ECLI:EU:C:2021:594

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

15 July 2021 (*)

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Equal treatment in employment and occupation – Prohibition of discrimination on the grounds of religion or belief – Internal rule of a private undertaking prohibiting the wearing of any visible political, philosophical or religious sign or the wearing of conspicuous, large-sized political, philosophical or religious signs in the workplace – Direct or indirect discrimination – Proportionality – Balancing the freedom of religion and other fundamental rights – Legitimacy of the policy of neutrality adopted by the employer – Need to establish economic loss suffered by the employer)

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

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) (C-804/18) and the Bundesarbeitsgericht (Federal Labour Court, Germany) (C-341/19), made by decisions of 21 November 2018 and of 30 January 2019, received at the Court on 20 December 2018 and 30 April 2019 respectively, in the proceedings

IX

v

WABE eV (C-804/18),

and

MH Müller Handels GmbH

v

MJ (C-341/19),

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Prechal, M. Vilaras, E. Regan, L. Bay Larsen, N. Piçarra and A. Kumin, Presidents of Chambers, T. von Danwitz, C. Toader, M. Safjan, F. Biltgen (Rapporteur), P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: A. Rantos,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 24 November 2020,

after considering the observations submitted on behalf of:

– IX, by K. Bertelsmann, Rechtsanwalt,

– WABE eV, by C. Hoppe, Rechtsanwalt,

– MH Müller Handels GmbH, by F. Werner, Rechtsanwalt,

– MJ, by G. Sendelbeck, Rechtsanwalt,

– the Greek Government, by E.M. Mamouna and K. Boskovits, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Swedish Government, by H. Eklinder, C. Meyer-Seitz, H. Shev, J. Lundberg and A. Falk, acting as Agents,

– the European Commission, by B.-R. Killmann and M. Van Hoof and by C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 February 2021,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 2(1) and (2)(a) and (b), Article 4(1) and Article 8(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) and Articles 10 and 16 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The request for a preliminary ruling in Case C-804/18 has been made in proceedings between IX and her employer, WABE eV (‘WABE’), an association registered in Germany operating a large number of child day care centres, concerning the suspension of IX from her duties following her refusal to comply with a rule imposed by WABE on its employees prohibiting them from wearing any visible political, philosophical or religious sign at the workplace when they are in contact with the children or their parents.

3 The request for a preliminary ruling in Case C-341/19 has been made in proceedings between MH Müller Handels GmbH ('MH'), a company operating a chain of drugstores in Germany, and its employee, MJ, concerning the legality of the instruction given to her by MH to refrain from wearing, in the workplace, conspicuous, large-sized political, philosophical or religious signs.

Legal context

Directive 2000/78

4 Recitals 1, 4, 11 and 12 of Directive 2000/78 state as follows:

'(1) In accordance with Article 6 [TEU], the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms[, signed in Rome on 4 November 1950] and as they result from the constitutional traditions common to the Member States, as general principles of [EU] law.

…

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

…

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the [TFEU], in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the [European Union] …'

5 Article 1 of that directive provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

6 Article 2 of the directive provides:

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

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

7 Article 3(1) of Directive 2000/78 states as follows:

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

…

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

…'

8 Article 8(1) of Directive 2000/78 provides:

'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.'

German law

The GG

9 Under Paragraph 4(1) and (2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1, 'the GG'):

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

(2) The undisturbed practice of religion shall be guaranteed.'

10 Paragraph 6(2) of the GG provides:

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

11 Paragraph 7(1) to (3) of the GG are worded as follows:

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

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

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

12 Paragraph 12 of the GG provides:

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

…’

The AGG

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

14 Paragraph 1 of the AGG, which sets out the objective of that law, states:

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

15 Paragraph 2(1) of the AGG provides:

‘For the purposes of this Act, any discrimination within the meaning of Paragraph 1 shall be inadmissible in relation to:

1. conditions for access to dependent employment and self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion;

2. employment conditions and working conditions, including pay and reasons for dismissal, in particular in contracts between individuals, collective bargaining agreements and measures to implement and terminate an employment relationship, as well as for promotion;

…’

16 Paragraph 3(1) and (2) of the AGG provides:

‘1. Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under Paragraph 1. Direct discrimination on grounds of gender shall also be taken to occur in relation to points 1 to 4 of Paragraph 2(1) in the event of the less favourable treatment of a woman on account of pregnancy or maternity.

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

17 Paragraph 7(1) to (3) of the AGG provides:

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

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

3. Discrimination within the meaning of subparagraph (1) by an employer or employee shall be deemed a violation of their contractual obligations.’

18 Paragraph 8(1) of the AGG states:

‘A difference in treatment on any of the grounds referred to under Paragraph 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

19 Paragraph 15 of the AGG provides:

‘1. In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.

2. Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.

3. The employer shall only be under the obligation to pay compensation where collective bargaining agreements have been entered into when he or she acted with intent or with gross negligence.’

The Civil Code

20 Under Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code), ‘any legal act contrary to a statutory prohibition shall be void unless otherwise provided by law’.

The GewO

21 Paragraph 106 of the Gewerbeordnung (Code governing the exercise of artisanal, commercial and industrial professions, hereinafter 'the GewO') provides:

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

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-804/18

22 WABE runs a large number of child day care centres in Germany, in which more than 600 employees work and which care for approximately 3 500 children. It is non-partisan and non-denominational.

23 It appears from the request for a preliminary ruling in this case that, in its daily work, WABE follows and wholly endorses the recommendations of the City of Hamburg (Germany) for the education of children in day care facilities, published in March 2012 by the Office for Employment, Social Affairs, Family and Integration of the City of Hamburg. Those recommendations state, inter alia, that 'All child day care facilities have the task of addressing and explaining fundamental ethical questions as well as religious and other beliefs as part of the living environment. Child day care centres therefore provide space for children to consider the essential questions of joy and sorrow, health and sickness, justice and injustice, guilt and failure, peace and conflict and the question of God. They support the children in expressing feelings and beliefs on these questions. The possibility of looking at these questions in a curious and inquisitive manner leads to consideration of the substance and traditions of the religious and cultural orientations represented in the group of children. This develops appreciation and respect for other religions, cultures and beliefs. This consideration increases the child's self-understanding and experience of a functioning society. The children also experience and actively contribute to religiously rooted festivals in the course of the year. By encountering other religions, children experience different forms of reflection, faith and spirituality.'

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

25 In March 2018, WABE adopted the 'Instructions on observing the requirement of neutrality' with a view to applying them in its establishments. IX learned of those instructions on 31 May 2018. Those instructions state, inter alia, that WABE is 'non-denominational and expressly welcomes religious and cultural diversity. In order to guarantee the children's individual and free development with regard to religion, belief and politics, … employees are required to observe strictly the requirement of neutrality that applies in respect of parents, children and third parties. WABE pursues a policy of political, philosophical and religious neutrality in respect thereof'. With the exception of teaching staff, the obligations imposed in order to comply with the principle of neutrality do not apply to WABE employees working at the registered office of the undertaking since they have no contact with either the children or the parents. In that connection, the following

regulations ‘serve as principles for specifically observing the requirement of neutrality in the workplace.

– Employees shall not make any political, philosophical or religious statements to parents, children and third parties in the workplace.

– Employees shall not wear any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace.

– Employees shall not give expression to any related customs to parents, children and third parties in the workplace’.

26 The ‘information sheet on the requirement of neutrality’ issued by WABE answers the question whether the Christian cross, Islamic headscarf or Jewish kippah may be worn as follows:

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

27 On 1 June 2018, IX came to her workplace wearing an Islamic headscarf. After she refused to remove that headscarf, she was temporarily suspended by the head of the child day care centre.

28 On 4 June 2018, IX came to work again wearing a headscarf. She was given a warning on that same day for having worn the headscarf on 1 June 2018 and was asked, in view of the requirement of neutrality, to perform her work without a headscarf in future. As IX again refused to remove the headscarf, she was sent home and temporarily suspended. She received a further warning on the same day.

29 During that same period, WABE required a female employee to remove a cross that she wore around her neck.

30 IX brought an action before the referring court seeking an order that WABE remove from her personal file the warnings concerning the wearing of the Islamic headscarf. In support of her action, she submits, first of all, that despite the general character of the rule prohibiting the wearing of visible political, philosophical or religious signs, that rule directly targets the wearing of the Islamic headscarf and therefore constitutes direct discrimination, next, that that rule exclusively affects women and must therefore also be examined in the light of the prohibition of discrimination on the grounds of gender and, lastly, that that rule has a greater impact on women with migration backgrounds, with the result that it is also capable of constituting discrimination on the grounds of ethnic origin. Furthermore, IX submits that the Bundesverfassungsgericht (Federal Constitutional Court, Germany) has held that a prohibition on wearing the Islamic headscarf at work, in a child day care centre, constituted a serious interference with the freedom of belief and faith and, in order to be permissible, had to relate to an established and specific risk. Lastly, she argues that her action seeking the removal of those warnings cannot be opposed on the basis of the judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203). In that judgment, the Court of Justice merely laid down minimum standards in EU law with the result that the level of protection against discrimination achieved in Germany – as a result of the case-law of the Bundesverfassungsgericht (Federal Constitutional Court) on Paragraph 4(1) of the GG and Paragraph 8 of the AGG – cannot be reduced.

31 WABE contends that the referring court should dismiss that action. In support of that contention, it submits, inter alia, that the internal rule prohibiting the visible wearing of political, philosophical or religious signs complies with the first sentence of Paragraph 106 of the GewO, read in conjunction with Paragraph 7(1) to (3) of the AGG, and that those national provisions should be interpreted in accordance with EU law. According to WABE, it is apparent from the judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), that a private employer is authorised to implement a policy of neutrality within the undertaking provided that it is pursued consistently and systematically and that it is restricted to employees who are in contact with customers. There is no indirect discrimination if the rule concerned is objectively justified by a legitimate aim, such as the employer's desire to pursue a policy of neutrality in its relations with customers, and the means of achieving that aim are appropriate and necessary. That is the case here. Moreover, IX cannot be transferred to a post which does not involve contact with the children and their parents since such a post does not correspond to her abilities and qualifications. WABE argues that, by its judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), the Court definitively ruled on the question of the balancing of fundamental rights in the light of the Charter in the case of a requirement of neutrality imposed by the employer. Since Paragraph 3(2) of the AGG is intended to transpose EU law, the German courts cannot give a different weighting to religious freedom, such as that adopted by the Bundesverfassungsgericht (Federal Constitutional Court), without contravening the primacy of EU law and the principle of interpretation in accordance with EU law. Moreover, according to WABE, even if it were necessary to establish the existence of a specific risk or specific economic harm in order to restrict the freedom of religion, that requirement would also be met in the present case, since it is apparent from the posts which the applicant in the main proceedings displayed on her personal page of a social network that she wished, by her conduct, to influence third parties in a targeted and deliberate manner.

32 In the light of those arguments, the referring court considers that IX may have been the subject of direct discrimination on the grounds of religion, within the meaning of Article 2(2)(a) of Directive 2000/78, because of the connection between the unfavourable treatment that she suffered, namely the issuing of a warning, and the protected characteristic of religion.

33 In the event that there is no direct discrimination, the referring court wishes to know whether a policy of neutrality adopted by an undertaking may constitute indirect discrimination on the grounds of religion or – given that the prohibition at issue in the main proceedings concerns women in the vast majority of cases – indirect discrimination on the grounds of gender. In that context, it asks whether a difference of treatment based on religion and/or gender may be justified by a policy of neutrality established in order to take account of customers' wishes. Moreover, in the case of a difference of treatment indirectly based on religion, the referring court seeks to determine whether, for the purposes of examining whether such a difference of treatment is appropriate, it may take into account the criteria laid down in Article 4(1) of the GG as a more favourable provision within the meaning of Article 8(1) of Directive 2000/78.

34 In those circumstances, the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

In particular:

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

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

Case C-341/19

35 MJ has been employed in a store operated by MH as a sales assistant and cashier since 2002. Since 2014, she has worn an Islamic headscarf. Since she did not comply with MH's request to remove that headscarf at her place of work, she was transferred to another post allowing her to wear the headscarf. In June 2016, MH again asked her to remove the headscarf. Following MJ's refusal to comply with that request, she was sent home. In July 2016, MH instructed her to attend her workplace without conspicuous, large-sized signs of any political, philosophical or religious beliefs.

36 MJ brought an action before the national courts seeking a declaration that that instruction was invalid and compensation for the damage suffered. In support of her action, MJ invoked her freedom of religion, protected by the GG, while claiming that the policy of neutrality sought by MH does not enjoy unconditional priority over the freedom of religion and must be subject to a proportionality test. MH contended that, since July 2016, an internal directive prohibiting the use of conspicuous, large-sized political, philosophical or religious signs in the workplace applied in all its stores ('the internal directive'). The aim of that directive is to maintain neutrality within the undertaking and thus to prevent conflicts between employees. Such conflicts, arising from the different religions and cultures represented in the undertaking, have already occurred several times in the past.

37 MJ's action before those courts was upheld and MH subsequently brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), in which it also argued that it is apparent from the judgment of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), that it is not necessary to establish specific economic harm or a reduction in customers in order for a prohibition on manifesting beliefs to be validly applied. Thus, the Court attributed greater weight to the freedom to conduct a business protected by Article 16 of the Charter than to freedom of religion. A different outcome cannot be derived from the fundamental rights protected by national law.

38 The referring court considers that, in order to be able to resolve the dispute before it, it must assess the legality of the instruction given to MJ by MH and the internal directive, in the light of the

limitations placed on the right of an employer to give instructions under the first sentence of Paragraph 106 of the GewO. Thus, the referring court states that it will have to examine, first, whether that instruction and the internal directive on which it is based constitute unequal treatment within the meaning of Paragraph 3 of the AGG and whether that unequal treatment constitutes unlawful discrimination. If that instruction complies with the existing legal framework, it will be necessary, in the second place, to carry out its assessment *ex aequo et bono*, which, according to the referring court, requires that the competing interests be weighed, taking into account, inter alia, the constitutional and legislative framework, the general principles of proportionality and appropriateness, and existing practices. All the particular circumstances of the case in the main proceedings should be taken into consideration in that assessment.

39 In the present case, the referring court considers that MH's internal directive, which has the nature of a general rule, constitutes unequal treatment indirectly based on religion, for the purpose of Paragraph 3(2) of the AGG and Article 2(2)(b) of Directive 2000/78. MJ is discriminated against, in particular, by comparison with other employees on a ground mentioned in Paragraph 1 of the AGG, since it is rarer for agnostic persons to express their beliefs in public through clothing, jewellery or other signs than persons who belong to a specific religion or belief system. However, in order to determine whether that unequal treatment constitutes unlawful indirect discrimination, within the meaning of Paragraph 3(2) of the AGG, it is also necessary to answer the question whether only a complete prohibition covering any visible form of expression of political, philosophical or religious beliefs is capable of achieving the aim pursued by a policy of neutrality adopted within the undertaking or whether a prohibition limited to conspicuous, large-sized signs, as in the case in the main proceedings, is sufficient for that purpose, provided that it is implemented consistently and systematically. The case-law of the Court of Justice, specifically the judgments of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203), and of 14 March 2017, *Bougnaoui and ADDH* (C-188/15, EU:C:2017:204), does not provide an answer to that question.

40 If it were to be concluded that the latter, limited prohibition is sufficient, the question would arise whether the prohibition at issue in the main proceedings, which appears necessary, is appropriate, within the meaning of Article 2(2)(b)(i) of Directive 2000/78. The referring court asks in that respect whether it is necessary, in examining the appropriate nature of that prohibition, to weigh the rights laid down in Article 16 of the Charter against those laid down in Article 10 of the Charter or whether that weighing should occur only when applying the general rule in the individual case concerned, for example when an instruction is given to an employee or when an employee is dismissed. If it were to be concluded that the conflicting rights deriving from the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') cannot be taken into consideration in examining the appropriateness of the prohibition at issue in the main proceedings in the strict sense, the question would then arise whether a right, protected by a national provision of constitutional status, in particular the freedom of religion and belief protected by Paragraph 4(1) and (2) of the GG, may be regarded as a more favourable provision, within the meaning of Article 8(1) of Directive 2000/78.

41 Lastly, it is also necessary to examine whether EU law – in this case Article 16 of the Charter – precludes the possibility of taking into account fundamental rights protected by national law when examining the validity of an instruction given by an employer. The question arises, inter alia, whether an individual, such as an employer, may rely on Article 16 of the Charter in a dispute exclusively between private persons.

42 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

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

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

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

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

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

Consideration of the questions referred

The first question in Case C-804/18

43 By its first question in Case C-804/18, the referring court asks, in essence, whether Article 1 and Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace constitutes, with regard to workers who observe certain dress codes based on religious precepts, direct discrimination based on religion or belief, within the meaning of that directive.

44 In order to answer that question, it should be noted that, in accordance with Article 1 of Directive 2000/78, the purpose of that directive is to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Under Article 2(1) of that directive, ‘the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1’ thereof. Article 2(2)(a) of that directive provides that, for the purposes of applying Article 2(1) thereof, direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 of that directive, which include religion or belief.

45 As regards the concept of ‘religion’, within the meaning of Article 1 of Directive 2000/78, the Court has already held that it must be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 28), which corresponds to the interpretation of that concept used in Article 10(1) of the Charter (see, to that effect, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 52).

46 The wearing of signs or clothing to manifest religion or belief is covered by the ‘freedom of thought, conscience and religion’ protected by Article 10 of the Charter. The specific content of religious precepts is based on an assessment which it is not for the Court to carry out.

47 In that regard, it should be added that Article 1 of Directive 2000/78 refers to religion and belief together, as does Article 19 TFEU, according to which the EU legislature may take appropriate action to combat discrimination based on, inter alia, ‘religion or belief’, and Article 21 of the Charter, which refers, among the various grounds of discrimination which it mentions, to ‘religion or belief’. It follows that, for the purposes of the application of Directive 2000/78, the terms ‘religion’ and ‘belief’ must be analysed as two facets of the same single ground of discrimination. As is apparent from Article 21 of the Charter, the ground of discrimination based on religion or belief is to be distinguished from the ground based on ‘political or any other opinion’ and therefore covers both religious beliefs and philosophical or spiritual beliefs.

48 It should also be added that the right to freedom of conscience and religion, enshrined in Article 10(1) of the Charter, and which forms an integral part of the relevant context in interpreting Directive 2000/78, corresponds to the right guaranteed in Article 9 of the ECHR and, under Article 52(3) of the Charter, has the same meaning and scope (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 27). In accordance with the case-law of the European Court of Human Rights (‘the ECtHR’), the right to freedom of thought, conscience and religion, enshrined in Article 9 of the ECHR, ‘represents one of the foundations of a “democratic society” within the meaning of [that] Convention’ and constitutes, ‘in its religious dimension, … one of the most vital elements that go to make up the identity of believers and their conception of life’ and ‘a precious asset for atheists, agnostics, sceptics and the unconcerned’, contributing to ‘the pluralism indissociable from a democratic society, which has been dearly won over the centuries’ (ECtHR, 15 February 2001, *Dahlab v. Switzerland*, CE:ECHR:2001:0215DEC004239398).

49 It is also apparent from the case-law of the Court that, by referring, first, to discrimination ‘on’ any of the grounds referred to in Article 1 of Directive 2000/78 and, secondly, to less favourable treatment ‘on’ any of those grounds, and by using the terms ‘another [person]’ and ‘other persons’, the wording and the context of Article 2(1) and (2) of that directive do not permit the conclusion that, regarding the protected ground of religion or belief referred to in Article 1 thereof, the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons having a particular religion or belief and those who do not. On the other hand, it follows from the expression ‘on’ that discrimination on the grounds of religion or belief, for the purposes of that directive, cannot be said to occur unless the less favourable treatment or particular disadvantage at issue is experienced as a result of the religion or belief (see, to that effect, judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19, EU:C:2021:64, paragraphs 29 and 30).

50 The objective of Directive 2000/78 also supports an interpretation of Article 2(1) and (2) thereof whereby that directive does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of religion or belief, for the

purposes of that directive, to those who do not have a particular religion or belief (see, to that effect, judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19, EU:C:2021:64, paragraph 31).

51 As is apparent from paragraph 44 of the present judgment, in accordance with Article 1 of Directive 2000/78 and as is clear from the title thereof, and preamble thereto, as well as from its context and purpose, that directive is intended to establish a general framework for combating discrimination on the grounds, inter alia, of religion and belief as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment, by providing everyone with effective protection against discrimination based, in particular, on that ground (judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19, EU:C:2021:64, paragraph 32).

52 As regards, more specifically, the question whether an internal rule of a private undertaking prohibiting the wearing of any visible sign of political, philosophical or religious beliefs in the workplace constitutes direct discrimination on the grounds of religion or belief, within the meaning of Article 2(2)(a) of Directive 2000/78, the Court has already held that such a rule does not constitute discrimination of that sort provided that it covers any manifestation of such beliefs without distinction and treats all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraphs 30 and 32). Since every person may have a religion or belief, such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference of treatment based on a criterion that is inextricably linked to religion or belief (see, by analogy, with regard to discrimination on the grounds of disability, judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*,C-16/19, EU:C:2021:64, paragraph 44 and the case-law cited).

53 That finding is not called into question, as the Advocate General observed in point 54 of his Opinion, by the fact that some workers observe religious precepts requiring certain clothing to be worn. Although the application of an internal rule such as that referred to in paragraph 52 above is indeed capable of causing particular inconvenience for such workers, that has no bearing on the finding, set out in that paragraph, that that rule, reflecting a policy of political, philosophical and religious neutrality on the part of the employer, does not, in principle, establish a difference of treatment between workers based on a criterion that is inextricably linked to religion or belief, within the meaning of Article 1 of Directive 2000/78.

54 Since it appears from the file before the court that WABE also required another employee wearing a religious cross to remove that sign, it appears prima facie that the internal rule at issue in the main proceedings was applied to IX without any difference of treatment by comparison with any other person working for WABE, with the result that it cannot be considered that IX suffered a difference of treatment directly based on her religious beliefs, for the purpose of Article 2(2)(a) of Directive 2000/78. However, it is for the referring court to make the necessary factual assessments and to determine whether the internal rule adopted by WABE was applied in a general and undifferentiated way to all the workers of that undertaking.

55 In the light of those considerations, the answer to the first question in Case C-804/18 is that Article 1 and Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or

belief, for the purpose of that directive, provided that that rule is applied in a general and undifferentiated way.

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

56 By part (a) of its second question in Case C-804/18, the referring court asks, in essence, whether Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that a difference of treatment indirectly based on religion and/or gender, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes.

57 At the outset, it should be noted that that question is based on the referring court's finding that the internal rule at issue in the main proceedings in Case C-804/18, prohibiting WABE's employees from wearing visible signs of political, philosophical or religious beliefs when they are in contact with parents or children, in practice concerns certain religions more than others and affects women more than men.

58 As a preliminary point, as regards the existence of indirect discrimination on the grounds of gender, referred to in this question, it should be noted that, as the Advocate General observed in point 59 of his Opinion, that ground of discrimination does not fall within the scope of Directive 2000/78, which is the only EU law measure to which this question relates. It is not therefore necessary to examine whether there is such discrimination.

59 As regards the question of a difference of treatment indirectly based on religion or belief, for the purposes of Article 2(2)(b) of Directive 2000/78, it should be recalled that such a difference exists where it is established that the apparently neutral obligation which a rule encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 34). Although it is for the referring court to verify that point, it should be noted that, according to the findings of that court, the rule at issue in Case C-804/18 concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith, and the Court therefore starts from the premiss that that rule constitutes a difference of treatment indirectly based on religion.

60 As regards the question whether a difference of treatment indirectly based on religion may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality in the workplace, in order to take account of the wishes of its customers or users, it should be recalled that Article 2(2)(b)(i) of Directive 2000/78 provides that such a difference of treatment is prohibited, unless the provision, criterion or practice from which it derives is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Accordingly, a difference of treatment, such as that referred to in part (a) of the second question of Case C-804/18, does not amount to indirect discrimination, within the meaning of Article 2(2)(b) of Directive 2000/78, if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (see, to that effect, judgment of 14 March 2017, *Bougnaoui and ADDH*, C-188/15, EU:C:2017:204, paragraph 33).

61 In that respect, the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it must be interpreted strictly (see, to that effect and by analogy, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 112).

62 Directive 2000/78 is a specific expression, within the field that it covers, of the general principle of non-discrimination now enshrined in Article 21 of the Charter (judgment of 26 January 2021, *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, C-16/19, EU:C:2021:64, paragraph 33). Recital 4 of that directive notes that the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by several international agreements, and it is apparent from recitals 11 and 12 of that directive that the EU legislature intended to consider, first, that discrimination based on, inter alia, religion or belief may undermine the achievement of the objectives of the TFEU, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity and the objective of developing the European Union as an area of freedom, security and justice, and, secondly, any direct or indirect discrimination based on religion or belief as regards the areas covered by that directive should be prohibited throughout the European Union.

63 In that regard, as regards the condition relating to the existence of a legitimate aim, an employer's desire to display, in relations with both public- and private-sector customers, a policy of political, philosophical or religious neutrality may be regarded as legitimate. An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, in particular where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers (see, to that effect, judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraphs 37 and 38).

64 That being said, the mere desire of an employer to pursue a policy of neutrality – while in itself a legitimate aim – is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate.

65 In those circumstances, in order to establish the existence of objective justification and, therefore, of a genuine need on the part of the employer, account may be taken, in the first place, of the rights and legitimate wishes of customers or users. That is the case, for example, of parents' right to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs recognised in Article 14 of the Charter or their wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children with the aim, inter alia, of 'guaranteeing the free and personal development of children as regards religion, belief and policy', as mentioned in the staff instructions adopted by WABE.

66 Such situations must, however, be distinguished, inter alia, from, first, the case which gave rise to the judgment of 14 March 2017, *Bougnaoui and ADDH* (C-188/15, EU:C:2017:204), in which an employee was dismissed following a complaint by a customer and in the absence of any internal rule of the undertaking prohibiting the use of any visible sign of political, philosophical or religious beliefs and, secondly, from the case which gave rise to the judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397), which concerned direct discrimination based on race or ethnic origin that allegedly arose from discriminatory requirements on the part of customers.

67 In the second place, in assessing whether there is a genuine need on the part of the employer within the meaning of paragraph 64 above, particular relevance should be attached to the fact that the employer has adduced evidence that, in the absence of such a policy of political, philosophical and religious neutrality, its freedom to conduct a business, recognised in Article 16 of the Charter,

would be undermined in that, given the nature of its activities or the context in which they are carried out, it would suffer adverse consequences.

68 It should also be emphasised that, as noted in paragraph 60 above, if an internal rule such as that at issue in the main proceedings is not to be regarded as indirect discrimination, it must be appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is genuinely pursued in a consistent and systematic manner, and that the prohibition on wearing any visible sign of political, philosophical or religious beliefs imposed by that rule is limited to what is strictly necessary (see, to that effect, judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraphs 40 and 42).

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

70 In the light of the foregoing, the answer to part (a) of the second question in Case C-804/18 is that Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, provided, first, that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

The first question in Case C-341/19

71 By its first question in Case C-341/19, the referring court asks, in essence, whether Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as meaning that indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting the wearing of visible signs of political, philosophical or religious beliefs in the workplace, with the aim of ensuring a policy of neutrality within that undertaking, can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs or whether it is sufficient that that prohibition is limited to conspicuous, large-sized signs provided that is implemented consistently and systematically.

72 In that regard, it should be noted at the outset that, although that question is premised on the existence of indirect discrimination, the fact remains that, as, inter alia, the European Commission argued in its observations in Case C-341/19, an internal rule of an undertaking which, like that at issue in that case, prohibits only the wearing of conspicuous, large-sized signs is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering.

73 As pointed out in paragraph 52 above, unequal treatment resulting from a rule or practice which is based on a criterion that is inextricably linked to a protected ground, in the present case religion or belief, must be regarded as being directly based on that ground. Accordingly, where the criterion of wearing conspicuous, large-sized signs of political, philosophical or religious beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition imposed by an employer on its employees on wearing those signs on the basis of that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, and that direct discrimination, within the meaning of Article 2(2)(a) of Directive 2000/78, may therefore be established.

74 Should such direct discrimination nevertheless not be found to exist, it must be borne in mind that, in accordance with Article 2(2)(b)(i) of that directive, a difference of treatment such as that referred to by the referring court would, if it were established that it in fact results in a particular disadvantage for persons adhering to a particular religion or belief, constitute indirect discrimination within the meaning of Article 2(2)(b) of that directive, as indicated in paragraph 60 above, unless it were objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary.

75 In that regard, it should be noted that it is apparent from the request for a preliminary ruling that the aim of the measure at issue is to avoid social conflicts within the undertaking, particularly in view of tensions which occurred in the past in relation to political, philosophical or religious beliefs.

76 As noted in paragraph 63 above, a policy of neutrality may constitute a legitimate aim, within the meaning of Article 2(2)(b)(i) of Directive 2000/78. In order to determine whether that policy is sufficient to justify objectively a difference of treatment indirectly based on religion or belief, it must be verified, as can be seen from paragraph 64 above, whether it meets a genuine need on the part of the undertaking. In that regard, it should be noted that both the prevention of social conflicts and the presentation of a neutral image of the employer vis-à-vis customers may correspond to a real need on the part of the employer, which it is for the latter to demonstrate. However, it must still be verified, in accordance with what has been stated in paragraphs 68 and 69 above, whether the internal rule prohibiting the wearing of any conspicuous, large-sized sign of political, philosophical and religious beliefs is appropriate for the purpose of achieving the aim pursued and whether that prohibition is limited to what is strictly necessary.

77 In that regard, it should be noted that a policy of neutrality within an undertaking, such as that referred to by the first question in Case C-341/19, can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality.

78 In the light of the foregoing considerations, the answer to the first question referred in Case C-341/19 is that Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as meaning that indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting, at the workplace, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality within that undertaking can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs. A prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs is liable to constitute direct discrimination on the grounds of religion or belief, which cannot in any event be justified on the basis of that provision.

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

79 By part (b) of the second question in Case C-804/18, which is analogous to part (b) of the second question in Case C-341/19, the Arbeitsgericht Hamburg (Hamburg Labour Court) asks, in essence, whether Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that national constitutional provisions protecting the freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of that directive in examining the appropriateness of a difference of treatment indirectly based on religion or belief.

80 That question arises from the doubts, also raised by the Bundesarbeitsgericht (Federal Labour Court) in Case C-341/19, as to whether, in examining the appropriateness of an internal rule of an undertaking such as that at issue in the disputes in the main proceedings, it is necessary to weigh up the rights and freedoms at issue, in particular Articles 14 and 16 of the Charter, on the one hand, and Article 10 of the Charter, on the other, or whether that weighing should occur only when applying the internal rule in the individual case concerned, for example when an instruction is given to an employee or when an employee is dismissed. If it were to be concluded that the rights at issue arising from the Charter cannot be taken into consideration in the context of that examination, the question would then arise as to whether a national constitutional provision, such as Article 4(1) and (2) of the GG, protecting freedom of religion and belief, may be regarded as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78.

81 As regards, in the first place, the question whether it is necessary, in examining the appropriateness, for the purposes of Article 2(2)(b)(i) of Directive 2000/78, of the restriction resulting from the measure adopted in order to ensure the application of a policy of political, philosophical and religious neutrality, to take into account the various rights and freedoms in question, it must first be recalled that, as the Court noted when it interpreted the concept of 'religion', within the meaning of Article 1 of Directive 2000/78, the EU legislature referred, in recital 1 of that directive, to fundamental rights as guaranteed by the ECHR, which provides, in Article 9, that everyone has the right to freedom of thought, conscience and religion, a right which includes, in particular, freedom, either alone or in community with others and in public or private, to manifest his or her religion or belief, in worship, teaching, practice and observance. In addition, in the same recital, the EU legislature also referred to the constitutional traditions common to the Member States, as general principles of EU law. Among the rights resulting from those common traditions, which have been reaffirmed in the Charter, is the right to freedom of thought, conscience and religion enshrined in Article 10(1) of the Charter. In accordance with that provision, that right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. As is apparent from the explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraphs 26 and 27).

82 Accordingly, when examining whether the restriction resulting from a measure intended to ensure the application of a policy of political, philosophical and religious neutrality is appropriate, within the meaning of Article 2(2)(b)(i) of Directive 2000/78, account must be taken of the various rights and freedoms in question.

83 Next, the Court has already held that, when examining whether a prohibition similar to that at issue in the main proceedings is necessary, it is for the national courts, having regard to all the

material in the file in question, to take into account the interests involved in the case and to limit the restrictions ‘on the freedoms concerned to what is strictly necessary’ (judgment of 14 March 2017, *G4S Secure Solutions*, C-157/15, EU:C:2017:203, paragraph 43). Since the case which gave rise to that judgment concerned only the freedom to conduct a business, recognised in Article 16 of the Charter, it must be concluded that the other freedom to which the Court referred to in that judgment was the freedom of thought, conscience and religion, referred to in paragraph 39 of that judgment.

84 It must therefore be observed that the interpretation of Directive 2000/78 thus adopted is in accordance with the case-law of the Court and that it ensures that, when several fundamental rights and principles enshrined in the Treaties are at issue, such as, in the present case, the principle of non-discrimination enshrined in Article 21 of the Charter and the right to freedom of thought, conscience and religion guaranteed in Article 10 of the Charter, on the one hand, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions recognised in Article 14(3) of the Charter and the freedom to conduct a business recognised in Article 16 of the Charter, on the other hand, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them (see, to that effect, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 65 and the case-law cited).

85 As regards the provisions of national law at issue in the main proceedings, more specifically Paragraph 4(1) of the GG, and the resulting requirement that, in a situation such as that at issue in those cases, it is for the employer not only to establish that it is pursuing a legitimate aim capable of justifying indirect discrimination on the grounds of religion or belief, but also to demonstrate that there was, at the time when the internal rule in question was introduced, or that there is currently, a sufficiently specific risk of that aim being undermined, such as the risk of specific disturbances within the undertaking or the specific risk of a loss of income, it must be held that such a requirement forms part of the context set out in Article 2(2)(b)(i) of Directive 2000/78 as regards the justification of a difference of treatment indirectly based on religion or beliefs.

86 As regards, in the second place, the question whether a national provision relating to freedom of religion and conscience may be regarded as a national provision which is more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of Directive 2000/78, it should be borne in mind that, as is apparent from its title, that directive establishes a general framework for equal treatment in employment and occupation, which leaves a margin of discretion to the Member States, taking into account the diversity of their approaches as regards the place accorded to religion and beliefs within their respective systems. The margin of discretion thus afforded to the Member States in the absence of a consensus at EU level must, however, go hand in hand with supervision, by the EU judicature, consisting in determining whether the measures taken at national level were justified in principle and proportionate (see, to that effect, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 67).

87 Moreover, the framework thus created shows that, in Directive 2000/78, the EU legislature did not itself effect the necessary reconciliation between the freedom of thought, conscience and religion and the legitimate aims that may be invoked in order to justify unequal treatment, for the purposes of Article 2(2)(b)(i) of that directive, but left it to the Member States and their courts to achieve that reconciliation (see, by analogy, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others*, C-336/19, EU:C:2020:1031, paragraph 47).

88 Consequently, Directive 2000/78 allows account to be taken of the specific context of each Member State and allows each Member State a margin of discretion in achieving the necessary reconciliation of the different rights and interests at issue, in order to ensure a fair balance between them.

89 It follows that the national provisions protecting freedom of thought, belief and religion, as a value to which modern democratic societies have attached great importance for many years, may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of Directive 2000/78, when examining what constitutes a difference of treatment based on religion or belief. Thus, for example, national provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of Directive 2000/78 would fall within the scope of the possibility offered by Article 8(1).

90 In the light of those considerations, the answer to part (b) of the second question in Case C-804/18 and part (b) of the second question in Case C-341/19 is that Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) of that directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief.

Part (a) of the second question and the third question in Case C-341/19

91 In the light of the answer given to the first question in Case C-341/19, there is no need to answer part (a) of the second question or the third question in that case.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 1 and Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does not constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, for the purpose of that directive, provided that that rule is applied in a general and undifferentiated way.**

2. **Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, provided, first, that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are**

carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

3. **Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as meaning that indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting, at the workplace, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality within that undertaking can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs. A prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs is liable to constitute direct discrimination on the grounds of religion or belief, which cannot in any event be justified on the basis of that provision.**

4. **Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) of that directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief.**

[Signatures]

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* Language of the case: German.