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PROTECTION OF CULTURAL IDENTITY – INTERNAL RULES OF THE EMPLOYERS AND THEIR ANTI-DISCRIMINATION ASPECTS IN THE DECISION MAKING PROCESS OF THE COURT OF JUSTICE OF THE EU

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Summary. The article deals with the recent judgments of the Court of Justice of the European Union that deal with the internal rules of the employers stipulating the neutrality principle of their employees. The neutrality principle prohibits the employee to wear any visible political, philosophical and religious symbols in the workplace. Such prohibition, may, however, be in conflict with the principle of non-discrimination within the meaning of the Directive 2000/78/EC. The article deals with the aspect the employers must take into account when they decide to issue internal rules requiring neutrality of their employees.

Key words: anti-discrimination, direct discrimination, indirect discrimination, religion, belief, Directive 2000/78/EC

FOREWORD

These days, people in Europe face many opinions and many proposals of different ways how to protect cultural identity. Also in countries of Central Europe protection of cultural identity became a topic for politicians and this topic became nearly a central topic for discussions, including the discussions among lawyers. It is more than clear that the cultural identity is also a legal problem, as it affects the relations between the state and an individual as well as between individuals themselves.

This is especially significant in employment relationships where very often different interests are in a collision. And truly said, both the interests are very often legitimate, as they may be legally founded on different principles based in international law, EU law or national law. This situation may be the

case where the employers require its employees to be neutral[1] regarding their political, philosophical or religious signs.

The Court of Justice of the EU (hereinafter as CJEU) issued two important judgments in March 2017 that provide the criteria for the employers relating their internal rules requiring their employees to follow the neutrality principle. These judgments have also been discussed by human rights activists who declared several doubts relating to potential discrimination of persons of certain religions that are connected with visible symbols characteristic for that religion (e.g. Muslims or Sikhs). Acceptance of the neutrality principle may lead to their exclusion from work life and will prevent them in integration[2].

Irrespective of the various opinions on the correctness or inaccuracy of those judgments of the CJEU, it is important for the employers that they have an instruction and interpretation of laws, in order not to breach laws that guarantee the right to freedom of religion or belief. Such a contradiction could occur in case of internal rules that assign the dress code for the employees[3]. These judgments are also important for interpretation of national laws of the EU member states as the EU legislation was transposed into national legislation[4].

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[1] See: M. Moravčíková, *Sekulárny štát a náboženská sloboda v sociológii a v právnej teórii*, in: *Constans et perpetua voluntas*, eds. P. Mach, M. Pekarik, V. Vladár, Trnavská univerzita v Trnave, Trnava 2014. pp. 435–450; Eadem, *Náboženská neutralita štátu a svet práce*, in: *Sloboda jednotlivca a svet práce*, eds. M. Moravčíková, M. Križan, Leges, Praha 2014, pp. 183–191; Eadem, *Religion, law, and secular principles in the Slovak Republic*, in: *Religion and the secular state*, eds. J. Martínez–Torrón, C. Durham, Universidad Complutense, Madrid 2015, pp. 641–655.

[2] D. Balážová, *Do práce bez hidžábu aj kríža? Nie vždy*, "Pravda" 16.03.2017, in: https://spravy.pravda.sk/domace/clanok/423261-do-prace-bez-hidzabu-aj-kriza-nie-vzdy/ [accessed: 1.11.2018].

[3] A. Olšovská, *"Dress code" zamestnanca a náboženské vyznanie*, in *Islam v Európe – právne postavenie a financovanie islamských náboženských organizácií*, ed. M. Moravčíková, Leges, Praha 2017, pp. 43–61; M. Moravčíková, *Temptation in the desert. Troubles with state neutrality: or (not-)talking about God: debate not only about the case of sister Dalmácia*, in: *Religion: problem or Promise?*, ed. Š. Marinčák, Dobrá kniha, Trnava 2009, pp. 153–158.

[4] In the Slovak Republic the anti-discrimination law is mainly regulated by the Act No. 365/2004 Coll., Anti-Discrimination Act and the Act No. 311/2001 Coll., the Labour Code. M. Moravčíková, *Law and religion in the workplace in the Slovak Republic*, in: *Law and religion in the workplace*, ed. M. Rodriguez Blanco, Comares, Granada 2016, pp. 337–348; Eadem, *The mutual roles of religion and state in Slovakia*, in: *The mutual roles of religion and state in Europe*, ed. B. Schanda, European consortium for Church and state research, Trier 2014, pp. 177–191.

1. LEGISLATION ON NON-DISCRIMINATION IN EUROPEAN UNION LAW

Antidiscrimination legislation is an important element of legislation in European Union law that also influences realization of private law relations, especially in labour law. Moreover, the issue of equal treatment is discussed a lot, as the realization of labour law relations, in which the antidiscrimination legislation is applied, may collide with other rights. Subsequently, it is up to the courts to decide the potential collision between two or more rights or to to clarify the mutual relations between the application of these rights, which can often collide with one another, as also mentioned in this article. There are quite many cases concerning the equal treatment in recent years. This growth of cases is connected with with increase in the sensitivity of the society to the occurrence of unequal treatment on the one hand as well as the fact the people are no more willing to accept that only the expectations of the major society are acceptable and correct[5].

The legislation of EU member states is highly influenced by EU law in the area of equal treatment. This is connected with the need to harmonize the national legislation with EU law. EU law has significantly influenced the qualitative level of legal protection against discrimination. E.g., in the Slovak Republic, the actual anti-discrimination legislation in the form as it is drafted, results from the obligation to transpose the EU directive into national legislation. However, in the Slovak Republic, there were many discussions about the necessity to adopt the anti-discrimination legislation. Due to these discussions the Slovak Anti-Discrimination Act was adopted with delay, since it came into effect only after the accession of the Slovak Republic to the EU[6].

EU anti-discrimination legislation is constantly developing, as there is a strong influence of the Court of Justice of the EU on this development.

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[5] M. Moravčíková, *Nekotorye aspekty gosudarstvenno-cerkovnych otnošenij v stranach Evropejskovo Sojuza*, in: *Novaja Evropa – obšestvo, kultura, riligija i parvo,* ed. M. Moravčíková, Kluwer, Bratislava 2016, pp. 68–79.

[6] Transposition of the directives is an obligation of the EU member states. Failure to comply with this obligation constitutes a breach of EU law. This obligation is established in the Accession Treaty of the member state to the EU. With respect to the Slovak Republic, the Article 2 of the Act on Conditions of the Accession stipulates an obligation to apply the EU law under the conditions and to the extent stipulated by EU law: "From the date of accession, the provisions of the original Treaties and acts adopted by the institutions and the European Central Bank prior to accession shall be binding on the new Member States and shall apply under the conditions laid down in these Treaties and in this Act".

1.1. Prohibition of discrimination in EU primary law

The Treaty on European Union[7] (TEU), the Treaty on the Functioning of the European Union[8] (TFEU) as well as the Charter of the Fundamental Rights of the EU[9] contain provisions on prohibition of discrimination, including the discrimination on grounds of religion or belief. To be complete, it is also necessary to point out the characteristics of EU law that are not based in EU legislation, but are necessary for a complex application of EU law in the territories of the EU member states, including the anti-discrimination legislation. In this connection the direct effect must be mentioned.

1.2. Prohibition of discrimination in EU secondary law

The customs union started to function in 1968. It was a necessary stage to further development, which is the internal market. The European Commission started works on social legislation in this time. In addition to the directives governing the process of collective redundancies, transfer of undertaking, also other directives regulating the equal treatment principle were adopted. This legislation has been gradually extending and includes also discrimi-

[7] Article 2 TEU contains a provision that specifies the values on which the EU is founded. According to this article, the EU is founded on 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.

[8] TFEU contains several provisions which fight against discrimination that is considered to be illegal. Article 8 TFEU stipulates that the EU shall, in all its activities, aim to eliminate inequalities, and to promote equality, between men and women. Article 10 stipulates that the EU shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in defining and implementing its policies and activities.

[9] According to the Article 6(1) TEU the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. According to the Article 51 of the Charter, the provisions of the 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. It may therefore be expected that the Charter provisions will be relatively often applied, including the provisions regulating the equal treatment. However, the Charter does not influence in any way the EU competences. The Charter explicitly prohibits 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. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

nation based on grounds of religion or belief in employment and occupation. This prohibition is established in the Directive No 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[10]. The purpose of this directive is to establish a general framework for combating discrimination in employment and occupation on the grounds of religion or belief, disability, age or sexual orientation, in order to implement the principle of equal treatment in the EU Member States. This directive does not provide with the definition of the term religion[11], but refers in its recitals to the fundamental human as rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and which result from constitutional traditions common to the Member States as fundamental principles of EU law. Article 9 ECHR provides, the right of everyone to freedom of thought, conscience and religion, including the right to express the religion or belief, either alone or in community with others and in public or private to manifest his religion or belief, in worship, teaching, practice and observance[12]. The directive refers to constitutional traditions common for the member states as fundamental principles of EU law. Among those rights stemming from these traditions, which have also been confirmed in the Charter of Fundamental Rights of the EU, are also the right to freedom of thought, conscience and religion[13]. This right includes the freedom to change the religion or belief, as well as the freedom to express the religion or belief either alone or together with others, either alone or in community, in worship, teaching, practice and observance. It is clear from the Explanatory report to the Charter of Fundamental Rights of the EU that this right corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, this right has the same meaning and scope. As the ECHR and subsequently the Charter of the Fundamental Rights of the EU admit a broad meaning to the term „reli-

[10] Published in OJ EC L 303, 2.12.2000, pp. 16–22; edition in Slovak language: Chapter 05 volume 004 pp. 79–85.

[11] M. Moravčíková, *Sloboda myslenia, svedomia a náboženského vyznania*, in: *Verejná správa*, ed. S. Košičiarová [et al.], Spolok Slovákov v Poľsku, Krakov 2015, pp. 146–150.

[12] Article 9 of the Convention mainly protects the area of personal conviction and religious belief (the right to freedom of thought, conscience and religion), that the people experience in their inner spheres. V. Križan, *Sloboda presvedčenia a výhrada svedomia v pracovnom práve*, in: *Právna ochrana slobody svedomia*, eds. M. Moravčíková, V. Križan, Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, Trnava 2013, pp. 50–67.

[13] Article 10(1) of the Charter of Fundamental Rights of the EU.

gion", this term must necessarily be interpreted in the same way for the purposes of the Directive 2000/78 so that it includes *forum internum* (the fact of having a belief) as well as *forum externum* (public demonstration of a religious belief[14]).

The following cases concern the interpretation of the prohibition of discrimination on grounds of religion in employment and occupation in cases where the employer issued an internal rule prohibiting wearing the visible political, philosophical and religious symbols and situations where the employer has a will to take into account the customer's wish that its services are no longer provided by a worker wearing a Islamic headscarf.

The interpretation concerned the provisions of the Directive 2000/78/EC, and the term „the principle of equal treatment" which means that there shall not be direct or indirect discrimination based on any of the grounds referred to in Article 1 of this Directive[15]. The Directive also provides the definition of direct and indirect discrimination, whereby the 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[16]. 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 that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary[17].

The Directive 2000/78/EC contains a provision that regulates its scope, and the Directive shall apply to all persons, as regards both the public and private sectors, including public bodies with respect to conditions for access to employment, including selection criteria and recruitment conditions, employment and working conditions, including dismissals and pay[18].

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[14] V. Križan considers the right to freedom of thought, conscious and religion in principle to be the matter of each individual that is also shown towards others. See: V. Križan, *Sloboda presvedčenia*, p. 53.

[15] Among these grounds belong: religion or belief, disability, age or sexual orientation.

[16] Article 2(2)(a) of the Directive 2000/78/EC.

[17] Article 2(2)(b) of the Directive 2000/78/EC.

[18] Article 3(1) of the Directive 2000/78/EC.

2. JUDGMENT OF THE COURT C-157/15, SAMIRA ACHBITA, CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING PROTI G4S SECURE SOLUTIONS NV[19]

In this case the Court of Justice (Court) issued a judgment on 14 March 2017. The case concerned an assessment of the employer's internal regulation that prohibited the employees wearing visible political, philosophical and religious symbols on the workplace and assessment of that prohibition in the light of the principle of non-discrimination within the meaning of the Directive 2000/78/EC. The subject of the dispute was whether the internal regulation of the employer causes direct or indirect discrimination and the conditions for the application of that prohibition with regard to the application of the Directive 2000/78/EC.

2.1. Facts of the case

The company G4S has forbidden its employees to wear any visible political, philosophical or religious symbols at their workplace and to carry out any related ceremonies. This prohibition led to a dispute between G4S and her employee Samira Achbita and the Centre for equal opportunities and fight against racism (Centre). Ms Achbita is of Islamic belief and started to work for G4S in 2003 as receptionist. There was an unspoken rule at the employer that the employees could not wear any visible political, philosophical, or religious symbols of their conviction in the workplace. Ms Achbita informed in April 2006 her supervisors that she plans to wear the Muslim scurf during the working time. The employer replied that the wearing of the scarf would not be tolerated, since the wearing of visible political, philosophical or religious symbols is contrary to the position of G4S neutrality. The employee informed the employer that she will wear the Muslim scurf after she returns to work after the temporary sick leave. Subsequently, the works council approved the amendment to the internal regulation, in the sense of which the employees are prohibited to wear any visible symbols of their political, philosophical or religious beliefs in the workplace and/or to carry out any related ceremony. As Ms Achbita continued to insist on wearing a Muslim scarf in the workplace, the employer decided to dismiss her, paying her the three-month severance pay and benefits under the employment contract.

[19] ECLI:EU:C:2017:203.

Ms Achbita brought an action for the nullity of dismissal. The first instance court decided to refuse her action. She subsequently recalled to the second instance court that also refused her appeal for reason that the dismissal cannot be considered to be unjustified since the blanket ban on wearing visible signs of political, philosophical or religious beliefs in the workplace did not give rise to direct discrimination, and no indirect discrimination or infringement of individual freedom or of freedom of religion was evident. The Appeals Court rejected the argument that the prohibition to wear visible religious or philosophical symbols itself constitutes a direct discrimination of Ms Achbita, as a person with her belief. The court stated that the prohibition did not only refer to the use of religious symbols, but also to symbols relating to philosophical belief which fulfills the condition of protection under Directive 2000/78/EC that refers to religion or belief. Ms Achbita argues that, by holding that the religious belief on which the employer's ban is based is a neutral criterion and by failing to characterise the ban as the unequal treatment of workers as between those who wear an Islamic headscarf and those who do not, on the ground that the ban does not refer to a particular religious belief and is directed to all workers, the Appeal Court misconstrued the concepts of 'direct discrimination' and 'indirect discrimination' as referred to in Article 2(2) of Directive 2000/78.

In those circumstances, the Hof van Cassatie (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: "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?".

2.2. The findings of the Court of Justice

The Court of Justice interpreted the question of the court as follows: Must the Article 2(2) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, constitutes direct discrimination that is prohibited by that directive.

The Court of Justice in the first place summarized the purpose of that directive 2000/78/EC that 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. The Court of Justice was

dealing with the term religion and confirmed that it must be broadly interpreted. In the second place it was necessary to determine whether the internal rule at issue in the main proceedings gives rise to a difference in treatment of workers[20] on the basis of their religion or their belief and, if so, whether that difference in treatment constitutes direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78.

The Court of Justice reflected in this case that the internal rule at issue refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating 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. The Court of Justice considers that the internal rule was not applied differently to Ms Achbita as compared to any other worker. Accordingly, it must be concluded that an internal rule such as that at issue does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78.

The Court of Justice concluded that it is not excluded that the national court may asses the facts and to determine whether and to what extent the internal rule at issue meets those requirements. The Court of Justice continues that such a difference of treatment does not amount to indirect discrimination within the meaning of Article 2(2)(b) of the directive if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. As regards the condition relating to the existence of a legitimate aim, it should be stated 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. 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, notably 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.

[20] A term worker is used in EU law (the provisions of the TFEU relating the free movement of workers as well as the secondary legislation use the term worker). On the other hand, Slovak legislation uses the term employee (e.g. the Labour Code); the employee is an individual performing a dependant activity. As the provisions of EU have also been transposed to the Labour Code, the interpretation of the term worker will also be applicable on employees.

As regards the appropriateness of an internal rule such as that at issue in the main proceedings, it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner. This is the role of the national court to ascertain whether the employer established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers.

As regards the assessment of the question whether the prohibition at issue was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In this case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.

The Court of Justice was of opinion that if the employee refused to give up wearing an Islamic headscarf when carrying out her professional duties for customers, it would be necessary to examine, if there would be an additional burden for the employer to offer her a post not involving any visual contact with those customers, instead of dismissing her. It is always necessary to limit the restrictions on the freedoms concerned to what is strictly necessary.

2.3. Conclusion to the judgment and summary

The Court of Justice in the judgment decided that the prohibition to wear Islamic headscarf that is established by the employer's internal rule prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of the directive 2000/78. However, it may constitute indirect discrimination if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary.

3. JUDGMENT OF THE COURT C-188/15, ASMA BOUGNAOUI, ASSOCIATION DE DÉFENSE DES DROITS DE L'HOMME (ADDH) V. MICROPOLE SA, FORMERLY MICROPOLE UNIVERS SA[21]

The Court of Justice issued a decision in this case on 14 March 2017. The case concerned a situation in which the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf can be considered a "genuine and determining occupational requirement" within the meaning of the Directive 2000/78/EC. The subject of the dispute concerned the situation when the employer dismissed a female employee on the grounds that she did not want to take off her Islamic headscarf while performing a work task at the customers.

3.1. Facts of the case

The subject of the case, similarly as in the previous case, was the interpretation of the provisions of the Directive 2000/78/EC. However, in this case, the Court of Justice was dealing with the Article 4(1) that stipulates, the 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[22] 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.

Ms Bougnaoui was employed by her employer for indefinite period as a design engineer. Prior she was recruited to the employment, she was on an internship at the employer. That time, she was wearing a simple bandana and was informed that wearing an Islamic headscarf might pose a problem when she was in contact with customers of the company. Later, she has decided to wear an Islamic headscarf.

The employer called her for an interview preliminary to possible dismissal. During this interview the issue of wearing an Islamic headscarf in the premises of the customers was discussed with her as number of the customer's employees were upset of that. The employer informed her that it re-

[21] ECLI:EU:C:2017:204.

[22] These grounds are: religion or belief, disability, age or sexual orientation.

spects her freedom of opinion and religious beliefs of everyone, but the employer practices the neutrality to which she was notified prior to the commencement of the employment relationship.

As the employee refused to change her opinion and further insisted to wear an Islamic headscarf, the employer decided to dismiss her. Ms Bougnaoui considered that dismissal to be discriminatory and brought an action before the court. The first instance court dismissed the remainder of the action on the ground that the restriction of Ms Bougnaoui's freedom to wear the Islamic headscarf was justified by her contact with customers of that company and proportionate to Micropole's aim of protecting its image and of avoiding conflict with its customers' beliefs. Ms Bougnaoui appealed against that decision, but the Appeal Court upheld the decision of the first instance court. It ruled, in particular, that Ms Bougnaoui's dismissal did not arise from discrimination connected with the religious beliefs of the employee, since she was permitted to continue to express them within the undertaking, and that it was justified by a legitimate restriction arising from the interests of the undertaking where the exercise by the employee of the freedom to manifest her religious beliefs went beyond the confines of the undertaking and was imposed on the latter's customers without any consideration for their feelings, impinging on the rights of others.

Ms Bougnaoui brought an appeal against that decision to the Court of Cassation. She claimed that restrictions on religious freedom should be justified by the nature of the task to be undertaken and should arise from a genuine and determining occupational requirement, subject to the proviso that the objective be legitimate and the requirement proportionate. They argued that the wearing of the Islamic headscarf by an employee of a private undertaking when in contact with customers does not prejudice the rights or beliefs of others, and that the embarrassment or sensitivity of the customers of a commercial company, at the mere sight, allegedly, of a sign of religious affiliation, is neither a relevant nor legitimate criterion, free from any discrimination, that might justify the company's economic or commercial interests being allowed to prevail over the fundamental freedom of religion of an employee.

The Court of Cassation reflected the previous case law of the CJEU, but it did not find an answer to the question whether Article 4(1) of Directive 2000/78 must be interpreted as meaning that the wish of an employer's customer no longer to have that employer's services provided by a worker on one of the grounds to which that directive refers is a genuine and determin-

ing occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out.

3.2. The findings of the Court of Justice

The Court of Justice has defined the scope of the question as follows: Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of that provision?

In this case the Court of Justice was dealing with the term religion and has taken into account a broad interpretation of this term both by the ECHR and the Charter of the Fundamentals Rights and Freedoms. This term includes both *forum externum* as well as *forum internum*.

The Court of Justice in its reply confirmed that the national court must ascertain whether the dismissal was based on non-compliance with a rule in force within that undertaking, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs, and if it were to transpire that that apparently neutral rule resulted, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, it would have to be concluded that there was a difference of treatment indirectly based on religion or belief, as referred to in Article 2(2)(b) of Directive 2000/78/EC. Such a difference of treatment does not amount to indirect discrimination if it is objectively justified by a legitimate aim, such as the implementation of a policy of neutrality vis-à-vis its customers, and if the means of achieving that aim are appropriate and necessary.

On the other hand, if the dismissal was not based on the existence of an internal rule, it would be necessary to consider whether the willingness of an employer to take account of a customer's wish no longer to have services provided by a worker who has been assigned to that customer by the employer and who wears an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78/EC. In accordance to this provision the 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 of the directive does 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. The Court of Justice emphasized that from the Article 4(1) of Directive 2000/78/EC results that that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement.

The Court of Justice 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 and according to wording of Article 4(1) of Directive 2000/78/EC, such a characteristic may constitute such a requirement only "by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out".

3.3. Conclusion to the judgment and summary

Based on the above mentioned information arises that the concept of "genuine and determining occupational requirement" 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. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer. As a consequence, the Court of Justice answered that the Article 4(1) of Directive 2000/78/EC must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

SUMMARY

The judgments of the Court of Justice presented in this article provide that employers may, in certain circumstances, prohibit their employees from wearing visible political, philosophical or religious symbols. The Court of Justice declared that such a prohibition does not introduce a direct discrimination. However, it did not exclude, that this may establish an indirect discrimination if the internal regulation proves to be disadvantageous to a certain group of people. Such a difference in treatment, however, does not establish an indirect discrimination if it is objectively justified by the legitimate aim and the means of achieving it are appropriate and necessary.

The Court of Justice stipulates that the will of an employer to introduce the neutrality principle into relations with the customers is legitimate, especially in case of employees who come into contact with customers. The

Court of Justice emphasized that the neutrality principle must be applied by the employer in a coherent and systematic way, i.e. it must be proven that the principle is consistently applied and is not an ad hoc application in a particular situation and that it is not an ad hoc application of that principle in a specific situation.

In the second case that was subject to analyses, the Court of Justice came to a conclusion that the willingness of the employer to take account the particular wishes of the customer that the services are no more provided by the employee who wears an Islamic scarf, cannot be considered to be a genuine and determining occupational requirement.

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OCHRONA TOŻSAMOŚCI KULTUROWEJ – WEWNĘTRZNE ZASADY PRACODAWCÓW I ICH ASPEKTY ANTYDYSKRYMINACYJNE W PODEJMOWANIU DECYZJI W PROCESACH PRZED TRYBUNAŁEM SPRAWIEDLIWOŚCI UE

Streszczenie. Artykuł dotyczy niedawnych wyroków Trybunału Sprawiedliwości Unii Europejskiej, które odnoszą się do wewnętrznych przepisów pracodawców określających zasadę neutralności ich pracowników. Zasada neutralności zabrania pracownikowi noszenia widocznych symboli politycznych, filozoficznych i religijnych w miejscu pracy. Zakaz taki może jednak pozostawać w sprzeczności z zasadą niedyskryminacji w rozumieniu dyrektywy 2000/78/WE. Artykuł dotyczy aspektu, który pracodawcy muszą wziąć pod uwagę przy podejmowaniu decyzji w wydawaniu wewnętrznych przepisów wymagających neutralności swoich pracowników.

Słowa kluczowe: antydyskryminacja, dyskryminacja bezpośrednia, dyskryminacja pośrednia, religia, przekonania, dyrektywa 2000/78/WE