

# Religious discrimination at the workplace and the CJEU case law concerning headscarves

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Wearing an Islamic veil or other religious symbols at work has become a major source of litigation in Europe

- *Employees challenge infringements upon their religious freedom and their right to protection against discrimination on religion*
- *Employers object to religious symbols and claim the right to a "neutral" company, to meet customer or public demand*
- *« Ethos based » companies make decisions about their employees on requirements derived from religious precepts*

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These tensions have only recently been referred to the CJEU,  
but it is more and more often the case

- CJUE, *Bougnaoui*, C-188/15 & *Achbita*, C-157/15 (2017)
  - CJUE, *Egenberger*, C-414/16 (2018)
    - CJUE, *IR*, C-68/17 (2018)
- CJUE, *Cresco Investigation*, C-193/17 (2019)
- **CJUE, *WABE and Müller Handels*, C- 804/18 et C-341/19 (2021)**
  - CJEU, *MIUR*, C-282/19 (2022)

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### **The *WABE* case**

WABE is a non-profit organization that operates day care centers in Germany  
600+ employees, 3500+ children  
It is « non-partisan and non-denominational »

While the employee, a specialized educator, was on parental leave, WABE adopted "service instructions for the respect of the principle of neutrality"

Upon returning to work, the employee was asked to remove the veil covering her hair

She refused and was temporarily suspended from work

When she returned to work, she was still wearing a veil and was given a warning, and asked to remove her veil in the future

The employee again refused to remove her veil, was temporarily suspended and received a second warning

During this same period, WABE required another employee, wearing a cross, to remove it

The employee challenged the two warnings issued by the company before the Hamburg labour court

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### ***The Müller Handels case***

MH Müller Handels operates a chain of drugstores in Germany

MJ, a Muslim, had been a sales consultant and cashier since 2002

When she returned from parental leave in 2014, she wore an Islamic headscarf

Her employer asked her to remove it, and stopped employing her when she refused

The employee subsequently took up another activity in the company, for which she was allowed to keep her headscarf

In June 2016, she was ordered to remove her scarf. She refused to do so and was sent home

During the month of July 2016, she was instructed to come to work without large conspicuous signs of political, philosophical or religious beliefs

Beginning in July 2016, an internal directive prohibited the use of conspicuous, large-sized political, philosophical or religious signs in the workplace applied in all stores

MJ brought an action before national courts seeking a declaration that that instruction was invalid and compensation for the damage suffered due to the violation of her freedom of religion protected by the German Constitution

Her action before lower courts was upheld, and MH subsequently brought an appeal to the Federal Labour Court

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### **Directive 2000/78 establishing a general framework for equal treatment in employment and occupation**

#### **Article 1**

#### **Purpose**

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

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## Objective of anti-discrimination law (EU law) Recital 11 of the directive

Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular

- the attainment of a high level of employment and social protection
  - raising the standard of living and the quality of life
  - economic and social cohesion and solidarity
  - the free movement of persons

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The case law of the CJEU has addressed a large range of issues

**I- The concept of religion**

**II- The particular rights of organizations whose ethos is based on religion**

**III- The notions of direct and indirect discrimination**

**IV- Justification of corporate neutrality policies**

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## I- The concept of religion

The concept of "religion" within the meaning of Article 1 of Directive 2000/78 must be interpreted as covering both the forum internum, i.e. the fact of having religious beliefs, and the forum externum, i.e. the public manifestation of religious faith

CJEU, *Achbita*, § 28

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**The very content of religious precepts rests on an assessment that is not for the Court to make**

CJEU, *Achbita & WABE*

Member States and their authorities, in particular judicial authorities, must, except in very exceptional cases, refrain from assessing the legitimacy of the very ethics of the church or organization concerned

CJEU, *Egenberger* (referring to ECtHR, *Fernández Martínez v. Spain*, 2014)

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## II- The special rights of organizations whose ethos is based on religion

Directive 2000/78, art. 4(2) § 1

“Occupational requirements”

« Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, ***in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.*** This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. »

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Directive 2000/78, art. 4(2) § 2

« Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos. »

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### *CJEU, Egenberger*

The Evangelisches Werk (a supplementary association of the Protestant Church in Germany, which pursues exclusively charitable, benevolent and ecclesiastical aims) published a fixed-term job offer for a project concerning the preparation of the report on the UN International Convention on the Elimination of All Forms of Racial Discrimination

The offer stated that "Membership in a Protestant church or a member church of the working community of Christian churches in Germany and identification with the diaconal mission are prerequisites"

Ms. Egenberger, who is non-denominational, applied for the position, was shortlisted, but was not called for an interview

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### How is respect of article 4(2) assessed?

- 1) The difference in treatment involves a direct link between the occupational requirement imposed by the employer and the activity concerned

Such a link may arise either from the nature of the activity (e.g., involving participation in determining the ethos of the church or organization or assisting in its proclamation mission) or from the conditions under which the activity is to be performed (e.g., the need to ensure credible representation of the church or organization)

- 2) the requirement must be "essential, legitimate and justified" in light of the ethos of the church or organization

- 3) Proportionality is also tested

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- "essential": membership in the religion or adherence to the beliefs on which the church's or organization's ethos is based must appear **necessary** because of the importance of the professional activity in question for the affirmation of that ethic or the exercise by that church or organization of its right to autonomy
- "legitimate": the requirement must not serve a **purpose** extraneous to that ethos or to the exercise by that church or organization of its right to autonomy
- "the church or organization has the obligation to demonstrate, in the light of the factual circumstances of the case, that the alleged **risk of infringement of its ethos or its right to autonomy is probable and serious**, so that the imposition of such a requirement is indeed necessary

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- proportionality

Although Article 4(2) does not expressly provide for this requirement, unlike Article 4(1), any difference in treatment must be exercised in compliance with, inter alia, the "general principles of Community law" which include proportionality

⇒ the requirement in question must be appropriate and must not go beyond what is necessary for attaining the objective pursued

CJEU, *Egenberger*, § 68

Link with necessity and legitimacy requirements?

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## I- The notions of direct and indirect discrimination

- Direct discrimination is reviewed in the framework of religious discrimination
  - The concept of indirect discrimination is toned down

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### Direct discrimination, in the framework of religious discrimination

#### A strict interpretation of the concept of direct discrimination

This is clearly visible when comparing the question asked by the French Court of Cassation in the *Bougnaoui* case and its reformulation by the Court of Justice

- The use of a criterion "indissociably linked" to the prohibited ground, which can only affect members of the protected group, should be considered direct discrimination  
CJEU, *Dekker*, C-177/88, 1990; *Maruko*, C-267/06, 2008
- Impact of comparison method - compared groups  
CJEU, *Achbita*
- What about the intention to discriminate?  
CJEU, *CHEZ*, C-83/14, 2015

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## CJEU, WABE § 52

An internal rule of a private undertaking prohibiting the wearing of any visible sign of political, philosophical or religious beliefs in the workplace does not constitute discrimination ... provided that it covers any manifestation of such beliefs without distinction and ***treats all workers of the undertaking in the same way*** by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs

Since ***every person*** may have a religion or belief, such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference of treatment based on a criterion that is inextricably linked to religion or belief

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WABE also demanded and obtained the removal of a religious cross from an employee

- Formally, the application of the internal rule was made without any differentiation between workers, based on their particular religion
- No difference in treatment directly based on religious beliefs

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### CJEU, *WABE* § 53

« That finding is not called into question (...) by the fact that some workers observe religious precepts requiring certain clothing to be worn. Although the application of an internal rule (...) is indeed capable of causing particular inconvenience for such workers, that has no bearing on the finding (...) that that rule, reflecting a policy of political, philosophical and religious neutrality on the part of the employer, does not, in principle, establish a difference of treatment between workers based on a criterion that is inextricably linked to religion or belief, within the meaning of Article 1 of Directive 2000/78 »

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Does this solution apply if ***only the wearing of large ostentatious signs of political, philosophical or religious convictions is prohibited?***

« unequal treatment resulting from a rule or practice which is based on a criterion that is inextricably linked to a protected ground, in the present case religion or belief, must be regarded as being directly based on that ground.

... where 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

⇒ direct discrimination may therefore be established

CJEU, *Müller Handels* (2021) § 73

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## An attenuated version of the concept of indirect discrimination

### **CJEU, *Achbita* (§ 34)**

Indirect discrimination can be established if the apparently neutral obligation ... results, in fact, in persons adhering to a particular religion or belief « **being put** at a particular disadvantage »

### **Directive 2000/78, art. 2(2) b)**

« indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice **would put** persons having a particular religion or belief ... at a particular disadvantage »

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### **CJEU, *WABE*, § 59**

According to the referring court: the internal rule prohibiting WABE employees from wearing visible signs of political, philosophical or religious beliefs when they are in contact with parents or children, in practice concerns certain religions more than others...

...it should be noted that, according to the findings of the referring court, « the rule at issue ... concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith, and the Court therefore starts from the premiss that that rule constitutes a difference of treatment indirectly based on religion »

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## What about intersectional discrimination?

➤ Recital 3 of Directive 2000/78

« in implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination »

➤ According to the German court,  
the policy at WABE affects, in practice, more women than men...

➤ CJEU, *WABE*, § 58

« as regards the existence of indirect discrimination on the grounds of gender (...) that ground of discrimination does not fall within the scope of Directive 2000/78, which is the only EU law measure to which the question relates. It is not therefore necessary to examine whether there is such discrimination »

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## IV- Justification of corporate neutrality policies

➤ A genuine and determining occupational requirement?

➤ Pursuing neutrality as an « objective justification » for indirect discriminations

➤ Proportionality

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Directive 2000/78, art. 4(1)

« Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate »

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## Defining genuine and determining occupational requirement

The concept of a 'genuine and determining occupational requirement' (...) refers to a requirement that is **objectively** dictated by the nature of the occupational activities concerned or of the context in which they are carried out.

It cannot, however, cover **subjective considerations**, such as the willingness of the employer to take account of the particular wishes of the customer »

CJEU, *Bougnaoui*, § 40

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### Unanswered questions

- Is national **legislation** required? What should be the source of an essential requirement?
- Is the removal of the Islamic veil an "occupational" requirement?
- ...

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### Pursuing neutrality as an objective justification for indirect discriminations

« The desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate »

An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers »

CJEU, *Achbita*, § 37-38

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« An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers ... »

CJEU, *WABE*, § 63

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**But, since *WABE & Müller Handels*, evidence must be provided by the employer ...**

« ... the mere desire of an employer to pursue a policy of neutrality – while in itself a legitimate aim – is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is **a genuine need on the part of that employer**, which it is for that employer to demonstrate»

CJEU, *WABE*, § 64

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- « account may be taken, in the first place, of the rights and legitimate wishes of customers or users »

EX: parents' right to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs recognised in Article 14 of the Charter or their wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children with the aim, inter alia, of 'guaranteeing the free and personal development of children as regards religion, belief and policy'

- Other « relevant » evidence that the employer must provide: that « in the absence of such a policy of political, philosophical and religious neutrality, its freedom to conduct a business, recognised in Article 16 of the Charter, would be undermined in that, given the nature of its activities or the context in which they are carried out, it would suffer **adverse consequences** »

CJEU, *WABE*, § 65-67

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« it is for the employer not only to establish that it is pursuing a legitimate aim capable of justifying indirect discrimination on the grounds of religion or belief, but also to demonstrate that ***there was, at the time when the internal rule in question was introduced, or that there is currently, a sufficiently specific risk of that aim being undermined, such as the risk of specific disturbances within the undertaking or the specific risk of a loss of income*** »

CJUE, *Müller Handels*, § 85

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### Proportionality test

- Coherence
- Necessity
- Balance of interests

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The policy must be « genuinely pursued in a consistent and systematic manner »

⇒ Evidence must be provided of a « a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers »

CJEU, *Achbita*, § 40-41

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When the aim of the measure is to maintain neutrality within the undertaking and thus to prevent conflicts between employees, such conflicts, arising from the different religions and cultures represented in the undertaking, having already occurred several times in the past...

...coherence requires that no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers « since ***the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality*** »

CJUE, *Müller Handels*, § 77

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### Necessity

- Necessity requires that the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers *only workers who interact with customers*

CJEU, *Achbita*, § 42

- Is reasonable accommodation required?

The employer must, if possible, offer a post not involving any visual contact with customers, instead of dismissing the worker

«inherent constraints to which the undertaking is subject » must be taken into account

No additional burden for the company

CJEU, *Achbita*, § 43

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### Balance of interests

Non-discrimination on ground of religion and religious freedom / Freedom to conduct a business

German courts wanted the high level of protection of religious freedom granted by the German Constitution to be taken into account

CJEU, *WABE & Müller Handels*

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National provisions protecting freedom of thought, belief and religion, as a value to which modern democratic societies have attached great importance for many years, may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of Directive 2000/78, when examining what constitutes a difference of treatment based on religion or belief.

For example, national provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of Directive 2000/78 would fall within the scope of the possibility offered by Article 8(1)

CJEU, *WABE & Müller Handels*, § 89-90

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### Article 8(1) of Directive 2000/78 - 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 »

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### Conclusion

- The CJEU has devised a framework for reconciling non-discrimination on the basis of religion with the freedom of companies to pursue a policy of "neutrality"
  - No broad conception of religious discrimination but rather a regressive approach
  - No recognition of intersectional discrimination
- Recent evolution of case law requiring a stricter and more concrete proportionality test, and involving reference to religious freedom (*WABE*, *Müller Handels*)

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