



# The interplay between religious discrimination in the workplace and fundamental rights: the cherry-pick approach of the EU Court of Justice

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## 1. Introduction: setting the scene

*Prima facie*, one might think that religion and religious diversity are strongly protected in the EU legal order, especially after the novelties introduced by the Lisbon Treaty.

Firstly, according to Article 2 TEU, the values on which the EU is founded covers the «protection of human rights, including the rights of persons belonging to minorities». Needless to say, that expression encompasses religious minorities, as well.<sup>1</sup> Moreover, in compliance

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<sup>1</sup> For the protection of minorities under EU law, see *inter alia*, S. PUGLIESE, *La tutela delle minoranze nell'Unione europea: il caso della minoranza Rom*, in *DUE*, 2019, pp. 331 ff.; G. N. TOGGENBURG, *The European Union and the Protection of Minorities: New Dynamism Via the European Citizen Initiative?*, in *Europäisches Journal für Minderheitenfragen*, 2018, pp. 1865 ff.; A. A. BILGIN, *Minority Protection in the European Union: to Protect or not to Protect?*, in *International Journal on Minority and Group Rights*, 2019, pp. 92 ff.; D. KOCHENOV, *The European Union's Troublesome Minority Protection*, in W. KYMLICKA, J. BOULDEN (eds.), *International Approaches to Governing Ethnic Diversity*, Oxford, 2014, pp. 79 ff.

with Article 3 TEU, the promotion of EU values and the combating of discrimination are included among the objectives of the EU. With specific regard to discrimination, Article 19 TFEU confers to the EU the competence to combat discrimination based, among others, on religion.<sup>2</sup>

Secondly, Article 17(1) TFEU stipulates that the EU «respects and does not prejudice the status» accorded to churches and religious associations or communities by national law of the EU Member States. That principle, which finds its origins in the Declaration No. 11 to the Treaty of Amsterdam, implies that the EU must keep a neutral attitude towards the relations between the Member States and their churches and religious communities.<sup>3</sup>

Finally – but essential from a constitutional point of view –, the EU Charter of Fundamental Rights («the Charter») protects the right to freedom of thought, conscience and religion (Article 10), prohibits discrimination on grounds, among others, of religion (Article 21), and affirms that the EU respects religious diversity (Article 22 Charter). As it is well-known, the entry into force of the Lisbon Treaty significantly impacted the protection of fundamental rights under the EU legal system. Notably, the revised version of Article 6 TEU gives the Charter the same legal value as the EU Treaties, placing it at the top of the hierarchy of the EU sources. It follows that, despite EU competences not being expanded by the Charter, this latter represents a *parameter* to interpret EU secondary law and to assess its validity.<sup>4</sup>

In the last decades, the wearing of religious symbols in the workplace has attracted a great deal of attention. In that regard, a wide case-law has been developed by the European Court of Human Rights (ECtHR), which has assessed whether the prohibition of religious symbols imposed both by national law and private undertakings are compatible with the freedom of thought, conscience and religion, as recognised by Article 9 of the European Convention on Human Rights (ECHR). More recently, these issues have gained a new momentum also in the jurisprudence of the Court of Justice of the European Union («CJEU» or «the Court»). Notably, following national courts' requests for a preliminary ruling, the CJEU was asked to deal with decisions of private employers prohibiting the wearing of religious symbols during working time. Under EU law, such decisions fall within the scope of application of Directive 2000/78, which, according to its Article 1, aims to define «a general framework for combating discrimination on the grounds [*inter alia*] of religion or belief».<sup>5</sup>

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<sup>2</sup> On Article 19 TFEU, see C. FAVILLI, *Article 19 TFEU [Combating Discrimination Based on Other Grounds]*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union. A Commentary*, Berlin, Heidelberg, 2021, pp. 469 ff.

<sup>3</sup> In that regard, see *ex multis* J. DI GESÙ, *Article 17 [Confessional and Non-confessional Organisations]*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *Treaty on the Functioning of the European Union*, cit., pp. 431 ff.; L. DE PASQUAL, *L'autonomia delle chiese e delle organizzazioni religiose europee alla luce della giurisprudenza recente della Corte di Giustizia dell'Unione europea*, in A. SANTINI, M. SPATTI (a cura di), *La libertà di religione in un contesto pluriculturale. Studi di diritto internazionale e dell'Unione europea*, Città del Vaticano, 2021, pp. 127 ff.

<sup>4</sup> F. BESTAGNO, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, in *DUDI*, 2015, pp. 259 ff., in particular pp. 268 ff.; L. S. ROSSI, *Stesso valore giuridico dei Trattati? Rango, primato ed effetti diretti della Carta dei diritti fondamentali dell'Unione europea*, in *DUE*, 2016, p. 329 ff.; L. DANIELE, *La protezione di diritti fondamentali nell'Unione europea dopo il Trattato di Lisbona: un quadro d'insieme*, in *DUE*, 2009, pp. 645 ff.; K. LENAERTS, J.A. GUTIÉRREZ-FONS, *The Place of the Charter in the EU Constitutional Edifice*, in S. PEERS ET AL., *The EU Charter of Fundamental Rights: A Commentary*, London, 2014, pp. 1559 ff.; A. ROSAS, H. KAILA, *L'application de la Charte des droits fondamentaux de l'Union Européenne par la Cour de Justice: un premier bilan*, in *DUE*, 2011, pp. 1 ff., in particular pp. 39 ff.; J. KOKOTT, C. SOBOTTA, *The Charter of Fundamental Rights of the European Union after Lisbon*, EU Working Paper, 2010; S. I. SÁNCHEZ, *The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, *CMLR*, 2012, pp. 1565 ff.

<sup>5</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2000), OJ L 303, 2.12.2000, pp. 16-22. More generally, on EU anti-discrimination law, see among others, C.

That contribution intends to assess the role played by the Charter, and, in particular, the freedom of thought, conscience and religion (hereinafter, for the sake of brevity, «freedom of religion») when the Court is asked to pronounce on the prohibition of religious symbols. A “fundamental rights-based approach”, leading the CJEU (and national judges implementing its judgments) to interpret the said discrimination «*in the light of fundamental rights*»<sup>6</sup>, is in line with the position of the Charter in the hierarchy of the EU law sources. Ultimately, such an approach ensures a real and effective protection of the freedom of religion under EU law.

After describing the main judgments of the CJEU on the prohibition of religious symbols by private employers (*Achbita*<sup>7</sup>, *Bouagnaoui*<sup>8</sup> and *WABE*<sup>9</sup>), the paper will assess whether and to what extent the discrimination stemming from the said prohibition is framed by the Court within fundamental rights and, in particular, the freedom of religion. The analysis will show that in this set of decisions, a fundamental rights-based approach is quite lacking. Such a shortcoming will be even more stressed by briefly referring to the CJEU’s jurisprudence on national rules, which grant an advantageous position to some churches and their members (*Egenberger*<sup>10</sup> and *Cresco*<sup>11</sup>). These short references will demonstrate that the interplay between religious discrimination in the workplace and fundamental rights is characterised by a cherry-pick and incoherent approach, which is not able to take into full account the position of fundamental rights in the EU legal system.

## **2. The prohibition of religious symbols by private employers: *Achbita*, *Bouagnaoui* and *WABE***

The analysis of the CJEU’s case-law on the prohibition of religious symbols imposed by private employers cannot but mention the *Achbita* judgment. This case concerned a Muslim woman who, after manifesting her intention to wear her headscarf at work, was informed that the company would not accept the wearing of a headscarf – as well as of any other political, philosophical or religious symbol – because it wanted to keep a neutral image. Following Ms. Achbita’s refusal to take off her headscarf, she was dismissed.

The Court came to the conclusion that the prohibition on wearing a headscarf at the workplace, arising from an internal rule of the employer prohibiting all employees from wearing visible signs of political, philosophical or religious beliefs during working hours, did not amount to direct discrimination (Article 2(2)(a) of Directive 2000/78), provided that it is applied in a general and undifferentiated manner.

Then the Court continued its analysis, considering that the internal regulation might be qualified as indirect discrimination (Article 2(2)(b)) if the apparent neutrality rule results in a

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FAVILLI, *La non discriminazione nell’Unione europea*, Bologna, 2008; C. FAVILLI, N. LAZZERINI, *Discrimination(s) as emerging from petitions received. Study for the Committee on Petitions*, Brussels, 2017; E. ELLIS, P. WATSON, *EU anti-discrimination law*, Oxford, 2012.

<sup>6</sup> Among others, CJEU (Grand Chamber), 13 May 2014, case C-131/12, *Google Spain and Google*, ECLI:EU:C:2014:317, point 68; CJEU, 5 June 2014, case C-146/14 PPU, *Mahdi*, ECLI:EU:C:2014:1320, point 52; CJEU (Grand Chamber), 4 June 2013, case C-300/11, ZZ, ECLI:EU:C:2013:363, point 52.

<sup>7</sup> CJEU (Grand Chamber), 14 March 2017, case C-157/15, *G4S Secure Solutions*, ECLI:EU:C:2017:203.

<sup>8</sup> CJEU (Grand Chamber), 14 March 2017, case C-188/15, *Bouagnaoui and ADDH*, ECLI:EU:C:2017:204.

<sup>9</sup> CJEU (Grand Chamber), 15 July 2021, case C-804/18, *WABE*, ECLI:EU:C:2021:594.

<sup>10</sup> CJEU (Grand Chamber), 17 April 2018, case C-414/16, *Egenberger*, ECLI:EU:C:2018:257.

<sup>11</sup> CJEU (Grand Chamber), 22 January 2019, case C-193/17, *Cresco Investigation*, ECLI:EU:C:2019:43.

particular disadvantage for the members of a specific religion. Though it is for the national judge to make such an evaluation, the CJEU provided it with the necessary guidance to assess whether the prospective indirect discrimination is justifiable because it pursues a legitimate aim and the means employed to achieve that aim are appropriate and necessary (Article 2(2)(b)(i)).

As for the *legitimate nature of the aim*, the Court stated that the employer's wish to display a neutral image of its activity is legitimate because it «relates» to the freedom of conducting a business, guaranteed by Article 16 of the Charter.<sup>12</sup> The *appropriateness* of the measure is met provided that the policy of neutrality is carried out in a consistent and undifferentiated manner – the evaluation of which is for the referring court. Finally, the Court affirmed that the employer's internal rule could be qualified as strictly *necessary* to the condition that applies only to workers who are in contact with customers. Additionally, if it could be ascertained – which is again for the referring court – that, after the employee's refusal to remove her headscarf, it was not possible, taking into account the inherent constraints to which the company would have been subject and without imposing an additional burden on the undertaking, to offer Ms. Achbita an alternative job not entailing any contact with customers, instead of dismissing her.<sup>13</sup>

The *Bouagnaoui* judgment originated from the case of a design engineer, Ms. Bouagnaoui, who refused to give up wearing her Islamic headscarf after a customer, where she worked, complained about her wearing of it and asked her to take it off for the future. After the employee's refusal to comply with the customer's request, her employer dismissed her. On that occasion, the referring Court asked whether the decision of an undertaking to satisfy the wish of a customer whose services no longer be provided by an employee wearing the Islamic headscarf falls within Article 4(1) of Directive 2000/78, according to which a difference of treatment, which is based upon a prohibited ground of discrimination, does not amount to discrimination where the requested characteristic «constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate». The Court came to the conclusion that the notion of «genuine and determining occupational requirement» covers only a requirement, which is «objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out». Therefore, this notion cannot encompass «subjective considerations»<sup>14</sup>, such as the employer's wish to satisfy the particular desire of a customer.

The Court ruled again on the use of religious symbols at private workplace in the *WABE* judgment regarding two joined cases: *IX v. WABE eV* and *MH Müller Handels GmbH v MJ*. Their factual background is very similar. Both concern two Muslim women, a special needs care-giver employed by a German charitable association running child day care centres (Ms. IX) and a sales assistant and cashier employed at a drugstore (Ms. MJ) who were instructed by their employers to take off their Islamic headscarves. Following their refusal, they received several warnings and eventually, they were temporarily suspended from work. The only

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<sup>12</sup> CJEU (Grand Chamber), *G4S Secure Solutions*, cit., point 38.

<sup>13</sup> As stressed by scholars, the solution proposed by the Court to accommodate Ms. Achbita's freedom of religion and her employer's interest is highly questionable because it would entail «hiding the employee» [and] is not a human rights solution»; cf. S. OUALD CHAIB, V. DAVID, *European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it*, in *Strasbourg Observers*, 27 March 2017, <https://strasbourgobservers.com>.

<sup>14</sup> CJEU (Grand Chamber), *Bouagnaoui and ADDH*, cit., point 40.

relevant difference between the two cases lies in the fact that the ban imposed by Ms. MJ's employer covered only *large-scale* political, philosophical or religious signs.

By its first preliminary question in *IX v. WABE* case, the referring court asked, in essence, whether an internal rule of a private undertaking that bans any visible sign of political, philosophical or religious beliefs in the workplace implies that employees who, *due to religious precepts*, follow certain clothing rules, suffer a direct discrimination on the grounds of religion. Although in *Achbita* the CJEU found that such an internal rule does not amount to direct discrimination, and the referring court is aware of that, it prompted the adoption of a broader notion of direct discrimination able to take into account the particular disadvantaged impact of the rule at issue on workers who follows some religious rules prescribing them certain garments.<sup>15</sup> Answering this question, the CJEU clarified some aspects already touched on in *Achbita*; nevertheless, it did not move away from its position taken on that occasion.

In line with its well-established case-law, the Court upheld that the notion of religion, covered by Article 1 of Directive 2000/78, must be interpreted in accordance with the meaning of that concept under Article 10(1) of the Charter; therefore, it also encompasses the wearing of religious clothing and symbols. It is worth stressing that, unlike in *Achbita*, the CJEU specified that the freedom of religion secured by the Charter – which, as recognised by the ECtHR, plays a fundamental role in promoting pluralism in democratic societies<sup>16</sup> – «forms an integral part of the relevant context in interpreting Directive 2000/78».<sup>17</sup>

With specific regard to the question at hand, the Court did not move away from the solution taken in *Achbita*, thus reiterating a narrow notion of direct discrimination. It stressed that the formulation of Article 1 of the Directive, which refers to discrimination «on» any of the grounds covered by the provision, implies that discrimination on the grounds of religion or belief occurs only where «the less favourable treatment or particular disadvantage at issue is experienced as a result of the religion or belief».<sup>18</sup> It follows that, since everyone can have a religion or belief, an internal rule of a private undertaking prohibiting the wearing of any visible political, philosophical or religious sign «does not establish a difference of treatment based on a criterion that is inextricably linked to religion or belief».<sup>19</sup> Although the CJEU recognised that the internal rule in question can cause particular trouble to employees wearing certain religious clothes, it maintained that such a circumstance does not invalidate the finding that the said rule does not introduce a difference of treatment based on a criterion that is inseparably

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<sup>15</sup> On the very questionable notion of discrimination adopted by the Court in *G4S Secure Solutions*, see among others, S. OUALD CHAIB, V. DAVID, *European Court of Justice keeps the door to religious discrimination in the private workplace opened*, cit.; E. BREMS, *European Court of Justice Allows Bans on Religious Dress in the Workplace*, in *IACL-AIDC Blog*, 26 March 2017, <https://iacl-aidc-blog.org/>; E. SPAVENTA, *What is the point of minimum harmonization of fundamental rights? Some further reflections on the Achbita case*, in *EU Law Analysis*, 21 March 2017, <http://eulawanalysis.blogspot.com/>; L. SALVADEGO, *Il divieto per i dipendenti di imprese private di esibire simboli religiosi all'esame della Corte di giustizia dell'Unione europea*, in *Rivista di diritto internazionale*, 2017, pp. 808 ff., particularly pp. 815 ff.; E. CLOOTS, *Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui*, in *CMLR*, 2018, pp. 589 ff., in particular p. 602.

<sup>16</sup> CJEU (Grand Chamber), *WABE*, cit., point 48; after stressing the correspondence existing between Article 10 of the Charter and Article 9 ECHR, the CJEU recalled that «In accordance with the case-law of the European Court of Human Rights ('the ECtHR'), the right to freedom of thought, conscience and religion, enshrined in Article 9 of the ECHR, 'represents one of the foundations of a "democratic society" within the meaning of [that] Convention' and constitutes, 'in its religious dimension, ... one of the most vital elements that go to make up the identity of believers and their conception of life' and 'a precious asset for atheists, agnostics, sceptics and the unconcerned', contributing to 'the pluralism indissociable from a democratic society, which has been dearly won over the centuries' (ECtHR, 15 February 2001, *Dahlab v. Switzerland* [...])».

<sup>17</sup> *Ibidem* (emphasis added).

<sup>18</sup> *Ibi*, point 49.

<sup>19</sup> *Ibi*, point 52.



connected to religion or belief; therefore, it does not amount to direct discrimination, provided that it is applied in a general and undifferentiated way.

The second preliminary question asked by the referring court in *IX v. WABE* case is focused on indirect discrimination and, ultimately, looked for some clarifications on the *Bougnaoui* judgment. The referring court asked, in essence, whether the internal rule in question entails an indirect difference of treatment on the grounds of religion and/or gender, which may be justified by the employer's desire to pursue a policy of neutrality to satisfy its customers' wishes.

The Court dealt very quickly with the issue of indirect discrimination on the grounds of gender mentioned by the referring court. As stressed by scholarship, the references made in the preamble of Directive 2000/78 to «multiple discrimination»<sup>20</sup> suffered by women would make possible the recognition of intersectional discrimination.<sup>21</sup> Despite that, the CJEU did not refer to that issue neither in *Achbita* nor in *Bougnaoui*.<sup>22</sup> A similar approach characterised *WABE*, as well. Following the solution proposed by Advocate General Rantos, the Court found it not necessary to examine the existence of gender-based discrimination because the preliminary question only referred to Directive 2000/78, which does not cover the said discrimination.<sup>23</sup>

As for the existence of indirect discrimination on the grounds of religion or belief, the CJEU started from the finding of the referring court that the contested internal rule impacts only on Muslim women, and, therefore, it amounts to a difference of treatment indirectly based upon religion or belief. Then, in accordance with Article 2(2)(b)(i) of Directive 2000/78, the Court gave some important guidance to the national judge to assess whether such a difference of treatment is justified.

Firstly, the CJEU recalled that the said Directive implements the general principle of non-discrimination, recognised by Article 21 of the Charter, and aims to prohibit all direct and indirect discriminations based, among others, on religion and belief, in the areas covered by the Directive; it follows that the notions of a legitimate aim, appropriateness and necessity of the measures taken to pursue it must be strictly interpreted.

Secondly, with regard to the existence of a *legitimate aim*, the Court, referring to *Achbita*, held that the employer's desire to project an image of neutrality towards customers and users is covered by the freedom to conduct a business, recognised by Article 16 of the Charter; therefore, it must be deemed as legitimate, particularly where the internal rule aiming to pursue such aim only applies to employees who are in contact with customers or users. In that regard, the Court

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<sup>20</sup> Directive 2000/78, cit., preamble, recital (3).

<sup>21</sup> See, *inter alia*, D. SCHIEK, *Broadening the scope and the norms of EU gender equality law: towards a multidimensional conception of equality law*, in *Maastricht Journal of European and Comparative Law*, 2005, pp. 427 ff.; on multiple discrimination, see also C. KILPATRICK, *Article 21 EU Charter of Fundamental Rights: non-discrimination*, in S. PEERS ET AL., *The EU Charter of Fundamental Rights: A Commentary*, cit., pp. 595 ff.

<sup>22</sup> This silence attracted considerable criticism; see, among other, E. HOWARD, *Islamic Headscarves and the CJEU: Achbita and Bougnaoui*, in *Maastricht Journal of European and Comparative Law*, 2017, pp. 348 ff.; D. SCHIEK, *On Uses, Mis-Uses and Non-Uses of Intersectionality Before the European Court of Justice (CJEU): The CJEU Rulings Parris (C-433/15), Achbita (C-157/15) and Bougnaoui (C-188/15) as a Bermuda Triangle?*, in *International Journal of Discrimination and the Law*, 2018, pp. 1 ff.

<sup>23</sup> That approach is very questionable in the light of the role played by the principle of equality between women and men in the EU legal order; since it is recognised by sources of primary law, notably Articles 21 and 23 of the Charter, the Court should have interpreted Directive 2000/78 in the light of these provisions and paid a greater deal of attention to the impact of the internal rule in term of intersectional discrimination. For a broader analysis on this point, cf. E. FRANTZIOU, *Joined cases C-804/18 and C-341/19, IX v WABE eV and MH Muller Handels GmbH v MJ: religious neutrality in a private workplace? Employer friendly and far from neutral*, in *European Law Review*, 2021, pp. 674 ff; in particular pp. 681-682.

meaningfully affirmed that the pursuing of a legitimate aim is not enough to justify the difference of treatment: by contrast, «such a justification can be regarded as being objective *only* where there is a *genuine need* on the part of that employer».<sup>24</sup> Then, the Court gave additional guidance to the referring court pointing out some elements which *may* be taken into account to assess the existence of such a special need, which is for the employer to demonstrate. First of all, «the rights and legitimate wishes of customers or users» may have some relevance.<sup>25</sup> With specific regard to the case at hand, the CJEU referred to the parents' right to ensure the education and teaching of their children in conformity with their religious and philosophical convictions, protected by Article 14(3) of the Charter. In that sense, the Court specified that this situation must be distinguished from the case analysed in *Bougnaoui*: there the employer did not adopt any internal rule, and the employee was dismissed after the complaint made by a customer.<sup>26</sup> This latter specification must be particularly criticised. Basically, the difference between *WABE* and *Bougnaoui* lies in the fact that, in this latter case, the employer had not (yet) adopted a neutrality policy, and her dismissal was justified only in the light of the alleged necessity to satisfy the desire of a customer. Such a distinction appears very questionable because it is likely to encourage undertakings to adopt a neutrality policy in order to anticipate their customers' desires.<sup>27</sup> Moreover, in assessing the existence of the employer's genuine need, special attention should be paid to the evidence adduced by the employer proving that, due to the nature of its activities or their context, the absence of the contested neutrality would negatively affect its activities and, therefore, its freedom to conduct a business.

Finally, in line with what already taken in *Achbita*, the Court upheld that the internal rule in question must be *appropriate* to reach the employer's purpose to display a neutral policy, and the prohibition of religious symbols must be «limited to what is strictly *necessary*».<sup>28</sup> Particularly, as specified in paragraph 69, this latter condition implies that

«it must be ascertained whether, in the case of a restriction of the freedom of thought, conscience and religion, guaranteed in Article 10(1) of the Charter, such as that entailed by prohibiting a worker from observing, at his or her workplace, a precept requiring him or her to bear a visible sign of his or her religious beliefs, that restriction appears strictly necessary in view of the adverse consequences that the employer is seeking to avoid by adopting that prohibition».<sup>29</sup>

By its first question in the *MH Müller Handels GmbH v MJ* case, the referring court asked, in essence, whether an internal rule which bans only conspicuous and large-sided signs is compatible with EU law.

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<sup>24</sup> CJEU (Grand Chamber), *WABE*, cit., point 64 (emphasis added).

<sup>25</sup> *Ibi*, point 65.

<sup>26</sup> The distinction made by the Court is very questionable because it corroborates the idea that, unlike the dismissal of an employee wearing a religious symbol following the complaints of a customer, the adoption of an internal rule prohibiting the wearing of any political, religious or philosophical sign does not amount, under certain conditions, to discrimination. Ultimately, the distinction made by the Court risks encouraging employers to adopt internal regulation banning the wearing of any political, religious and philosophical signs.

<sup>27</sup> A similar risk was already envisaged by scholarship after *Achbita* and *Bougnaoui*; in that sense, cf. A. SANTINI, *La religione nell'ordinamento dell'Unione europea: il modello pluralistico alla prova della giurisprudenza della Corte di Giustizia*, in SANTINI, M. SPATTI (a cura di), *La libertà di religione in un contesto pluriculturale*, cit., pp. 127 ff.; in particular p. 141.

<sup>28</sup> CJEU (Grand Chamber), *WABE*, cit., point 68.

<sup>29</sup> *Ibi*, point 69.

Diverging from the solution proposed by Advocate General Rantos, the CJEU found that indirect discrimination deriving from such an internal rule cannot be justified. According to the Court, the policy of neutrality pursued by the measure at issue can be achieved only if *all* visible expressions of religion or belief are banned. By contrast, if the wearing of small-sized signs is allowed, it would undermine the ability of the internal rule to ensure the said neutrality. Moreover, the CJEU found that an internal rule prohibiting only the wearing of large-sized signs amounts to an unjustified direct discrimination on grounds of religion or belief. The Court reached such a conclusion stressing that an internal rule banning only large-sized signs is likely to have a greater impact on people whose religion or belief prescribes the wearing of this kind of signs: since the unequal treatment stems from a rule which is based upon «a criterion that is inextricably linked to a protected ground [it] must be regarded as being directly based on that ground». <sup>30</sup>

Such a recognition must be certainly welcome; at the same time, it shows the shortcomings of the notion of direct discrimination adopted by the Court in *Achbita* and upheld in the answer given to the first preliminary question in *WABE*. As already recalled on these latter occasions, the Court did not take into any account the fact that an internal rule prohibiting the wearing of religious, political and philosophical symbols implies a particular disadvantage on workers following some religious rules prescribing them certain clothes. Therefore, it denied that the questioned internal rule amounts to direct discrimination. This latter narrow notion of direct discrimination is not in line with the broad (and more accurate) notion of direct discrimination which led the Court to answer to the preliminary question in *Müller* by concluding that an internal rule banning only the wearing of large-sized signs amounts to direct discrimination on the grounds of religion or belief.

### **3. The (limited) role of the freedom of religion in the case-law on the prohibition of religious symbols by private employers**

One of the main shortcomings of *Boungnaoui* and especially *Achbita* resides in the nearly total absence of references to the freedom of religion. The only (although relevant) reference was made to define the notion of religion covered by Article 1 of the Directive. Since this latter does not include a definition of religion, the Court referred to the case-law of the ECtHR on Article 9 ECHR, which corresponds to Article 10 of the Charter for the purpose of Article 52(3) thereof. In accordance with the interpretation of the ECtHR, the CJEU concluded that the concept of religion set out in Article 1 of the Directive must be interpreted in a broad way, which includes both the fact of having a religion or belief (*forum internum*) and its public manifestation (*forum externum*). The two judgments include no other references to the freedom of religion, and the Court's reasoning is only focused on the principle of non-discrimination. This is quite surprising because, as authoritatively underlined, *Achbita* and *Boungnaoui* were «fundamental rights cases» and, despite the CJEU not being a human rights court, «it cannot avoid being confronted with fundamental rights cases». <sup>31</sup>

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<sup>30</sup> *Ibi*, point 73.

<sup>31</sup> E. CLOOTS, *Safe harbour or open sea for corporate headscarf bans? Achbita and Boungnaoui*, cit., in particular p. 624.



At first glance, in *WABE*, the Court seems to have left such a restrictive approach. First of all, as already mentioned, the Court clarified the notion of religion relevant for the purposes of the Directive by specifying that the freedom of religion secured by the Charter «forms an integral part of the relevant context in interpreting Directive 2000/78».<sup>32</sup> Moreover, in *WABE*, the Court was directly asked to clarify whether the appropriateness and necessity of a difference of treatment on the grounds of religion or belief, resulting from an internal rule of a private undertaking, must be assessed by taking into account the freedom of religion, as recognised by Article 10 of the Charter and Article 9 ECHR.

In his opinion on this point, Advocate General Rantos took a very restrictive position which recognises no role to the freedom of religion.<sup>33</sup> Firstly, he held that Directive 2000/78 must be interpreted only in the light of the general prohibition of discrimination enshrined in Article 21 of the Charter. By contrast, other fundamental rights, in particular the freedom of religion, are not relevant: according to the Advocate General, the prohibition of religious discrimination and the freedom of religion, although linked, «constitute fundamental rights which must be clearly distinguished»<sup>34</sup>; notably, the Directive does not aim to guarantee the freedom of religion but rather the principle of non-discrimination on the grounds, among others, of religion or beliefs.<sup>35</sup> Secondly, the reference to «appropriate and necessary means» in Article 2(2)(b)(i) of the Directive entails a proportionality test aiming to assess whether the legitimate aim «is being implemented properly». In the Advocate General's opinion, the protection of the freedom of religion must have no relevance within this assessment.

Significantly diverging from the Advocate General's position, the CJEU firstly held that the references made by the Directive's preamble to fundamental freedoms as protected by the ECHR, and the constitutional traditions common to the Member States – which include the freedom of religion – imply that the appropriateness of a neutrality policy must be assessed by taking into account «the various rights and freedoms in question».<sup>36</sup> Secondly, the Court stated that the necessity of the measure must be examined considering «the interests involved in the case and limiting the restrictions on the freedoms concerned to what is strictly necessary», and, these freedoms concerned encompass the freedom of religion, too. The CJEU concluded that, in line with its case-law, when different and competing rights are at issue,

«such as, in the present case, the *principle of non-discrimination* enshrined in Article 21 of the Charter and the right to *freedom of thought, conscience and religion* guaranteed in Article 10 of the Charter, on the one hand, and the *right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions* recognised in Article 14(3) of the Charter and the *freedom to conduct a business* recognised in Article 16 of the Charter, on the other hand, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements

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<sup>32</sup> CJEU (Grand Chamber), *WABE*, cit., point 48.

<sup>33</sup> Opinion of Advocate General Rantos delivered on 25 February 2021, Joined Cases C-804/18 and C-341/19, *IX v WABE eV* and *MH Müller Handels GmbH v MJ*.

<sup>34</sup> *Ibi*, point 96.

<sup>35</sup> Advocate General Rantos also argued that the simultaneous application of all rights secured by the Charter in the interpretation of the Directive would prevent its full and uniform implementation and the coherence with its objectives, namely the protection of the principle of non-discrimination in employment and occupation.

<sup>36</sup> CJEU (Grand Chamber), *WABE*, cit., point 82.

of the protection of those various rights and principles at issue, striking a fair balance between them».<sup>37</sup>

In stating that, the Court significantly expressed the necessity to frame the interpretation of the Directive within the fundamental rights recognised by the Charter, also taking into account the freedom of religion. That affirmation must be even more welcome because, on this point, the Court diverged from the Advocate General's Opinion and left the approach taken in *Bougnaoui* and *Achbita* where it interpreted Directive 2000/78 recognising no role to the freedom of religion. Nevertheless, the change of course emerging from the above-mentioned paragraphs must not be overestimated. As it will be proved in the following sections, the Court did not really change its approach.

### 3.1. Must Directive 2000/78 be interpreted in the light of the Charter?

There is no doubt that the prohibition of religious discrimination and the freedom of religion are different fundamental rights and that Directive 2000/78 does not have the objective to promote the freedom of religion. However, this does not mean that – as argued by Advocate General Rantos in his opinion in *WABE* – freedom of religion cannot be taken into account to examine the appropriateness and necessity of a different religious treatment. The fact that an EU secondary act aims to promote a specific right (i.e., the principle of non-religious discrimination) does not exclude the relevance of other fundamental rights in its interpretation. The point is not the *application* of the Charter rights in the interpretation of an EU secondary act – as affirmed by Advocate General Rantos – but rather *the interpretation of this act «in the light of fundamental rights»*.<sup>38</sup> This is the only approach able to respect the Charter's position in the hierarchy of EU law sources; as recalled in the Introduction, such a position entails that the Charter must be a *parameter* to interpret EU secondary law. Thus, an interpretation of Article 2(2)(b) of Directive 2000/78 giving no relevance to the freedom of religion is not admissible from an EU constitutional point of view.<sup>39</sup>

Moreover, although the preamble of Directive 2000/78 does not explicitly mention the freedom of religion, it is worth noting that such a reference is included in the proposal for a Directive aimed at widening the scope of application of the principle of equal treatment

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<sup>37</sup> *Ibi*, point 84 (emphasis added).

<sup>38</sup> Among others, CJEU (Grand Chamber), *Google Spain and Google*, cit., point 68; CJEU, *Mahdi*, cit., point 52; CJEU (Grand Chamber), *ZZ*, cit., point 52.

<sup>39</sup> The opinion of Advocate General Rantos on this point was deeply criticised by former Advocate General Eleanor Sharpston in her "shadow opinion". As stressed by Sharpston, the thesis that directive 2000/78 must only be interpreted in the light of Article 21 of the Charter is contrary to the solution taken by the Court in *Achbita*; indeed, on that occasion, the Court moved away from a purely discrimination-based approach and took into account the employer's freedom to conduct a business protected by Article 16 of the Charter. Although Sharpston agrees with the necessity to consider this right, she stressed that it would be inadmissible to bring Articles 16 and 21 into the analysis of the Directive and to not give due regard to Article 10; therefore, according to Sharpston, the approach proposed by Advocate General Rantos «is both misconceived and intellectually flawed»; cf. E. SHARPSTON, *Shadow Opinion of former Advocate-General Sharpston: headscarves at work*, in *Eu Law Analysis*, 23 March 2021, <http://eulawanalysis.blogspot.com>. See also M. VAN DEN BRINK, *Preserving Prejudice in the Name of Profit*, in *Verfassungsblog*, 1 March 2021, <https://verfassungsblog.de>; according to him, the Opinion of Advocate General Rantos «is based on a strangely schizophrenic application of fundamental rights»: on the one hand, he referred to the parents' right to ensure the education and teaching of their children in conformity with their convictions (Article 14(3) of the Charter) and to the freedom to conduct a business (Article 16 of the Charter), but on the other, he recognised no relevance to the freedom of religion.

irrespective of religion or belief, disability, age or sexual orientation beyond the work field.<sup>40</sup> Where its preamble affirms that the Directive must respect the fundamental rights enshrined in the Charter, it explicitly mentions Article 10 thereof. It is even more meaningful that the European Commission's proposal stressed that the proposed Directive «will help to further the fundamental rights of citizens, in line with the EU Charter of Fundamental Rights».<sup>41</sup> That affirmation clarifies that, even if the Directive mainly aims to implement the principle of equal treatment outside the field of employment<sup>42</sup>, it significantly contributes to improving the effectiveness of all fundamental rights secured by the Charter. In that regard, the interplay between the prohibition of religious discrimination and the freedom of religion is a paradigmatic example. As it emerges from international human rights law, the right not to be discriminated against on the grounds of religion or belief is a *component* of the right to have and express one's religion or belief.<sup>43</sup>

Finally, the necessity to look at the Directive also through the lens of the freedom of religion finds confirmation in the previous case-law of the CJEU on age discrimination. On several occasions, the Court was asked to examine whether a difference of treatment on the basis of age, set out by national law, does not constitute discrimination because, in accordance with Article 6(1) of Directive 2000/78, it pursues a legitimate aim and «the means of achieving that aim are appropriate and necessary». The necessity test is carried out recognising that, although the Member States enjoy a margin of discretion in the definition of measures able to achieve a legitimate aim, such measures «may not frustrate the prohibition of discrimination on grounds of age set out in Directive 2000/78». It follows that the said prohibition «must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter», in order to pay special attention «to the participation of older workers in the labour force, and thus in economic, cultural and social life». Against such a background, it is necessary to determine whether the national legislation achieved a fair «balance» between the right of older persons to engage in work and other competing interests at stake, such as the promoting access of young people to the labour market.<sup>44</sup> The same reasoning must be applied to workers who are discriminated against based on religion. In that case, the difference of treatment at issue affects not only the right to work but also the right to have and express one's religion. By analogy, both rights must be taken into account by the Court when interpreting Directive 2000/78.

In conclusion, the Court should interpret that Directive also in light of the freedom of religion. After saying that, it is necessary to clarify *which is the specific role of the freedom of*

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<sup>40</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180}{SEC(2008)2181}/\*COM/2008/0426 final. For a detailed analysis of that proposal see, among others, E. ELLIS, P. WATSON, *EU anti-discrimination law*, cit., pp. 372 ff.

<sup>41</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, cit., point 1.

<sup>42</sup> *Ibi*, Article 1.

<sup>43</sup> See, among others, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981. In that regard, see also E. SHARPSTON, *Shadow Opinion of former Advocate-General Sharpston: headscarves at work*, cit.; according to Sharpston, Articles 10 and 21 of the Charter are a paradigmatic example of «rights and freedoms [which] are best understood as co-existing with one another [...]». The former could be said to generate the latter. The latter exists to give meaningful effect to the former».

<sup>44</sup> See, among others, CJEU, 21 July 2011, joined cases C-159/10 and C-160/10, *Fuchs and Köhler*, ECLI:EU:C:2011:508, points 62 ff.; CJEU, 5 July 2012, case C-141/11, *Hörnfeldt*, ECLI:EU:C:2012:42, points 37 ff.; CJEU, 2 April 2020, case C-670/18, *Comune di Gesturi*, ECLI:EU:C:2020:272, points 44 ff.; CJEU, 15 April 2021, case C-511/19, *Olympiako Athlitiko Kentro Athinon*, ECLI:EU:C:2021:274, points 46 ff.

*religion* in that regard. As it will be stressed in the following paragraphs, it should play a key role within the proportionality test.

### **3.2. The role of the employee's freedom of religion in interpreting Directive 2000/78: the proportionality test**

The proportionality principle set out by Article 2(2)(b)(i) of Directive 2000/78 entails a *3-prong test*.<sup>45</sup> The provision, criterion or practice entailing a difference in treatment is justifiable provided that it is: a) appropriate, namely suitable to achieve the legitimate aim pursued; b) necessary, so it cannot go beyond what it is necessary to pursue it<sup>46</sup>; and c) proportionate *stricto sensu*. This latter criterion, which expresses the general principle of proportionality of EU law, implies that the disadvantages caused by the appropriate and necessary measures must not be disproportionate compared to the aims pursued; in other words, the proportionality assessment requires that a fair balance between the different interests and rights at stake must be struck.<sup>47</sup>

As emerges from the above-mentioned case-law on discrimination, the CJEU has usually affirmed the necessity to carry out this kind of balance also in the context of discrimination.<sup>48</sup> When assessing proportionality *stricto sensu*, it is exactly that the CJEU must also weigh the worker's freedom of religion. As stressed by Advocate General Sharpston in her opinion in *Bouagnaoui*, «the starting point for any analysis must be that an employee has, in principle, the right to wear religious apparel or a religious sign».<sup>49</sup> Then, the Court must strike a balance between that right and the employer's right to pursue a policy of neutrality. In most cases, according to Sharpston, the employer and the employee will have the chance to adequately accommodate their competing rights. However, she found that, in the exceptional case where such an accommodation is not possible, the employee's right to manifest their religion must take priority over the employer's right to conduct a business. According to the Advocate General, giving way to the employer's right to pursue a policy of neutrality in order to satisfy a customer's wish revealing a prejudice based on religion – which is one of the prohibited grounds of discrimination – would be contrary to the purpose of Directive 2000/78: indeed, it aims to protect the employees against discrimination on those prohibited factors.

Against such a background, the reasoning made by the CJEU in *Bouagnaoui* and especially in *Achbita* is highly questionable. Although in *Bouagnaoui* it reached the conclusion that the employer's willingness to meet the customer's wishes cannot be considered a genuine

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<sup>45</sup> For a detailed description of this 3-step test, see the Opinion of Advocate General Kokott delivered on 6 May 2010, Case C-499/08, *Ole Andersen*, ECLI:EU:C:2010:248, point 52 ff.

<sup>46</sup> *Ibi*, point 60: a measure «is 'necessary', however, only where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means».

<sup>47</sup> *Ibi*, point 68: «According to that principle, measures must not cause disadvantages which are disproportionate to the aims pursued, even if those measures are appropriate and necessary for meeting legitimate objectives». On the principle of proportionality, see W. SAUTER, *Proportionality in EU Law: A Balancing Act?*, in *Cambridge Yearbook of European Legal Studies*, 2013, pp. 439 ff.; T.I. HARBO, *The Function of the Proportionality Principle in EU Law*, in *European Law Journal*, 2010, pp. 158 ff.; with specific regard to the application of this principle in EU anti-discrimination law, see E. ELLIS, P. WATSON, *EU anti-discrimination law*, cit., pp. 130 ff.

<sup>48</sup> In that regard, it is paradigmatic the opposite approach taken by the Court and Advocate General Sharpston in *Bouagnaoui*: in her opinion, she made a rigorous analysis of the proportionality which did not find any match in the Court's judgment; cf. Opinion of the Advocate General Sharpston delivered on 13 July 2016, Case C-188/15, *Asma Bouagnaoui Association de défense des droits de l'homme (ADDH) v Micropole SA*, EU:C:2016:553, point 120 ff.

<sup>49</sup> *Ibi*, point 122 (emphasis added).

and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78, the Court's reasoning shows some shortcomings. As a matter of fact, it focused its reasoning on the notion of genuine and determining occupational requirement. The CJEU did not carry out the proportionality test and gave no consideration to the balance between the employee's right to wear a religious symbol and the employer's right to communicate a certain image of its company, radically diverging from the solution proposed by the Advocate General Sharpston.

The solution adopted in *Achbita* is even more questionable. As mentioned above, where the Court examined the existence of indirect discrimination, it referred to the appropriateness and necessity of the measure and still completely ignored the proportionality in *stricto sensu*. In that regard, the judgment significantly diverged from the path adopted by Advocate General Kokott in her opinion: although she proposed a solution which in essence was accepted by the Court, she reached such a solution making a (more) rigorous application of the proportionality test, which, instead, is completely lacking in the CJEU's reasoning.<sup>50</sup> By contrast, the balance of the competing rights at stake would have allowed the Court to take into due account the employee's freedom of religion. And to do that, one must take account of the case-law of the ECtHR, in compliance with Article 52(3) of the Charter.

The ECtHR has elaborated a wide case-law on the freedom to wear religious clothing in the workplace. With specific regard to the limitations defined by internal rule of private undertakings, it is worth recalling the *Eweida v. the UK* judgment concerning a British Airways employee who complained about the airline's uniform policy preventing her from visibly wearing a cross around her neck. The ECtHR's reasoning deserves to be mentioned. Firstly, the Strasbourg Court referred to the doctrine of States' positive obligations<sup>51</sup>: since the alleged violation stems from a private company's act, the issues at hand must be evaluated in the light of the State's positive obligations to secure the freedom of religion.<sup>52</sup> In other words, States party to the ECHR have the obligation to take measures to protect the effectiveness of the freedom of religion even in the sphere of private relations between individuals. This implies that national authorities must ensure a fair balance between the competing interests of the concerned individual and of the community as a whole. Secondly, in striking that balance, the

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<sup>50</sup> The way in which the Court applied the proportionality test in *Achbita* was deeply criticised by scholars; see among others M. BELL, *Leaving Religion at the Door? The European Court of Justice and Religious Symbols in the Workplace*, in *Human Rights Law Review*, 2017, pp. 784 ff., in particular p. 795; E. HOWARD, *Islamic Headscarves and the CJEU: Achbita and Bougnaoui*, cit., pp. 358-359; ID, *EU anti-discrimination law: Has the CJEU stopped moving forward?*, in *International Journal of Discrimination and the Law*, 2018, pp. 60 ff., in particular p. 74; S. JOLLY, *Religious Discrimination in the Workplace: the European Court of Justice Confronts a Challenge*, in *European Human Rights Law Review*, 2017, pp. 308 ff., in particular p. 312.

<sup>51</sup> On the doctrine of States' positive obligations elaborated by the ECtHR, see *inter alia* F. BESTAGNO, *Diritti umani e impunità. Obblighi positivi degli Stati in materia penale*, Milano, 2003; A. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, 2004; R. PISILLO MAZZESCHI, *Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme*, in HAGUE ACADEMY OF INTERNATIONAL LAW, *Collected Courses of the Hague Academy of International Law*, Leiden, 2008, pp. 175 ff.; J.-F. AKANDJI-KOMBE, *Les obligations positives en vertu de la Convention européenne des Droits de l'Homme: un guide pour la mise en œuvre de la Convention européenne des Droits de l'Homme*, Strasbourg, 2006; S. FREDMAN, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford, 2008; L. LAVRYSEN, *Human Rights in a Positive State. Human Rights in a Positive State. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, Cambridge, 2016; on positive obligations stemming from the freedom of thought, conscience and religion in the case-law of the ECtHR, see M. FERRI, *The freedom to wear religious clothing in the case law of the European Court of Human Rights: an appraisal in the light of states' positive obligations*, in *Religion, State and Society*, 2017, pp. 186 ff.

<sup>52</sup> ECtHR, 15 January 2013, *Eweida et al. v. the United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, point 84.



ECtHR found the aim pursued by British Airways to project a certain image of the company by imposing a dress code to its employees legitimate. Yet, the Strasbourg Court made a strong and strict evaluation of proportionality: the ECtHR followed a rigorous reasoning by weighing Ms. Eweida's desire to manifest her religious conviction on one side of the scale and the employer's wish to communicate a certain image of its company on the other. Notably, the ECtHR struck that balance by taking into account the fact that the cross did not affect the applicant's professional appearance and that the company had previously authorised the use of other religious clothing (such as the Sikh turban and the Islamic hijab), and their use did not compromise the airline's neutral image.

The assessment made by the CJEU in *Achbita* is very different. The Court recalled the *Eweida* judgment only to affirm that the employer's interest to project a specific image of its corporation must be qualified as a legitimate aim. After that statement, the CJEU did not go further. *Misapplying* Article 52(3) of the Charter, it overlooked that in *Eweida* the ECtHR made a rigorous balance between the competing rights at stake and gave significant weight to the employee's freedom to wear religious clothing in the workplace.

### **3.3.....and the revised test introduced in *WABE*: change something to change nothing!**

One of the most relevant aspects of the *WABE* judgment lies in the affirmations made by the CJEU with regard to the assessment requested to determine whether or not a difference of treatment, indirectly based upon prohibited grounds of discrimination, can be justified, according to Article 2(2)(b)(i). Indeed, *WABE* is characterised by a significant revision of the test used in *Achbita*, which allowed the Court to strengthen the proportionality assessment. As already recalled, the CJEU specified that the employer must prove that the allegedly pursued policy of neutrality responds to a «genuine need» of its activity. The introduction of such an additional criterion to the assessment, the full guidance given to the national courts to make it, and the great emphasis put on the employer's burden of proof make the evaluation more rigorous. Nevertheless – and this is the main drawback of *WABE* – the proportionality test still shows some shortcomings. As emerges from point 69 of the judgment quoted above, the Court recognised the existence of a restriction of the freedom of religion, but it did not carry out a rigorous proportionality test aiming to strike a balance between the competing rights at stake. The focus is on «*the adverse consequences that the employer is seeking to avoid by adopting*»<sup>53</sup> its policy of neutrality, and so on its freedom to conduct a business. By contrast, the Court did not engage in making a real and effective balance able to take into due account the (negative) impact of the said policy on the employee's freedom of religion.

Despite the revised test adopted in *WABE*, that judgment confirms the predominant role recognised by the Court to the freedom to conduct a business. More generally, such a role is not in line with the formulation of Article 16 of the Charter, which recognises such freedom «in accordance with Union law and national laws and practices». Indeed, as emerges from the wide case-law of the CJEU in that regard, the freedom to conduct a business is not unconditional and «must be viewed in the light of [its] social function».<sup>54</sup>

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<sup>53</sup> CJEU (Grand Chamber), *WABE*, cit., point 69 (emphasis added).

<sup>54</sup> CJEU, 14 May 1974, case 4/73, *Nold KG v Commission*, ECLI: EU:C:1974:51, point 14; in that regard, cf. M. EVERSON, R. CORREIA GONÇALVES, *Freedom to Conduct a Business*, in S. PEERS ET AL., *The EU Charter of Fundamental Rights: A*

#### 4. The opposite approach characterising the case-law on national rules granting an advantageous position to some churches and their members: *Egenberger* and *Cresco*

The shortcomings of the case-law on the prohibition of religious symbols by private employers emerge even more clearly by recalling the approach taken by the Court in some other relevant judgments on religious discrimination in the employment field. Notably, the *Egenberger* and *Cresco* cases deserve to be recalled. Both judgments concern national rules granting an advantageous position to some churches and their members.

In the *Egenberger* case, the Evangelisches Werk (the Protestant Work for Diaconate and Development) refused the job application of a woman because she did not belong to the Protestant church.<sup>55</sup> As a matter of fact, the German legislation transposing Directive 2000/78, and in particular its Article 4(2)<sup>56</sup>, allows churches (and religious societies, institutions and associations) to maintain a difference of treatment on the grounds of religion where a specific religion or belief constitutes an occupational requirement according to its “self-perception”. Such a provision was based upon the interpretation elaborated by the Federal Constitutional Court on the churches’ right to self-determination. According to this interpretation, where a religious organisation decides that a particular religion constitutes an occupational requirement, the judicial control on its necessity must be based upon the “self-perception” of the religious organisation itself.

As for *Cresco*, this case concerns the Austrian national law on rest periods and public holidays according to which only workers belonging to Christian churches are entitled to enjoy a public holiday or to receive additional pay if requested to work on Good Friday. As emerges from the judgment in which the request for a preliminary ruling was raised, an employee not belonging to the said churches was denied public holiday pay despite having worked on a Good Friday.

Although these judgments have already been deeply discussed, for the present analysis, it is worth stressing three points of the Court’s reasoning.

Firstly, the CJEU adopted a *fundamental rights-based approach*.

In *Egenberger*, the Court concluded that Article 4(2) of Directive 2000/78 cannot be interpreted as allowing a limited judicial control on the difference of religious treatment

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*Commentary*, cit., pp. ff.; M. PARODI, *The EU Charter of Fundamental Rights as the Source of Judicially Enforceable Obligations to the Activity of Private Companies*, in M. BUSCEMI, N. LAZZERINI, L. MAGI, D. RUSSO (eds.), *Legal Sources in Business and Human Rights. Evolving Dynamics in International and European Law*, Leiden, 2020, pp. 97-119.

<sup>55</sup> CJEU (Grand Chamber), 17 April 2018, case C-414/16, *Egenberger*, ECLI:EU:C:2018:257.

<sup>56</sup> Directive 2000/78, Article 4(2): «Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos». For a detailed analysis on this provision and its origin see, among others, E. ELLIS, P. WATSON, *EU anti-discrimination law*, cit., pp. 394 ff.

imposed by a religious organisation. The CJEU stressed that the objective of the said provision is to strike a fair balance between two rights: on the one hand, the right of churches and religious organisations to enjoy their autonomy and self-determination, which is recognised by Article 17 TFEU and Article 10 of the Charter; and, on the other hand, the right of employees – and prospective employees – not to be discriminated against based on religion or belief. However – as held by the Court – the balance found in a particular case must be entirely subject to an effective judicial review to assure that, in the case at hand, the criteria set out by Article 4(2) of the Directive are satisfied. The CJEU came to such a conclusion by interpreting the said provision in the light of its objective and context: these criteria lead it to stress that the Directive represents a specific application of the general principle of non-discrimination recognised by Article 21 of the Charter. The full implementation of this principle implies that Member States must ensure that all persons claiming to be a victim of a violation of the principle of non-discrimination must have access to judicial and/or administrative procedures. Even though this right is provided for by Article 9 of the Directive, the Court made a specific reference to the right to the effective judicial protection enshrined in Article 47<sup>57</sup> by highlighting that the dispute pending before the referring court fell *within the scope of the Charter*<sup>58</sup>.

A similar approach characterised the reasoning developed in *Cresco*. Where the CJEU assessed whether the national measures at stake are compatible with the Directive because they are necessary to protect fundamental rights (Article 2(5)<sup>59</sup>) or because they represent positive measures aiming to compensate for a disadvantage linked to religion (Article 7(1)<sup>60</sup>), extra attention is paid to fundamental rights and the principle of proportionality. Notably, in verifying whether the national legislation may be justified under Article 7(1) of the Directive, the Court stressed that any derogation from a fundamental right, such as the principle of equal treatment, must comply with the principle of proportionality which implies, among others, that the said principle must «be reconciled as far as possible with the requirements of the aim thus pursued».<sup>61</sup>

Secondly, it is worth recalling the *mandatory effect* recognised by the Court to the *prohibition of discrimination on the grounds of religion and belief*. In this regard, the

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<sup>57</sup> In this regard, see also CJEU (Grand Chamber), joined cases C-585/18, C-624/18 and C-625/18, A.K. (*Independence of the Disciplinary Chamber of the Supreme Court*), ECLI:EU:C:2019:982, point 114: the Court stated that Article 9(1) of Directive 2000/78 «reaffirms» the right to effective judicial protection sanctioned by Article 47 Charter.

<sup>58</sup> Furthermore, the Court held that such a solution is not invalidated by Article 17 TFEU; although that provision «expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities», this neutral attitude is not such as to exclude the respect of Article 4(2) of Directive 2000/78 from effective judicial review (point 58). In that regard, see also the Opinion of Advocate General Tanchev delivered on 9 November 2017, in case C-414/16, *Egenberger*, ECLI:EU:C:2017:851; according to the Advocate General, Article 17(1) TFEU cannot be interpreted as «some kind of meta principle of constitutional law» entailing the EU's obligation to respect the status recognised by the law of Member States to churches, religious and non-confessional organisations, «whatever the circumstances» (point 93); on that judgment, see C. SCHUBERT, *Church Labour Law in the Multi-Level System of Law – the Case Law of the CJEU in IR and Egenberger in the light of the ECHR*, in *Kirche und Recht*, 2020, pp. 40 ff.; L. LOURENÇO, *Religion, discrimination and the EU general principles' gospel: Egenberger*, in *CMLR*, 2019, p. 193 ff.; L. DE PASQUAL, *L'autonomia delle chiese e delle organizzazioni religiose alla luce della giurisprudenza recente della corte di giustizia dell'Unione europea*, cit., in particular pp. 173 ff.

<sup>59</sup> Directive 2000/78, Article 2(5): «This Directive 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».

<sup>60</sup> Directive 2000/78, Article 7(1): «With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1».

<sup>61</sup> CJEU (Grand Chamber), 22 January 2019, case C-193/17, *Cresco Investigation*, cit., point 65.

*Egenberger* decision represents a critical turning point in the emergence of a (horizontal) direct effect characterising the EU general principles and the Charter's provisions. As it is well known, after being first elaborated in the landmark decision *van Gend en Loos*<sup>62</sup>, the doctrine of the direct effect has been further developed by the CJEU. With specific regard to the affirmation of the horizontal direct effect characterising the general principles of EU law and the Charter's provision, three steps have been detected in literature.<sup>63</sup> During the first phase, typifying the *Mangold*<sup>64</sup> and *Küçükdeveci*<sup>65</sup> judgments, the requirement to disapply any national provision contrary to the EU general principle of prohibition of age discrimination appears to be based upon the primacy of EU law<sup>66</sup> rather than on the horizontal direct effect of the said principle. Notably, in this first stage, the disapplication does not stem from the specific nature of the general principle but from the «combined effect»<sup>67</sup> of such a principle and a secondary law provision applying it, normally a directive which is not able to have horizontal direct effect. The second phase is marked by the *Association de médiation sociale (AMS)* judgment<sup>68</sup> in which the Court stated that when a fundamental right «is sufficient in itself to confer on individuals an individual right which they may invoke as such»<sup>69</sup>, it produces horizontal direct effect<sup>70</sup>. It follows that the “combined effect approach”, characterising the previous phase, was left in favour of the requirements that a fundamental right, recognised by a general principle or a Charter's provision, must meet in order to have direct effect. The third phase is inaugurated by *Egenberger*. Notably, on this occasion, the Court stated that the prohibition of religious discrimination «is mandatory as a general principle of EU law».<sup>71</sup> This sentence reveals a new approach taken by the CJEU: the mandatory effect of this general principle stems from its intrinsic nature that «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».<sup>72</sup> The capacity of a Charter provision to produce direct effect – both vertical and horizontal – is ascertained by the Court applying the test elaborated in *AMS*.<sup>73</sup>

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<sup>62</sup> CJEU, 5 February 1963, case C-26/62, *van Gend en Loos*, ECLI:EU:C:1963:1.

<sup>63</sup> N. LAZZERINI, *The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect*, in K. ZIEGLER, P.J. NEUVONEN, V. MORENO-LAX (eds.), *Research Handbook on General Principles in EU Law*, Cheltenham, 2022, pp. 173.

<sup>64</sup> CJEU (Grand Chamber), 22 November 2005, case C-144/04, *Mangold*, ECLI: EU:C:2005:709.

<sup>65</sup> CJEU (Grand Chamber), 19 January 2010, case C-555/07, *Küçükdeveci*, ECLI:EU:C:2010:21.

<sup>66</sup> The Court explicitly referred to the principle of the primacy of EU law in *Küçükdeveci*, cit., point 54: «By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied» (emphasis added).

<sup>67</sup> N. LAZZERINI, *The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect*, cit., p. 179.

<sup>68</sup> CJEU (Grand Chamber), 15 January 2014, case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2.

<sup>69</sup> *Ibi*, point 47; see also point 49.

<sup>70</sup> For a detailed analysis of this judgment, see N. LAZZERINI, *(Some of) the fundamental rights granted by the Charter may be a source of obligations for private parties: AMS*, in *CMLR*, 2014, pp. 921 ff.; E. PALADINI, *Fundamental rights, horizontal exclusionary effect and a stone guest (Judgment C-176/12, A.M.S.)*, in *DUE*, 2014, pp. 571 ff.

<sup>71</sup> CJEU (Grand Chamber), *Egenberger*, cit., point 76 (emphasis added).

<sup>72</sup> *Ibi*, point 77. The new approach taken by the Court in *Egenberger* emerges also from the fact that in this point the Court explicitly referred to *Defrenne*; on this aspect, see N. LAZZERINI, *The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect*, cit., p. 182.

<sup>73</sup> In that regard, see A. COLOMBI CIACCHI, *The Direct Horizontal Effect of EU Fundamental Rights: CJEU 17 April 2018, Case C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. and CJEU 11 September 2018, Case C-68/17, IR v JQ*, in *European Constitutional Law Review*, 2019, pp. 294 ff.; C. SCHUBERT, *Church Labour Law in the Multi-Level System of Law – the Case Law of the CJEU in IR and Egenberger in the light of the ECHR*, cit.; F. CROCI, *Interazioni tra principi (e tra fonti) nel diritto dell'Unione europea: la sentenza Egenberger e i successivi sviluppi*, in *Stato, Chiese e pluralismo confessionale*. Special Issue edited by A. ANGELUCCI ET AL., *Pluralismo religioso e integrazione europea: le nuove*



Against such a background, the Court held that Article 21(1) of the Charter, codifying the prohibition of religious discrimination, and Article 47 on the right to effective judicial protection, do not need further specifications by other provisions of EU or national law. Therefore, these provisions are sufficient to confer on individuals a right which they are entitled to rely on as such in disputes between them.

The recognition of such a direct effect in *Egenberger* is important not only in itself<sup>74</sup> but also because its recognition, implying the *disapplication* of the national law limiting the judicial review of the employment decisions taken by churches, significantly reinforces the protection of employees against religious discrimination.

As a matter of fact, the third element of the relevance of *Egenberger* and *Cresco* is represented by the *consequences* stemming from the recognition of the mandatory effect characterising the prohibition of religious discrimination. In that regard, it must be emphasised that the horizontal direct effect of fundamental rights, recognised in general principles or codified in the Charter, paves the way to the definition of corresponding obligations binding private actors. This point is explicitly addressed in *Bauer and Broßonn*<sup>75</sup> in which the Court interpreted EU law, notably Article 7 of the working time Directive<sup>76</sup> and Article 31(2) of the Charter (right to paid annual leave), as precluding a national legislation that prevents the heirs of an employee from receiving an allowance instead of the paid annual leave acquired by the worker and not taken before their death. The Court held that when the consistent interpretation is not possible, such a national law must be disappplied, and the right to an allowance must be granted to the worker's heirs. As meaningfully stressed by the CJEU, when such a right is claimed against a private employer, the obligation to disapply stems from Article 31(2) of the Charter<sup>77</sup>. The right to paid annual leave, enshrined in this provision, «entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave».<sup>78</sup> On this occasion, the Court felt the necessity to clarify the «effect» produced by Article 31(2) of the Charter on a private employer. Notably, it specified that, although Article 51(1) of the Charter states that its provisions are addressed to the EU and to the Member States (when they are implementing EU law), this Article cannot be interpreted as preventing the Charter from requiring individuals to comply with some Charter's provisions.<sup>79</sup>

In this vein, the *Cresco* judgment is even more meaningful. On that occasion, after recognising that the Austrian law amounts to a direct discrimination on the grounds of religions

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*s fide*, 2019, pp. 86 ff. On the direct effect of the Charter provisions, see among others E. MUIR, *The Horizontal Effects of Charter Rights Given Expression to in EU Legislation, from Mangold to Bauer*, in *Review of European Administrative Law*, 2020, pp. 185 ff.; L. S. ROSSI, *The relationship between the EU Charter of Fundamental Rights and Directives in horizontal situations*, in *EU Law Analysis*, 2019, <http://eulawanalysis.blogspot.com/>; S. VEZZANI, *L'efficacia diretta della Carta dei diritti fondamentali: problemi e prospettive alla luce della recente giurisprudenza della Corte di giustizia*, in AA.VV., *Temi e questioni di diritto dell'Unione Europea. Scritti offerti a Claudia Morviducci*, Bari, 2019, pp. 207 ff.

<sup>74</sup> As a matter of fact, this was the first occasion on which the Court has recognised that the prohibition of religious discrimination is a general principle of EU law and has a «mandatory effect» (point 77); in that regard, see N. LAZZERINI, *The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect*, cit., p. 183.

<sup>75</sup> CJEU (Grand chamber), 6 November 2018, case C-569/16, *Bauer*, ECLI:EU:C:2018:871.

<sup>76</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9-19.

<sup>77</sup> On this occasion, the Court delivered its judgment on two joined cases: in one case (*Bauer*) the dispute was between a public employer and the heirs of a worker; instead, the other case (*Broßonn*) concerned a private employee; the Court specified that, in *Bauer*, the obligation to disapply was dictated by Article 7 of the Directive 2003/88/EC and Article 31(2) of the Charter; in *Broßonn* such an obligation stemmed only from Article 31(2) of the Charter.

<sup>78</sup> CJEU (Grand chamber), *Bauer*, cit., point 90 (emphasis added).

<sup>79</sup> *Ibi*, point 87.



contrary to Directive 2000/78, the Court assessed whether Article 21 of the Charter entails that, until the national legislator has amended its legislation to remove the said discrimination, a private employer does have the obligation to grant all their employees, regardless of their religion, a public holiday on Good Friday and, if they are required to work, a public holiday pay.

After recalling its well-established case-law denying the directives' horizontal direct effect<sup>80</sup> and the “*Mangold* rule”, according to which the principle of equal treatment is not established by Directive 2000/78 in itself but as a general principle of EU law<sup>81</sup>, the Court referred to *Egenberger* and upheld the mandatory effect of the prohibition of religious discrimination. Then, the Court strictly applied the consequences of the direct effect. Unlike in *Egenberger*, in *Cresco*, the protection provided for by Article 21 cannot be implemented by merely disapplying the national legislation, but it needed a levelling up solution<sup>82</sup>. In other words, until the national legislation in question has not been amended to restore equal treatment, «*a private employer who is subject to such legislation is obliged also to grant [their] other employees a public holiday on Good Friday, [...], and, [...] to recognise that those employees are entitled to public holiday pay where the employer has refused to approve such a request*».<sup>83</sup> Such a conclusion, which diverged from the solution proposed by Advocate General Bobek in his Opinion<sup>84</sup>, upheld that the Charter provisions provided with direct effect entail obligations binding private individuals.<sup>85</sup> However, in *Cresco*, the Court developed this conclusion to its maximum development by broadening the scope of the obligations binding private employers in correspondence to Article 21 of the Charter: as a matter of fact, the *levelling up solution* is able to protect not only the employee who suffered the discrimination in the specific case at hand, but *all* employees who risk to be discriminated against on the grounds of religion.

These judgments are even more meaningful if one considers that, as underlined by scholarship, they concern – although implicitly – the freedom to conduct a business, which, in

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<sup>80</sup> The exclusion of the directives' horizontal direct effect was stated by the Court for the first time in its famous judgment *Marshall* (CJEU, 26 February 1986, case C-152/84, *Marshall*, ECLI:EU:C:1986:84, point 48); then, it was frequently reiterated in its case-law; see, among others, CJEU (Grand Chamber), *Bauer*, cit., point 76; CJEU (Grand chamber), 7 August 2018, case C-122/17, *Smith*, ECLI:EU:C:2018:631, point 42; CJEU, 14 July 1994, case C-91/92, *Faccini Dori*, ECLI:EU:C:1994:292, point 20.

<sup>81</sup> CJEU (Grand Chamber), *Mangold*, cit., points 74-75; on this judgment and its evolution, see among others, C. FAVILLI, *Article 19 TFEU*, cit., pp. 484 ff.; ID., *Art. 21 della Carta dei diritti fondamentali dell'Unione Europea*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI, *Carta dei diritti fondamentali dell'Unione Europea*, Milano, 2017, pp. 413 ff., in particular pp. 417 ff.; N. LAZZERINI, *The Horizontal Application of the General Principles of EU Law: Nothing Less than Direct Effect*, cit.; C. KILPATRICK, *Article 21 EU Charter of Fundamental Rights: non-discrimination*, cit.

<sup>82</sup> In that regard, see among others, L. CECCHETTI, *Gli strumenti del giudizio di eguaglianza della Corte di giustizia alla prova del divieto di discriminazione sulla base della religione: il caso Cresco Investigation*, in *DUE*, 2020, pp. 317 ff.; G. CASSANO, *The freedom of religion in the workplace in the latest case law of the Court of Justice of the European Union: the Cresco Investigation case and religious holidays*, in *Variazioni su temi di diritto del lavoro*, 2019, pp. 1379 ff.

<sup>83</sup> CJEU (Grand Chamber), *Cresco Investigation*, cit., point 89 (emphasis added).

<sup>84</sup> Cf. Opinion of Advocate General Bobek delivered on 25 July 2018 in case C-193/17, *Cresco Investigation GmbH v Markus Achatzi*, ECLI:EU:C:2018:614, points 139 ff.; Advocate General denied the horizontal direct effect of the Charter provisions in the name of predictability and legal certainty of law, and argued that the employee could have brought an action for state liability to obtain compensation for damage caused by the failure of the concerned Member State to implement the Directive, in accordance with *Francoovich* jurisprudence.

<sup>85</sup> It is not surprising that *Egenberger* and *Cresco* have been qualified in literature as the judgments sanctioning the «victory of direct horizontal effect»; cf. A. COLOMBI CIACCHI, *Egenberger and Comparative Law: A Victory of the Horizontal Direct Effect of Fundamental Rights*, in *European Journal of Comparative Law and Governance*, 2018, pp. 207 ff.

the traditional case-law of the Court, was interpreted according to a very “generous” approach promoting the pursuance of the internal market and European economic integration.<sup>86</sup>

## 5. Concluding remarks

Based on the foregoing analysis, it is possible to make some considerations on the CJEU’s case-law on the prohibition of wearing religious symbols imposed by private employers.

In that set of decisions, the interpretation of Directive 2000/78 is not really framed within the fundamental rights enshrined in the Charter. Notably, the fundamental rights-based approach is quite lacking in *Achbita* and *Bouagnaoui*, where the Court moved away from a purely discrimination-based approach but considered only the employer’s freedom to conduct a business. By contrast, it gave no relevance to the employee’s freedom of religion. In *WABE*, the Court paid some more attention in that regard by affirming that Directive 2000/78 must be interpreted taking into account the different rights at stake and, among others, the freedom of religion. Yet, as stressed above, that affirmation remained more theoretical than practical. As a matter of fact, the assessment made by the Court and the revised test applied did not ensure full consideration to the freedom of religion; by contrast, the freedom to conduct a business continued to keep a dominant role. In other words, in *WABE*, the Court declared that the assessment of indirect discrimination on the grounds of religion must be framed within fundamental rights, but then it applied this framework in a very imbalanced way.

The jurisprudence on the prohibition of wearing religious symbols is deeply questionable; notably, it reveals the cherry-pick approach affecting the CJEU’s case-law on religious discrimination in the workplace. In that regard, it is worth recalling the judgments where an employee complains about a religious discrimination stemming from a legislative provision that accords an *advantage position* to a church/religious association and/or to employees belonging to that church (*Egenberger* and *Cresco*).

This latter set of decisions reveals the Court’s tendency to guarantee that disadvantaged employees are protected against discrimination. To do so, the CJEU firstly frames discrimination issues within the protection of fundamental rights by taking into full account the Charter. In this respect, *Egenberger* is paradigmatic. Although the questions referred were focused on Directive 2000/78, the Court framed it in the context of fundamental rights by stressing the necessity to strike a fair balance between the competing rights at stake namely, on the one hand, the churches’ right of autonomy (Articles 17 TFEU and 10 of the Charter) and, on the other, the employees’ right not to be discriminated against on the grounds of religion (Articles 10 and 21 of the Charter) and to obtain effective judicial protection of that right (Article 47 Charter).<sup>87</sup>

Secondly, the CJEU applied the principle of direct effect – one of the most important principles elaborated by the Court to ensure effective protection to rights conferred to individuals by EU law. Notably, in *Egenberger*, it recognised the horizontal direct effect to the principle of non-religious discrimination, laid down in Article 21(1) of the Charter. In *Cresco*, the Court applied the horizontal direct effect doctrine to its maximum development by adopting

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<sup>86</sup> M. PARODI, *The EU Charter of Fundamental Rights as the Source of Judicially Enforceable Obligations to the Activity of Private Companies*, cit.

<sup>87</sup> CJEU (Grand Chamber), *Egenberger*, cit., points 50 ff.

a levelling up solution entailing some relevant positive obligations binding private employers. That judgment provided a paradigmatic example of the extraordinary capacity which horizontal direct effect can have in terms of fundamental rights protection.

Some scholars have suggested that the narrow interpretation adopted in *Achbita* and *Bougnaoui* expresses a more general «reluctance» of the Court to address religious issues that have given rise to tension, as the drafting of the EU treaties and the EU Constitution proved.<sup>88</sup> The foregoing analysis proposes that the said *reluctance* does not affect the whole case-law on religious discrimination in the workplace but rather religious symbols issues. The short references made to *Egenberger* and *Cresco* show that, where the Court deals with national rules granting an advantageous position to some churches and their members, it is fully determined to protect disadvantaged employees against religious discrimination, and it uses all the tools provided by the EU legal order to ensure such an effective and direct protection.

Regardless of the (political) reasons underlying the attitude taken by the Court in its case-law on religious symbols, they should be set aside by fully valuing and applying the *WABE*'s affirmation that freedom of religion secured by the Charter is «relevant [...] in interpreting Directive 2000/78».<sup>89</sup> Such a statement – although partly betrayed in *WABE* – can pave the way for a new phase of the CJEU's approach to religious symbols that would be able to ensure a greater coherence in its jurisprudence on religious discrimination in the workplace and – first of all – to respect the Charter's position in the hierarchy of EU law sources.

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<sup>88</sup> L. VICKERS, *Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace*, in *European Labour Law Journal*, 2017, pp. 232 ff., in particular, pp. 254 ff.; see also, T. LOENEN, *In Search of an EU Approach to Headscarf Bans: Where to Go after Achbita and Bougnaoui?*, in *Review of European Administrative Law*, 2017, pp. 47 ff., in particular p. 48; E. HOWARD, *Islamic Headscarves and the CJEU: Achbita and Bougnaoui*, cit., p. 74.

<sup>89</sup> CJEU (Grand Chamber), *WABE*, cit., point 48.