Provisional text

OPINION OF ADVOCATE GENERAL

RANTOS

delivered on 25 February 2021 (1)

Joined Cases C-804/18 and C-341/19

IX

v

WABE eV

(Request for a preliminary ruling from the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany))

and

MH Müller Handels GmbH

v

MJ

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Article 2(2) – Discrimination on the grounds of religion or belief – Internal rules of undertakings prohibiting workers from wearing visible, conspicuous or large-scale political, philosophical or religious signs in the workplace – Direct discrimination – None – Indirect discrimination – Female worker prohibited from wearing an Islamic headscarf – Customers' wishes that the undertaking pursue a policy of neutrality – Entitlement to wear small, visible signs – Article 8(1) – National provisions more favourable to the protection of the principle of equal treatment – Freedom of religion under Article 10 of the Charter of Fundamental Rights of the European Union – National constitutional provisions protecting the freedom of religion)

I. Introduction

1. In recent times, questions have been referred to the Court for a preliminary ruling concerning religion or belief, whether with regard to the observance of religious rites, (2) in matters of health (3) or even in the field of international protection. (4)

2. Those questions also relate to the application of the principle of non-discrimination in matters of employment and occupation, which forms the subject matter of Directive 2000/78/EC. (5) In particular, the Court ruled, in the judgments in *G4S Secure Solution* (6) and *Bougnaoui and ADDH*, (7) on the existence of discrimination on the grounds of religion, (8) within the meaning of that directive, where the female employees of a private undertaking are prohibited from wearing an Islamic headscarf in their workplace.

3. These joined cases follow on directly from those two judgments and seek, in particular, to clarify the concept of 'indirect discrimination' within the meaning of the Directive as well as the relationship between EU law and the law of the Member States as regards the protection of the freedom of religion.

4. In that regard, I am of the view that the Court must seek to strike a balance between establishing a uniform interpretation of the principle of non-discrimination when applying Directive 2000/78 and the need to afford discretion to the Member States, in view of the diversity of their approaches as regards the place of religion in a democratic society.

II. Legal context

A. EU law

5. Under Article 1 of Directive 2000/78, which is entitled '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.'

6. Article 2 of that directive, which is entitled 'Concept of discrimination', states:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) 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;

(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, 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 …

…'

7. Article 3 of the Directive, which is entitled 'Scope', provides in paragraph 1:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…'

8. Article 4 of the same directive, which is entitled 'Occupational requirements', provides in paragraph 1:

'Notwithstanding Article 2(1) and (2), 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 conditions 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.'

9. Article 8 of Directive 2000/78, which is entitled 'Minimum requirements', provides in paragraph 1:

'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.'

B. German law

1. The GG

10. Under Article 4 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949I, p. 1), in the version thereof in force at the time of the facts in the main proceedings ('the GG'):

'1. Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

2. The undisturbed practice of religion shall be guaranteed.

…'

11. Article 6(2) of the GG states:

'The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.'

12. Article 7 of the GG provides:

'1. The entire school system shall be under the supervision of the state.

2. Parents and guardians shall have the right to decide whether children shall receive religious instruction.

3. Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.

…'

13. Article 12(1) of the GG provides:

‘All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.’

2. The AGG

14. Under Paragraph 1 of the Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (BGBl. I, p. 1897, ‘the AGG’), which is intended to transpose Directive 2000/78 into German law:

‘The purpose of this Law is to prevent or stop any discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.’

15. Paragraph 3 of the AGG states:

‘1. 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 under Paragraph 1. Direct discrimination on the grounds of gender shall also be taken to occur in relation to Paragraph 2(1)(1) to (4) in the event of the less favourable treatment of a woman on account of pregnancy or maternity.

2. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Paragraph 1, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

…’

16. Paragraph 7 of the AGG provides:

‘1. Employees shall not be permitted to suffer discrimination on any of the grounds referred to under Paragraph 1; this shall also apply where the person committing the act of discrimination assumes only the existence of the grounds referred to under Paragraph 1.

2. Any provisions of an agreement which violate the prohibition of discrimination under Subparagraph 1 shall be ineffective.

3. Any discrimination within the meaning of Subparagraph 1 by an employer or employee shall be deemed a violation of their contractual obligations.’

3. The Gewerbeordnung

17. Paragraph 106 of the Gewerbeordnung (German Code governing the exercise of artisanal, commercial and industrial professions), in the version thereof in force at the time of the facts in the main proceedings, provides:

‘The employer may, exercising its discretion in a reasonable manner, further specify the content, place and time of the work, as far as those working conditions are not determined by the contract of employment, provisions of a company agreement, an applicable collective agreement or statutory provisions. This shall also apply in relation to the employee’s compliance with the internal regulations of the undertaking and that employee’s conduct within the undertaking. In the exercise of that discretion, the employer must also take into account disabilities of the employee.’

III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedures before the Court

A. Case C-804/18

18. WABE, a charitable association, runs child day care centres, with more than 600 employees taking care of around 3 500 children. It is non-partisan and non-denominational. On its website, WABE has stated the following on the subject of 'diversity and trust':

> 'Gender, background, culture, religion or special needs – we firmly believe that diversity enriches our lives. By being open and curious, we learn to understand one another and to respect differences. Since we welcome all children and parents, this creates an atmosphere in which everyone can feel safe, feel a sense of belonging and can develop trust. This is the basis for a healthy social development and peaceful social interaction.'

19. In its daily work, WABE states that it follows unconditionally the recommendations of the City of Hamburg (Germany) for the education of children in day care facilities, which were published in March 2012. Under those recommendations:

> 'All child day care facilities have the task of addressing and explaining fundamental ethical questions as well as religious and other beliefs as part of the living environment. Child day care centres therefore provide space for children to consider the essential questions of joy and sorrow, health and sickness, justice and injustice, guilt and failure, peace and conflict and the question of God. They support the children in expressing feelings and beliefs on these questions. The possibility of looking at these questions in a curious and inquisitive manner leads to the consideration of subjects and traditions of the religious and cultural orientations represented in the group of children. This develops appreciation and respect for other religions, cultures and beliefs. This consideration increases the child's self-understanding and experience of a functioning society. The children also experience and actively contribute to religiously rooted festivals in the course of the year. By encountering other religions, children experience different forms of reflection, faith and spirituality.'

20. IX is a special needs carer and has been employed by WABE since 1 July 2014. From 15 October 2016 to 30 May 2018 she was on parental leave. At the start of 2016, IX, who is of Muslim faith, decided to wear an Islamic headscarf.

21. On 12 March 2018, whilst IX was on parental leave, WABE adopted the 'Instructions on observing the requirement of neutrality' ('the Instructions'); IX learned of the Instructions on 31 May 2018. Those instructions state inter alia:

> 'WABE is non-denominational and expressly welcomes religious and cultural diversity. In order to guarantee the children's individual and free development with regard to religion, belief and politics, WABE employees are required to observe strictly the requirement of neutrality that applies in respect of parents, children and other third parties. WABE pursues a policy of political, philosophical and religious neutrality in respect thereof. In this connection, the following regulations serve as principles for specifically observing the requirement of neutrality in the workplace.
>
> – Employees shall not make any political, philosophical or religious statements to parents, children and third parties in the workplace.
>
> – Employees shall not wear any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace.
>
> – Employees shall not give expression to any resultant customs to parents, children and third

parties in the workplace.

…'

22. In the 'Information sheet on the requirement of neutrality' produced by WABE, the answer to the question of whether the Christian cross, Muslim headscarf or Jewish kippah may be worn reads as follows:

> 'No, this is not permitted as the children should not be influenced by the teachers with regard to a religion. The deliberate choice of religiously or philosophically determined clothing is contrary to the requirement of neutrality.'

23. With the exception of the qualified teaching staff, WABE employees working at the undertaking's headquarters are not subject to the requirement of neutrality as they have no customer contact.

24. On 1 June 2018, on the day of her return to work following parental leave, IX was asked to remove her headscarf, which entirely covered her hair. She refused to do so and was thereupon temporarily suspended by the head of the child day care centre. On 4 June 2018, IX appeared for work again wearing a headscarf. She was given a warning on that same day for having worn the headscarf on 1 June 2018 and was asked, in order to comply with the requirement of neutrality, to perform her work without a headscarf in future. As IX refused to remove her headscarf on 4 June 2018, she was once again sent home and temporarily suspended. She received a further warning on the same day. WABE has subsequently required a female employee to remove a cross that she wore around her neck.

25. IX challenged WABE's decision to issue her with the warnings dated 4 June 2018 before the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany).

26. The referring court states that, in the judgment in *G4S Secure Solutions*, the Court found that an internal rule, such as the Instructions, does not introduce a difference of treatment on the grounds of religion or belief, within the meaning of Article 2(2)(a) of Directive 2000/78, as that rule applies equally to all employees. However, the referring court is of the opinion that direct discrimination is always to be taken to occur when a rule relates to a certain characteristic protected by Article 1 of that directive. In its view, consideration of whether the person concerned has suffered a disadvantage directly related to the protected characteristic of religion is therefore decisive in order for such direct discrimination to be found to exist.

27. According to the referring court, IX's action should therefore be upheld since her activity as a teacher does not give rise to a genuine and determining occupational requirement, within the meaning of Article 4(1) of Directive 2000/78, not to wear a headscarf at work. It is, however, of the view that the grounds for the judgment in *G4S Secure Solutions*, which require clarification, preclude that action from being upheld.

28. Furthermore, for interference with the fundamental right of freedom of religion as laid down in Article 4(1) of the GG to be established, the Bundesverfassungsgericht (Federal Constitutional Court, Germany) requires, in addition to the existence of a legitimate aim, that the external expression of religion must entail a sufficiently specific risk for interests protected by the GG. The referring court states that, in its view, in the light of the significance of the fundamental right to freedom of religion and of the principle of proportionality laid down in Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), it is not enough for the employer to express the wish to appear neutral to customers, without having to suffer an economic disadvantage arising from the lack of neutrality, for the right which it derives from Article 16 of the Charter on the freedom to conduct a business to take priority over the freedom of religion. The referring court explains that it feels that that interpretation is confirmed by the judgment in *Bougnaoui and ADDH*, in which the Court held that an employer's willingness to take account of a customer's wishes to no longer have that employer's services provided by a female employee wearing an Islamic headscarf cannot be regarded as a genuine and determining occupational requirement within the

meaning of Article 4(1) of Directive 2000/78.

29. Nevertheless, the referring court is prevented from upholding IX's action because of the Court's interpretation of Article 16 of the Charter in the judgments in *G4S Secure Solutions* and *Bougnaoui and ADDH* to the effect that the employer's wish for its employees to project religious neutrality is sufficient in itself as objective justification for a difference of treatment indirectly based on religion, so long as that difference of treatment is appropriate and necessary. According to the referring court, WABE has not demonstrated to the requisite legal standard economic losses or a specific risk to the legal interests of third parties which could justify a decision to dismiss IX's action also pursuant to Article 4 of the GG.

30. It is in those circumstances that the Arbeitsgericht Hamburg (Labour Court, Hamburg) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute direct discrimination on the grounds of religion, within the meaning of Article 2(1) and 2(2)(a) of … Directive [2000/78], against employees who, due to religious covering requirements, follow certain clothing rules?

(2) Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute indirect discrimination on the grounds of religion and/or gender, within the meaning of Article 2(1) and 2(2)(b) of Directive [2000/78], against a female employee who, due to her Muslim faith, wears a headscarf?

In particular:

(a) Can [indirect] discrimination on the grounds of religion and/or gender be justified under Directive [2000/78] with the employer's subjective wish to pursue a policy of political, ideological and religious neutrality even where the employer thereby seeks to meet the subjective wishes of his customers?

(b) Do Directive [2000/78] and/or the fundamental right of freedom to conduct a business under Article 16 of the [Charter] in view of Article 8(1) of Directive [2000/78] preclude a national regulation according to which, in order to protect the fundamental right of freedom of religion, a ban on religious clothing may be justified not simply on the basis of an abstract capacity to endanger the neutrality of the employer, but only on the basis of a sufficiently specific risk, in particular of a specifically threatened economic disadvantage for the employer or an affected third party?'

31. Written observations were lodged by IX, WABE, the Polish and Swedish Governments and the European Commission.

B. Case C-341/19

32. MH Müller Handels operates a chain of drugstores in Germany. MJ, who is of Muslim faith, has been employed by that undertaking as a sales assistant and cashier since 2002. On her return from parental leave in 2014, unlike before, she wore an Islamic headscarf. She did not comply with her employer's request to remove her headscarf at work. She thus ceased to be employed. MJ subsequently carried on a different activity within the undertaking for which she did not have to remove her headscarf. On 21 June 2016, she was asked to remove her headscarf. Following her refusal to do so, she was sent home. In July 2016, she received the instruction to attend her workplace without any conspicuous, large-scale political, philosophical or religious signs ('the contested instruction').

33. MJ sought a declaration that the contested instruction was ineffective and also requested that she be

remunerated. MJ stated that she wore the Islamic headscarf solely in order to meet a religious requirement and that she regarded the Islamic covering requirement to be mandatory. She challenged the applicability of the contested instruction within the undertaking, taking the view that she could rely on the freedom of religion as protected by German constitutional law. In her view, the policy of neutrality, based on the freedom to conduct a business, does not have unconditional priority over freedom of religion and that an examination of proportionality must be carried out. In that regard, EU law contains merely minimum requirements.

34. MH Müller Handels argued that the contested instruction is lawful, stating that it has always imposed a dress code according to which, inter alia, headwear of any kind cannot be worn in the workplace. Since July 2016, all its stores have been subject to the rule that the wearing of conspicuous, large-scale political, philosophical or religious signs in the workplace is prohibited. MH Müller Handels' aim is to maintain neutrality within the undertaking, inter alia with a view to avoiding conflicts amongst employees. There has already been in the past three cases of conflict arising from religious and cultural differences. MH Müller Handels contends that there is no need for economic disadvantage to occur or for customers to stay away in order for an undertaking to be able to prohibit its employees from expressing their faith in the workplace.

35. The national courts seised of the matter upheld MJ's action against the contested instruction. By its appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), leave for which was granted, MH Müller Handels contended that that action should be dismissed.

36. The referring court states that, in the light of the judgments in *G4S Secure Solutions* and *Bougnaoui and ADDH*, the difference of treatment invoked by MJ cannot constitute direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78, and that, in the present case, the issue is a difference of treatment indirectly based on religion for the purposes of Article 2(2)(b) of that directive. That court states that it assumes that the employer's wish to project an image of neutrality towards customers is covered by the freedom to conduct a business, as provided for in Article 16 of the Charter, and thus constitutes a legitimate aim. The court entertains doubts whether only a prohibition of any visible form of religious expression is appropriate in order to pursue the aim of a policy of neutrality within the undertaking or whether a prohibition restricted to conspicuous, large-scale signs of political, philosophical or religious beliefs in the work place is sufficient in that regard, provided that that policy is implemented in a consistent and systematic manner.

37. Furthermore, the referring court asks whether, when examining the appropriateness of the means of achieving the aim of neutrality, for the purposes of Article 2(2)(b)(i) of Directive 2007/78, a balance may be struck between the competing interests, namely, on the one hand, Article 16 of the Charter and, on the other hand, Article 10 of the Charter and Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), on the freedom of thought, conscience and religion, or whether such a balancing act is to be performed only upon application of the internal rule to the individual case, for example where an instruction is issued to an employee or notice of dismissal is given.

38. The referring court also asks whether national constitutional law, in particular the freedom of religion and faith under Article 4(1) and (2) of the GG, can constitute a more favourable rule within the meaning of Article 8(1) of Directive 2000/78.

39. Lastly, that court wishes to know whether EU law (here: Article 16 of the Charter) precludes the possibility of incorporating national fundamental rights into the examination of the validity or invalidity of an instruction adopted by an employer with a view to establishing a policy of neutrality.

40. It is in those circumstances that the Bundesarbeitsgericht (Federal Labour Court) stayed proceedings and decided to refer the following questions to the Court for a preliminary ruling:

‘(1) Can established indirect unequal treatment on grounds of religion within the meaning of Article 2(2)(b) of Directive [2000/78], resulting from an internal rule of a private undertaking, be justifiable only if, according to that rule, it is prohibited to wear any visible sign of religious, political or other philosophical beliefs, and not only such signs as are prominent and large-scale?

(2) If Question 1 is answered in the negative:

(a) Is Article 2(2)(b) of Directive [2000/78] to be interpreted as meaning that the rights derived from Article 10 of the [Charter] and from Article 9 [ECHR] may be taken into account in the examination of whether established indirect unequal treatment on grounds of religion is unjustifiable on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs?

(b) Is Article 2(2)(b) of Directive [2000/78] to be interpreted as meaning that national rules of constitutional status which protect freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of Directive [2000/78] in the examination of whether established indirect unequal treatment on grounds of religion is justifiable on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs?

(3) If Questions 2(a) and 2(b) are answered in the negative:

In the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs, must national rules of constitutional status which protect freedom of religion be set aside because of primary EU law, even if primary EU law, such as, for example, Article 16 of the [Charter], recognises national laws and practices?’

41. Written observations were lodged by MH Müller Handels, MJ, the Greek, Polish and Swedish Governments and the Commission.

42. At the joint hearing for Cases C-804/18 and C-341/19 held on 24 November 2020, oral argument was presented by IX, WABE, MH Müller Handels, MJ and the Commission.

IV. Analysis

A. The first question in Case C-804/18

43. By its first question in Case C-804/18, the referring court asks, in essence, whether Article 2(2)(a) of Directive 2000/78 is to be interpreted as meaning that the prohibition on wearing any visible sign of political, philosophical or religious beliefs in the workplace, which results from an internal rule of a private undertaking, constitutes direct discrimination on the grounds of religion or belief, within the meaning of that provision, in respect of employees who, due to religious covering requirements, follow certain clothing rules.

44. Under Article 2(1) of Directive 2000/78, the ‘principle of equal treatment’ is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. Article 2(2)(a) of that directive states that, for the purposes of paragraph 1, direct discrimination is to 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 of the Directive.

45. Although it does mention the judgment in *G4S Secure Solutions*, the referring court takes the view that the case in the main proceedings concerns direct discrimination within the meaning of Article 2(2)(a) of

Directive 2000/78 because the unfavourable treatment suffered by IX, as a result of being issued with a warning for having worn an Islamic headscarf at work, relates to a specific characteristic protected by Article 1 of that directive (here: religion).

46. I can fully understand that different approaches may be developed as regards the existence and classification of discrimination on the grounds of religion or belief in relation to the wearing of religious signs in the workplace. For instance, Advocate General Kokott in her Opinion in *G4S Secure Solutions* (9) and Advocate General Sharpston in her Opinion in *Bougnaoui and ADDH* (10) expressed differing points of view in cases of female workers prohibited from wearing an Islamic headscarf.

47. However, I note that, in the case that gave rise to the judgment in *G4S Secure Solutions*, the Court was expressly asked about the existence of direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 where the wearing of any visible sign of political, philosophical or religious beliefs at work is prohibited.

48. In that regard, in paragraphs 30 to 32 of that judgment, the Court held that the internal rule at issue in that case (11) referred to the wearing of visible signs of political, philosophical or religious beliefs and therefore covered any manifestation of such beliefs without distinction; that that rule was therefore to be regarded as treating 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; and that, in that regard, it was not evident from the material in the file available to the Court that the internal rule at issue had been applied differently to the female worker concerned as compared to any other worker. On that basis, the Court concluded that an internal rule such as that at issue in that case did not introduce a difference of treatment that is *directly* based on religion or belief for the purposes of Article 2(2)(a) of Directive 2000/78.

49. In the judgment in *Cresco Investigation*, (12) the Court adopted that same approach, stating that the legislation at issue in that case, which concerned granting certain employees a day's holiday on Good Friday, introduced a difference of treatment which was *directly* based on the religion of employees, since the test used by that legislation in order to differentiate was based directly on whether an employee belonged to a *particular religion*.

50. It follows from that case-law that direct discrimination, within the meaning of Article 2(2)(a) of Directive 2000/78, is to be taken to occur where, under national legislation, a worker is treated less favourably according to whether he belongs to one religion rather than to another. An internal rule covering any expression of employees' political, philosophical or religious beliefs, in a general and undifferentiated way, does not introduce direct discrimination within the meaning of that provision.

51. Here, the Instructions set out in point 21 of this Opinion state, inter alia, that the employees of WABE are not to wear any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace.

52. Those instructions therefore apply without distinction to any manifestation of the employees' political, philosophical or religious beliefs in relations with the undertakings' customers. They are not a measure directed specifically against female employees of Muslim faith who would like to wear an Islamic headscarf, although – quite clearly – such employees are covered by the prohibition of any visible sign of their political, philosophical or religious beliefs, on the same basis as employees who are of a different faith, non-religious or atheists. (13) Accordingly, the Instructions do not appear to establish the less favourable treatment of a worker that is directly and specifically linked to his or her religion or beliefs.

53. It is for the referring court to verify whether the Instructions are implemented as they are worded, namely that they were not applied differently to the female employee concerned as compared to any other worker. (14) If that is the case, I take the view that, on the basis of the case-law of the Court established in the

judgments in *G4S Secure Solutions* and *Cresco Investigation*, (15) the view must be taken that an internal rule of a private undertaking such as the Instructions does not introduce direct discrimination on the grounds of religion or belief within the meaning of Article 2(2)(a) of Directive 2000/78. I see no reason for the Court to alter its interpretation, as recently adopted sitting as the Grand Chamber, even though that interpretation generated criticism, (16) such as that made by the referring court, to the effect that the Instructions establish direct discrimination within the meaning of that provision.

54. Furthermore, the fact that the employees concerned follow certain clothing rules due to religious covering requirements, as mentioned in the first question referred for a preliminary ruling, does not appear to me capable of giving rise to a different conclusion vis-à-vis the lack of direct discrimination. Indeed, the existence of such discrimination must be examined on the basis of an objective assessment, which consists in ascertaining whether the undertaking's employees are treated in the same way, and not on the basis of subjective considerations specific to each of them.

55. I would add that I fully concur with the interpretation adopted by the Court in the judgment in *G4S Secure Solutions*. In my view, direct 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 of a private undertaking which prohibits the wearing of visible signs of political, philosophical or religious beliefs in the workplace.

56. That case-law does not mean that discrimination on the grounds of religion or belief cannot be found to exist in a situation, such as that in the main proceedings, where a female worker is prohibited from wearing an Islamic headscarf. However, consideration must then be given to whether or not there is indirect discrimination, within the meaning of Article 2(2)(b) of Directive 2000/78. I will consider this matter below in response to the other questions referred for a preliminary ruling.

57. In those circumstances, I propose that the first question referred in Case C-804/18 should be answered to the effect that Article 2(2)(a) of Directive 2000/78 is to be interpreted as meaning that the prohibition on wearing any visible sign of political, philosophical or religious beliefs in the workplace, which results from an internal rule of a private undertaking, does not constitute direct discrimination on the grounds of religion or belief, within the meaning of that provision, in respect of employees who, due to religious covering requirements, follow certain clothing rules.

B. Part (a) of the second question in Case C-804/18

58. By part (a) of its second question in Case C-804/18, the referring court asks, in essence, whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that a difference of treatment indirectly based on religion or belief, for the purposes of that provision, can be justified by the employer's intention to pursue a policy of political, philosophical and religious neutrality in the workplace in order to take account of the wishes of its customers.

59. As a preliminary point, I note that, in its second question, the referring court mentioned indirect discrimination on the grounds of gender. However, firstly, such discrimination is not covered by Directive 2000/78, (17) the only legal act to which that question refers. Second, it is my view that the order for reference does not contain sufficient facts to consider whether discrimination on the grounds of gender exists in a case such as that in the main proceedings. In what follows, I will therefore consider the question only in so far as it concerns indirect discrimination on the grounds of religion or belief, within the meaning of Article 2(2)(b) of Directive 2000/78.

60. With regard to the application of that provision, it strikes me as appropriate to recall that, in the judgment in *G4S Secure Solutions*, the Court ruled that an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace may constitute indirect

discrimination within the meaning of that provision if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary.

61. In the light of those considerations, it is for the referring court to ascertain whether the apparently neutral obligation imposed by the Instructions results, in fact, in persons adhering to a particular religion or belief (here: the Muslim faith) being put at a particular disadvantage. If that is the case, it is apparent from the referring court that WABE pursues, in its relations with its customers, a policy of political, philosophical and religious neutrality, which is a legitimate aim within the meaning of Article 2(2)(b) of Directive 2000/78, as stated in the preceding point above.

62. As regards the means of achieving that legitimate aim, it is clear from the order for reference 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 WABE employees who interact with customers. (18) Accordingly, it appears that that prohibition must be considered, subject to the checks to be made by the referring court, as not only appropriate but also strictly necessary for the purpose of achieving the aim pursued. (19)

63. In addition, as regards the refusal of a female worker to give up wearing an Islamic headscarf when carrying out her professional duties for customers, it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without it being required to take on an additional burden, it would have been possible for the employer, faced with such a refusal, to offer her a post not involving any visual contact with those customers. It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary. (20)

64. In the light of the question put by the referring court in part (a) of its second question, it must be observed that, in the absence of a company policy of political, philosophical or religious neutrality, the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a female employee wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78. (21) In such a situation, those customers' wishes cannot therefore justify the existence of a difference of treatment within the meaning of Article 2(2)(b) of that directive.

65. However, there may be other reasons for an employer pursuing a policy of political, philosophical or religious neutrality. For instance, the origin of such a policy may be the wishes of customers that the undertaking adopts such an approach. In the present case, as the Instructions state, WABE's objective is to 'guarantee the children's individual and free development with regard to religion'. (22) The parents of those children may not want their children's teachers to manifest their religion or beliefs in the workplace. In that regard, it should be noted that, under 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 is to be respected, in accordance with the national laws governing the exercise of that right.

66. Furthermore, an employer's wish to project an image of neutrality towards its customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter, (23) in accordance with which the freedom to conduct a business in accordance with EU law and national laws and practices is recognised.

67. The protection afforded by that article covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition. (24) In my view, that protection covers the willingness to respect customers' wishes, in particular for commercial reasons. Unlike the situation in the case that gave rise

to the judgment in *Bougnaoui and ADDH*, (25) the prohibition, inter alia, on wearing the Islamic headscarf is not in response to a request to that effect from a customer, but is rather part of a policy of general and undifferentiated neutrality pursued by the undertaking.

68. I therefore propose that part (a) of the second question in Case C-804/18 be answered to the effect that Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that a difference of treatment indirectly based on religion or belief, for the purposes of that provision, can be justified by the employer's intention to pursue a policy of political, philosophical and religious neutrality in the workplace in order to take account of the wishes of its customers.

C. The first question in Case C-341/19

69. By its first question in Case C-341/19, the referring court asks, in essence, whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that an internal rule of a private undertaking prohibiting, as part of a policy of neutrality, only the wearing of conspicuous, large-scale signs of political, philosophical or religious beliefs in the workplace can be justified for the purposes of that provision.

70. As a preliminary point, it should be noted that, in the judgment in *G4S Secure Solutions*, the Court took as its point of reference the *visible wearing of any sign* of political, philosophical or religious beliefs in the workplace. In my view, the Court's analysis must not be understood to the effect that, with a view to applying a principle of neutrality, only prohibiting any outward sign of political, philosophical or religious beliefs could be justified. The answer given by the Court stemmed from the context of the case that gave rise to that judgment, in which the internal regulations in question prohibited visible signs of political, philosophical or religious beliefs and/or engaging in any observance of such beliefs. (26)

71. The question of whether the prohibition, by means of an internal rule of a private undertaking, on wearing conspicuous, large-scale signs of political, philosophical or religious beliefs can be justified, in the context of applying Article 2(2)(b) of Directive 2000/78, has not yet been settled by the Court. That question in effect amounts to determining whether the *visible* wearing, in the workplace, of *small-scale* (27) signs of political, philosophical or religious beliefs is appropriate. (28)

72. In that regard, although the referring court seeks the interpretation of Directive 2000/78 and not of Article 10 of the Charter, (29) I consider it important to refer to the case-law of the European Court of Human Rights ('the ECtHR'). Here, Case C-341/19 concerns a private undertaking which operates a chain of drugstores. There is a judgment of the ECtHR which is directly relevant to the question of the wearing of religious clothing in a private undertaking: the judgment in *Eweida and Others v. the United Kingdom*. (30)

73. In the case which gave rise to that judgment, Ms Nadia Eweida, a practising Coptic Christian, had worked as a member of check-in staff for British Airways Plc. Although she had wanted to wear a cross at work as a sign of her faith, her employer refused to allow her to stay in her job whilst wearing that cross visibly. According to the ECtHR, Ms Eweida's cross was *discreet and could not have detracted from her professional appearance*. (31) It concluded that there had been a violation of Article 9 of the ECHR on the freedom of thought, conscience and religion in respect of Ms Eweida.

74. In the light of that judgment, I take the view that a policy of political, philosophical or religious neutrality pursued by an employer, in its relations with its customers, is not incompatible with the wearing, by its employees, of signs, whether visible or not, that are small in scale (in other words: discreet) of political, philosophical or religious beliefs in the workplace which are not noticeable at first glance. It is true that even small-scale signs, such as a pin or an earring, may reveal to an attentive and interested observer the political, philosophical or religious beliefs of a worker. However, such discreet signs, which are not conspicuous, cannot, in my view, upset those customers of the undertaking who are not of the same religion or do not share the same beliefs as the employee(s) concerned.

75. This involves applying the principle of proportionality, for the purposes of Article 2(2)(b)(i) of Directive 2000/78, under which the means of achieving the legitimate aim of pursuing a policy of political, philosophical or religious neutrality must be appropriate and necessary. If the prohibition on wearing, in the workplace, any visible sign of political, philosophical or religious beliefs is permissible, as is apparent from the judgment in *G4S Secure Solutions*, the employer seems to me also to be at liberty, within the context of the freedom to conduct a business, to prohibit only the wearing of conspicuous, large-scale signs of such beliefs. (32)

76. The debate does then admittedly shift to the concept of 'visible and "small-scale" signs of political, philosophical or religious beliefs'. In my view, it is not for the Court to give a precise definition of that term, since the context in which the sign is worn may be a relevant consideration. The national court seised of the matter must, therefore, examine the situation on a case-by-case basis. However, I am of the view that, in any case, an Islamic headscarf is not a small-scale religious symbol. (33) In the same vein, in her Opinion in *G4S Secure Solutions*, (34) Advocate General Kokott took the view that a 'small and discreetly worn religious symbol – in the form of an earring, necklace or pin, for example – is more likely to be acceptable than a noticeable head covering such as a hat, turban or headscarf'. (35)

77. As the Court observed in the judgment in *G4S Secure Solutions*, the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs in the workplace is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a *consistent and systematic manner*. (36) In addition, in my view, a policy of neutrality that prohibits only the wearing of conspicuous, large-scale signs of political, philosophical or religious beliefs does not mean that that prohibition cannot be carried out in a consistent and systematic manner, that is to say such that it is part of a general and undifferentiated policy, which is a matter for the national court to ascertain.

78. In their written observations, MJ and the Greek and Swedish Governments point out that an internal rule of an undertaking which prohibits only conspicuous, large-scale signs will have an unfavourable effect on certain groups who wear particularly visible religious symbols. Employees belonging to those groups are at a greater risk of suffering discrimination in the workplace on account of their religion or beliefs.

79. In that regard, I acknowledge that religious symbols may be more or less visible according to the religion. However, following that argument would necessarily amount to prohibiting the wearing of any sign of political, philosophical or religious beliefs, with a view to applying a policy of neutrality, which would appear paradoxical in the light of the objective of Directive 2000/78, which seeks to combat discrimination on the grounds of religion or belief. As the Court has observed, the prohibition of such signs must be limited to what is strictly necessary. (37) Otherwise 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.

80. In other words, there appears to me to be room between, on the one hand, granting complete freedom to workers to wear signs of political, philosophical or religious beliefs in the workplace, which an employer may opt to apply in the context of its freedom to conduct a business under Article 16 of the Charter, (38) and, on the other hand, the prohibition of any visible sign of a political, philosophical or religious nature, with a view to applying a policy of neutrality, which the employer may likewise decide to implement. (39) The policy of neutrality can therefore take several forms, provided that it is pursued in a consistent and systematic manner.

81. In the light of the foregoing, I propose that the first question in Case C-341/19 is answered to the effect that Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that an internal rule of a private undertaking which prohibits, in the context of a policy of neutrality, only the wearing of conspicuous,

large-scale signs of political, philosophical or religious beliefs in the workplace can be justified for the purposes of that provision. Such a prohibition must be implemented in a consistent and systematic manner, which is for the referring court to ascertain.

D. Part (b) of the second question in Case C-804/18 and part (b) of the second question in Case C-341/19

82. By part (b) of the second question in Case C-804/18 and part (b) of the second question in Case C-341/19, which should be examined jointly, (40) the referring courts ask, in essence, whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that the national constitutional provisions protecting the freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of that directive in the examination of whether indirect unequal treatment on the grounds of religion or beliefs is justifiable.

83. Under Article 8(1) of Directive 2000/78, 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 that directive. Furthermore, recital 28 of the Directive states that the Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions, and that the implementation of the Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

84. In the light of the questions referred, consideration must be given to the extent to which national provisions on the freedom of religion may be regarded as being more favourable to the protection of the principle of equal treatment than those laid down in Directive 2000/78.

85. In that regard, I would note that the Court has already interpreted Article 8(1) of that directive, albeit solely at present in the context of compliance with procedural rules. On the basis of that provision, it has thus held that Article 9(2) of Directive 2000/78 (41) in no way precludes a Member State from laying down, in its national law, the right of associations with a legitimate interest in ensuring compliance with that directive to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. (42)

86. Such an interpretation appears to me entirely justified. Firstly, Article 9(2) of Directive 2000/78 specifically lays down the framework for the intervention of those associations to bring legal or administrative proceedings and lays down conditions, namely that those associations act on behalf or in support of the complainant, with his or her approval. Second, in order to ensure that rights are defended, Article 8(1) allows for a broader intervention on the part of those associations before the national courts, without a complainant being needed, which is more favourable to the protection of the principle of equal treatment.

87. As regards the national provisions on the freedom of religion, I am, however, of the view that they do not come within the scope of Article 8(1) of Directive 2000/78. Although those national provisions do seek to protect workers in relation to the expression of their religion, they are not intended to strengthen the application of the principle of equal treatment, as provided for in Article 8(1) of that directive, because their purpose is not to combat discrimination.

88. As I will go on to explain, those national provisions can be applied by the Member States, but in a different context from that of Directive 2000/78, the sole purpose of which is to lay down a general framework for combating discrimination on the grounds, inter alia, of religion or belief.

89. I therefore propose that part (b) of the second question in Case C-804/18 and part (b) of the second question in Case C-341/19 are answered to the effect that Article 2(2)(b) of Directive 2000/78 is to be

interpreted as meaning that national constitutional provisions protecting the freedom of religion may not be taken into account as more favourable provisions within the meaning of Article 8(1) of that directive in the examination of whether indirect unequal treatment on the grounds of religion or beliefs is justifiable.

E. Part (a) of the second question in Case C-341/19

90. By part (a) of its second question in Case C-341/19, the referring court asks, in essence, whether Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that the rights laid down in Article 10 of the Charter and in Article 9 ECHR may be taken into account in the examination of whether indirect unequal treatment on the grounds of religion or belief and resulting from an internal rule of a private undertaking is appropriate and necessary.

91. In that regard, the referring court asks whether, with a view to examining whether such a difference of treatment is appropriate, a balance may be struck between competing interests namely, on the one hand, Article 16 of the Charter and, on the other hand, the freedom of thought, conscience and religion laid down in Article 10 of the Charter and in Article 9 ECHR.

92. In order to answer that question, I consider it important to go back to the wording of Article 2(2)(b) of Directive 2000/78, which, in the context of justifying indirect unequal treatment on the grounds of religion or belief, draws a distinction, firstly, between where a legitimate aim exists and where it does not, and, second, as to whether the means of achieving that aim are appropriate and necessary.

93. In paragraphs 38 and 39 of the judgment in *G4S Secure Solutions*, the Court held that 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, and that an interpretation to the effect that the pursuit of that aim allows, within certain limits, a restriction to be imposed on the freedom of religion is borne out by the case-law of the ECtHR in relation to Article 9 ECHR.

94. The Court made reference to Article 16 of the Charter and to Article 9 ECHR solely in the context of examining whether a legitimate aim exists, within the meaning of Article 2(2)(b)(i) of Directive 2000/78, with regard to the implementation of an undertaking's policy of neutrality towards its customers.

95. Following that line of reasoning, it appears to me that, with a view to examining the appropriateness and necessity of the measures implemented to achieve that aim, since the freedom to conduct a business is no longer involved in that stage of the analysis, there is no need to balance, on the one hand, the freedom to conduct a business and, on the other, the freedom of thought, conscience and religion. Should, however, account be taken of the right to that latter freedom when examining the means of achieving the objective of a policy of neutrality? I do not believe so.

96. In the first place, as the Commission rightly noted in its written observations, the prohibition of discrimination on the grounds of religion or beliefs is unquestionably linked to the protection of the right to freedom of religion, since such discrimination affects the freedom of a person to practise his religion freely and openly. However, the prohibition of discrimination on the grounds of religion or beliefs, as provided for in Article 21(1) of the Charter, and the freedom of thought, conscience and religion, as laid down in Article 10 of that Charter, constitute fundamental rights which must be clearly distinguished. (43)

97. It is important to recall that Directive 2000/78 gives concrete expression to Article 21 of the Charter, which, as regards its mandatory effect, is no different, in principle, from the various provisions of the founding Treaties prohibiting discrimination on various grounds, even where the discrimination derives from contracts between individuals. (44) The sole purpose of that directive is therefore to combat discrimination on the grounds, inter alia, of religion or beliefs. It does not seek to guarantee the protection of the freedom of religion, strictly speaking, as provided for in Article 10 of the Charter.

98. In the second place, in the context of justifying indirect unequal treatment on the grounds of religion or belief, within the meaning of Article 2(2)(b)(i) of Directive 2000/78, it is my view that the fundamental right to the protection of the freedom of religion is not a relevant consideration, since that provision refers to appropriate and necessary *means*. This is a review of proportionality which presupposes that specific consideration is given to the situation in order to determine whether the recognised legitimate aim, that is to say a policy of neutrality, is being implemented properly.

99. In the third place, I am of the opinion that 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, which is solely concerned with the principle of non-discrimination in employment and occupation.

100. I therefore propose that part (a) of the second question in Case C-341/19 be answered to the effect that Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that the rights laid down in Article 10 of the Charter and in Article 9 ECHR may not be taken into account in the examination of whether indirect unequal treatment on the grounds of religion or belief and resulting from an internal rule of a private undertaking is appropriate and necessary.

F. The third question in Case C-341/19

101. By its third question in Case C-341/19, the referring court asks, in essence, whether Directive 2000/78 is to be interpreted as precluding a national court from applying national constitutional provisions that protect freedom of religion in the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of signs of political, philosophical or religious beliefs in the workplace.

102. As a preliminary point, I note that, by its questions referred for a preliminary ruling, the referring court has asked the Court for an interpretation of Directive 2000/78 and not of Article 10 of the Charter. I will therefore consider the third question in Case C-341/19, which follows on from the first and second questions, in the light of that directive, as part of the examination of indirect unequal treatment on the grounds of religion or belief.

103. As I have stated in point 97 of this Opinion, Directive 2000/78 does not seek to guarantee the protection of the freedom of thought, conscience and religion provided for in Article 10 of the Charter. Accordingly, account cannot be taken of that freedom when examining the appropriateness and the necessity of the means implemented to achieve the undertaking’s aim of neutrality. The same interpretation must be adopted in relation to the freedom to conduct a business enshrined in Article 16 of the Charter, which is not a fundamental right pursued by that directive.

104. In those circumstances, where the principle of non-discrimination as provided for in Directive 2000/78, which gives concrete expression to Article 21 of the Charter, is not undermined, I am of the view that the Member States remain at liberty to apply the national law covering the legal situation concerned.

105. This may be, for example, as the Commission points out, a national provision on the form in which the instruction establishing the policy of neutrality must be communicated to the undertaking’s workers. The application of such a provision may render that instruction null and void even if, in substantive terms, the policy of neutrality envisaged satisfies the conditions laid down in Directive 2000/78. Although that is a procedural example, that reasoning likewise applies as regards the actual substance of the right to equal treatment. Provisions of EU law on the principle of non-discrimination thus co-exist with national provisions laying down certain requirements applicable to the employer’s policy of neutrality.

106. The same reasoning applies to national provisions on the protection of the freedom of religion, which may be taken into account by the courts of the Member State concerned for the purpose of assessing the

validity of an employer's instruction relating to the application of a policy of neutrality.

107. In that regard, the referring court states that, in accordance with the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), the protection of a fundamental right such as that provided for in Article 4(1) and (2) of the GG applies to legal relationships between private individuals. The freedom of faith laid down in those provisions, as a civil liberty, would be supplanted by the freedom to conduct a business, to which Article 12(1) of the GG refers, only where there is a sufficiently specific threat of an economic disadvantage for the employer or a relevant third party. In other words, as is also explained by the referring court in Case C-804/18 in its order for reference and in part (b) of its second question, it follows from the German constitutional provisions that an employer's wish to pursue a policy of religious neutrality towards its customers is, in principle, legitimate only if it would suffer economic harm if such neutrality did not exist.

108. As has already been stated, the purpose of provisions such as Article 4(1) and (2) of the GG, which are concerned with the protection of the freedom of religion, differs from that of Directive 2000/78. Therefore, provided that the principle of non-discrimination laid down in that directive is observed, I see no barrier to applying national constitutional provisions that protect the freedom of religion when examining an undertaking's policy of neutrality. (45)

109. Such a possibility afforded to Member States as regards the protection of the freedom of religion echoes the case-law of the ECtHR, according to which it is not possible to discern throughout Europe a uniform conception of the significance of religion in society and the meaning or impact of the public expression of a religious belief will differ according to the time and context. Rules in that sphere may therefore vary from one country to another and the choice of the extent and form of such rules should, inevitably, be left up to a point to the State concerned, as it will depend on the specific domestic context. (46)

110. I am therefore of the view that account should be taken of the various approaches taken by the Member States to the protection of the freedom of religion, (47) which is not called into question by the application of the principle of non-discrimination provided for in Directive 2000/78.

111. Here, it appears to me, prima facie, that the national provisions concerned do not conflict with that directive. They do not prohibit a policy of political, philosophical or religious neutrality pursued by an employer, but rather simply lay down an additional requirement for the implementation of such a policy relating to the existence of a sufficiently specific threat of an economic disadvantage for the employer or a relevant third party. It is for the referring court to ascertain that the national rules relied on do not undermine the principle of non-discrimination as provided for in the Directive.

112. I therefore propose that the third question in Case C-341/19 be answered to the effect that Directive 2000/78 is to be interpreted as not precluding a national court from applying national constitutional provisions that protect the freedom of religion in the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of signs of political, philosophical or religious beliefs in the workplace, as long as those provisions do not undermine the principle of non-discrimination laid down in that Directive, which is for the referring court to ascertain.

V. Conclusion

113. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) and the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

(1) Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general

framework for equal treatment in employment and occupation is to be interpreted as meaning that the prohibition on wearing any visible sign of political, philosophical or religious beliefs in the workplace, which results from an internal rule of a private undertaking, does not constitute direct discrimination on the grounds of religion or belief, within the meaning of that provision, in respect of employees who, due to religious covering requirements, follow certain clothing rules.

(2) Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that a difference of treatment indirectly based on religion or belief, for the purposes of that provision, can be justified by the employer's intention to pursue a policy of political, philosophical and religious neutrality in the workplace in order to take account of the wishes of its customers.

(3) Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that an internal rule of a private undertaking which prohibits, in the context of a policy of neutrality, only the wearing of conspicuous, large-scale signs of political, philosophical or religious beliefs in the workplace can be justified for the purposes of that provision. Such a prohibition must be implemented in a consistent and systematic manner, which is for the referring court to ascertain.

(4) Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that national constitutional provisions protecting the freedom of religion may not be taken into account as more favourable provisions within the meaning of Article 8(1) of that directive in the examination of whether indirect unequal treatment on the grounds of religion or beliefs is justifiable.

(5) Article 2(2)(b) of Directive 2000/78 is to be interpreted as meaning that the rights laid down in Article 10 of the Charter of the Fundamental Rights of the European Union and in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, may not be taken into account in the examination of whether indirect unequal treatment on the grounds of religion or belief and resulting from an internal rule of a private undertaking is appropriate and necessary.

(6) Directive 2000/78 is to be interpreted as not precluding a national court from applying national constitutional provisions that protect the freedom of religion in the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of signs of political, philosophical or religious beliefs in the workplace, as long as those provisions do not undermine the principle of non-discrimination laid down in that Directive, which is for the referring court to ascertain.

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1 Original language: French.

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2 See, inter alia, judgment of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* (C-426/16, EU:C:2018:335).

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3 See judgment of 29 October 2020, *Veselības ministrija* (C-243/19, EU:C:2020:872).

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4 See judgment of 4 October 2018, *Fathi* (C-56/17, EU:C:2018:803).

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5 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

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6 Judgment of 14 March 2017 (C-157/15, EU:C:2017:203, 'the judgment in *G4S Secure Solutions*').

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7 Judgment of 14 March 2017 (C-188/15, EU:C:2017:204, 'the judgment in *Bougnaoui and ADHH*').

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8 In the judgments in *G4S Secure Solutions* (paragraph 28) and *Bougnaoui and ADDH* (paragraph 30), the Court found that the concept of 'religion' in Article 1 of Directive 2000/78 should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.

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9 C-157/15, EU:C:2016:382. In point 141 of her Opinion, Advocate General Kokott took the view that the fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion for the purposes of Article 2(2)(a) of Directive 2000/78 if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general.

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10 C-188/15, EU:C:2016:553. In point 135 of her Opinion, Advocate General Sharpston took the view that a rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief.

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11 The undertaking's internal regulations stated that 'employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'.

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12 Judgment of 22 January 2019 (C-193/17, EU:C:2019:43, paragraph 40).

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13 It is apparent from the 'Information sheet on the requirement of neutrality' produced by WABE (cited in point 22 of this Opinion) that the Christian cross, Islamic headscarf and Jewish kippah may not be worn by persons dealing with children.

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14 See judgment in *G4S Secure Solutions*, paragraph 31. In this regard, I note that, according to the order for reference, WABE required a female employee wearing a cross around her neck to remove it.

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15 Judgment of 22 January 2019 (C-193/17, EU:C:2019:43).

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16 See, inter alia, Howard, E., 'Islamic headscarves and the CJEU: Achbita and Bougnaoui', *Maastricht Journal of European and Comparative Law*, 2017, vol. 24(3), pp. 348 to 366, in particular pp. 351 to 354; Cloots, E., 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', *Common Market Law Review*, vol. 55, 2018, pp. 589 to 624. See, more generally, Weiler, J. H. H., 'Je suis Achbita: à propos d'un arrêt de la Cour de justice de l'Union européenne sur le hijab musulman (CJUE 14 mars 2017, aff. C-157/15)', *Revue trimestrielle de droit européen*, 2019, pp. 85 to 104.

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17 Such discrimination is covered by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

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18 In this regard, the referring court states that, with the exception of the qualified teaching staff, the obligations relating to the application of the neutrality requirement do not apply to WABE employees working at the undertaking's headquarters since they have no customer contact.

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19 See, to that effect, judgment in *G4S Secure Solutions*, paragraph 42.

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20 See, to that effect, judgment in *G4S Secure Solutions*, paragraph 43.

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21 See judgment in *Bougnaoui and ADDH*, paragraph 41. In paragraphs 32 and 34 of that judgment, the Court drew a clear distinction according to whether or not there is within the undertaking an internal rule establishing a policy of political, philosophical or religious neutrality.

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22 See point 21 of this Opinion.

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23 See judgment in *G4S Secure Solutions*, paragraph 38.

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24 See judgment of 16 July 2020, *Adusbef and Federconsumatori* (C-686/18, EU:C:2020:567, paragraph 82 and the case-law cited).

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25 See judgment in *Bougnaoui and ADDH*, paragraph 14.

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26 See judgment in *G4S Secure Solutions*, paragraph 15.

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27 I am working on the assumption that a small-scale sign, which is not worn to be highlighted, is not conspicuous. The word '*ostentation*' [in English: conspicuousness] is defined by the Larousse dictionary as follows: '*affectation qu'on apporte à faire quelque chose, étalage indiscret d'un avantage ou d'une qualité, attitude de quelqu'un qui cherche à se faire remarquer*' [in English: affectation adopted when doing something, indiscreet display of an advantage or quality, attitude of someone who seeks to be noticed]. See https://www.larousse.fr/dictionnaires/francais/ostentation/56743.

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28 To my mind, it is clear that if the employer wishes to pursue, with its customers, a policy of political, philosophical or religious neutrality, which is a legitimate aim when applying Article 2(2)(b) of Directive 2000/78, it is entitled to prohibit the wearing of conspicuous, large-scale signs in the workplace.

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29 According to the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.

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30 ECtHR, 15 January 2013 (CE:ECHR:2013:0115JUD004842010). Moreover, the Court referred to that judgment in paragraph 39 of the judgment in *G4S Secure Solutions*.

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31 ECtHR, 15 January 2013, *Eweida and Others v. the United Kingdom* (CE:ECHR:2013:0115JUD004842010, § 94). See, in relation to that judgment, Mathieu, C., Gutwirth, S., and de Herth, P., 'La croix et les juges de la Cour européenne des droits de l'homme: les enseignements des affaires Lautsi, Eweida et Chaplin', *Journal européen des droits de l'homme*, Larcier, 2013, No 2, pp. 238 to 268.

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32 My view appears to echo that of Advocate General Kokott in her Opinion in *G4S Secure Solutions* (C-157/15, EU:C:2016:382, point 141), who referred to the 'size' and the 'conspicuousness' of the religious symbol in the context of the justification of indirect discrimination on the grounds of religion within the meaning of Article 2(2)(b) of Directive 2000/78.

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33 The judgment of the ECtHR of 15 January 2013, *Eweida and Others v. the United Kingdom* (CE:ECHR:2013:0115JUD004842010) differs from the decision of that Court of 15 February 2001, *Dahlab v. Switzerland* (CE:ECHR:2001:0215DEC004239398), in which it held that 'it is very difficult to assess the impact that a *powerful external symbol* such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the [Swiss] Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils' (emphasis added). Besides the fact that the judgment in *Eweida and Others v. the United Kingdom* concerned a private undertaking and the decision in *Dahlab v. Switzerland* a public school and that the case-law of the ECtHR may have evolved, the emphasis placed on the fact that an Islamic headscarf is a 'powerful external symbol' could explain why the ECtHR finds the prohibition on wearing the Islamic headscarf, as opposed to a 'discreet' religious symbol, compatible with the ECHR.

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34 C-157/15, EU:C:2016:382, point 118.

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35 In the light of the decision of the ECtHR of 15 February 2001, *Dahlab v. Switzerland* (CE:ECHR:2001:0215DEC004239398), a hat, turban or headscarf may be regarded as 'powerful external symbols'.

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36 Judgment in *G4S Secure Solutions*, paragraph 40.

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37 Judgment in *G4S Secure Solutions*, paragraph 42.

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38 It must be recalled that an employer is by no means obliged to pursue a policy of neutrality vis-à-vis its customers. It can opt to highlight a religious affiliation, which may be manifested by religious symbols particular to the religion in question, which are worn by employees. The employer is also free not to impose any restriction on the wearing of religious symbols in the workplace, regardless of the religion or the size of

those symbols.

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39 The referring court states that the policy of neutrality within the undertaking concerned is also intended to avoid conflicts between employees. In that regard, that objective differs from that of a policy of neutrality vis-à-vis customers, which relates to the freedom to conduct a business, as the Court observed in the judgment in *G4S Secure Solutions* (paragraph 38). In the light of the facts of the dispute in the main proceedings in Case C-314/19, it does not appear to me to be necessary, in the context of these joined cases, to examine whether the aim of avoiding conflicts between employees is legitimate within the meaning of Article 2(2)(b) of Directive 2000/78.

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40 Part (b) of the second question in Case C-804/18 refers to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) that interprets Article 4(1) and (2) of the GG.

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41 Under Article 9(2) of Directive 2000/78, 'Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive'. It follows from the very wording of that provision that it does not require an association to be given standing in the Member States to bring judicial proceedings for enforcement of obligations under that directive where no injured party can be identified (judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 61).

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42 Judgments of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 37) and of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 63).

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43 The Commission gives the example, based on a line of reasoning *ad absurdum*, of a total prohibition imposed by a Member State on practising religion, which would therefore infringe the freedom of religion, without however being contrary to the prohibition of discrimination on the grounds of religion, since all the inhabitants of that Member State would be treated equally.

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44 See judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 77 and the case-law cited).

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45 It therefore appears to me that, since the provisions of EU and national law at issue have a different purpose, there is no need to apply the reasoning adopted by the Court in the judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60), according to which, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

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46 Judgments of the ECtHR of 10 November 2005, *Leyla Şahin v. Turkey* (CE:ECHR:2005:1110JUD004477498, § 109), and of 10 January 2017, *Osmanoğlu and Kocabaş v. Switzerland* (CE:ECHR:2017:0110JUD002908612, § 88).

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47 See, to that effect, Loenen, M. L. P., 'In search of an EU approach to headscarf bans: where to go after Achbita and Bougnaoui?', *Review of European Administrative Law*, 2017, No 2, pp. 47 to 73.