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Religious clothing and symbols in employment

A legal analysis of the situation in the EU Member States

Including summaries in English, French and German

Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
Directorate D — Gender equality
Unit JUST/D2

European Commission
B-1049 Brussels

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A legal analysis of the situation in the EU Member States

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November 2017

Directorate-General for Justice and Consumers

2017

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Luxembourg: Publications Office of the European Union, 2017

ISBN 978-92-79-75352-7
Doi:10.2838/380042
Catalogue number DS-06-17-260-3A-N

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Executive summary

This report examines the wearing by individual employees of religious clothing and symbols at work. The existing national legislation and case law in the 28 Member States of the EU is considered together with that of the European Union and the Court of Justice of the European Union (CJEU) and the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the European Court of Human Rights (ECtHR), the Court overseeing the ECHR. National country fiches show (see table 1 below) that a minority of Member States have national, regional and/or local legal prohibitions relating to the wearing of (some forms of) religious clothing and symbols at work in public and/or private employment, in other areas or even in all public spaces. A few other Member States are considering such legislation. There is case law from just over half of the 28 EU Member States but there are also Member States where the issue has not (or not yet) arisen. Therefore, practices vary significantly between Member States, but the issue of the wearing of religious clothing or symbols has arisen in case law or debates in a considerable number of EU Member States.

Discrimination on the grounds of religion or belief is prohibited by the Employment Equality Directive.[1] Until recently, the CJEU had not given any judgments on religion or belief discrimination, but, on 14 March 2017, its first two judgments in this area came out.[2] Both cases concerned Muslim women who wanted to wear a Muslim headscarf or hijab[3] to work and who were dismissed when they refused to take these off. The judgments are, therefore, very important for the subject of this report. They will be referred to throughout the report and are analysed in detail in Chapter 5. But before this analysis, a number of other issues are examined. The report starts with an exploration of definitions of the terms: religion; belief; manifestations of religion or belief; and, religious clothing and religious symbols. The CJEU, in *Achbita v G4S* and *Bougnaoui v Micropole,* followed the case law of the ECtHR. The CJEU held that the term 'religion' needs to be given a wide interpretation and includes both the *forum internum*: the fact of having a belief, and the *forum externum*: the manifestation of a religious faith in public.[4] The CJEU and the ECtHR have both accepted that the wearing of the Islamic headscarf is a manifestation of religion. The CJEU held that the hijab is thus covered by the protection against religion or belief discrimination given by the Employment Equality Directive.

The fundamental human right to freedom of religion in Article 10 of the Charter of Fundamental Rights of the European Union (EUCFR) and Article 9 ECHR and, the fundamental human right to non-discrimination (Article 21 EUCFR and Article 14 ECHR/Protocol 12 to the ECHR) are analysed because they are pertinent for the subject of this report. The ECtHR has decided a number of cases on the wearing of religious clothing or symbols and can thus play a role as a source of guidance for the CJEU. Under Article 9(2) ECHR, the right to freely manifest one's religion can only be restricted if certain conditions are fulfilled: the restriction must be prescribed by law; must be necessary in a democratic society by fulfilling a pressing social need; must have a legitimate aim (these aims are mentioned in Article 9(2) ECHR); and, the means used to achieve that aim must be proportionate and necessary. The right not to be discriminated against can, according to the ECtHR, also be restricted under certain circumstances and here a similar justification test is applied. And, as is clear from Article 51(2) EUCFR, a similar test also applies to restrictions on the rights in Articles 10 and 21 EUCFR. The ECtHR has, generally, held that bans on the wearing of religious clothing or symbols are justified under Article 9(2) ECHR. In recent cases, the ECtHR has also accepted, under the legitimate aim of 'the protection of the rights and freedoms of others', state neutrality and the preservation of the conditions of 'living together'. However, the ECtHR has rejected gender equality

1 Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation (hereafter: 'the Employment Equality Directive' or 'the Directive').

2 Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV,* EU:C:2017:203 (hereafter: *Achbita v G4S*); and Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v Micropole Univers SA* EU:C:2017:204 (hereafter: *Bougnaoui v Micropole*).

3 The hijab is a scarf that covers the hair and neck, but leaves the face free.

4 *Achbita v G4S,* paras 27-28; *Bougnaoui v Micropole*, paras 29-30.

or human dignity as falling under this legitimate aim and it has clarified that public safety can only be accepted as a legitimate aim if there is concrete evidence of a threat.

The provisions of the Employment Equality Directive on direct discrimination, indirect discrimination, harassment, instruction to discriminate and victimisation are examined together with the concept of 'genuine occupational requirements' as provided for in Article 4(1) and (2) of the Directive. Some of these have played a role in the two CJEU cases mentioned above. Direct religion or belief discrimination takes place, according to Article 2(2)(a) of the Employment Equality Directive where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the ground of religion or belief. According to Article 2(2)(b) of the Directive, indirect religious discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, at a particular disadvantage compared to other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. From these definitions it is clear that to establish direct and indirect discrimination, a comparison needs to be made. The definitions also show that indirect discrimination can be justified by a legitimate aim and proportionate and necessary means. Direct discrimination cannot be justified unless it concerns positive action measures or unless it concerns a genuine and determining occupational requirement. Positive action falls outside the scope of this report and will not be discussed.

Article 4(1) of the Employment Equality Directive provides for an exception from the prohibition of discrimination in cases where being of a particular religion or belief is a genuine and determining occupational requirement. This exception applies to all grounds of discrimination covered by the EU Anti-discrimination Directives. However, Article 4(2) contains an additional exception for churches and public or private organisations the ethos of which is based on religion or belief. Article 4(2) has two parts: a church or an organisation with a religious ethos can, under prescribed conditions, apply a genuine, legitimate and justified occupational requirement; and, a church or an organisation with a religious ethos can require employees to act in good faith and with loyalty to the organisation's ethos. Article 4(2) has not been implemented in all Member States, but most have done so. However, the precise meaning of this provision is not very clear and, according to Chopin and Germaine:

> most of the controversy around the implementation of the provisions of the Employment Equality Directive on religion or belief centres on the extent of any exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools).[5]

This is thus an area in need of further clarification. The *Achbita v G4S* and *Bougnaoui v Micropole* cases only discussed the genuine and determining occupational requirements in Article 4(1), but not the exception in Article 4(2) of the Directive. The question, in *Bougnaoui v Micropole,* referred to the CJEU by the French Court of Cassation specifically addressed the requirement in Article 4(1) as **France** has not implemented Article 4(2). The CJEU did not mention the genuine and determining occupational requirement in *Achbita v G4S,* but Advocate Kokott, in her Opinion in that case, did.

The CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole* and the Opinions of the Advocates General (Advocate General Kokott in *Achbita v G4S*[6] and Advocate General Sharpston in *Bougnaoui v Micropole*)[7] in these cases raise issues relating to direct and indirect discrimination and the genuine and determining occupational requirement of Article 4(1) and are, therefore, analysed in detail in a separate chapter. In both cases, the CJEU accepted that the wearing of the Islamic headscarf was protected by the provisions against religion or belief discrimination in the Employment Equality Directive.

5 Chopin, I. and Germaine, C. (2016) *A Comparative Analysis of Non-discrimination Law in Europe 2016*, European network of legal experts in gender equality and non-discrimination, European Commission, Directorate-General for Justice and Consumers p. 17: http://www.equalitylaw.eu/downloads/3987-a-comparative-analyses-of-non-discrimination-law-in-europe-2016-pdf-1-2-mb.

6 Opinion Advocate General Kokott in Case C-157/15 *Achbita v G4S*, EU:C:2016:382.

7 Opinion Advocate General Sharpston in Case C-188/15 *Bougnaoui v Micropole*, EU:C:2016:553.

The analysis of these two cases includes some of the criticism raised against the judgments and an assessment what the judgments mean in practice in the view of the author. The Opinions of the Advocates General, which were very different and contradictory on some issues, are also examined. In *Achbita v G4S,* both the CJEU and the Advocate General found that there was no direct discrimination. But, in case the national court which referred the case to the CJEU held that there was indirect discrimination, the CJEU gave guidance on this. It held that it is a legitimate aim for an employer to have a neutrality policy in the work place because it is related to the freedom to conduct a business in Article 16 EUCFR. The CJEU held that, if there was indirect discrimination – and it was up to the referring Court to decide whether there was or not – then the ban on visible political, philosophical or religious symbols, as imposed by G4S, was justified and appropriate as long as: it was genuinely pursued in a consistent and systematic manner; it did not make a distinction between different religions or different (religious, philosophical or political) beliefs; the rule was limited to customer-facing employees; and, the employer had considered whether the employee could be moved to a job without contact with customers. According to the CJEU in *Bougnaoui v Micropole,* the wish of customers not to be served by someone with an Islamic headscarf was not a genuine and determining occupational requirement under Article 4(1) of the Employment Equality Directive.

The judgments in *Achbita v G4S* and *Bougnaoui v Micropole* have led to confusion and concerns in some Member States. In the view of the author, the judgements do not give employers the right to ban clothing and symbols of one particular religion only and they do not give employers a blanket right to dismiss employees who wear Muslim headscarves. The judgments make clear that bans should cover all religious, philosophical and political symbols and they make it difficult for an employer to justify restrictions on clothing for those employees who do not come into contact with customers.

The analysis of national law in the 28 EU Member States showed that few of them have specific legislation on the wearing of religious clothing in public employment and even fewer have specific legislation against this in private employment (see table 5 below). In some Member States, general bans on face covering clothing in public places cover public employment as well. But, debates about the issue are taking or have been taking place in many Member States and the examination of the case law reveals that bans are being challenged in tribunals or courts of quite a few Member States. The case law also shows that bans on the wearing of religious clothing or symbols in employment are most often seen as indirectly discriminatory and, where this is the case, the issue of justification plays an important role. However, it is clear that the justification test is not always applied in the same way. Courts in some Member States apply stricter requirements for justification than courts in other Member States. In many Member States, a difference is also made between religious clothing and symbols which cover the face and those which do not do so. Generally, restrictions on face-covering clothing are more easily justified, especially in situations, including employment situations, where communication plays an important role. However, the case law shows that the justification test also applies to bans on face-covering clothing, which is in line with what the ECtHR has held.

The analysis done in this report also reveals that the case law almost exclusively concerns the wearing of Muslim headscarves or other clothing, even though the legal bans that are in place are all formulated in neutral language and do not single out Islamic or other religious clothing or symbols. Islam and its clothing and symbols thus appear to be particularly problematic in many EU Member States and this appears to be linked to the rising tide of anti-Muslim hatred/Islamophobia across Europe. The report must thus be seen against the background of debates in many European countries about immigration and the integration of immigrant communities in their host societies. Not only do the migrants in many countries have a different religion, they also often practice this religion in a much more public way. This, together with the events of 9/11 in New York, the bombings in Madrid and London, the recent attacks in Paris, Brussels, London, Manchester and Barcelona and other acts of terrorism motivated by Islamist extremism, appear to have led to Muslims especially being seen as a threat to European societies. This, in turn, has led to debates about the integration, or lack of integration, of Muslims and other migrants into their host society. For many, the visible expression of religion or belief through religious clothing and symbols in the

public space, especially the wearing by Muslim women of face-covering veils or headscarves, is seen as a sign of not wanting to integrate and be part of that society. This has led to calls for bans on the wearing of such clothing or symbols in public spaces or at certain public or private work places. This background needs to be kept in mind when reading this report.

There is also great variety between the 28 Member States in the relationship between religion and the state, with some Member States being strictly secular and having a strict separation between church and state, while other Member States still have an established (state) church. Yet other Member States take up a position somewhere between these two. This relationship between church and state can also influence the debates on whether legislation should ban the wearing of religious clothing and symbols so this should also be kept in mind when reading the report.

Résumé

Le présent rapport est consacré au port par des travailleurs individuels de tenues ou de symboles religieux sur leur lieu de travail. Il analyse à cette fin la législation et la jurisprudence nationales en vigueur dans les 28 États membres de l'UE; de l'Union européenne et de la Cour de justice de l'Union européenne (CJUE); et de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH) et de la Cour européenne des droits de l'homme (CouEDH) qui veille à son application. Les fiches par pays montrent (voir le tableau 1 en page 7) qu'une minorité d'États membres ont édicté des interdictions légales nationales, régionales et/ou locales en rapport avec le port de (certaines formes de) tenues et symboles religieux sur le lieu de travail dans le cadre de l'emploi public et/ou privé, dans d'autres domaines ou même dans l'ensemble de l'espace public. Quelques autres envisagent ce type de législation. Une jurisprudence existe dans un peu plus de la moitié des 28 États membres mais la question ne s'est pas (ou pas encore) posée dans d'autres. Les pratiques varient donc considérablement d'un pays de l'UE à l'autre, mais la problématique du port de tenues ou de symboles religieux n'en a pas moins fait l'objet de cas de jurisprudence et de débats dans bon nombre d'entre eux.

La discrimination fondée sur la religion ou les convictions est interdite par la directive sur l'égalité en matière d'emploi.[1] La CJUE n'avait, jusqu'à une date récente, rendu aucun arrêt portant sur la discrimination fondée sur ces motifs, mais ses deux premiers arrêts en la matière ont été prononcés le 14 mars 2017.[2] Les deux affaires concernent des femmes musulmanes qui voulaient porter un foulard islamique ou hijab[3] au travail et qui ont été licenciées pour avoir refusé de l'enlever. Les arrêts s'avèrent donc très importants dans la perspective du présent rapport: il y sera fait référence tout au long de celui-ci et ils seront examinés en détail au chapitre 5. Préalablement toutefois, une série d'autres points seront abordés. Le rapport s'intéresse premièrement aux définitions d'une série de termes: religion; convictions; manifestations de la religion ou des convictions; et attributs vestimentaires religieux et les symboles religieux. Dans les affaires *Achbita c. G4S* et *Bougnaoui c. Micropole,* la CJUE a suivi la jurisprudence de la CouEDH. Elle a considéré qu'il convient de donner une large interprétation au terme «religion» et y inclut à la fois le *forum internum* (le fait d'avoir des convictions) et le *forum externum* (la manifestation en public de la foi religieuse).[4] La CJUE et la CouEDH ont admis l'une et l'autre que le port du foulard islamique est une manifestation de la religion. La CJUE a considéré que le hijab est dès lors visé par la protection contre la discrimination fondée sur la religion ou les convictions que confère la directive sur l'égalité en matière d'emploi.

Le droit fondamental à la liberté de religion consacré par l'article 10 de la Charte des droits fondamentaux de l'Union européenne (CDFUE) et l'article 9 de la CEDH ainsi que le droit fondamental à la non-discrimination (article 21 CDFUE et article 14 de la CEDH/ Protocole 12 à la CEDH) sont analysés en raison de leur pertinence pour le sujet du présent rapport. La CouDH s'est prononcée dans plusieurs affaires sur le port de tenues ou de symboles religieux et peut donc être source d'orientations pour la CJUE. En vertu de l'article 9, paragraphe 2, de la CEDH, la liberté de manifester sa religion ne peut faire l'objet de restrictions que pour autant que certaines conditions soient remplies: les restrictions doivent être prévues par la loi; elles doivent constituer des mesures nécessaires dans une société démocratique en répondant à un besoin social pressant; elles doivent avoir un but légitime (les buts visés sont énoncés à l'article 9, paragraphe 2 de la CEDH); et les moyens utilisés pour atteindre ce but doivent être proportionnés et nécessaires. Le droit à la non-discrimination peut, selon la CEDH, faire lui aussi l'objet de certaines restrictions dans des circonstances déterminées, et un critère de justification similaire est d'application. Il ressort clairement en outre de l'article 51, paragraphe 2, de la CDFUE qu'un critère analogue s'applique

1 Directive 2000/78/CE du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (ci-après «la directive sur l'égalité en matière d'emploi» ou «la Directive»).

2 Affaire C-157/15 *Samira Achbita et Centrum voor Gelijkheid van Kansen en voor Racismebestrijding contre G4S Secure Solutions NV,* EU:C:2017:203 (ci-après: *Achbita c. G4S*); et affaire C-188/15 *Asma Bougnaoui, Association de défense des droits de l'Homme (ADDH) contre Micropole Univers SA* EU:C:2017:204 (ci-après: *Bougnaoui c. Micropole*).

3 Le hijab est un foulard qui couvre les cheveux et le cou, mais laisse le visage dégagé.

4 *Achbita c. G4S,* points 27-28; *Bougnaoui c. Micropole,* points 29-30.

également aux restrictions imposées aux droits visés aux articles 10 et 21 de la Charte. La CouEDH a généralement considéré que l'interdiction de porter des tenues ou symboles religieux devait être justifiée en vertu de l'article 9, paragraphe 2, de la CEDH. Elle a également admis dans des affaires récentes la neutralité de l'État et la préservation des conditions du «vivre ensemble au titre du but légitime de «la protection des droits et libertés d'autrui». Elle a néanmoins refusé l'égalité hommes-femmes ou la dignité humaine comme relevant de ce but légitime, et précisé que la sécurité publique est uniquement admise en tant que but légitime s'il existe une preuve concrète de menace.

Le rapport se penche sur les dispositions de la directive sur l'égalité en matière d'emploi relatives à la discrimination directe, la discrimination indirecte, le harcèlement, l'injonction de discriminer et les rétorsions ainsi que sur le concept de l'«exigence professionnelle essentielle» prévue à l'article 4, paragraphes 1 et 2, de la Directive – certains de ces éléments ayant joué un rôle dans les deux affaires susmentionnées dont la CJUE a été saisie. Selon l'article 2, paragraphe 2 sous a), de la directive sur l'égalité en matière d'emploi, une discrimination directe fondée sur la religion ou les convictions se produit lorsqu'une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable en raison de sa religion ou de ses convictions. Selon l'article 2, paragraphe 2 sous b), de la même directive, il est considéré qu'une discrimination religieuse se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une religion ou de convictions données, par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifiée par un objectif légitime et que les moyens de réaliser cet objectif ne soient appropriés et nécessaires. Il apparaît clairement de ces définitions qu'une comparaison doit être faite afin d'établir l'existence d'une discrimination directe ou indirecte. Les définitions montrent également qu'une discrimination indirecte peut être justifiée par un but légitime et des moyens proportionnés et nécessaires. La discrimination directe ne peut pour sa part être justifiée à moins de concerner des mesures d'action positive ou une exigence professionnelle essentielle et déterminante. L'action positive sort du cadre du présent rapport et n'y sera donc pas abordée.

L'article 4, paragraphe 1, de la directive sur l'égalité en matière d'emploi prévoit une dérogation à l'interdiction de discrimination lorsque l'appartenance à une religion ou des convictions constitue une exigence professionnelle essentielle et déterminante. Cette exception s'applique à tous les motifs de discrimination visés par les directives européennes antidiscrimination. L'article 4, paragraphe 2, contient cependant une dérogation supplémentaire pour les églises et autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions. Cet article comprend deux parties: une église ou une organisation ayant une éthique religieuse peut, dans des conditions précises, appliquer une exigence professionnelle essentielle, légitime et justifiée; et une église ou une organisation ayant une éthique religieuse peut requérir des personnes travaillant pour elle une attitude de bonne foi et de loyauté envers l'éthique de l'organisation. Si tous les États membres n'ont pas mis en œuvre l'article 4, paragraphe 2, la plupart d'entre eux l'ont fait. Il n'en reste pas moins que la signification exacte de cette disposition n'est pas très claire et, selon Chopin and Germaine:

> l'essentiel de la controverse entourant la mise en œuvre des dispositions de la directive sur l'égalité en matière d'emploi relatives à la religion ou aux convictions porte sur l'étendue des exceptions prévues pour les religions organisées (églises notamment) et les organisations ayant une éthique fondée sur la religion ou les convictions (écoles confessionnelles par exemple).[5]

Il s'agit donc d'un domaine qui demande des éclaircissements complémentaires. Seules les exigences professionnelles essentielles et déterminantes visées à l'article 4, paragraphe 1, de la Directive ont été discutées dans le cadre des affaires *Achbita c. G4S* et *Bougnaoui c. Micropole,* mais l'exception visée à l'article 4, paragraphe 2, n'a pas été abordée. Dans l'affaire *Bougnaoui c. Micropole,* la question adressée

5 Chopin, I. et Germaine, C. (2016) *A Comparative Analysis of Non-discrimination Law in Europe 2016*, Réseau européen d'experts juridiques dans le domaine de l'égalité des genres et la non-discrimination, Commission européenne, direction générale de la justice et des consommateurs, p. 17: http://www.equalitylaw.eu/downloads/3987-a-comparative-analyses-of-non-discrimination-law-in-europe-2016-pdf-1-2-mb.

à la CJUE par la Cour de cassation française portait spécifiquement sur l'exigence visée au premier paragraphe de l'article 4, étant donné que la France n'a pas mis en œuvre le second paragraphe de cet article. La CJUE n'a pas mentionné l'exigence professionnelle essentielle et déterminante dans l'arrêt prononcé dans l'affaire *Achbita c. G4S,* mais l'Avocat général M[me] Kokott l'a fait dans ses conclusions relatives à cette même affaire.

Les arrêts de la CJUE et les conclusions des Avocats généraux dans les affaires *Achbita c. G4S* et *Bougnaoui c. Micropole* (M[me] Kokott dans la première[6] et M[me] Sharpston dans la seconde[7]) soulèvent certaines questions à propos de la discrimination directe et indirecte, et de l'exigence professionnelle essentielle et déterminante visée à l'article 4, paragraphe 1, et font dès lors l'objet d'une analyse approfondie dans un chapitre distinct. La CJUE a admis dans les deux affaires que le port du foulard islamique était protégé par les dispositions contre la discrimination fondée sur la religion ou les convictions figurant dans la directive sur l'égalité en matière d'emploi.

L'analyse de ces deux affaires inclut certaines critiques formulées à l'encontre des arrêts ainsi qu'une évaluation de leur signification pratique, selon l'auteur. Les conclusions des Avocats généraux, très différentes voire contradictoires sur certains points, sont également examinées. Dans l'affaire *Achbita c. G4S,* tant la CJUE que l'Avocat général constatent l'absence de discrimination directe. Mais la Cour n'en donne pas moins certaines orientations au cas où la juridiction nationale qui lui a adressé l'affaire devait retenir l'existence d'une discrimination indirecte. Elle considère qu'une politique de neutralité sur le lieu de travail constitue un but légitime pour un employeur parce qu'elle relève de la liberté d'entreprise visée à l'article 16 de la CDFUE. La CJUE a estimé qu'au cas où il y aurait discrimination indirecte – ce qu'il appartient à la juridiction de renvoi de décider – l'interdiction de symboles politiques, philosophiques ou religieux visibles, telle qu'imposée par G4S, serait alors justifiée et appropriée pour autant que la politique de neutralité soit poursuivie de manière cohérente et systématique; qu'elle ne fasse pas de distinction entre différentes religions ou différentes convictions (religieuses, philosophiques ou politiques); que la règle se limite au personnel en contact avec la clientèle; et que l'employeur ait envisagé la possibilité de transférer le travailleur à une fonction n'impliquant pas de contact avec la clientèle. Selon la CJUE dans l'arrêt *Bougnaoui c. Micropole,* le souhait d'un client de ne plus voir les prestations de service assurées par quelqu'un portant le foulard islamique ne saurait être considéré comme une exigence professionnelle essentielle et déterminante au titre de l'article 4, paragraphe 1, de la directive sur l'égalité en matière d'emploi.

Les arrêts rendus dans les affaires *Achbita c. G4S* et *Bougnaoui c. Micropole* ont suscité une certaine confusion et certaines préoccupations dans plusieurs États membres. De l'avis de l'auteur, ces arrêts n'octroient aux employeurs ni le droit d'interdire uniquement des tenues et symboles d'une religion particulière ni un droit général de licencier des travailleuses portant un foulard musulman. Ils établissent clairement que les interdictions doivent couvrir tous les symboles religieux, philosophiques et politiques, et ils font en sorte qu'il est difficile pour un employeur de justifier des restrictions en matière de tenue vestimentaire pour des salariés qui ne sont pas en contact avec la clientèle.

L'analyse du droit national des 28 États membres de l'UE montre que rares sont ceux qui se sont dotés d'une législation spécifique concernant le port d'attributs vestimentaires religieux dans l'emploi privé, et qu'ils sont plus rares encore à s'être dotés d'une législation spécifique en la matière dans l'emploi privé (voir le tableau 5 en page 95). Dans certains États membres, l'interdiction générale de vêtements couvrant le visage dans les lieux publics vise également l'emploi dans la fonction publique. Des débats sur cette question ont lieu ou ont eu lieu dans beaucoup d'États membres, et l'examen de la jurisprudence révèle que des interdictions sont contestées devant les cours et tribunaux d'un nombre non négligeable d'entre eux. La jurisprudence montre également que les interdictions de porter des tenues ou symboles religieux sur le lieu de travail sont le plus souvent perçues comme indirectement discriminatoires et que,

6 Conclusions de l'Avocat général M[me] Kokott dans l'affaire C-157/15 *Achbita c. G4S*, EU:C:2016:382.
7 Conclusions de l'Avocat général M[me] Sharpston dans l'affaire C-188/15 *Bougnaoui c. Micropole*, EU:C:2016:553.

lorsque tel est le cas, la question de la justification joue un rôle important. Il est clair néanmoins que le critère de justification n'est pas toujours appliqué de la même manière. Les juridictions de certains États membres appliquent en matière de justification des prescriptions plus strictes que les juridictions d'autres États membres. Dans beaucoup d'États membres, une distinction est également établie entre les tenues et symboles religieux qui couvrent le visage et ceux qui laissent le visage dégagé. De manière générale, les restrictions relatives aux vêtements couvrant le visage sont plus aisément justifiées, surtout dans les situations (y compris professionnelles) où la communication joue un rôle important. La jurisprudence montre cependant que le critère de justification s'applique également à l'interdiction de vêtements couvrant le visage, ce qui est conforme à la prise de position de la CouEDH.

L'analyse du présent rapport révèle par ailleurs que la jurisprudence concerne de manière quasiment exclusive le port de foulards ou autres attributs vestimentaires musulmans, même si les interdictions légales en vigueur sont toutes formulées en langage neutre et ne ciblent pas spécifiquement les tenues ou symboles liés à l'islam ou à une autre religion. L'islam et ses attributs vestimentaires et symboles apparaissent donc comme particulièrement problématiques dans bon nombre d'États membres de l'UE, ce qui pourrait être lié à la montée d'une haine anti-musulmane/islamophobie partout en Europe. Il convient donc d'envisager le rapport dans le contexte des débats en cours dans de nombreux pays européens à propos de l'immigration et de l'intégration des communautés immigrées dans les sociétés d'accueil. Non seulement les migrants présents dans de nombreux pays ont une religion différente, mais ils la pratiquent souvent de manière davantage publique. Cette situation, conjuguée aux évènements du 11 septembre à New York, à l'explosion de bombes à Madrid et à Londres, aux récentes attaques à Paris, Bruxelles, Londres, Manchester et Barcelone, et à d'autres actes de terrorisme motivés par un extrémisme islamiste, semble avoir eu pour effet que les Musulmans sont spécialement perçus comme une menace pour les sociétés européennes – ce qui a généré à son tour des débats sur l'intégration ou le manque d'intégration des Musulmans et d'autres migrants dans leur société d'accueil. Aux yeux de beaucoup, la manifestation visible de la religion ou des convictions par des tenues et symboles religieux dans l'espace public, et en particulier le port de voiles couvrant le visage ou de foulards par les femmes musulmanes, est considérée comme le signe d'un refus de s'intégrer dans une société et d'y participer. Cette perception est à l'origine de demandes d'interdiction de porter ce type de tenues ou de symboles dans l'espace public ou sur certains lieux de travail publics ou privés. Il convient de garder ce contexte à l'esprit lors de la lecture du présent rapport.

Il existe également une grande diversité entre les 28 États membres pour ce qui concerne le rapport entre la religion et l'État, certains étant strictement laïques et veillant à une séparation rigoureuse entre l'église et l'État tandis que d'autres ont encore une Église (d'État) établie. D'autres États membres encore optent pour une position se situant entre les deux précédentes. Le rapport entre l'église et l'État peut également influencer les débats sur le point de savoir si la législation doit ou non interdire le port de tenues et symboles religieux, ce qu'il faut également avoir à l'esprit en lisant le rapport.

Zusammenfassung

Der vorliegende Bericht untersucht das Tragen religiöser Kleidung oder Symbole seitens von Arbeitnehmerinnen und Arbeitnehmern am Arbeitsplatz. Untersucht wird neben der bestehenden nationalen Gesetzgebung und Rechtsprechung der 28 EU-Mitgliedstaaten auch die der Europäischen Union und des Gerichtshofs der Europäischen Union (EuGH) sowie der Europäischen Konvention zum Schutz der Menschenrechte und Grundfreiheiten (EMRK) und des Europäischen Gerichtshofs für Menschenrechte (EGMR), der die EMRK überwacht. Eine Übersicht über die einzelnen Länder (Tabelle 1, S. 7) zeigt, dass in einer Minderheit von Mitgliedstaaten nationale, regionale und/oder lokale gesetzliche Verbote existieren, die das Tragen (bestimmter Arten) religiöser Kleidung oder Symbole am Arbeitsplatz in öffentlichen und/oder privaten Beschäftigungsverhältnissen, in anderen Bereichen oder auch in allen öffentlichen Bereichen betreffen. Einige andere Mitgliedstaaten erwägen eine solche Gesetzgebung. Aus etwas mehr als der Hälfte der 28 EU-Mitgliedstaaten liegt Rechtsprechung vor; es gibt aber auch Mitgliedstaaten, in denen das Thema (noch) nicht behandelt wurde. Der Umgang der Mitgliedstaaten mit diesem Thema ist also sehr unterschiedlich, in der Rechtsprechung und in Debatten wurde das Tragen religiöser Kleidung oder Symbole aber in zahlreichen EUMitgliedstaaten thematisiert.

Diskriminierung wegen der Religion oder Weltanschauung ist nach der Gleichbehandlungsrahmenrichtlinie[1] verboten. Bis vor kurzem hatte der EuGH keinerlei Urteile zu Diskriminierung wegen der Religion oder Weltanschauung gefällt, am 14. März 2017 ergingen aber seine ersten beiden Urteile zu diesem Thema.[2] Beide Fälle betrafen muslimische Frauen, die bei der Arbeit ein islamisches Kopftuch bzw. einen Hijab[3] tragen wollten und entlassen wurden, weil sie sich weigerten, diese abzunehmen. Die Urteile sind für den Gegenstand dieses Berichts daher von großer Bedeutung. Auf sie wird im gesamten Bericht immer wieder Bezug genommen, und in Kapitel 5 werden sie ausführlich analysiert. Im Vorfeld dieser Analyse werden jedoch einige andere Fragen behandelt. Der Bericht beginnt mit einer Untersuchung von Definitionen der Begriffe: Religion, Weltanschauung, Bekundung einer Religion oder Weltanschauung sowie religiöse Kleidung und religiöse Symbole. In *Achbita gegen G4S* und *Bougnaoui gegen Micropole* folgte der EuGH der Rechtsprechung des EGMR. Der EuGH vertrat die Ansicht, dass der Begriff der Religion weit ausgelegt werden müsse und sowohl das *forum internum*, d. h. den Umstand, Überzeugung zu haben, als auch das *forum externum*, d. h. die Bekundung des religiösen Glaubens in der Öffentlichkeit, umfasse.[4] Sowohl der EuGH als auch der EGMR gingen davon aus, dass das Tragen des islamischen Kopftuchs eine Bekundung des religiösen Glaubens darstellt. Nach Ansicht des EuGH fällt der Hijab somit unter den in der Gleichbehandlungsrahmenrichtlinie gewährleisteten Schutz vor Diskriminierung wegen der Religion oder Weltanschauung.

Das grundlegende Menschenrecht auf Religionsfreiheit in Artikel 10 der EUGrundrechtecharta (EUGRC) und Artikel 9 EMRK sowie das grundlegende Menschenrecht auf Nichtdiskriminierung (Art. 21 EUGRC und Art. 14 EMRK/Protokoll Nr. 12 zur EMRK) werden untersucht, weil sie für den Gegenstand dieses Berichts von Bedeutung sind. Der EGMR hat eine Reihe von Urteilen zum Tragen religiöser Kleidung bzw. Symbole gefällt und kann somit als Wegweiser für den EuGH dienen. Nach Artikel 9 Absatz 2 EMRK kann das Recht, die eigene Religion frei zu bekennen, nur eingeschränkt werden, wenn bestimmte Voraussetzungen erfüllt sind: Die Einschränkung muss gesetzlich vorgesehen sein, sie muss in einer demokratischen Gesellschaft zur Erfüllung eines dringenden gesellschaftlichen Bedürfnisses notwendig sein, sie muss ein legitimes Ziel verfolgen (diese Ziele werden in Art. 9 Abs. 2 EMRK aufgeführt), und die Mittel müssen zur Erreichung dieses Ziels angemessen und erforderlich sein. Auch das Recht, nicht diskriminiert zu

1 Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf (im Folgenden „die Gleichbehandlungsrahmenrichtlinie" bzw. „die Richtlinie").

2 Rechtssache C-157/15, *Samira Achbita und Centrum voor Gelijkheid van Kansen en voor Racismebestrijding gegen G4S Secure Solutions NV,* EU:C:2017:203 (im Folgenden „*Achbita/G4S*"), und Rechtssache C-188/15, *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) gegen Micropole Univers SA*, EU:C:2017:204 (im Folgenden „*Bougnaoui/Micropole*").

3 Der Hijab ist ein Kopftuch, das Haare und Hals bedeckt, das Gesicht jedoch frei lässt.

4 *Achbita/G4S,* Rn. 27-28; *Bougnaoui/Micropole*, Rn. 29-30.

werden, kann nach Ansicht des EGMR unter bestimmten Voraussetzungen eingeschränkt werden, wobei hier eine ähnliche Rechtfertigungsprüfung zur Anwendung kommt. Und, wie aus Artikel 51 Absatz 2 EUGRC hervorgeht, gelten ähnliche Kriterien auch für Einschränkungen der in Artikel 10 und Artikel 21 EUGRC verankerten Rechte. Gemeinhin hat der EGMR entschieden, dass Verbote des Tragens religiöser Kleidung oder Symbole nach Artikel 9 Absatz 2 EMRK gerechtfertigt sind. In jüngeren Fällen hat der EGMR, im Rahmen des legitimen Ziels „Schutz der Rechte und Freiheiten anderer", auch Staatsneutralität und die Wahrung der Voraussetzungen des „Zusammenlebens" akzeptiert. Andererseits hat er jedoch abgelehnt, dass Geschlechtergleichheit bzw. Menschenwürde unter dieses legitime Ziel fallen, und erklärt, dass öffentliche Sicherheit nur dann als legitimes Ziel anerkannt werden kann, wenn konkrete Hinweise auf eine Bedrohung vorliegen.

Die Bestimmungen der Gleichbehandlungsrahmenrichtlinie zu unmittelbarer Diskriminierung, mittelbarer Diskriminierung, Belästigung, Anweisung zur Diskriminierung und Viktimisierung wurden ebenso geprüft wie das Konzept der „wesentlichen beruflichen Anforderungen" gemäß Artikel 4 Absatz 1 und 2 der Richtlinie. Einige davon haben in den beiden oben genannten Entscheidungen des EuGH eine Rolle gespielt. Gemäß Artikel 2 Absatz 2 Buchstabe a der Gleichbehandlungsrahmenrichtlinie liegt eine unmittelbare Diskriminierung wegen der Religion oder Weltanschauung vor, wenn eine Person wegen der Religion oder Weltanschauung eine weniger günstige Behandlung erfährt, als eine andere Person erfährt, erfahren hat oder erfahren würde. Eine mittelbare Diskriminierung wegen der Religion liegt nach Artikel 2 Absatz 2 Buchstabe b der Richtlinie vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen mit einer bestimmten Religion oder Weltanschauung gegenüber anderen Personen in besonderer Weise benachteiligen können, es sei denn diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich. Aus diesen Definitionen geht klar hervor, dass für die Feststellung von unmittelbarer oder mittelbarer Diskriminierung ein Vergleich durchgeführt werden muss. Die Definitionen zeigen auch, dass eine mittelbare Diskriminierung durch ein rechtmäßiges Ziel sowie angemessene und erforderliche Mittel gerechtfertigt sein kann. Eine unmittelbare Diskriminierung kann nur gerechtfertigt sein, wenn es sich um positive Maßnahmen oder um eine wesentliche und entscheidende berufliche Anforderung handelt. Positive Maßnahmen sprengen den Rahmen dieses Berichts und werden nicht behandelt.

Artikel 4 Absatz 1 der Gleichbehandlungsrahmenrichtlinie sieht eine Ausnahme vom Diskriminierungsverbot in Fällen vor, in denen die Religion oder Weltanschauung einer Person eine wesentliche und entscheidende berufliche Anforderung darstellt. Diese Ausnahme gilt für alle Diskriminierungsgründe, die von den EUAntidiskriminierungsrichtlinien erfasst werden. Artikel 4 Absatz 2 enthält jedoch eine zusätzliche Ausnahme für Kirchen und andere öffentliche oder private Organisationen, deren Ethos auf einer Religion oder Weltanschauung beruht. Artikel 4 Absatz 2 besteht aus zwei Teilen: Kirchen oder Organisationen mit religiösem Ethos können unter vorgeschriebenen Bedingungen wesentliche, rechtmäßige und gerechtfertigte berufliche Anforderungen stellen, und Kirchen oder Organisationen mit religiösem Ethos können von ihren Mitarbeitern und Mitarbeiterinnen verlangen, dass diese sich loyal und aufrichtig im Sinne des Ethos der Organisation verhalten. Artikel 4 Absatz 2 wurde nicht in allen Mitgliedstaaten umgesetzt, wohl aber in den meisten. Die genaue Bedeutung dieser Vorschrift ist jedoch nicht wirklich klar, und bei Chopin und Germaine heißt es dazu:

> Bei der Kontroverse um die Umsetzung der Vorschriften der Gleichbehandlungsrahmenrichtlinie zu Religion bzw. Weltanschauung geht es vor allem um den Umfang etwaiger Ausnahmen für organisierte Religionen (z. B. Kirchen) und Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht (z. B. religiöse Schulen).[5]

5 Chopin, I. und Germaine, C. (2016), *A Comparative Analysis of Non-discrimination Law in Europe 2016*, Europäisches Netzwerk von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung, Europäische Kommission, Generaldirektion Justiz und Verbraucher, S. 17: http://www.equalitylaw.eu/downloads/3987-a-comparative-analyses-of-non-discrimination-law-in-europe-2016-pdf-1-2-mb.

Es handelt sich hier also um einen Bereich, der weiterer Klärung bedarf. In den Rechtssachen *Achbita/G4S* und *Bougnaoui/Micropole* wurde lediglich auf die in Artikel 4 Absatz 1 genannten wesentlichen und entscheidenden beruflichen Anforderungen eingegangen, nicht jedoch auf die Ausnahme in Artikel 4 Absatz 2 der Richtlinie. Die Frage in *Bougnaoui/Micropole*, die der französische Kassationshof dem EuGH vorlegte, bezog sich speziell auf die Anforderung in Artikel 4 Absatz 1, da **Frankreich** Artikel 4 Absatz 2 nicht umgesetzt hat. In *Achbita/G4S* wurden die wesentlichen und entscheidenden beruflichen Anforderungen vom EuGH nicht erwähnt, wohl aber von der Generalanwältin Kokott in ihren Schlussanträgen in diesem Verfahren.

Die Urteile des EuGH in den Rechtssachen *Achbita/G4S* und *Bougnaoui/Micropole* sowie die Schlussanträge der Generalanwältinnen (Generalanwältin Kokott in *Achbita/G4S*[6] und Generalanwältin Sharpston in *Bougnaoui/Micropole*[7]) in diesen Verfahren sprechen Fragen im Zusammenhang mit unmittelbarer und mittelbarer Diskriminierung sowie der wesentlichen und entscheidenden beruflichen Anforderung in Artikel 4 Absatz 1 an und werden daher in einem separaten Kapitel eingehend behandelt. In beiden Rechtssachen kam der EuGH zu dem Ergebnis, dass das Tragen des islamischen Kopftuchs durch die in der Gleichbehandlungsrahmenrichtlinie enthaltenen Bestimmungen gegen Diskriminierung aufgrund der Religion oder Weltanschauung geschützt war.

Die Analyse dieser beiden Verfahren umfasst einige der an den Urteilen geäußerten Kritikpunkte und eine Einschätzung dessen, was die Urteile nach Ansicht der Verfasserin in der Praxis bedeuten. Die Schlussanträge der Generalanwältinnen, die in einigen Punkten sehr unterschiedlich und widersprüchlich waren, werden ebenfalls untersucht. In *Achbita/G4S* kamen sowohl der EuGH als auch die Generalanwältin zu dem Ergebnis, dass keine unmittelbare Diskriminierung vorlag. Sollte das nationale Gericht, das den Fall an den EuGH verwiesen hatte, jedoch für Recht erkennen, dass eine mittelbare Diskriminierung vorlag, gab der EuGH ihm dazu entsprechende Hinweise. Zunächst, so der EuGH, sei der Wunsch eines Arbeitgebers, am Arbeitsplatz eine Politik der Neutralität zu verfolgen, ein rechtmäßiges Ziel, da dies zur unternehmerischen Freiheit gemäß Art. 16 EUGRC gehöre. Sollte eine mittelbare Diskriminierung vorliegen – und es sei allein Sache des vorlegenden Gerichts zu entscheiden, ob eine solche vorliege oder nicht – sei, so der Gerichtshof, das von G4S verhängte Verbot sichtbarer politischer, philosophischer oder religiöser Symbole unter folgenden Voraussetzungen gerechtfertigt und angemessen: Es wurde in kohärenter und systematischer Weise angewandt, es unterschied nicht zwischen verschiedenen Religionen oder verschiedenen (religiösen, philosophischen oder politischen) Überzeugungen, es war auf Beschäftigte mit Kundenkontakt beschränkt, und der Arbeitgeber hatte die Möglichkeit geprüft, die Arbeitnehmerin auf einen Arbeitsplatz ohne Kundenkontakt zu versetzen. Nach Ansicht des EuGH in *Bougnaoui/Micropole* war der Wunsch von Kunden, nicht von einer Person mit islamischem Kopftuch betreut zu werden, keine wesentliche und entscheidende berufliche Anforderung im Sinne von Artikel 4 Absatz 1 der Gleichbehandlungsrahmenrichtlinie.

Die Urteile in *Achbita/G4S* und *Bougnaoui/Micropole* haben in einigen Mitgliedstaaten Verwirrung und Bedenken ausgelöst. Nach Ansicht der Verfasserin berechtigen die Urteile Arbeitgeber weder dazu, ausschließlich Kleidung oder Symbole einer bestimmten Religion zu verbieten, noch berechtigen sie Arbeitgeber generell dazu, Arbeitnehmerinnen, die ein muslimisches Kopftuch tragen, zu entlassen. Die Urteile stellen klar, dass Verbote sich auf alle religiösen, philosophischen und politischen Symbole erstrecken sollten, und sie machen es Arbeitgebern schwer, Kleidungsbeschränkungen für Beschäftigte zu rechtfertigen, die nicht mit Kunden in Kontakt kommen.

Die Analyse des nationalen Rechts der 28 EU-Mitgliedstaaten ergab, dass nur wenige von ihnen spezielle Rechtsvorschriften zum Tragen religiöser Kleidung in öffentlichen Arbeitsverhältnissen und noch weniger spezielle Rechtsvorschriften gegen das Tragen religiöser Kleidung in privaten Arbeitsverhältnissen erlassen haben (Tabelle 5, S. 95). In einigen Mitgliedstaaten beziehen generelle Verbote gesichtsverhüllender

6 Schlussanträge der Generalanwältin Kokott in der Rechtssache C-157/15, *Achbita/G4S*, EU:C:2016:382.
7 Schlussanträge der Generalanwältin Sharpston in der Rechtssache C-188/15, *Bougnaoui/Micropole*, EU:C:2016:553.

Kleidung im öffentlichen Bereich auch öffentliche Arbeitsverhältnisse mit ein. Diskussionen über das Thema finden oder fanden aber in vielen Mitgliedstaaten statt, und die Analyse der Rechtsprechung zeigt, dass Verbote in etlichen Mitgliedstaaten gerichtlich angefochten werden. Die Rechtsprechung zeigt auch, dass Verbote des Tragens religiöser Kleidung oder Symbole am Arbeitsplatz in den meisten Fällen als mittelbar diskriminierend angesehen werden und dass, wo dies der Fall ist, das Thema Rechtfertigung eine große Rolle spielt. Die Rechtfertigungsprüfung wird jedoch nicht immer in gleicher Weise angewandt. Gerichte in einigen Mitgliedstaaten wenden strengere Rechtfertigungskriterien an als Gerichte in anderen Mitgliedstaaten. In vielen Mitgliedstaaten wird auch zwischen religiösen Kleidungsstücken und Symbolen, die das Gesicht verhüllen, und solchen unterschieden, die dies nicht tun. Im Allgemeinen sind Beschränkungen für gesichtsverhüllende Kleidung leichter zu rechtfertigen, insbesondere in Situationen – auch Beschäftigungssituationen – in denen Kommunikation eine wichtige Rolle spielt. Die Rechtsprechung zeigt jedoch, dass die Rechtfertigungsprüfung auch für Verbote von gesichtsverhüllender Kleidung gilt, was mit der Sichtweise des EGMR in Einklang steht.

Die Analyse in diesem Bericht zeigt auch, dass die Rechtsprechung fast ausschließlich das Tragen muslimischer Kopftücher oder anderer muslimischer Kleidung betrifft, obwohl die geltenden gesetzlichen Verbote allesamt neutral formuliert sind und weder islamische noch andere religiöse Kleidung oder Symbole herausgreifen. Der Islam und seine Kleidung und Symbole scheinen also in vielen EU-Mitgliedstaaten besonders problematisch zu sein, und dies scheint mit dem Anstieg von antimuslimischem Hass/Islamophobie in ganz Europa zusammenzuhängen. Der Bericht muss daher vor dem Hintergrund der in vielen europäischen Ländern geführten Debatten über Einwanderung und die Integration von Gemeinschaften mit Migrationshintergrund in ihre Aufnahmegesellschaften gesehen werden. Die Migrantinnen und Migranten haben in vielen Ländern nicht nur eine andere Religion, sie üben diese Religion oft auch wesentlich öffentlicher aus. Dies – zusammen mit den Ereignissen des 11. September in New York, den Bombenanschlägen von Madrid und London, den jüngsten Anschlägen in Paris, Brüssel, London, Manchester und Barcelona und anderen durch islamistischen Extremismus motivierten terroristischen Anschlägen – scheint dazu geführt zu haben, dass insbesondere Muslime als Bedrohung für die europäischen Gesellschaften gesehen werden. Dies wiederum hat zu Debatten über die Integration, bzw. mangelnde Integration, von Muslimen und anderen Migranten in ihre jeweilige Aufnahmegesellschaft geführt. Viele sehen die sichtbare Bekundung von Religion oder Weltanschauung durch religiöse Kleidung und Symbole im öffentlichen Raum, insbesondere das Tragen von Gesichtsschleiern oder Kopftüchern seitens muslimischer Frauen, als ein Zeichen fehlenden Willens, sich in die jeweilige Gesellschaft zu integrieren und Teil derselben zu sein. Dies hat zu Rufen nach einem Verbot des Tragens solcher Kleidung oder Symbole im öffentlichen Raum bzw. an bestimmten öffentlichen oder privaten Arbeitsplätzen geführt. Dieser Hintergrund muss beim Lesen des Berichts berücksichtigt werden.

Auch in der Beziehung zwischen Religion und Staat existieren große Unterschiede zwischen den 28 Mitgliedstaaten: Während einige Mitgliedstaaten streng säkular sind und eine strikte Trennung zwischen Staat und Kirche aufweisen, haben andere Mitgliedstaaten nach wie vor eine Staatskirche. Wieder andere Mitgliedstaaten sind irgendwo dazwischen angesiedelt. Diese Beziehung zwischen Staat und Kirche kann die Diskussionen darüber, ob das Tragen religiöser Kleidung und Symbole per Gesetz verboten werden sollte, ebenfalls beeinflussen – auch dies gilt es bei der Lektüre des Berichts zu berücksichtigen.

1 Introduction

This report analyses a number of issues related to the wearing by individual employees of religious clothing and symbols at work, including existing national legislation and case law. National country fiches show that some Member States have national, regional and/or local legal prohibitions relating to the wearing of (some forms of) religious clothing and symbols at work in public and/or private employment, in other areas or even in all public spaces. Some other Member States are considering such legislation. **Austria**, **Belgium**, **Bulgaria** and **France** have national legislation, while **Belgium, Germany** and **Spain** have municipal or regional/state provisions against the wearing of religious clothing or symbols. In **Latvia** and the **Netherlands**, there are legislative proposals going through the parliamentary process and, in **Luxembourg**, the Minister of Justice has been asked to prepare a bill. In both **Slovakia** and **Slovenia**, bans have been proposed by one national party, but these were rejected by other parties. In many Member States political and public debates have also taken place on the issue, sometimes following one or more widely publicised cases. For example, in **Croatia**, the recent CJEU cases concerning Muslim headscarves[8] led to outrage and in the **Czech Republic**, although the issue is generally not debated, there was some debate and a wave of criticism of a case where a Muslim student was not allowed to wear a headscarf.[9] In the **UK**, debates took place after the CJEU cases mentioned and also after the decision of the ECtHR in *Eweida and Others v the United Kingdom*[10] and, following the latter judgment, the Equality and Human Rights Commission produced guidance.[11] On the other hand, there are also Member States, such as **Cyprus**, **Estonia**, **Finland**, **Greece**, **Hungary**, **Italy**, **Lithuania**, **Malta**, **Poland**, **Portugal** and **Romania**, in which the issue has not arisen and is not debated, although some of these countries do have some case law on the wearing of religious clothing or symbols. Therefore, practices in this area vary significantly between Member States, but the issue of the wearing of religious clothing or symbols has arisen in case law or debates in a considerable number of EU Member States.

Table 1: State of Play in the Member States

Member State	Legislation in force?	Legislative proposal?	Debates?	Case law?
Austria	Yes, in force: 1 October 2017	No	Yes	Yes
Belgium	Yes, at national and state level	No	Yes	Yes
Bulgaria	Yes	No	Not much	No
Croatia	No	No	Yes, in relation to schools and hospitals and public outrage after CJEU decisions	No
Cyprus	No	No	No	No
Czech Republic	No	No	No, but outrage about Muslim student who was not allowed to wear headscarf	No
Denmark	Only in relation to judges	No bill yet, but bans discussed	Yes	Yes, one case
Estonia	No	No	No	No
Finland	No	No	No	Yes, two cases
France	Yes, national and local	No	Yes	Yes

8 *Achbita v G4S* and *Bougnaoui v Micropole*.

9 **Czech Republic**: Hospodářské noviny (2017), *Soud zamítl* žalobu *studentky na* školu *kvůli zákazu hidžábu,* http://domaci.ihned.cz/c1-65603220-soud-zamitl-zalobu-studentky-kvuli-hidzabu-pozadovala-omluvu-a-60-tisic-korun.

10 *Eweida, Chaplin, Ladele and McFarlane v the United Kingdom*, App. Nos 48420/10, 59842/10, 51671/10 and 36516/10 and 59842/10, 15 January 2013.

11 **UK**: Equality and Human Rights Commission, *Religion or Belief: Dress Codes and Religious Symbols*: https://www.equalityhumanrights.com/en/advice-and-guidance/religion-or-belief-dress-codes-and-religious-symbols.

Member State	Legislation in force?	Legislative proposal?	Debates?	Case law?
Germany	Yes, at state (Länder) level	No	Yes	Yes
Greece	No	No	No	No
Hungary	No	No	No, except in relation to one case	Yes, one case
Ireland	No	No	Academic debate only	Yes
Italy	No	No	No	Yes
Latvia	No	Yes	Yes, on draft law	Yes
Lithuania	No	No	No	No
Luxembourg	No	Yes, minister has been asked to prepare bill	Only on the wearing of the veil	No
Malta	No	No	No	No
Netherlands	No	Yes	Yes	Yes
Poland	No	No	No, but research by Equality Body planned	Yes
Portugal	No	No	No	No
Romania	No	No	No	No
Slovakia	No	Proposed but rejected	Some after proposal	No
Slovenia	No	Proposed but rejected	No	No
Spain	Only attempts at local level but courts have denied municipalities the possibility of introducing restrictions on the use of religious clothing		Yes	Yes
Sweden	No	No	No	Yes
UK	No	No	Yes	Yes

This report will analyse EU and national legislation and case law on direct and indirect discrimination on the ground of religion or belief, as well as the concept of 'genuine occupational requirements' as provided for in Article 4(1) and (2) of the Employment Equality Directive and the implementation of these provisions in the Member States. With regard to Article 4(2) – which applies to churches and organisations who have a religious ethos – the question whether secularism and state neutrality can also count as such an ethos will be addressed. Where common approaches between the Member States are present, these will be identified. The report will cover the **28 Member States of the EU** and will not cover any additional states. It will only examine the wearing of religious clothing and symbols in employment and will not cover other areas. This report will only examine clothing and symbols that are worn by individuals and will not cover, for example, the display of religious symbols in the work environment.

Some Member States have bans on the wearing of religious clothing or symbols in public employment and some require neutrality with regard to religion or belief from their public employees and they expect them to represent the neutral or secular character of the state, while other Member States do not make a distinction between public and private employment in this regard. The possible distinction between public and private employment will be examined in this report. This examination will be placed in the context of Article 21 in conjunction with Article 10 EUCFR. Article 10 guarantees freedom of thought, conscience and religion and the freedom to manifest one's religion or belief 'in worship, teaching, practice and observance' and is thus particularly pertinent for this study. Article 21 contains a prohibition of discrimination on a large number of grounds of discrimination, including religion or belief. Article 10 echoes Article 9 ECHR. Not only have all Member States signed and ratified the ECHR, but Article 52(3)

EUCFR determines that, where the rights in the Charter correspond to the rights in the ECHR, the meaning and scope of the Charter rights shall be the same as those laid down by the ECHR. Therefore, the ECHR and the case law of the ECtHR will be examined where relevant. The ECtHR has decided on the wearing of religious clothing and symbols in a number of cases and thus this case law can and should play an important role in the interpretation of the provisions against religion and belief discrimination in the Employment Equality Directive. Article 52(3) EUCFR also makes clear that it does not prevent Union law from providing more extensive protection than the ECHR.

The debates about the wearing of religious clothing and symbols (at work) do not occur in a vacuum, they have taken and are taking place against the background of discussions in many European countries about immigration and the integration of immigrant communities in their host societies. In the last 4 or 5 decades, many European countries have seen the arrival of migrants from all over the world, often from different religions than the mainly Christian population of Europe although, for some EU Member States, this has not happened until much more recently. Not only do the migrants have a different religion, they also often practice this religion in a much more public way. This, together with the events of 9/11, the bombings in Madrid and London, the recent attacks in **France**, **Belgium**, **Spain** and the **UK** and other acts of terrorism linked to Islamic religious motives, have led to especially Muslims being seen as a threat to European societies. This, in turn, has led to debates about the integration, or lack of integration, of Muslims and other migrants into their host society. For many, the visible expression of religion or belief through religious clothing and symbols in the public space, especially the wearing by Muslim women of face-covering veils (niqab or burqa)[12] or headscarves (hijab), is seen as a sign of not wanting to integrate and be part of that society.[13] This has led to calls for bans on the wearing of such clothing or symbols in public spaces or at certain public or private work places. The debates and the legislation described in this report must thus be seen against this background.

Although legal bans of, for example, face-covering clothing which are in place in **Austria**, **Belgium**, **Bulgaria** and **France** and are proposed elsewhere, are couched in neutral terms and prohibit all forms of face-covering clothing, they are usually referred to colloquially as 'burqa bans', which shows the real target of such bans. That the bans are specifically aimed at the wearing of Muslim face-covering veils is also clear from the fact that, in the parliamentary and wider popular debates, one of the recurring arguments for imposing a legal ban is that this is necessary to promote equality between women and men and to fight the oppression of (Muslim) women who are made to wear religious head and face-coverings by men. These veils are described as symbols of the oppression of women and as going against a woman's fundamental rights and freedoms.[14] This background needs to be kept in mind when reading this report.

There is also great variety between the **28 Member States** in the relationship between religion and the state, with some Member States being strictly secular and having a strict separation between church and state like, for example, **Croatia**, **Czech Republic**, **France**, **Latvia**, **Lithuania**, **Portugal**, **Spain** and

12 The niqab is a veil that covers the head and face with the exception of the eyes. The burqa is a loose robe that covers the female form from head to toe with the exception of the hands and with gauze covering or a slit for the eyes. It must be noted that very few women in Europe wear a burqa; the vast majority of women wearing face-covering veils in Europe wear the niqab or similar type veils. See on this: Brems, E., 'Introduction to the Volume', in Brems, E. (ed.) *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, Cambridge University Press, 2014) p. 3. There are other names for Islamic headscarves and face covering veils, but this report will use the term 'hijab' or (Islamic) headscarf for the headscarf which leaves the face free, while the terms 'niqab' and 'burqa' will be used for veils or clothing that covers the whole or part of the face.

13 The furore about the wearing of the 'burkini' in **France** in the summer of 2016 is an example of this. A burkini (a portmanteau made up from the words 'burqa' and 'bikini') is a piece of women's clothing for swimming that is in two pieces and that covers the whole body except the face, hands, and feet. See on the burkini issue: Hochman, T. (2016) *Islam on the Beach – The Burkini Ban in France:* http://verfassungsblog.de/islam-on-the-beach-the-burkini-ban-in-france/ and Howard, E. (2016) *What (Not) to Wear on a French Beach this Summer:* https://mdxminds.com/2016/08/31/what-not-to-wear-on-a-french-beach-this-summer/.

14 See on this: Howard, E. (2012) 'Banning Islamic Veils: Is Gender Equality a Valid Argument?' 12, 3, *International Journal of Discrimination and the Law*, p. 148.

Sweden, while other Member States still have an established (state) church, like, for example, **Denmark**, **Greece**, **Malta** and the **UK**. Yet other Member States take up a position somewhere between these two. This relationship between church and state can also influence the debates on whether legislation should ban the wearing of religious clothing and symbols.

Prohibitions on the wearing of religious clothing or symbols in employment may amount to discrimination on the ground of religion or belief against the wearer. The Employment Equality Directive prohibits such discrimination in the fields of employment, occupation and vocational training.[15] The CJEU has recently delivered its first two judgments related to religion or belief discrimination under the Directive, both concerning Muslim women who wanted to wear Islamic headscarves at work and were dismissed when they refused to take these off.[16] Both women claimed that their dismissal constituted discrimination on the grounds of religion or belief. The lower courts in their respective countries (**Belgium** and **France**) rejected their claims while, following appeal, the Courts of Cassation in both countries made a preliminary reference to the CJEU, posing different questions. Advocates-General Kokott, in *Achbita v G4S,*[17] and Sharpston, in *Bougnaoui v Micropole,*[18] issued substantially different opinions and they arrived at, essentially, opposite conclusions. The judgments raise questions about the meaning to be given to 'direct' and 'indirect' discrimination, to the justification test for indirect discrimination and to the concept of 'genuine and determining occupational requirements' in the Employment Equality Directive. These judgments and what they mean in practice will be examined in this report.

Bans on the wearing of religious clothing or symbols may give rise to (direct or indirect) discrimination on other grounds than religion or belief as well, for example, discrimination on the grounds of gender or of racial and ethnic origin. It could even give rise to discrimination on more than one ground, which is often referred to as multiple discrimination. For example, if such bans significantly affect women more than men, this could amount to gender discrimination. Bans on the wearing of face-covering veils or Islamic headscarves only affect Muslim women, as men do not wear these items of clothing. In a similar way, bans on the wearing of turbans would only affect men. So in these cases, there could be discrimination on the grounds of religion or belief and of gender. Some bans on the wearing of religious clothing or symbols affect people from certain racial or ethnic origins, for example, from non-Western origin, more than others and thus could constitute (direct or indirect) racial or ethnic origin discrimination. The report will examine whether there are provisions addressing multiple discrimination in national legislation and in case law and whether cases concerning bans on the wearing of religious clothing or symbols have been challenged on other grounds of discrimination, like gender or racial or ethnic origin, or on multiple grounds.

For each of the issues referred to here, an analysis will be provided of the relevant European and national legislation and case law in the **28 Member States**. Common approaches will be classed together and states will be classified according to the approaches adopted.

Structure of the report

This report examines the following topics:

1. Definitions of religion and belief, religious clothing and religious symbols;
2. EU and European human rights context: Articles 10 and 21 EUCFR and Article 9 and 14, and protocol 12 ECHR;

15 There is a proposal to extend the material scope of the Directive beyond these areas (see: COM (2008) 426 Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation) but this proposal has not been adopted to date. As this report is confined to the wearing of religious clothing or symbols in employment, the proposal will not be discussed.

16 *Achbita v G4S* and *Bougnaoui v Micropole*.

17 Opinion Advocate General Kokott in *Achbita v G4S*.

18 Opinion Advocate General Sharpston in *Bougnaoui v Micropole*.

3. EU context: Directive 2000/78/EC (Employment Equality Directive), including direct and indirect discrimination, justification, genuine and determining occupational requirements;
4. CJEU cases on the wearing of religious clothing in employment and Advocates General Opinions;
5. Relevant national law.

The report includes a number of tables summarising the position in national law in the **28 Member States**. The tables and the information provided in the report are based on country fiches and questionnaires completed by national experts from the European network of legal experts in gender equality and non-discrimination and on the comparative report on Anti-discrimination law in Europe done by the same network,[19] as well as desk research by the author. Throughout the report, the case law of the Member States has been used to illustrate concepts and issues.

19 Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016.*

2 Definitions

A preliminary question needs to be discussed: how should the terms 'religion' and 'belief' be defined? The Employment Equality Directive does not give a definition of either of these terms. In both *Achbita v G4S* and *Bougnaoui v Micropole,* the CJEU referred to Article 10 EUCFR, which, as mentioned before, guarantees freedom of religion and the freedom to manifest one's religion, and stated that Article 10 corresponds with Article 9 ECHR, and thus that, in accordance with Article 52(3) of the EUCFR, the right has the same meaning and scope as the right in Article 9 ECHR. The Court explained that the term 'religion' should be interpreted in a broad sense as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.[20] Therefore, the term 'religion' should be given a broad interpretation and this follows the interpretation given to the term by the ECtHR. According to Advocate General Kokott, in her Opinion in *Achbita v G4S,* the scope of the Employment Equality Directive could not be interpreted restrictively if its objective, which aimed to combat discrimination in employment and occupation, was to be achieved. She also considered that, although a broad interpretation did not mean that any behaviour or actions were automatically protected because they were based on a religious conviction, in this case it was clear that Ms Achbita wore the headscarf for religious reasons and that there was no reason to doubt the sincerity of her motivation.[21] Therefore, according to Advocate General Kokott, the CJEU should follow the ECtHR's approach in relation to Article 9 and 'regard the foregoing as a factor linking this case to religion to an extent sufficient to bring it within the substantive scope of the EU-law prohibition on religious discrimination'.[22] In her Opinion in *Bougnaoui v Micropole,* Advocate General Sharpston made clear that she regarded the wearing of distinctive apparel as part of one's religious observance, as falling squarely under the freedom to manifest one's religion and then she addressed the issue under the Employment Equality Directive.[23]

Therefore, the CJEU and both Advocates General considered the restrictions on the wearing of the Islamic headscarf I at issue in these cases as falling under the protection against religion or belief discrimination in the Directive. In relation to the term 'belief', the ECtHR has held that, to be protected by the freedom of religion in Article 9 ECHR, a religious or philosophical belief must: attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; not be incompatible with human dignity; not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.[24] As the CJEU followed the ECtHR in relation to the meaning of the term 'religion', it is likely to follow this definition of 'belief' as well. The EU Commission has explained that the concept of 'belief' should be read in the context of 'religion or belief' and that it refers to a belief or a philosophical conviction which does not need to be of a religious nature, but it does not cover political opinion.[25]

Not all Member States define the terms 'religion' or 'belief' in their national legislation but some of them give a definition and/or make clear that the terms should be interpreted broadly. In **Austria**, the explanatory notes to the Equal Treatment Act state that the terms 'religion and 'belief' must be interpreted in a broad manner and then give more information on the definition of these terms. Especially 'religion' is not restricted to churches and officially recognised religious communities. Nevertheless, it has to be noted that for a religion there are minimum requirements concerning a statement of belief, some rules for the way of life and a cult. Religion is any religious, confessional belief, the membership of a church or religious community. The explanatory notes also make it clear that the wearing of religious symbols and clothing is

20 *Achbita v G4S,* paras 27-28; *Bougnaoui v Micropole*, paras 29-30.
21 Opinion AG Kokott in *Achbita v G4S,* para. 35.
22 Opinion AG Kokott in *Achbita v G4S,* paras 37 and 38.
23 Opinion AG Sharpston in *Bougnaoui v Micropole*, para. 73.
24 *Campbell and Cosans v United Kingdom,* App. Nos 7511/76 and 7743/76, 23 March 1983, para. 36.
25 SWD (2014) 5, Annex to COM (2014) 2, Joint Report on the Application of Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation ('Employment Equality Directive'), 17 January 2014. SWD (2014) 5: http://ec.europa.eu/justice/discrimination/files/swd_2014_5_en.pdf COM (2014) 2: http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf.

covered by the scope of the protection. It constitutes an infringement of the prohibition of discrimination, if the employer acknowledges the wishes of a specific group while not acknowledging those of another group. In relation to belief, the explanatory notes state that the term is closely connected with the term 'religion'. It is a classification for all religious, ideological, political and other leading perceptions of life and of the world as a construction of sense, as well as for an orientation of the personal and societal position for the individual understanding of life. 'Belief' means non-religious belief, as the religious part is fully covered by the term 'religion'. Belief is a system of interpretation consisting of personal convictions concerning the basic structure, modality and functions of the world; it is not a scientific system. As far as beliefs claim completeness, they include perceptions of humanity, views of life, and morals.

In **Cyprus**, the constitutional right to freedom of religion covers atheists as well and is not limited to traditional religions or religions with institutional characteristics or practices analogous to traditional religions, so there is a wide interpretation of the term 'religion'. In the decisions of the **Cypriot** equality body, religion is often used interchangeably with ethnicity and race.[26] In **France**, there is no definition in legislation, but the case law has established that a religion can be defined by the convergence of two elements, an objective element, the existence of a community, and a subjective element, a common faith. In **Germany**, the case law of the Federal Constitutional Court makes clear that 'faith' in this context is interpreted as a subjective conviction relating to religion or a philosophical belief independently of the content of the religion or belief. Religion and belief encompass a wide range of systems of convictions not limited to those which are well established. Often, religion and belief are taken to be any specific views in relation to the world as a whole and the origin and purpose of humankind which gives sense to human life and the world.

In **Greece**, the Constitution defines religion as a 'known' religious belief and the Council of State has explained this as meaning that a religion is 'known' as long as it is not hidden and it does not pose an affront to public order or morality or constitute a form of proselytism (trying to convert others with some form of pressure). In **Hungary**, Article 6 of the Act CCVI on the Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities states that religious activities are linked to a worldview which is directed towards the transcendental, has a system of faith-based principles, the teachings of which are directed towards existence as a whole, and which embraces the entire human personality through specific requirements and conduct. Because the **Hungarian** Equal Treatment Act has an open-ended list of grounds, anything that is not regarded as falling under the term 'religion', can still be dealt with as 'other characteristic'.

In **Ireland**, 'religious belief' is defined as including 'religious background or outlook' while, in **Italy**, the Constitutional Court has stated that a broad meaning of church or religious group is included in Constitutional provisions dealing with freedom of religion. In the **Netherlands**, case law has made it clear that the terms 'religion' and 'belief' are broadly conceived and the Constitutional Court in **Romania** has mentioned the case law of the ECtHR in relation to definitions of 'religion' and 'belief'. The Criminal Code in **Slovakia** uses the terms 'confession/creed' and law commentaries have explained this as the active or passive relation to a particular religion as to the general theory of the interpretation of the world presented by a particular faith. **Slovak** law makes no clear distinction between religion, confession/creed and belief. In **Spain**, there is no formal definition of religion but a 'negative definition' in Article 3.2 of

26 A number of the Czech Republic's equality body decisions adopt a liberal approach to conceptualising groups and communities as having multiple identities, with religion being one of them. Thus, religion is used interchangeably with ethnicity or race and elements deriving from religion such as culture and customs are also cited by the equality body as protected grounds. In the course of the evolution of identities, the identity marker for two larger communities of Cyprus (Greek/Cypriot and Turkish/Cypriot) changed over the decades from religion (in the 1940s and 1950s) to ethnicity in the years which followed the establishment of the Cypriot state (1960). The intersectionality of grounds in the Cypriot context becomes apparent in Article 2 of the Constitution which defines the "Greek Community" as comprising of "all citizens of the Republic who are of Greek origin and whose mother tongue is Greek or who share the Greek cultural traditions or *who are members of the Greek-Orthodox Church*". Likewise, the Turkish Community is described as "compris[ing] all citizens of the Republic who are of Turkish origin and whose mother tongue is Turkish or who share the Turkish cultural traditions or *who are Moslems*" (emphasis added in country fiche).

the Organic Law on Religious Freedom, which determines that activities, purposes and entities relating to or engaging in the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection of this Act. The **Spanish** Constitutional Court has held that the legal notion of a religious denomination is characterised by three elements: the belief in a Supreme Being developed into tenets and moral commands, an external worship and a certain institutional organisation.[27] In **Sweden**, there are no definitions in legislation or in case law and one reason given for this is the overlap between ethnicity and religion. In the **UK**, the Equality Act 2010 makes clear that a lack of religion and a lack of belief are also covered and, the explanatory notes to the Act point out that the definition is broad and in line with Article 9 ECHR and, in relation to the meaning of 'philosophical belief', it gives the requirements given in *Campbell and Cosans v the United Kingdom,* discussed above.

Therefore, there are definitions of the terms 'religion' and 'belief' in a number of Member States and generally a wide interpretation is given to these terms. This broad interpretation has now been confirmed by the CJEU in *Achbita v G4S* and *Bougnaoui v Micropole,* as discussed above. In both cases, the CJEU stated that the term 'religion' includes the manifestation of religious faith in public[28] and appeared to accept, as the Advocates General in both cases did, that the wearing of an Islamic headscarf was such a public manifestation and thus fell within the protection of the Employment Equality Directive. In the view of the author, the CJEU followed the ECtHR in this, as the ECtHR now also appears to accept quite readily that the wearing of religious clothing or a religious symbol is a manifestation of religion or belief and then continues with assessing whether the interference with this manifestation is justified under Article 9(2) ECHR.

The ECtHR has also explained, in *Eweida and Others v the United Kingdom,* that in order to establish that an act is a manifestation of religion or belief for the purposes of Article 9, the applicant does not have to establish that he or she acted in fulfilment of a duty mandated by the religion in question. It is sufficient to establish the existence of a sufficiently close and direct link between the act and the underlying belief.[29] This suggests that the ECtHR accepts that there may be different views of what a particular religion or belief requires in relation to the wearing of clothing or symbols, for example, even though not all Christians see the wearing of a crucifix as compulsory, some see this as a requirement of their belief, as Ms Eweida did in the ECtHR case. This was accepted by the ECtHR as a manifestation of her religious beliefs. Moreover, the fact that the majority of people within one religion or belief do not see certain requirements as part of the religion or belief does not mean that something cannot be accepted as a manifestation. Therefore, even though, for example, not all Muslims consider that their religion requires women to wear a headscarf, this does not mean that for some, the wearing of a headscarf is a requirement of their religion and this should be accepted as a manifestation of their religion. Vickers writes that the ECtHR *Eweida* case implies, in the context of the Employment Equality Directive, that many of the practices to which the Directive may apply will be viewed as religious practices which are *prima facie* protected from direct and indirect discrimination.[30] This has indeed been applied in this way by the CJEU in *Achbita v G4S* and *Bougnaoui v Micropole.* Applying this to the subject of this report, the wearing of religious clothing and religious symbols, these terms refer to clothing and symbols worn by individuals for reasons closely and directly linked to their religion or belief. Examples of religious clothing are religious headscarves, face-covering veils, turbans and skull caps, while crucifixes, kara bangles, kirpans (ceremonial daggers) and certain religious jewellery can be seen as examples of religious symbols.

A related issue is if the Employment Equality Directive also protects people who do not have a religion or belief. The CJEU has not mentioned this, but, as will be clear from the above, some Member States do

27 **Spain**: Constitutional Court, Judgment 46/2001, 15 February 2001.
28 *Achbita v G4S,* paras 27-28; *Bougnaoui v Micropole*, paras 29-30.
29 *Eweida and Others v the United Kingdom*, para. 82.
30 Vickers, L. (2015) 'Religion and Belief Discrimination in Employment under the Employment Equality Directive: a Comparative Analysis', *European Equality Law Review 2015/1,* p. 25, http://www.equalitylaw.eu/downloads/2935-european-equality-law-review-1-2015-pdf-1-579-kb.

indeed cover discrimination against someone because they do not have a (particular) religion or belief. The ECtHR has established that Article 9 ECHR covers atheism and other non-religious beliefs[31] and, if the CJEU follows the ECtHR in this, then the Directive would also cover these. Uyen Do writes that:

> a number of claims challenging termination of contracts or refusals to examine job applications because of lack of membership of a specific church or association (such as the Masonic order) have been brought to the attention of the national courts, which found direct discrimination.[32]

This suggests that discrimination because of not having a (particular) religion or belief is covered by the Employment Equality Directive, but Uyen Do only refers to one case from **Northern Ireland** where a police officer was less favourably treated because he was not a member of the Masonic order.[33] In the view of the author, the fact that the CJEU has given a wide interpretation to the terms 'religion' and 'belief' in the above cases, would suggest that discrimination on the ground of not having a religion or belief would also be covered. More support for this can be found in the fact that the EU Council, which has provided guidelines on freedom of religion or belief, has stated that 'persons holding non-theistic or atheistic beliefs should be equally protected [by the guarantee of freedom of religion], as well as people who do not profess any religion or belief'.[34] In the same guidelines, the EU Council refers to General Comment 22 of the United Nations Human Rights Committee on Article 18 of the International Covenant on Civil and Political Rights, which has been ratified by all EU Member States. Article 18 guarantees freedom of religion in very similar terms to Article 9 of the ECHR and, in the General Comment, it is stated that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief'.[35] And, in the above mentioned cases on religious discrimination, the CJEU refers to 'religious, philosophical and political beliefs' which also suggests that it does not see religious beliefs as different from other forms of belief. All this suggests that discrimination for not having a religion or belief at all or for not having a particular religion or belief is also prohibited by the Employment Equality Directive.

Therefore, the above indicates that the terms 'religion' and 'belief' in the Employment Equality Directive need to be interpreted expansively. What is also clear from the above is that prohibitions on the wearing of religious clothing and symbols touches on different areas of law. Such bans might breach human rights law – as an infringement of a person's right to freely manifest their religion or belief as guaranteed by Article 10 EUCFR and Article 9 ECHR – and anti-discrimination legislation – because they could discriminate against religious people who want to wear such clothing or symbols at work.

Summary

Summarising definitions of religion and belief:

- Includes both *forum internum*: the fact of having a belief, *forum externum*: the manifestation of religious faith in public;
- 'Religion' must be given wide definition, following ECtHR case law;
- 'Belief' must attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; not be incompatible with human dignity; not conflict with fundamental

31 Atheism: *Angeleni v Sweden,* App. No. 10491/83, 3 December 1986. The ECtHR has also held that Pacifism (*Arrowsmith v the United Kingdom*, App. No. 7050/75, 12 October 1978), Veganism (*W v the United Kingdom*, App. No. 18187/91, 10 February 1993), and Druidism (*Chappell v the United Kingdom*, App. No. 12587/86, 30 March 1989) are all protected by Article 9 ECHR.

32 Uyen Do, T. (2011) '2011: A Case Odyssey into 10 Years of Anti-Discrimination Law', 12 *European Anti-Discrimination Law Review,* p. 17, http://www.equalitylaw.eu/downloads/2521-law-review-12.

33 **UK**: *Gibson v Police Authority of Northern Ireland* [2006] NIFET 00406_00 (24 May 2006), 5 *European Anti-discrimination Law Review*, 5 (2007), p. 100.

34 Council of the European Union, *EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief,* adopted at the Foreign Affairs Council Meeting, Luxembourg, 24 June 2013, para. 2.

35 Council of the EU, Guidelines, para. 11; Human Rights Committee, General Comment No. 22, *The Right to Freedom of Thought, Conscience and Religion (Art. 18),* 30 July 1993, CCPR/C/1/Rev.1/Add.4, point 2.

rights; and, relate to a weighty and substantial aspect of human life and behaviour, following ECtHR case law;
- Manifestation: need to establish the existence of a sufficiently close and direct link between the act and the underlying belief;
- Wearing of headscarf accepted as a manifestation of religion;
- Religious clothing: e.g. religious headscarves, face-covering veils, turbans and skull caps;
- Religious symbols: e.g. crucifixes, kara bangles, kirpans (ceremonial daggers) and certain religious jewellery;
- People who do not have a religion or belief are also covered.

3 EU and Council of Europe Context

This part of the report examines the fundamental human rights to freedom of religion and to freely manifest one's religion and to be free from discrimination. These rights are guaranteed by two European instruments, the EUCFR and the ECHR. The case law of the ECtHR in relation to these two rights and its relevance for the wearing of religious clothing and symbols in employment in Europe will be analysed. As will become clear below, many of the cases of the ECtHR concern education, with bans on the wearing of religious clothing or symbols for pupils, students and/or teachers. Although only the bans imposed on teachers relate to employment, the other cases are still important to explain the way the ECtHR has dealt with the wearing of religious clothing and symbols. Moreover, the country reports show that education is an area of debate in quite a few of the Member States. For example, in **Belgium**, there is case law on the wearing of conspicuous religious symbols by both pupils and teachers (see below as well). In **Croatia**, there are public debates about religious symbols in schools, often from the aspect of the rights of students and their parents. In **Cyprus**, two incidences of girls wearing headscarves at school were depicted in the media. In the **Czech Republic**, there are generally no debates, but there was a wave of criticism about an instance where a Muslim student was not allowed to wear a headscarf in secondary medical school. In **France**, a law from 2004 prohibits the wearing of ostentatious symbols or dress by which pupils openly manifest a religious affiliation and the Islamic headscarf is often seen as an ostentatious symbol. The best known debate in **Germany** concerns the ban of religious clothing and symbols in public schools. And, in **Ireland**, academic commentary has focused primarily on religious symbols/clothing worn by female Muslim students in schools. The proposed ban on face covering clothing in the **Netherlands** covers, among other areas, both pupils and teachers.

The examination of the right to freedom of religion and to be free from discrimination in the EUCFR and the ECHR will contain, where relevant, illustrative examples from the case law of the EU Member States. But before this examination takes place, it is important to highlight that these rights are also guaranteed in the national constitutions of the Member States, as table 2 illustrates. Constitutional guarantees at national level strengthen and support the guarantees in the EUCFR and the ECHR. According to the country fiches, all EU Member States have constitutional guarantees of freedom of religion and of non-discrimination. The guarantees of equality or non-discrimination vary: in many countries religion, creed, conviction or belief is mentioned explicitly as a ground while in some other countries there are general guarantees of equality without mentioning any grounds at all. The latter is the case in **Belgium**, **Latvia**, **Luxembourg** and **Poland.** The only country where the Constitution does not contain a general prohibition of discrimination is **Denmark**, but Article 70 of the **Danish** Constitution states that 'no person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons'. The **UK** has no written constitution, but Articles 9 and 14 ECHR have been given some level of constitutional force through the Human Rights Act 1998, which partially incorporates the ECHR into domestic law.

Table 2: Constitutional Guarantees

	Constitutional guarantee of religious freedom	**Constitutional prohibition of discrimination;**
Austria	Article 14 ECHR is part of Austrian Constitution. Article 14/1 Basic Law of the State and Art 149/1 of the Federal Constitutional Act	Article 7 of the Federal Constitutional Act: 'faith'
Belgium	Articles 19 and 20	Articles 10 and 11: do not specify a list of grounds
Bulgaria	Article 37(1) and (2)	Article 6(2): religion
Croatia	Article 40	Article 14, religion, political or other belief

	Constitutional guarantee of religious freedom	Constitutional prohibition of discrimination;
Cyprus	Article 18(6) Article 11	Article 28 (2), religion, political or other convictions
Czech Republic	Not in constitution, but Articles 15(1) and 16 of the Law No. 2/1993 Coll., Charter of Fundamental Rights and Freedoms. This Charter is seen as forming part of the constitutional order	Article 3(1) of the Charter of Fundamental Rights and Freedoms: religion and belief
Denmark	Article 67	No general prohibition of discrimination. Article 70, creed or descent
Estonia	Article 40	Article 12, religion, political or other opinion
Finland	Article 11	Article 6(2), religion, conviction
France	Article 10 Declaration of Human and Civil Rights	Article 1, religion
Germany	Article 4	Article 3.3, religion or belief
Greece	Article 13	Article 5(2), Article 13
Hungary	Article VII	Article XV religion
Ireland	Article 44.2.1	Article 44.2.3, religious profession, belief or status
Italy	Article 19; Article 14: equality of all religions	Article 3, religion
Latvia	Article 99	Article 91, general, no specific grounds mentioned
Lithuania	Article 26	Article 29, belief, convictions or views
Luxembourg	Article 19	Article 11, general, no specific grounds mentioned
Malta	Section 40	Section 45 creed
Netherlands	Article 6	Article 1, religion and belief
Poland	Article 53	Article 32, 'any reason whatsoever'
Portugal	Article 41(2)	Article 13(1) and (2) religion
Romania	Article 29	Article 4(2) religion
Slovakia	Article 24	Article 12, belief or religion
Slovenia	Article 41	Article 14(1), religion, political or other beliefs
Spain	Article 16	Article14 religion
Sweden	Chapter 2, Section 1 point 6 of the Instrument of Government (1974:15)	Chapter 2, Section 12 of the Instrument of Government (1974:15) religion
United Kingdom	No written constitution, Human Rights Act 1998 incorporated ECHR into British law: gives Article 9 ECHR constitutional force	No written constitution, Human Rights Act 1998 incorporated ECHR into British law: give Article 14 ECHR constitutional force

3.1 Freedom of religion

As mentioned, Article 10(1) EUCFR guarantees the right to freedom of thought, conscience and religion and makes clear that this right includes the freedom to change religion or belief and the freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance. Article 10(1) EUCFR uses the same wording as Article 9(1) ECHR. But the second paragraphs of these two articles differ. Article 10(2) EUCFR mentions that the right to conscientious objection is recognised, in accordance with the national laws governing this right. As this is not relevant for the subject of this report, it will not be discussed. However, Article 9(2) ECHR is important. It determines that:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others.

It will be clear from Article 9(1) and 9(2) ECHR that the right to freedom of thought, conscience and religion is an absolute right which cannot be restricted by the state, so the state cannot interfere with this right at all. This is often referred to as the *forum internum*, as the CJEU did in *Achbita v G4S* and *Bougnaoui v Micropole*, stating that the *forum internum* 'is the fact of having a belief'.[36] But, according to Article 9(2) ECHR, the freedom to manifest one's religion or beliefs can be subject to limitations. So the right to manifest one's religion is what is called a qualified right and is referred to as the *forum externum* which, according to the CJEU, is 'the manifestation of religious faith in public'.[37] In other words, interference with the right to freely manifest one's religion can be restricted if this is justified under the circumstances given in Article 9(2) ECHR.

Article 10 EUCFR does not contain a similar justification, but Article 52(1) EUCFR determines that:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Moreover, the Explanations to Article 10 of the Charter state that 'the right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the Convention…', and then the Explanations cite Article 9(2) ECHR.[38]

Therefore, Article 9(2) ECHR is important for the interpretation of Article 10 EUCFR. And, through Article 10 EUCFR, it is also important for the interpretation of the Employment Equality Directive, as Advocate General Kokott in *Achbita v G4S* points out. She considers that the freedom of religion is 'one of the foundations of a democratic society and an expression of the system of values on which the European Union is founded' and that it is important, within the scope of the Directive, to take due account of those values.[39]

3.1.1 Justification

Article 9(2) ECHR contains three conditions under which an interference with the freedom to manifest one's religion can be justified. First of all, a restriction or limitation must be prescribed by law or, as Article 52(1) determines, a limitation needs to be 'provided for by law'. This means that the restriction must be laid down in a law or regulation and people must be able to know about it. The law or regulation must be adequately accessible and it must be formulated with sufficient precision to enable someone to foresee the consequences of their conduct to a reasonable degree.[40] The ECtHR has also held that 'the concept of "law" must be understood in its "substantive" sense, not its "formal" one. It therefore includes everything that goes to make up the written law, including enactments of lower ranks than statutes'.[41] The ECtHR

36 *Achbita v G4S,* paras 27-28; *Bougnaoui v Micropole*, paras 29-30.
37 *Achbita v G4S,* paras 27-28; *Bougnaoui v Micropole*, paras 29-30.
38 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/33, Article 10.
39 Opinion AG Kokott in *Achbita v G4S,* para. 113.
40 *Sunday Times v the United Kingdom,* App. No. 6538/74, 26 April 1979, para. 49.
41 *Kervanci v France*, App. No. 31645/04, and *Dogru v France,* App. No. 27058/05, both 4 December 2008, para. 52.

has also accepted that, under certain circumstances, unwritten common law and case law can qualify as law.[42]

Prescribed by law

In *Achbita v G4S,* there was, at the time Ms Achbita started working for G4S, an unwritten rule that workers could not wear visible signs of their political, philosophical or religious beliefs in the workplace. This unwritten rule was later (at the time of Ms Achbita's dismissal) laid down in an amendment to the workplace regulations.[43] It can thus be questioned, whether the rule in this case would pass the test of Article 52(1) EUCFR ('provided for by law') or of Article 9(2) ECHR ('prescribed by law'). The CJEU did not discuss this, but Advocate General Kokott mentioned Article 2(5) of the Employment Equality Directive.[44] Article 2(5) contains a general exception clause and reads as follows:

> 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.

Measures 'laid down by national law' corresponded to the term 'prescribed by law' in Article 9(2) ECHR, as Advocate General Kokott pointed out, and thus, these measures must emanate from or at least be authorised by a public authority. She then continued that the company rule as operated by G4S was not a measure which emanated from a public authority or which was based on a sufficiently precise authorisation issued by a public authority.[45] This suggests that the G4S rule at issue in *Achbita v G4S*, would not pass the 'prescribed by law' test of Article 9(2) ECHR and thus would not be justified. However, Advocate General Kokott did not come to that conclusion. She stated that, at most, the legislation transposing Article 4(1) of the Directive (the genuine and determining occupational requirement (see below)) could be regarded as authorising the adoption of measures referred to in Article 2(5); and, if that was true, then Article 2(5) carried no significance independent of that of Article 4(1) as a ground of justification for a difference of treatment based on religion. In other words, according to Advocate General Kokott, Article 2(5) did not have to be considered, as it did not add anything to what she has concluded about Article 4(1) of the Employment Equality Directive (see below).[46]

Necessary in a democratic society

The second condition for justification in Article 9(2) ECHR is that the limitation must be necessary in a democratic society and this means, according to the case law of the European Court of Human Rights, that it must fulfil a pressing social need.[47] This in turn means that, firstly, the limitation must pursue any of the legitimate aims mentioned in Article 9(2) ECHR: the interests of public safety, the protection of public order, health and morals, or the protection of the rights and freedoms of others. Secondly, this also requires that the means used to achieve the legitimate aim must be proportionate and necessary. Article 52(1) EUCFR also mentions that limitations must be necessary and are 'subject to the principle of proportionality'. You could thus sum up the tests in Article 9(2) ECHR and Article 52(1) EUCFR as a three part justification test: legality, necessity and proportionality.

It will be clear that the principle of proportionality plays an important role in the assessment whether an interference with the right to freely manifests one's religion is justified, both under the EUCFR and the ECHR. Proportionality means that a fair balance needs to be struck between the interests of the state

42 See for example, *Sunday Times v the United Kingdom*, para. 47; *Kruslin v France*, App. No. 11801/85, 24 April 1990, paras 28-29.
43 *Achbita v G4S,* paras 11 and 15.
44 Opinion AG Kokott in *Achbita v G4S*, paras 136-140. Article 2(5) Employment Equality Directive will be analysed below.
45 Opinion AG Kokott in *Achbita v G4S*, para. 138.
46 Opinion AG Kokott in *Achbita v G4S*, paras 139-140.
47 *Handyside v the United Kingdom,* App. No. 5493/72, 7 December 1976, para. 48.

and the interests of the individual.[48] In other words, the principle of proportionality is concerned with a balancing of the individual's right or freedom and the state's interest in limiting this and there must be a reasonable relationship between the aim of the restriction by the state and the means used by the state to achieve that aim. But how does the ECtHR determine whether a measure restricting the freedom of religion is proportionate under Article 9(2) ECHR? The doctrine of the margin of appreciation plays a role here. In *Handyside v the United Kingdom*, the ECtHR explained that states enjoy a certain margin of appreciation to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity', because the national authorities are considered to be better placed to assess what is necessary in a democratic society. In other words, states have some discretion in deciding this because they are in a better position to assess this. However, this margin or appreciation is not unlimited and the ECtHR is empowered to give the final ruling.[49]

In relation to Article 9(2) ECHR, the ECtHR has held that 'it is not possible to discern throughout Europe a uniform conception of the significance of religion in society ... even within a single country such conceptions may vary'.[50] This absence of a pan-European consensus or a common standard on religion in Europe has led the ECtHR to afford states a wide margin of appreciation in relation to restrictions on the right to manifest one's religion under Article 9(2) ECHR. The width of the margin of appreciation is important, because the level of scrutiny by the ECtHR depends on how wide a margin of appreciation is given to the state. The narrower the margin of appreciation, the closer the scrutiny of the justification test, of the necessity and proportionality test. The margin of appreciation in relation to religious issues is wide and thus the ECtHR will not scrutinise justifications very strictly. In *Sahin v Turkey,* the ECtHR considered that 'where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance'.[51]

Legitimate aims: public safety

Of the legitimate aims mentioned in Article 9(2) ECHR, public safety plays a role in situations where it is important that someone's identity can be established for safety and security purposes. There are some examples from the case law of the ECtHR, where this legitimate aim played a role: a Sikh man was made to take off his turban at airport security;[52] a woman was asked to remove her veil for an identity check at the French Consulate in Marrakech;[53] and, a Sikh man was refused a duplicate driving licence because he refused to supply a picture without his turban.[54] It is interesting to note that the UN Human Rights Committee did find a violation of the freedom of religion under Article 18 of the International Covenant on Civil and Political Rights in a case with very similar facts, but this time concerning the refusal to renew a residence permit in the absence of an identity photograph showing the applicant bareheaded.[55] The three ECtHR cases mentioned above were all related to situations outside employment and there have not been any cases where public safety played a role within the employment sphere.

It must be noted that Article 9(2) ECHR does not mention the interests of national security as a legitimate aim. This contrasts with Article 8 (the right to respect for private and family life), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) ECHR, which all three contain a three part justification test similar to the test in Article 9(2). According to the ECtHR, 'the exceptions to freedom

48 Evans, M. (2009) *Manual on the Wearing of Religious Symbols in Public Areas* (Strasbourg, Council of Europe Publishing) p. 125.
49 *Handyside v the United Kingdom*, paras 48-50. This has now been added to the Preamble of the Convention by Article 1 of Protocol 15.
50 *Otto-Preminger-Institute v Austria*, App. No. 13470/87, 20 September 1994, para. 50.
51 *Sahin v Turkey,* App. No. 44774/98, 29 June 2004 (Chamber), para. 101; 10 November 2005 (Grand Chamber), para. 109.
52 *Phull v France,* App. No. 35753/03, 11 January 2005.
53 *El Morsli v France*, App. No. 15585/06, 4 March 2008.
54 *Mann Singh v France,* App. No. 24479/07, 13 November 2008.
55 *Ranjit Singh v France* CCPR/C/102/D/1876/2009, 22 July 2011. See also a similar Human Rights Committee decision in relation to the Keski (under-turban): Bikramjit Singh v France, CCPR/C?106/D/1852/2008, 4 February 2013.

of religion listed in Article 9 § 2 must be narrowly interpreted, for their enumeration is strictly exhaustive and their definition is necessarily restrictive'.[56] The Court then continued:

> However, unlike the second paragraphs of Articles 8, 10, and 11, paragraph 2 of Article 9 of the Convention does not allow restrictions on the ground of national security. Far from being an accidental omission, the non-inclusion of that particular ground for limitations in Article 9 reflects the primordial importance of religious pluralism as one of the foundations of a 'democratic society' within the meaning of the Convention and the fact that a State cannot dictate what a person believes or take coercive steps to make him change his beliefs.[57]

The ECtHR thus made clear that the interests of national security could not serve to justify an interference with the right to manifest one's religion.

In *S.A.S. v France,*[58] the **French** ban on face covering clothing in public spaces was challenged before the ECtHR. The French Government put forward, as one of the legitimate aims, the protection of public safety. The ECtHR rejected the public safety argument because, in view of its impact on the rights of women who wish to wear the face-covering veil for religious reasons, a blanket ban could only be regarded as proportionate when there was a general threat to public safety and there was no concrete evidence of this in the case. According to the ECtHR, public safety could also be attained by an obligation to show one's face when needed to identify oneself.[59] So here the ECtHR refers to the impact on the women who wear face-covering veils and suggests that there are alternative, less discriminatory means of achieving the aim sought. Therefore, a consideration whether the aim sought can be achieved by means which are less discriminatory and thus have less impact on the human right invoked by the applicant appears to be part of the justification test.

Legitimate aims: public order

The aim of public order has been held to be engaged in some of the ECtHR cases regarding the wearing of religious clothing or symbols and this aim includes the argument that bans are necessary to preserve the secular nature of the state. In *Sahin v Turkey*, for example, a student of medicine at the University of Istanbul was refused access to exams because she was wearing the Islamic headscarf. The ECtHR found the interference with Ms Sahin's Article 9 ECHR right to be justified, among other reasons, for the protection of public order because 'this religious symbol [the Islamic headscarf] had taken on political significance in Turkey in recent years' and because there were 'extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conceptions of a society founded on religious precepts'.[60] Public order was also accepted as a legitimate aim for limitations in *Kervanci v France* and *Dogru v France*, *Aktas and Others v France* (all concerning school pupils and what they could or could not wear in public education in **France**) and *Kurtulmus v Turkey* (concerning a university professor who wanted to wear an Islamic headscarf against the dress rules of a public university).[61] Of these cases, only the latter concerned a ban on the wearing of religious symbols in employment.

Legitimate aims: protection of health

The protection of health could play an important role in relation to employment. For example, the wearing of hard hats on building sites is a safety measure which could interfere with the wearing of a Sikh turban, although there does not seen to be any problem with wearing hard hats together with, for example,

56 *Nolan and K v Russia*, App. No. 2512/04, 12 February 2009, para 73.
57 *Nolan and K v Russia*, para 73.
58 *S.A.S. v France*, App. No. 43835/11, 1 July 2014.
59 *S.A.S. v France,* para. 139.
60 *Sahin v Turkey*, Chamber, paras 108-109, confirmed by Grand Chamber, para. 115.
61 *Kervanci v France* and *Dogru v France*; *Aktas and Others v France*, App. Nos 43563/08; 14308/08, 18527/08, 29134/08, 25463/08, and 27561/08, 30 June 2009; *Kurtulmus v Turkey,* App. No. 65500/01, 24 January 2006.

Jewish skullcaps or Islamic headscarves. In the **UK**, the law exempts Sikhs from the legal duty to wear head protection at work. The protection of health played a role in *Chaplin v the United Kingdom,* where a nurse wanted to wear a small crucifix on a chain with her nurse's uniform. The ECtHR held that the employer was justified in requiring Ms Chaplin to take off her necklace and crucifix in order to protect the health and safety of both nurses and patients in a hospital. In this case, there was evidence that the employer had, for the same reasons, also informed two Sikh nurses that they could not wear a bangle or kirpan and had prohibited flowing hijabs.[62] In the **Netherlands**, a Muslim nurse was dismissed after she refused to follow the hospital rules that nurses in the dialysis unit could not wear long sleeves. The rule was introduced to avoid infection and followed national guidelines and the District Court deciding the case held that this rule was necessary, proportionate and justified.[63] It will be clear that workplace rules which prohibit the wearing of loose and or flowing clothing or of items of jewellery, even if these are worn for religious reasons, could, in certain work circumstances, also be justified for the protection of health and safety. Although the hospital, in *Chaplin v the United Kingdom,* prohibited the wearing of flowing hijabs for the protection of health and safety, it allowed Muslim doctors to wear a close-fitting 'sports' hijab for this reason.[64] Another example from the **UK** is the case of *Dhinsa v Serco,* where a refusal to allow a Sikh man who was a trainee prison officer to wear his *kirpan* (a ritual dagger) was held to be justified, because the restriction was appropriate and necessary for the maintenance of prison security and the safety of staff, visitors and prisoners.[65]

Legitimate aims: protection of the rights of others

In the case law of the ECtHR, the necessity of restrictions on the wearing of religious clothing and symbols has often been based on the need to protect the rights and freedoms of others either as an aim on its own or in combination with one of the other aims mentioned in Article 9(2) ECHR. For example, in *Dahlab v Switzerland,* a teacher in a primary school had converted to Islam after she had joined the school and started wearing long loose clothing and a hijab or headscarf. She wore this for a couple of years without any objection from parents, pupils or colleagues. But then, after an inspection, the director of public education directed her to stop wearing the hijab in school because it was against the strict denominational neutrality of a public, secular education system. Ms Dahlab claimed before the ECtHR that this was an interference with her freedom of religion under Article 9 ECHR. The ECtHR held that the direction given to Ms Dahlab was, indeed, an interference with her right to manifest her religion but that this was justified and proportionate to the stated aim of protecting the rights and freedoms of others, namely the rights of the children in the school. The ECtHR accepted that 'it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children'. Ms Dahlab was teaching children between 4 and 8 years old. The ECtHR held that the wearing of the headscarf might have some proselytising effect and was hard to square with the principles of tolerance and respect for others and of gender equality (gender equality will be discussed below).[66] So the ECtHR weighed the right of a teacher to manifest her religion against the need to protect pupils against proselytism, or improper attempts at conversion. In this regard, the ECtHR also stressed the importance of ensuring the neutrality of State education in schools, something which was stressed again in *Kurtulmus v Turkey*.[67]

This argument has been used in some of the Member States to impose bans on the wearing of headscarves and/or face-covering veils on teachers and on pupils in schools. For example, in **Belgium**, a maths teacher who wanted to wear an Islamic headscarf while teaching asked the Council of State to annul the regulation prohibiting the wearing of conspicuous religious symbols by teachers. The Council of State dismissed her action. It held that the contested regulation did not infringe her right to manifest

62 *Eweida and Others v the United Kingdom*, paras 98 and 99.
63 **Netherlands**: District Court, 's Hertogenbosch, *Jeroen Bosch Ziekenhuis v X,* 13 July 2009, ECLI:NL:RBSHE:2009:BJ2840.
64 *Eweida and Others v the United Kingdom,* para. 20.
65 **UK**: *Dhinsa v Serco* [2011] ET 1315002/2009 (18 May 2011) (unreported).
66 *Dahlab v Switzerland,* App. No. 42393/98, 15 February 2001, under THE LAW, para. 1.
67 *Kurtulmus v Turkey*, under The Law, A, para. 2.

her freedom of religion as the measure pursued the legitimate purpose of guaranteeing the principle of neutrality and was proportionate, because the measure was general, abstract, non-discriminatory and limited in time (it was only imposed during the exercise of their functions). The Council of State also held that the measure did not violate the principle of equality and non-discrimination. Although the regulation could be seen as indirect discrimination, it was justified by legitimate aims (the neutrality in schools) and the means of achieving these aims were proportionate and necessary.[68] On the other hand, when internal regulations were adopted by Flemish School Boards following an Administrative Circular of the Board of the Flemish Community Schools on bans on the wearing of any conspicuous philosophical symbols at school (except in classes of religion) and when these bans were challenged by pupils, the **Belgian** Council of State held that these regulations interfered with the pupils' freedom of religion and that the schools had failed to prove that the prohibition was necessary in a democratic society.[69]

It will be clear that the effect of the wearing of religious clothing and symbols on the rights and freedoms of others is taken into account and this appears to include the right to be free from pressure. This not only concerns pressure to convert as considered in *Dahlab v Switzerland*, but also another form of pressure: if one employee, teacher or pupil is allowed to wear a religious symbol like an Islamic headscarf or a face-covering veil, there will be pressure on other Muslim women and girls to do so as well. Although this might be especially pertinent for school pupils, this pressure on others, in this case fellow students, also played a role in the ECtHR decision in *Sahin v Turkey.*[70]

A related argument for banning religious clothing and symbols is the argument that such bans are necessary to protect women's rights and gender equality. This can be seen as falling under the aim of the protection of the rights and freedoms of others: the right of women to be equal with men which is a fundamental principle in EU law and in many national constitutions; and, related to the previous paragraph, the right to be free from pressure to wear something one does not want to wear. As mentioned above, both arguments were used by the ECtHR to justify the bans imposed in *Dahlab v Switzerland* and *Sahin v Turkey.* This argument has been and is often used in debates on the need for banning the wearing of religious clothing and symbols, for example, in the parliamentary and other debates in both **Belgium** and **France** before the laws on banning the covering of the face in public were adopted.[71] According to the country fiche, in **Belgium**, the legitimate aims of the Act banning face-covering clothing in public places brought forward by the Government were public security, equality between women and men and a certain conception of the 'living together' in society. The country fiche from **Spain** describes that the Supreme Court cancelled a Lieida City Council ban on the wearing of the full face-covering veil in public city spaces with the argument that the use of the integral veil is part of religious freedom, which is a fundamental right.[72] However, the **Spanish** country fiche also points out that another part of the public (political and legal) opinion argues that the integral veil is an imposition of the most fundamentalist of Islam and symbolises the oppression of women.

The gender equality argument is based on the fact that the burqa, niqab and hijab are seen as symbols of the oppression of women and as going against women's rights and freedoms because they are imposed on women and girls by men, be it spouses, family, communities, religious leaders or the state.[73] The argument is also sometimes expressed in language of protecting the dignity of women and protecting

68 **Belgium**: Council of State, No. 223.042, 27 March 2013.
69 **Belgium**: Council of State, No. 238.751; 228.752 and 228.748, 14 March 2014.
70 *Sahin v Turkey,* Chamber, para. 99.
71 See; Howard, E. (2012) *Law and the Wearing of Religious Symbols European Bans on the Wearing of Religious Symbols in Education* (London/New York, Routledge) pp. 35-36 and the references there. See also some of the contributions to Brems, E. (ed.) (2014) *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge, Cambridge University Press).
72 **Spain**: Supreme Court, Judgment 4118/2011, 14 February 2013.
73 McGoldrick, D. (2006) *Human Rights and Religion: the Islamic Headscarf Debate in Europe* (Oxford/Portland, Oregon, Hart Publishing) pp. 13-15.

women against dehumanisation.[74] Both these parts of the argument – gender equality and human dignity – were put forward by the **French** Government in *S.A.S. v France.*[75]

Although *S.A.S. v France* did not concern the wearing of religious clothing or symbols in employment, it is important to examine this case here, because it is the first ECtHR case concerning face-covering clothing and because the ECtHR established some important points, one of which was mentioned above under the legitimate aim of public safety. In this case, a Muslim woman challenged the **French** legal ban on the wearing clothing designed to conceal the face in public spaces and claimed that this ban violated Articles 3, 8, 9, 10, 11 and 14 ECHR. The ECtHR only examined the case under Article 8 and 9 (taken together, but with an emphasis on Article 9) and, very briefly under Article 14. Along with the legitimate aim of public safety, the French Government also suggested the following legitimate aims to justify the ban: the protection of the rights and freedoms of others, which included equality between men and women, respect for the dignity of the person and compliance with the minimum requirements of life in society, of 'living together'.[76]

The ECtHR rejected the gender equality argument because a state cannot invoke that argument in order to ban a practice that is defended by women such as the applicant in this case. And, it rejected the human dignity argument and said that that argument could not legitimately justify a blanket ban. The wearing of the face-covering veil was an expression of cultural identity and there was no evidence that women who wear it were seeking to express contempt of others or to offend against their dignity.

The ECtHR took the following into consideration: only a small number of women were affected by the ban; bans have a significant negative impact on women like the applicant; a large number of international and national observers in the field of fundamental rights protections have found that a blanket ban is disproportionate; the Court was concerned that certain Islamophobic remarks had marked the debates on the law; and, although the prospect of being prosecuted and face a criminal sanction can be upsetting for the face veiling woman, the sanctions imposed are among the lightest that could be envisaged.[77] The ECtHR then accepted that the legitimate aim of 'living together' fell under the protection of the rights and freedoms of others and that the decision on whether a ban was necessary for this aim fell within the margin of appreciation of the State. The ECtHR afforded France a wide margin of appreciation in this case because there was little common ground among the Member States of the Council of Europe as to the question of the wearing of the face-covering veil in public.[78] The ECtHR concluded that the law banning face-covering clothing in public spaces was proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others' and thus necessary in a democratic society. Therefore, there was no violation of Articles 8 and 9 ECHR.[79] This suggests that a general ban on all clothing designed to conceal the face in all public spaces can be compatible with Articles 8 and 9 ECHR.

The ECtHR recently decided two cases concerning the ban on covering the face in public spaces in **Belgium**: *Belcacemi and Oussar v Belgium* and *Dakir v Belgium.* The ECtHR referred to and followed its own reasoning in *S.A.S. v France* in relation to the legitimate aim of 'living together' as part of the

74 See, for example, the parliamentary debates in **Belgium**: DCO 52 2289/005 Belgium Chamber of Representatives, Proposal of an Act to Establish a Prohibition of the Wearing of Clothing which hides the Face Totally or Principally, 9 April 2010: http://www.lachambre.be/FLWB/PDF/52/2289/52K2289005.pdf, pp. 7, 15 and 25; and, for **France** see: Council of State, *Study of Possible Legal Grounds for Banning the Full Veil*, Report adopted by the Plenary General Assembly, 25 March 2010, pp. 8, 21 and 22.

75 *S.A.S. v France*, App. No. 43835/11, 1 July 2014.

76 *S.A.S. v France*, para. 82. Compare this with the arguments brought forward by the **Belgian** Government as aims for the ban on face-covering clothing in public spaces mentioned above: public security, equality between women and men and a certain conception of the 'living together' in society.

77 *S.A.S. v France,* paras 145-148.

78 *S.A.S. v France,* paras 153-156. But see what was said about this in *Ebrahimian v France*, App. No. 64846/11, 26 November 2015, para. 65, below.

79 *S.A.S. v France,* paras 157-159.

protection of the rights of others and the wide margin of appreciation afforded to the State. It thus did not find a breach of either Article 8 or Article 9 ECHR.[80]

Another ECtHR case where the legitimate aim of the protection of the rights of others played a role is *Eweida and Others v the United Kingdom,* a case already mentioned. This case is particularly important for the subject of the report as it concerned the wearing of religious symbols in employment. The case concerned four applicants who were all devout Christians. Ms Eweida worked for British Airways as check-in staff. She was required to wear a uniform and wanted to wear a small silver cross on a chain with her uniform. Until 2004, the uniform had a high-necked shirt and Ms Eweida wore her cross underneath it. But, in 2004, British Airways changed its uniform to an open-necked shirt and banned employees from wearing any visible item of adornment around the neck. Ms Eweida's cross was visible with the new uniform shirt and, when she refused to take it off, she was suspended. The second applicant, Ms Chaplin, was a nurse who was also not allowed to wear a small cross on a necklace with her nurse's uniform, as was mentioned above. The third and fourth applicants will not be discussed here as their claims were not concerned with the wearing of religious clothing or symbols. In the domestic courts, both Ms Eweida and Ms Chaplin had claimed that their employers had discriminated against them because of their religion and both had lost their cases. In their application to the ECtHR, they both claimed a breach of Articles 9 and 14 in conjunction with Article 9 ECHR.

The decision of the ECtHR in this case is very important for employees because the ECtHR abandoned its previous stance on what is sometimes called the 'free to resign' rule. Up to then, the ECtHR had always held that, where a religious individual had voluntarily submitted to an arrangement which placed them in a specific situation, like employment, the possibility of that individual simply leaving the arrangement negated the possible interference with that individual's freedom to manifest their religion. So, if an employer prohibited a religious employee from wearing religious clothing or symbols at work, there was no restriction on the right to manifest their religion because the employee was free to resign and take on another job where they were allowed to wear the clothing or symbol. So the argument was that the employee could end the interference with their right to freely manifest their belief by resigning from their job. This meant that the case would simply be dismissed under Article 9(1) ECHR without the need to apply the justification test of Article 9(2).[81] A related argument is the argument that there is no breach of the right to manifest one's religion if there are other means open to practice or observe it.[82]

In *Eweida and Others v the United Kingdom*, the ECtHR abandoned this 'free to resign' rule. It held that the possibility of changing job would no longer be sufficient to hold that there had been no interference but, instead, this had to be weighed in the overall balance when considering whether or not the restriction was justified and proportionate under article 9(2) ECHR.[83] So now the question whether you can resign from your job plays a role in the proportionality test, the balancing exercise which has to take place under Article 9(2).

In relation to Ms Eweida, the ECtHR assessed whether a fair balance was struck between her rights and those of others and concluded that a fair balance had not been struck between her right to freely manifest her religion and British Airways wish to protect its corporate image and that the domestic courts had given too much weight to the latter. The ECtHR took into consideration that Ms Eweida's cross was discreet and could not have detracted from her professional appearance; that there was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had had any negative impact on British Airways' brand or image; and, that the fact that

80 *Dakir v Belgium*, App. No. 4619/12, 11 July 2017, paras 49-51 and 60; *Belcacemi and Oussar v Belgium*, App. No. 37798/13, 11 July 2017, paras 48-49 and 61.

81 See, for example, *Ahmad v the United Kingdom*, App. No. 8160/78, 12 March 1981; *Kontinnen v Finland*, App. No. 24949/94, 3 December 1996; and, *Stedman v the United Kingdom*, App. No. 29107/95, 9 April 1997.

82 See: *Jewish Liturgical Association Cha'are Shalom Ve Tsedek v France*, App. No. 27417/95, 27 June 2000; and, *Pichon and Sajous v France,* App. No. 49853/99, 2 October 2001.

83 *Eweida and Others v the United Kingdom*, para. 83.

the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrated that the earlier prohibition was not of crucial importance. Because there was no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect Ms Eweida's right to manifest her religion.[84] So Ms Eweida won her case. In the view of the author, based on the considerations of the ECtHR, the reasons for this are that the uniform policy was not applied to all religious clothing or symbols, as turbans and hijabs were allowed; and, it was not of crucial importance for maintaining the company image, as British Airways amended its uniform policy later. As we saw above, the ECtHR came to a different conclusion in relation to Ms Chaplin, as the protection of health and safety on a hospital ward was inherently of much greater importance than that which applied in respect of Ms Eweida.[85]

The latest ECtHR case on the wearing of religious clothing or symbols in employment is *Ebrahimian v France,* where the need for employees to present a neutral image in a public hospital played a role. In this case, a psychiatric social worker worked on a fixed term contract at a hospital and social care centre. Following complaints from patients, she was told that her contract would not be renewed because she refused to remove her veil. The ECtHR referred to Ms Ebrahimian wearing a 'veil', so the judgment is not very clear about whether she was wearing a hijab or a niqab, but commentators have referred to Ms Ebrahimian wearing a headscarf. The ECtHR accepted that the wearing of the veil was a manifestation of Ms Ebrahimian's religion and that there was an interference with this manifestation. Then it examined the justification under Article 9(2) ECHR and held that this interference was prescribed by law and pursued the legitimate aim of protecting the rights of others (which, according to the ECtHR, includes the constitutional principle of *laïcité*), namely the rights of patients to have their religious beliefs respected and to benefit from equal treatment by the state regardless of the nature of those beliefs.[86] The ECtHR held that a wide margin of appreciation was appropriate in this case. Although the majority of the Council of Europe Member States did not regulate the wearing of religious clothing or symbols and only five States did so, it was important to take into account the national context of relations between church and state. **France** had reconciled the principle of the neutrality of the state with religious freedom, thus determining the balance to be struck between competing private and public interests or between different rights protected by the Convention. The State has a wide margin of appreciation in striking this balance. Moreover, the ECtHR considered that it had already held, in *Eweida and Others v the United Kingdom,* that hospital authorities were better placed to take these decisions than an international court.[87] The ECtHR then concluded that France had not overstepped the margin of appreciation and thus there was no violation of Article 9 ECHR.[88]

As Alidadi concludes, 'the state's wide "margin of appreciation" in addressing working conditions restricting the exercise of individuals' religious freedom has been the main obstacle in religious dress cases'.[89] She also points out that the ECtHR 'has not yet ruled on a headscarf issue in favour of the applicant'.[90]

Summary

Summarising the issues in relation to freedom of religion:

- The right to freedom of thought, conscience and religion is an absolute right and cannot be restricted by the state;
- The right to freely manifest one's religion is a qualified right, which can be restricted;

84 *Eweida and Others v the United Kingdom*, paras 91 and 94-95.
85 *Eweida and Others v the United Kingdom*, para. 99.
86 *Ebrahimian v France*, paras 52 and 53.
87 *Ebrahimian v France,* para. 65.
88 *Ebrahimian v France*, para. 70.
89 Alidadi, K. (2017) *Religion, Equality and Employment in Europe. The Case for Reasonable Accommodation* (Oxford/Portland, Oregon, Hart Publishing) p. 50.
90 Alidadi, *Religion, Equality and Employment in Europe,* p. 51.

- Restrictions must fulfil the three part justification test: legality, necessity and proportionality;
- States enjoy a certain margin of appreciation to decide what is necessary in a democratic society;
- The margin of appreciation under Article 9(2) is wide, as there is no common consensus about the place of religion in society;
- Proportionality test means a balancing of all interests involved in the case.

Summarising the ECtHR case law on the wearing of religious clothing or symbols:

- ECtHR now fairly readily accepts that the wearing of religious clothing or symbols is a manifestation of a person's religion or belief;
- Bans on the wearing of religious clothing or symbols are generally held to be justified under Article 9(2) (only exception was Ms Eweida);
- Legitimate aims: public safety, public order, health and the rights and freedom of others;
- Question about whether employee can resign and take other job is now part of the justification test in Article 9(2);
- Under 'rights and freedoms of others', the ECtHR has accepted state neutrality and the preservation of the conditions of 'living together';
- Under 'rights and freedoms of others', the ECtHR has rejected the public safety argument, unless there is concrete evidence of a threat, the gender equality argument and the human dignity argument.

3.2 Right not to be discriminated against

Prohibitions on the wearing of religious clothing and symbols can contravene anti-discrimination measures. They could be seen as direct or indirect discrimination on the ground of religion or belief, but also on the grounds of racial or ethnic origin and gender, or even as discrimination on a combination of these grounds. The EU Directives against discrimination will be analysed in the next part but both the EUCFR and the ECHR also contain an anti-discrimination clause and these will be discussed here. It must be noted that equality is amongst the values on which the EU is founded, as laid down in Article 2 of the Treaty on European Union. Article 20 EUCFR, the first article in the title on equality, start with a clear declaration that 'everyone is equal before the law' and this is followed by a prohibition of discrimination. Article 21(1) determines that:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

The EU Anti-discrimination Directives cover: sex (or gender), racial or ethnic origin, religion or belief, disability, age and sexual orientation, so the list of grounds in Article 21 is more extensive. So does the EUCFR extend the protection provided by the EU Anti-discrimination Directives to cover other grounds? Article 51(1) EUCFR explains that 'the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'. This means, according to the Explanations to the Charter, that Article 21(1) does not lay down 'a sweeping ban of discrimination' in these wide-ranging areas but 'it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred by the Treaties, and by the Member States only when they are implementing Union law'.[91] In contrast, the EU Anti-discrimination Directives impose a duty on Member States to enact laws against discrimination on the grounds covered. But, the Anti-Discrimination directives and Article 21 EUCFR are clearly linked. Advocate General Kokott, in *Achbita v G4S,* made this clear where she stated that the Employment Equality Directive 'puts into practice the principle of equal treatment, which is one

91 Explanations Relating to the Charter of Fundamental Rights, Article 21.

of the founding principles of EU law, is in the nature of a fundamental right and has been enshrined prominently in Article 21 of the Charter of Fundamental Rights'.[92]

The justification test laid down in Article 52(1) EUCFR, which was discussed in relation to Article 10 EUCFR, applies to Article 21 as well. So, restrictions are permitted if these are provided by law, have a legitimate aim and the means used to achieve this aim are proportionate and necessary. And, here too, the ECHR and its interpretation by the ECtHR are important.

3.2.1 Article 14 ECHR

Article 14 ECHR prohibits discrimination in the enjoyment of the rights and freedoms in the ECHR on 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. Article 14 provides for non-discrimination in the enjoyment of the rights and freedoms of the ECHR and thus it can only be invoked in conjunction with another article of the Convention. On the other hand, Protocol 12 to the ECHR provides a freestanding right to non-discrimination in the enjoyment of 'any right set forth by law' and thus can be invoked without any other article.

However, not many states have ratified Protocol 12. Of the EU Member States, **Croatia**, **Cyprus**, **Finland**, **Luxembourg**, **Malta,** the **Netherlands**, **Portugal**, **Romania**, **Slovenia** and **Spain** have signed and ratified the Protocol, so in these Member States a ban on the wearing of religious clothing or symbols could be challenged as discrimination in violation of Article 1, Protocol 12 without invoking any other right of the Convention. Of the other EU Member States, **Austria**, **Belgium**, **Czech Republic**, **Estonia**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **Latvia** and **Slovakia** have signed the Protocol, but have not ratified it; while **Bulgaria**, **Denmark**, **France**, **Lithuania**, **Poland**, **Sweden** and the **UK** have not signed or ratified it. This means that in these two latter groups of countries, a discrimination claim before the ECtHR can only be made under Article 14 in conjunction with another article of the Convention. In relation to bans on the wearing of religious clothing or symbols this other article is usually Article 9 ECHR. However, the ECtHR often deals with the claim under Article 9 first and then comes to the conclusion that it is not necessary to deal with the Article 14 claim separately, either because a violation of Article 9 has been found or because the discrimination is held to be reasonably and objectively justified on the same grounds on which the claim under Article 9 was held to be justified.

For example, in *Eweida and Others v the United Kingdom,* both Ms Eweida and Ms Chaplin claimed violations of Article 9 and of article 14 in conjunction with Article 9. The ECtHR rejected Ms Eweida's claim because, in light of its conclusion in relation to Article 9, it did not consider it necessary to examine separately the applicant's complaint under Article 14 taken in conjunction with Article 9.[93] And, the ECtHR rejected Ms Chaplin's Article 14 claim because 'the factors to be weighed in the balance when assessing the proportionality of the measure under Article 14 taken in conjunction with Article 9 would be similar', and thus 'there is no basis on which it can find a violation of Article 14 either in this case'.[94]

Indirect discrimination

In *Thlimmenos v Greece,* the Grand Chamber of the ECtHR held that the right under Article 14 not to be discriminated against was violated 'when States treat differently persons in analogous situations without providing an objective and reasonable justification', which is a description of direct discrimination, but also 'when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different', which is a description of indirect discrimination.[95] From this

92 Opinion AG Kokott in *Achbita v G4S,* para. 35.
93 *Eweida and Others v the United Kingdom,* para. 95.
94 *Eweida and Others v the United Kingdom,* para. 101.
95 *Thlimmenos v Greece,* App. No. 34369/97, 6 April 2000, para. 44.

it will be clear that the ECHR prohibits both direct and indirect discrimination. This was confirmed in *Jordan v the United Kingdom*, where the ECtHR considered: 'Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group'.[96] And, in *D.H. and Others v the Czech Republic,* the ECtHR repeated this and then stated, with a reference to the EU Race Directive,[97] that 'such a situation may amount to "indirect discrimination", which does not necessarily require discriminatory intent'.[98]

An example of direct religious discrimination is an employer prohibiting his employees from wearing a Muslim headscarf at work, but allowing the wearing of Sikh turbans or Jewish skull caps. This would treat people in analogous situations differently because all these employees want to manifest their religion or belief through the wearing of religious clothing, but only Muslims are prohibited from doing so and thus Muslims are treated differently. An example of indirect discrimination could be prohibiting the wearing of any head covering in the workplace. Those who want to cover their head for religious reasons are treated in the same way as other employees, but this rule has a disproportionately prejudicial effect on them. However, the ECtHR does not make a very clear distinction between direct and indirect discrimination and has held that both can be justified. This is, as discussed below, different under the EU Anti-discrimination Directives which clearly distinguish between the two concepts and have different rules on justification for each form of discrimination. Under EU law, the latter example of a ban covering the head at work could also, under certain circumstances, amount to direct discrimination. This is analysed in more detail below.

Justification

From the quotes above it will be clear that the ECtHR allows for objective and reasonable justification of both direct and indirect discrimination. As the ECtHR has held that Article 1 of Protocol 12 must be interpreted in the same way as Article 14, this applies to that article as well.[99] So when is discrimination under Articles 14 and 1 Protocol 12 ECHR justified? The ECtHR case law shows that the principle of equal treatment is violated if the distinction made has no objective and reasonable justification. And, to be justified, a difference in treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[100] This test is thus similar to the justification and proportionality test in Article 9(2) ECHR, especially because, here again, 'the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment'.[101] This test is thus very similar to the justification test under Article 9(2) ECHR and Article 52(1) EUCFR. In relation to Article 14 ECHR, the width of the margin of appreciation depends on whether the discrimination ground is considered 'suspect' or not. The ECtHR will scrutinise differences in treatment on suspect grounds more strictly and it will require very weighty reasons before it finds the difference in treatment justified. Religion has been held to be a suspect ground, as have gender and race.[102]

Even in those cases where the ECtHR dealt with the discrimination claim under Article 14, it has often dismissed this without much examination. In *Dahlab v Switzerland,* Ms Dahlab claimed that the prohibition on the wearing of the hijab was a violation of Article 9 and of Article 14 in conjunction with Article 9. Her

96 *Jordan v the United Kingdom*, App. No. 24746/94, 4 May 2001, para. 154.
97 Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic origin, OJ L 180/22 (hereafter referred to as the Race Directive).
98 *D.H. and Others v the Czech Republic*, App. No. 57325/00, 13 November 2007, para. 184.
99 *Sejdic and Finci v Bosnia and Herzogovina*, App. Nos 27996/06 and 34836/06, 22 December 2009, para 55.
100 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium* Appl. Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, BI, para. 10.
101 *Willis v the United Kingdom*, App. No.36042/97, 11 June 2002, para. 39.
102 Religion: *Vojnity v Hungary*, App. No. 29617/07, 12 February 2013, para 36; gender: *Adulaziz, Cabales and Balkandali v the United Kingdom*, App. Nos 9214/80, 9473/81 and 9474/81, 28 May 1985, para. 78; race: *Timishev v Russia*, App. Nos 55762/00 and 55974/00, 13 December 2005, para 58.

claim under Article 14 was based on gender discrimination: she argued that a Muslim man could teach at a **Swiss** state school without being subject to any form of prohibition. The ECtHR held that:

> the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing the Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.[103]

Therefore, as the measure applied to men as well as women, the ECtHR concluded that there was no discrimination on the grounds of gender in this case. In the view of the author, the ECtHR should have, at least, considered whether the measure was indirectly discriminatory against women, but it did not do so.

In *Sahin v Turkey,* discrimination on the ground of religion was claimed but this was turned down because the 'regulations on the Islamic headscarf were not directed against the applicant's religious affiliation'.[104] No consideration was given to whether the measures in question could amount to indirect discrimination on the grounds of religion or belief or gender. Thus, in cases where the ECtHR has considered the discrimination claim it has held that the rules banning the wearing of religious clothing or symbols are not concerned with religious affiliation or gender. Instead, the ECtHR examined the aims of the rules and then decided that these were legitimate and that there was, thus, no discrimination and no violation of article 14.

Summary

Summarising the issues in relation to the right not to be discriminated against:

- Starting point is equality before the law, Article 20 EUCFR;
- Article 21 EUCFR contains large number of grounds, but application limited and justification (Article 52(1)) applies;
- Article 14 ECHR, only in conjunction with other article;
- Protocol 12: freestanding right to non-discrimination, but only ratified by 10 EU Member States;
- Article 14 applies to other 18 Member States;
- Under both Article 14 and Protocol 12, justification of both direct and indirect discrimination is possible: must be a proportionate and necessary means to achieve a legitimate aim.

103 *Dahlab v Switzerland,* under 2. See also: *Kurtulmus v Turkey,* where a similar conclusion was reached.
104 *Sahin v Turkey*, Grand Chamber, para. 165.

4 EU Context: Directive 2000/78/EC

In 2000, the EU adopted two directives against discrimination: the Race Directive covering racial and ethnic origin discrimination, and the Employment Equality Directive covering discrimination on the grounds of religion or belief, disability, age and sexual orientation. As already mentioned, these Directives impose a duty on Member States to enact legislation against discrimination on these grounds. According to the report by the European Commission on the Directives, 'all 28 Member States have transposed the Directives and the conformity of all those laws with the Directives has been checked by the Commission'.[105] The Employment Equality Directive covers the fields of employment, occupation and vocational training but as mentioned before, there is a proposal to expand the protection outside these areas.[106] If this proposal is accepted, the areas covered by the prohibition of religion or belief discrimination and the other grounds covered by the Employment Equality Directive will be the same as the areas covered by the Race Directive. It must be noted that a number of Member States provide the same protection as the Race Directive does for some or all grounds covered by the Employment Equality Directive.[107] The CJEU has given a wide interpretation to the concepts of employment, access to employment, dismissal and vocational guidance and training.[108] The EU has had a prohibition against sex or gender discrimination in employment in place for a much longer time and this was expanded to the access to and supply of goods and services in 2004.[109]

As already mentioned, the CJEU has recently delivered its first two judgments on religion or belief discrimination under the Directive, both concerning Muslim women who wanted to wear Islamic headscarves at work and were dismissed when they refused to take these off.[110] These cases and the very different Opinions of the Advocates General in each of these cases will be analysed in detail below, but first the provisions of the Employment Equality Directive will be examined. Where relevant, the case law of the Member States has been used to illustrate the concepts discussed.

4.1 Prohibited forms of conduct

The Employment Equality Directive prohibits direct discrimination, indirect discrimination, harassment, instruction to discriminate and victimisation.

4.1.1 Direct discrimination

According to Article 2(2)(a) of the Directive, direct religion or belief discrimination takes place where one person is treated less favourably than another is, has been or would be treated in a comparable situation on the ground of religion or belief. The country fiches mention some instances of direct discrimination. In **Austria**, in a case regarding an employee of a public notary who first wore a hijab, and then later a niqab at work, the Supreme Court held that the ban on the hijab was discrimination based on specific religious clothing and this was to be regarded as direct religious discrimination. However, a ban on the wearing

105 COM (2014) 2, pp. 3.
106 COM (2008) 426.
107 As this report covers the wearing of religious clothing and symbols in employment only, the proposal and the national coverage beyond employment will not be discussed. For more information the reader is referred to: Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016,* pp. 61-71. For the areas covered by each Member State for religion and belief discrimination see: McColgan, A. (2013) *National Protection beyond the Two EU Anti-discrimination Directives The Grounds of Religion and Belief, Disability, Age and Sexual Orientation beyond Employment* (European Network of Legal Experts in the Non-discrimination Field, European Commission, Directorate-General for Justice) pp. 80-81: http://www.equalitylaw.eu/downloads/2715-final-beyond-employment-en.
108 Equinet (2011) *Equality Law in Practice A Question of Faith: Religion and Belief in Europe,* (Equinet, Brussels) p. 11: http://www.equineteurope.org/Equality-Law-in-Practice-Religion.
109 The two most important and current Directives are: Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services [2004] OJ L 373/37; and, Council Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) [2006] OJ L 204/23.
110 *Achbita v G4S* and *Bougnaoui v Micropole*.

of the niqab was held to be justified as a genuine determining requirement (see below).[111] In **Belgium**, an employee of a Hema store who wore a headscarf was forbidden to work with customers after some customers had complained. This was despite the fact that, at the beginning of her employment, she was told that the wearing of a headscarf was acceptable, and she was even provided with a Hema headscarf as worn by staff in the Netherlands. The Labour Court of Tongres held that this was direct discrimination, because evidence showed that the neutrality argument was a fake one invoked to cover the prejudice towards Islam of some clients. The Court stressed that the store did not have a clear neutrality policy in the workplace.[112]

In **Italy**, a company had excluded a girl from a selection of hostesses to be employed during an exhibition handing out leaflets. The company was a selection and recruitment agency that was acting under instructions from another company and was in charge of the organisation of the exhibition. The requirements mentioned in the job advertisement were the following: knowledge of English language, shoe size 37, good looking, 165 cm height and size 40/42. A girl applied for the job, attaching a picture of herself, believing to satisfy the 4 required characteristics. The company replied positively but asked if she agreed to take off the headscarf. The girl explained to the company that she was wearing the headscarf in accordance with her religion, so that she couldn't take it off. The company didn't select her for this reason. Actually, the instructions given to the recruiting company included also 'flowing hair', although not as an essential requirement. The Tribunal of Milan rejected the claim for discrimination on grounds of religion but, on appeal, the Court of Appeal of Milan found that this was a case of direct discrimination on grounds of religion.[113]

In **Spain**, the Social Court 1 of Palma de Mallorca held that a private company (ACCIONA Airport Services) must accept that a Muslim woman can wear the hijab in positions where she deals with the public. The claimant was a Muslim woman who had worked for ACCIONA to provide customer service at Palma de Mallorca airport since 2007. In 2015, she told the company that she wanted to start wearing a hijab to work for religious reasons. Initially, she was authorised to do so, but the company later changed its position. The employer imposed increasingly serious labour sanctions for wearing the hijab and the employee brought an action against the company. The argument of the company was based on the fact that, in defence of a good corporate image, all employees in the passenger service department had to comply with written rules of uniformity established by the company which did not allow the use of garments not mentioned therein. The claimant maintained, among other reasons, that she was discriminated since other workers could exhibit necklaces with Christian religious symbols. The Social Court 1 of Palma de Mallorca held that there was direct discrimination on the grounds of religion or belief.[114]

Lastly, in a case from **Sweden**, which, although not concerning employment, is a good example of direct discrimination, the following occurred. Two women who were wearing clothes covering most of their bodies were asked to leave a swimming pool. The rule in question applied to everybody regardless of their religion and said that swimming outfits must be worn regardless of whether the person was in the pool or not. The two women had accompanied their children, did not intend to enter the pool and only wanted to supervise their children. The Appeal Court found direct discrimination. They did not believe that a Swedish parent (who maybe had forgotten their swimsuit) would have been denied to be beside the pool supervising their children in their ordinary clothes, because there was a small risk that they may have needed to go into the pool if an accident happened. The municipality thus failed to prove that the rule was enforced against everybody.[115]

111 **Austria**: Supreme Court, Decision No 9ObA117/15v, 25 May 2016.
112 **Belgium**: Labour Court, Tongres, 2 January 2013, *Joyce V.O.D.B. v R.B. NV and H.B. BVBA,* Judgment No. A.R.11/214/A.
113 **Italy**: Court of Appeal of Milan, 20 May 2016, *Mahmoud Sara v Evolution Events Srl*.
114 **Spain**: Social Court 1 of Palma de Mallorca, 5 February 2017 (case 0031/2017).
115 **Sweden**: Appeal Court for Western Sweden, case T-2049-07.

Discrimination by association and by assumption

The Employment Equality Directive prohibits discrimination on the ground of religion or belief and it does not specify that this must be on the grounds of 'his or her' religion or belief. This indicates that the discrimination does not have to take place because of the victim's religion or belief. The definition is broad enough to include discrimination by association and discrimination by perception. The first form of discrimination takes place when someone is discriminated against because they are associated with someone with a particular religion or belief. An example would be an employer refusing to employ a Jewish person because they are married to a Catholic person. Discrimination by perception or assumption takes place where someone is discriminated against because the discriminator assume that they have a certain religion or belief, for example, when an employer does not employ a person with an African sounding name because they presume that the person is Muslim, although they are not. In *Coleman v Attridge Law and Steve Law*, a woman was treated less favourably at work because she had a disabled son. The CJEU held that discrimination by association is prohibited by the Employment Equality Directive and that this covers both direct discrimination and harassment by association.[116] In *CHEZ Razpredelenie*, the CJEU held that this also covers indirect discrimination by association.[117] According to the European Commission, both directives also prohibit a situation where a person is directly discriminated against on the basis of a wrong perception or assumption of protected characteristics.[118] In the view of the author, the definition of direct discrimination in the Employment Equality Directive is also wide enough to cover discrimination by an employer on the ground of the employer's own religion or belief because that would be on the ground of religion or belief.

Comparison

The definition of direct discrimination – as less favourable treatment than another in a comparable situation – means that a comparison needs to be made with another person. So, to successfully claim direct religion or belief discrimination, the claimant needs to show that they are, have been or would be treated less favourably than a person without that religion or without any religion or belief. The definition makes clear that the comparator can be a previous employee ('has been') or a hypothetical ('would be') employee. However, the choice of comparator can determine the outcome of the case and thus it is important to choose the right comparator.[119] Vickers writes that:

> It would seem that if the recitals clauses [of the Employment Equality Directive] are to be respected, and the commitments to equality and respect for human rights contained within them are to be upheld, then once less favourable treatment can be shown in comparison with another group, the discrimination finding should be made, whether that comparison is with those of a majority religion, minority religion, established religion or no religion. The fact that the treatment may be similar to a third group should not prevent a finding of discrimination as between the chosen groups.[120]

Justification

The Employment Equality Directive does not allow for justification of direct discrimination except in situations prescribed in the Directive itself. The exceptions provided for are: positive action (Article 7); genuine and determining occupational requirements (Article 4(1)); some wider exceptions for employers

116 Case C-303/06 *Coleman v Attridge Law and Steve Law,* ECLI:EU:C:2008:415.
117 Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za Zashtita ot Diskriminatsia*, ECLI:EU:2015:480.
118 COM (2014) 2, point 4.5, p. 10.
119 For possible problems in relation to comparators for both direct and indirect religion or belief discrimination, see Vickers, L. (2006) *Religion and Belief Discrimination in Employment – the EU Law,* European Network of Legal Experts in the Non-Discrimination Field, European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities, pp. 14-15: http://www.equalitylaw.eu/downloads/2505-religion-and-belief-en.
120 Vickers, *Religion and Belief Discrimination in Employment – the EU Law*, p. 15.

in organisations with an ethos based on religion and belief (Article 4(2)); direct age discrimination (Article 6(1)); and reasonable accommodation for disabled people (Article 5). Of these, only Article 4(1) and 4(2) are relevant for the subject of this report and this will be analysed below under 'genuine and determining occupational requirements' and 'ethos-based organisations'.

Apart from these exceptions provided for in the Directive there is also a general exception clause in Article 2(5) of the Directive, as mentioned above:

> 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.

The wording of this article is quite similar to the justification under Article 9 (and other articles) of the ECHR and thus the CJEU might well look at the interpretation by the ECtHR. No such general exception clause is present in the Race Directive or the EU Directives against gender discrimination. Ellis and Watson write that this provision was added to the Directive during the final hours of negotiation and that it was thought necessary to prevent members of harmful cults, paedophiles and people with dangerous mental and physical illnesses from gaining protection from the Directive. But, they add, the exception is extremely broadly drafted, especially given that the Directive covers only workplace discrimination and, according to these authors, the CJEU 'will have to patrol its boundaries carefully'.[121] The CJEU has held that Article 2(5), as an exception to the principle of the prohibition of discrimination, must be interpreted strictly.[122] According to Bell, Article 2(5) addresses situations where the fundamental right to equality and non-discrimination clashes with other fundamental rights and values.[123] But is this the case where someone is prohibited from wearing religious clothing or symbols at work? It is true that both the fundamental right to freely manifest one's religion and the right to be free from religious discrimination are engaged. But these rights are both rights of the wearer of the clothing or symbols and thus they do not clash but mutually reinforce each other: the employee enjoys both these rights. This would be different if the exercise of the right to freely manifest one's religion clashes with someone else's – a fellow employee or a customer, for example – right to be free from discrimination, but it is difficult to envisage a scenario where someone else is discriminated against by a person wearing religious clothing or symbols. As was mentioned before, in *Achbita v G4S,* Advocate General Kokott stated that Article 2(5) did not need to be considered as it did not add anything to Article 4(1) of the Employment Equality Directive.[124] Article 2(5) did not feature in the CJEU headscarf decisions[125] nor was it mentioned by Advocate General Sharpston in *Bougnaoui v Micropole*.[126]

4.1.2 Indirect discrimination

According to Article 2(2)(b) of the Employment Equality Directive, indirect religious discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, at a particular disadvantage compared to other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The word 'compared' indicates that here, too, a comparison needs to take place and what was said above about this applies here as well. The Handbook on European Anti-discrimination Law explains that 'provision, criterion or practice' means that 'there must be some form

121 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2dn ed., Oxford, Oxford University Press) pp. 402-403.
122 Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,* ECLI:EU:C:2010:4, para. 60.
123 Bell, M. (2007) 'Direct Discrimination', in Schiek, D., Waddington L. and Bell, M. (eds) *Cases, Materials and Text on National, Supernational and International Non-Discrimination Law* (Oxford/Portland, Oregon, Hart Publishing) p. 290.
124 Opinion AG Kokott in *Achbita v G4S*, paras 139-140.
125 *Achbita v G4S* and *Bougnaoui v Micropole*.
126 Opinion AG Sharpston in *Bougnaoui v Micropole*.

of requirement that is applied to everybody'.[127] So these terms must be interpreted widely. Moreover, the person applying the provision, criterion or practice is the one who must prove that it is justified.[128] So, indirect discrimination takes place where a neutral rule (provision, criterion or practice) is applicable to everyone in the same way, but where some people, because of their religion or belief, cannot comply with the rule.

Justification

It will be clear from the definition that indirect discrimination is not against the law if it is objectively justified: if it pursues a legitimate aim and the means used to reach that aim are appropriate and necessary. The CJEU has explained, in relation to indirect sex discrimination, that this objective justification test consists of three parts: first, the means chosen must correspond to a real need; secondly, they must be appropriate with a view of achieving the legitimate aim or objective pursued; and, thirdly, they must be necessary to that end.[129] The third requirement, 'must be necessary to that end' indicates that the justification test for indirect discrimination includes a consideration of the question whether there is an alternative, less far-reaching and less discriminatory way of achieving the aim pursued. If there is an alternative which affects the individual less, then that should be chosen and, if it is not chosen, then the rule will be held not to be justified. Above it was argued that this was also the case for the justification test under Article 9 ECHR. A good example would be the rule that applies in many places where food is handled: that all hair must be covered for health and hygiene reasons. This rule clearly has a legitimate aim and would fulfil the above test as long as the employer would not require all employees to wear a specific type of hat: allowing turbans and headscarves that cover all hair would achieve the legitimate aim as well and would not discriminate against Sikh men or Muslim women.

The country fiches provide a number of examples. In **Belgium**, Actiris – the public body responsible for employment in the region of Brussels-Capital – prohibited the wearing of conspicuous philosophical symbols. The President of the Court of First instance of Brussels ruled that this was indirect discrimination against the applicant who was wearing the Islamic veil. According to the Court, the prohibition at stake was not legitimate since the regional legislator itself did not impose 'exclusive neutrality'. Moreover, Actiris did not show that the measure was appropriate and necessary to achieve the aim of neutrality pursued.[130] In **Denmark**, a female employee was dismissed for having worn a headscarf to work for religious reasons. The Supreme Court found that this did not amount to indirect discrimination based on religion. The Court argued that the clothing regulation in the supermarket applied to every employee having direct customer contact and that the rules had been consistently enforced. The Court recognised that the prohibition of wearing headgear when having direct contact with customers would mainly affect Muslim women. In the ruling, the Supreme Court, however, accepted the supermarket's wish to appear politically and religiously neutral as a legitimate aim. The court found that a clothing requirement as a means to achieve this aim was appropriate and necessary. The court thus concluded that the differential treatment of the Muslim woman in question was objectively justified.[131]

The country fiche from **Finland** reports on a written analysis of the Occupational Health and Safety Authorities who gave their opinion on the interpretation of the Non-Discrimination Act. They concluded that the ban on wearing a turban when driving a bus amounted to indirect discrimination on the ground of religion. The case was not taken to court but resulted in the employee and employer unions' agreement

127 EU Fundamental Rights Agency and European Court of Human Rights, Council of Europe, *Handbook on European Non-discrimination Law*, Luxembourg, Publications Office of the European Union, 2011, p. 29: http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf.

128 *Handbook on European Non-discrimination Law*, p. 126.

129 Case C-170/84 *Bilka Kaufhaus v Karin Weber van Hartz,* ECLI:EU:C:1986;204, para. 36.

130 **Belgium**: Court of First Instance of Brussels, 16 November 2015, No. 13 / 7828 / A.

131 **Denmark**: Supreme Court, *Føtex*-case 2004, U.2005.1265H.

on a policy on the wearing of the turban.[132] In a case from the **Netherlands**, McDonalds had a dress code prohibiting personnel from wearing a headscarf with their uniform as it would interfere with the uniform image the company wanted to communicate to its customers. The Court held that the prohibition was not legitimate as it was not necessary to achieve this goal: the company could very well design headscarves matching the uniform.[133] So, the Court suggested an alternative, less discriminatory way of achieving the legitimate aim. In *Azmi v Kirklees Metropolitan Borough Council*,[134] a case from the **UK**, a language teaching assistant employed to work with children whose first language was not English, was prohibited from wearing a face-covering veil when she was teaching her pupils, but was allowed to wear it around the school at other times. The Employment Appeal Tribunal held that this was indirect discrimination but that it was justified, as it was proportionate given the need to uphold the interests of the children in having the best possible education. The fact that the school had undertaken a close investigation to see if the quality of teaching was reduced when she wore the face-covering veil (the headmaster had observed Ms Azmi's teaching while wearing the face-covering veil on two occasions); and, the fact that the school had considered whether it was possible to rearrange her timetable to enable her to assist only in classes with a female teacher, were relevant to the finding that the ban on the veil was justified.

Because direct discrimination on the grounds of religion or belief cannot generally be justified, but indirect discrimination can, it is important to make a distinction between these two. However, in cases concerning bans on the wearing of religious clothing and symbols in the workplace, it is not always easy to do so as will be clear form the country examples above. It is also clear from Advocate General Kokott's Opinion in *Achbita v G4S,* where she pointed out that **France** and the **UK** assumed that there was indirect discrimination; **Belgium** and the equality body (Centrum voor Gelijkheid van Kansen and Racismebestrijding, who assisted Ms Achbita), considered there to be direct discrimination; the EU Commission supported a finding of indirect discrimination in *Achbita v G4S*, and an assumption of direct discrimination in *Bougnaoui v Micropole*; and, the practice of national courts was also inconsistent.[135] In the view of the author, as will become clear below, the CJEU could have found either direct or indirect discrimination because arguments for either finding could be brought forward. In the case from **Finland** mentioned above, the ban on the turban for bus drivers was seen as indirect discrimination under the Non-Discrimination Act. However, the concept of discrimination in the Penal code is 'differential treatment without acceptable reason' and does not make an explicit division between direct and indirect discrimination. In **France**, bans on the wearing of religious clothing in employment have been held to be direct discrimination in breach of anti-discrimination law, or they have been discussed on the level of admissible limitations to fundamental rights and freedoms in employment. And, the country fiche from the **Netherlands** describes that cases on prohibitions on wearing religious or other symbols at work cover instances of both direct and indirect discrimination, depending on the question whether the prohibition is based on a neutral policy of the employer banning all kinds of expressions of personal identity or whether it singles out religious expressions.

It must be noted that the four Member States that have national legal bans against face-covering clothing in public spaces in place, all formulate these bans in general terms: in **Austria,** the law prohibits covering the face and does not mention religion; in **Belgium**, the law bans the wearing of any clothing totally, or principally hiding the face; in **Bulgaria**, the law is called the Limiting of the Wearing of Clothing Partially or Fully covering the Face Act (with partially covering the face meaning covering the mouth, nose or eyes); and, in **France**, the law bans the wearing of garments designed to cover the face in public places. Yet, these bans are, as mentioned before, usually referred to colloquially as 'burqa bans', which shows the real target of such bans. In **Austria**, the law is linked to integration and participation in the society. The Austrian country fiche states that the law 'is clearly targeting only Muslim headgear for women, like burqa or niqab. Although the provision does not explicitly refer to religious clothing, the public debate

132 **Finland**: Etelä-Suomen Aluehallintoviraston toimintaohje, Dnro ESAVI/524/05.13.05.02/2013: https://www.syrjinta.fi/documents/10181/10854/44937_avi_turbaanikeissi_ratkaisu.pdf/252d6eca-19be-4ea2-b34b-c0ff05243ae6.

133 **Netherlands**: District Court, Arnhem, 1 September 2004, ECLI:NL:RBARN:2004:AS6299.

134 **UK**: *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154.

135 Opinion AG Kokott in *Achbita v G4S,* para. 41.

was entirely on a "ban on burqas"'. The country fiche from **Belgium**, states that 'this Act applies in the public area and does not explicitly target any "religious" clothing. Though, it was quite clear from the parliamentary debates that the aim was to prohibit the wearing of the burqa and the niqab in the public sphere, including in employment'. In **Bulgaria**, the country fiche reports that 'the bill was introduced by Islamophobic parties termed by ECRI "ultra-nationalist/ fascist" in order to suppress a recent practice of wearing the burca by a fraction of Muslim women, mostly Roma, in certain communities'. In the view of the author, these laws are formulated in general terms, because a ban on only Muslim face-covering veils would constitute direct discrimination because they would treat Muslim women less favourably than other religious people.

4.1.3 Harassment

According to Article 2(3) of the Employment Equality Directive, harassment is a form of discrimination which occurs when unwanted conduct related to religion or belief takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. An example would be an employee being bullied for wearing, for example, a cross or a headscarf, or a Jewish employee wearing a Jewish skull cap being subjected to jokes about Jewish people. The Directive does not set out how to determine whether or not the dignity of a person is violated or when an environment can be considered to be hostile, degrading, humiliating or offensive. Moreover, is this an objective or a subjective test? Is it about what the person who is harassed finds degrading or humiliating or is it about what a reasonable person would see as such? According to the Handbook on European Non-Discrimination law, 'EU law adopts a flexible objective/subjective approach. Firstly, it is the victim's perception of the treatment that is used to determine whether harassment has occurred. Secondly, however, even if the victim does not actually feel the effects of the harassment, a finding may still be made so long as the complainant is the target of the conduct in question'.[136] The country fiches do not give any examples of harassment on the grounds of the wearing of religious clothing or symbols.

4.1.4 Instruction to discriminate

Article 2(4) of the Employment Equality Directive determines that an instruction to discriminate shall be deemed to be discrimination, but this article does not indicate what an 'instruction to discriminate' means. The Handbook on European Non-discrimination Law states that:

> In order to be of any worth in combating discriminatory practices, it ought not to be confined to merely dealing with instructions that are mandatory in nature, but should extend to catch situations where there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected grounds. This is an area that may evolve through the jurisprudence of the courts.[137]

The handbook also points out that harassment and instruction or incitement to discriminate may fall under the national criminal law in the Member States.[138]

4.1.5 Victimisation

Article 11 of the Employment Equality Directive provides protection against victimisation. This is defined as dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. An example would be where an employee has complained of religion or belief discrimination and is then passed over for promotion because they have done so. The rationale for this protection can be found

136 *Handbook on European Non-discrimination Law*, pp. 32.
137 *Handbook on European Non-discrimination Law*, pp. 33.
138 *Handbook on European Non-discrimination Law*, pp. 34.

in Recital 30 of the Directive: 'the effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation'. This rationale suggests that not only the person who is the victim of discrimination is protected, but also those persons who assist the victim and those who provide evidence in a complaint by someone else or act as witness. The national legislation varies in this respect.[139]

Summary

Summarising the issue in relation to prohibited conduct on the ground of religion or belief under the Employment Equality Directive:

- Direct religion or belief discrimination: less favourable treatment;
- Direct religion or belief discrimination: cannot be justified except in case of positive action or genuine and determining occupational requirement;
- Indirect discrimination: can be objectively justified: legitimate aim and proportionate and necessary means;
- Both direct and indirect discrimination require a comparison to be made;
- Discrimination by association and assumption covered for direct and indirect discrimination and harassment;
- Protection against harassment and instruction to discriminate provided;
- Victimisation provisions.

4.2 Genuine and determining occupational requirements / ethos-based organisations

Article 4 of the Employment Equality Directive concerns occupational requirements. Apart from positive action (Article 5) these exceptions provide the only defence for direct discrimination. In *Achbita v G4S*, Advocate General Kokott concluded that there was no direct discrimination, but just in case the CJEU found that there was, she discussed the genuine and determining occupational requirement.[140] Article 4(1) provides that:

> Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

So, there is no discrimination if there is a genuine and determining occupational requirement to be of a certain religion or belief: provided that it is *genuine* and *determining*; it is a requirement of the job; it is due to the nature of the job or the context in which this is carried out; and, the application of the requirement is a proportionate means to achieve a legitimate aim. All this suggests that the genuine and determining occupational requirements must be considered very carefully. Vickers writes that:

> it cannot realistically be claimed that being of a particular religion is a determining occupational requirement for many jobs. Under Article 4(1) religious discrimination is only really likely to be lawful in cases of those employed in religious service, whose job involved teaching or promoting the religion or being involved in religious observance.[141]

139 See for information on this: Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016,* pp. 99-102.
140 Opinion Advocate General Kokott in *Achbita v G4S*, para. 62. See further on this below.
141 Vickers, *Religion and Belief Discrimination in Employment – the EU Law*, p. 56.

The justification and proportionality test in Article 4(1) is similar to the test for indirect discrimination and the tests under Articles 9 and 14 ECHR. An example of a genuine and determining occupational requirement on the ground of religion or belief would be a requirement that a rabbi is Jewish or that the Pope is Catholic. The CJEU has consistently held, in relation to the genuine and determining occupational requirement concerning gender, that this provision, as derogation from an individual right laid down in the Directive, must be interpreted strictly.[142]

The provision in Article 4(1) of the Directive applies to all grounds of discrimination covered by the EU Anti-discrimination Directives. However, the Employment Equality Directive contains a further exception in Article 4(2) which is not applicable to any other grounds of discrimination but applies to churches and other public or private organisations with an ethos based on religion or belief. Article 4(2) reads as follows:

> 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.

There are two parts to the exception in Article 4(2) which could both be relevant to the wearing of religious clothing and symbols for employees of organisations with a religious ethos.[143] The first is an occupational requirement and determines that organisations with a religious ethos may treat a person's religion or belief as a genuine, legitimate and justified occupational requirement where the nature of the job or the context of the activities justifies them doing so. This means that, for example, a school managed by a religious order can require its teachers to practise the religion of the school, but it will have to demonstrate that the nature or the context of the teacher's activities requires them to share the school's religion in order to maintain its ethos. This exception is broader than the exception in Article 4(1), as here the requirement does not have to be *determining,* although it still has to be occupational, legitimate and justified and it still needs to be linked to the nature or context of the job. Moreover, Article 4(2) makes clear that this should not justify discrimination on another ground. The latter might not be very relevant for or apply in many cases in relation to the wearing of religious clothing or symbols, although, bans on this could, as was mentioned above, constitute discrimination on the grounds of racial or ethnic orgin or gender. This first part of Article 4(2) suggests that the school might be entitled to refuse to employ a teacher because they are of a different religion, but not because they are homosexual. An Islamic school could thus require a teacher who is involved in leading worship or teaching religion to be of the Islamic faith. But it could not require cleaners to be of the Islamic faith, as the nature or context of their activities does not require this.[144]

142 See, for example, Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para. 36; Case C-273/97 *Sirdar v The Army Board and Secretary of State for Defence*, ECLI:EU:C:1999:523, para. 23; and, Case C-285/98 *Kreil v Bundesrepublik Germany*, ECLI:EU:C:2000:2, para. 20.

143 See on this also Bell, 'Direct Discrimination', in Schiek, Waddington and Bell, pp. 308-309.

144 Equinet, *Equality Law in Practice A Question of Faith: Religion and Belief in Europe,* p. 52.

The second part of Article 4(2) allows organisations with a religious ethos to require their employees to conduct themselves in a way which is in keeping with the organisation's ethos but this is subject to the proviso that the provisions of the Directive are otherwise complied with. Bans on the wearing of religious clothing or symbols of any other religion than the religion of the organisation could, possibly, fall under this exception, although there is no case law from the CJEU on this. In *Achbita v G4S* and *Bougnaoui v Micropole,* only the exception in Article 4(1) was discussed. This leaves a number of questions about the interpretation of this part of Article 4(2). Would, for example, a Catholic organisation be able to refuse to employ a woman who is wearing an Islamic headscarf on the ground that this is not in keeping with its ethos? Would an Islamic organisation be able to require that their female employees wear a headscarf based on the requirement of loyalty to the organisation's ethos? And, does the nature of the activities and the context in which they are performed, play a role in this second part of Article 4(2) as well?

Two examples from the **Netherlands** illustrate how these questions have been answered there. In the first case, a Muslim woman was refused a job as an Arabic teacher in a Muslim school because she refused to wear the Islamic headscarf. Article 5(2)(c) of the Dutch Equal Treatment Act states that the prohibition of direct discrimination when recruiting people does not apply when it concerns 'the freedom of a private, educational establishment to impose requirements on the occupants of a post which, in view of the establishment's purpose, are necessary for it to live up to its founding principles'. It was not disputed that the Muslim school was a private educational establishment. In addition, in these cases, the Equal Treatment Commission[145] generally investigates: whether the requirement (i.e. to wear the headscarf) was necessary for the realisation of the founding principles; and, whether this requirement forms part of a continuing policy of the institution and is maintained in practice. In this case, the Commission found that the second requirement had been fulfilled, but the school had not succeeded in proving the first one: the school had also appointed non-Muslim teachers who did not have to wear the headscarf and teachers and pupils were not required to wear the headscarf outside the school, so the wearing of a headscarf was not so fundamental. Finally, the Commission also stated that no proof had been given that wearing a headscarf is a functional criterion for the proper performance of the task of teaching the Arabic language.[146] This suggests that the school could have required female teachers to wear a headscarf if this had been fundamental and necessary because of the ethos (or founding principles) of the school. It also suggests that the nature of the job might be significant for the second part of Article 4(2) of the Employment Equality Directive. However, if this is the case, would that mean that those who perform activities which are not linked to the religious ethos of the organisation, would not need to be loyal to this ethos? In the view of the author, an organisation, whether it has a religious ethos or not, can expect a certain loyalty from its employees, but the question is how far this can go?

In the second case from the **Netherlands**, a part-time local councillor for the right wing Party for Freedom (PVV) posted a number of strongly worded twitter messages expressing Islamophobic opinions. He was also a teacher of civil education in a Catholic high school providing education from a Catholic/inter-confessional perspective. He was suspended because the School Board considered that the twitter messages were incompatible with his position and not consistent with the school's mission. The Netherlands Institute of Human Rights found discrimination (on the ground of political opinion), but then found that the exception for institutions founded on religious and ideological principles, in other words institutions with a religious ethos, applied and thus the suspension did not constitute prohibited discrimination based on the school's consistent policy of maintaining its ideological principles. The claimant could have known that his statements ran contrary to his employer's core principle of respect.[147] The nature or context of the job did not appear to play a role in this case so this is somewhat contradictory to the case above. But both cases stress the importance of maintaining a consistent policy.

145 This Commission has now gone up in the Netherlands Institute of Human Rights.
146 See on this: **Netherlands**: Equal Treatment Commission, Judgment 2005-222.
147 **Netherlands**: Netherlands Institute of Human Rights, Judgment 2013-9.

Some guidance might also be derived from the case law of the ECtHR. Although the cases were not brought under Article 9 ECHR, they all did involve issues of religion and belief. In *Fernandez Martinez v Spain*, a Catholic employer refused to renew the employment contract of a teacher of religion and ethics because he had publicly shown his disagreement with the Catholic Church's position on abortion, divorce, sexuality and contraception. The ECtHR held that there was no violation of Article 8 ECHR (right to respect for private and family life). Religious organisations were entitled to demand a certain degree of loyalty from those working for them or representing them. According to the ECtHR, the employee had knowingly and voluntarily accepted a special duty of loyalty to the religious organisation which limited the scope of his right to respect for his private and family life to a certain degree. Such contractual limitations were, according to the Court, permissible under the Convention where they are freely accepted.[148] In other words, the employee had accepted a special duty of loyalty by signing the employment contract.

Obst v Germany and *Schüth v Germany*[149] related to two church employees. Mr Obst was director of public relations of the Mormon Church for Europe, while Mr Schüth was an organist and choir master in a Catholic church. Both were dismissed because they had extra-marital relationships. In both cases, the ECtHR recognised the right of the employer to require loyalty to the teaching of the church from these employees.[150] The ECtHR held that the dismissal of Mr Obst did not constitute a violation of Article 8 ECHR. Mr Obst had grown up in the Mormon Church and he had been or should have been aware when signing the employment contract of the importance of marital fidelity for his employer and of the incompatibility of his extra-marital relationship with the increased duties of loyalty he had contracted towards the Church as director for Europe of the public relations department.[151] In contrast, in relation to Mr Schüth, the ECtHR found that there was a breach of Article 8 because the national court had not examined the argument of the employer but had simply reproduced it without giving any attention to Mr Schüth's family life or the legal protection afforded to it and thus had not balanced all the interests involved.[152] A more detailed examination was required when weighing the competing rights and interests at stake. The ECtHR mentioned that the national Court should have taken into account that Mr Schüth had not challenged the position of the Catholic Church and the limited possibilities he had of getting another job.[153] This suggests, as Vickers writes, that the CJEU, under Article 4 of the Employment Equality Directive:

> will need to consider the right to religious freedom of the religious employer along with other competing interests such as the equality, privacy and dignity rights of employees when assessing the proportionality of any occupational requirement imposed by an ethos-based employer.[154]

In the view of the author, these competing interests could also include the right of an employee to freely manifest their religion through the wearing of religious clothing or symbols.

According to Chopin and Germaine:

> most of the controversy around the implementation of the provisions of the Employment Equality Directive on religion or belief centres on the extent of any exceptions provided for organised religions (e.g. churches) and organisations with an ethos based on religion or belief (e.g. religious schools).[155]

148 *Fernandez Martinez v Spain*, App. No. 56030/07, 12 June 2014, paras 131 and 134. The European Commission of Human Rights had come to the same conclusion in relation to the right to freedom of expression under Article 10 ECHR in an earlier case concerning a doctor who was dismissed by a Catholic hospital for publicly expressing his pro-abortion views: *Rommelfanger v Germany*, App. No. 12242/86, 6 September 1989.

149 *Obst v Germany*, App. No. 425/03 and *Schüth v Germany*, App. No. 1620/03, both 23 September 2010.

150 *Obst v Germany*, para. 51; *Schüth v Germany*, para. 69.

151 *Obst v Germany*, paras 48-51.

152 *Schüth v Germany*, para. 69.

153 *Schüth v Germany*, para. 73.

154 Vickers, 'Religion and Belief Discrimination in Employment under the Employment Equality Directive: a Comparative Analysis', p. 35.

155 Chopin, and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016,* p. 17.

The EU Commission has expressed the opinion that Article 4(2) 'has to be interpreted narrowly as it is an exception'.[156] This is clearly an area in need of interpretation by the CJEU. The CJEU will get a chance to consider Article 4(2) as there are two cases, both from **Germany**, pending before the Court. The first case is *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.,* which concerns the first part of Article 4(2) and whether a religious organisation may authoritatively determine whether adherence to a specified religion is a genuine, legitimate and justified occupational requirement.[157] The second pending case is *I.R. v J.Q.,* which concerns the second part of Article 4(2) and the duty of loyalty and whether the church can determine with binding effect that an organisation such as the defendant in this case, where employees in managerial positions are required to act in good faith and with loyalty, shall differentiate between employees who belong to the church and those who belong to another church or to none at all.[158] In both cases, the principle of autonomy and self-determination of churches and religious organisations is the central issue in the referring question, so the CJEU is unlikely to shed light on the questions raised above or on issues related to the wearing of religious clothing and symbols in employment, as neither case is concerned with the latter.

The exceptions in Article 4(2) of the Employment Equality Directive do not have to be implemented into national law, but most Member States have done so. Exceptions are **Finland**, **France**, **Portugal**, **Romania** and **Sweden**, although in **Portugal** it can be derived from the combination of several legal provisions. And, in **Romania**, the provisions on determining occupational requirements can be interpreted to allow ethos or religion-based exceptions.[159]

Table 3: Article 4(2) and secularism/neutrality as religious ethos

Member State	Article 4(2) transposed into national law?	Secularism or neutrality a religious ethos
Austria	Yes	No
Belgium	Yes	No
Bulgaria	Yes, possibly stricter than the Directive	No case law
Croatia	Yes	No case law
Cyprus	Yes	Possibly
Czech Republic	Yes	No case law
Denmark	Yes	No? Not confirmed by case law
Estonia	Yes	No information
Finland	No	No
France	No	Not under Article 9 ECHR, see: Baby Loup case
Germany	Yes	No
Greece	Yes, possibly too wide	No information
Hungary	Yes, going beyond Directive?	Yes. No case law
Ireland	Yes, possibly too wide	No
Italy	Yes, possibly too wide	Yes, based on ECtHR case law
Latvia	Yes	Not clear
Lithuania	Yes	No case law
Luxembourg	Yes	No information
Malta	Yes	No information
Netherlands	Yes	No, confirmed by Equal treatment Commission judgments

156 COM (2014) 2, p. 15.
157 Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*
158 Case C-68/17 I.R. v J.Q.
159 See: Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016,* p. 17 and the country fiches. See also further below.

Member State	Article 4(2) transposed into national law?	Secularism or neutrality a religious ethos
Poland	Yes	No case law
Portugal	No, can be derived from the combination of several legal provisions (see below)	No information
Romania	No, but determining occupational requirements can be interpreted to allow ethos or religion-based exceptions	No
Slovakia	Yes, but see below	No information
Slovenia	Yes	No information
Spain	Yes	No
Sweden	No	A very important part of the Swedish 'non-programmatic' approach to secularism is that neither a secular argument nor a religious argument receives special treatment within the discrimination act
United Kingdom	Yes	Yes

In **Austria**, in the case about the wearing of a niqab by an employee of a public notary, mentioned above, the Supreme Court saw the prohibition of the niqab as a genuine and determining occupational requirement because it was among the undisputed basic rules of interpersonal communication in Austria to not cover one's face.[160] In **Belgium**, the wearing of the hijab by teachers of the Islamic religion was also debated in two cases before the Council of State. The schools in these cases did not employ the teachers when they refused to take off their headscarves outside the classrooms when they were not teaching. The Council of State held that the religious beliefs – and thus the related religious symbols –of a teacher of religion are inherent to their function. Furthermore, the Council of State pointed out that the exercise of the functions of teachers of religion or moral education is not limited to the sole hours when the philosophical courses are given and to the sole classrooms where these latter are given. For these reasons, the Council of State annulled, in the regulations in issue, the words 'when they are in the premises where they give their courses', so that the exception to the wearing of political, ideological or religious symbols, granted to teachers of religion or moral education, is not limited to the premises where they teach their philosophical courses.[161]

In **Croatia**, the People's Ombudsman, in her Report for 2016, expressed her view that the exception from Article 9 of the Anti-discrimination Act regarding organisations or persons with a religious ethos, cannot be applied to the process of employment of all employees of a religious organisation, more precisely that it cannot be a condition for employment of administrative staff, although this kind of practice is widespread in **Croatia**. This suggests that, for example, an organisation with an Islamic religious ethos cannot require all female employees to wear Islamic headscarves and that which employees can be required to do so depends on the work they are doing. Section 6(4) of the Anti-discrimination Law in the **Czech Republic**[162] mentions a genuine and determining, legitimate and justified occupational requirement with respect to the ethos of the church or religious organisation. So the occupational requirement here must also be determining, a term not mentioned in Article 4(2) of the Employment Equality Directive. On the other hand, the law does not explicitly mention that this kind of unequal treatment cannot lead to discrimination on other grounds. **Estonia** has provided for the exception in Articles 10(2) and 10(3) of its Equal Treatment Act[163] in words which are almost identical to those used in Article 4(2). The country fiche makes clear that this, in practice, means that access to some key positions (especially clergy) might be limited by internal rules or traditions of a church, which could include rules relating to the wearing of religious clothing or symbols, but it does not apply to all positions or jobs. There is no case law to clarify the issue.

160 **Austria**: Supreme Court, Decision No. 9ObA117/15v, 25 May 2016.
161 **Belgium**: Council of State, No. 223.201, 17 April 2013; Council of State, No. 232.344, 25 September 2015.
162 **Czech Republic**, Law No. 198/2009, Anti-discrimination law.
163 **Estonia**, Equal Treatment Act, 11 December 2008, RT I 2008, 56, 315.

France has not made any provisions for organisations or persons with a religious ethos and religious institutions are not permitted to select people (on the basis of their religion), to hire or to dismiss them from a job if that job is in a state entity or in an entity financed by the state. Ever since the decision of the Court of Cassation on 17 April 1991 in Fraternité Ste Pie, the religious orientation of the employer does not justify an exception to the application of Article L122-45 Labour Code (now Article L1132-1 ff). In this landmark case, which preceded the Employment Equality Directive, the Court of Cassation decided that the sexual orientation of the employee was not in and of itself sufficient to justify dismissal. At the time, it considered that the employer was required to establish that the behaviour of the employee had, considering their function and their objective behaviour, generated substantial disruption within the community.[164] **Greece** provides for the exception in Article 4(2) of the Employment Equality Directive. Moreover, according to well-established jurisprudence from the Council of State, as a state entity of public law, the Orthodox Church of **Greece** is obliged to respect the fundamental constitutional provisions which provide, among others, for non-discrimination (on religious grounds) of Greek citizens in their access to employment in a church entity. In other words, religious beliefs do not constitute criteria for public sector recruitment, even if this recruitment concerns Orthodox institutions.[165] In **Hungary**, Article 22(1)(b) of the Equal Treatment Act states that the principle of equal treatment is not violated if 'the differentiation arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit'.[166]

The country fiche of **Ireland** reports that Section 37(1) of the Employment Equality Acts 1998-2015 makes provisions for organisations with a religious ethos, and that this applies to any 'religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values'. Such an organisation

> 'shall not be taken to discriminate against a person… if—
> a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
> b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution'.

Section 37(1) then determines that, where such an institution is state-funded, it may only avail itself of the exception in circumstances that cohere with Article 4(2) of the Employment Equality Directive as set out in the section. This suggests that this is not the case for the first part of this section and thus that that section provides for broader exceptions than Article 4(2) of the Directive allows, but these provisions have not been the subject of any case law.

Italy has implemented the provisions of Article 4(2) of the Employment Equality Directive. What could be of importance for the exception is a recent judgment of the **Italian** Constitutional Court where it has stated that a broad meaning of church and religious group is included in the Constitutional provisions dealing with freedom of religion.[167] This interpretation would mean that more organisations would be considered to be organisations with a religious ethos for the purposes of the exception. In **Latvia**, the exception applies to religious organisations only and excludes belief organisations. In **the Netherlands**, Article 5(2) of the General Equal Treatment Act (GETA) provides that institutions founded on religious or similar principles as well as institutions based on political principles and denominational schools may impose requirements in relation to the occupancy of a post which, in view of the organisation's purpose, are necessary to live up to its founding principles. Article 5(2) GETA is interpreted strictly by the national equality body (until 2012 the Equal Treatment Commission and since then the Netherlands Institute of Human Rights). The

164 **France**: Court of Cassation, Social Chamber, 17 April 1991, Droit Social 1991, 485.
165 **Greece**: *Eleftherotipia*, 17 August 2007.
166 See on **Hungary** also: Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016,* p. 18.
167 **Italy**: Constitutional Court, Judgment 52/2016.

religious ethos organisation has to show that its identity is indeed manifested in its actual practice and is consistently upheld. It also has to show that the requirements are necessary to fulfil the specific function held by the employee in the organisation. This confirms what was said above. Thus a Christian school may prohibit a teacher from manifesting a non-Christian conviction by wearing a headscarf.[168] For an employee such as an administrator, however, who is not directly engaged in the realisation of the school's mission, the necessity test may lead to a different outcome.[169] In the **Netherlands**, the GETA does not apply to legal relationships within churches and other religious communities or associations of a spiritual nature as such and excludes the application of equal treatment norms to 'ministers of religion' (Article 3 GETA). This restriction of the scope of application of non-discrimination law is informed by the constitutional right to freedom of religion and the separation between church and state.

In **Poland**, the 2010 Equal Treatment Act introduces the exception in an almost verbatim translation of the text of Article 4(2) of the Employment Equality Directive, but it does not contain the part of that article which stipulates that the difference in treatment should not justify discrimination on another ground. In **Portugal**, although national law does not explicitly provide for an exception for employers with an ethos based on religion or belief, this exception can be derived from the combination of several legal provisions. Article 25(2) of the Labour Code states:

> it does not constitute any discrimination when the behaviour based on a discrimination factor that constitutes a justifiable and determining occupational requirement for the exercise of the profession, given the nature of the activity in question or the context of its implementation, where it is objectively justified by a legitimate aim and the means of achieving that aim are proportionate.

Religion or belief may be considered a justified discrimination factor, provided the employer has an ethos based on such religion or belief. Article 3 of the Law on Religious Freedom (Law 16/2001 of 22 June 2001) states that churches are free to organise themselves, exercise their functions and provide church services. The freedom of organisation may include the exclusion of contracting a worker with a different religion or belief. So far, religious entities have in practice benefited from discretion in hiring or dismissing any worker who does not conform to their professed religion, stated beliefs, or religious ethos in general and the same applies to political parties. Religious institutions are permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the state (the Catholic Church in **Portugal** can also select religious teachers in state schools).

In **Slovakia**, there are no specific provisions that would explicitly deal with conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. However, the absence of any provisions enabling religious organisations to exercise exceptions that would impact on other rights to non-discrimination and the existing case law indicate that in (potential) conflicts, other rights to non-discrimination would take precedence. As regards organisations with a special ethos connected with their religion or belief, the relevant legislation states that there will be no right to interfere with such an organisation's internal matters.[170] The law in **Slovenia** provides for the exception in similar wording to those of Article 4(2) of the Employment Equality Directive, but it does not specifically state that such differences in treatment should not justify discrimination on another ground, although this is implied in the way the provision is worded. In **Slovenia**, religious institutions are in general not permitted to select people for a job on the basis of their religion or to dismiss from a job when that job is in a state entity. There are two exceptions to this rule. The first exception is the military chaplain, a state official employed to provide religious (Catholic and Protestant) services to the armed forces. The second exception is for a few Catholic schools which are funded by the State as they run a state-accredited programme. There is also an interesting provision in the Decree on Police Uniforms: Article 28 (4) states that the police chaplain may, while performing his job in the police force, wear visible religious symbols in addition to his uniform.

168 **Netherlands**: Equal Treatment Commission, Judgment 2012-68.
169 **Netherlands**: Equal Treatment Commission, Judgment 2005-102.
170 **Slovakia**, Act on Freedom of Religious Belief and Status of Churches or Religious Societies, 308, 1991.

In **Spain**, the anti-discrimination law (Law 62/2003) makes no reference to organisations with an ethos based on religion or belief but Article 6 of the Organic Law on religious freedom states:

> Registered churches, faiths and religious communities shall be fully independent and may lay down their own organisational rules, internal and staff byelaws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses safeguarding their religious identity and own personality as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination.

According to the country expert, this provision is in keeping with Article 4(2) of the Employment Equality Directive. In private organisations with a specific ethos, the exemptions operate in practice at three stages of the employment relationship: the first being access to employment; the second being during the performance of an activity within the organisation; and, the third being dismissal as a consequence of that activity. At the first stage, before the signature of the contract, the general rule is that religious reasons cannot be claimed for preventing anyone from exercising their right to work. Moreover, according to Article 16.2 of the Constitution, nobody may be compelled to make statements regarding his/her religion, belief or ideology, which means that there is a prohibition against asking about the ideology or beliefs of the worker. However, in these organisations, questions about religion and belief, and the requirement that workers accommodate their private lives to the ethos of the enterprise, seem legitimate if the activity to be performed is linked to the ideological orientation pursued by the organisation. This is connected with the situation of religious education teachers in state schools. At the second stage, during the employment relationship, the employees have to show respect for the ideology of the enterprise. This respect for the ideology also includes out-of-work activities, if they affect this ethos. At the third stage, although the general rule says that a discriminatory dismissal is void, in those organisations with a specific ethos it will not be discriminatory if there has been behaviour hostile to that ethos.

In **Sweden**, the Discrimination Act only implements Article 4(1) of the Employment Equality Directive, and Article 4(2) is not implemented. Moreover, the preparatory works of the act underline that this general exception applies to core positions only and that the exception must always be given a very narrow interpretation. In an organisation only the positions that are 'visible' to the public can come into question, not an entire organisation per se and automatically. The employer must, furthermore, have a strong motive for applying the exemption; the position must clearly have demanded that the discrimination takes place. Religious communities do not have any favourable status, but they are explicitly mentioned in the preparatory works, along with other examples. The headmaster of a Muslim or a Christian school would be a position where the school would be allowed to reject an applicant because he or she is an atheist or otherwise of another faith than that of the school. This could include the wearing of clothing or symbols from a specific religion. A teacher would be regarded as an ordinary worker and the school would not be allowed to discriminate on the basis of the applicant's faith or lack of faith.

The **Swedish** provisions suggest that the provisions for genuine and determining occupational requirements in Article 4(1) of the Employment Equality Directive could well be sufficient to deal with occupational requirements of organisations with a religious ethos and thus that Article 4(2) adds little to this. However, as was mentioned above, Article 4(2) does not require that the requirement is 'determining' as well, which makes it slightly easier to establish a genuine occupational requirement under Article 4(2) than under Article 4(1). But both require a proportionality test and for both, the requirement must be 'occupational' and by reason of the nature of the activities or of the context in which they are carried out. In the **UK**, the provision in Article 4(2) of the Directive is laid down in Schedule 9 of the Equality Act 2010.

One last question should be examined: can secularism or neutrality be seen as a religious ethos? According to the country fiches, in some countries – **Bulgaria**, **Croatia**, **Czech Republic**, **Lithuania** and **Poland** – there is no case law and it is not clear that secularism or neutrality falls under the ethos exception or not. The country fiches from some other countries – **Estonia**, **Greece**, **Latvia**, **Luxembourg**, **Malta**,

Portugal, **Slovakia** and **Slovenia –** are silent as to this question; or simply say that secularism and neutrality do not fall under the exception – like **Finland**, **Germany**, **Romania** and **Spain**. A case from **Austria** concerned a woman who worked as kindergarten assistant and who wore a religious headscarf. Her employment contract was not renewed because a group of parents opposed the renewal. The kindergarten claimed that neutrality was a genuine occupational requirement because they considered themselves to be religiously neutral. The Ombud for Equal Treatment held that Articles 4(1) and (2) of the Directive were not applicable as the kindergarten was not an organisation attached to a particular ethos where the religion or belief of the person concerned constituted a genuine, legitimate and justified occupational requirement. The case was then settled before it reached the Equal Treatment Commission.[171] The finding that neutrality cannot be an ethos for the genuine and determining occupational requirement provision is supported by the statement of the Supreme Court that the exception must be seen narrowly, only applicable to 'not any ethos but an ethos that is based on religious principles only'.[172]

In **Belgium**, the question whether secularism or state neutrality can be considered to be an ethos is a controversial issue. In the already mentioned case of the Maths teacher who wanted to wear an Islamic headscarf while teaching, the Council of State considered, in 2010, that neutrality was a philosophical belief and that public schools (which have to follow the neutrality principle) might amount to ethos-based organisations. But this was not confirmed at a later stage of the proceedings as the Council of State reasoned on the ground of indirect discrimination instead of direct discrimination and thus did not discuss the ethos exception. Recently, in the Actiris case, which has also already been mentioned, the President of the Court of First instance of Brussels stated that a public body, such as Actiris, may not invoke the derogation designed for ethos-based organisations without infringing the constitutional principle of equal access to the civil service. Holding that a public body could do so would imply considering neutrality as a belief among others while it is a constitutional principle.[173] So, secularism or neutrality has not been considered to be an ethos which falls under the exception. The country fiche from **Cyprus** reports that secularism and neutrality are not specifically mentioned, but that they may well be deemed to fall under 'belief'. In **Denmark**, Article 6(1) of the Act on the Prohibition of Discrimination in the Labour Market refers to a 'certain religious ethos', and it can be argued that this article must be interpreted restrictively and thus does not cover secularism. However, there is no case law to confirm this.

Although **France** has not transposed Article 4(2) of the Employment Equality Directive in its national law, the issue of neutrality as an ethos protected by Article 9 ECHR has been discussed. In the *Baby Loup* case, an employee at a privately run day care centre for children was dismissed for wearing an Islamic veil (hijab) when she returned from maternity leave as this was a violation of the centre's internal regulations. She filed a complaint arguing violation of the principle of non-discrimination on the ground of religion. In March 2013, the Court of Cassation held that the principle of secularity is not applicable to employees of the private sector who are not in the position of managing a public service. It therefore cannot be invoked by a private employer to hinder the protection against discrimination provided by the Labour Code. The case was sent back before another court of appeal. The Paris Court of Appeal then considered that a privately run centre 'could be considered as an organisation with an ethos based on the "belief" of secularity'. But, the Paris Court of Appeal did not address the fact that **France** did not transpose Article 4(2) of the Directive.[174] Then, the Council of State gave a legal opinion on the scope of the principle of secularity regarding private as opposed to public employees and clearly determined that the duty of neutrality only applies to public sector employees.[175] After the Paris Court of Appeal's decision, the case was sent back to the Court of Cassation.[176] The Court refused to consider that the law provided for a

171 Equinet, *Equality Law in Practice A Question of Faith: Religion and Belief in Europe,* p. 16.
172 **Austria**: Supreme Court, Decision No. 9ObA117/1Sv, 25 May 2016.
173 **Belgium**: Court of First Instance of Brussels, No. 13 / 7828 / A, 16 November 2015.
174 Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016*, p. 19.
175 **France**: Council of State, Study requested by the Defender of Rights, adopted 19 December 2013: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2014/09/conseil_detat_-_etude_voile_et_liberte_religieuse_-_2013.pdf.
176 **France**: Court of Cassation, Decision No. 612 of 25 June 2014 (13-28.369), ECLI:FR:CCASS:2014:AP00612.

possibility to argue occupational requirements and, considering that **France** had not transposed Article 4(2) of the Directive, it did not discuss whether neutrality could be argued as an ethos based on religion or belief. It held, however, that the (private) day care centre was not an organisation with an ethos and belief protected by Article 9 ECHR since its main purpose was not to promote or hold religious convictions, but to provide care for young children. The Court of Cassation did not discuss direct or indirect discrimination or justification under anti-discrimination law but looked at the case as a limitation on the freedom of religion.[177] *Ebrahimian v France,*[178] an ECtHR case discussed above, concerned a public sector employee and can thus be distinguished from this case. The ECtHR held that this interference was prescribed by law and pursued the legitimate aim of protection the rights of others (which, according to the ECtHR, includes the constitutional principle of secularism (*laïcité*)).[179] This fits with the opinion of the Council of State that a duty of neutrality can be imposed on public sector employees.

In **Hungary**, secularism could in principle be regarded as falling under 'other ideological conviction', but there is no case law on this. The exception in **Ireland** pertains to 'a religious, educational or medical institution under the direction of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values', and thus, secularism or neutrality is not covered. The country fiche for **Italy** reports that secularism or state neutrality may be included in the concept of 'ethos' according to ECHR case law, but it does not refer to any specific case. As was mentioned above, in **Latvia**, the exception applies to religious organisations only and excludes belief organisations, and this suggest that secularism and neutrality are not seen as a religious ethos. In the **Netherlands**, secularism or state neutrality are not included in the notion of 'ethos' in terms of the exception clause in the General Equal Treatment Act for ethos based employers. In two cases involving a public school that claimed it was justified to refuse an applicant for an internship because she wore a headscarf this was confirmed by the Equal Treatment Commission which held this exception clause was not applicable.[180] The Commission made clear that public schools can require teachers to have an open and neutral attitude which accords with the public character of the school, but that the mere wearing of the headscarf is not sufficient to show that a teacher does not have this attitude. This must be examined on the facts of each case.[181] In **Sweden**, a very important part of the **Swedish** 'non-programmatic' approach to secularism is that neither a secular argument nor a religious argument receives special treatment within the discrimination act. In the **UK**, secularism or state neutrality are included.

Therefore, not many Member States see secularism or neutrality as an ethos for the purposes of Article 4(2) of the Employment Equality Directive. In the view of the author, accepting it as an ethos for this article would stretch the exception too far and, quite possibly, beyond what was meant by the EU legislator, especially because of the general opinion of the CJEU mentioned before, that exceptions to the principle of equal treatment must be interpreted narrowly. The CJEU in *Bougnaoui v Micropole* and the Advocates General in that case and in *Achbita v G4S* discussed the genuine occupational requirement in Article 4(1) of the Employment Directive, as will be examined next, but they did not address the exception in Article 4(2). As mentioned above, this area is in need of clarification by the CJEU.

Summary

Summarising the issue in relation to occupational requirements on the ground of religion or belief under the Employment Equality Directive:

– Article 4(1): provision for *genuine and determining* occupational requirements, applicable to all discrimination grounds covered; nature and context of work important;

177 Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016,* p. 19.
178 *Ebrahimian v France*, App. No. 64846/11, 26 November 2015.
179 *Ebrahimian v France*, paras 52 and 53.
180 **Netherlands**: Equal Treatment Commission, Judgments 1999-18 and 1999-103.
181 **Netherlands**: Equal Treatment Commission, Judgments 1999-18 and 1999-103.

- Article 4(2): exception for organisations with religious ethos for *genuine, legitimate and justified* occupational requirement; nature and context of work important; should not justify discrimination on another ground;
- Article 4(2): exception for organisations with a religious ethos to require employees to act in good faith and with loyalty to the organisation's ethos;
- Article 4(2) not transposed in all Member States;
- Article 4(2) in need of clarification by CJEU.

5 CJEU cases on religious clothing and symbols in employment[182]

As mentioned before, the CJEU (Grand Chamber) has recently (14 March 2017) decided its first cases concerning religion or belief discrimination under the Employment Equality Directive: *Achbita v G4S* and *Bougnaoui v Micropole*. Both cases concerned Muslim women who wanted to wear a hijab to work and who were dismissed when they refused to take these off. Both women claimed that their dismissal constituted discrimination on the grounds of religion or belief. Because these cases are of crucial importance for the subject of this report, they are analysed in detail in a separate chapter. The Opinions of the Advocates General in both cases – Advocate General Kokott in *Achbita v G4S* and Advocate General Sharpston in *Bounaoui v Micropole* – were very different and appeared to contradict each other on a number of important issues. These Opinions will also be examined.

Both applicants received assistance in their claims: Ms Achbita was supported by the Centrum voor Gelijkheid van Kansen en voor Racismebestrijding, while Ms Bougnaoui was supported by the Association de Défense des Droits de l'Homme. Ms Achbita, a Muslim woman, worked for G4S as a receptionist and was permanently contracted out to a third party. After she had worked for G4S for three years, she informed them of her intention to start wearing the Islamic headscarf to work. G4S told Ms Achbita that this was against G4S' strict neutrality rule. This was an unwritten rule that employees could not wear any visible signs of their political, philosophical or religious beliefs, but this rule was added to the (written) workplace regulations after Ms Achbita had announced her intention to start wearing the hijab at work. When Ms Achbita refused to take off the headscarf, she was dismissed. She then claimed that her dismissal constituted religion or belief discrimination contrary to the Employment Equality Directive. Both the Labour Court and the Higher Labour Courts in Antwerp, **Belgium**, rejected Ms Achbita's claim.[183] On appeal, the Belgian Court of Cassation asked the CJEU for a preliminary ruling on the following question:

> Should Article 2(2)(a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?[184]

Ms Bougnaoui was a design engineer who sometimes went to work at customer's sites. She was told by her employer to remove her Islamic headscarf when visiting clients after a complaint by a staff member of one client. She refused to follow this instruction and was dismissed. She also claimed that her dismissal constituted discrimination on the ground of religion or belief, a claim which was rejected by the Labour Tribunal and the Court of Appeal in Paris.[185] On a cassation complaint, the **French** Court of Cassation referred the following question to the CJEU for a preliminary ruling:

> Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?[186]

The definitions of religion or belief and what was said by the CJEU and the Advocates General in these two cases was already discussed above and it was concluded that the CJEU and both Advocates General considered restrictions on the wearing of the Islamic headscarf as falling under the protection against religion or belief discrimination as contained in the Employment Equality Directive.

182 See on this: Howard, E. (2017) 'Islamic Headscarves and the CJEU: Achbita and Bougnaoui', *Maastricht Journal of European and Comparative Law*.
183 *Achbita v G4S,* paras 10-20.
184 *Achbita v G4S,* para. 21.
185 *Bougnaoui v Micropole,* paras 13-18.
186 *Bougnaoui v Micropole,* para. 19.

5.1 Direct discrimination

The definition of direct discrimination from the Employment Equality Directive was given above: direct discrimination on the ground of religion or belief shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion or belief. In *Achbita v G4S*, Ms Achbita argued that the ban on the wearing of the hijab was direct discrimination because there was unequal treatment between those who wore the Islamic headscarf and those who did not. The national court had thus, according to her, misconstrued the concepts of direct and indirect discrimination.[187] However, the CJEU held that there was no direct religion or belief discrimination because G4S's internal rule referred 'to the wearing of visible signs of political, philosophical or religious beliefs' and thus covered 'any manifestation of such beliefs without distinction'; and, because the rule treated all workers the same and there was no evidence that the rule was applied differently to Ms Achbita.[188] According to the CJEU in *Bougnaoui v Micropole*, it was not clear whether the referred question was based on a finding of direct or indirect discrimination. The CJEU then stated that it was for the referring court to decide whether the dismissal was directly or indirectly discriminatory.[189]

It was already pointed out above, that opinions as to whether there was direct or indirect discrimination were divided and that the EU Commission supported a finding of indirect discrimination in *Achbita v G4S*, and an assumption of direct discrimination in *Bougnaoui v Micropole*.[190] Advocate General Kokott, in *Achbita v G4S,* came to the conclusion that there was nothing in the case to indicate that an individual was treated less favourably and that there was no discrimination between religions in this case: the measure in question was not directed specifically against employees of the Muslim faith or against female employees of that religion. As the rule also explicitly prohibited visible political and philosophical signs, the rule applied without distinction and was neutral from the perspective of religion and ideology. There was thus no direct discrimination, but the rule could, according to Advocate General Kokott, nevertheless constitute indirect discrimination.[191] Vickers appears to agree with this where she writes, in a blog about the two cases, that 'both allegations of direct discrimination were, unsurprisingly, rejected. Discrimination based on a generally applicable dress code is not direct discrimination'.[192]

In contrast, in her Opinion in *Bougnaoui v Micropole,* Advocate General Sharpston reached the conclusion that Ms Bougnaoui's dismissal amounted to direct discrimination because she 'was treated less favourably on the ground of her religion than another would have been treated in a comparable situation. A design engineer working for Micropole who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed'.[193]

There was thus disagreement on whether workplace bans on the wearing of the hijab amounted to direct or indirect discrimination. According to the CJEU in *CHEZ Razpredelenie*, a practice constitutes direct discrimination if the protected discrimination ground determined the decision to impose the treatment or if that measure proved to have been introduced and/or maintained for reasons relating to a protected discrimination ground,[194] while indirect discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads to the result that particularly persons possessing that characteristic are put at a disadvantage.[195] Based on this, it could be argued that the G4S rule in *Achbita v G4S,* was introduced and maintained for reasons related to religion or belief (and thus direct discrimination), although it could also be argued that

187 *Achbita v G4S,* para. 20.
188 *Achbita v G4S,* paras 30-32. The Higher Labour Court in Antwerp had expressed the same opinion, see para. 18.
189 *Bougnaoui v Micropole*, paras 31-32. The CJEU had also pointed this out in *Achbita v G4S,* para. 36.
190 Opinion Advocate General Kokott in *Achbita v G4S*, para. 41.
191 Opinion Advocate General Kokott in *Achbita v G4S*, paras 48-49, 51-57.
192 Vickers, L. (2017) Direct Discrimination and Indirect Discrimination: Headscarves and the CJEU*, Oxford Human Rights Hub*: http://ohrh.law.ox.ac.uk/direct-discrimination-and-indirect-discrimination-headscarves-and-the-cjeu/.
193 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 88.
194 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, para. 91.
195 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, para. 94.

it was a rule formulated in neutral terms (and thus indirect discrimination). Amnesty International and the European Network against Racism (ENAR) brought out their observations on discrimination based on religion in the two cases. They concluded that 'it is undeniable that the measure imposed by G4S explicitly refers to religion or belief and introduces a difference of treatment on that ground'. An employee who manifests his or her religion or belief by wearing a visible religious symbol or dress is treated less favourably than an employee who does not do so and thus 'the measure puts the former employee in a less favourable situation than the latter precisely on the grounds of religion or belief'.[196] They concluded that the ban imposed by G4S constituted direct discrimination. A similar view was expressed in a Briefing Paper from the Open Society Justice Initiative.[197]

In the view of the author, the different opinions on whether there is direct discrimination are linked to the choice of comparator: as was discussed above, to establish both direct and indirect discrimination a comparison needs to take place. The CJEU and Advocate General Kokott, in *Achbita v G4S,* compared Ms Achbita with other people who wanted to manifest their religion or belief through the wearing of religious symbols at work. Since the ban applied to all visible signs without distinction, these other people were also prohibited from doing this and, thus, there was no less favourable treatment and the ban could not constitute direct discrimination.[198] Advocate General Sharpston, in *Bougnaoui v Micropole*, Amnesty International and ENAR and the Open Society Justice Initiative picked a different comparator: an employee who wants to wear religious clothing or symbols to work should be compared with an employee who does not do so and, applying this to the two cases in question, there was, therefore, direct discrimination. The Open Society Justice Initiative writes that:

> a policy barring the headscarf, turban, and kippah is not 'neutral' between religions. To the contrary, such a policy disfavours persons whose religious beliefs require an outward manifestation of those beliefs. It is direct discrimination for employers to require employees who hold these religious beliefs to hide those beliefs as a condition for employment.[199]

Spaventa remarks that the CJEU 'seems to imply that a rule that discriminates all religious people would not be problematic'. According to her, this is a restrictive interpretation which is not supported by the text of the Employment Equality Directive or the EUCFR which both refer to discrimination on the grounds of religion or belief in general. She concludes that, 'in any event, in discrimination cases it is crucial to identify the comparator, and the Court fails to do so clearly and to support its choice with sound legal arguments'.[200] Brems makes a similar point in an even stronger way where she writes that:

> it is astonishing that, in the eyes of the European Court, direct discrimination on grounds of religion or belief exists only when a measure targets a single religion or a selection of religions, but not when a measure targets all religions and beliefs. Generalized hostility toward religions is apparently a manifestation of neutrality.[201]

Brems continues that, as not all employees have a religion or belief or want to express this at work, 'hostility against all religions and beliefs targets only part (arguably a small minority) of the employees'. She compares this with disability as a discrimination ground and concludes that:

196 Amnesty International and European Network Against Racism, *Wearing the Headscarf in the Workplace Observations on Discrimination Based on Religion in the Achbita and Bougnaoui Cases*: https://www.amnesty.org/en/documents/eur01/5077/2016/en/.

197 Open Society Justice Initiative, Briefing Paper: *Employer's Bar on Religious Clothing and European Union Discrimination Law,* para. 19*:* https://www.opensocietyfoundations.org/sites/default/files/briefing-cjeu-headscarves-20160712.pdf.

198 *Achbita v G4S,* paras 30-31 and Advocate General Kokott in *Achbita v G4S,* para. 49.

199 Open Society Justice Initiative, Briefing Paper, para. 26.

200 Spaventa, E. (2017) 'What is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case', *EU Law Analysis*: http://eulawanalysis.blogspot.co.uk/2017/03/what-is-point-of-minimum-harmonization.html.

201 Brems, E. (2017) 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', *Blog of the IACL, AIDC*: https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/.

> it seems unthinkable that the ECJ [CJEU] would rule that a measure excluding without distinction persons with all kinds of disabilities would not constitute direct discrimination. What is different about religion? Has anti-religious sentiment become so normalized in Europe, that it has become invisible – the new normal?

So a number of sources supported a finding of direct discrimination in these cases. Jolly makes another important point where she writes that 'a rule expressed neutrally on workplace attire or apparel is more likely to constitute indirect discrimination, unless there is evidence of particular stereotyping, prejudice or intent behind the rule which could lead it to be direct discrimination'.[202] Advocate General Kokott also mentioned that 'if a ban such as that at issue here proved to be based on stereotypes or prejudice in relation to one or more specific religions — or even simply in relation to religious beliefs generally', then 'it would without any doubt be appropriate to assume the presence of direct discrimination based on religion. According to the information available, however, there is nothing to indicate that that is the case'.[203] This opinion of Advocate General Kokott was based on the information available to the CJEU. However, there was other information indicating the contrary and this was the reason the Belgian equality body has supported the case for 8 years as a strategic case. The presence of prejudice and stereotypes could be another reason to argue here that there is direct discrimination. Bribrosia and Rorive, for example, point out that, 'in the Bougnaoui case, there is a body of evidence that stereotype and prejudice found the dismissal'.[204] Ouald Chaib writes that Advocate General Kokott's main argument was 'that the possible prejudicial preferences of clients can trump the right of an employee not to be discriminated against on the basis of her religion' and that 'this reasoning accepts prejudicial ideas about people on the basis of their appearance as a justification for unequal treatment of employees'.[205] And, Brems writes that it is bewildering that there is no reference in the judgment 'to either the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress'.[206]

Therefore, the CJEU could have found that there was direct discrimination on the ground of religion or belief in both cases. However, in *Achbita v G4S,* the CJEU held, as Advocate General Kokott had done, that there was no direct discrimination. The referred question was thus answered with a 'no'. But, because the referring court might conclude that the internal rule was indirectly discriminatory, the CJEU provided further guidance on this.[207] In *Bougnaoui v Micropole,* the CJEU mentioned that it was not clear from the order of reference whether the referring court's question was based on a finding of direct or indirect discrimination and that it was for that court to ascertain whether there was either. The CJEU then referred to its judgment in *Achbita v G4S.*[208]

5.2 Indirect discrimination and justification

As was already mentioned, the distinction between direct and indirect discrimination is important because of the issue of justification. The Employment Equality Directive does not allow for justification of direct religion and belief discrimination except in situations prescribed in the Directive itself, and, in relation to *Achbita v G4S* and *Bougnaoui v Micropole*, the only relevant justification can be found in the provisions for genuine and determining occupational requirements. On the other hand, indirect discrimination is not unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are

202 Jolly, S. (2016) 'Islamic Headscarves and the Workplace Reach the CJEU: the Battle for Substantive Equality', 6 *European Human Rights Law Review*, p. 675.
203 Opinion Advocate General Kokott in *Achbita v G4S,* para. 55.
204 Bribosia, E. and Rorive, I. (2016) 'ECJ Headscarf Series (4): The Dark Side of Neutrality', *Strasbourg Observers*: https://strasbourgobservers.com/2016/09/14/ecj-headscarf-series-4-the-dark-side-of-neutrality/.
205 Ouald Chaib S. (2016) 'ECJ Headscarf Series (6): The Vicious Circle of Prejudice against Muslim Women', *Strasbourg Observers*: https://strasbourgobservers.com/2016/09/20/ecj-headscarf-series-6-the-vicious-circle-of-prejudices-against-muslim-women/.
206 Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace'.
207 *Achbita v G4S,* paras 32-34.
208 *Bougnaoui v Micropole,* paras 31-33.

appropriate and necessary. Based on the above, indirect religion or belief discrimination can be described as taking place when there is a neutral rule ('provision, criterion or practice') which applies to everyone equally but with which some people cannot comply because of their religion or belief. If a rule can be seen as constituting indirect discrimination, then the way the justification test is applied becomes important. The CJEU, in *Achbita v G4S,* referred to settled case law that it was for the CJEU to extract the points of EU law which require interpretation in view of the subject matter of the dispute[209] and thus it gave guidance on indirect discrimination.

In relation to the legitimate aim, the CJEU held, in *Achbita v G4S,* that 'the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate' because it relates to the freedom to conduct a business as guaranteed by Article 16 EUCFR, notably where only those workers who are in contact with the employer's customers are covered.[210] Article 16 EUCFR states 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. The CJEU pointed out that this was supported by the case law of the ECtHR in *Eweida and Others v the United Kingdom*.[211] In this regard, the CJEU followed the Opinions of both Advocates General. Advocate General Kokott, in *Achbita v G4S*, discussed the legitimate aim in relation to Article 4(1) of the Employment Equality Directive, which, as was explained above, contains a similar justification test, and concluded that, if there is a genuine and determining occupational requirement under that article (and in her view the requirement to present a neutral image was such a requirement), then the aim of this requirement would be legitimate under Article 2(2)(b) of the Directive.[212] Advocate General Sharpston, in *Bougnaoui v Micropole*, also concluded that the interests of the employer's business were a legitimate aim. She stated that 'a policy of requiring that employees wear a uniform or a particular style of dress or maintain a "smart" outward appearance will fall within the concept of a legitimate aim'.[213]

Despite the CJEU following the Advocates General, it has been criticised for not giving any further explanation as to why the neutrality policy was to be considered a legitimate aim. Solomon, for example, points out that the aim of preserving religious neutrality is not mentioned as a legitimate aim in Article 10, read together with Article 52 EUCFR, nor is it mentioned in Article 9 ECHR.[214] Steijns criticises the CJEU for 'primarily (maybe even solely?)' focusing on Article 16 EUCFR but not mentioning, for example, Article 31(1) EUCFR which determines, under the title 'fair and just working conditions' that 'every worker has the right to working conditions which respect his or her … dignity'.[215] Respect for an employee's dignity would surely include respect for the way they want to manifest their religion through the wearing of religious clothing or symbols.

A related point of criticism is that the CJEU did not make a distinction between public and private employers in relation to the duty of neutrality imposed on employees. Both *Achbita v G4S* and *Bougnaoui v Micropole* concerned private employers. Spaventa, for example, criticises the CJEU for this and remarks that both the Belgian and the French Governments sided with the claimants in these cases and both drew a 'very conceptual limit to the principle of laïcité [secularism] which is justified, in this view, because of the very nature of the State and its duty of neutrality, a duty which cannot be extended to private parties (or if so only exceptionally)'.[216] Brems also sees it as problematic that the CJEU 'accepts the

209 *Achbita v G4S,* para. 33.
210 *Achbita v G4S,* paras 37-38.
211 *Achbita v G4S,* para. 39, referring to *Eweida and Others v the United Kingdom*, para. 94.
212 Opinion Advocate General Kokott in *Achbita v G4S,* para. 129.
213 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 116.
214 Solomon, S. (2017) 'The Right to Religious Freedom and the Threat to the Established Order as a Restriction Ground: Some Thoughts on Account of the Achbita Case', *European Journal of International Law Talk*: https://www.ejiltalk.org/the-right-to-religious-freedom-and-the-threat-to-the-established-order-as-a-restriction-ground-some-thoughts-on-account-of-the-achbita-case/.
215 Steijns, M. (2017) 'Achbita and Bougnaoui: Raising more Questions than Answers', *Eutopia Law*: https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/ .
216 Spaventa, 'What is the point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case'.

expansion of neutrality into the private sphere without the least degree of scrutiny'. She continues that extending neutrality to the private sector is 'a big leap' and that 'neutrality can be an easy cover-up for prejudice'.[217] This suggests that a policy of political, philosophical or religious neutrality can be considered legitimate for public employment, but the CJEU's expansion of this to private employment should have been examined and explained in much more detail. For example, Advocate General Kokott stated that the neutrality policy was necessary because external individuals might associate the employer with the belief expressed through the employee's dress.[218] The CJEU could have required evidence that this was, indeed, happening in practice.

Once it has been established that there is a legitimate aim, the next step in the justification test is to examine whether the means used to achieve that legitimate aim are appropriate and necessary. In *Achbita v G4S,* the CJEU held that the ban on visible political, philosophical or religious signs, imposed by G4S, was appropriate to achieve the aim of the policy of neutrality as long as that policy was 'genuinely pursued in a consistent and systematic manner'.[219] This finding goes against the opinion of the **Belgian** and **French** Governments and the Centrum voor Gelijkheid van Kansen en voor Racismebestrijding that the rule was not appropriate.[220] In *Bougnaoui v Micropole,* Advocate General Sharpston stated that it is up to the national court to decide on the question of proportionality, but that it was, in her view, unlikely that the prohibition imposed on Ms Bougnaoui was proportionate.[221] Proportionality is further analysed below.

Assessing whether the G4S rule in *Achbita v G4S,* was necessary, the CJEU stated that the prohibition must be limited to what is strictly necessary and concluded that this was the case if the G4S rule covered only workers who interacted with customers.[222] The CJEU also stated that it was for the referring court to ascertain whether it would have been possible for G4S, when faced with Ms Achbita's refusal to take off her headscarf, to offer her a post not involving any visual contact with customers.[223] Advocate General Kokott discussed the necessity test in relation to Article 4(1) of the Employment Equality Directive and pointed out that this test included examining whether the objective could have been achieved by more lenient, i.e. less discriminatory, means than a ban. She also mentioned that **France** saw the G4S policy as too general and indiscriminate and that the EU Commission had expressed a similar view.[224] The EU Commission had actually suggested an alternative: G4S could provide its female employees with a uniform which included an optional headscarf in a matching colour and style. However, according to Advocate General Kokott, this was:

> much less satisfactory, not to say entirely inappropriate, for achieving the objective of religious or ideological neutrality which G4S has laid down as an occupational requirement. After all, an employee who wears an Islamic headscarf displays a visible religious symbol whether or not the headscarf matches the colour and style of his work clothes. What is more, if the religious symbol forms part of the uniform, the employer actually departs from the path of neutrality which it has itself elected to follow.[225]

Advocate General Kokott suggested as an alternative solution that employees such as Ms Achbita could possibly be moved to back-office positions where they would not have face-to-face contact with external individuals; or, they could be deployed only with customers who had no objections to the employment of a receptionist who wears visible and conspicuous signs of a religious belief such as the Islamic headscarf,

217 Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace'.
218 Opinion Advocate General Kokott in *Achbita v G4S,* para. 95.
219 *Achbita v G4S,* para. 40.
220 Opinion Advocate General Kokott in *Achbita v G4S,* para. 63.
221 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 132.
222 *Achbita v G4S,* para. 42.
223 *Achbita v G4S,* para. 43.
224 Opinion Advocate General Kokott in *Achbita v G4S,* para. 104.
225 Opinion Advocate General Kokott in *Achbita v G4S,* paras 105-107.

although allowing the latter would undermine the employer's neutrality policy, as the Advocate General herself stated.[226]

For indirect discrimination to be justified, a rule must also be proportionate. Advocate General Sharpston, in *Bougnaoui v Micropole,* explained that this meant that it is necessary to find the right balance between the different interests involved.[227] In *Achbita v G4S,* the CJEU held that the following factors play a role in this: a rule against all visible political, philosophical and religious symbols must be genuinely pursued in a consistent and systematic manner and thus it must not distinguish between different religions or different (religious, philosophical or political) beliefs; the rule must be limited to customer-facing employees; and, the employer must consider whether the employee can be moved to a job without contact with customers.[228]

However, in the view of the author, what is missing in this list of factors which have to be put in the balance is any reference to the importance of the right to freely manifest her religion for the applicant, Ms Achbita, as guaranteed by Article 10 EUCFR. Should a proper balancing exercise not include weighing issues on both sides: the importance for the employer of presenting a neutral company image must be balanced against the importance of being able to wear a religious symbol as a manifestation of their religion for the employee. As mentioned, the CJEU accepted that a policy of neutrality was a legitimate aim, with a reference to the ECtHR case of *Eweida and Others v the United Kingdom*. However, the ECtHR in that case also weighed the importance of presenting a professional corporate image for the employer against Ms Eweida's right to manifest her religion by wearing a small silver cross with her uniform. Balancing these interests, the ECtHR found in favour of Ms Eweida and held that a fair balance had not been struck between her right to freely manifest her religion and her employer's wish to protect its corporate image and that the domestic courts had given too much weight to the latter.[229] But the CJEU, in *Achbita v G4S,* did not follow this part of the ECtHR judgment when considering whether the rule was appropriate and necessary. As Article 10 EUCFR must be interpreted in accordance with the ECHR and the case law of the ECtHR, as prescribed by Article 52(3) EUCFR, the CJEU should have done so and followed the ECtHR and the Opinion of Advocate General Sharpston, in *Bougnaoui v Micropole,* that the measures were not proportionate. Although there are two separate judgments in these two cases, they are clearly linked: the cases were heard together by the Grand Chamber and the judgments came out on the same day.

In *Bougnaoui v Micropole,* Advocate General Sharpston put more emphasis on the right of the employee to freely manifest their religion. According to her, when examining whether the right balance had been struck, the starting point had to be that an employee had, in principle, the right to wear religious apparel or a religious sign but that the employer also had, or may have, the right to impose restrictions. Here, Advocate General Sharpston refers to *Eweida and Others v the United Kingdom* in a footnote.[230] She then continued that it would not be unreasonable to require employees to do as much as possible to meet the uniform rule requirements. An employer could thus stipulate that employees wear a headscarf in the colour of the uniform or require the employee to wear the religious symbol discreetly where it is possible to do so.[231] Here again, the Advocate General refers to *Eweida and Others v the United Kingdom*, where the ECtHR had considered that the cross Ms Eweida wanted to wear 'was discreet and cannot have detracted from her professional appearance'.[232]

Advocate General Sharpston then suggested the following, which indicates again her more nuanced approach to proportionality:

226 Opinion Advocate General Kokott in *Achbita v G4S,* paras 108-109.
227 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* paras 120-121.
228 *Achbita v G4S*, paras 40-43.
229 *Eweida and Others v the United Kingdom*, para. 94.
230 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para 122 and footnote 114.
231 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* paras 123-124.
232 *Eweida and Others v the United Kingdom,* para. 94.

> the employer and employee will need to explore the options together in order to arrive at a solution that accommodates both the employee's right to manifest his religious belief and the employer's right to conduct his business. Whilst the employee does not, in my view, have an absolute right to insist that he be allowed to do a particular job within the organisation on his own terms, nor should he readily be told that he should look for alternative employment. A solution that lies somewhere between those two positions is likely to be proportionate. Depending on precisely what is at issue, it may or may not involve some restriction on the employee's unfettered ability to manifest his religion; but it will not undermine an aspect of religious observance that that employee regards as essential.[233]

Advocate General Sharpston expressed the view that, in most cases, employer and employee should be able to come to 'an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business'. But, if that was not possible, the business interest in generating maximum profit should 'give way to the right of the individual employee to manifest his religious convictions'.[234] Therefore, Advocate General Sharpston placed more emphasis on the freedom of the employee to manifest their religion. This is more in line with what the ECtHR did in *Eweida and Others v the United Kingdom.* As Alidadi writes, this case means that:

> company neutrality policies cannot be considered to *automatically trump* Article 9 ECHR fundamental rights of employees any longer. There has to be an effective and genuine balancing of the various rights and interests at stake, including the fundamental rights of the employee to express his or her religious beliefs and practices, which must be given adequate weight in the exercise [italics in original].[235]

In *Achbita v G4S*, the CJEU considered that the justification test includes ascertaining whether the employer could have moved the employee to a job without contact with customers, although this had to take into account the inherent constraints to which the undertaking was subject, and without G4S being required to take on an additional burden.[236] This, and Advocate General Sharpston's reference, in *Bougnaoui v Micropole*, to the employer and employee coming to 'an accommodation',[237] might, very tentatively, be read as going somewhat towards a duty of reasonable accommodation of religious manifestations. Article 5 of the Employment Equality Directive imposes a duty on employers to make reasonable accommodation for disabled employees, unless this would impose a disproportionate burden on the employer. EU law imposes this duty only in relation to disability, but such a duty might be useful for religion or belief as well, for example, when an employee requests to be allowed to wear religious clothing or symbols at the workplace.[238] It has been suggested that a duty of reasonable accommodation for all grounds of discrimination covered should be laid down in EU law and in the national law of the Member States, subject to the proviso that this should not impose a disproportionate burden on employers or service providers.[239]

As was referred to before, in *Eweida and Others v the United Kingdom*, one of the applicants, Ms Chaplin, was a nurse who wanted to wear a crucifix on a chain around her neck with her nurse's uniform.

233 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 128.
234 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 133.
235 Alidadi, *Religion, Equality and Employment in Europe,* p. 163.
236 *Achbita v G4S*, para. 43.
237 Advocate General Sharpston, in *Bougnaoui v Micropole,* para. 133.
238 Alidadi argues that a duty of reasonable accommodation of religion or belief should be laid down in law, see: Alidadi, *Religion, Equality and Employment in Europe.*
239 See, for example: Council of Europe, Opinion, Commissioner for Human Rights on National Structures for Promoting Equality, CommDH (2011) 2, p. 20: https://rm.coe.int/ref/CommDH(2011)2 ; and, Equinet, *Beyond the Labour Market New Initiatives to Prevent and Combat Discrimination*, Equinet, Brussels, 2008, p. 8: http://www.equineteurope.org/IMG/pdf/EN_-_Beyond_the_Labour_Market_-_Opinion_2008.pdf. For more information see: Bribosia, E. and Rorive, I. (2013) *Reasonable Accommodation beyond Disability in Europe?* (European Network of Legal Experts in the Non-discrimination Field) European Commission, Directorate-General for Justice, pp. 44-45: http://www.equalitylaw.eu/downloads/2502-reasonable-accommodation-en.

This was not allowed for health and safety reasons. However, the hospital can be said to have made accommodations for people who wanted to wear religious clothing or symbols. It allowed Muslim doctors to wear a close-fitting 'sports' hijab[240] and tried to accommodate Ms Chaplin's wish by offering her the possibility of wearing a cross in the form of a brooch attached to her uniform, or tucked under a high-necked top worn under her tunic, but she did not consider that this would be sufficient to comply with her religious conviction and thus she had turned this offer down.[241]

Some Member States do impose a duty of reasonable accommodation beyond disability. For example, in **Bulgaria**, **Croatia**, **Denmark**, **Romania**, **Spain** and **Sweden**, religion as well as disability is covered. In **France** and **Germany**, a duty of reasonable accommodation for religion or belief can possibly be deduced from the case law. And, a duty of reasonable accommodation for religion or belief is laid down in law in the Vienna region of **Austria** and the Flemish region of **Belgium**.[242]

As a last point under the heading of 'indirect discrimination and justification', it must be noted that Advocate General Sharpston, in *Bougnaoui v Micropole,* also discussed the situation where a rule prohibits the wearing of religious apparel that covers the eyes and face entirely. She made a clear distinction between that kind of apparel and headgear which does not cover the face and eyes. According to the Advocate General, a rule prohibiting face-covering clothing would be proportionate for an employee who performs a job that involves face-to-face contact with customers, but it would not be proportionate when there is no such contact. This is because 'Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers'. And, Advocate General Sharpston concluded, 'where the employee seeks to wear only some form of headgear that leaves the face and eyes entirely clear, I can see no justification for prohibiting the wearing of that headgear'.[243]

5.3 Genuine and determining occupational requirements

The French Court of Cassation, in *Bougnaoui v Micropole*, asked the CJEU whether the wish of a customer not to be served by an employee wearing an Islamic headscarf is a genuine and determining occupational requirement, in accordance with Article 4(1) of the Employment Equality Directive. **France** has not implemented Article 4(2) of that Directive and the CJEU did, therefore, not address Article 4(2). As referred to above, Article 4(1) determines that the prohibition of discrimination does not apply where having a particular characteristic, including religion or belief, is a genuine and determining occupational requirement, subject to a justification and proportionality test.

In *Achbita v G4S*, the CJEU did not mention the genuine and determining occupational requirement at all, although Advocate General Kokott had discussed this in some length in her Opinion in the case (see below). In *Bougnaoui v Micropole*, the CJEU, referring to Recital 23 of the Preamble to the Directive, pointed out that 'it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement'. It then considered that the concept of 'genuine and determining occupational requirement' in Article 4(1) 'refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out' but that it cannot 'cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer'. The CJEU thus concluded that this was not a genuine and determining occupational requirement and answered the referred question in the negative.[244]

240 *Eweida and Others v the United Kingdom*, para. 19.
241 *Eweida and Others v the United Kingdom,* para. 98.
242 Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016*, pp. 28-30; Bribosia, and Rorive, *Reasonable Accommodation beyond Disability in Europe?*, pp. 44-45.
243 Advocate General Sharpston in *Bougnaoui v Micropole,* para. 130.
244 *Bougnaoui v Micropole*, paras 38-41.

Although the genuine and determining occupational requirement or Article 4(1) of the Employment Equality Directive was not mentioned in the referred question in *Achbita v Bougnaoui,* Advocate General Kokott discussed this in case the CJEU found that there was direct discrimination, because, as was mentioned before, the occupational requirement can justify direct religion or belief discrimination.[245] Both she and Advocate General Sharpston mentioned that Article 4(1) must be interpreted strictly and that the exception should apply only 'in very limited circumstances', according to Recital 23 of the Directive.[246] However, the Advocates General interpreted Article 4(1) and the words 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' in quite different and opposing ways. Advocate General Kokott expressed the opinion that 'either of those two elements [nature or context] can in and of itself serve as a ground of justification for a difference of treatment based on religion'.[247] The nature of the job of receptionist did not require Ms Achbita to take off her headscarf as the work of a receptionist could be performed just as well with a headscarf as without one. However, the context of the job could do so because 'one of the conditions of carrying out that work may nonetheless be compliance with the dress code laid down by the employer (...) in which case the employee carries out her work in a context in which she must refrain from wearing her headscarf'.[248] Advocate General Kokott thus concluded that the ban imposed by G4S 'may be regarded as a genuine and determining occupational requirement within the meaning of Article 4(1)'.[249]

In relation to the proportionality test which has to be applied under Article 4(1) of the Employment Equality Directive, Advocate General Kokott mentioned that the following factors need to be taken into account: the size and the conspicuousness of the religious symbol; the role and nature of the employee's activity; the context in which she has to perform that activity; whether any difference in treatment on other grounds is also present; and, the national identity of the Member State concerned.[250] In relation to the first point, the Advocate General wrote that 'in case of doubt, a small and discreetly worn religious symbol – in the form of an earring, necklace or pin, for example – is more likely to be permitted than a noticeable head covering such as a hat, turban or headscarf'.[251] So, a small crucifix on a necklace or a pin with a political slogan would be allowed? What about a Jewish skull cap, is that conspicuous? Where do you draw the line? Moreover, do such symbols not also undermine the employer's neutrality policy?

Another factor to be taken into account, according to Advocate General Kokott, is the national identity of the Member State concerned. In relation to this, she remarked:

> this may mean that, in Member States such as **France**, where secularism has constitutional status and therefore plays an instrumental role in social cohesion too, the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector and generally in public spaces) than in other Member States the constitutional provisions of which have a different or less distinct emphasis in this regard.[252]

This is similar to the 'margin of appreciation' which the ECtHR uses to reflect national differences in cases pertaining to freedom of religion. According to Jolly, this 'has the effect of demoting religious discrimination among a hierarchy of protected characteristics'.[253] In other words, it would lead to less protection against religion and belief discrimination than the protection provided by EU law against other

245 Opinion Advocate General Kokott *in Achbita v. G4S*, para. 62.
246 Opinion Advocate General Kokott in *Achbita v G4S*, para. 72; Opinion Advocate General Sharpston in *Bougnaoui v Micropole*, para. 95.
247 Opinion Advocate General Kokott in *Achbita v G4S*, para. 73.
248 Opinion Advocate General Kokott in *Achbita v G4S,* para. 75.
249 Opinion Advocate General Kokott in *Achbita v G4S,* para. 84.
250 Opinion Advocate General Kokott in *Achbita v G4S,* paras 118-125.
251 Opinion Advocate General Kokott in *Achbita v G4S,* para. 118.
252 Opinion Advocate General Kokott in *Achbita v G4S,* para. 125. Note that the Advocate General here applies secularism and policies of neutrality to the private sector as well, something the CJEU was criticised for, as mentioned above.
253 Jolly, 'Islamic Headscarves and the Workplace Reach the CJEU: the Battle for Substantive Equality', p. 677.

forms of discrimination. Vickers writes that this introduction of a margin of discretion raises particular concerns:

> in the context of equality law, because equality has usually been developed to eradicate entrenched inequality. Given that it would seem inconceivable that a court would allow a state to argue that national traditions should be allowed to justify sex or race discrimination in employment, it is questionable whether such reasoning should be accepted in the different context of religion.[254]

This raises the question whether religion or belief as discrimination ground should be treated differently from the other grounds of discrimination. Is religion different from the other protected grounds? The Advocates General expressed different views on this issue. Advocate General Kokott, in *Achbita v G4S*, saw religion as a question of choice and thus as different from other characteristics because, unlike the other characteristics, 'the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence'. Because of this, an employee 'may be expected to moderate the exercise of his religion in the workplace'.[255] Advocate General Sharpston, in *Bougnaoui v Micropole,* saw this differently, where she wrote 'to someone who is an observant member of a faith, religious identity is an integral part of that person's very being' and 'it would be entirely wrong to suppose that, whereas one's sex and skin colour accompany one everywhere, somehow one's religion does not'.[256] The fact that Advocate General Sharpston saw religion as part of a person's identity led her to place more weight on the importance of being able to manifest this identity at work.

Based on the above, seeing religion as part of a person's identity would mean not treating it differently as a discrimination ground and thus applying the same justification and proportionality test – for indirect discrimination and for genuine and determining occupational requirements – to all grounds of discrimination covered by EU anti-discrimination law. The CJEU is generally concerned with the uniform application of EU law and with a desire to avoid inconsistencies and thus this is an argument for treating all grounds of discrimination the same. The Open Society Justice Initiative gives another, related reason why religion or belief as discrimination ground should not be treated differently from other grounds: the CJEU 'should respect and build on its case law in other fields of discrimination to avoid serious impacts on protection from discrimination on grounds such as ethnicity, sexual orientation and sex'.[257] This refers to the possible effect of 'levelling down': applying a more lenient justification and proportionality test for religion or belief could lead to such a test also being applied to the other grounds covered by EU anti-discrimination law and thus to lowering the protection. All this would suggest that religion or belief should not be seen as different from the other discrimination grounds.

Advocate General Kokott, in *Achbita v G4S,* came to the conclusion that the genuine and determining occupational requirement in this case was proportionate.[258] In contrast, Advocate General Sharpston, in *Bougnaoui v Micropole,* stated that the exception for occupational requirements 'cannot be used to justify a blanket exception for all the activities that a given employee may potentially engage in'. The wording of Article 4(1) of the Employment Equality Directive reflected its narrowness: the occupational requirement must be both 'genuine' and 'determining' and this meant that 'the derogation must be limited to matters which are absolutely necessary in order to undertake the professional activity in question'. Therefore, the application of the derogation in Article 4(1) could not be justified by the commercial interest of the business in its relations with its customers.[259] Advocate General Sharpston also pointed out that accepting the view of the employer in this case – that the wish of a customer not to be served by someone with a

254 Vickers, L. (2016) 'Blog Series 2: The Role of Choice; and the Margin of Appreciation', *Strasbourg Observers*: https://strasbourgobservers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/
255 Opinion Advocate General Kokott in *Achbita v G4S,* para. 116.
256 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 118.
257 Open Society Justice Initiative, Briefing Paper, para. 4.
258 Opinion Advocate General Kokott in *Achbita v G4S,* para. 126.
259 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* paras 95, 96 and 100.

hijab is a genuine and determining occupational requirement – would 'risk "normalising" the derogation' which 'cannot be right' as 'it is intended that the derogation should apply only in the most limited of circumstances'. There was nothing 'to suggest that, because she [Ms Bougnaoui] wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer' and thus, according to Advocate General Sharpston, the requirement not to wear the headscarf could not be a genuine and determining occupational requirement.[260] As mentioned, the CJEU agreed with this.

5.4 Other issues

Influence of client's requests

In *Bougnaoui v Micropole*, the CJEU thus followed the interpretation given by Advocate General Sharpston and concluded that the wish of a customer not to be served by someone in a headscarf was not a genuine and determining occupational requirement. This restrictive interpretation follows the CJEU's previous case law that derogations from the principle of equality, including the provision for genuine and determining occupational requirements, must be interpreted strictly, as was mentioned above. However, this raises a question: is there a tension between this decision and the CJEU's acceptance, in *Achbita v G4S*, that the aim of neutrality can be a legitimate aim? What would an employer's policy of neutrality be based on other than their customers' real or perceived wishes? As Peers writes, 'there is a thin line between saying that employee headscarves can't be banned just because customers ask for it on the one hand, and allowing employers to ban such clothing in effect due to *anticipation* of customer reaction' [italics in original].[261] And Mahlmann asks: 'what other reasons, apart from anticipated or real wishes of customers, could serve to justify the creation of a brand image of neutrality'?[262] So there is a certain tension between the two judgments. According to McCrea, this tension can be explained as follows: in *Achbita v G4S*, the CJEU focused on the justification of indirect discrimination, while in *Bougnaoui v Micropole*, there was direct discrimination (a customer request that targeted symbols of a particular faith) and 'as the test for justification of directly discriminatory measures ("genuine and determining occupational requirements") is so much more demanding than that for indirectly discriminatory measures, the reasons for the apparent contrast in the outcomes in the two cases becomes clear'.[263] In the view of the author, this does not really alleviate the tension as the justification tests in Articles 2(2)(b) and 4(1) Employment Equality Directive are phrased in similar terms and as, according to the CJEU in *Bougnaoui v Micropole*, it was not clear whether the referred question was based on a finding of direct or indirect discrimination.

But can such a request of a client play a role when deciding whether indirect discrimination is objectively justified? As mentioned above, in *Achbita v G4S,* the CJEU held that the following factors need to be taken into account: a rule against all visible political, philosophical and religious symbols must be genuinely pursued in a consistent and systematic manner and thus it must not distinguish between different religions or different (religious, philosophical or political) beliefs; the rule must be limited to customer-facing employees; and, the employer must consider whether the employee can be moved to a job without contact with customers.[264] This list does not contain a reference to requests of clients as a factor to be taken into account which does suggest that it cannot. The following also suggests that this applies even more strongly in relation to direct discrimination where the objective justification test does not apply, except when there is a genuine and determining occupational requirement. For example, Advocate General Sharpston, in *Bougnaoui v Micropole,* drew attention to:

260 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* paras 100-102.
261 Peers, S. (2017) 'Headscarf Bans at Work: Explaining the ECJ Rulings', *EU Law Analysis*: http://eulawanalysis.blogspot.co.uk/2017/03/headscarf-bans-at-work-explaining-ecj.html.
262 Mahlmann, M. (2016) 'ECJ Headscarf Series (3): The Everyday Troubles of Pluralism', *Strasbourg Observers*: https://strasbourgobservers.com/2016/09/12/ecj-headscarf-series-3-the-everyday-troubles-of-pluralism/.
263 McCrea, R. (2017) 'Faith at Work: the CJEU's Headscarf Rulings', *EU Law Analysis*: http://eulawanalysis.blogspot.co.uk/2017/03/faith-at-work-cjeus-headscarf-rulings.html.
264 *Achbita v G4S*, paras 40-43.

> the insidiousness of the argument, 'but we need to do X because otherwise our customers won't like it'. Where the customer's attitude may itself be indicative of prejudice based on one of the 'prohibited factors', such as religion, it seems to me particularly dangerous to excuse the employer from compliance with an equal treatment requirement in order to pander to that prejudice. Directive 2000/78 is intended to confer protection in employment against adverse treatment (that is, discrimination) on the basis of one of the prohibited factors. It is not about losing one's job in order to help the employer's profit line.[265]

In *Centrum voor Gelijkheid van Kansen v Firma Feryn NV*, the Director of a company which installed security and garage doors made a statement on the local radio to the effect that, although the company was seeking to recruit new employees, they could not employ 'immigrants' because its customers were reluctant to give them access to their private residences for the duration of the works. The CJEU held that such a statement concerning candidates of a particular ethnic or racial origin constituted direct discrimination under Article 2(2)(a) of the Race Directive, as such a public declaration was clearly likely to dissuade some candidates from applying for jobs with this employer.[266] Here, the CJEU thus accepted that the wishes of customers as a basis for not employing people from a group protected by anti-discrimination law, was direct discrimination. In parallel, a prohibition of the wearing of headscarves, because customers would not want employees with headscarves coming to work at their premises, would be clearly likely to dissuade some candidates from applying for jobs with this employer. If this, as the CJEU held in *Feryn,* amounts to direct discrimination, then the wishes of customers could certainly not justify indirect discrimination.

Bribosia and Rorive point out that the parallel with the *Feryn* case is obvious and ask: 'what is different between a situation where people of Moroccan origin are not recruited because "customers don't want them" and a dismissal based on the embarrassment of a client company justifying the un-obeyed order "there should be no veil next time"'?[267] They continue that 'a company policy imposing neutrality in its dress code should not give a blank cheque to discriminate. An assessment of the context in which the policy was adopted should be required so as to define whether the policy was not targeting religious minorities'.[268] Even Advocate General Kokott, in *Achbita v G4S*, mentioned that an undertaking must consider the wishes of customers but it 'cannot pander blindly and uncritically to each and every demand and desire expressed by a third party'.[269] She then provided the example of a customer's demand to be served only by employees of a particular religion, ethnic origin, colour, sex, age or sexual orientation, or only by employees without a disability, and stated, with a footnote reference to *Feryn,* that this would quite obviously not constitute a legitimate objective for a genuine and determining occupational requirement for Article 4(1) of the Employment Equality Directive[270] and thus would not justify direct discrimination. The Advocate General did not see the G4S policy of neutrality as pandering to the demands of a third party as she concluded that the policy was a genuine and determining occupational requirement.

Could the recognition of the freedom to conduct a business in accordance with Union law and national laws and practices as laid down in Article 16 EUCFR support a finding that, following a customer's request not to be served by someone wearing religious clothing or symbols, an undertaking can prohibit its employee from doing so? The Explanations to the Charter do not really assist us here. They state that Article 16 is based on: CJEU case law which has recognised freedom to exercise an economic or commercial activity and freedom of contract; and, on Article 119(1) and (3) of the Treaty on the Functioning of the European Union which recognises free competition. But the Explanations also point out that this right may be subject to the limitations provided for in Article 52(1) EUCFR. Ouald Chaib and David argue that the ECtHR

265 Opinion Advocate General Sharpston in *Bougnaoui v Micropole*, para. 133.
266 Case C-54/07 *Centrum voor Gelijkheid van Kansen v Firma Ferijn NV,* ECLI:EU:C:2008:397.
267 Bribosia and Rorive, 'ECJ Headscarf Series (4): The Dark Side of Neutrality'.
268 Bribosia and Rorive, 'ECJ Headscarf Series (4): The Dark Side of Neutrality'.
269 Opinion Advocate General Kokott in *Achbita v G4S,* para. 90
270 Opinion Advocate General Kokott in *Achbita v G4S,* para. 90 and 91.

judgment in *Eweida and Others v the United Kingdom* runs against the interpretation adopted in *Achbita v G4S* for a number of reasons, one of which is important here:

> While the Court [ECtHR] accepted as legitimate the private companies' wish to project a certain corporative image, it made it clear that this does not stand on a same footing with the right to manifest one's religion. For the ECJ [CJEU], an employer's wish to project an image of neutrality is covered by the freedom to conduct a business (Article 16 Charter). This reasoning doesn't have a place at the ECtHR. Freedom of religion, like the prohibition of discrimination, is a human right protected by the ECHR (Article 9); the private companies' interest to project an image is not. The Court [ECtHR] thus concluded in *Eweida* that too much weight was accorded to this interest (§ 94).[271]

Therefore, according to Ouald-Chaib and David, the two rights at stake do not carry the same weight because only the right to freedom of religion is a fundamental human right. Furthermore, it can also be argued that the EUCFR does not only recognise the right to freely conduct a business, it also guarantees everybody's freedom of religion (Article 10), provides a right to non-discrimination (Article 21), states that the Union respects religious diversity (Article 22), and, determines that every worker has the right to working conditions which respect his or her dignity (Article 31(1)). All these rights should be taken into account when assessing proportionality and Article 2 of the Treaty on European Union should also be kept in mind. This article reads as follows:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Therefore, in the view of the author, Article 16 EUCFR does not support a finding that, following a customer's request not to be served by someone wearing religious clothing or symbols, an undertaking can prohibit its employee from doing so.

In **Belgium**, in the 'Club case' from 2008, a company had clear guidelines that employees should not only wear a uniform with the company logo but that they should also refrain from wearing any clothing or symbols likely to undermine the corporate image (described as an 'open, available, sober, family-based and neutral' image). The Labour Appeal Court of Brussels held, among other points, that freedom of religion was not absolute: restrictions were allowed where the religious practices were 'likely to lead to chaos' and that the company could justify the firing on objective consideration linked to its corporate image.[272] However, it is not clear whether there was any request from customers involved in this case. The same is true for the following case from **Denmark**, the already mentioned *Føtex*-case, where a female employee was dismissed for having worn a headscarf to work for religious reasons. The Supreme Court held that the differential treatment was justified by the supermarket's wish to appear politically and religiously neutral and by the fact that the clothing regulations were consistently enforced.[273]

In **Germany**, the case law of the Federal Constitutional Court includes considerations on freedom of profession as a fundamental right under the Constitution. The Federal Labour Court has ruled that, as far as weighing of fundamental rights is concerned, the comprehensive fundamental right of freedom of religion is of greater importance than the basic right to entrepreneurial freedom.[274] And, in another

271 Ouald Chaib, S. and David, V. (2017) 'European Court of Justice Keeps the Door to Religious Discrimination in the Private Workplace Opened. The European Court of Human Rights could Close it', *Strasbourg Observers:* https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/.

272 **Belgium**: Labour Appeal Court, Brussels, 15 January 2008.

273 **Denmark**: Supreme Court, *Føtex*-case 2004, U.2005.1265H.

274 **Germany**: Federal Labour Court, 10 October 2002, 2 AZR 472/01.

German case concerning a woman who applied for a position as a dentist's assistant and wanted to wear a headscarf during work, but was not allowed to do so by her future employer, the employer addressed his freedom to conduct a business and the interest of the employer to be free to only hire employees who corresponded to their ideas. The Berlin Labour Court ruled that the interference with the freedom to conduct business (Article 12 (1) sentence 2 of the Constitution) is subject to a legal reservation, like the General Act on Equal Treatment.[275] The country fiche of the **Netherlands** reports that cases have addressed all kinds of arguments to prohibit the wearing of religious clothing/symbols, including the freedom to choose an occupation, the freedom to conduct a business or requests from clients not to have to deal with someone wearing religious clothing or symbols, but all such arguments have been rejected as a justification. In the **UK** case of *Noah*, where a woman wearing a headscarf was turned down for the job of hairdresser, the employer sought to argue that clients needed to see the hair of the employee hairdressers. The employer did not succeed in justifying this claim, as she brought no evidence to substantiate it. It is therefore possible that if she had had evidence to this effect that she might have been successful (on the basis of business need), but this has not been tested.[276] However, here again, there was no mention of any wishes made by customers not to be served by a woman with an Islamic headscarf.

Gender discrimination

Bans on the wearing of religious clothing or symbols are most often challenged as discrimination on the grounds of religion or belief but other grounds of discrimination could be applicable as well. For example, if such bans significantly affect women more than men, this could amount to gender discrimination. Bans on the wearing of face-covering veils or Islamic headscarves only affect Muslim women, as men do not wear these items of clothing and, thus, they could constitute gender discrimination. But, they could also be seen as discrimination on the ground of racial or ethnic origin, as the majority of the people affected would be of non-Western origin.

As mentioned, Advocate General Kokott, in *Achbita v G4S,* gave a number of issues that needed to be taken into account when assessing the proportionality of a genuine and determining occupational requirement, and one of these factors was whether differences in treatment on other grounds were also present. In relation to this, she wrote that the fact that a difference in treatment on other grounds was also present might indicate that a ban was disproportionate. But, she continued, the G4S rule was capable of affecting men as much as women and did not appear to put employees of a particular colour or ethnic background at a particular disadvantage.[277] In an earlier paragraph, Advocate General Kokott had already considered that all the information available indicated that 'the measure in question is *not* one directed specifically against employees of the Muslim faith, let alone specifically against *female* employees of that religion' because the G4S rule would also affect male employees of the Jewish faith who wanted to wear a skull cap or a Sikh employee who wanted to wear a turban, or male and females who wanted to wear a clearly visible crucifix [italics in original].[278] Advocate General Sharpston, in *Bougnaoui v Micropole,* only mentioned that the issues arising in her Opinion did not relate to the Islamic faith or to members of the female sex alone and that the wearing of religious apparel was not limited to one specific religion or to one specific gender.[279] She did not mention sex or gender discrimination at all. The CJEU did not mention this in either case.

In **Austria**, as was mentioned above, the Supreme Court recently decided that a ban on the wearing of the niqab by an employee of a public notary was permissible because this hindered the normal communication with society, clients, colleagues and employer. The claimant in this case used the argument that she was indirectly discriminated against on the ground of gender by the ban. However, the Court did not deal with

275 **Germany**: Labour Court Berlin, 28 March 2012, 55 Ca 2426/12.
276 **UK**: *Noah v Sarah Desrosiers (trading as Wedge)*. ET 2201867/2007.
277 Opinion Advocate General Kokott in *Achbita v G4S,* para. 121.
278 Opinion Advocate General Kokott in *Achbita v G4S,* para. 49.
279 Opinion Advocate General Sharpston in *Bougnaoui v Micropole,* para. 30.

this in substance.[280] In **Germany**, the ruling of the Federal Constitutional Court on the Education Act of North Rhine-Westphalia discussed discrimination on grounds of gender (under Article 3 para. 2 sentence 1 and para. 3 Constitution) but rejected such discrimination for women wearing a headscarf in this case given its restrictive interpretation of the law under scrutiny.[281]

Multiple discrimination

Bans on the wearing of religious clothing and symbols at work could also amount to discrimination on more than one ground, often referred to as multiple discrimination.[282] For example, bans on the wearing of face-covering veils or Islamic headscarves only affect Muslim women, as men do not wear these items of clothing, so this could constitute discrimination on the grounds of both religion or belief and gender. As was analysed above, some organisations and authors were of the opinion that the rule in *Achbita v G4S* amounted to direct discrimination because it was based on stereotypes of Muslim women. Therefore, the relevant bans could have been considered not only as religion or belief discrimination but also as gender discrimination and thus as multiple discrimination, as discrimination on both these grounds. Brems, for example, writes about *Achbita v G4S* that it is bewildering that there is no reference in the judgment 'to either the Europe-wide context of Islamophobia, or the widespread existence of negative stereotypes about Muslim women, and in particular those who wear Islamic dress'.[283] Amnesty International and ENAR refer to restrictions in European states on the wearing of religious or cultural symbols and dress which 'have a disproportionate impact on Muslim women'.[284] In *Bougnaoui v Micropole,* the customer had requested that there should be 'no veil next time'.[285] This was specifically targeted at Muslim women who wear a headscarf or veil and thus could have been seen as discrimination on the grounds of both religion or belief and gender. However, according to Fredman, it is unusual for these cases to be expressly identified as a multiple discrimination issue, let alone an intersectional one, although equality bodies have been more open to viewing discrimination against women in headscarves as an intersectional issue.[286] This point is confirmed by the lack of any mention of multiple discrimination in the case law of the Member States regarding the wearing of religious clothing and symbols in employment. Only in **France**, it was mentioned in the *Baby Loup* case. This was the case of the employee at a privately run day care centre for children who was dismissed for wearing an Islamic veil when she returned from maternity leave because this was violating the centre's internal regulations. The prohibition on the wearing of the Islamic veil was argued as multiple discrimination based on religion and sex,[287] but this was not discussed in the decision of any of the Courts. The country fiche from **France** reports on another case of multiple discrimination but this was about the wearing of the Islamic veil by a student of adult education classes, so did not concern employment. No other country fiche mentioned multiple discrimination.

The Employment Equality Directive and the Race Directive both refer in their Preambles to the fact that 'women are often victims of multiple discrimination'.[288] However, the term is not further defined and there is no indication on whether and how discrimination claims on multiple grounds can be made. The EU

280 **Austria:** Supreme Court, Decision No. 9ObA117/15v, 25 May 2016.

281 **Germany**: Federal Constitutional Court, 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10.

282 For more information on this see: Fredman, S. (2016) *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (European Network of Legal Experts in Gender Equality and Non-discrimination, European Commission, Directorate-General for Justice and consumers): http://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb.

283 Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace'.

284 Amnesty International and European Network Against Racism, *Wearing the Headscarf in the Workplace Observations on Discrimination Based on Religion in the Achbita and Bougnaoui Cases.*

285 *Bougnaoui v Micropole,* para. 14.

286 Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law,* p. 60. She gives examples from **Austria**, where, in relation to the wearing of headscarves, discrimination was found on the grounds of sex and religion; and, **Croatia**, where discrimination was found on the grounds of sex and age. The Croatian case did not concern employment and it is not clear if the Austrian cases did concern employment or other areas.

287 **France**: Opinion of the Prosecutor General Marin, before the Court of Cassation: https://www.courdecassation.fr/IMG/Avis_PG_pleniere_140625ano.pdf; Report of the Reporter of the Court Truchot, https://www.courdecassation.fr/IMG/Rapport_Truchot_pleniere_140625ano.pdf.

288 Recital 3, Employment Equality Directive and Recital 14 Race Directive.

Commission, in its 2014 report on the Directives, stated that 'the Directives already allow a combination of two or more grounds of discrimination to be tackled in the same situations' but that problems may arise from the different levels of protection provided for the different grounds.[289] However, a recent CJEU case suggests otherwise. In *Parris v Trinity College Dublin,* the CJEU held that, where discrimination on the basis of each ground – in this case age and sexual orientation – taken in isolation does not exist, no new category of discrimination resulting from the combination of more than one of those grounds may be found to exist.[290] Therefore, a claim on a combination of grounds of discrimination cannot succeed unless discrimination exists on either or both grounds taken separately. So a Muslim woman who, like Ms Achbita and Ms Bougnaoui, was prohibited from wearing an Islamic headscarf to work, could claim that this is discrimination on the grounds of religion or belief, gender and/or on a combination of religion or belief and gender, but their claim could not succeed unless either religion or belief discrimination or gender discrimination was found. Neither the CJEU nor either of the Advocates General mentioned anything about multiple discrimination in these cases although Advocate General Kokott suggests that the fact that a difference in treatment on other grounds is also present might indicate that a ban is disproportionate.[291] This suggests that, in her view, the question whether there is discrimination on multiple grounds is taken into account to assess proportionality.

5.5 Reactions in the Member States to the judgments in *Achbita v G4S* and *Bougnaoui v Micropole*

The judgments in the *Achbita v G4S* and *Bougnaoui v Micropole* are mentioned in some of the country reports. The report from **Belgium** (*Achbita v G4S* was a reference from the Court of Cassation in Belgium) describes what was held and then reports that, according to UNIA, the Belgium equality body (formerly called the Centre for Equal Opportunities and Opposition to Racism/Centrum voor Gelijkheid van Kansen en voor Racismebestrijding), the CJEU ruling clarifies the limits along which a company may restrict the freedom of religion of its employees on the basis of its neutral policy. There are, according to the report, a number of decisions accepting bans on religious symbols as long as the company has a neutrality charter or policy. The Croatian report mentions that that the CJEU decisions led to strong reactions in **Croatia** through media reports. The general attitude of the public and religious communities reflected outrage about the decisions and considered them to be discriminatory and contrary to the provisions of the Croatian Constitution. The report from **Romania** notes that the decisions were reported in a very limited and erroneous way – there were only a few articles, no discussions and the main message was that the case concerned 'the prohibition of the Islamic veil by the EU'.

The report from **Sweden** criticises the judgment in *Achbita v G4S* and agrees with Advocate General Kokott that the Member States should have been left a certain margin of discretion which would have meant that the courts in a country like Sweden could have come to a different outcome. The report sees the effect of the case, that Article 16 EUCFR sets a maximum protection level, as reducing the protection level which would otherwise have applied in **Sweden** according to the Discrimination Act, at least with regard to private employers. In the **UK**, on 15 March 2017 the Parliamentary Under-Secretary of State for Women and Equalities replied to an urgent commons question asked in Parliament about the implications of the decisions for the **UK**.[292] This shows some confusion and disquiet about what the judgment in *Achbita v G4S* means in practice, especially for those Member States which have more tolerant attitudes to the wearing of Islamic headscarves in employment and beyond, like **Sweden** and the **UK**. For example, in the **UK**, concerns were raised about the compatibility of the judgment with the ECtHR judgment in *Eweida and Others v the United Kingdom*. The Parliamentary Under-Secretary of State for Women and Equalities replied that 'we do not believe that the different judgments are in conflict. Both the CJEU and

289 COM (2014) 2, pp. 9-10.
290 Case C-443/15 *Parris v Trinity College Dublin*, ECLI:EU:C:2016:897, paras 80-81.
291 Opinion Advocate General Kokott in *Achbita v Bougnaoui,* para. 121.
292 **UK**: for details see: Cranmer, F. (2017) 'Urgent Commons Question on CJEU Rulings in *Achbita* and *Bougnaoui*', *Law & Religion UK*, 15 March 2017, http://www.lawandreligionuk.com/2017/03/15/urgent-commons-question-on-cjeu-rulings-in-achbita-and-bougnaoui/.

the ECHR were trying to assess the balance in each case between the religious needs of the employee and the needs of the employer. In *Eweida*, the assessment favoured the employee; in another ECHR case, and also in the *Achbita* case, the assessment favoured the employer'. She also stated that 'the law is clear and remains unchanged' and that 'the Government did not want employers mistakenly thinking that the rulings gave them any authority to sack public-facing staff who wore headscarves or any other religious symbols'.[293]

Summary

Summarising the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole:*

- Neutrality policy is legitimate aim;
- Justified if:
  - genuinely pursued in a consistent and systematic manner;
  - does not make a distinction between different religions or different (religious, philosophical or political) beliefs;
  - rule is limited to customer-facing employees;
  - employer has considered whether the employee could be moved to a job without contact with customers.
- Wish of customers not to be served by someone with an Islamic headscarf was not a genuine and determining occupational requirement.

Practical meaning (in the view of the author):

- The judgments do not give employers the right to ban Islamic headscarves or symbols of one particular religion only or to sack employees wearing such clothing;
- Any bans should cover all religious, philosophical and political symbol;
- judgment also makes it difficult for an employer to justify restrictions on clothing for those employees who do not come into contact with customers;
- Some form of accommodation must be made: employer has to consider whether employee can be moved to a job without contact with customers.

293 Cranmer, 'Urgent Commons question on CJEU rulings in *Achbita* and *Bougnaoui*'.

6 Relevant national law

In this chapter, the national law, case law and the most important guidance and codes of practice on the wearing of religious clothing and symbols in employment in the **28 Member States** will be analysed. The constitutional and general principles in relation to religion and belief and the constitutional right to equality and non-discrimination were addressed above. Here, an overview will be given of the specific legislation prohibiting discrimination on the grounds of religion or belief in employment. The national legislation on the wearing of religious clothing and symbols in employment will be examined and this includes whether a distinction is made between public and private employment. A separate section will analyse the national case law, but cases are also mentioned in the sections on national laws where this is relevant, as it is often through the case law that the legal position is interpreted or established.

6.1 National law prohibiting discrimination on the grounds of religion or belief

The Employment Equality Directive imposed a duty on Member States to enact legislation against discrimination on the ground of religion or belief (and other grounds) in employment. And, as was mentioned, according to the report by the European Commission, 'all 28 Member States have transposed the Directives and the conformity of all those laws with the Directives has been checked by the Commission'.[294] Therefore, all Member States have provisions against religion or belief discrimination in employment. Table 4 gives an overview of this legislation in the Member States. From the table it will be clear that the protection is often provided through more than one act.

Table 4: National law against religion or belief discrimination

Member State	National law against religion or belief discrimination
Austria	• Equal Treatment Act, paras 17/1, 18, 31/1 (private sector) • Federal Equal Treatment Act, para 13/1 (public sector)
Belgium	• Federal Act pertaining to fight against certain forms of discrimination (General Antidiscrimination Federal Act), 10 May 2007 • Decree establishing a Framework Decree for the Flemish equal opportunities and equal treatment policy (Flemish Community/Region), 10 July 2008 • Decree on the fight against certain forms of discrimination (French Community), 12 December 2008 • Decree on the fight against certain forms of discrimination, including discrimination between women and men, in the field of economy, employment and vocational training (Walloon Region), 6 November 2008 • Decree aimed at fighting certain forms of discrimination (German-speaking Community), 19 March 2012 • Ordinance related to the fight against discrimination and equal treatment in the employment field (Region of Brussels-Capital), 4 September 2008 • Ordinance related to the promotion of diversity and the fight against discrimination in the civil service of the Region of Brussels-Capital, 4 September 2008 • Decree on equal treatment between persons in vocational training (Commission Communautaire Française [Cocof]), 22 March 2007 • Decree on the fight against certain forms of discrimination and on the implementation of the principle of equal treatment (Commission Communautaire Française [Cocof]), 9 July 2010
Bulgaria	• Constitution, Article 6 (2) • Religious Denominations Act, Article 4 (4) • Protection Against Discrimination Act, Article 4 (1) • Labour Code, Article 8 (3)
Croatia	• Constitution of the Republic of Croatia, Article 14 • Anti-discrimination Act, Article 9.1 • Anti-discrimination Act, Article 8 • Labour Act, Article 7

294 COM (2014) 2, p. 3.

Member State	National law against religion or belief discrimination
Cyprus	• Law on equal treatment in employment and occupation, Article 6(1) • The Criminal Code Cap. 154, Article 141 • The Constitution of the Republic of Cyprus, Article 28(2) • The Constitution of the Republic of Cyprus, Article 18
Czech Republic	• Law no. 198/2009 Coll., Anti-discrimination Law, Section 2(3) • Law No. 262/2006 Coll., Labour Code, Section 16 • Law No. 435/2004 Coll., on employment, Section 4
Denmark	Act on the Prohibition of Discrimination in the Labour Market etc., Article 1(1)
Estonia	Equal Treatment Act, 11 December 2008, RT I 2008, 56, 315, Article 2 (2)
Finland	• Non-Discrimination Act (1325/2014), Section 8 (2) • Penal Code (1889/39) Chapter 47, Section 3
France	• Constitution of 1958, Article 1 • Declaration of Human and Civic Rights, 26 August 1789, Article 10 • Law of 9 December 1905 on the separation of Church and State, Article 1 • Law n° 83-634 of 13 July 1983 relating to rights and obligations of civil servants, Article 6 • Law n° 2016-1547 of 18 November 2016 of modernization of the XXIst Century, Article 86
Germany	• Constitution, Article 3.3 • General Act on Equal Treatment, Sections 1, 2 and 7
Greece	• Greek Constitution, Article 5 (2) • Equal Treatment Law 4443/2016, Articles 1 and 2 (1)
Hungary	Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA), Article 8
Ireland	Employment Equality Acts 1998-2015, Section 6(2)(e), Section 6(1), Section 31, Section 14(A)
Italy	• Legislative Decree 216/2003 – implementing Directive 2000/78/EC, Article 1-3 • Law 300/1970, Workers Act, Article 3
Latvia	• Labour Law, Article 7(2), Article 29(9) • Law on the Prohibition of Discrimination of Natural Persons-Economic Operators (self-employment), Article 4(2)
Lithuania	• Law on Equal Treatment, Article 7 • Labour Code, Articles 2, 96, 129
Luxembourg	• Penal Code, Article 454 • Labour Law, Article L 251-1
Malta	• Employment and Industrial Relations Act, Article 26 • Equal Treatment in Employment Regulations, Articles 2, 3 and 6 • Extension of Applicability to Service with Government (Equal Treatment in Employment) Regulations • Equal Treatment in Self-Employment and Occupation Order, Article 4
Netherlands	General Equal Treatment Act, Article 1 in conjunction with Article 5
Poland	• Act on the Labour Code (implementation amendment) • Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment
Portugal	Labour Code, Article 24
Romania	• Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination, 30 August 2000, Articles 2(1), 5-8 • Labour Code in Articles 5 and 59
Slovakia	• Slovak Constitution, Article 12(2) (Act No 460/1992 Constitution of the Slovak Republic; latest amendments: 08/12/2015 (No 427/2015) • Law: Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act), Section 2a(2) in conjunction with section 2(1): latest amendments: 12/11/2015 (No. 378/2015) • Labour Code No. 311/2001, Article 6 of General principles, Section 13 para 2, Section 41 para 8; latest amendments: 26/11/2015 (No. 440/2015)
Slovenia	• Protection of Discrimination Act, Article 1 (1) • Employment Relationship Act, Article 6

Member State	National law against religion or belief discrimination
Spain	• Spanish Constitution, Art. 14 and 16. • Workers' Statute (RLD 2/2015), Art. 4.2.c. • Law 62/2003, Art. 34. • Criminal Code (Organic Law 10/1995), Art. 314.
Sweden	Discrimination Act (2008:567), Chapter 1 Sections 4-5
United Kingdom	Equality Act 2010, Section 10, Section 13, Section 19

6.2 National law on the wearing of religious clothing and symbols in employment

6.2.1 Public employment

In **Austria**, the Federal Act on the prohibition of covering the face was adopted very recently and has come into effect on 1 October 2017. This Act makes covering one's face in public and in public buildings an administrative offence, punishable with an administrative fine of 150 euros. The Act does not explicitly mention employment, but it means that employees in public employment cannot wear face-covering clothing in the workplace, according to the country report. The Bill preceding this Act received a large amount of expressly negative comments and experts opinions. The Act does not mention religion but its stated aim, according to the preparatory explanatory notes, is to facilitate integration by strengthening participation and living together in society. Integration is a process involving society at large while its success depends on the cooperation of everyone living in **Austria** and is based on social interaction. The Act is thus clearly targeting Muslim headgear for women, like the burqa and the niqab. The public debate was entirely on a 'ban on burqas'. The ECtHR case of *S.A.S. v France* triggered debates on banning Muslim religious clothing. This act only bans face-covering clothing, but in addition to this ban, there have been heated public debates on whether religious neutrality in appearance could be expected from public officials, like the judiciary and the police. The public debates were mainly taken up by the tabloid newspapers.

Belgium adopted a Federal Act prohibiting the wearing of any clothing totally or principally hiding the face in 2011. The Act contains the possibility of imposing a prison sentence on those who violate it. The Constitutional Court has rejected actions for annulment of this Act, but it has held that it should not apply in places of worship. Therefore, as in Austria, the ban only covers face-covering clothing. The ban covers the public sphere, and this includes, according to the country report, employment.

Apart from this Act, there is no general rule in **Belgium** regulating the wearing and/or display of religious symbols in employment, in education or in public services. Constitutional provisions, providing for the protection of freedom of religion and neutrality of public education (which means, in Belgium, more a pluralistic approach than a strictly secular [laïque] one) have to be taken into account in regulating this area. The federal structure makes the regulation of the wearing of religious clothing and symbols very complex. Depending on the material scope of application (education, employment, public services, etc.), different entities (the Federal State, the Communities and the Regions) have the competence to address the wearing and/or display of religious symbols. In Flanders, the network of public schools of the Flemish (i.e. Dutch-speaking) Community introduced a general ban on the wearing of all religious symbols in primary and secondary schools for all pupils and for teachers, with an exception for teachers of religious education classes. This thus includes both face-covering and other religious clothing or symbols.

Currently, no general national prohibition of religious clothing or symbols regulates the public sector in **Belgium**. This means that each public authority may interpret the neutrality requirement and decide whether or not to allow its civil servants or employees to wear such clothing or symbols. However, the

legislative section of the Council of State, gave, in 2008, an opinion[295] on a draft bill aiming at applying the separation of the State and religious and philosophical organisations.[296] Article 5 of this proposal stipulated that 'civil servants must refrain, during the exercise of their function, from showing any distinctive philosophical, religious, community or partisan expression'. In its opinion, the Council of State recalled what was meant by the constitutional principle of neutrality:

> In a democratic State governed by the rule of law, the public authority has to be neutral, because it is the public authority from and for all the citizens, and it must, in general, treat all of them equally, without discrimination on the ground of their religion, belief or preferences for a community or for a political party. For this reason, it can be expected from civil servants, that, within the limits of their function, they observe strictly, regarding all citizens, the principles of neutrality and equality. [...] Having in mind the European Court of Human Rights case-law [...], mentioning that an in concreto assessment has to be done in order to judge if there is, on the one hand, a pressing social need, and, on the other hand, if the restriction is proportionate with the legitimate objective, the Council of State considers that the proposal does not justify enough the very general scope of application of Article 5. In particular, the proposal explanations do not justify enough why it concerns any civil servant, independently of the nature of his or her function and the fact that he or she exercises it in contact with the public or not. (translation as per country fiche).

On the ground, it appears that several public institutions have opted for a prohibition and, at the local level, several municipalities have introduced a ban on the wearing of religious or philosophical clothing or symbols for employees, especially for those who have a public function that involves direct contact with citizens. This includes face-covering as well as other religious clothing.

Since the beginning of the nineties, in **Belgium**, the debates and the bans on religious symbols all concern the Islamic headscarf and veil. The country fiche reports that there was a public debate on the wearing of face-covering veils in the public area in some municipalities in Belgium. This led to the adoption of the Federal Act aiming at prohibiting the wearing of any clothing totally, or principally, hiding the face. The Federal Parliament passed the so-called 'anti-burqa Bill' through the urgency procedure and with almost unanimous approval. No expert or NGO was consulted and no role was assigned to the equality body. Moreover, the Council of State was deprived of its mission to give its opinion as to whether the Bill respected fundamental freedoms and no reliable figures on the phenomenon of the wearing of the burqa – actually, the niqab in Belgium – were available. Critical submissions from Amnesty International, Human Rights Watch, the Human Rights League and the former Commissioner for Human Rights of the Council of Europe were all received with indifference. Double standards were applied: on the one hand, the hearings which took place before the French National Assembly justified the fact that no hearings had to be organised before the Belgian House of Representatives; on the other hand, the opinion of the French Council of State was put aside in the name of the sovereignty of the Belgian State. The law was adopted on 1 June 2011 and came into force on 23 July 2011.

In **Bulgaria**, there is no general legislation banning all religious symbols at the workplace, however, the Limiting of the Wearing of Clothing Partially or Fully Covering the Face Act bans specifically the wearing of face-covering clothing in all public places. Under the Act, a public place means any publicly accessible place. Religious symbols fully or partially covering the face may only be worn in prayer houses. Partial covering of the face is defined as occurring where clothing covers the mouth, nose, or eyes. So, other religious clothing and symbols can be worn as long as they do not cover the mouth, nose or eyes. According to the country report, all employment is covered by this legal prohibition, both public and private, including places where one practices a profession or occupation, for example, lawyers' offices. The law only excludes work carried out from one's home, because the home is not a public place, and work done by prayer house staff.

295 **Belgium**: Council of State, Legislative Section, Opinion No. 44.521/AG, 20 May 2008.
296 **Belgium**: Doc. Parl. Sénat, S.O. 2007-2008, 4-351/2.

The Act was adopted with little parliamentary and public debate. The main argument for the law was that it was necessary to see an individual's face for public security reasons. The country fiche of **Bulgaria** reports that, in reality, the Bill was introduced by Islamophobic parties in order to suppress a recent practice of wearing the burqa by a fraction of Muslim women, mostly Roma, in certain communities. According to the country fiche, some public schools have banned their employees (teachers and other staff) from wearing any religious symbols, so both face-covering and other clothing, at the workplace by internal rules (four such schools were found online, according to the country fiche). Presumably, these internal rules were based on a provision in the Pre-school and School Education Act (adopted 2015, in force as of 2016) that declares pre-school and school education to be secular (Article 11 (1)), and bans any imposition of religious (or ideological) doctrine (Article 11 (2)). This provision, however, does not explicitly give schools the right to ban religious symbols worn by their staff.

In **Croatia**, there is no legislation prohibiting the wearing of religious clothing or symbols in employment. Article 5 of the Act on Misdemeanours against Public Order and Peace imposes liability for the wearing, in public, of symbols which disrupt public order and peace. And, although this Act doesn't explicitly mention religious symbols, there is a possibility that this provision could be interpreted as prohibiting the wearing of religious symbols if they disrupt public order and peace. However, this can only indirectly affect the right of wearing religious clothing and symbols in employment. Public debates about religious symbols in schools and hospitals, which would include employees in those establishments, are very common in **Croatia**, although no legislative changes have been made or proposed. And, as mentioned above, the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole* have led to strong public reactions.

In **Cyprus**, there are no national laws regulating the wearing of religious symbols at work and there are no plans for regulating this matter in the foreseeable future. The restrictive immigration regime in employment probably accounts for the fact that the wearing of religious symbols at the work place has not reached the public sphere. Religious symbols are worn by a very small number of third country nationals, usually students, whose right to work is restricted to specific sectors and carries a certain maximum number of hours of work per week. The vulnerable status of these workers presumably accounts for the fact that their rights to non-discrimination and freedom of religion are not actively pursued. As a result, there are no publicly known tensions or political debates over religious symbols at work. In an almost universally Christian society, such as the **Cypriot** society, the wearing of crosses is a generally accepted practice, nowadays perhaps more closely connected to fashion rather than religion, which does not raise issues with employers (who are almost entirely Christians anyway). The headscarf for women, although not as common as the cross, does not raise issues in Cyprus and is not necessarily associated with religion or religious fundamentalism. In previous generations, the headscarf was commonly worn by both Christian (Greek Cypriot) and Muslim (Turkish Cypriot) women, conceived at the time as a social and cultural characteristic rather than a religious symbol.

In the **Czech Republic**, there is no legislation in relation to the wearing of religious clothing or symbols in any area but there was some public outrage when a Muslim student was not allowed to wear a Muslim headscarf. In **Denmark**, Article 56 of the Administration of Justice Act establishes that a judge in court hearings cannot appear in a way that may be perceived as indicating their religious affiliation. In practice, this means that a judge cannot wear any religious clothing or symbols. However, the prohibition does not encompass lay judges. The wearing of a Muslim headscarf is a recurrent political topic, which is typically brought up by the members of Parliament from the Danish Peoples Party. In one example from September 2016, the Danish Peoples Party put forward a proposal to ban all Muslim headscarves in Danish schools, including for both teachers and students. The majority in the Danish Parliament did not support the proposal. In both **Estonia** and **Finland**, there are no laws restricting the wearing of religious clothing or symbols in public or private employment and there are no debates on this issue.

In **France**, apart from the law banning face-covering clothing in public spaces which include public employment, the wearing of religious clothing or symbols, both face-covering and other clothing or symbols, is prohibited in all sectors of public employment through established case law and through the

Council of State study relating to the purview of the principle of neutrality of public servants conducted and adopted at the request of the Defender of Rights, rather than through specific laws.[297] This means that the wearing of religious clothing and symbols is prohibited regardless of the status of the worker's contract. This covers public education, public health services and hospitals and all local, departmental and national public services. The country fiche from **France** reports that there is an ongoing debate in many public arenas and private workplaces in relation to the opportunity to limit the expression of religious faith. This debate is amplified by the fact that many persons erroneously believe that the principle of secularity entails the possibility to prohibit religious symbols in public places. As regards members of Parliament and politicians, there is a general propensity to defend an extensive interpretation of secularity and thus an extensive ban on the wearing of all religious clothing and symbols.

In **Germany**, the Ludin judgment[298] of the Federal Constitutional Court left the States to decide whether to enact a general ban on religious clothing and symbols or to guarantee religious plurality at public schools. Public employers and schools can ban the wearing of religious clothing. Eight of the sixteen States[299] passed laws that prohibit teachers in public schools from wearing religious symbols and clothing. The parliamentary debates on the draft laws and the corresponding law commentaries make it clear that the main objective of the prohibition is the Muslim headscarf. In two federal states, the prohibitions also apply to a part of (Berlin) or to all the employees of the state service (Hesse). Although the Federal Constitutional Court has decided (for North Rhine-Westphalia) that a general headscarf ban is not compatible with Article 4 (freedom of religion) and Article 3 (equality guarantee) of the Constitution,[300] most Governments of the States stated that they see no need for action. In their view, these laws would be quite different from the one in North Rhine-Westphalia. After the ruling of the Berlin-Brandenburg Labour Court[301] on the Berlin Neutrality Act, the debate has resurfaced as to whether these State Laws need to be amended. The Berlin State Education Act/Neutrality Act prohibits the wearing of all religious clothing and symbols in the education sector of public employment.

In **Germany**, the best known debate concerns the ban of religious clothing and symbols in public schools as laid down in the laws in some of the States, while another debate revolves around the ban of religious clothing and symbols in court. The former issue, the ban in public schools, was subject of both academic debate and parliamentary debates in the States. A third debate concerns the cases of an employee wearing religious clothing or symbols connected to a different religion while working for an employer who is affiliated to the Christian Churches.

Greece, **Hungary**, **Ireland** and **Italy** do not have any laws that prohibit the wearing of religious clothing or symbols in (public) employment. In **Greece** there are also no public or academic debates on this issue. In **Hungary**, a municipal decree banning the burqa caused wider public debate. The ban was abolished by the **Hungarian** Supreme Court and this case is discussed below. In 2007, in **Ireland**, a debate took place, largely in the national media, concerning the uniform policy of the national police force. It was prompted by the actions of a Sikh man who sought to challenge a ban on the wearing of turbans for members of the Reserve Police. He was advised by an Assistant Commissioner that he would have to wear a standard uniform and would no longer be permitted to wear a turban. A discrimination complaint did not succeed because the action fell outside the ambit of the Employment Equality Acts since he was a volunteer and not engaged in either employment or vocational training. As a consequence, the substantive issue was not

297 **France:** Council of State, 8 December 1948, Demoiselle Pasteau, No. 91.406; Council of State, 3 May 1950, Demoiselle Jamet, no 98.284; Council of State, (opinion (avis)), 3 May 2000, Mlle Marteaux, No. 217017; Lyon Administrative Appeal Court, 27 November 2003, Mlle Ben Abdallah, No. 03LY01392; Council of State, *Study Relating to the Purview of the Principle of Neutrality of Public Servants*, conducted and adopted at the request of the Defender of Rights; Constitutional Council, No. 2012-297 QPC, 21 February 2013, Association pour la Promotion et l'Expansion de la Laïcité.

298 **Germany:** Federal Constitutional Court, 24 September 2003, 2 BvR 1436/02 (Ludin).

299 These States are: Baden Württemberg; Bayern; Berlin; Bremen; Hesse; Lower Saxony; Saarland; and, North Rhine-Westphalia.

300 **Germany**: Federal Constitutional Court, 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10. This is further discussed under the case law below.

301 **Germany:** Berlin-Brandenburg State Labour Court, 9 February 2017, 14 Sa 1038/16.

addressed. The most extensive public and academic debate on religious symbols and clothing in **Ireland** took place in 2008 when a school principal requested guidance from the Minister for Education following a request from a Muslim student to wear a hijab to school. The debate thus centred on religious symbols outside the employment context. The country fiche from **Italy** reports that, despite the hostility against Muslims, fuelled by many centre-right parties and opinion leaders, bans on the wearing of religious clothing or symbols have not yet entered into the debate.

In **Latvia**, a draft 'Face Covering Restriction Law' has been announced. Although the proposed law is formulated neutrally and mentions masks, helmets and garments, it focuses only on the Islamic veil. Prior to the adoption of this law, there was a public consultation and 21 opinions were received, 13 of which did not support the ban and 8 of which were in favour. The Ombudsman also provided an opinion, stressing that a complete ban on face-covering clothing infringes fundamental rights and that additional research on the need for such a ban in Latvia was required. On 22 September 2016, the Minister of Justice announced the draft law and a revised explanatory opinion. In early 2017, media reported that several ministries (the Ministry of Foreign Affairs and the Ministry of Welfare) have objected to the overly broad ban on face-covering clothing. So here again, the law would prohibit the wearing of face-covering (religious) clothing but not other religious clothing or symbols. The only debates in **Latvia** concern this draft law.

Lithuania does not have any laws that prohibit the wearing of religious clothing or symbols in (public) employment and bans are not part of the wider public or academic discourse. In the beginning of February 2017, the **Luxembourg** Minister of Justice was charged with preparing a bill on the wearing of the face-covering veil. There is no further clarification as to which areas this will cover. There is a debate on the wearing of the face-covering veil but there is no debate on the wearing of other religious clothing and symbols in employment. In **Malta**, there are no laws on the wearing of religious clothing or symbols and the issue is not debated.

In the **Netherlands**, a bill is pending before the Senate which prohibits face-covering clothing in education, public transport, public buildings and health care.[302] The main argument for the ban is that covering the face seriously affects open and mutual communication and the proposal intends to prevent this by providing a clear, uniform standard applicable to the whole sectors concerned. The legislation is, again, formulated in a neutral way and includes non-religious face-covering attire as well as niqabs and burqas, but there is no doubt that the initiative for the legislation was inspired by the wish to ban the niqab and the burqa. The proposed law does not cover religious or other clothing not covering the face. There are also lower-level and internal rules prohibiting the wearing of religious clothing and other symbols of personal identity for the judiciary and the police, but these do not have the status of legislation. These bans are limited to functions closely linked to core state functions and informed by the principle of neutrality. The country fiche from the **Netherlands** reports that there has been an on-going debate on the wearing of religious clothing and symbols since the 1990s. The debates have intensified over the years and more particularly since the turn of the century in parallel with increasing tensions and debates on the integration of groups with a non-western migrant background, especially those adhering to Islam. The topic is a prominent one on the political agenda of populist parties and politicians such as Geert Wilders. Important academic and political debates on the wearing of religious clothing and symbols in employment have also taken place, in particular in public employment. They are part of a much wider discussion on the role of religion in the public sphere and on multicultural issues more generally.[303]

302 **Netherlands**: Proposal for a Partial Prohibition of Face-covering Clothing, Kamerstukken II, 2015-2016, No. 34 349): https://zoek.officielebekendmakingen.nl/dossier/34349.

303 **Netherlands**: This is illustrated, for instance, by the fact that in 2006 the Scientific Council for Government Policy (WRR), a high profile think tank advising the Government, published an extensive report on religion in the public domain in response to the increasing public and political debates regarding this issue; see: WRR 2006, Beliefs in the Public Domain. Explorations of a Double Transformation: https://www.wrr.nl/publicaties/verkenningen/2006/12/19/geloven-in-het-publiek-domein-verkenningen-van-een-dubbele-transformatie---13.

Poland, **Portugal** and **Romania** do not have any laws that prohibit the wearing of religious clothing or symbols in (public) employment. The country fiche from **Poland** reports that debates on the issue might well arise after the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole*; and that the Ombud (the **Polish** equality body) is planning to do research on this subject. The issue is not debated in **Portugal** or **Romania**. In **Slovakia**, in reaction to the terrorist attack at the Christmas market in Berlin on 19 December 2016, the Slovak National Party chairman and chairman of the Slovak Parliament – Andrej Danko – announced that his party planned to submit a bill to Parliament in 2017 aimed at introducing a ban on wearing burqas in public places. The coalition and opposition politicians approached by media generally rejected his proposal. Open support for an initiative sponsored by Danko was expressed only by the opposition We Are Family party. But the Chairman of the Islamic Foundation in Slovakia, Mohamed Hasna, has commented in the media that Danko tackles a problem that does not exist, as Muslim women in Slovakia do not wear the burqa. Some other NGOs and human rights activists have also criticised the proposal. There has not been any further public discussion about this proposal during 2017.

In **Slovenia**, there is no law against the wearing of religious clothing or symbols. From time to time politicians, while discussing the refugee situation, mention the need to ban burqas and niqabs in the public space. In 2015, one of the opposition parties – the Slovenian Democratic Party – filed a legislative proposal on the prohibition of Muslim clothing. The proposal was not adopted. The Ministry of Interior issued an opinion that the prohibition of burqas would interfere with religious freedoms protected by the Constitution. In 2016, a member of Parliament of the same Slovenian Democratic Party asked, by means of a Parliamentary question, the Minister of the Interior whether it is considering proposing a law prohibiting burqas and niqabs in public. No reply was reported.

In **Spain**, the Supreme Court's case law suggests that the legislator can adopt bans on the wearing of the burqa and niqab, but this must be done through national law, as it affects the exercise of a fundamental right. There have been some debates linked to case law on the prohibition of different Islamic veils. The first debate is linked to the attempt by some municipalities (almost all in Catalonia) to introduce restrictions on the use of the burqa in public spaces within their municipality (which could have affected public employment in the municipality). The second debate concerns hijabs in schools and other public places. There were also some political debates arising from the case law, which is discussed below. The socialist Government, in general, defends the wearing of the hijab, but accepts the autonomy of educational institutions. There are no plans to enact any legislation in this area.

In **Sweden**, there are no laws prohibiting the wearing of religious clothing or symbols in employment. The wearing of headscarves (and even more so niqabs and burqas) in schools has been debated extensively within academic and political circles, but there is little public debate on this issue. There have, however, been extensive discussions on the refusal to shake hands with members of the opposite sex for religious reasons. Similar debates have been taking place in the **Netherlands**.

In the **UK**, there are no laws prohibiting the wearing of religious clothing or symbols in employment. Some cases have attracted media attention and spurred on some public debate but generally this was short lived. As mentioned, there was some debate following the case of *Eweida and Others v the United Kingdom,* and this led to guidance from the Equality and Human Rights Commission, the British equality body. There has been academic debate and the equality body has commissioned a call for evidence on religion and belief in the workplace and service delivery[304] and a review of equality and human rights law relating to religion or belief.[305] There has also been some debate by parliamentary groups (e.g. Christians

304 **UK**: Mitchell, M. and Beninger, K. (with Howard, E. and Donald, A.) (2015) *Religion or Belief in the Workplace and Service Delivery: Findings from a Call for Evidence* (NatCen for the Equality and Human Rights Commission): https://www.equalityhumanrights.com/sites/default/files/call_for_evidence_report_executive_summary.pdf.

305 **UK**: Edge P. and Vickers L. (2015) *Review of Equality and Human Rights Law Relating to Religion or Belief,* Equality and Human Rights Commission Research report 97, (Manchester: Equality and Human Rights Commission): https://www.equalityhumanrights.com/sites/default/files/research-report-97-review-of-equality-and-human-rights-law-relating-to-religion-or-belief.pdf.

in Parliament). And, as was mentioned above, the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole* have led to questions being asked in Parliament.

There are, therefore, not many Member States which have legislation prohibiting the wearing of some or all religious symbols in employment. As mentioned earlier, four Member States have legislation against covering the face in public: **Austria**, **Belgium**, **Bulgaria** and **France**. In **Austria**, this means that face-covering in public employment is not allowed, while, in **Bulgaria**, face-covering clothing is not allowed in any form of employment, public or private. The laws in these two countries do not, however, cover religious clothing or symbols which do not cover the face. In **Belgium**, the legislative ban on face-covering in public spaces includes public employment but, apart from this ban, there are no general bans on the wearing of religious clothing or symbols in public employment. It is left to each public authority to decide on this and several public institutions and municipalities have introduced bans on all religious or philosophical clothing or symbols. In Flanders, the wearing of religious clothing and symbols is prohibited for all teachers and pupils in primary and secondary schools.

In **France**, apart from the law banning the cconcealment of the face in public spaces which includes public employment, a study from the Council of State and case law has established a ban on the wearing of all religious clothing and symbols for all employees in public employment. So this covers clothing not covering the face, like hijabs and turbans, as well. Apart from these four countries, in 8 of the 16 States of **Germany** there are bans on the wearing of religious clothing and symbols for employees in public employment. In **Denmark** and the **Netherlands,** there are bans for judges and/or for the police imposed by regulations. Therefore, only **France** has a blanket ban on all religious clothing and symbols in public employment.

But, as was mentioned above and in the introduction and as is clear from Table 1, there have been and are debates in many Member States, including those Member States that have no legislation or regulations in place. These debates have often been linked to legislative proposals, national cases or incidents or the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole*. Moreover, below it will become clear that there is also case law regarding the issue in quite a few of the Member States.

6.2.2 Private employment

There is no explicit prohibition of the wearing of face-covering clothing in private employment in **Austria** and no explicit legal norm that allows private employers banning such clothing. There is, though, according to the country expert for **Austria**, a strong *argumentum a maiore ad minus* that if the state declares it a punishable offence to do something in public (such as, in the case of the Anti-face-covering Act, to cover your face), then private employers are allowed to ban the same behaviour in the workplace. In **Belgium**, in relation to the private sector, the case law is not clear-cut. In the majority of decisions bans on religious symbols are accepted as long as the company has a 'neutrality' charter or policy. The decision in the *Achbita v G4S* case, which now, after the judgment of the CJEU, will have to be decided on by the Belgian Court of Cassation, would be leading in this respect. **Bulgaria** only prohibits the wearing of face-covering clothing and, as already mentioned, this prohibition covers both public and private employment. However, employers, public or private, cannot ban religious clothing that does not cover the face. According to the country expert for **Bulgaria**, this is based on the argument that employers need to have a legal basis to ban such clothing. They do not have a legal basis and thus they cannot do so. They can only impose restrictions on their employees for which there is a legal basis. Furthermore, in the legal opinion of the country expert, imposing such a restriction would be in contravention with Article 4 (1) of the Protection Against Discrimination Act which bans all religious discrimination. There is no case law on the wearing of any form of religious clothing or symbols in employment, either from the **Bulgarian** courts or from the **Bulgarian** equality body.

In **Croatia**, there is no legislation prohibiting the wearing of religious clothing or symbols in either public or private employment. This is the same for **Cyprus**, but the country fiche reports that such bans may informally be practised by employers in the private sector, particularly against third country nationals in casual or undeclared work. There is no record of private sector practices as there are no labour inspections at work places where third country nationals usually work. No such ban was ever challenged in public probably because of the uncertain employment status of the people subject to such bans. In the **Czech Republic**, **Denmark**, **Estonia** and **Finland** there are no laws restricting the wearing of religious clothing or symbols in private employment.

In **France**, the law does not provide for a general prohibition of religious symbols in private employment. However, to lay down in law the decision in the Baby Loup case, Article 2 of Law n° 2016-1088 of 8 August 2016 adopted an amendment to the Labour Code and this created Article L 1321-2-1 which provides that the employer's internal regulations can prescribe the principle of neutrality as a rule and can stipulate restrictions to the principle of religious freedom for employees, if these restrictions are justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service, as long as they are proportionate to the objective pursued. There have been a number of calls for a new interpretation of the boundaries between private and public service and projects to ban religious symbols not on the basis of the employer being a public or private organisation, but on the basis of the service offered to the public, such as kindergartens and (social) services for disabled, elderly and sick persons. That would mean that private organisations providing such services would also be subject to being strictly neutral and not allowing the wearing of any religious clothing or symbols.

In **France,** there is also case law on bans on the wearing of religious clothing and symbols in private employment, as will become clear below. The mayor of a municipality, Mandelieu-la-Napoule has, recently, written a letter to private commercial enterprises to ban sales staff from wearing headscarves, as the wearing of hijabs in clothing shop H&M had given rise to many complaints. The reason given for this demand was that the municipality underwrites the republican identity and religious neutrality. The demand was also based on the CJEU decision (in *Achbita v G4S*) that a private enterprise can prohibit the wearing of the headscarf under certain circumstances. H&M has replied that its internal regulation allows everyone to dress as they wish within the limits of the law and that it does not prohibit anything that legislation does not prohibit.[306]

In **Germany**, there are no laws prohibiting the wearing of religious clothing or symbols in private employment. In **Greece**, national law is completely silent on whether certain religious clothing or symbols are prohibited in either public or private employment. **Hungary**, **Ireland** and **Italy** do not have legislation against the wearing of religious clothing or symbols in private employment. However, in **Italy**, there is a case regarding this, as will be analysed below. **Latvia**, **Lithuania**, **Luxembourg** and **Malta** do not prohibit the wearing of religious clothing or symbols in private employment either. Neither does the **Netherlands**, and, in fact, the case law there shows that private firms and organisations which cannot claim to be ethos based have very little leeway to prohibit their employees to wear religious clothing or symbols (see below under case law). However, the proposed bill prohibiting face-covering clothing in education, public transport, public buildings and health care also covers employees in private educational or health care institutions. The latter include hospitals, as well as doctors, dentists and physiotherapy practices. In **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Sweden** and the **UK** there are no laws prohibiting the wearing of religious clothing and symbols in private employment, although there is case law in both **Spain** and the **UK**, as will be discussed below.

It will be clear that there are very few legal prohibitions on the wearing of religious clothing or symbols in private employment in the **28 member States**. There are some bans of face-covering clothing that

306 **France**: Chambraud, C. (2017) In Mandelieu-la-Napoule, the Mayor, the Wearing of the Veil and H&M, *Le Monde*, 15 June 2017: http://www.lemonde.fr/societe/article/2017/06/15/a-mandelieu-la-napoule-le-maire-le-port-du-voile-et-h-m_5145013_3224.html.

include (parts of) the private employment sector (**Austria**, **Belgium**, **Bulgaria** and **France** and the proposed bill in the **Netherlands**) but, where it concerns private employment, clothing and symbols which do not cover the face are not covered by any prohibition in national law although case law might allow bans under certain conditions.

6.3 National case-law on the wearing of religious clothing and symbols in employment

There is case law on the wearing of religious clothing and symbols in employment in many of the **28 Member States** and this case law will be examined here with specific attention given to the justifications brought forward, including justifications based on the right to conduct a business and/or Article 15 EUCFR, the company's image and (the perception of) clients' wishes and requests. Some of these cases have already been mentioned in the previous chapters.

In **Austria**, the Supreme Court has held that a public notary could ban an employee from wearing the niqab because it was a proportionate occupational requirement as it hindered the normal communication with society, clients, colleagues and the employer. However, the employee had previously been banned from wearing a hijab, and this was held to be direct discrimination on the ground of religion.[307] The **Austrian** Supreme Court thus made a clear difference between clothing that covers the face and clothing that does not do so.

There have been quite a few cases in **Belgium**. First of all, there have been challenges to the Act on covering the face in public places. The Constitutional Court rejected the action for annulment of this law. It stated that the rights to freedom of expression, freedom of religion and to respect for private life are not absolute, and that limitations are allowed if they are prescribed by law and are necessary in a democratic society. The Constitutional Court ruled that the Federal Act, prohibiting any clothing totally or principally hiding the face in the public sphere, interfered with the religious freedom of women wearing a face-covering veil. However, this interference was considered to be prescribe by law (it was a Federal Act) and necessary in a democratic society. The aims pursued by the Act (public security, equality between women and men, and a certain conception of 'living together' in society) were legitimate; and, the means of achieving these objectives (prohibition, by means of a criminal sanction) were proportionate, notably because the Act provided for a light criminal sanction. For the same reasons, the Court held that potential limitations on the rights to freedom of expression and to private life were necessary in a democratic society. The Constitutional Court also held that there was no indirect discrimination because the restriction was proportionate to the legitimate aims pursued by the Act. Nevertheless, the Court held that the words 'areas accessible to the public', as enshrined in the law, should not be interpreted as including places of worship, so these places are now excluded.[308]

Cases from **Belgium** concerning public employment include cases regarding the wearing of religious clothing or symbols by teachers. The case of the Maths teacher, who wanted to wear an Islamic headscarf while teaching, was already mentioned. She asked the Council of State to annul the regulation prohibiting the wearing of conspicuous religious symbols by teachers. The Council of State dismissed her action using similar arguments to those of the Constitutional Court in the case above. The contested regulation did not infringe her right to manifest her freedom of religion, according to the Council of State, as the measure pursued legitimate aims (guaranteeing the principle of neutrality and providing students with the knowledge of the plurality of values which constitute contemporary humanism) and was proportionate, because the measure was general, abstract, non-discriminatory and limited in time (she was only prohibited from wearing the headscarf during the exercise of her functions). The Council of State also held that there was no violation of the principle of equality and non-discrimination, because, although the regulation could be seen as indirect discrimination, it was justified by a legitimate aim (the

307 **Austria**: Supreme Court, Decision No. 9ObA117/15v, 25 May 2016.
308 **Belgium:** Constitutional Court, Decision No. 145/2012, 6 December 2012.

neutrality in schools) and the means of achieving this aim was proportionate and necessary.[309] In relation to the wearing of Islamic headscarves by teachers of the Islamic religion, the Council of State held that the religious beliefs – and thus related religious symbols – of a teacher of religion are inherent to their function and thus that a school could not require a Muslim teacher of the Islamic religion to remove her hijab outside the classroom after her classes.[310]

Another case from **Belgium** concerning public employment, the *Actiris* case, has also already been mentioned. Actiris is the public body responsible for employment in the Brussels-Capital region. It prohibited the wearing of conspicuous philosophical symbols. This was held to amount to indirect discrimination against the applicant, who was wearing the Islamic veil: because the prohibition at stake was not legitimate since the regional legislator itself did not impose a policy of 'exclusive neutrality'; and, because Actiris did not show that the measure was appropriate and necessary to achieve the aim of neutrality pursued.[311] The country fiche mentions that the President of the Court considered that it was not necessary to wait for the CJEU ruling in *Achbita v G4S* since there was indirect discrimination in this case while the *Achbita v G4S* case was only related to direct discrimination. Although the referred question in *Achbita v G4S* might have asked about direct discrimination, the CJEU did address indirect discrimination in quite some detail as well. The difference between the two cases is that *Actiris* concerned a public employer, while *Achbita v G4S* concerned a private employer.

There is also other case law from **Belgium** which concerns private employment, some of which have also been mentioned before. In the *Club* case from 2008, a company had clear guidelines that employees should wear a uniform with the company logo and that they should refrain from wearing any clothing or symbols likely to undermine the corporate image. The Labour Appeal Court of Brussels held that freedom of religion was not really at stake, because the employee was not blamed for belonging to the Islamic religion but for coming to work wearing an ostentatious religious symbol against the company guidelines. Moreover, according to the Court, freedom of religion was not absolute: restrictions were allowed where the religious practices were 'likely to lead to chaos' and where the company could justify the dismissal with objective considerations linked to its corporate image; and, the Court also held that there was no discrimination because the company policy applied to all workers without distinction.[312] In the *Hema* case, an employee of a Hema store wore a headscarf at work. When she started working for Hema, she was told that this was acceptable and she was provided with a Hema headscarf as worn by employees in the Hema stores in the Netherlands. But then she was told she could no longer do work which brought her in contact with customers while wearing the headscarf, as customers had complained about this. The Labour Court of Tongres held that this was direct discrimination, because evidence showed that the neutrality argument was a fake one invoked to cover the prejudice towards Islam of some clients. The Court stressed that the store did not have a clear neutrality policy in the workplace.[313] In *Achbita v G4S,* the Labour Court of Antwerp held, in 2011, that the dismissal of an employee wearing the headscarf in order to preserve the neutral image of the company was not unreasonable and therefore did not amount to indirect discrimination, even though the company did not have any clear regulation on the neutrality in the workplace at the time of hiring.[314]

Therefore, there is, in **Belgium**, case law from the courts, including the highest ones, concerning the wearing of religious clothing – almost exclusively the Islamic headscarf – in public and private employment. The case law is not very clear-cut and this remains a controversial issue. Depending on the facts of the cases and on the courts, cases are decided under freedom of religion enshrined in the Constitution and/

309 **Belgium:** Council of State, No. 223.042, 27 March 2013.
310 **Belgium:** Council of State, No. 223.201, 17 April 2013; Nos 226.345 and 226.346, 5 February 2014; and, No. 232.344, 25 September 2015.
311 **Belgium**: Court of First Instance of Brussels, No. 13 / 7828 / A, 16 November 2015.
312 **Belgium**: Labour Appeal Court, Brussels, 15 January 2008.
313 **Belgium**: Labour Court, Tongres, 2 January 2013, *Joyce V.O.D.B. v R.B. NV and H.B. BVBA,* Judgment n. A.R.11/214/A.
314 **Belgium**: Labour Appeal Court, Antwerp, Nos A.R. 2010/AA/453 and 2010/AA/ 467, 23 December 2011. The Labour Court of Brussels came to a similar conclusion in relation to an employee of Carrefour, see: *Carrefour* Case: Labour Court of Brussels, A.R. 14/218/A, 18 May 2015. Again the Court did not find it necessary to wait for the CJEU judgment in *Achbita v G4S.*

or under anti-discrimination laws, as direct or indirect discrimination, be it at Federal or regional level. The decision of the Court of Cassation in *Achbita v G4S,* after the CJEU judgment, is awaited and will be guiding in this respect.

In **Bulgaria**, **Croatia**, **Cyprus** and the **Czech Republic** there is no case law, either from the courts or from the national equality body, on the wearing or religious clothing or symbols in employment. In **Denmark**, the leading case is the *Føtex* case from 2004, where a female employee was dismissed by a supermarket for having worn a headscarf at work for religious reasons. The supermarket had a prohibition of all headgear and explained that it wanted to present a religiously neutral image to its customers. The Supreme Court found that this did not amount to direct or indirect discrimination based on religion. The Court argued that the clothing regulation in the supermarket applied to every employee who had direct customer contact and that the rules had been consistently enforced and thus that they did not amount to direct discrimination. The Court recognised that the prohibition would mainly affect Muslim women but it accepted the supermarket's wish to appear politically and religiously neutral as a legitimate aim and found that a clothing requirement as a means to achieve this aim was appropriate and necessary. The court thus concluded that the differential treatment of the Muslim woman in question was objectively justified.[315] The case was dealt with under the Act on the Prohibition of Discrimination in the Labour Market etc., under the prohibition of religious discrimination. According to the country fiche, the judgment seemed to accept a wide area of managerial powers with regard to clothing rules that have a discriminatory effect on ethnic or religious minorities.

There is no case law regarding the wearing of religious clothing or symbols in employment in **Estonia**. In **Finland**, the Helsinki District Court found discrimination on the ground of religion, prohibited in the Penal Code, when a clothing shop terminated a work contact of a woman wearing a headscarf in 2014. The Penal Code does not make a distinction between direct and indirect discrimination and prohibits differential treatment because of religion. The Occupational Health and Safety Authorities in **Finland** gave, in a written analysis, their opinion on the interpretation of the Non-Discrimination Act. They concluded that the ban to wear a turban when driving a bus was indirect discrimination on the ground of religion. The case was not taken to court but resulted in the employee and employer unions' agreement on a policy on wearing a turban.

A number of cases from **France** have already been mentioned above, including those which have established a ban on the wearing of religious clothing or symbols in public employment. This case law is not based on the application of anti-discrimination law but on the application of the Constitutional principle of secularity laid down in Article 1 of the Constitution of 1958. In a decision regarding people working for **French** social security – which is a private employer executing the functions of a public service – the Court of Cassation decided that a private employer executing a public service can adopt and enforce in-house regulations in order to implement the principle of secularism contained in Article 1 of the Constitution in relation to its employees, even if they are subject to a private law contract governed by the Labour Code.[316] So, such an employer can impose a policy of neutrality. This right of the employer is applicable to all employees, whether or not they are in contact with members of the public. According to the country fiche, the Court of Cassation held that restrictions on freedom of religion can be justified by the nature of the particular occupational activities concerned and the context in which they are carried out, and can thereby constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate and the in-house regulations are specific and precise. The case concerned here provided an example of a restriction which was sufficiently precise to satisfy the requirements of precision and proportionality of a genuine and determining occupational requirement and thus the prohibition targeting clothing and a general rule of neutrality covering not only religion but also ethnic origin or ideological conviction was held to be justified. Whether the decision of the **French** Court of Cassation in *Bougnaoui v Micropole,* which it now has to make after the judgment of the

315 **Denmark**: Supreme Court, *Føtex*-case 2004, U.2005.1265H.
316 **France**: Court of Cassation, Social Chamber, 19 March 2013, CPAM v. X, No. 12-11690.

CJEU, will change this remains to be seen. The latter case concerned a private employer providing private services while, in the above case, there was a private employer executing the functions of a public service.

In the *Baby Loup* case from **France**, an employee at a privately run day care centre for children was dismissed for wearing an Islamic veil (hijab) when she returned from maternity leave as this was a violation of the centre's internal regulations. The employee challenged this as a violation of the principle of non-discrimination on the ground of religion. The case went through a number of different Courts. In March 2013, the Social Chamber of the Court of Cassation held that the principle of secularity is not applicable to employees of the private sector who are not in the position of managing a public service. It therefore cannot be invoked by a private employer to hinder the protection against discrimination provided by the Labour Code. So the Court of Cassation appears to have distinguished this case from the case of *CPAM v X,* just mentioned, in that here the private employer was not managing a public service. The Council of State gave a legal opinion on the scope of the principle of secularity regarding private as opposed to public employees and clearly determined that the duty of neutrality only applies to public sector employees.[317] The *Baby Loup* case was sent back to the Paris Court of Appeal and was then appealed again to the Court of Cassation. The latter Court did not discuss direct or indirect discrimination or justification under anti-discrimination law but looked at the case as a limitation on the freedom of religion. It invoked the legal regime allowing an employer to justify legitimate restrictions to fundamental rights and freedoms provided by Articles 1121-1 and 1321-3 of the Labour Code, and concluded that the limitation provided by the internal regulation in this case was precise enough and that, in the specific circumstance of this day-care centre and its specific users, it was justified by the task to be accomplished and proportionate to the legitimate objective pursued.[318]

As mentioned above, the Baby Loup case led to legislative proposals, now adopted, adding Article L 1321-2-1 to the Labour Code. Above it was also mentioned that, in **France**, there have been a number of calls for a new interpretation of the boundaries between private and public service and projects to ban religious symbols not on the basis of the employer being a public or private organisation, but on the basis of the service offered to the public, such as kindergartens and (social) services for disabled, elderly and sick persons. If this is accepted it would mean that private organisations providing such services would also be subject to strict neutrality rules which would not allow the wearing of any religious clothing or symbols.

In **Germany**, there is case law[319] on the wearing of religious symbols, mainly the Islamic headscarf. According to the country fiche, the headscarf issue is, at its core, not conceptualised by the Federal Constitutional Court as a matter relating to unequal treatment of religions, but instead as relating to possible limits on the freedom of religion.[320] Article 33.3 of the Constitution states that admission to public employment is independent of religious beliefs. This also prohibits refusing admission to public offices for reasons that are incompatible with the freedom of religion.[321] However, the Federal Constitutional Court has emphasised that any prohibition of religious symbols must respect the strictly interpreted equality of religions. The Court stated as well that the standards of anti-discrimination law are not more exacting than those under the fundamental right of freedom of religion.[322]

317 **France**: Council of State, Study requested by the Defender of Rights, adopted 19 December 2013: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2014/09/conseil_detat_-_etude_voile_et_liberte_religieuse_-_2013.pdf.

318 **France:** Court of Cassation, No. 612 of 25 June 2014 (13-28.369), ECLI:FR:CCASS:2014:AP00612, *Baby Loup v Hafif*. See also: Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016*, pp. 19-20.

319 **Germany**: for example: Mala, Land Labour Court Düsseldorf, 22 March1984, 14 Sa 1905/83); Labour Court Hamburg 3 January 1996, 19 Ca 141/95; Labour Court Dortmund 16 October 2003, 6 Ca 5736/02; Federal Labour Court, 5 AZR 611/12, 24 September 2014 and Labour Court Hamm, Sa 1724/14, 8 May 2015.

320 **Germany**: Federal Constitutional Court, 2 BvR 1436/02, para. 32.

321 **Germany**: Federal Constitutional Court, 2 BvR 1436/02, para. 39.

322 **Germany**: Federal Constitutional Court, 2 BvR 1436/02, para. 43, 71.

In relation to public employment, in previous case law, it had been held to be constitutional to prohibit a teacher in a state school from wearing a headscarf.[323] However, the **German** Federal Constitutional Court has now held, in relation to a law in North Rhine-Westphalia, that a general ban on headscarves for teachers employed in state schools is not compatible with Article 4 (freedom of religion) and Article 3 (equality guarantee) of the Constitution.[324] This was confirmed in a case concerning the wearing of an Islamic headscarf by a kindergarten teacher employed by a public authority, where the Federal Constitutional Court decided that the basic right to freedom of religion entitled the teacher to wear such a headscarf and held that provisions of anti-discrimination law do not provide legal rights of the claimants beyond those derived from the fundamental right to freedom of religion. The Court underlined that such a garment is by now common in Germany and a necessary consequence of a pluralist society.[325] The prohibition on wearing a headscarf for a legal trainee in the public justice system was also held to be illegal.[326] And, the Labour Court of Berlin-Brandenburg recently ruled that a Muslim teaching applicant is entitled to compensation as she was not hired by the Berlin State because of her headscarf. According to the Court, such a disadvantage would only be compatible with the Constitution if the teacher wearing the headscarf 'is a concrete danger for school peace'. The Berlin State did not provide proof that this was the case.[327]

In a similar decision, but now relating to private employment, the Federal Labour Court in **Germany** has held, in a case of a saleswoman who had her employment terminated for wearing an Islamic headscarf, that, without a concrete 'disruption of the working peace', the employer should not forbid the headscarf, unless he can prove that the turnover of the department store suffers.[328] And, the Labour Court of Berlin, in a case mentioned before, affirmed discrimination in the application process of a woman who applied for a position as a dentist's assistant and wanted to wear a headscarf during work but was not allowed to by her future employer.[329]

In **Greece**, there is no case law to indicate whether employers may or may not impose restrictions on the wearing of religious clothing or symbols on their employees. In **Hungary**, one case has led to a wider public debate. In November 2016, the municipal council of Ásotthalom (a village on the Southern border of Hungary with a population of 5,000) adopted Decree 25/2016 (XI.23.) on Amending Decree 12/2014 (IV. 30.) on the Fundamental Rules of Communal Cohabitation (under Article 143 of Act CLXXXIX of 2011 on the Municipal Councils of Hungary, municipal councils are entitled to adopt decrees on the fundamental norms of communal cohabitation and the sanction of behaviour breaching such norms). The mayor of this village is a well-known right-wing extremist. The amendment introduced, into the 2014 decree, a new Article 7/B, banning a number of acts in public premises, including wearing burqas, chadris, niqabs covering the whole body, head and the whole face or a part of it as well as wearing bathing suits covering the whole body, including the so-called burkini. The mayor explained that this part of the ban served the purpose of deterring migrants – most of whom were Muslims.

On 20 December 2016, the Commissioner for Fundamental Rights (the Ombudsman) filed a petition with the **Hungarian** Constitutional Court, asking it to abolish this unconstitutional amendment (the Constitutional Court has the right to declare a legal provision null and void if it contradicts the Constitution) on the basis that the amendment severely restricts fundamental rights (freedoms of religion and expression). According to the Constitution, fundamental rights may only be restricted in an Act of Parliament and not in a municipal decree. The Commissioner for Fundamental Rights also argued that the contents of the regulation would be unconstitutional even if they were adopted in an appropriate form, since they violated the requirement of equal treatment by only banning the external manifestations of one particular religion,

323 **Germany**: Federal Constitutional Court, 2 BvR 1436/02; Federal Administrative Court, 2 C45/03, 24 June 2004.
324 **Germany**: Federal Constitutional Court, 27 January 2015, 1 BvR 471/10, 1 BvR 1181/10.
325 **Germany**: Federal Constitutional Court, 18 October 2016 1 BvR 354/11.
326 **Germany:** Administrative Court Augsburg 30 June 2016, Au 2 K 15.457.
327 **Germany:** Labour Court Berlin-Brandenburg, 9 February 2017, 14 Sa 1038/16.
328 **Germany:** Federal Labour Court, 10 October 2002, 2 AZR472/01.
329 **Germany**: Labour Court Berlin, 28 March 2012, 55 Ca 2426/12.

whereas no similar ban was prescribed for any other religion. The Commissioner also emphasised that the bans on religious manifestations amounted to such a severe limitation of the freedom of religion that they could only be allowed under very extreme circumstances.

On 11 April 2017, the **Hungarian** Constitutional Court declared the amendment null and void with retroactive effect because the amendment was unconstitutional: the municipal council were not authorised to adopt legislation (decrees) that would directly impact or limit the exercise of fundamental rights. Three judges (out of 14) attached a concurring opinion, emphasising –'with a view to the problems stemming from the obvious threats caused by the Islamisation of Europe' – that while they agreed with the decision on a procedural basis, this should not be interpreted as excluding the possibility of restricting the exercise of the Muslim religion in acts of Parliament.[330] The Constitutional Court thus made its decision on a formal, procedural basis and it did not address the issue whether there was a violation of fundamental rights. According to the country fiche, the concurring opinion suggests that fierce debates can be expected within the Constitutional Court if similar restrictions are adopted in the required legislative format.

In **Ireland**, a case about an employee wearing a hijab who was dismissed because she could not comply with the retailer's dress code was settled before proceedings. Another case concerned the wearing of a turban for a reserve police officer, but this case did not succeed because the Employment Equality Acts do not cover volunteers.[331] So neither case dealt with any substantive issues of discrimination. In **Italy**, there is the case of a girl who wore a headscarf and was excluded from a selection of hostesses to be employed during an exhibition to hand out leaflets, which was mentioned before. The company, a selection and recruitment agency acting under instructions from another company, was tasked with the organisation of the exhibition. The requirements mentioned in the job advertisement were the following: knowledge of English language, shoe size 37, good looking, 165 cm height and size 40/42. The girl applied for the job, believing to satisfy the 4 required characteristics and attaching a picture of herself. The recruitment company replied positively but asked if she agreed to take off the headscarf. After she explained that she was wearing the headscarf for religious reasons and thus could not take it off, the company did not select her. The instructions given to the recruitment company also included 'flowing hair', but this was not an essential requirement. The Tribunal of Milan rejected the claim for discrimination on grounds of religion but, on appeal, the Court of Appeal of Milan found that this was a case of direct discrimination on grounds of religion.[332]

In **Latvia**, the media have reported on a case where a woman wearing a full Islamic veil underwent in-serving training at the Riga Maternity House. According to the Board Member of the Maternity House, there was no objection to her dress as many foreign students underwent their in-service training there and she has not been the only one who was wearing such clothes. The Maternity House had one requirement for all staff concerning clothes – they had to be clean. There had been no complaints about students with Islamic veils from patients. As the work is connected with women, if a woman patient requested that the student uncovered her face, she had always complied with the request.[333] Her case, though, has led to amending the Internal Rules of the Order of Studies in Riga Stradins University concerning rights and duties of students, which require that a student has to be identifiable.

In **Lithuania**, **Luxembourg** and **Malta**, there are no cases concerning the wearing of religious clothing or symbols in employment but, in the **Netherlands**, there is an extensive body of case law on the subject. In relation to public employment, civil servants are allowed to wear religious clothing or symbols at work regardless of whether there job includes face-to-face contact with the members of the public. However, where public functions are concerned which are deemed to be connected to the core functions of the state, this is different. In such functions the principle of state neutrality comes into play as employees

330 **Hungary:** Constitutional Court decision No. II/2034/2016, 11 April 2017.
331 **Ireland**: High Court, *An Garda Síochána v Oberoi* [2013] IEHC 267.
332 **Italy**: Court of Appeal of Milan, 20 May 2016, *Mahmoud Sara v Evolution Events Srl*.
333 **Latvia**: Latvia, TVNET (2015). How is It? To Be a Muslim Woman in Latvia? A Story about the Latvian Fatima, 19 August, at http://www.tvnet.lv/zinas/latvija/572307-ka_tas_ir_but_musulmanietei_latvija_latvietes_fatimas_stasts.

figure more prominently as representatives of the state. In this context, more restrictions on expressions of personal identity, including religious ones have been held to be acceptable. For example, the approach in terms of state neutrality is strict for the judiciary and the wearing of religious or other symbols showing personal convictions is prohibited in the courtroom, as it is held to detract from the neutral and impartial appearance of judges when delivering justice.[334]

For the police, the same applies although, around 2000, plans were made to design headscarves to match police uniforms. However, these plans were not put into practice and the current rules for the police are very restrictive for persons who wish to wear religious clothing or symbols at work. The policy for the police is called 'life style neutrality' and prohibits not just religious clothing and symbols but all sorts of expressions of personal conviction, including conspicuous tattoos or haircuts. The policy does not distinguish between personnel working in direct contact with members of the public and those employed in other, for example, administrative functions. The Equal Treatment Commission has been very critical of this policy as it implies a blanket ban which does not meet the objective justification test.[335] Recently there has also been a heated debate in the **Netherlands** after the Amsterdam Chief of Police suggested that Muslim officers should be allowed to wear a headscarf. However, the national Chief of Police made clear that this suggestion will not be taken on board.

The majority of cases concern the wearing of a headscarf by Muslim women and have been dealt with by the **Netherlands** Institute of Human Rights (and its predecessor, the Equal Treatment Commission), the national equality body, under the General Equal Treatment Act. As mentioned, case law shows that private organisations which cannot claim to be ethos based have very little leeway to prohibit their employees to wear religious clothing or symbols. For prohibitions that constitute direct discrimination generally no justifications apply. While for cases where indirect discrimination is at stake, the objective justification test is applied in a strict way. An early example of this approach can be found in a judgment of 1994 which held that a hairdresser could not prohibit one of his employees from wearing a headscarf at work. The Court was asked to declare the employment contract terminated but declined to do so, arguing that the wearing of the headscarf was a manifestation of the wearer's religion and was not expressly prohibited by law or by the employment contract and, that the damage was minimal.[336]

Since then, many judgments and, in particular, opinions of the Equal Treatment Commission and the Netherlands Institute of Human Rights have fleshed out the applicable standards which have also been laid down in guidelines (see below). The employee's freedom to wear a religious symbol such as a headscarf generally takes priority. Many arguments which employers have used to try and justify bans have been rejected in the case law, including the idea that a headscarf is not representative and that it goes against the image of the company or that it frightens off customers.[337] Prohibitions put in place in response to complaints by clients have also been rejected.[338] The already mentioned case regarding McDonalds is a good example of the way cases are dealt with in the **Netherlands**: the McDonalds dress code prohibited personnel from wearing a headscarf with their uniform because it would interfere with the company image. The Court held that the prohibition was not legitimate as it was not necessary to achieve this goal: the company could very well design headscarves matching the uniform.[339]

There are also cases concerning the wearing of face-covering veils in the **Netherlands**, but these cases do not concern employment. Rather, they concern pupils and clients of welfare and other organisations who were refused admittance or were not served because they were wearing a face-covering veil. The

334 **Netherlands**: This prohibition is not based on a specific legislative provision, but on the interpretation of the applicable dress codes formulated for the judiciary.
335 **Netherlands**: Equal Treatment Commission, Advice 2007/08 concerning Outward Appearance of the Police 'Pluriform Uniform?': https://www.mensenrechten.nl/publicaties/detail/9934.
336 **Netherlands**: Lower District Court Alphen aan de Rijn, 22 March 1994, ECLI:NL:KTGAAR:1994:AG0643.
337 **Netherlands**: These and more examples are mentioned on the website of the Netherlands Institute of Human Rights, see File Religion and Work: https://www.mensenrechten.nl/dossier/religie-en-werk.
338 **Netherlands**: Equal Treatment Commission, Judgment 2011-56.
339 **Netherlands**: District Court Arnhem, Judgment 1 September 2004, ECLI:NL:RBARN:2004:AS6299.

Equal Treatment Commission and the Netherlands Institute of Human Rights have acknowledged that requiring pupils or clients to unveil may serve a legitimate aim such as promoting good communications, but they apply strict justification tests and consider all the specific circumstances of the case for assessing the appropriateness and necessity of the policies at stake.[340] The proposed Bill on face-covering clothing in public, mentioned above, would apply to public and private education and health care.

In **Poland**, there is a case which appears linked to the wearing of religious clothing and symbols in employment, but the details are, according to the country fiche, quite sketchy so far.[341] It concerns a woman who was dismissed from a Marshall's office, officially because of the opinions about her employer which she had expressed on the internet. She claimed that the attitude of her bosses changed when she converted to Islam and changed her wardrobe, including wearing a veil. First, she was moved to a job with almost no contact with customers and then she was dismissed. She sued the employer for reinstatement to the job and won the case on 23 July 2014 in the District Court of Kielce. However, in the materials available, the court decision is presented as based on the fact that reinstatement was decided due to lack of justified reasons for disciplinary dismissal and discrimination is not mentioned. And, according to the Public Prosecutor's Office in Kielce, which was informed about the case and which begun the investigation, there was no evidence of discrimination on the grounds of religion and/or harassment.

The country fiche from **Poland** also reports that the Ombud office, although it has not received any relevant complaints about the wearing of religious clothing or symbols, in one case acted ex officio, after an incident reported by the media, by issuing a letter. The incident concerned a client in one of the banks who did not want to be served by an employee who wore religious symbols.[342] The Ombud's letter in reaction also provided information on the legal means of action in similar situations and included the opinion of the Ombud that the 'discreet manifestation of religious feelings does not violate the rights and freedoms of others'.[343] The letter led to some, but not very much, debate and also to some critical reactions. The Think Tank Ordo Iuris gave as its opinion that, although it was necessary to agree with the negative evaluation of the bank customer's behaviour, they had serious doubts about the letter of the Ombud which suggested that only discreet manifestations do not violate the rights and freedoms of others. Ordo Iuris expressed the opinion that the wearing of religious symbols is covered by provisions of the Polish Constitution and of international law and that any restrictions must be of a statutory nature and justified by special circumstances or reasons.[344]

In **Poland**, there was also an issue concerning the policy on dress of LOT (Polish Airlines). In February 2012, LOT announced a change to its rules, which stated that employees were not allowed to wear, in a visible way, jewellery displaying religious symbols. This led to a heated, but very short media debate and then the company announced that it had changed its decision. LOT's spokesperson said that LOT's intention in creating their uniform instructions was the comfort and safety of all passengers. They wanted their staff to dress so as not to upset the people they were carrying, who often were orthodox followers of their religion. But they acknowledged that this policy had dismayed many people and apologised for this.[345]

In **Portugal**, **Romania**, **Slovakia** and **Slovenia** there is no case law regarding the wearing of religious clothing or symbols but in **Spain**, there have been a number of cases. Some of these challenged municipal bans on the wearing of face-covering veils. One of these is the *Lleida* case, challenging an ordinance of

340 **Netherlands**: Equal Treatment Commission, Judgments 2003-40; 2004-95; 2006-159; 2009-36; 2012-34; Netherlands Institute of Human Rights, judgment 2015-30.
341 **Poland**: see for instance: http://www.tvp.info/16157474/urzedniczka-w-kielcach-zwolniona-za-noszenie-muzulmanskiej-chusty.
342 **Poland**: http://www.fzp.net.pl/spoleczenstwo/nie-bedzie-mnie-zydowka-obslugiwac.
343 **Poland**: http://www.fzp.net.pl/spoleczenstwo/rzecznik-praw-obywatelskich-pisze-do-forum-zydow-polskich.
344 **Poland**: http://www.ordoiuris.pl/wolnosc-gospodarcza/analiza-listu-rzecznika-praw-obywatelskich-adama-bodnara-do-forum-zydow.
345 **Poland** see, for example, http://www.rp.pl/artykul/809992-LOT-wycofuje-sie-z-zakazu-eksponowania-symboli-religijnych.html#ap-1.

the City Council of Lleida (Catalonia). The ban was challenged by the Watari Immigrants Association for Freedom and Justice. The High Court of Catalonia[346] found for the City Council, but on appeal, the Supreme Court cancelled the ordinance.[347] The fundamental argument of the judgment was that the use of the veil by some women is part of their religious freedom. Religious freedom is a fundamental right recognised in the Spanish Constitution (Article 16) that can only be further regulated by a law passed in Parliament. Therefore, the judgment declared the City Council Ordinance void because Lleida City Council did not have the power to limit freedom of religion. The Supreme Court also answered another relevant question: whether the burqa should be banned on the grounds that women wearing it are victims of coercion. According to the Supreme Court, the risk of perverse effects that may arise from a ban of this type are commonly emphasised in doctrinal studies: it would lead to the confinement of women within their immediate family group and, instead of serving the elimination of discrimination, this could contribute to increasing it if public spaces were closed to these women. The Supreme Court ruling did not however preclude the possibility that the legislator could consider a regulation on face-covering clothing appropriate. This means that it is possible to ban the wearing of the burqa and niqab in **Spain**, but it must be done through a law, as it affects the exercise of a fundamental right. There was some talk about doing this but no bills were presented to Parliament. The case led to debates in which some politicians and legal experts argued that face-covering veils are a sign of the oppression of women.

In **Spain**, there have also been several cases of limitations imposed on the use of the hijab in schools and other public spaces.[348] In non-university educational institutions, the School Board approves the school's regulations, which can include rules forbidding the wearing of any headdress either in the classroom or in the school's facilities at large. Recently, there has been case law on the wearing of religious clothing in employment. As was mentioned, the Social Court 1 of Palma de Mallorca held that a private company (ACCIONA Airport Services) must accept that a Muslim woman can wear the hijab in positions where she deals with the public. The claimant, a Muslim woman, had worked for ACCIONA since 2007. In 2015, she told the company that she wanted to start wearing a hijab to work for religious reasons. Initially, she was authorised to do so, but the company later changed its position. She was sanctioned repeatedly for wearing the hijab and brought an action against the company. The company argued that to uphold the corporate image, all employees in the passenger service department had to comply with a written dress code, which did not allow the wearing of anything not mentioned in the code. The claimant argued that she was discriminated against since other workers could exhibit necklaces with Christian religious symbols. The Social Court 1 of Palma de Mallorca held that there was direct discrimination on the grounds of religion or belief.[349] According to the country fiche, the ruling recognises that the company has the right to impose on its employees the use of a uniform, but that there are no unlimited rights and that this right ceases if it collides with a fundamental right, such as religious freedom. That is why the Court found in favour of the claimant and considered that ACCIONA Airport Services had discriminated against her for religious reasons and had violated her fundamental rights by prohibiting her from wearing the hijab. The Court considered the wearing of the hijab a manifestation of the religious belief of the worker which is not comparable to the use of mere adornments. Another argument was that it was not stated (nor was it claimed by the company) that the conduct of the worker has caused some type of damage or impairment to the image of the company.

In **Sweden**, there is no case law on religious clothing or symbols from the Labour Court in relation to the Discrimination Act. There has been a case where a woman who wanted to follow an educational training

346 **Spain**: High Court Catalonia, Judgment 489/2011, 7 June 2011.

347 **Spain**: Supreme Court, Judgment 4118/2011, 14 February 2013. A similar ordinance in the City of Reus was suspended by the High Court of Catalonia, which applied the reasoning of the Supreme Court in the *Lleida* case, see: High Court Catalonia, Judgment ATSJ CAT 1/2015, 29 January 2015.

348 **Spain**: Fátima Elidrisi (2002): school girl who went to another school where she could wear the hijab; Shaima Saidani (2007) school girl who could wear the hijab to school after regional Government decided she could so; Zoubida Barik (2009): Muslim lawyer, expelled from the courtroom for wearing the hijab; General Council of the Judiciary upheld the decision; case was declared inadmissible by ECtHR because of non-exhaustion of domestic remedies; Najwa Malha case: school girl wearing hijab was expelled; decision upheld by Court.

349 **Spain**: Social Court 1 of Palma de Mallorca, 5 February 2017 (case 0031/2017).

programme for pre-school teachers was prohibited from doing so because she was wearing a niqab. The school then found alternative solutions which made it possible for her to attend. This case was widely discussed in the media and the discussion made it clear that schools following the old guidelines on niqab and burqas risked violating the Discrimination Act, at least according to the Equality Ombudsman.[350] The case led to guidelines from the School Inspectorate which emphasise that such obstacles can in most cases be overcome by other means than to ask the pupil to remove her burqa or niqab and that it is only in the few cases that such solutions are impossible that a prohibition is allowed. Headscarves have also been extensively debated in schools. The right of a pupil to wear a headscarf or a burqa is always protected in Sweden as it is regarded as a normal statement of the pupil's personality. Religious clothing can thus only be forbidden in situations where it really creates a problem. The country fiche suggests that the Equality Ombudsman will try and find a practical solution in employment situations as well.

In the **UK**, there is case law on the wearing of religious symbols in employment, under the Equality Act 2010 and the previous anti-discrimination legislation. Rules restricting the wearing of religious clothing or symbols are treated as potentially indirect discrimination and thus they will have to be objectively justified by a legitimate aim and the means of achieving that aim will need to be appropriate and necessary. If an employer seeks to justify on the basis of hypothetical claims (for example, that customers may object) this is not likely to be sufficient, as the employer will need to show that the requirement is necessary and proportionate. This is clear from the case of *Noah v Sarah Desrosiers (trading as Wedge)*.[351] The main case is the already mentioned *Azmi v Kirklees Metropolitan Borough Council*.[352] In this case, a teaching assistant, who was employed to work with children whose first language was not English, was prohibited from wearing a face-covering veil when she was teaching her pupils, but was allowed to wear it around the school at other times. The Employment Appeal Tribunal held that there was no direct discrimination, as someone who covered her face for other than religious reasons would also have been asked not to wear this while teaching the pupils. The Tribunal held that there was indirect discrimination but that it was justified, as it was proportionate given the need to uphold the interests of the children in having the best possible education. The fact that the school had undertaken a close investigation to see if the quality of teaching was reduced when she wore the face-covering veil (the headmaster had observed Ms Azmi's teaching while wearing the face-covering veil on two occasions); and, the fact that the school had considered whether it was possible to rearrange her timetable to enable her to assist only in classes with a female teacher, were relevant to the finding that the ban on the veil was justified. Another case where the indirect discrimination was held to be justified, this time for the maintenance of prison security and the safety of staff, visitors and prisoners, was the above mentioned case of *Dhinsa v SERCO*, where a Sikh man who was a trainee prison officer was not allowed to wear his ritual dagger at work.[353]

Despite the fact that in most Member States there is no legislation prohibiting the wearing of religious clothing and symbols in public or private employment, debates are taking place in many Member States regarding this and there is case law in just over half (15 Member States) of the **28 Member States** as well. Nearly all these cases concern Islamic headscarves or face-covering veils, with a few cases concerning Sikh turbans and one case about the Sikh ceremonial dagger. The fact that the case law overwhelmingly concerns Islamic headscarves and face-covering veils, suggests that the Muslim religion and its clothing and symbols are particularly problematic in many EU Member States. It might also be surprising that, in light of the fact that the case law nearly always concerns Muslim women, gender discrimination has not played a more prominent role in these cases.

In conclusion, there have been cases in 15 of the Member States, although not all have made it to court. Those that have made it to court show that the decision often rests on the question whether a ban on religious clothing or symbols in (public and private) employment is justified by a legitimate aim and by the use of proportionate means to achieve that aim. **France** can be seen as an exception: bans in public

350 **Sweden**: Equality Ombudsman, case 2009/103, 30 November 2010.
351 **UK**: *Noah* v *Sarah Desrosiers (trading as Wedge)*. ET 2201867/2007.
352 **UK**: *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154.
353 **UK**: *Dhinsa v Serco* [2011] ET 1315002/2009 (18 May 2011) (unreported).

employment (and in private organisations performing public junctions) are justified by the constitutional principle of secularity, while the Labour Code provides that, in private employment, a ban must be justified. The justification test is applied more strictly by courts in some Member States than in others and some Member States will also aim to find a practical solution. It is too early to establish whether the case law in the Member States will change after the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole*. The decisions of the national courts in Belgium and France, which referred the cases to the CJEU, might well lead to changes in those two countries, but the judgment of the CJEU could have wider influence in other Member States as well. As was mentioned in the previous chapter, the judgments have led to some uncertainty and disquiet in some Member States.

6.4 Most important Guidance + Codes of practice on the use of religious clothing and symbols in employment

There are no collective agreements or relevant guidance or codes of practice on the wearing of religious clothing and symbols in employment in **Austria**. In **Belgium**, there is a Special Study drafted in November 2009 by UNIA (the Centre for Equality and Opposition to Racism) on 'Display of Symbols Expressing a Belief. State of Play and Way Forward'.[354] This study is an informative document containing recommendations, based on legal analysis, and aimed at informing the citizens on their rights and obligations and at helping the political bodies to tackle the issue in an objective way. No collective agreements, relevant guidance or codes of practice on the wearing of religious clothing and symbols in employment exist in **Bulgaria**, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, or **Estonia**, while in **Finland**, in the previously mentioned case about bus drivers being allowed to wear turbans, the Transport Workers' Union AKT and the Employers' Federation of Road Transport agreed on the interpretation of the relevant collective agreement to allow the use of turbans as part of work uniform.

In **France** there are no collective agreements, guidance or codes of practice and the same is true for **Germany**. In fact, after the CJEU judgments in *Achbita v* G4S and *Bougnaoui v Micropole,* the Federal Union of **German** Employers' Associations (BDA) has stated once again in the press that there will be no Code of Practice for the BDA members regarding this matter. In **Greece** and **Hungary**, there are also no collective agreements, guidance or codes of practice, but in **Ireland**, the Code of Practice on Sexual Harassment and Harassment at Work states that harassment as defined in Section 14A(7) of the Employment Equality Act 1998-2015 may include: 'Pressure to behave in a manner that the employee thinks is inappropriate, for example being required to dress in a manner unsuited to a person's ethnic or religious background'.[355] This suggests that not being allowed to wear religious clothing or symbols at work could be harassment. **Italy**, **Latvia**, **Lithuania**, **Luxembourg** and **Malta** do not have collective agreements, guidance or codes of practice in place.

In the **Netherlands**, there is guidance from the Equal Treatment Commission which has brought out a number of advisory opinions.[356] The Government has also brought out guidance on dress codes in schools, which is based on the case law of the Equal Treatment Commission.[357] In **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain** and **Sweden**, there are no collective agreements, guidance or codes of practice. The country fiche from **Romania** does suggest that, should the issue arise, it is likely that an attempt to ensure accommodation of religious requirements would prevail. This would be possible

354 **Belgium:** UNIA (the Centre for Equality and Opposition to Racism) on 'Display of Symbols Expressing a Belief. State of Play and Way Forward' [Les Signes d'Appartenance Convictionnelle. Etat des Lieux et Pistes de Travail] November 2009: http://signes.diversite.be/note-signes-convictionels.pdf.

355 **Ireland**: S.I. No. 208/2012 – Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012: http://www.irishstatutebook.ie/eli/2012/si/208/made/en/print.

356 **Netherlands**: Equal Treatment Commission, Advisory Opinion 2004/06 concerning Employment, Religion and Equal Treatment; Equal Treatment Commission, Advisory Opinion 2008/03 concerning Equal Treatment in Education: 'Towards a Discrimination-free School'; Equal Treatment Commission, Advisory Opinion 2007/08 concerning Outward Appearance of the Police 'Pluriform Uniform?'; all available from: http://www.mensenrechten.nl/publicaties/zoek.

357 **Netherlands**: Guideline on Dress Codes in Schools: https://www.rijksoverheid.nl/onderwerpen/vrijheid-van-onderwijs/inhoud/openbaar-en-bijzonder-onderwijs.

because secularism or neutrality are not perceived as part of the state's policies and more extreme believers from the Orthodox majority would also be affected by such bans. Moreover, previous experience with accommodation of Islamic religious holidays and burial regulations has been positive. In the **UK**, the Equality and Human Rights Commission has brought out guidance on dress codes and religious symbols.[358] The country fiche from the **UK** also reports that alternative solutions have involved adapting uniforms to accommodate religious expression, such as turbans or hijabs in corporate colours to conform to the corporate image. Many public employers allow adaptations to their uniforms, including the police and judiciary.

Therefore, only a few Member States do have guidance on the wearing of religious clothing and symbols in employment. Whether this guidance will change after the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole* remains to be seen. Table 5 summarises the information in this chapter.

Table 5: Relevant national law, case law and guidance

Member State	Legislation prohibiting the wearing or religious clothing and symbols in private employment	Case law	Guidance, collective agreements, Codes of Practice
Austria	No specific law but prohibition of face-covering easy once Act comes into force	Yes, niqab ban held to be justified; hijab ban held not to be justified	No
Belgium	No, but restrictions are accepted as long as it is based on a general neutrality policy	Yes, hijab, niqab and burqa	Yes, UNIA
Bulgaria	Yes, face-covering	No	No
Croatia	No	No	No
Cyprus	No, although this may be practiced informally	No	No
Czech Republic	No	No	No
Denmark	No	Yes, one case, hijab ban justified	No
Estonia	No	No	No
Finland	No	Yes, two cases: hijab (discrimination under Penal Code) and turban (collective agreement)	No, but collective agreement (transport)
France	Yes, if justified Also: allowed if private company is performing public function	Yes, hijab, niqab and burqa bans: public (state) employment: justified by constitutional principle of secularity Private employment: Labour Code: allowed if justified	No
Germany	No	Yes, hijab: only if concrete danger to school or work peace, otherwise not justified Blanket bans not justified	No

358 **UK**: Equality and Human Rights Commission, *Religion or Belief: Dress Codes and Religious Symbols*: https://www.equalityhumanrights.com/en/advice-and-guidance/religion-or-belief-dress-codes-and-religious-symbols.

Member State	Legislation prohibiting the wearing or religious clothing and symbols in private employment	Case law	Guidance, collective agreements, Codes of Practice
Greece	No	No	No
Hungary	No	Yes, burqa/niqab: cannot be banned by municipal decree (but can be done by legislation)	No
Ireland	No	Yes, hijab, turban, no decision on substance	Some
Italy	No	Yes, hijab ban private employment not allowed	No
Latvia	No	Yes, niqab allowed, no court case	No
Lithuania	No	No	No
Luxembourg	No	No	No
Malta	No	No	No
Netherlands	Draft bill on face-covering covers employees in education and health	Yes, hijab, niqab and burqa bans allowed in very specific circumstances otherwise strict justification test Hijab bans; very strict justification test applied	Yes, Equal Treatment Commission (now Netherlands Institute of Human Rights)
Poland	No	Yes, hijab: discreet religious symbols cannot be banned	No
Portugal	No	No	No
Romania	No	No	No
Slovakia	No	No	No
Slovenia	No	No	No
Spain	No	Yes, niqab: bans can only be imposed by legislation Hijab ban not justified in private employment	No
Sweden	No	Yes, niqab: search for practical solutions Hijab pupils cannot be banned	No
UK	No	Yes, hijab, niqab, kirpan: bans need to fulfil strict justification test	Yes, Equality and Human Rights Commission

Summary

Summarising the relevant national law, case law and guidance/codes of practice:

- All **28 Member States** have transposed the Employment Equality Directive;
- Not many Member States have legislation on the wearing of some or all religious clothing and symbols in public employment;
- Even less Member States have legislation on the wearing of some or all religious clothing and symbols in private employment;
- The existing legislation mainly covers face-covering clothing and bans are formulated in neutral terms;
- There is case law in 15 Member States;
- The case law almost exclusively concerns clothing or symbols of the Islamic religion;
- There is guidance in only a few Member States.

7 Conclusion

This report has analysed a number of issues related to the wearing, by individual employees, of religious clothing and symbols in employment, with a focus on the provisions of the EU Employment Equality Directive against discrimination on the ground of religion or belief. National law on the rights to freedom of religion or belief and to be free from discrimination and on the protection against religion or belief discrimination in the **28 EU Member States** has been examined as well as the case law on the wearing of religious clothing and symbols. The report has not covered any other states than the **28 EU Member States**. The examination has included an overview of the case law of the ECtHR under Article 9 ECHR, which guarantees the freedom of religion and under Article 14 and Protocol 12 ECHR, which prohibit discrimination. These articles correspond to Articles 10 and 21 EUCFR and, according to Article 52(3) EUCFR, where the rights in the Charter correspond to the rights in the ECHR, the meaning and scope of the Charter rights shall be the same as those laid down by the ECHR. Therefore, the ECHR and the case law of the ECtHR are important for the interpretation of the EUCFR and of the Employment Equality Directive.

The report shows that some Member States have legislation in place against the wearing of (some forms) of religious clothing, although specific legal prohibitions in relation to all public employment are scarce and these are even more scarce in relation to private employment. **Austria, Belgium, Bulgaria and France** have laws against the wearing of face-covering clothing in public places and this includes public employment. In **France**, public employees are not allowed to wear any other religious clothing or symbols either. In **Germany**, there are some regional bans on face-covering and/or other religious clothing and symbols. In **Austria,** now the law against face-covering clothing in public spaces has come into force, there are no barriers, according to the country report, to bans on face-covering clothing in private employment. In **Bulgaria**, the ban on face-covering clothing includes private employment. In **France**, bans on the wearing of all religious clothing and symbols in private employment are allowed when the private company is perfomring a public function. Apart from these countries, there are legislative proposals prohibiting face-covering clothing in **Latvia, Luxembourg** and the **Netherlands,** but only the proposal in the **Netherlands** includes some areas of private employment (in education and health institutions) (see table 5) In many other Member States, although there is no legislation, debates have taken or are taking place about the wearing of religious clothing or symbols in different areas, including employment, although the issue has not arisen in some Member States (table 1).

Article 9 ECHR and the case law of the ECtHR on this article has been examined as this can play a role in the interpretation of the EUCFR and the Employment Equality Directive by the CJEU. The right to freely manifest one's religion or belief under Article 9 ECHR can be restricted but the restriction must fulfil the three part justification test of Article 9(2): it must be prescribed by law; be necessary in a democratic society by fulfilling a pressing social need; have a legitimate aim; and, the means used to achieve that aim must be proportionate and necessary. The legitimate aims are mentioned in Article 9(2): public safety; public order; health; and, the rights and freedom of others. The proportionality test, which is part of the justification test, means that a balancing of all interests involved needs to take place. According to ECtHR case law, States enjoy a certain margin of appreciation to decide what is necessary in a democratic society and, under Article 9(2) ECHR, this margin is wide because there is, as yet, no common consensus among the Member States of the Council of Europe about the place of religion in society. In relation to the wearing of religious clothing and symbols, the ECtHR has generally held that bans are justified under Article 9(2) ECHR. Recent ECtHR case law has clarified the legitimate aim of 'the protection of the rights and freedoms of others'. Under this aim, the ECtHR has accepted state neutrality and the preservation of the conditions of 'living together', but it has rejected gender equality and human dignity. And, according to ECtHR case law, public safety can only be accepted as a legitimate aim if there is concrete evidence of a threat.

The Employment Equality Directive protects against direct discrimination, indirect discrimination, harassment, instruction to discriminate and victimisation. Direct and indirect discrimination are the most

important for the subject of this report and have thus been discussed in detail. Direct religion or belief discrimination occurs where a person is treated less favourably than another is, has been or would be treated because of religion or belief. Direct discrimination cannot be justified except in two situations described in the Directive: positive action and genuine and determining occupational requirements. Only the latter has been analysed, as the former is not relevant for the subject of this report. Indirect religion or belief discrimination takes place where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless this is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. For both direct and indirect discrimination, a comparison needs to be made and it is important to choose a comparator with care because the choice of comparator can determine the outcome of a case.

Indirect discrimination is not unlawful if it is objectively justified and the test for this is similar to the tests applied to justification under Articles 9 and 14 ECHR, Protocol 12 ECHR and Articles 10 and 21 EUCFR: to be objectively justified, the criterion, provision or practice which is applied must have a legitimate aim and the means used to achieve that aim must be proportionate and necessary. It is not always easy to distinguish between direct and indirect discrimination and prohibitions on the wearing of religious clothing and symbols have been held to be either, often depending on the circumstances of the case but also on the court deciding the case. There were, for example, different opinions as to whether the discrimination in *Achbita v G4S* and *Bougnaoui v Micropole* was direct or indirect discrimination. If a ban is imposed covering the religious clothing or symbols of one religion only, it is likely to be direct discrimination. However, as mentioned in the report, many bans are formulated in neutral language, for example, prohibiting the covering of the face in public or in certain places but, in reality, they are, as the country fiches make clear, adopted to ban burqas and niqabs (and often referred to colloquially as 'burqa bans'), which are only worn by Muslim women.

Article 4(1) of the Employment Equality Directive contains an exception for genuine and determining occupational requirements which applies to all grounds of discrimination covered by the Directive. There is no discrimination if there is a genuine and determining occupational requirement to be of a certain religion or belief provided that: it is *genuine* and *determining*; it is a requirement of the job; it is due to the nature of the job or the context in which this is carried out; and, the application of the requirement is a proportionate means to achieve a legitimate aim. So, here again, there is a justification test similar to the tests for indirect discrimination and for restrictions on fundamental rights under the EUCFR and the ECHR. However, Article 4(2) of the Directive contains another exception which applies to organisations with a religious ethos and which has two parts: such an organisation can apply a genuine, legitimate and justified occupational requirement, where this is required by the nature or the context of the job and as long as this does not justify discrimination on another ground; and, an organisation with a religious ethos can require employees to act in good faith and with loyalty to the organisation's ethos. Not all Member States have implemented the exceptions in Article 4(2): **Finland**, **France**, **Portugal**, **Romania** and **Sweden** have not done so, although, in **Portugal,** the exception can be derived from the combination of several legal provisions. And, in **Romania**, the provisions on determining occupational requirements can be interpreted to allow ethos or religion-based exceptions.[359] In some Member States, the exception might have been transposed in such a way that it allows for wider exceptions than the Directive does. In most Member States, secularism or neutrality cannot be seen as an ethos under Article 4(2) of the Directive (see table 3). The interpretation of Article 4(2) is thus in need of clarification by the CJEU. In the Opinions of the Advocates General and in the judgments in *Achbita v G4S* and *Bougnaoui v Micropole,* only Article 4(1) was addressed.

The report contains an analysis of the first two judgments on the subject of discrimination on the grounds of religion or belief under the Employment Equality Directive which were handed down by the Grand

359 See: Chopin and Germaine, *A Comparative Analysis of Non-discrimination Law in Europe 2016*, p. 17 and the country fiches. See also further below.

Chamber of the CJEU on 14 March 2017. Both cases, *Achbita v G4S* and *Bougnaoui v Micropole,* concerned women who were prohibited from wearing an Islamic headscarf at work and were dismissed when they refused to take off their headscarf. The judgments are very important for the subject of the report and have, therefore, been scrutinised closely. The Opinions of the two Advocates General (Advocate General Kokott in *Achbita v G4S* and Advocate General Sharpston in *Bougnaoui v Micropole*), which were very different and contradictory on some issues, were also examined.

In *Achbita v G4S,* both the CJEU and the Advocate General found that there was no direct discrimination (which was what the referred question of the national Court had asked). But, the CJEU gave guidance on indirect discrimination in case the national court would conclude that there was indirect discrimination. It held, just as both Advocates General had done, that a neutrality policy for a work place is a legitimate aim because it is related to Article 16 EUCFR which refers to the freedom to conduct a business. The CJEU then held that the ban on visible political, philosophical or religious symbols, imposed by G4S, was appropriate as long as: it was genuinely pursued in a consistent and systematic manner; it did not make a distinction between different religions or different (religious, philosophical or political) beliefs; the rule was limited to customer-facing employees; and, the employer had considered whether the employee could be moved to a job without contact with customers.

In *Bougnaoui v Micropole,* the CJEU held that the wish of customers not to be served by someone with an Islamic headscarf was not a genuine and determining occupational requirement under Article 4(1) of the Employment Equality Directive. The judgments have been subject to a number of criticisms, some of which were explored in the report.

In the view of the author, the judgments in *Achbita v G4S* and *Bougnaoui v Micropole* do not give employers the right to ban Islamic headscarves or symbols of one particular religion only and nor do they give employers the right to dismiss employees who wear hijabs. They make clear that bans should cover all religious, philosophical and political symbols. The judgments also make it difficult for an employer to justify restrictions on clothing for those employees who do not come into contact with customers. Very tentatively, the *Achbita v G4S* judgment could be interpreted as suggesting that some form of accommodation needs to be made because the employer must consider whether the employee can be moved to a job without contact with customers. However, both judgments have given rise to confusion and concern about their meaning in some Member States. The cases were also, erroneously, reported in some Member States as allowing bans on headscarves at work and were welcomed by many right wing parties for this.

The overview of national case law demonstrated that bans on the wearing of religious clothing and symbols have been challenged in the courts in a number of Member States. The case law almost exclusively concerns clothing or symbols of the Islamic religion, although the bans that are in place are all formulated in neutral language and ban all religious clothing or symbols. The fact that the case law overwhelmingly concerns Islamic headscarves and face-covering veils, suggests that the Muslim religion and its clothing and symbols are particularly problematic in many EU Member States. The case law also shows that justification often plays an important role in the cases. Justifications of bans on the wearing of face covering religious clothing and symbols in employment include that such clothing is an obstacle to communication in society and the concept of living together; and, that it hinders communication with clients. Other justifications for bans on the wearing of face-covering or other religious clothing or symbol at work brought forward in national case law, with varying success, is that this interferes with the corporate image of neutrality; that it frightens off customers; that it can endanger public safety and security; that it can lead to chaos and disruptions of the peace; and, that it goes against gender equality. However, it is clear from the national case law that the justification test is applied more strictly by courts in some Member States than in others and, in some Member States, equality bodies will also aim to find a practical solution and avoid cases going to court.

In many Member States, a difference is made between religious clothing and symbols which cover the face, like the niqab and the burqa, and those which do not do so, like the hijab. Generally, restrictions on face-covering clothing are more easily justified, especially in situations, including employment situations, where communication plays an important role. Four of the Member States, **Austria**, **Belgium**, **Bulgaria** and **France**, have national laws against covering the face in public spaces, while there are proposals or draft bills against this in **Latvia**, **Luxembourg** and the **Netherlands**, and discussions relating to a legislative ban of face-covering clothing in **Denmark**. The main argument for the bill in the **Netherlands**, for example, is that face-covering clothing seriously affects open and mutual communication and the proposal intends to prevent this by providing a clear, uniform standard applicable to the relevant sectors (education, public transport, public buildings and healthcare).

Advocate General Sharpston, in *Bougnaoui v Micropole,* made a clear distinction between religious clothing that covers the face and/or eyes entirely and religious clothing that does not do so. A rule prohibiting face-covering clothing would be proportionate for an employee who performs a job that involves face-to-face contact with customers, but it would not be proportionate when there is no such contact, according to Advocate General Sharpston. The reason she gave for this is that 'Western society regards visual or eye contact as being of fundamental importance in any relationship involving face-to-face communication between representatives of a business and its customers'.[360] This appears to be the view of the ECtHR as well, as that court accepted that the minimum requirements of 'living together' fell under the legitimate aim of 'the protection of the rights and freedoms of others' in Article 9(2) ECHR in *S.A.S. v France, Belcacemi and Ossar v Belgium and Dakir v Beligium.*[361] Although Advocate General Sharpston mentions this in relation to a business situation, while the ECtHR is talking about communication in society in general, this distinction between face-covering clothing and clothing that does not do so thus appears to be made across Europe. The case law from the ECtHR and the quote from Advocate General Sharpston suggest that even bans on face-covering clothing are subject to a justification and proportionality test and this appears to be applied in some Member States as well, as is clear from the case law discussed.

Unfortunately, as mentioned above, the CJEU judgments in *Achbita v G4S* and *Bougnaoui v Micropole* have led to some uncertainty and disquiet in some Member States and, in the view of the author, they appear unlikely to result in a more uniform approach to the wearing of religious clothing and symbols in employment in the **28 Member States.**

360 Advocate General Sharpston in *Bougnaoui v Micropole,* para. 130.

361 *S.A.S. v France*, paras 153 and 157; *Dakir v Belgium,* paras 49-51 and 60; *Belcacemi and Oussar v Belgium*, paras 48-49 and 61. The latter two cases both refer to *S.A.S. v France*.

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DS-06-17-260-3A-N

Publications Office

ISBN 978-92-79-75352-7 doi:10.2838/380042