OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 28 April 2022(1)

Case C-344/20

LF
v
SCRL

(Request for a preliminary ruling from the Tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium))

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Discrimination on the grounds of religion or belief – Internal neutrality rule of a private undertaking – Prohibition on the wearing of any visible political, philosophical or religious signs in the workplace – Religious clothing obligations – Article 8 – More favourable provisions in national law to the protection of the principle of equal treatment – Margin of discretion of the Member States – Religion and religious beliefs as an autonomous ground of discrimination)

I. Introduction

1. This request for a preliminary ruling follows directly on from the judgments of the Court in *G4S Secure Solution*, (2)*Bougnaoui and ADDH* (3) and *WABE*, (4) concerning discrimination on the grounds of religion or belief within the meaning of Directive 2000/78. (5) The reference results from proceedings between LF and SCRL where a spontaneous application for an internship was not taken into consideration due to the refusal of the candidate to comply with the internal neutrality rule imposed on the undertaking's employees. That rule prohibited the manifestation of any religious, philosophical or political belief, in particular through clothing, in the workplace. (6)

2. The present case invites the Court to address, once again, the question of whether employees of a private undertaking, including interns, can be prohibited from wearing certain clothing based on religious precepts in their place of work. It also calls for an examination of the discretion afforded to Member States, pursuant to Article 8 of Directive 2000/78, to adopt provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive, in particular by treating religion and religious beliefs as an autonomous ground of discrimination. According to the Court's request, the present Opinion shall be confined to that latter question.

II. Legal framework

A. European Union law

3. Directive 2000/78 establishes a general framework for equal treatment in employment and occupation. Its aim is to combat 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'. (7)

4. For the purposes of Directive 2000/78, the 'principle of equal treatment' means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. (8)

5. In particular, 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 those grounds. (9) By contrast, 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, (10) unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (11)

6. Directive 2000/78 shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. (12)

7. Member States may also provide that a difference of treatment, which is based on a characteristic related to any of the grounds enshrined in Directive 2000/78, 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. (13)

8. Finally, for the purposes of the present case, it is important to bear in mind that recital 28 of Directive 2000/78 states that the directive only lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of Directive 2000/78 should not serve to justify any regression in relation to the situation which already prevails in each Member State. Moreover, under the heading 'Minimum requirements', Article 8(1) of Directive 2000/78 provides that 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. Article 8(2) of Directive 2000/78 also establishes that the implementation of that directive shall, under no circumstances, constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by that directive.

B. Belgian law

9. The Loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination (Law of 10 May 2007 to combat certain forms of discrimination; 'the General anti-discrimination law') (14) transposes Directive 2000/78 into Belgian law. (15) Its purpose is to create a general framework for combating discrimination in the fields of employment and occupation. (16) It applies to employment relationships, (17) which include, inter alia, relationships that are formed as part of unpaid work, of work carried out pursuant to an internship or apprenticeship, or arising from work experience agreements. (18)

10. The criteria protected against discrimination are listed in Article 4(4) of General anti-discrimination law as 'age, sexual orientation, civil status, birth, financial situation, religious or philosophical belief, political belief, trade union belief, language, current or future state of health, disability, physical or genetic characteristics or social origin'.

11. According to Article 7 of the General anti-discrimination law, any direct distinction based on one of the protected criteria referred above constitutes direct discrimination, unless that direct distinction is objectively justified by a legitimate aim and the means of achieving that aim are

appropriate and necessary. However, Article 8(1) of the same law provides that a direct distinction based, inter alia, on religious or philosophical belief can be justified only by genuine and determining occupational requirements.

III. Facts, procedure and the questions referred

12. LF, the applicant in the main proceedings, is Muslim and wears the Islamic headscarf. SCRL, the defendant undertaking, is primarily engaged in the letting and operating of social housing intended for people with reduced access to the private rental market.

13. In March 2018, LF applied for an unpaid internship of six weeks' duration in SCRL as part of her vocational studies in office automation. She was invited to an interview a week later, during which she was asked whether she would agree to comply with the neutrality rule promoted within the undertaking. According to that rule, laid down in the terms of employment of SCRL, 'workers undertake to respect the company's strict policy of neutrality. They will therefore make sure not to manifest in any way, either by word or through clothing or any other way, their religious, philosophical or political beliefs, whatever those beliefs may be'. When questioned on this point, LF replied that she would refuse to remove her headscarf to comply with that rule.

14. Given that no further action was taken on her application, in April 2018, LF renewed her request for an internship with SCRL proposing to wear another type of head covering. However, in response to that communication, SCRL informed her that she could not be offered an internship as no type of head covering was permitted on its premises, whether it be a cap, a hat or a scarf.

15. LF brought an action for a prohibitory injunction before the referring court, challenging the refusal to offer her an internship, which she considers to be based directly or indirectly on her religious beliefs and, consequently, on a violation of the provisions of the General anti-discrimination law. (19)

16. The referring court takes the view that LF's application for an internship with SCRL constitutes an employment relationship which falls within the scope of Directive 2000/78 and the General anti-discrimination law. It considers, however, that the interpretation of the concept of direct discrimination on the grounds of religion or belief, within the meaning of Article 2(2)(a) of Directive 2000/78, requires further clarification from the Court. Among the issues raised by the referring court is whether it may exercise any discretion in carrying out the assessment of the comparability of situations, which, according to the judgment in G4S Secure Solutions, is incumbent on national courts to undertake and from which it may be inferred that there has been direct discrimination.

17. The referring court also questions whether the Court, in the judgment in *G4S Secure Solutions*, intended to merge religious beliefs, philosophical beliefs and political beliefs into a single protected criterion, such that there is no longer any need to distinguish between those grounds of discrimination. That would imply that Article 1 of Directive 2000/78 is to be interpreted as meaning that religion and belief are two sides of the same protected criterion. In the view of the referring court, the answer to that question is crucial, since if religion and religious beliefs are to be classed together with other types of beliefs (other than religious), it would significantly influence the comparison to be made for the purposes of assessing the existence of direct discrimination.

18. Finally, the referring court considers that that question raises another one, namely whether a provision of national legislation which affords separate protection to religious, philosophical and political beliefs may be regarded as a more favourable provision to the protection of the principle of equal treatment within the meaning of Article 8 of Directive 2000/78.

19. It is in those circumstances that the Tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium) has decided to stay the proceedings and to refer, inter alia, the following question to the Court of Justice for a preliminary ruling:

'…

(2) If Article 1 of [Directive 2000/78] is to be interpreted as meaning that religion and belief are two facets of the same protected criterion, would that prevent the national court, pursuant to Article 8 of that directive and in order to prevent a lowering of the level of protection against discrimination, from continuing to interpret a rule of national law such as Article 4(4) of the [General anti-discrimination law], as meaning that religious, philosophical and political beliefs are separate protected criteria?

…'

20. The request for a preliminary ruling was lodged at the Court Registry on 27 July 2020. Written observations were submitted by the Kingdom of Belgium, the Republic of Poland, the European Commission and the parties in the main proceedings.

IV. Analysis

21. In line with the Court's request, the present Opinion treats only the question by which the referring court asks, in essence, whether a provision of national legislation such as Article 4(4) of the General anti-discrimination law can be considered a more favourable provision to the protection of the principle of equal treatment, within the meaning of Article 8 of Directive 2000/78, and interpreted to the effect that religious, philosophical and political beliefs constitute separate grounds of discrimination.

22. As a preliminary point, I must point out that, in the judgment in *WABE*, delivered after the present request for a preliminary ruling was lodged, the Court declared that, 'for the purposes of the application of Directive 2000/78, the terms "religion" and "belief" must be analysed as two facets of the same single ground of discrimination'. More precisely, the Court stated that 'the ground of discrimination based on religion or belief is to be distinguished from the ground based on "political or any other opinion" and therefore covers both religious beliefs and philosophical or spiritual beliefs'. (20)

23. The question referred in the present case thus requires an examination as to whether, notwithstanding that interpretation of the Court in the judgment in *WABE*, Article 8 of Directive 2000/78 affords Members States a discretion to adopt and interpret national legislation as providing protection to religion and religious beliefs, on the one hand, and to philosophical or spiritual beliefs, on the other, as separate grounds of discrimination.

24. In the present Opinion, as a first step, I shall refer to the normative content of Article 8 of Directive 2000/78, as well as to the margin of discretion recognized by the Court to the Member States in order to adopt provisions which are more favourable to the protection of the principle of equal treatment. I shall then explain the rationale behind the question referred, and the position taken by the Court, in the judgments in *G4S Secure Solutions* and *WABE*, regarding the assessment of discrimination in the context of an internal neutrality rule of a private undertaking. Moreover, I shall examine whether Member States should enjoy discretion to protect religion and religious beliefs as an autonomous ground of discrimination. Lastly, I shall analyse whether a national provision such as Article 4(4) of the General anti-discrimination law can be interpreted as providing more favourable protection in terms of equal treatment in the workplace in respect of religion and religious beliefs.

A. Article 8 of Directive 2000/78

1. More favourable provision

25. According to Article 1 of Directive 2000/78, the purpose of that 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.

26. Recital 28 of Directive 2000/78 states that the directive only provides for minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable

provisions. According to that same recital, the implementation of Directive 2000/78 should not serve to justify any regression in relation to the situation which already prevails in each Member State.

27. The declaration contained in recital 28 of Directive 2000/78 is given concrete expression in Article 8 thereof, which is entitled ‘Minimum requirements’. In particular, Article 8(1) establishes that Member States may introduce or maintain provisions that are more favourable to the protection of equal treatment than those laid down in that directive. Accordingly, Directive 2000/78 contains a provision by which Member States can adopt legislation providing for a higher level of protection than that guaranteed by the directive. (21) Article 8(2) of Directive 2000/78 further provides that the implementation of that directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the areas covered by the directive.

28. Prior to the judgment in *WABE*, the Court interpreted Article 8 of Directive 2000/78 on several occasions, albeit solely in the context of compliance with procedural rules. (22) In *Bulicke*, for instance, the Court declared that Article 8 of Directive 2000/78 does not preclude a national procedural rule, adopted in order to implement that directive, which has the effect of amending earlier legislation that provided a time limit for claiming compensation for discrimination on grounds of sex. (23) More recently, in *Associazione Avvocatura per i diritti LGBTI*, the Court considered that Article 8 of Directive 2000/78 does not preclude national legislation granting automatic standing to an association of lawyers, of which the statutory objective was the judicial protection of persons having a certain sexual orientation, to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages. (24)

29. In the judgment in *WABE*, by contrast, the Court had to address, from a substantive angle, whether national constitutional provisions protecting the freedom of religion and conscience could be taken into account as more favourable provisions, within the meaning of Article 8(1) of Directive 2000/78, in examining the appropriateness of a difference of treatment indirectly based on religion or belief under Article 2(2)(b)(i) of that same directive. In essence, the question raised sought clarification on the judgment in *G4S Secure Solutions* as regards the weighting to be accorded to the freedom of religion and conscience in the context of the balancing of that freedom with other legitimate aims that may be invoked in order to justify indirect discrimination on the grounds of religion or belief.

30. Under an approach that evokes the structure of the reasoning in *Melloni*, (25) the Court has considered that Directive 2000/78 illustrates that the EU legislature did not itself effect the necessary reconciliation between, on the one hand, the freedom of thought, conscience and religion and, on the other, the legitimate aims that may be invoked in order to justify a difference in treatment. According to the Court, it is for the Member States and their courts to achieve that reconciliation, (26) taking into account the specific context of each Member State. (27) The Court has also recognised that Directive 2000/78 allows Member States a margin of discretion in achieving the necessary reconciliation between the different rights and interests at issue in order to ensure a fair balance between them, (28) which permits the introduction, for example, of higher requirements when examining a justification for a difference in treatment indirectly based on religion or belief. (29)

2. Partial harmonisation

31. The question referred in the case that led to the judgment in *WABE* concerned the application of Article 8(1) of Directive 2000/78 in the context of indirect discrimination and its justification pursuant to Article 2(2)(b)(i) of that directive. For that reason, that judgment does not settle the matter at issue in the present case, which is whether a provision of national legislation can be considered more favourable to the protection against unequal treatment, within the meaning of Article 8(1) of Directive 2000/78, when it impacts the comparison to be made for the assessment of the existence of direct discrimination under Article 2(2)(a) of Directive 2000/78.

32. The answer to that question depends, first and foremost, on the level of harmonisation brought about by Directive 2000/78, an issue also raised in the judgment in *WABE*. In that regard, the Court stated that Directive 2000/78 leaves a margin of discretion to the Member States, taking into account

the diversity of their approaches as regards the place accorded to religion and beliefs within their respective systems. (30)

33. For reasons which do not require further elaboration after the clear statement of the Court in the judgment in *WABE*, (31) it appears to be accepted that, by setting out minimum requirements, Directive 2000/78 was only enacted to establish a partial harmonisation of the relevant rules on equal treatment in the fields of employment and occupation. It thus leaves scope for different approaches to be adopted at national level between competing views on how properly and legitimately to address discrimination. (32) With respect to religion and belief, the degree of uniformity or diversity preferred within certain Member States is certainly capable of affecting those choices, as I shall explain later in this Opinion.

B. The assessment of discrimination on the grounds of religion or belief

34. Whether the margin of discretion afforded to Member States under Article 8 of Directive 2000/78, as recognised by the Court, allows for the protection of religion and religious beliefs as an autonomous ground of discrimination at national law must be decided with full consideration of the influence of that approach on the exercise of the comparison to be made in each specific case and the degree of protection that that exercise entails. In that respect, it is important to point out that, notwithstanding their apparent objectivity, both the type of comparison employed for the assessment of the existence of discrimination and the circle of reference delineated for that purpose involve far-reaching judgements about the desirable level of equality in society. (33)

1. Intergroup vs intragroup comparison

35. In order to understand the rationale behind the referred question, I must recall that, for discrimination to be found as regards employment and occupation, Directive 2000/78 requires a differential treatment or disadvantage to occur in relation to, inter alia, 'religion or belief'. That discrimination is direct, according to Article 2(2)(a) of Directive 2000/78, if one person adhering to a religion or belief is treated less favourably than another person in a comparable situation. That requires, in essence, a determination as to whether an inextricable link exists between the unequal treatment under consideration and the ground of religion or belief. (34) The discrimination is, by contrast, indirect, pursuant to Article 2(2)(b) of Directive 2000/78, if an apparently neutral rule or practice results, in fact, in persons adhering to a religion or belief being put at a particular disadvantage as compared with other persons. (35)

36. In both cases, the manner in which that comparison is made, for the assessment of the existence of a differential treatment, plays an essential role, as it is capable of impacting the type of discrimination present in a specific case. That would be irrelevant were it not for the fact that the justifications that concern each type of discrimination are each significantly different and, accordingly, the level of scrutiny to be applied differs in respect of each of them. (36)

37. I observe that, traditionally, Directive 2000/78 has been interpreted as prohibiting discrimination between in- and out-groups, which, in essence, entailed comparing individuals who shared a certain protected characteristic (in-group) with those who did not (out-group). (37)

38. Recent judgments of the Court demonstrate, however, a shift towards an approach focused not on intergroup but rather on intragroup discrimination. In particular, in *VL*, (38) a case concerning discrimination on grounds of disability, the Court has stated expressly that Directive 2000/78 does not specify in any way the person or group of persons that may be used as the benchmark for assessing whether there is discrimination on that ground. It considered thus that a prohibition of discrimination cannot be limited only to differences in treatment between persons who have disabilities and able-bodied persons, but should focus, instead, on the existence of differential treatment as between persons concerned by that common ground.

39. Intragroup comparison requires an assessment as to the existence of discrimination *within* a group composed of individuals that share the same protected characteristic. Its aim is, according to the Court, to avoid diminishing the protection granted by Directive 2000/78, (39) by focusing on the detection of the relative burdens suffered by certain persons belonging to a group concerned by the

same protected characteristic, rather than searching for similarities and differences between two groups not related by that common characteristic. (40) From that perspective, intragroup comparison extends the reach of Directive 2000/78 with increased sensitivity to less visible disadvantages (41) and also extends equality protection to the less privileged individuals within a particular group. Later in this Opinion, I shall refer to how, in the judgment in *WABE*, the Court relied on an intragroup comparison for the purposes of assessing the existence of discrimination on the grounds of religion or belief.

2. The delineation of the reference circle for comparison

40. Nevertheless, the more effective equality protection deriving from intragroup comparisons is highly dependent on the circle of persons delineated for the purposes of undertaking that comparison. As observed by Advocate General Bobek in his Opinion in *Cresco Investigation*, (42) the delineation of the comparison circle – broadly or narrowly – is capable of shaping the definitions of direct and indirect discrimination under Directive 2000/78 and may lead to divergent outcomes even when confronted with a similar set of facts.

41. In essence, if religion and religious beliefs are protected together with philosophical and spiritual beliefs, then the reference person for comparability purposes is reduced because of the broadening of the circle of persons composing the group of comparison concerned by the protected ground. In the context of internal neutrality rule within the workplace, an employee who claims discrimination because of his or her religion or religious beliefs would be considered to form part of a group including persons who profess philosophical or spiritual beliefs. No direct discrimination can, in principle, be found if the internal neutrality rule applies equally to all the members of that group because a direct causal link between that rule and the protected criterion will be less visible. That would be the case also with respect to employees of an undertaking concerned by religious clothing obligations.

42. By contrast, if religion and religious beliefs are protected as an autonomous ground of discrimination, the comparison will be carried out among individuals affected by reason of their religion and religious beliefs, leaving aside individuals affected by reason of their philosophical or spiritual convictions. An intragroup comparison – in relation to the internal neutrality rule at issue – would then entail an assessment of the situation of employees who observe religious clothing obligations with that of employees who are not bound by those obligations. Arguably, unequal treatment resulting from a rule which prohibits the wearing at work of clothing prescribed by religion is more likely to be regarded as inextricably linked to the protection criterion when applied to employees concerned by religious clothing obligations, given that those employees would be unable to meet the requirements of that rule unless they abandon the observance of the obligations prescribed by their faith.

43. It follows that widening the circle of persons for intragroup comparison promotes uniformity within that group by diluting the differential elements that individualise its members, whereas reducing that circle of persons promotes diversity by rendering more visible the differential elements in need of protection.

44. There is no need to elaborate how the delineation of the comparison group actually affects the conclusion as to whether an internal neutrality rule is capable of giving rise to either direct or indirect discrimination within the meaning of Directive 2000/78. I would merely observe that the ethos underpinning Directive 2000/78 regarding discrimination based on religion or religious beliefs is manifested differently depending on whether employees concerned by religious clothing obligations are considered to be either directly or indirectly discriminated against by an internal neutrality rule. Indeed, whereas the finding of direct discrimination relies on an approach that prohibits, as a matter of principle, practices that discriminate against those employees, subject only to a closed-justification regime; the finding of indirect discrimination allows the balancing of opposing rights and freedoms within their justification and adopts, therefore, a more consequentialist perspective towards discrimination.

45. It is important to bear in mind that a choice between both approaches is inevitable when deciding if an internal neutrality rule constitutes either direct or indirect discrimination with respect to

employees who must observe religious clothing obligations. Crucial in this respect is whether differences arising from religion or religious beliefs, namely by clothing obligations, is to be addressed by promoting uniformity at the workplace through a generalised prohibition on those differences, established in the terms of employment of an undertaking, or, alternatively, by promoting diversity through the normalisation of those differences.

3. The judgments in G4S Secure Solutions and WABE

46. The Grand Chamber of the Court has taken a clear position, first, in the judgment in *G4S Secure Solutions* and, subsequently, in the judgment in *WABE*, as to how to structure the assessment of discrimination on the grounds of religion or belief with regard to employees concerned by religious clothing obligations in the context of the application of an internal neutrality rule.

47. In particular, the Court has declared that an internal neutrality rule prohibiting the wearing of any visible sign of political, philosophical or religious beliefs in the workplace does not constitute direct discrimination provided that it covers any manifestation of such beliefs without distinction and treats all employees of the undertaking in the same way by requiring them to dress neutrally. (43) In the Court's view, as long as all employees of an undertaking, conceived homogeneously, are treated alike, then direct discrimination cannot be taken to occur when applying such a rule, including with respect to employees who are bound by religious clothing obligations. (44)

48. It is important to note, first, that, in order to make the previous finding, the Court established, in the judgment in *WABE*, that the assessment of discrimination on the grounds of religion or belief, in a case concerning an internal neutrality rule, must rely on an intragroup comparison. By referring to the judgment in *VL*, (45) the Court stated explicitly that the wording, context and purpose of Directive 2000/78 requires not limiting the circle of persons in relation to whom a comparison may be made to those who do not have a particular religion or belief. (46) According to the Court, given that Directive 2000/78 is intended to establish a general framework for combating discrimination on the grounds of, inter alia, religion and belief, it must provide everyone with effective protection against discrimination based, in particular, on that ground. (47)

49. Second, with respect to the definition of the reference circle for comparison purposes, the Court has defined it as encompassing not only employees professing a religion or religious beliefs – it has also taken into account those employees manifesting philosophical or spiritual beliefs. As already noted, that is the consequence of interpreting, for the purposes of Directive 2000/78, the terms 'religion or belief' in Article 1 of that directive as covering both sorts of beliefs. (48) Moreover, in its reasoning, the Court assumed that 'any person may have a religion or belief'. In practice, that leads to incorporating, into the reference group of comparison, *all* the employees of the undertaking and to concluding, consequently, that an internal neutrality 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. (49)

50. I must admit that, in my view, in the judgement in *WABE*, the Court construed the group for comparison purposes in such a way that it diluted the references to differential treatment regarding employees who are not merely manifesting their religion or religious beliefs but observing them by wearing particular clothing. From that perspective, even if cited repeatedly, that approach appears to deviate from the judgment in *VL*, (50) wherein the Court highlighted the relative disadvantages suffered by certain individuals within a group concerned by the same protected characteristic. Instead, as a consequence of the judgment in *WABE*, employees observing religious clothing obligations are faced with the dilemma, in the literal sense of the word, (51) of deciding between retaining a job in an undertaking or respecting the obligations prescribed by their faith. The circle delineated also serves as the basis of the Court's statement that the application of an internal neutrality rule is capable only of causing, for the employees bound by religious clothing obligations, '*particular inconvenience*'. (52)

51. Having said that, the judgments in *G4S Secure Solutions* and *WABE* demonstrate a resolved approach from the Court on the assessment of the existence of discrimination on the grounds of religion or belief when examining an internal neutrality rule. That approach excludes direct discrimination also regarding workers for whom their religion or religious beliefs impose clothing

obligations. Only an express prohibition, within the internal neutrality rule, on wearing conspicuous, large-sized signs of religious beliefs may lead to the finding of direct discrimination. (53) Nevertheless, the Court leaves open for national courts the assessment of whether the application of an internal neutrality rule can be considered indirect discrimination, capable of being objectively justified, if persons adhering to a particular religion or belief are placed at a particular disadvantage. (54) In that context, the balance between, on the one hand, the freedom to conduct a business, recognised in Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter'), (55) and, on the other, the freedom of thought, religion and conscience, guaranteed in Article 10 of the Charter, acquires significant relevance. (56)

C. The discretion to protect religion and religious beliefs as an autonomous ground

1. No conceptual identity

52. For the purposes of determining whether the margin of discretion afforded to Member States under Article 8 of Directive 2000/78, and as recognised by the Court, allows for the autonomous protection of religion and religious beliefs under national law, I would like to point out, from the outset, that the sole line of reasoning sustaining that religion and religious beliefs, on the one hand, and philosophical and spiritual beliefs, on the other, are to be analysed as two facets of the same single ground of discrimination results from paragraph 47 in the judgment in *WABE*.

53. According to the Court's reasoning, that interpretation stems from the wording of Article 1 of Directive 2000/78, which refers to 'religion or belief' together, only separated by the preposition 'or', as does Article 19 TFEU, according to which the EU legislature may take appropriate action to combat discrimination based on, inter alia, 'religion or belief', and Article 21 of the Charter, which refers, among the various grounds of discrimination which it mentions, to 'religion or belief'.

54. It is clear, then, that the Court has not established an identity between religion and religious beliefs, on the one hand, and philosophical and spiritual beliefs, on the other, which could impede Member States, from a conceptual point of view, from setting out an autonomous and distinct protection for each of those elements. On the contrary, it appears to follow from the judgment in *WABE* that national law implementing Directive 2000/78 may opt to recognise autonomous protection through wording – to follow the Court's reasoning – such as 'religion and religious belief, philosophical belief' in the list of the grounds of discrimination.

2. Legitimate decisions for Member States

55. Further, if, according to the judgment in *WABE*, Article 8 of Directive 2000/78 is to be taken as recognising a margin of discretion for the Member States by reason of the place accorded to religion and beliefs within their respective systems, that margin must necessarily cover any element of the assessment of the existence of discrimination which might affect such a place, as well as the meaning and significance of religion and religious beliefs in the Member State concerned. Taking into account that the choice of protecting religion and religious beliefs as an autonomous ground of discrimination is capable of influencing, as already explained, the finding of direct or indirect discrimination in a specific case and, consequently, the degree of protection afforded to that ground within a Member State, a national provision opting for such autonomous protection falls, in my opinion, within the scope of Article 8 of Directive 2000/78.

56. In that connection, it is important to understand that, if the discretion recognised by Article 8 of Directive 2000/78 were limited only to the stage of justifying indirect discrimination, as the Court has already recognised in the judgment in *WABE*, and inapplicable to other elements that might influence the definition of the reference circle of persons for comparison purposes, Member States could be impeded from deciding on sensitive and legitimate aspects regarding religion and religious beliefs which, ultimately, determine the level of uniformity or diversity that they might wish to introduce – or maintain – in their societies. I do not think that the aim of Directive 2000/78, in laying down minimum requirements for the relevant rules on equal treatment in the fields of employment and occupation, is to prevent Member States making such choices.

(a) The ethos underpinning non-discrimination on the grounds of religion and religious beliefs

57. In the present Opinion, I have explained how the autonomous protection of religion and religious beliefs may, arguably, lead to an internal neutrality rule, within the framework of an intragroup comparison, being regarded as inextricably linked to that protection criterion when applied to employees concerned by religious clothing obligations. (57) That rule would then likely be considered to give rise to unequal treatment of those employees, prohibited as direct discrimination, inasmuch as they would be unable to meet its requirements unless they abandon the respect of the obligations prescribed by their faith.

58. I have also pointed out that, beyond the technical legal aspects resulting from the finding of direct or indirect discrimination regarding an internal neutrality rule, direct discrimination responds to an approach that prohibits unequal treatment as a matter of principle, subordinated only to a closed-justification regime, including, for instance, public security and the prevention of criminal offences, occupational requirements and positive action. By contrast, indirect discrimination responds to a more consequentialist approach, because it allows for justification on the basis of the balancing of opposing rights and freedoms, namely the right to conduct a business and the freedom of religion, conscience and thought. There will be cases then where the right to conduct a business will prevail over the freedom of religion, conscience and thought.

59. I would like to add now that the finding that an internal neutrality rule occasions either direct discrimination or, alternatively, indirect discrimination also relies on two opposing views as to how to address prejudice against differences arising from religion or religious beliefs in society. In essence, a ‘direct discrimination’ approach is premissed on the normalisation of those differences in the workplace through a stricter scrutiny of prejudice. It departs from the assumption that differences arising from religion and religious beliefs are better addressed by the promotion of tolerance and respect, which in turn results in the acceptance of a larger degree of diversity. On the contrary, an ‘indirect discrimination’ approach assumes the need to tolerate a certain degree of prejudice of the public towards religious differences (58) if it is demonstrated that the undertaking concerned could suffer otherwise severe adverse economic consequences. (59) Differences arising from religion and religious beliefs are, within that context, considered to be better addressed in the workplace by promoting uniformity through the generalised prohibition resulting from an internal neutrality rule.

60. It is not my purpose to argue, in the present Opinion, what is the most appropriate way to express – as already observed in point 44 of the present Opinion – the ethos underpinning anti-discrimination legislation on the grounds of religion or religious beliefs. However, the previous considerations demonstrate that the protection of religion and religious beliefs as an autonomous ground of discrimination impacts the place accorded to religion and religious beliefs within Member States, in particular in terms of uniformity or diversity. Therefore, to my mind, Article 8 of Directive 2000/78 must be interpreted as permitting Member States to adopt such an autonomous protection as a means legitimately to determine, first, whether employees concerned by religious clothing obligations should not be placed, as a matter of principle, in a situation where they might need to choose between observing the obligations deriving from their faith or retaining their employment. Second, they must also remain competent to define the way by which they wish to counter prejudices against differences arising from religion or religious beliefs at the workplace.

(b) Religion and religious beliefs as an ‘inseparable characteristic’

61. Another legitimate element on which Member States should be able to take a position, closely related to the previous one, is whether religion and religious beliefs are to be considered as an ‘inseparable characteristic’ of persons.

62. Indeed, it cannot be excluded that religion and the obligations that it entails might be conceived, in certain Member States, as being so intimately related to a person that they deserve to be protected as an inseparable characteristic of his or her being. Within that context, the protection of an employee on whom an internal neutrality rule imposes the renouncement of the clothing obligations prescribed by his or her faith, as a condition to retain his or her job, might be seen as better addressed by an approach that would consider such a rule as inextricably linked to the ground of religion, considered autonomously, and, therefore, as unequal treatment prohibited as direct discrimination. Attention should be drawn, in that regard, to the fact that, according to the case-law of the Court, the specific

content of religious obligations, including obligations regarding clothing and their compulsory nature, is based on an assessment which is only for national courts to carry out. (60)

63. I would like to point out that, under Directive 2000/78, the Court has recognised such direct protection against discrimination in cases where the person in question was unable to renounce an inseparable characteristic of his or her being, such as age (61) or sexual orientation. (62) For instance, in *Hay*, the Court declared that a difference in treatment based on the employees' marital status, even though not expressly based on their sexual orientation, was still direct discrimination because only persons of different sexes could marry in the Member State concerned by that case and homosexual employees were therefore unable to meet the condition required for obtaining the benefit claimed. (63)

64. Given that religion and religious beliefs might be viewed as a characteristic that is inseparable from a person's being, I think it is legitimate for Member States to promote, under Article 8 of Directive 2000/78, an approach similar to the one endorsed by the Court in *Hay*, affording direct protection to employees concerned by religious clothing obligations through the protection of religion and religious beliefs as an autonomous ground of discrimination. Even if the judgment in *WABE* concluded differently, in the context of the interpretation of the minimum requirements set out by Directive 2000/78 (in particular, Article 1 and Article 2(2) thereof), I would invite the Court to consider that it is an aspect that can be approached from different and highly sensitive angles, which, in the end, depend on the concrete meaning of religion and religion beliefs for individuals in each Member State. I find no argument to support the view that, upon the adoption of Directive 2000/78, in particular Article 8 thereof, the EU legislature wished to prevent Member States from deciding on such an aspect.

(c) The 'particular inconvenience' understanding

65. Finally, in connection also with the previous considerations, Member States must remain capable of deviating from an understanding by which employees concerned by religious clothing obligation face, to use the express wording of the judgment in *WABE*, a '*particular inconvenience*' when an internal neutrality rule is applied to them. After all, that appreciation of the burden of an internal neutrality rule might not be shared in certain cases, where Member States might instead conceive it as an obstacle to access to the labour market and, as such, a way further to exclude employees obliged to fulfil those obligations. Let me emphasise, in that respect, that employment, occupation and vocational training, concerned by Directive 2000/78, are entry points for demands that extend beyond the scope of material disadvantage, and include grievances relating to participation in social life and recognition of diversity and difference. (64)

66. For example, if employers impose internal neutrality rules as a generalised policy, Muslim women may in reality not only experience '*particular inconveniences*', but a deep disadvantage to becoming employees. That may lead in turn to setting them apart from the labour market – a source of personal development and social integration – resulting then in discrimination going beyond religion and extending also to gender. (65) Whilst it is for national courts to make the requisite findings to determine whether those potential issues are borne out by the facts, (66) I find it important to highlight that double discrimination is a real possibility which can be legitimately addressed by Member States by enhancing the level of protection for religion and religious beliefs, as an autonomous ground of discrimination, under Article 8 of Directive 2000/78.

3. Autonomous protection of religion and religious beliefs as a more favourable provision

67. In the light of the above, I must conclude that a national legislation is to be considered as more favourable to the protection of the principle of equal treatment, within the meaning of Article 8 of Directive 2000/78, when it concerns, not only the analysis of a justification applicable to indirect discrimination, but also the assessment of the existence of discrimination and, consequently, the finding of direct or indirect discrimination in a specific case. That encompasses national legislation which, upon the implementation of Directive 2000/78, establishes autonomous protection of religion and religious beliefs as a single ground of discrimination. Such an approach does not jeopardize the basis of Directive 2000/78, which, as the Court has recognized, is to be conceived as an instrument allowing Member States to make legitimate choices that concern the place accorded to religion and

religious beliefs within their systems. The judgments in *G4S Secure Solutions* and *WABE* are not undermined, nor is the principle of primacy of EU law, given that both judgments refer to the interpretation of Article 1 and Article 2(2) of Directive 2000/78 – which establish minimum requirements for combating discrimination in employment and occupation – and thus do not exclude the possibility of affording, under Article 8 of that same directive, a higher degree of protection against unequal treatment.

D. The General anti-discrimination law

68. According to my previous reasoning, Article 8 of Directive 2000/78 must be interpreted as permitting Member States to implement that directive by protecting religion and religious beliefs as an autonomous ground of discrimination. I must add at the present stage that, for that to be so, the national legislature must address that distinction upon the adoption – or subsequent modification – of the legislation implementing Directive 2000/78 within a Member State.

69. The present case thus requires an examination as to whether Directive 2000/78 has been implemented into Belgian law as setting out religion and religious beliefs autonomously, distinct from the ground of philosophical and spiritual beliefs.

70. In that regard, it must be recalled that the General anti-discrimination law transposes Directive 2000/78 into Belgian law. Its aim is to create a general framework for combating discrimination within the scope of employment and occupation. (67)

71. The protected criteria are listed in Article 4(4) of General anti-discrimination law, (68) which mentions age, sexual orientation, civil status, birth, financial situation, religious or philosophical belief, political belief, trade union belief, language, current or future state of health, disability, physical or genetic characteristics or social origin.

72. I observe, on the one hand, that Article 4(4) of the General anti-discrimination law employs a wording that is almost identical to that of Article 1 of Directive 2000/78 when referring to the ground of discrimination of religious and philosophical belief. Both are placed together in the list of protected criteria, separated only by the preposition ‘or’. Article 8 of the General anti-discrimination law adopts that same wording when it provides that a direct distinction based, inter alia, on ‘religious or philosophical belief’ is capable of being justified only by genuine and determining occupational requirements.

73. On the other hand, a reading of the General anti-discrimination law reveals that the Belgian legislature differentiated political belief and, subsequently, trade union belief (69) as separate grounds of discrimination in the list provided in Article 4(4) of the General anti-discrimination law. From that perspective, it appears that, whereas the Belgian legislature opted to differentiate political belief and trade union belief from other sorts of belief, that is not the case between religious and philosophical beliefs.

74. It is therefore difficult to conclude, on the basis of the information provided in the order for reference, that, by contrast to Article 1 of Directive 2000/78, as interpreted by the Court in the judgment in *WABE*, the Belgian legislature conceived of religion and religious beliefs, on the one hand, and of philosophical beliefs, on the other, as separate grounds of discrimination. On the contrary, for the purposes of the General anti-discrimination law, both sorts of belief appear to arise, in the light of the reasoning of the judgment in *WABE*, as two facets of the same single ground of discrimination.

75. It follows from the previous considerations that, in the absence of a distinction between religious and philosophical beliefs, a provision that refers to ‘religious or philosophical belief’ in the list of grounds of discrimination of the national legislation implementing Directive 2000/78 cannot be interpreted as meaning that those beliefs are separate protected criteria. Otherwise, the Court’s *dicta* in the judgment in *WABE*, (70) which, as already mentioned, interpreted those terms, as provided in Article 1 of Directive 2000/78, would be contradicted. For that same reason, Article 8 of Directive 2000/78 cannot be taken as a sufficient basis to consider that national provision as a more favourable provision to the protection of the principle of equal treatment. It does not therefore allow the national

judiciary to interpret it to the effect that religious and philosophical beliefs constitute separate grounds of discrimination under national law.

V. Conclusion

76. On the basis of the analysis set out above, I propose that the Court answer the question referred by the Tribunal du travail francophone de Bruxelles (Brussels Labour Court (French-speaking), Belgium) as follows:

Article 8 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as permitting Member States to implement that directive as to protect religion and religious beliefs as an autonomous ground of discrimination.

However, Article 8 of Directive 2000/78 precludes the interpretation of a provision which refers to 'religious or philosophical belief' in the list of grounds of discrimination of the national legislation implementing that directive as being a more favourable provision to the protection of the principle of equal treatment, meaning, in particular, that religious and philosophical beliefs constitute separate grounds of protection.

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1 Original language: English.

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

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3 Judgment of 14 March 2017, Bougnaoui and ADDH (C-188/15, EU:C:2017:204).

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4 Judgment of 15 July 2021, WABE and MH Müller Handel (C-804/18 and C-341/19, EU:C:2021:594) ('the judgment in *WABE*').

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5 Council Directive 2000/78/EC 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 In the present Opinion, I shall refer to such type of rules by the term 'internal neutrality rule'.

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7 Article 1 of Directive 2000/78.

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8 Article 2(1) of Directive 2000/78.

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9 Article 2(2)(a) of Directive 2000/78.

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10 Article 2(2)(b) of Directive 2000/78.

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11 Article 2(2)(b)(i) of Directive 2000/78.

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12 Article 2(5) of Directive 2000/78.

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13 Article 4(1) of Directive 2000/78. A similar rule applies to occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief. See, in that regard, Article 4(2) of Directive 2000/78.

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14 *Moniteur belge*, 30 May 2007, p. 29016.

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15 Article 2 of the General anti-discrimination law.

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16 Article 3 of the General anti-discrimination law.

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17 Article 5(1)(5) of the General anti-discrimination law.

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18 Article 4(1) of the General anti-discrimination law.

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19 In her pleadings before the national court, LF also invoked a plea of discrimination based on her gender. However, in the request for a preliminary ruling, the referring court states that ‘the applicant does not establish facts from which it may be inferred that there has been direct discrimination based on gender’.

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20 The judgment in *WABE* (paragraph 47).

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21 Opinion of Advocate General Sharpston in Associazione Avvocatura per i diritti LGBTI (C-507/18, EU:C:2019:922, point 82).

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22 See Opinion of Advocate General Rantos in Joined Cases WABE and MH Müller Handel (C-804/18 and C-341/19, EU:C:2021:144, point 85).

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23 Judgment of 8 July 2010, Bulicke (C-246/09, EU:C:2010:418, paragraph 47).

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24 Judgment of 23 April 2020, Associazione Avvocatura per i diritti LGBTI (C-507/18, EU:C:2020:289, paragraph 65).

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25 See judgment of 26 February 2013, Melloni (C-399/11, EU:C:2013:107, paragraph 60).

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26 The judgment in *WABE* (paragraph 87).

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27 *Ibid*. (paragraph 88).

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28 Ibidem.

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29 *Ibid.* (paragraph 89).

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30 The judgment in *WABE* (paragraph 86).

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31 See also Sharpston, E., 'Shadow Opinion: Headscarves at Work (Cases C-804/18 and C-341/19)', EU Law Analysis, 23 March 2021, available at http://eulawanalysis.blogspot.com/2021/03/shadow-opinion-of-former-advocate.html, points 104 and 272 et seq.

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32 See, in that regard, judgment of 17 December 2020, Centraal Israëlitisch Consistorie van België and Others (C-336/19, EU:C:2020:1031, paragraph 67).

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33 Xenidis, R., 'The polysemy of anti-discrimination law: the interpretation architecture of the framework employment directive at the Court of Justice', *Common Market Law Review*, vol. 58, 2021, p. 1659.

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34 See the judgment in *WABE* (paragraph 52 and the case-law cited).

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35 See also the judgment in *G4S Secure Solutions* (paragraph 34), and the judgment in *WABE* (paragraph 74).

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36 Direct discrimination on the grounds of religion or belief has a closed regime of justifications, namely public order, security health and protection of rights and freedoms (Article 2(5) of Directive 2000/78), genuine and determining occupational requirements (Article 4(1) of Directive 2000/78), occupational requirements related to organisations whose ethos is based on religion or belief (Article 4(2) of Directive 2000/78) and positive action (Article 7 of Directive 2000/78). By contrast, indirect discrimination is essentially subject to an open-ended justification regime pursuant to which only indirect discrimination that is not objectively justified by a legitimate aim and for which the means of achieving that aim are not appropriate and necessary is to be prohibited (Article 2(2)(b)(i) of Directive 2000/78).

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37 Opinion of Advocate General Pitruzzella in Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej Krakowie (C-16/19, EU:C:2020:479, point 82).

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38 Judgment of 26 January 2021, Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej Krakowie (C-16/19, EU:C:2021:64, paragraphs 29, 30 and 35). See also judgment of 22 January 2019, Cresco Investigation (C-193/17, EU:C:2019:43, paragraph 47).

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39 *Ibid.* (paragraph 35).

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40 Xenidis, R., *op. cit.*, p. 1659.

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41 See, in that regard, judgment of 26 January 2021, Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej Krakowie (C-16/19, EU:C:2021:64, paragraph 57).

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42 See, in that regard, Opinion of Advocate General Bobek in Cresco Investigation (C-193/17, EU:C:2018:614, points 55 and 62).

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43 See the judgment in *G4S Secure Solutions* (paragraph 30), and the judgment in *WABE* (paragraph 52).

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44 The judgment in *WABE* (paragraph 55).

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45 See, in particular, judgment of 26 January 2021, Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej Krakowie (C-16/19, EU:C:2021:64, paragraphs 29 to 32).

46 The judgment in *WABE* (paragraphs 49 and 50).

47 *Ibid.* (paragraph 51).

48 *Ibid.* (paragraph 47).

49 *Ibid.* (paragraph 52).

50 Judgment of 26 January 2021, Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej Krakowie (C-16/19, EU:C:2021:64).

51 Situation in which a person must choose either of two unfavourable alternatives.

52 The judgment in *WABE* (paragraph 53). Emphasis added. I must emphasise that the Court uses these exact terms in the judgment.

53 The judgment in *WABE* (paragraph 73).

54 See the judgment in *G4S Secure Solutions* (paragraph 34), and the judgment in *WABE* (paragraph 59).

55 See the judgment in *G4S Secure Solutions* (paragraph 38).

56 The judgment in *WABE* (paragraph 84). In that judgment, the Court also refers to the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions as recognised in Article 14(3) of the Charter.

57 See point 42 of the present Opinion.

58 See, in that regard, the judgment in *WABE* (paragraph 65). The assumption of tolerating a certain degree of prejudice mainly from customers' wishes is evident even for the Court, when referring to the possibility of placing an employee wearing a headscarf at the back office of an undertaking with no direct contact with customers. See the judgment in *G4S Secure Solutions* (paragraph 42), and the judgment in *WABE* (paragraph 69).

59 The judgment in *WABE* (paragraph 67).

60 Ibid., paragraph 46.

61 See, for instance, judgment of 12 October 2010, Ingeniørforeningen i Danmark (C-499/08, EU:C:2010:600, paragraph 49).

62 See, to that regard, judgments of 1 April 2008, Maruko (C-267/06, EU:C:2008:179, paragraph 73), and of 10 May 2011, Römer (C-147/08, EU:C:2011:286, paragraph 52). See also a similar approach in the judgment of 10 July 2008, Feryn (C-54/07, EU:C:2008:397, paragraph 28), concerning the prohibition on racial discrimination under Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

63 Judgment of 12 December 2013, Hay (C-267/12, EU:C:2013:823, paragraph 44).

64 Xenidis, R., *op. cit.*, p. 1653.

65 See, in that regard, Sharpston, E., *op. cit.*, point 269.

66 Regarding the case concerned by the main proceedings, see footnote No 19 to the present Opinion.

67 See, in that respect, Article 5 of the General anti-discrimination law.

68 See also Article 3 of the General anti-discrimination law.

69 *Moniteur belge*, 31 December 2009, p. 82925.

70 The judgment in *WABE* (paragraph 47).