

Reflections on joined cases WABE and Müller: the CJEU's legal tests for private employers' religious neutrality policies

Description

This paper examines the WABE judgment of the Court of Justice. The Author finds in the ruling a greater leeway awarded to national courts in balancing fundamental freedoms, while respecting the standards of equality set by EU law. Moreover, in the proportionality assessment, the relevance of freedom of enterprise to justify neutrality policies is decreased: such freedom prevails over the workers' religious freedom only when, in the absence of a neutrality policy, the employer would suffer economic damages that must however be demonstrated. If such negative consequences are not proven, the neutrality policy is not objectively justified.

Il presente contributo esamina la sentenza WABE della Corte di giustizia. A parere dell'Autrice, in tale pronuncia, la Corte ha incrementato la libertà d'azione dei giudici nazionali nel bilanciare le libertà fondamentali delle parti, pur nel rispetto degli standard di eguaglianza fissati dalla normativa dell'UE. Inoltre, nel giudizio di proporzionalità, viene ridimensionato il peso della libertà d'impresa per giustificare le politiche di neutralità: la libertà d'impresa prevale infatti sulla libertà religiosa di lavoratori e lavoratrici solo se, senza l'applicazione di una politica di neutralità, si verifica un pregiudizio economico che l'impresa deve dimostrare. Se tali conseguenze negative non sono provate, la politica di neutralità non è obiettivamente giustificata.

[Read the decision](#)

Introduction

This contribution concerns the ruling on joined cases C-804/18 and C-341/19 (respectively *WABE* and *MH Müller Handels GmbH*), the references for which were both brought forward by German courts^[1]. The courts put several questions, among which the one most heavily debated internationally concerns the justifiability of policies of religious neutrality in private employment relationships by the freedom to conduct a business, as protected under art. 16 CFREU, and how the freedom of religion, as protected under art. 10 CFREU, may or must also be considered. From a domestic perspective, the referring courts additionally hoped for a decision avoiding yet another conflict^[2] with the national Constitutional Court over the necessary level of protection for the freedom of religion. This latter expectation at least was met, because the CJEU gave a lot of leeway to national legal systems for balancing fundamental freedoms of the parties once this doesn't limit the EU equality standards in the Directives^[3]. The CJEU entitled national courts to apply their respective constitutional approaches in balancing fundamental rights and freedoms under the proportionality test.

For critics, the ruling still provides far too little protection to religious freedom at EU level, specifically in comparison to standards developed by the ECtHR. While opening up for better protection at national level represents a progress, a common standard at EU level remains out of reach. Nevertheless, the CJEU explicitly acknowledged that CFREU rights such as religious freedom play a role in treating a discrimination case^[4], quite distinct from the previous findings^[5] that explicitly mentioned only the

freedom to conduct a business. Admittedly, the phrase cited from the *Achbita* decision used the notion of freedoms (plural)[\[6\]](#), but without mentioning any other right than art. 16 CFREU. Therefore, it was widely understood as allowing the freedom to conduct a business to generally justify broadly framed neutrality policies without even considering art. 10 CFREU. Against this background, the *WABE/ Müller* decision is definitely helpful.

The factual background

The decision concerns two cases in which employees working in the private sector and wearing Islamic headscarves had been ordered to remove them. In the *WABE* case, the employer was a large nursery school chain establishing a company policy of disallowing the display of any symbols of religious beliefs or political or philosophical convictions while in contact with children, their parents or third parties. This rule based on the self -description of being a non-denominational establishment, different from the many church-run educational institutions in the country, wishing to act strictly neutral for accommodating and respecting the diversity of views among their customers. In the *Müller* case, the employer was a large cosmetics store chain establishing a policy of refraining from wearing any “conspicuous or large-surface format” religious, political, or philosophical symbols at work. This rule based on the wish for avoiding further religious arguments between co-workers that had happened before.

The legal background

Already the CJEU's earlier decisions[\[7\]](#) dealt with private employers' neutrality policy restricting the wearing of religious symbols at work, and these cases exclusively based on controlling for discrimination because of religion. Several aspects of this test were heavily debated and therefore of concern for the referring courts. They asked for the type of discrimination, direct or indirect, the respective neutrality policy should be assigned to, and the possible justification of policies disallowing any display of symbols for religious, political or philosophical convictions or beliefs, or a potentially justifying effect of either customer preferences or the aim of preserving peaceful cooperation on the premises.

Specifically the lack of aligning the dominant discrimination test with the protection of religious freedom became, from the standpoint of the German legal doctrine, the earlier CJEU's decisions' most problematic aspect. A legal system attributing freedom of religion or beliefs a prominent position among constitutionally protected rights, as art. 4 of the German Basic Law (constitution), disallows severe restrictions to such right, and consequentially classifies neutrality policies in employment as suspicious. This not only concerns public institutions such as schools, kindergartens or other emanations of the State[\[8\]](#) but also private employers[\[9\]](#). Technically, religious freedom is balanced against freedoms to accommodate one dumbbell chest workout the interests or wishes of customers, co-workers or other third parties, whereby neither right may restrict the other further than necessary under a proportionality requirement.

Balancing protected freedoms of contracting parties works different from a discrimination test because this process is not so much concerned with whether employees have been treated worse than comparators. Much rather, it strives for securing the minimum level of protection objectively necessary for guaranteeing the essence of a fundamental right. While discrimination does not occur once the person concerned is not treated differently from a relevant comparator, religious freedom could be violated even though no comparator exists or if so, they would be treated equally badly. Private

employers' neutrality policies measured against a test for violating constitutional freedoms are justified merely where the companies responsible for such policies can prove objectively threatening disadvantages for themselves or affected third parties that outweigh employees' freedom of religion or belief.

Against this background, the referring courts suggested that applying the discrimination test should either not hinder national courts considering national provisions protecting the freedom of religion or beliefs in the balancing process relevant for justifying discrimination, or accepting them as representing more favourable standards of protection admitted under art. 8 para.1 Directive 2000/78/EC. Finally, the CJEU sitting in Grand Chamber effectively avoided the potential conflict with the national (German) constitution by accepting both these suggestions^[10]. For reaching this conclusion, however, the CJEU changed its previous legal reasoning only gradually. The discrimination test itself does not change, nor do the indicators for differentiating between direct and indirect discrimination, and the preconditions for justifying them. Consequentially, the focus of the test remains on whether claimants are treated worse than a relevant comparator. Protection of constitutional freedoms can be integrated in this test by national courts, providing them a large margin of discretion to accommodate their respective legal systems' understanding of the balance between religion and State neutrality. Additionally, the Court underlined the relevance of the CFREU for this balancing process, which national courts must conduct respecting EU law^[11].

The concept of discrimination under EU law: direct discrimination

The decisions start from common ground in identifying direct discrimination as a difference in treatment necessarily linked to a protected characteristic^[12]. The closeness of the connection between the different treatment and the protected ground depends on the existence of two (groups of) comparators separated by the existence of the specific characteristic in the disadvantaged group: this group must be homogeneously composed of protected members, so that everyone negatively affected by the differentiation belongs to the protected group. For the comparator group, however, homogeneity is no longer constitutive^[13]: direct discrimination because of religion may occur even if the comparator group of persons not disadvantaged is composed of non-believers and persons of a different belief^[14].

In restricting the scope of application of direct discrimination to differentiations targeting specifically religious beliefs while excluding broadly conceived neutrality clauses^[15], the CJEU follows this line of reasoning. Any difference in treatment between protected and not protected groups can be avoided by conceiving the neutrality policy broadly enough. The *WABE* case makes for a telling example. The employer policy was not prohibiting the wearing only of religious symbols, which would clearly identify the group negatively affected as being composed only of religious persons, i.e. bearers of a protected characteristic, and therefore clearly qualify as directly discriminatory. Much rather, the respective policy prohibits any form of displaying symbols of any kind of worldview, be it religious, political or philosophical. Neither ones' preference for a political party nor specific social communities or ideas is to be expressed visibly at work. The group negatively affected is therefore not composed homogeneously of bearers of a protected characteristic, the direct discrimination – test mentioned above is not met by the broadly conceived neutrality policy.

Alternatively, direct discrimination can also occur where not all bearers of a protected characteristic are negatively affected by the differentiation but nobody else but them. One example is the case of disadvantage of pregnant employees, which doesn't affect all women, but only women. In parallel,

disadvantaging wheel chair-users would not negatively affect all persons with disability, but everyone negatively affected by such rule would be a person with disability. It follows from there that the directly discriminatory effect of prohibiting the wearing of headscarves is not justified based on the argument that not all religious employees, all Muslims or even all Muslim women are negatively affected but merely those who understand the wearing of headscarves as imperative for their respective interpretation of the religious dress code.

However, the CJEU further mentions an aspect that could bring a neutrality policy in the scope of application of direct discrimination^[16]: a policy not prohibiting any form of display of symbols but merely of “conspicuous or large-surface format” symbols might not avoid the direct discrimination test. This is based on the proximity of this prohibition to a disguised, or covert, reference to prohibiting explicitly an Islamic headscarf^[17]: obviously there are not too many clear alternatives of visualizing a worldview in a format of large surface. This description excludes necklaces with a cross or other religiously connotated jewelry, badges of political parties, society crystals or lapel pins, or even patent boots or base-caps associated with specific political convictions but not of a large surface. To overcome any suspicion of merely hiding discrimination because of wearing an Islamic headscarf, the neutrality policy therefore must be applied consistently throughout, without any exceptions even for small, not easily detectable symbols^[18].

Indirect discrimination

The neutrality policy, even if applied in the widest possible manner, will nevertheless impact differently on different persons. While everyone will be restricted in showing visibly their beliefs or convictions, for most persons such restrictions will amount to a mere inconvenience, while for persons feeling religiously obliged to wear specific symbols the prohibition leads to a potentially insurmountable inner conflict. The impact of the neutrality policy might become much more intrusive for religious persons than for persons who do not believe or adhere to a different interpretation of religious rules or dress codes. Such difference of impact by a seemingly neutral policy amounts to indirect discrimination because of religion^[19].

The standard for justifying indirect discrimination

The standards for justification of indirectly discriminatory measures are softer than those for directly discriminatory measures. In the latter case, the measure can be justified merely by genuine occupational requirements, which are difficult to establish^[20]. Presumed customer preferences clearly do not qualify as justification. For a merely indirectly discriminating policy, however, in principle justification is easier. The company needs to present a legitimate goal for the measure taken and must apply it in a proportionate manner^[21]. While this in principle is not disputed, for the present case specific standards for another category of discrimination could have played a role: as the neutrality policies at stake affects in practice primarily women^[22] of a distinct ethnical background, the Court could have decided on whether to apply a stricter standard for justifying intersectional discrimination. The violation of several protected characteristics in combination might constitute an aggravated case.

Nevertheless, the CJEU dismissed the question of the referring court for mere technical reasons. The national decision had asked for interpretation of provisions of the Framework Equality Directive, which does not include “sex” as a protected characteristic. Therefore, the CJEU dismissed any reasoning on the fact that the detriment affected primarily women^[23] and therefore failed in drawing a complete picture of the disparate treatment concerned. It neglected the possibility that discrimination because of

several protected grounds in combination might result in more detrimental cumulative effects than would occur for each factor separately. The CJEU is not hindered by an incomplete reference decision to provide additional information, and frequently uses the technique of giving useful advice for aspects not mentioned before^[24]. Furthermore, secondary legislation in Directives dealing with different protected grounds separately are not the only relevant legal source in discrimination cases. All characteristics protected from discrimination have one common, additional basis in art. 21 para 1 CFREU to which the court should have regard for interpreting Equality Directives.

The measures' legitimate goal

In applying the regular justification requirements for indirect discrimination, the measure under control firstly has to pursue a legitimate goal. The legitimacy of a neutrality policy could serve the goal of accommodating customer preferences for furthering the economic success of the undertaking. Under the constitutional freedom to conduct a business, the employer could claim it to constitute a business necessity to keep clients satisfied, and therefore this goal is to be accepted as legitimate. The CJEU in principle agreed^[25] but underlined that for discrimination tests, both the legitimacy of a goal pursued and the proportionality of measures taken to achieve it must be interpreted narrowly for protecting equality^[26]. The intention of saving money, for example, has not been accepted for justifying discrimination, – so why would the intention to earn more money?

The Court consequently looked for further aspects to strengthen the relative weight of the freedom to conduct a business, turning to the quality of the very customers' preferences the neutrality policy accommodates. In the *WABE* case, the relevant quality was the constitutional protection of the parents' right to education under art. 14 CFREU^[27]. Parents could legitimately refer to their individual educational preference including keeping their children away from any influence of convictions they themselves do not share. In combination, the constitutionally protected rights of the employer and the customers might outweigh the equally protected religious freedom. However, where customer preferences equals merely disliking a specific religion, a neutrality policy based on accommodating such prejudices is not justified. The freedom to conduct a business will then prevail over religious freedoms of employees only if, without applying a neutrality policy, harsh economic detriments to the business demonstrably occur^[28]. Where such negative consequences are not proven, the policy is not objectively justified.

The Proportionality Test

The next step for objectively justifying indirectly discriminatory measures is the proportionality test. The fact that measures pursue a legitimate goal is, as such, insufficient for justifying discrimination. They additionally must be applied in the least intrusive manner possible, not going any further than what is indispensable for achieving the goal. A strict neutrality policy impacts heavily on employees religious practice by operating on a total prohibition of any display of any conviction or believe. A less intrusive manner of accommodating customer preferences through a neutrality policy, on the other hand, is difficult to imagine. It might be questioned then, whether the range of the policy pursued should be narrower than aiming at complete neutrality. Would it be less intrusive and therefore more proportionate to apply a policy prohibiting merely large, visible symbols which any customer immediately notes, while excluding symbols which only a specifically attentive customer might notice? A policy of excluding small symbols from the policy could prominently refer to the line of reasoning followed by the ECtHR in *Eweida*^[29], stating that a discreet, small-scale symbol "cannot have

detracted from a professional appearance” and therefore must not be prohibited. The legal control parameter applied by the ECtHR, however, was freedom of religion, i. e. different from the discrimination test used by the CJEU.

The proportionality test in a discrimination case is quite distinct from balancing fundamental freedoms of parties to an employment contract. The CJEU argues that the policy needs to be applied consistently to all similar situations in order to meet the proportionality requirement of being an adequate tool for reaching the legitimate goal^[30]. Consistency in applying a policy is an indispensable precondition for treating no one worse than his or her comparators. Allowing small scale symbols while prohibiting large ones disadvantages convictions or beliefs typically associated with larger symbols. Under a discrimination test, treating someone worse than others due to an item symbolizing a specific religious practice is unacceptable. As the reasoning in *Eweida* shows, advantaging other religions would not automatically violate the freedom of religion of the disadvantaged individuals. Such freedom surely could be violated by the prohibition as such, but not by the fact that other religions are exempted from the prohibition. Against this background the rulings of the ECtHR on the one hand and the CJEU, on the other, base their respective reasoning consistently on their distinct tests for adjudicating neutrality policies. However, their reasoning starts from different fundamental guarantees, equality on the one hand, and fundamental freedoms, on the other. How to combine these two approaches is the most fundamental aspects of the *WABE & Müller* decision.

The Opinion of Advocate General Rantos^[31] stated in this perspective that both lines of reasoning should remain effectively distinct: art. 10 CFREU should be relevant in discrimination cases primarily for defining the notion of religion, and may then be considered for establishing the legitimacy of a neutrality policy. According to this Opinion, it should nevertheless have no further role in the proportionality test as discrimination law, as such, is not meant to protect fundamental freedoms. Such argument is not convincing, though. EU institutions in setting and interpreting Equality Directives are bound by the complete CFREU, not merely by the Charters’ equality guarantees. When applying discrimination law, courts may not completely disregard the freedom of religion or belief. Consequently, the CJEU dismissed this result by inserting religious freedom as one aspect to be considered for the proportionality test. The neutrality policy may be justified by balancing all the protected rights and interests at stake, so that restrictions to the freedom of religion are acceptable only where strictly necessary for pursuing the legitimate goal^[32].

Conclusion

The CJEU was asked to bridge the gap between two approaches to supervising private employers’ neutrality policies, the discrimination test and controlling for violation of religious freedom, by giving more leeway to national courts. The CJEU agreed^[33], accepting the different views of national legal systems on the correct balance between individual religious freedom and neutrality of the State. The decision went further by leaving protection of the individual freedom not completely to national legal systems and their diverging policies but included it as a part of the proportionality test under EU- law. The balancing of a strictly applied neutrality test against the requirement to restrict fundamental freedoms no further than necessary remains, however, an open question.

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[1] ArbG Hamburg (Hamburg Labour Court), 21.11.2018, 8 Ca 123/18, and BAG (Federal Labour Court), 30.1.2019, 10 AZR 299/18 (A).

[2] CJEU, 17.4.2018, C-414/16, Egenberger and its' implementation in BAG, 25.10.2018, 8 AZR 501/14, are still under review by the Federal Constitutional Court, pending case 2 BvR 934/19.

[3] CJEU, WABE & Müller, para. 86.

[4] CJEU, WABE & Müller, para. 83.

[5] CJEU, 14.3.2017, C-157/15, Achbita, para. 43.

[6] CJEU, Achbita, para. 38.

[7] CJEU, 14. 3. 2017, C-157/15, Achbita and C-188/15 Bougnaoui.

[8] BVerfG (German Federal Constitutional Court) 27.1.2015, 1 BvR 471/10 and 1 BvR 1181/10; 14.1.2020, 2 BvR 1333/17.

[9] BAG (Federal Labour Court), 27.8.2020, 8 AZR 62/19, paras. 57 and following; 10.10.2002, 2 AZR 472/01.

[10] CJEU, WABE & Müller, para. 86 and following.

[11] CJEU, WABE & Müller, para. 83.

[12] CJEU, WABE & Müller paras. 52, 73.

[13] CJEU, 26.1.2021, C-16/19, Szpital Kliniczny, paras. 31, 35.

[14] CJEU, WABE & Müller para. 49.

[15] CJEU, WABE & Müller para. 52.

[16] CJEU; WABE & Müller, paras. 72/73, 78.

[17] CJEU, WABE & Müller, para. 78.

[18] CJEU, WABE & Müller, para. 54.

[19] CJEU, WABE & Müller, para. 59.

[20] CJEU, 14.3.2017, C-188/15, Bougnaoui, paras. 32, 34.

[21] CJEU, Bougnaoui para. 33.

[22] CJEU, WABE & Müller, para. 57.

[23] CJEU, WABE & Müller, para. 58.

[24] CJEU, 14.3.2017, C- 157/15, Achbita, para.36; 26.1.2021, C- 16/19 Szpital Kliniczny para. 38.

[25] CJEU, WABE & Müller, para. 63.

[26] CJEU, WABE & Müller, para.61.

[27] CJEU, WABE & Müller, paras. 67, 70.

[28] CJEU, WABE & Müller, para. 70.

[29] ECtHR, 15.1.2013, No. 48420/10, Eweida, paras. 94, 99.

[30] CJEU, WABE & Müller, para. 77.

[31] Opinion of the Advocate General to WABE & Müller, paras. 95.97.

[32] CJEU, WABE & Müller, para. 83.

[33] CJEU, WABE & Müller, para. 85.

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