established and specific risk in order to allow a prohibition of the headscarf.
- According to *WABE*, a policy of neutrality that is consistently and systematically applied and restricted to employees who are contact with customers is acceptable under EU law.

### The *Müller* case (C-341/19)

- According to employee MJ:
  - Invokes her **freedom of religion** under the German constitution;
  - Argues that a policy of neutrality enjoys priority only if the measure taken is **proportionate**.
- According to *Müller*, its rule is fine as it is intended to prevent conflicts between employees.

## Questions asked to the Court of Justice of the EU

### Preliminary ruling procedure

- What does EU law require in such cases?
- The national courts in the two cases at hand make use of the preliminary ruling procedure (Art. 267 TFEU) and turn to the CJEU with questions of interpretation of EU law, in particular of Directive 2000/78.
- These questions essentially relate to:
  - The nature of discrimination on grounds of religion or belief in such cases, **direct or indirect discrimination**.
  - **Justification** for indirect discrimination, including in particular:
    - The role of the **wishes of the customers** in establishing a policy of neutrality;
    - The role of **conflicting fundamental rights** under the EU Charter (CFR) and the ECHR, including in particular Art. 10 CFR and Art. 9 ECHR (freedom of thought, conscience and religion), Art. 14 CFR (right to education) and Art. 16 CFR (freedom to conduct a business).
  - The room left to the Member States given that Directive 2000/78 provides for mere **minimum of protection** against discrimination.



## CJEU on direct and indirect discrimination on grounds of religion or belief

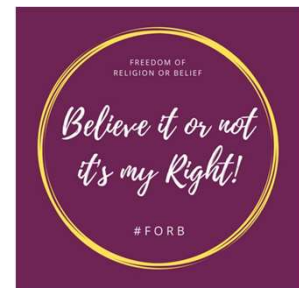
### Legal definitions and delimitation (see also *Charts 10/10, 10/11, 10/12*)

- Art. 2(2)(a) of Directive 2000/78: “**direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1”.
- Art. 2(2)(b) of Directive 2000/78: “**indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary [...]”
- What about the dividing line between direct and indirect discrimination?
  - *Müller and Wabe* confirms previous case law according to which reliance on a criterion that is “inextricably” linked to a particular discrimination ground leads to **direct discrimination**.
  - Further: even apparently neutral criteria may lead to **direct discrimination**, e.g. where they exclude one group entirely. Example: the criterion of marriage, where homosexual people are not allowed to marry; *Maruko, Hay*.

## CJEU on direct and indirect discrimination on grounds of religion or belief

### An important preliminary remark: the thorny issue of the choice of the right comparator

- Discrimination results from unequal treatment, i.e. the treatment of different persons or groups of persons must be compared. But: who must be compared to whom?
- E.g. religion or belief: can one compare believers with non-believers, arguing that all rules that negatively affect the former amount to discrimination?
- Not according to the CJEU in *WABE and Müller*:
  - The prohibition in the Directive is not limited to differences in treatment between those having a religion and belief and those who do not.
  - CJEU refers to the ECtHR, according to whom Art. 9 ECHR is a vital element for believers // a precious asset for atheists, agnostics, sceptists and the unconcerned, and contributes to «pluralism indissociable from a democratic society» (*Dhalab v. Switzerland*).
  - The EU Directive wants to provide everyone with effective protection against discrimination.
- This has consequences for the discrimination analysis – see the following sheets.



## CJEU on direct and indirect discrimination on grounds of religion or belief

### **WABE and Müller on direct discrimination**

- Remember the rules at issue:
  - “Employees in contact with customers must not wear any visible signs of their political, philosophical or religious beliefs.”
  - “Employees must not wear conspicuous, large-sized signs of any political, philosophical or religious beliefs.”
- CJEU on the first type of rule (*WABE*):
  - There is **no difference of treatment between workers directly based on religion or belief** where a rule covers any manifestation of religion or belief without distinction and is applied in a general and undifferentiated way to all workers in the undertaking.
  - Here: fully general rule that has in practice also been applied to a Christian women wearing a small cross.
  - [But: what if the rule in fact targeted Muslim women? See hints in earlier case law (*Nikolova*) ...]
- CJEU on the second type of rule (*Müller*):

Liabile to have a greater effect on people with particular religious, philosophical or non-denominational beliefs, namely those that require the wearing of a large-sized sign, therefore **direct discrimination on grounds of religion or belief**.

## CJEU on direct and indirect discrimination on grounds of religion or belief

### **WABE and Müller on indirect discrimination**

- *WABE*:

According to the national court, the rule in question concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith – seems to indicate the existence of **prima facie indirect discrimination**.
- *Müller*:

If no direct discrimination is found, then still **prima facie indirect discrimination**.
- A practical note:

In the framework of the preliminary ruling procedure, the actual finding of direct discrimination or prima facie indirect discrimination in the concrete case at hand is left to the national court.
- Next step in the CJEU decision: justification. Note that the CJEU only deals with objective justification for indirect discrimination. The national courts had not asked about statutory justification grounds (see **Chart 10/13**).

## CJEU on objective justification

### Objective justification

Can discrimination in the workplace be justified?



### Objective justification for indirect discrimination

- Art. 2(2)(b) of Directive 2000/78 requires a legitimate aim and a proportionate measure. In CJEU case law, much is left to the national court.
- *WABE* in relation to the aim:
  - Employer cites the desire to pursue a policy of political, philosophical and religious neutrality with regard to the customers, in order to take account of their legitimate wishes.
  - CJEU:
    - Desire as such is covered by Art. 16 CFR.
    - But: there is a **legitimate** aim under Art. 2(2)(b) of Directive 2000/78 only, where the employer demonstrates a genuine need in this respect, e.g. by citing rights and legitimate wishes of the customers (here: parents in relation to the religious education of their children) or bringing evidence of adverse consequences in the absence of the policy.
- *WABE* in relation to proportionality – only general statements. Measure must be:
  - Appropriate/suitable in view of the aim and be genuinely pursued in a consistent and systematic manner.
  - Necessary/requisite, in fact strictly necessary [remember previous case law about jobs with no contact with customers].

## CJEU on objective justification

### Objective justification for indirect discrimination

- *Müller* in relation to the aim:
  - Employer cites the desire to avoid, through a policy of neutrality, social conflicts between the employees within the undertaking, particularly in view of tensions which occurred in the past in relation to political, philosophical or religious beliefs.
  - CJEU: may be legitimate.
- CJEU in *Müller* in relation to proportionality – here a clear finding:  
A policy of neutrality can be effectively pursued **only if no visible manifestation** of political, philosophical or religious beliefs is allowed.
- In other words:  
Rules such as that at issue in the *Müller* case are **not proportionate** and, therefore, amount to **indirect discrimination on grounds of religion or belief**.

## CJEU on minimum protection under EU law

### Room for more protection under national law

- Art. 8 of Directive 2000/78 on “Minimum requirements”: “Member States **may introduce or maintain provisions which are more favourable to the protection** of the principle of equal treatment than those laid down in this Directive. [...]”
- Under German law, the employer accused of indirect discrimination must show not only a legitimate aim but also demonstrate a sufficiently serious specific risk of the legitimate aim being undermined, e.g. the risk of specific disturbances in the undertaking or the specific risk of loss of income. (Remember EU law: “a genuine need”).
- CJEU:
  - National law can set up stricter rules, e.g. by making justification for indirect discrimination subject to higher requirements.
  - Such rules may be taken into account as “more favourable provisions” in examining the appropriateness of a difference of treatment.
- [By the way: at the beginning of this part, the CJEU here goes back to the proportionality test and refers to the various rights and freedoms that must be balanced and reconciled with each other. Why?]

## Finally: what about multiple discrimination?

### A challenge avoided by the CJEU ...

- Remember that employee IX in the *WABE* case argued that there are **three types of discrimination**, namely at the same time discrimination based on religion, sex and ethnic origin. One of the national courts also mentions sex in addition to religion and belief.
- CJEU avoids the challenge in a rather “cheap” way, namely by stating that the national courts’ questions relate exclusively to Directive 2000/78, which does not cover sex.
- CJEU case law on multiple discrimination (see in particular *Parris*):
  - Cumulative discrimination is covered by EU law – could have been applied in this case!
  - Intersectional discrimination is not covered.

– Do you find the *WABE* and *Müller* judgment convincing in this and other respects?



Universität  
Basel

**Thank you**  
for your attention!

**Contact:**

[christa.tobler@unibas.ch](mailto:christa.tobler@unibas.ch) or [r.c.tobler@law.leidenuniv.nl](mailto:r.c.tobler@law.leidenuniv.nl)

**Charts referred to in this presentation and included in the seminar materials are taken from:**

Christa Tobler/Jacques Beglinger, *Essential EU Law in Charts and Text*, 5th edition, Budapest: HVG-ORAC 2020 (see [www.eur-charts.eu](http://www.eur-charts.eu)).