



ERA- 9-6-2022

## Are religion neutrality clauses in companies neutral?

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## OVERVIEW

- I. Labour law and balancing fundamental rights-  
Sources
- II. Case-law about religious symbols and  
"neutrality"- CJEU-cases  
and ... conflicting opinions
- III. What is "neutrality"?
- IV. Provoking concluding remarks/questions  
answering the question from ERA..

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## I. LL= BALANCING FUNDAMENTAL RIGHTS

**LL:** Balancing FR employers v. workers  
However: Dir. 2000/78 covers also independent workers !  
Dir. 2000/43: also goods and services

**LL=** conflicting interests in semi-public sphere  
Profit making v. personal ambitions  
Loyalty is required, but no fiduciary relationship

Employment= inherently a limitation on personal rights and freedoms: but always present

ECHR: FR of workers on the work floor !  
liberty, privacy, freedom of expression, religion, competition



## FR –Employers

Right of the employer to conduct his business= FR ?  
Not in ECHR but Protocol n° I (property)  
In many national constitutions !

E.g. **TFEU: Art. 49:** "The freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms"

E.g. **Art. 16 CFREU:** "The freedom to conduct a business in accordance with Union law and national laws and practices is recognised."

**ALSO: Art. 4.2. Dir. 2000/78:** Religious employers (Tendenzbetriebe, entr. tendance, ideological and phil. enterprises)



## Religion and belief of the employers- also FR

(Tendenzbetriebe- Germany !)

- Obst: ECtHR 23-09-2010: Staff member: OK//Art. 8 ECHR
- Schüth: ECtHR, 23-2010: Organ player: Not OK//Art. 8 ECHR
- Siebenhaar, ECtHR, 3-2-2011, Kindergarten teacher:  
OK// Art. 9 ECHR (proselytism)
- Martinez: ECtHR 7-5-2011 + Gr.Ch.ECtHR 12-06-2014:  
Catholic religion teacher (8 v. 7 !) // Art. 9, 11, Quid art. 8  
ECHR ? Dissenting opinions ! See merits of the case !  
Did he seek publicity ? Criteria for proportionality test
- Yilmaz v. Turkey: ECtHR 2-6-19: Religion- Teacher criteria  
headscarf of spouse, student arrest

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## Freedom of religion as a fundamental right

Art. 9 ECHR- 1950

1. *Everyone has the right to **freedom of thought, conscience and religion**; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's **religion or beliefs** shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Forum internum : not practical ! "Lived religion= practices"  
Forum externum: finding ways to accommodate

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## EU-Law

Directive 2000/78: Art. 1,

Limited to employment: Art. 3

(goods and services: only proposal)

Art. 10 CFR- EU: *Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*

*2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.*

*NOTE: Also: Art. 51 (1): Limitations= restrictive !?*

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## Context in society: shifting

**Society:** tendency to ban headscarf and Islamic dress codes and Islamic customs

- Growing "discomfort" with Islam (Nussbaum)  
(incidents → rejection → political debate → incidents)

**Judiciary:** solving problems ? Uneasiness of judges..

- Rituals (C-336/19, Belgium, Brussels)
- Education (neutrality in public schools)  
Belgium: Council of State v. Constitutional Court
- Swimming pools (dress codes)

**Legislation:** cf. France: Code du Travail: L 1132-1-2 (2016)  
Work Rules may limit FR // functioning of the enterprise and proportionality

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## From headscarf to religion to neutrality

A.G. Kokott (C-157/15, 3): *"Ultimately, the legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities"*

Judiciary: headscarf=symbol of serious discussion in society  
But: limited to individual cases

Ph.D. Van Bellingen(UCL-2022): Serious questions about "neutrality": law may probably not solve the question



## II. CASE LAW

1° ECtHR 15-01-2013 (2/4 joint cases:  
Christians !

(Eweida & Chaplin)

2° ECJ 14-3-2017: C-157/15 and 188/15

(G4S & Bougnaoui)

3° ECJ 15-7-2021: C-804/18 and C-341/19

(Wabe & MH Müller)

Pending: C-344/20 (Lab.Trib. Brussels)



## 1° ECtHR: Eweida en Chaplin

- 1° Eweida: Coptic christian, airhostess BA,  
small cross on necklace: under/above uniform  
Lab.Trib.: no religious obligation- individual expression  
ECtHR: x art. 9: disproportionate (discrete, hesitation of BA)
- 2° Chaplin: nurse NHS, cross on necklace  
reasonable accommodation for other religions  
alternative employment  
Medical reasons: //art 9
- Remark: collective relations and negotiation ?  
Eweida: after v. Chaplin: before  
Relevance of collective relations for proportionality test:  
(finding justification)



## 2° Headscarf in EU-law 2017- G4S and Bougnaoui

- Two cases: 14th March 2017 + two different opinions AG  
C-157/15, G4S, Belgian case, (Achbita)  
AG Kokott 31.5.2016  
Labour Court Antwerp 23.11.2011,  
Belg.Cass. 9.3.2015
- C-188/15, Micropole (Bougnaoui)  
French case, AG Sharpston 13.7.2016  
Fr. Cass. 24.4.2015



## C-157/15, G4S, Facts- Belgian case

Facts:

2003: Employment contract

G4S: reception service

Unwritten rule: no religious signs

2006: wish to wear the veil

Refusal – sickness leave –

Works council: confirmation of work rules: no religious signs

Dismissal

Labour tribunal + Labour Court: no discrimination

Cass: Is the refusal to wear the veil direct discrimination ?

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## C-157/15, G4S, (Belgium) AG Kokott 31.5.2016

Ban on headscarf= **direct discrimination** ?

AG: No (opinion 46 e.f.)

No discrimination between religions !? (ECJ 22/01/2019, C-193/17)

**National identity** does not therefore limit the scope of the Directive as such, but must be duly taken into account in the **interpretation** of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment. Moreover, even France acknowledged, at the hearing before the Court, that such an approach is a viable way of preserving national identity. (32)

Is it religion ? Sincere belief is enough: no discussion about religious necessities (34-38)

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C-157/15, G4S, (Belgium)  
AG Kokott 31.5.2016

***Genuine and determining occupational requirement ?***

X Art. 4 (1): not necessarily in the form of laws and decrees  
even by employer / works councils

Restrictive interpretation

But: employer "a degree of discretion" (AG N° 81), so YES !  
(even on the basis of unwritten workrules !) (Sic)

***Objective and proportional***

Dress code=corporate identity=legitimate aim

Consumer preference ? Cautious, but not irrelevant

Policy of neutrality is absolutely crucial

Proportionality test



C-157/15, G4S, (Belgium)  
AG Kokott 31.5.2016

***Proportionality test***

- ***Appropriate***

Conflict between manifestation and company policy  
Suitable alternatives have not been identified during the  
proceedings

- ***No undue prejudice***

manifestation of religion can be moderated

Dress codes, prominent role or position, contact with  
customers, neutrality policy, does not affect other protected  
grounds, equal treatment

- ***Rights and freedom of the employee***

OK, but must be balanced with the employer's "freedom to  
conduct a business" Art. 16 CFR-EU





## C-188/15, Bougnaoui, French case

**AG Sharpston** 13.7.2016

Difference between public and private sector ?

Yes ! Case is limited to private sector !

Direct or indirect discrimination ?

"genuine and determining occupational requirement"

Art. 4 Dir. 2000/78

AG: No, very restrictive framing, "in very limited circumstances" (Not for a design engineer !)

It may also be regarded as indirect discrimination

Dress code = neutral

1° legitimate aim: freedom of employer: yes but must be balanced

2° proportional: case by case approach

5% contact with clients

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## The CJEU

**Achbita C-157/15= basic judgement**

No definition of religion: cf. art. 9 ECHR and case law ECtHR= Art. 10 ECFR

protects forum internum + forum externum

- No direct discrimination: "any religious sign"

- "*It is not evident from the material in the file available...*" (31)

Neutral clothing is not against particular religion

Critics: not so obvious//other case law

What is neutral clothing ?

Companies: must really impose this on other clothing (T-shirts)

Court narrows appreciation by national judges

Strict proportionality: really necessary !

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## ***Genuine and determining occupational requirement***

### **C-188/15, Bougnaoui**

- AG Sharpston: no banalisation of g.d.o.r
- ECJ: "Consumer preference" = not decisive ! (40)
- "...such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'."



## **Follow up- cases again in appeal procedure**

France + Belgium:

different outcome

- Cour d'appel de Versailles: 18th April 2019:  
dress code invalid- no consumer preference  
nullity of dismissal: 8.378,78 € (compensation in lieu of notice)  
+ 15.234 € (nullity compensation)

- Arbeidshof Gent: 12<sup>th</sup> October 2020  
no discrimination: neutral dresscode accepted,  
Work rules are OK

Weblogs of lawyers: green light for employers!

Case law in Belgium: mostly in favour of employer!



## 3° CJEU: 15th July 2021 WABE- C-804/18 MH MÜLLER C- 341/19

Discussion in Germany: what about constitutional tradition in Germany: no principle of "laïcité"

Did Achbita-case open the way for policies of neutrality?

Extensively motivated questions by BAG (C-804/18)

Also question by AG Hamburg (C-341/19)

CJEU contradicts Bundesverfassungsgericht (Const.Court)?

CJEU: 15th July 2021

Opinion: AG RANTOS

Shadow opinion former AG SHARPSTON ! (2019)

Divergent! CJEU: more nuances than RANTOS

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## WABE- C-804/18

WABE eV: runs child day care centres in Hamburg, neutrality requirement // recommendations of City of Hamburg

"No statements, no signs (no crosses), no comments"

Warnings- should be removed from personal file

IX: special needs carer wearing a headscarf

Direct discrimination: against headscarf

Question "abstract danger of proselitism"

v. "real and present danger"?

What about German Constitutional Rulings ?

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## MH MÜLLER C-341/19

MJ: sales assistant and cashier in a store

Prohibition of "large scale symbols"

AG-LAG-Questions BAG

1° It is unclear if the cases of 14/03/2017 contain a general principle of the power of the employer to impose "neutrality"  
Difference between "any visible sign" v. "prominent and large-sized" ?

2° a) Can the court apply the proportionality test ?

Can the ECHR (art. 9) and CFREU (art. 10) be applied ?

Compare to Egenberger (C-414/16: rights of the employer)?

b) If not: can a court apply national constitutional principles if they grant more rights to the employee ?

3° Does EU-law leave a margin of appreciation of MS to apply domestic constitutional law if it provides more protection ?

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## CJEU- 15/07/2021 First question WABE (1)

- Answer CJEU: Art. 1 and Art. 2(2)(a) of Council Directive 2000/78/EC ...must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, **does not constitute**, with regard to workers who observe certain clothing rules based on religious precepts, **direct discrimination** on the grounds of religion or belief, for the purpose of that directive, **provided that that rule is applied in a general and undifferentiated way.** //C-157/15 =GS4)
- CJEU: Do not restrict comparison to religion  
**Dresscodes affect all workers** (43-55)  
All beliefs, religions, opinions are affected (not only Islam)

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## CJEU- 15/07/2021 Second question WABE (2)

Art. 2(2)(b) Dir. 2000/78 must be interpreted as meaning that a difference of treatment **indirectly** based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, **may be justified** by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, **provided**,..

1° that that policy meets a **genuine need** on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the **legitimate wishes** of those customers or users and the **adverse consequences** that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out;

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## CJEU- 15/07/2021 Second question WABE

2° secondly, that that difference of treatment is **appropriate** for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a **consistent and systematic** manner; ..

3° that the prohibition in question is limited to what is **strictly necessary** having regard to the actual scale and severity of the **adverse consequences** that the employer is seeking to avoid by adopting that prohibition.

**CJEU**: strict criteria: more restrictive than C-157/15 !

"The mere desire to pursue neutrality is not enough" (64)

But still large margin of appreciation for national judges: very open questions: legitimate wishes ? adverse consequences ?

Art. 14 CFREU: rights of parents= legitimate!

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## CJEU- 15/07/2021 Second question WABE

### Intersectionality ?

Dress codes statistically affect muslim female workers! (59)  
= gender discrimination ? Not covered by Dir. 2000/78! (no answer) Race and origin: not covered also..

Only in contact with customers //C-157/15 and C-188/15 !

**Reasonable accommodation:** not mentioned by the court

cf. C-157/15:

Not in Directive! General principle DL ?

(L. Waddington, E. Howard)

Back office? highly controversial..

Not provided in Belgian LL

only for disability- poor remedy?



## CJEU- 15/07/2021 First question BAG (3)

### Difference: large- small sized signs?

Art. 2(2)(b)(i) Dir. 2000/78 must be interpreted as meaning that indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting, at the workplace, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality ... can be **justified only** if that **prohibition covers all visible forms of expression of political, philosophical or religious beliefs**. A prohibition which is limited to the wearing of **conspicuous, large-sized signs** of political, philosophical or religious beliefs is liable to constitute **direct discrimination** on the grounds of religion or belief... // First question WABE-case

**CJEU:** tries to avoid focus on headscarf, neutrality must cover all (even discrete) signs ! Not only religion, also politics ! (final comment) Note: Difference from **ECtHR:** Eweida-case



## CJEU- 15/07/2021 Second (b) question BAG Second question WABE (4)

MOST DELICATE QUESTION: WHAT ABOUT GERMAN  
CONSTITUTIONAL TRADITIONS

Art. 2(2)(b) Dir. 2000/78 must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more **favourable provisions**, within the meaning of **Article 8(1) Dir**, in examining the **appropriateness of a difference of treatment indirectly based on religion or belief**.

**CJEU**: avoids constitutional conflict: cf. French case C-188/15 "laïcité": Result: FR Religion: EU-Law provides minimum protection, MS may grant larger protection  
= margin of appreciation (ECtHR) ?

Consequence: no answer needed to second question (a) and third question BAG !

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## III. WHAT IS NEUTRALITY

Traditionally: neutrality= international law  
(vague, contextual, many violations)  
President Roosevelt (Oct. 1941)

### Public law

Belgium: Const.Court 4/4/2020: evolution/ shifting interpretations:

Passively: Non-intervention (abstentionism)

State must respect different religions, opinions

Actively: Supporting religions, encouraging diversity  
(interventionism)

But states must be objective: no discrimination  
(ECtHR... 5<sup>th</sup> April 2022: N° 20165/20)

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## Neutrality in private law?

- Religious and ideological employers: Art. 4.2. Dir. 2000/78
- Associations: collective instrument of freedom of opinion, religions  
collective dimension of FR- citizens  
churches, political parties, trade unions  
But: limits: not every employer  
Neutrality as a belief, opinion ?



## Neutrality in private enterprises

Ph.D. VAN BELLINGEN (UCL- 2022)

La neutralité de l'entreprise privé

New development: more questions than answers

What is the root of the problem?

Shift from clear, objective groups to individual

"Sincere individual belief"

opens very wide and unpredictable questions

Response: restore predictability- preventive neutrality-policy

Two objectives:

1° internal function//working enterprise

2° external function: public reputation/ image





## Transposing public law principles to private law

- Enterprise as an institution//state?
- Objective side: What about internal democracy?  
Right of workers to negotiate neutrality?
- Subjective side: subjective unilateral view of employer v. FR employee: where is the balance of LL?  
FR employer > FR workers?
- Neutrality: aim+ legitimation in itself?  
Danger: subjective consumer preference as legitimation?  
Danger: Employers use neutrality as instrument to promote their own ideological opinions ?  
Danger: what about other opinions x neutrality ?  
Political opinions, me too-movement, pacifism, political strikes..??

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## IV. FINAL REMARKS/CONCLUSIONS

- Answering the question by ERA ?
- Remarks are questions
- The head of the judge in the hornets nest?
- 1° Dress codes are sometimes tricky  
//cultural and national traditions
  - 2° Undertakings as "neutral" institutions?  
Differences between states and companies
  - 3° Defining neutrality? Exercise with flags?

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## 1° Dress codes: tricky

Problem with dress codes at work: what is neutral, what is necessary: where are the limits?

Balance: case Eweida-Chaplin ECtHR

How far can an employer go in dress codes?

Neutral// culture, country

Very different perceptions, interpretations

Intersectionality: gender-discrimination? Origin?

Not covered ! (1 short point)

*"Men continue dictating the bodyware of women, because they want to control the woman's body".*

(Belg. President Women's Counsel)



## Perception: UK: Sikhs as loyal citizens,





## School uniform: no shorts allowed, so we wear skirts (The Guardian)



## 2° Undertakings as institutions? What about democracy?

Comp. state neutrality: does not prohibit internal discussion, conflicting opinions..Balancing FR by democracy..

Who defines "neutrality" ? The employer unilaterally?

*"Cuius regio, illius religio" ?*

### **Internal democracy ?**

Traditional balance in LL: collective bargaining

Neutrality= instrumental (necessary tool) or teleological (aim in itself)

Work rules? (C-157/1) Where are the unions?

Note: problematic relationship DL and CLL !

What about sincerity test for employer?

### **Corporate governance-responsibility?**

What about consumers' political standards?

What is consumers' preference?

Silent majority silenced v. loud minority respected?

Incidents: who is responsible? Who provoked? Assesment?

## FINAL REMARKS

### 3° All signs ?



CJEU: Broad scope of comparability: all signs of political, religious, ideological beliefs

CJEU: tries to avoid focus on headscarf, religion

// Polish case: C-16/19: disability ?

= Opening box of Pandora ?

E.g.: what about political parties, pacifism, unionism, class struggle, rainbow-flag, environmentalism, Me-Too... ?

Help? Strict criteria set by the court: legitimate, proportional, strictly necessary,

E.g. unionism = essential part of enterprise and FR of workers- collective labour law (CFREU)..

What about LGTB+- symbols ? (neutral, test ?)

What about political parties ?

## Neutral or political?



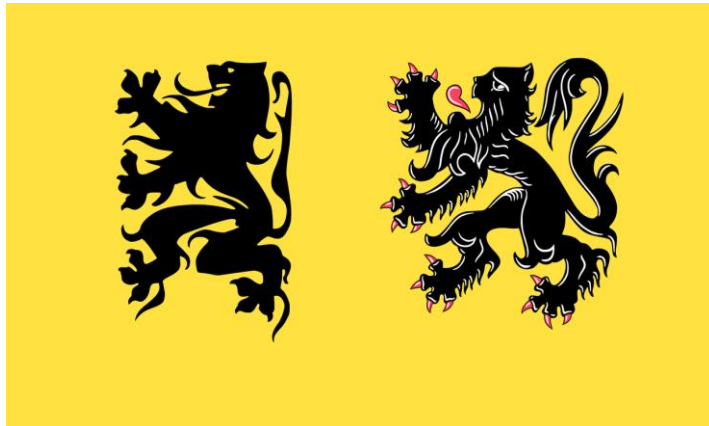
**#MeToo**

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## Neutral or political How a flag makes a difference?



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