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Religious Freedom in the EU: The Jurisprudence of the European Court of Justice in Light of Diverging National Case Law

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"Imagine there's no countries
It isn't hard to do
Nothing to kill or die for
And no religion, too
Imagine all the people
Livin' life in peace"

- John Lennon, 1971

Table of Content

I. Introduction

"God is dead"[1] – more than 100 years after the famous statement by Friedrich Nietzsche, religion still plays an important role in the European Union. Although declining, 70% of the EU citizens consider themselves as religious, meaning that religion still contributes strongly to the individual identities.[2] Moreover, the influence of religion, especially the Christian heritage of the Member States is reflected on a more societal level: special status for religious communities, religious holidays like easter or Christmas, references to religion in the constitutions or crucifixes in state buildings. While the importance of religion declines and all Member States are secular democracies, religion remains to be relevant, on the one hand for the individual citizens, on the other for the whole society.

Religious freedom is a fundamental part of modern, liberal democracies. After decades of religious violence and persecution, freedom of religion was established as a fundamental right in the 17th century. This acknowledged the importance religion and showing one's religion can have for individuals – creating and strengthening one's identity, upholding traditions or promoting certain values. Based on this importance religion can have, many Member States have granted religious communities certain privileges, often rooted in the national history and culture. This already indicates the sensitivity religious freedom brings, being intertwined with fundamental rights and individual identity as well as with national identities and particularities. With the EU, the Member States have created or entered a community of law, and submitted themselves to the jurisdiction of the Court of Justice of the EU (CJEU). With five ground-breaking judgements in the last five years, the European Court of Justice (ECJ) has issued widely discussed decisions regarding religious freedom. The discussion of these judgements has been primarily centred around the reasoning of the Court and have been mostly limited to the analysis of one or two cases. To complement the literature in that regard, this thesis takes a different approach: First, the thesis aims at drawing a bigger picture of the ECJ's jurisprudence by taking two case groups into account: wearing of religious symbols in the workplace and occupational requirements by religious employers. Moreover, the thesis is not centred around the claimant's perspective, thus the worker wanting to wear a religious symbol or the religious employer setting certain requirements for its employees, but rather around the constitutional

[1] Friedrich Nietzsche, *Die Fröhliche Wissenschaft. In: Digitale Kritische Gesamtausgabe Werke Und Briefe* (Giorgio Colli and Mazzino Montinari eds, Walter de Gruyter 1967) <http://www.nietzschesource.org/#eKGWB/FW>, 125.

[2] European Commission, Directorate-General for Communication, 'Special Eurobarometer 493: Discrimination in the EU' 229, 230 <http://data.europa.eu/88u/dataset/S2251_91_4_493_ENG> accessed 25 June 2022.

dimension. Hence, the jurisprudence of the ECJ on religious freedom will be evaluated in view of the European constitutional order, and more specifically supremacy of EU law and its limits.

Therefore, the research question of this thesis will be: "*To what extent can religious freedom be interpreted uniformly and protected effectively within the EU in light of conflicting constitutional doctrines among the Member States?* In order to answer this question, several sub-questions have to be assessed.

The first sub-question concerns what religious freedom entails exactly. In this descriptive part freedom of religion as a fundamental right will be presented in detail as well as the contribution of anti-discrimination law to religious freedom.

Secondly, the question concerning the tensions and conflicts that arise between the European and the national legal orders will be examined. In order to answer this question, the existing jurisprudence by the ECJ will be presented, followed by relevant case law from the Member States. The sub-chapter on the ECJ's jurisprudence will be focused on the cases *Achbita*, *Bougnaoui* and *IX v Wabe (Wabe) eV* and *MH Müller Handels GmbH (Müller) v MJ* as well as *Egenberger* and *IR v JQ*. Concerning national case law, judgements were considered as relevant, when they concerned either wearing religious symbols in the workplace or occupation requirements of religious employers. The selected case shall be illustrative for the diversity in the jurisprudence among the Member States. The list of cases cannot not claim comprehensiveness but rather to be complete in the sense of not lacking a major judgement, which diverges from one of the presented cases. Due to the language barrier, the main source for identifying relevant national case law was a publication of the European Commission[3] and further secondary literature. After presenting the national case law, I will juxtapose the jurisprudences and point out tension and conflicts that arise, not only concerning the outcome but also the reasoning of the judgements.

The fourth chapter then lays the theoretical groundwork for the analytical part. In order to answer the research question, the question how the national legal orders and the European legal order relate to each other and the mechanisms of resolving tensions and conflicts within the European legal system must be answered. For this, a short introduction into the relation of national and EU fundamental rights protection will be given. The second sub-chapter then presents three supremacy theories, Constitutional Pluralism, Multilevel Constitutionalism and

[3] Erica European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment: a legal analysis of the situation in the EU Member States.* (Publications Office 2017) <https://data.europa.eu/doi/10.2838/380042> accessed 9 January 2022.

Composite Constitutionalism. All three theories conceptualise the (non-)hierarchy within the European legal system and also provide thereby theoretical foundations for the understanding of the European constitutional order. Besides this, the supremacy locks, developed by different constitutional courts will be examined. As they form the limit to supremacy of EU law, their exact definition and interpretation is needed for the later analysis.

The last chapter is then based on the findings of the sub-question and aims to answer the research question. After the tensions and conflicts arising from the judgements on religious freedom have been pointed out in the third chapter, they will be assessed in light of the supremacy theories and the supremacy locks. In this, it will be carved out, where conflicting national constitutional doctrines can be subsumed under a supremacy lock and thereby pose an absolute limit for the ECJ's jurisprudence, and in which points national particularities remain to be particularities – without a fundamental, constitutional dimension. Through this, it shall be illustrated, where the ECJ is free to set high standards of fundamental rights protection and impose a uniform interpretation, and where national constitutional doctrines oppose this and the ECJ should rule with restraint in view of the risk of constitutional conflict. Based on this, the last chapter is an attempt in conciliation: finding a way of achieving a high protection of fundamental rights and a uniform standard in the EU, without creating the risk of a constitutional conflict.

In the conclusion, the findings of this thesis will be summarized.

It shall be clarified, that this thesis adopts the terminology by of Tuori and Sankari, in which the European legal system is constituted by the European legal order, thus the a*cquis Communautaire,* and the 27 national legal orders.[4] Moreover, the term "religious freedom" will be used as an overarching term, which includes the fundamental right freedom of religion, the right to self-determination of religious communities and the right to non-discrimination on grounds of religion.

II. Religious Freedom in the EU

Freedom of religion is enshrined as a fundamental right in various international treaties, obliging the 27 EU Member States and in all their national constitutions. This chapter focuses first on the positive law, thus examining where freedom of religion is protected. Secondly, the

[4] Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Ashgate Pub 2010) 12, 13.

underlying concepts of freedom of religion will be assessed in more detail; namely positive and negative freedom of religion, the protected aspects of religion, thus the *forum in-* and *externum* as well its relation with other rights.

a) Freedom of Religion in Positive Law

Freedom of religion is enshrined in many legal documents on international as well as on national level. In 1648, the Peace of Westphalia included religious freedom as a Fundamental Right the first in an international treaty as a reaction to the previous religiously motivated conflicts.[5] With this, the cornerstone for freedom of religion in Europe has been laid.[6]

Under a similar rationale, the European Convention on Human Rights (ECHR) was adopted in 1959, roughly 300 years after the signing of the Peace of Westphalia. With Art 9, the ECHR protects the freedom of thought, conscience and religion. In the aftermath of the second world war, including the persecution and murder of millions of Jews by Nazi Germany, twelve Member States[7] of the Council of Europe agreed on a system of international protection of human rights.[8] Protected under Art 9 ECHR are thought, conscience and religion, including the right to change these and to manifest the religion or belief, alone or with others, in private and in public. Art 9 (2) ECHR specifies that the right to manifest one's religion or belief can only be restricted on grounds of "public order, health or morals, or for the protection of the rights and freedoms of others".

The ECHR is relevant for EU law not only because all Member States ratified the ECHR, but also because the Charter of Fundamental Rights of the EU (CFR) refers to the ECHR in stating that rights, which are enshrined in both documents shall be the same in scope and meaning.[9] Nevertheless, the function of the ECHR and the CFR and their respective courts diverge: The ECHR aims at setting a minimum standard, thus often leaving the states a margin of appreciation. In contrast, the EU is a legal community, thus, the CFR is more than a "safety net", but rather aims at an effective protection of fundamental rights in itself.[10] The Charta

[5] Jonatas EM Machado, 'Freedom of Religion: A View From Europe' (2005) 10 Roger Williams University Law Review 451, 454.
[6] Logi Gunnarsson and Norman Weiß (eds), *Menschenrechte und Religion: Kongruenz oder Konflikt?* (BWV, Berliner Wissenschafts-Verlag 2016) 17.
[7] Note: Namely Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey and the UK.
[8] Abraham van de Beek, *Freedom of Religion* (Brill 2010) 17.
[9] Charter of Fundamental Rights of the European Union 2009, Art 52 (3).
[10] Daniel Augenstein, 'Religious Pluralism and National Constitutional Traditions in Europe', *Law, State and Religion in the New Europe. Debates and Dilemas* (Cambridge University Press 2012) 230

protects freedom of religion in Art 10 (1) CFR, stating that "Everyone has the right to freedom of thought, conscience and religion." The second paragraph specifies that this includes the right to belief, to change one's religion and to manifest religion or belief. In this, the CFR and the ECHR show strong similarities in their structure. Although the provision in the CFR does not mention grounds to restrict freedom of religion, in contrast to Art 9 ECHR, it is evident from the ECJ's case law that it is not an absolute right.[11]

Even though the importance of international Fundamental Rights protection grows, the national protection through the constitutions remains essential[12] – on the one hand because the scope and scrutiny of the above-mentioned treaties are limited, on the other hand because the national constitutions and the case law of the constitutional courts are important in the way freedom of religion is interpreted on international level.[13] All 27 Member States enshrined freedom of religion in their constitutions. Article 44 (2) of the Irish constitution[14] states that "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.". The French *Déclaration des droits de l'Homme et du citoyen*, which has constitutional status, establishes that "No man ought to be molested on […] account of his religious opinions, provided his avowal of them does not disturb the public order established by law."[15] The structure of protecting freedom of religion in the first place but making it then subject to restrictions, for instance for the public order can be found in many other constitutions, too. Nevertheless, the EU is far away from forming a heterogenous community in terms of the understanding and conceptualisation of freedom of religion.[16] The interpretation of freedom of religion, thus its scope and the possible restrictions, is inextricably

<https://d1wqtxts1xzle7.cloudfront.net/8505546/Chapter_11_RelPlurNCT_Augenstein-libre.pdf?1390855704=&response-content-disposition=inline%3B+filename%3DReligious_Pluralism_and_National_Constit.pdf&Expires=1656351223&Signature=RtQdGKiz5ffj~G2WRzcyT20ZFnA7CbSM3xdlmUWb2rCN6~eUt9fnvHM-IBY674VIGkcntOqVcIuv~kBa5h~dVI0ym4dusZha6JdpPoemrcV1ww3oyYqH95A-YOLqkEgyX5WPxA-uzvKiLW85j6Tic8kqWsgi0cEw327tJckakXrfh6oNEi6CeagScHDyZf0EIZHWpuEOCe4pL8le9-HP~hrLLxbBFRVEUJHs2pk3~ya8uCOGNjlbOKLfzHsSTWJX~g~-d8sroSUa0lvmyK3NmhD4C-TR0JBKZ4xhc9CgMoHinZNIrnV32wmZ3aN~2BQIElq1hIUICsQBEiBFsd8orQ__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA> accessed 27 June 2022.

[11] See e.g. *Samira Achbita v G4S Secure Solutions NV* [2017] European Court of Justice C-157/15; *Egenberger* [2018] European Court of Justice C-414/16; *Centraal Israëlitisch Consistorie van België - C-336/19* [2020] European Court of Justice ECLI:EU:C:2020:1031.

[12] Machado (n 5) 467.

[13] See e.g. Christopher Bilz, *Margin of appreciation der EU-Mitgliedstaaten: eine Untersuchung im Anwendungsbereich der Grundrechtecharta am Beispiel des Datenschutzgrundrechts, der Religionsfreiheit, der unternehmerischen Freiheit und des Rechts auf einen wirksamen Rechtsbehelf* (Mohr Siebeck 2020) 38, 253.

[14] Constitution of Ireland 1937.

[15] Déclaration des droits de l'homme et du citoyen - The Declaration of the Rights of Man and of the Citizen 1789. Art X.

[16] Claus Dieter Classen, 'Schwierigkeiten Eines Harmonischen Miteinanders von Nationalem Und Europäischem Grundrechtsschutz' (2017) 52 Europarecht 347, 347.

linked to the role of religion in the public sphere in general.[17] Thus, although the EU Member States share a certain religious, Christian inheritance, the perspectives on religion vary strongly.[18] For instance, Malta committed itself to the catholic church in its constitution, the Irish constitution states in the preamble that Ireland promotes the holy trinity and recognizes its obligations towards Jesus Christ, Denmark and Finland recognise the Lutheran church as state church, while other Member States like the Netherlands, Portugal or Slovakia have no state church.[19] Neither does Germany, which however upholds close cooperation with the catholic and Lutheran church.[20] France established a policy of *laïcité*, thus a strict separation between the state and the church, rooted in the anti-clerical dimension of the French revolution in 1789.[21] This brief, non-exhaustive list shall illustrate the broad variety of constitutional arrangements regarding the relationship between religion and the state among the EU Member States. Thus, although all states are shaped by Christianity while being secular, the role assigned to religion diverges strongly.[22] This has, as will be shown in chapter III, inevitably strong effects on freedom of religion for the individual as well as the privileges and their limits granted to (certain) religious communities.

Thus, while all Member States are secular and enshrined freedom of religion in their constitutions, the understandings of what this entails exactly and what legal status and privileges religious communities enjoy diverge massively. These differences can be traced back to historical reasons, to cultural differences and political decisions.

Lastly, religious freedom is protected to some extent under EU anti-discrimination law. For the purposes of this thesis, Directive 2000/78/CE (Equality Framework Directive, EFD) is of particular relevance. The Directive aims at eliminating discrimination on grounds of religion or belief, disability, age or sexual orientation in employment in the public and private sector.[23] Moreover, the Directive refers in its preamble to fundamental rights protected by the ECHR

[17] Machado (n 5) 453.
[18] Ronan McCrea, 'Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State' (2016) 5 Oxford Journal of Law and Religion 183, 185; Sylvaine Laulom, 'Religion at Work: European Perspectives' (2019) 2019 Hungarian Labour Law 1, 2.
[19] Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press 2010) 40, 41 <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199595358.001.0001/acprof-9780199595358> accessed 14 May 2022.
[20] ibid 43.
[21] Melanie Adrian, *Religious Freedom at Risk* (Springer International Publishing 2016) 80 <http://link.springer.com/10.1007/978-3-319-21446-7> accessed 14 May 2022.
[22] Machado (n 5) 517.
[23] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation 2000 (2000/78/EC) Art 1, 3.

and the constitutional traditions common to the Member States.[24, 25] The EFD has been transposed by all Member States and therefore became part of the national legal orders. In addition to that, Art 4 (2) EFD is relevant for religious freedom. With this provision, the EU legislator established that the Member States can maintain legislation which allows religious employers to treat applicants and employees differently on grounds of religion if the unequal treatment is a genuine, legitimate and justified requirement in light of the nature of the activity. In this, the constitutional provisions and principles applicable in the Member States shall be taken account of.[26] This privilege can be traced back to the right to self-determination of religious communities granted in certain Member States, which ultimately follows from the individual freedom of religion.[27] Due to the nature of many religions, the individual freedom of religion requires a collective freedom of religion, too.[28]

Religious freedom is therefore protected on the one hand through the fundamental right of freedom of religion, enshrined in the ECHR and the CFR, as well as on national level by the constitutions of all EU Member States. On the other hand, religious freedom is, to some extent protected through EU anti-discrimination law, prohibiting unequal treatment on grounds of religion. While positive law is the necessary basis for achieving religious freedom, its interpretation and balancing with conflicting rights by the highest courts are ultimately crucial for the holders of fundamental rights. This dimension will be assessed in the third chapter.

b) Freedom of Religion – A Conceptual Approach

After assessing the *locus* of freedom of religion in the EU, this part examines the fundamental right from a more conceptual side. As a multidimensional and multisided right, freedom of religion requires a more detailed analysis, what it entails, before coming to the national differences in its interpretation.

First, it must be distinguished between the *forum internum* and the *forum externum*.[29] The forum internum protects the inner freedom of the individual, thus a protection against persecution on

[24] ibid Preamble, Recital (1).
[25] Note: The Directive does not refer to the CFR, as it has not been adopted at that time.
[26] Art 4 (2) Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
[27] Martijn van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' (2022) 1 European Law Open 89, 94.
[28] Joseph HH Weiler, 'Feedom of Religion and Freedom From Religion: The European Model' (2013) 65 Maine Law Review 759, 762.
[29] Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd edn, Hart Publishing, an imprint of Bloomsbury Publishing Plc 2016) 34.

grounds of religion.[30] For instance the inquisition in the Middle Age[31] or the religious cleansing by the "Islamic State" in Iraq and Syria[32] were not aimed at restricting or eliminating the manifestation or worship of religious beliefs, but at eliminating the persons of this belief. Thus, the persecution violates the *forum internum*[33]. The *forum externum* means the manifestation of the religion, thus, observance, practice, worship and teaching.[34] In short, the *forum internum* can be understood as the protection of the inner conviction and thoughts, in contrast to *forum externum*, which includes the "execution" and showing of faith. Within the *forum externum*, another distinction can be made, the *devotio domestica sim plex*, the manifestation in the private sphere, and the *devotio publica*, thus the manifestation in public.[35] While the *forum internum* has been protected in the Peace of Westphalia already, the protection of the *forum externum* emerged only in the 19th and 20th century.[36] Due to societal and political changes, the relevance of freedom of religion shifted from protecting the *forum internum*, thus the negative obligation to non-intervention by the state, to a positive obligation to safeguard the right of individuals to manifest their religion.[37] This shift towards a positive obligation is also reflected in the case law which will be analysed in chapter III. The differentiation between the *forum internum* and *externum* can also be seen in the structure of Art 9 ECHR: The first paragraph protects both *fora*, the second allows however only restrictions of the *forum externum*. Therefore, the *forum internum* is an absolute right.[38] As mentioned above, this applies equally to the CFR and to the national constitutions.[39]

A second dimension is freedom of religion as a multisided right. As stated above, freedom of religion as a fundamental right entails a positive and a negative obligation for the state. The side of the norm-addressee is however more complex. Self-explanatory, freedom of religion confers rights to religious individuals, which can be subsumed under the positive freedom of religion. This includes also a certain collective aspect, thus, the right to assembly and to

[30] Beek (n 8) 10.
[31] See Paweł Kras, *The System of the Inquisition in Medieval Europe* (Peter Lang GmbH 2020) 427–439 <https://www.peterlang.com/view/title/63263> accessed 23 June 2022.
[32] Nina Shea, 'Barbarism 2014: On Religious Cleansing by Islamists' (2014) 177 World Affairs 34, 34, 35.
[33] Note: The *forum internum* is a pre-condition for the *forum externum*, thus the inquisition or religious cleansing inevitably violates the forum externum, too.
[34] Karen Murphy, *State Security Regimes and the Right to Freedom of Religion and Belief: Changes in Europe since 2001* (1. publ, Routledge 2013) 26.
[35] Beek (n 8) 10.
[36] ibid.
[37] Katayoun Alidadi and Marie-Claire Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe' (2012) 30 Netherlands Quarterly of Human Rights 388, 394.
[38] Erica Howard, *Law and the Wearing of Religious Symbols in Europe* (2nd edn, Routledge 2019) 19.
[39] See Miguel Rodríguez Blanco, *Law and Religion in the Workplace: Proceedings of the XXVIIth Annual Conference Alcalá de Henares* (Comares 2016) 16, 82–383.

manifest in community.[40] On the other hand, there is also a negative freedom of religion, thus a freedom *from* religion. A non-religious person has also the right to be free from proselytism and the right to not belief.[41] This leads inevitably to tensions within the freedom of religion, as the positive right of religious persons has to be balanced against the negative right of non-religious or persons of different faiths.

Lastly, the relationship of freedom of religion to other rights shall be presented briefly. Overlaps with freedom of expression or assembly can be neglected, as freedom of religion is, for religious matters, the *lex specialis*.[42] With regard to anti-discrimination law, the dimension of equality comes into play. While freedom of religion protects the individual liberty, anti-discrimination law solely prohibits unequal treatment.[43] Thus, a general ban of religious worship would be contrary to freedom of religion, but not necessarily to anti-discrimination law, as it applies equally. Consequently, freedom of religion and anti-discrimination law can complement and reinforce each other, but must not be confused.

In conclusion, religious freedom in the EU is safeguarded through freedom of religion on the one hand and anti-discrimination law on the other hand. Freedom of religion is enshrined not only in the two central international treaties for fundamental rights protection, the ECHR and the CFR, but also on national level through constitutional law. While the right granted is similar in terms of the structure and wording, its interpretation varies strongly. Especially the interpretation of the *forum externum* and the balance between the positive and negative freedom of religion varies over time and is subject to deliberation in societies and to balancing by courts.[44] Differences in history and culture lead to diverging understandings of the role of religion in the society generally – resulting in disparate interpretations of freedom of religion as a fundamental right. This applies similarly to the protection of religious freedom through anti-discrimination law. The question what constitutes direct or indirect discrimination based on religion, and to what extent religious communities are exempted from anti-discrimination law is inextricably intertwined with the role of religion in the state generally.

[40] Bilz (n 13) 249.
[41] Vickers (n 29) 37.
[42] Santiago Cañamares Arribas, 'Religious Freedom and Freedom of Expression in Spain' (2014) 9 Religion and Human Rights 209, 216.
[43] See Shino Ibold, 'Freiheit Oder Gleichheit?: Kopftuchverbote Im Spannungsfeld von Unionsrecht Und Grundgesetz' (*Verfassungsblog*, 11 February 2019) <https://intr2dok.vifa-recht.de/receive/mir_mods_00005441> accessed 23 June 2022.
[44] Adrian (n 21) 48.

III. The Jurisprudence on Freedom of Religion: The ECJ and National Courts

With examining religious freedom in depth in the second chapter, the groundwork for an analysis of the jurisprudence of the ECJ has been laid. This part of the thesis will first look at the recent jurisprudence concerning religious freedom. Secondly, a selection of cases from several Member States will be presented. Based on this, not only the diversity in the national case law shall be illustrated, but also the inevitable tensions, and possibly even conflicts within the EU legal order.

a) Case Law of the European Court of Justice

Although the jurisprudence of the ECJ concerning religious freedom is quite limited, this thesis will only take two constellations of cases into account: wearing religious symbols at the workplace in private employment and occupational requirements by religious employers. Wearing religious symbols concerns the positive freedom of religion in the *forum externum* of the employee. Concerning the privileges of religious employers, a balance must be made between the (negative) freedom of religion of the employee and the right to self-determination of churches, stemming from the positive freedom of religion of its members. These two case-groups have been chosen as, one the one hand, at least two judgements by the ECJ were issued on the matters, thus certain lines of thought and an attitude of the court becomes evident. On the other hand, both case-groups are related to the labour market, meaning that the conflicting objectives, concepts and rights are similar and comparable. Other important cases concerning religious freedom, for instance religious slaughter in light of animal welfare[45] or the taxation of churches[46] are not considered in this thesis as the conflicting interests in these cases are fundamentally different.

i. Religious Symbols in the Workplace

The ECJ has issued two ground-breaking judgements in 2017 concerning wearing religious symbols in the workplace and extended and refined its jurisprudence in a preliminary ruling in 2021 in a joined case.

[45] *Centraal Israëlitisch Consistorie van België - C-336/19* (n 11).
[46] *Congregación de Escuelas Pías Provincia Betania* [2017] European Court of Justice C-74/16.

In *Achbita*, the Court had to decide in a case referred by a Belgian Court of Cassation, whether a rule prohibiting all signs of political, philosophical and religious beliefs at the workplace should be considered as a direct discrimination in the sense of Art 2 (2) EFD, which prohibits discrimination in employment.[47] Mrs. Achbita worked at G4S as a receptionist and decided to wear a headscarf[48] three years after the beginning of the contract in 2003. Since she worked for G4S, there was an unwritten rule, prohibiting to wear signs of their political, philosophical or religious belief.[49] The ECJ held that there was no direct discrimination as the rule was applied indifferently.[50] The Court however did not stop at that point but also assessed whether such a rule could constitute indirect discrimination. Therefore, it had to be examined whether the neutrality-policy pursues a legitimate aim, is appropriate and necessary.[51] Without further elaborations, the Court accepted "neutrality" as a legitimate aim by referring to Art 16 CFR, the freedom to conduct a business.[52] The judges held that the appropriateness of a neutrality rule would be ensured if it is applied in a systematic and genuine way.[53] Concerning the necessity, the ECJ ruled that it should be examined whether G4S could have offered Mrs Achbita a job without customer contact, where she could wear a headscarf. Therefore, the ECJ decided essentially, that a rule prohibiting all signs of beliefs does not constitute discrimination, if it pursues a legitimate aim, is appropriate and limited to what is necessary. For this assessment, the judges leave broad margin of discretion to the national courts.

In the second decision, *Bougnaoui*, the Court had to decide in a preliminary question referred by the French Court of Cassation. Mrs Bougnaoui worked as a design engineer for Micropole and was required to visit the offices of customers.[54] In 2009, a customer requested that Mrs. Bougnaoui would stop wearing a veil when working on their site. Subsequently, Micropole held that its employees have to be discrete concerning personal expressions when working vis-à-vis customers.[55] As Mrs. Bougnaoui still rejected to work without a headscarf when being in contact with customers, she was dismissed. The Court of Cassation asked in the preliminary reference whether the wish of customer can constitute a "genuine and legitimate requirement"

[47] *Samira Achbita v G4S Secure Solutions NV* (n 11) para 21.
[48] Note: The used terminology in the literature varies, often used "headscarf", "veil" or "*hijab*", see Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing 2006) 4, 5. Following the majority of legal scholars, this thesis will use the term "headscarf".
[49] *Samira Achbita v G4S Secure Solutions NV* (n 11) para 11.
[50] ibid 17–19, 32.
[51] ibid 34, 35.
[52] ibid 37, 38.
[53] ibid 40.
[54] *Bougnaoui* [2017] European Court of Justice C-188/15 13.
[55] ibid 14.

in the sense of the EFD[56]. The Court repeated its jurisprudence from the *Achbita*-case, however it made also clear, that Micropole had not established a general policy of neutrality but solely reacted to the wish of a customer.[57] As the concept of a "genuine and legitimate occupational requirement" is objective, the subjective wish of the employer and ultimately of the customers could therefore not be considered as genuine and legitimate.[58] In this, the court indicated that a prohibition of religious signs at workplace in reaction to the wishes of a customer cannot be justified and therefore constitute discrimination.

Four years after the two judgements, the ECJ dealt with the joined cases *IX v Wabe* and *Müller v MJ*.

IX worked at Wabe, running children day-care centres, with a headscarf before she took parental leave for 18 months.[59] Two months before her return, Wabe established a rule of political, philosophical and religious neutrality in order to ensure the free development of the children.[60] The rule applied only to employees having direct contact with children or parents. As IX refused to take her headscarf off after her return, she was dismissed. Besides claims of intersectional discrimination[61], IX relied on her freedom of religion, based freedom of religion, enshrined in Art 4 of the German constitution (*Grundgesetz*, GG) and the jurisprudence of the German constitutional court, the *Bundesverfassungsgericht*, providing a high standard of protection.[62] In contrast, Wabe invoked the *Achbita*-jurisprudence of the ECJ and the primacy of EU law, preventing German courts to assign a higher weight to freedom of religion.[63] The referring court asked, *inter alia*, whether the rule in question constitutes indirect discrimination on grounds of religion. The ECJ upheld its decision from *Achbita* and *Bougnaoui*, stating that a neutrality-rule is justified when it pursues a legitimate aim, is appropriate and necessary.[64] Concerning the legitimate aim and the appropriateness, the judges followed the decision *Achbita*. With regard to the necessity, the Court however stresses that in the assessment Art 10 CFR, thus freedom of religion as a fundamental right has to be taken into considerations.[65] In

[56] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.
[57] *Bougnaoui* (n 54) paras 32–34.
[58] ibid 40.
[59] *IX v Wabe eV and MH Müller Handels GmbH v MJ* [2021] European Court of Justice C-804/18; C-341/19 [22, 24].
[60] ibid 25.
[61] Note: The highly interesting claims of intersectional discrimination on grounds of gender and ethnic origin cannot be assessed *in extensio*, due to the limits of this paper. However, it had to be mentioned for reasons of completeness. The ECJ did not find intersectional discrimination in the present case.
[62] *IX v Wabe eV and MH Müller Handels GmbH v MJ* (n 59) para 30.
[63] ibid 31.
[64] ibid 52, 55, 60.
[65] ibid 69.

summary, the ECJ upheld its judgements *Achbita* and *Bougnaoui*, but stressed that the aim for neutrality, based on Art 16 CFR must be balanced with the freedom of religion. Hence, freedom of religion as an individual liberty reinforces the claim for religious freedom under anti-discrimination law.

MJ has worked since 2002 for Müller, a German drugstore. After MJ decided in 2014 to wear a headscarf, Müller transferred her to another post, where she was officially allowed to wear it.[66] Two years later, Müller changed its policy and prohibited "conspicuous, large-sized political, philosophical or religious signs" – leading to a dismissal of MJ in 2016 after she refused to take her headscarf off.[67] MJ claimed that the policy was unproportionate and violated her freedom of religion.[68] Müller argued that the courts of first instances failed to follow the *Achbita*-jurisprudence and undermined the primacy of EU law by attributing a too high value to freedom of religion based on national law.[69] In its second question, the *Bundesarbeitgericht* asks inter alia whether Art 10 CFR, freedom of religion can be taken into account in the proportionality-assessment of neutrality rules. This question aims at a clarification of the relationship between anti-discrimination law, so an equality right and freedom of religion as a fundamental right, thus an individual liberty. Moreover, it asks whether national constitutional provisions can be taken into account as "more favourable provisions" in the sense of Art 8 (1) of the EFD.[70] In its answer, the ECJ reinforces the approach which was already indicated in the ruling of *IX v Wabe*: As the EU legislator referred in the preamble of the EFD to freedom of religion enshrined in the ECHR, the CFR and the traditions common to the national constitutions, it established it as a "general principle[s] of EU law"[71]. Therefore, courts *must* take freedom of religion into consideration when ruling on neutrality-policies and balance it with conflicting rights.[72] In regard to the second question, the Court stressed that the Directive created a level playing field, however, it leaves a margin of discretion where the Member States lack a consensus in the way how to balance conflicting rights.[73]

In summary the ECJ attributed a high value to the freedom to conduct a business and the aim to be neutral – to the detriment of religious freedom. What becomes evident is that in *Achbita* and *Bougnaoui*, the Court has assessed neutrality rules in light of equality and discrimination.

[66] ibid 35.
[67] ibid.
[68] ibid 36.
[69] ibid 36, 37.
[70] ibid 42.
[71] ibid 81.
[72] ibid 82, 88.
[73] ibid 86, 87.

In *IX v Wabe* and *Müller v MJ*, the judges strengthened the role of freedom of religion as a fundamental right and obliged national courts to take it into consideration. Nevertheless, the Member States are granted a broad margin of discretion in how to balance religious freedom and the freedom to conduct a business.

ii. Occupational Requirements by Religious Employers

The second group of cases are the occupational requirements set by religious employers. Thus, freedom of religion is still at the core of the judgements, however more from the perspective of the legal status of religious communities.

The first case is the *Egenberger*-judgement from 2018. Mrs Egenberger is non-religious and applied in 2012 for a job offer from the Evangelisches Werk (Diakonie), a protestant organisation, to draft a report on racial discrimination in Germany.[74] The job offer stated that a membership of the Protestant church and an identification with the faith is necessary. Although Mrs. Egenberger was shortlisted, she was not invited to an interview.[75] In response, Mrs. Egenberger claimed that this decision violated her right to equal treatment stemming from the German implementation of the EFD.[76] The Diakonie claimed that the unequal treatment was justified based on the right to self-determination stemming from the Art 140 GG, Art 4 (2) of the EFD and Art 17 TFEU.[77] While Mrs Egenberger has won in the first instances, the referring court had doubts concerning the interpretation of "genuine, legitimate and justified occupational requirements" in the sense of Art 4 (2) EFD.[78] These doubts were reinforced, as the *Bundesverfassungsgericht* had decided that the court's review must be limited to a plausibility-control of the churches self-perception, because a religion-based decision to set a certain requirement cannot be assessed with secular standards.[79] This decision will be further discussed below. The ECJ diverges from this approach and held that concerning the special role of religious entities, a balance between the right to judicial protection, non-discrimination and self-determination of religious communities must be made – which can only be done by national courts.[80] Therefore, courts are obliged to review whether the given requirements are genuine, legitimate and justified. Without addressing the jurisprudence of the *Bundesverfassungsgericht*

[74] *Egenberger* (n 11) 24, 26.
[75] ibid 26.
[76] ibid 27.
[77] ibid 28.
[78] ibid 29, 41.
[79] ibid 31.
[80] ibid 52, 53.

directly, the ECJ reinforced, that settled case law which is contrary to EU law cannot preclude courts to interpret national provisions in conformity of EU law.[81]

IR v JQ concerns a catholic doctor, JQ, working for IR, an operator of hospitals which belongs to the Caritas, a catholic organisation.[82] JQ married a woman in 2003 under canon and civil law. In 2008 they got legally divorced and JQ married another woman under civil law – without having the catholic marriage annulled.[83] After IR was informed about this, they dismissed JQ due to a violation of his duties stemming from his contract.[84] JQ claimed that this dismissal violated his rights, as his non-religious colleagues in similar positions would not have been dismissed for re-marrying.[85] After the federal labour court (*Bundesarbeitsgericht*) decided that the dismissal was unlawful, IR appealed to the *Bundesverfassungsgericht*, claiming that the *Bundesarbeitsgericht* failed to respect their right to self-determination.[86] In the judgement, which was already mentioned above, the German judges ruled that an assessment must be limited to a plausibility-control of the self-perception of the religious body. The *Bundesarbeitsgericht* then referred the case to the CJEU for a preliminary ruling, asking *inter alia* whether unequal treatment can be justified through the self-perception of the religious employer and under what conditions these requirements can be imposed.[87] The ECJ widely repeated its *Egenberger*-judgement in stating that occupational requirements by religious employers can still need to be genuine, legitimate and justified.[88] Moreover, the compliance with these conditions must be subject to judicial review, as the special status of religious communities cannot result in a lacuna of judicial protection.[89] In the present case, the ECJ strongly indicated that the requirement imposed by the Diakonie cannot be considered as genuine and justified.[90] Similar to the *Egenberger*-case, the ECJ addressed the jurisprudence of the *Bundesverfassungsgericht* indirectly by stressing that primacy of EU law requires national courts to interpret national law in conformity – regardless of contrary national case law.[91]

The ECJ has established in the two cases that the Member States have some margin in discretion concerning the status and privileges of churches and therefore of religious employers, this

[81] ibid 73, 82.
[82] *IR v JQ* [2018] European Court of Justice C-68/17 [23, 24].
[83] ibid 25.
[84] ibid 26, 28.
[85] ibid 25.
[86] ibid 30.
[87] ibid 37.
[88] ibid 43, 50, 52–54.
[89] ibid 47, 48.
[90] ibid 58–60.
[91] ibid 64, 65.

margin is however limited by the right to judicial protection. Thereby the ECJ prevents that the sphere of religious employer turns into an uncontrollable area. Thus, the Court strengthened the non-discrimination rights of the (potential) employees – to the detriment of the religious freedom of denominational employers.

b) Case Law of the National (Constitutional) Courts

In order to discover tensions with the national constitutions and the shortcomings of the above-mentioned judgements, the case law of national courts will be assessed. There is no legislation on wearing religious symbols in private employment among the Member States.[92] In regard to the legal status of religious communities, there is a variety of constitutional arrangements. Nevertheless, regarding the concrete question how far-reaching certain privileges are, only the case law of courts can bring clarity. Due to this, this part focuses primarily on case law and will mention positive law only briefly and only if relevant.

Concerning the selection of judgements, two factors were relevant. First, the presented cases shall present the diversity concerning the jurisprudence on religious freedom among the Member States. Secondly, the cases shall illustrate the tensions and potential conflicts that can arise between the European legal order and the national legal orders. The legal situation of religious freedom in many Member States will not be presented. The reasons for that can be twofold: Either the case law did not contribute to the thesis in the sense of the two above-mentioned factors or there is no case law on religious symbols at the workplace and the requirements of religious employers. In case of the latter, this can be explained by a strong consensus in the society, and therefore a lack of conflicts or through a low number of minorities and their hampered access to judicial protection.[93] Concerning the time frame, no limit was applied, however the majority of the judgements were issued after 2000.

i. Religious Symbols in the Workplace

Concerning wearing religious symbols in private employment, the case law in the Member States diverges. What unites the jurisprudence are, similar to the reasoning of the ECJ in

[92] Open Society Justice Initiative, 'Restrictions on Muslim Women's Dress in the 28 EU Member States: Current Law, Recent Legal Developments, and the State of Play' 11 <https://www.justiceinitiative.org/uploads/dffdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf> accessed 27 June 2022.
[93] Alidadi and Foblets (n 37) 401.

Bougnaoui, that prohibitions of headscarves specifically, opposed to neutrality rules are considered as discrimination.[94] In the following, case law from Belgium, France, Denmark, the Netherlands, Germany and Sweden will be presented.

Labour Courts and Tribunals in Brussels as well as in Antwerp accepted in a variety of cases the objective of neutrality as justified and proportionate in order to restrict the freedom of religion of the applicants.[95] This is also reflected in the decisions of the courts of lower instances in the *Achbita*-case.[96] Overall, it is noticeable, that the case law in Belgium largely matches the decisions in *Achbita* and *Bougnaoui*: In the *Club*-case[97], the Brussels Labour Court of Appeal decided that a policy prohibiting symbols which could harm the "neutral image" of the company was no discriminatory.[98] The court based its decision primarily on equality, as the rule prohibited symbols of all religions as well as political or philosophical ones. Interestingly, the court also addressed freedom of religion as a fundamental right in saying that it is not an absolute right and can therefore be restricted when its exercise might lead to "chaos".[99] In the *HEMA*-case[100], the Tongeren Labour Tribunal held that a prohibition of religious symbols in response to a request by customers is in contrast discriminatory, in line with the *Bougnaoui*-judgement issued four years later.[101]

In France, the legal situation is similar. Most famously, the Court of Cassation decided in the *Baby Loup*-case[102] that a private child care centre can ban religious symbols, based on the freedom *from* religion of the children.[103] Due to the particular influenceability of children combined with the perspective of wearing a veil as active proselytism and exercising pressure, the Parisian court found that the ban was lawful.[104] Worth to mention is that the judges rejected arguments based on neutrality and *laïcité*, as these principles do not extend to the private sector.[105] In contrast to *Achbita* or *Bougnaoui*, the case was therefore centred around freedom

[94] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 44.
[95] Fabienne Kéfer, 'Religion at Work. The Belgian Experience' (2019) Vol 2019 Hungarian Labour Law 41, 50.
[96] *Samira Achbita v G4S Secure Solutions NV* (n 11) paras 17–19.
[97] *Club* (Labour Appeal Court, Brussels).
[98] Open Society Justice Initiative (n 92) 19.
[99] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 75.
[100] *(HEMA) - Joyce VODB v RB NV and HB BVBA* [2013] Tongeren Labour Court No. A.R.11/214/A.
[101] Kéfer (n 95) 50.
[102] *Baby Loup v Hafif* [2014] Court of Cassation No. 612; 13-28.369.
[103] Open Society Justice Initiative (n 92) 42.
[104] Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS' (2015) 4 Oxford Journal of Law and Religion 94, 96.
[105] Myriam Hunter-Henin, 'Religion, Children and Employment: The Baby Loup Case' (2015) 64 International and Comparative Law Quarterly 717, 718, 719.

of and *from* religion and the effect of a headscarf, instead of questions of equality and discrimination.

In 2004, the Danish Supreme Court decided in the *Føtex*-case[106] that a supermarket was allowed to impose a dress code, which precluded wearing headgear.[107] The Danish court considered, contrary to the ECJ in *IX v Wabe*, arguments of intersectionality and found that the rule indeed affected Muslim women disproportionally.[108] Nevertheless, this unequal treatment was still justified, as the neutral dress code promoted peace[109] in the workplace and aimed at creating a neutral image to the public.[110] Thus, although the policy did not prohibit religious symbols generally but solely headgear, affecting certain religions overproportionate, the judges decided that the dress code is not discriminatory.[111] Except acknowledging the intersectionality in the unequal treatment, the *Føtex*-judgement is highly similar to the jurisprudence of the ECJ.

The Swedish Ombudsman decided in the aftermath of the *Achbita*-decision, in conformity with the ECJ, that a dress code precluding political, religious, cultural, or ideological symbols is not discriminatory.[112] The case concerned a Muslim women which was rejected in an application procedure by the Scandinavian Airlines when she refused to take off her headscarf.[113] On the other hand, the Stockholm District Court decided in 1987 that a Sikh man cannot be refused to wear his turban for his job as a ticket seller.[114] The employer, a public transport undertaking, prescribed a working uniform while being silent on headgear. The judges held that wearing a turban in corporate colours would nearly eliminate the risk of disfunctions concerning the tasks of the man. Moreover, it held that the "Swedish society can afford to show the broad-mindedness"[115].With this, the aim of neutrality as such is questioned to some extent: the judges stressed that the openness of the Swedish society would be undermined by a ban or restriction of religious symbols in the public sphere. The underlying idea is that pluralism, instead of

[106] *Føtex* [2004] Supreme Court of Denmark U.2005.1265.H.
[107] Howard (n 38) 122.
[108] Maria Vittoria Onufrio, 'Intersectional Discrimination in the European Legal Systems: Toward a Common Solution?' (2014) 14 International Journal of Discrimination and the Law 126, 134.
[109] Note: It was considered to promote peace as it avoids conflicts between employees and between employees and customers.
[110] Onufrio (n 108) 134.
[111] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 92.
[112] *SAS v Alhassani* (Equality Ombudsman Sweden).
[113] Melek Saral and Şerif Onur Bahçecik (eds), *State, Religion, and Muslims: Between Discrimination and Protection at the Legislative, Executive, and Judicial Levels* (Brill 2020) 484.
[114] *Sikh Ticket Seller* [1987] Stockholm District Court T 3-107-86.
[115] Nanna Sundkvist, 'The Wearing of Religious Symbols at the Workplace in Sweden' 19 <https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1713352&fileOId=1713371>.

enforced uniformity or "republicanism" is desirable for a liberal democracy.[116] This assumption leads ultimately to a rejection of the neutrality as an objective in general. Thus, there is a certain inconsistency in the case law or change in the doctrine as a reaction to the *Achbita*-decision in Sweden.[117] It has to be mentioned that it does not become evident from the available literature, whether the employer was public or private. If the undertaking was public, this could explain this inconsistency, too as then private autonomy cannot be invoked by the undertaking. Another reason might be a change in the Swedish society between 1987 and 2017, as debates about multiculturalism, immigration and identity grew, influencing the discussion on wearing religious symbols.[118] While the concrete reasons for this change in jurisprudence cannot be unequivocally determined, it shall be pointed out, that the need for neutrality must not necessarily taken for granted. Following the Stockholm District Court, societal pluralism includes, that religious symbols can be worn in the workplace and the public sphere, too.

Dutch courts have repeatedly applied high standards to restrictions of religious freedom in private employment.[119] In 2004, the District Court of Arnhem ruled that the McDonalds dress code could not preclude women from wearing a headscarf.[120] Prohibiting headscarves in order to present a "uniform image" was not necessary, as a less restrictive measure would have been available: providing a headscarf in corporate colours, thus incorporating it in the dress code.[121] Similar to the Stockholm court, it was thereby established that the religious symbol in itself cannot undermine a company's image, but solely its design.

In Germany, the outcome is similar, however the approach is different. The *Bundesverfassungsgericht* held in 2003 that a dismissal of a saleswomen, subsequent to her decision to wear a headscarf was unjustified.[122] In contrast to the Belgian *HEMA*-case or the *Bougnaoui*-judgement, the court stated that the outcome could have been different, if the defendant would have been able to prove inefficiencies or economical losses stemming from

[116] See for this argument: Veit Bader, Katayoun Alidadi and Floris Vermeulen, 'Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction' (2013) 13 International Journal of Discrimination and the Law 54, 57; *Leyla Şahin v Turkey* [2005] European Court of Human Rights 44774/98 [108].
[117] Jenny Julén Votinius, 'Headscarves, Handshakes, and Plastic Underarm Covers. Recent Developments on Religion in Working Life in Sweden' (2019) 2019 Hungarian Labour Law 99, 95.
[118] McGoldrick (n 48) 20.
[119] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 96.
[120] *McDonalds* [2004] Arnhem District Court 354156 HA VERZ 04-5573.
[121] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 96.
[122] *Kaufhaus L -Beschluss der 2 Kammer des Ersten Senats* [2003] Bundesverfassungsgericht 1 BvR 792/03 [25].

wearing the headscarf.[123] The different outcome compared to the ECJ can be explained by the in chapter II mentioned distinction between equality- and liberty-rights. As the *Bundesverfassungsgericht* assessed the cases as interferences with freedom of religion instead of discrimination, it based the reasoning on the rule "the stronger a rule interferes with fundamental rights, the higher is the need for justification".[124] A ban, which is necessarily a strong interference with the freedom of religion, especially for female Muslims or male Sikhs and Jews, requires a high standard of justification. The *Bundesverfassungsgericht* came therefore to the conclusion that the abstract fear of economic losses or the anticipated wishes of customers are not capable of justifying such a far-reaching restriction of the freedom of religion.

In Spain, the airport service *Acciona* prohibited to wear clothing that undermines the uniform standards of their dress code.[125] A woman who was, based on that rule, not allowed to wear a headscarf brought action to Court, claiming that the rule violates her freedom of religion. The Social Court of Palma agreed with her *inter alia* on that ground and ordered Acciona to pay the applicant financial compensation.[126] The employer based its reasoning however on the argument of "presenting a uniform image" instead of an actual neutrality. Thus, employees in the same position as the claimant were able to wear more discrete religious symbols, such as a necklace.[127] In the terminology of the ECJ, this would likely be considered as a neutrality rule, which is however not applied consistently – and therefore discriminatory. Hence, the *Acciona*-judgement is reconcilable with the European case law.

These cases have shown, that the interpretation of neutrality rules and strict dress codes in light of religious freedom diverges strongly among the Member States. The Belgian case law is in its argumentation congruent with the doctrine developed years later by the ECJ. General neutrality bans are considered legitimate, as long as they are not based on the demand of a customer. This applies similar to the Danish *Føtex* case and the decision of the Swedish Ombudsman, where bans of religious, political or philosophical symbols were upheld. In Spain, there is no case law yet on consistently applied neutrality rules, the *Acciona*-case however fits into the ECJ jurisprudence, as an inconsistently applied neutrality rule was considered

[123] ibid.
[124] ibid 7, 8.
[125] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 98.
[126] *Acciona* [2017] Social Court 1 of Palma de Mallorca 0031/2017.
[127] European Commission. Directorate General for Justice and Consumers., *Religious clothing and symbols in employment* (n 3) 98.

discriminatory. In contrast, the Dutch judiciary has set high standards for restricting religious symbols in the workplace. Although the balanced interests, freedom to conduct a business against freedom of religion and non-discrimination are the same, the outcome is different. The Stockholm District Court has gone even more far in questioning the aim for neutrality generally as it stressed that Sweden as a liberal country can afford to show its tolerance towards religious symbols. All of these judgments diverge in their conclusion, but are united in the conflicting interests they balance. In the *Baby-Loup* decision, the French court came to the same result as the ECJ, however based on a different reasoning: The child care centre could not rely directly on its wish for neutrality, but only indirectly through the freedom *from* religion for the children, justifying the aim of neutrality. The ban was therefore justified, but not based on the aim for neutrality, as in the ECJ's decisions. The German case law diverges from the ECJ, too. Not only is the outcome different, also the reasoning diverges, as the *Bundesverfassungsgericht* assessed not the right to equality but the freedom of religion of the claimant. Opposite to the notion of the *Bougnaoui*-judgement, it was held that a restriction of freedom of religion might be justified, if the employer can prove economical disadvantages.[128]

ii. Occupational Requirements by Religious Employers

When it comes to the requirements religious employers can set, the picture is not less heterogenous. As already explained, the legal arrangements for the relation between the state and the church vary strongly: some Member State have a strong commitment to the church in their constitution, some have established state churches, others have no established churches but cooperation, while some separate religion and the state very strictly.[129] Although this does not determine the privileges of religious employers, it inevitably influences it. For instance, France and Sweden, which have no established church, have not implemented the facultative exemption for religious communities in Art 4 (2) of the EFD.[130] Twelve Member States have

[128] Note: this argumentation can also be found in later decision concerning teachers wearing religious symbols. In this, the BVerfG stated that a ban can only be justified by a concrete danger for the peace at school or the neutrality of the state. (See *Kopftuch im Lehramt - Beschluss des Ersten Senats* (Bundesverfassungsgericht) [141].)

[129] McCrea, *Religion and the Public Order of the European Union* (n 19) 34, 35.

[130] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Sweden 2021*. (Publications Office 2021) 5, 49 <https://data.europa.eu/doi/10.2838/304904> accessed 23 June 2022; European Commission. Directorate General for Justice and Consumers., *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: France 2021*. (Publications Office 2021) 70 <https://data.europa.eu/doi/10.2838/05858> accessed 29 May 2022.

transposed Art 4 (2) EFD into national law, without tensions arising.[131] For instance, the Dutch judiciary has established a strict control of religious communities acting as employers concerning the link of the occupation and the religion.[132] Similarly, the Slovakian constitutional court ruled in 2001 that the citizens have a right to judicial protection, meaning that also relationships under ecclesiastical law must be subject to judicial review.[133] This clearly resembles the reasoning the ECJ adopted in its *Egenberger*-decision. However, several Member States seem to grant (certain) religious communities a stronger right of self-determination than Art 4 (2) EFD allows. Ireland, Poland, Lithuania, Greece, Bulgaria and Hungary limited the exemption of Art 4 (2) not to grounds of religion and therefore also allowed for unequal treatment, for instance based on sexual orientation.[134] The German case law on the self-

[131] European Commission. Directorate General for Justice and Consumers., *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Spain 2021.* (Publications Office 2021) 50, 51 <https://data.europa.eu/doi/10.2838/35422> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: The Netherlands 2021.* (Publications Office 2021) 49 <https://data.europa.eu/doi/10.2838/549431> accessed 29 May 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Belgium 2021.* (Publications Office 2021) 65 <https://data.europa.eu/doi/10.2838/97201> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Malta 2021.* (Publications Office 2021) 44, 45 <https://data.europa.eu/doi/10.2838/161759> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Latvia 2021.* (Publications Office 2021) 46 <https://data.europa.eu/doi/10.2838/460562> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers., *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Slovakia 2021.* (Publications Office 2021) 58 <https://data.europa.eu/doi/10.2838/145703> accessed 29 May 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Italy 2021.* (Publications Office 2021) 35, 36 <https://data.europa.eu/doi/10.2838/09390> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78 : Slovenia 2021.* (Publications Office 2021) 47 <https://data.europa.eu/doi/10.2838/375> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78 : Croatia 2021.* (Publications Office 2021) 57 <https://data.europa.eu/doi/10.2838/884518> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Estonia 2021.* (Publications Office 2021) 26 <https://data.europa.eu/doi/10.2838/578936> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Luxembourg 2021.* (Publications Office 2021) 24 <https://data.europa.eu/doi/10.2838/964190> accessed 28 June 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78 : Czechia 2021.* (Publications Office 2021) 48 <https://data.europa.eu/doi/10.2838/3463> accessed 28 June 2022.

[132] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 131) 49.

[133] European Commission. Directorate General for Justice and Consumers., *Country Report* (n 131) 59.

[134] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and*

determination of religious communities and the judicial review, which is limited to a plausibility-control has already been mentioned above. In the decision[135], the *Bundesverfassungsgericht* held that the state and therefore the judiciary must remain neutral in religious questions.[136] The argumentation is based on the assumption, that the catholic church, respectively religious communities in general, pursues its aims and mission, even when it is active in the secular sphere, for instance running hospitals, child care centres, etc.[137] From this follows, that decision in that field, such as requirements for employees are potentially religion-based, too. If a court would assess these religious decisions based on secular standards, it would inevitably violate its neutrality-obligation.[138] Nonetheless, the judgement does not create a lacuna in *stricto sensu*: the rights of the catholic church are not absolute, hence, the courts shall exercise a plausibility-control.[139] Religious employer are therefore free in setting occupational requirements, as long as they can plausibly explain, based on the religious beliefs, dogmatics, tradition and doctrine, that a certain occupational requirement is necessary.[140, 141] In summary, the *Bundesverfassungsgericht* has not granted religious communities a *carte blanche*, as the requirements still need to be plausible, but it has removed religiously motivated decisions from judicial review with secular standards. In Austria, the national transposition of the EFD remain ambiguous. With a broad formulation in the law and a vague explanatory memorandum, the legislator did not close the door to a very broad interpretation of the exemption for religious

2000/78: Poland 2021. (Publications Office 2021) 55 <https://data.europa.eu/doi/10.2838/749944> accessed 29 May 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Lithuania 2021*. (Publications Office 2021) 64 <https://data.europa.eu/doi/10.2838/415417> accessed 29 May 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Bulgaria 2021*. (Publications Office 2021) 53, 54 <https://data.europa.eu/doi/10.2838/87746> accessed 29 May 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Hungary 2021*. (Publications Office 2021) 66 <https://data.europa.eu/doi/10.2838/065465> accessed 29 May 2022; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Greece 2021*. (Publications Office 2021) 50 <https://data.europa.eu/doi/10.2838/017442> accessed 29 May 2022; Amy Dunne, 'Tracing the Scope of Religious Exemptions under National and EU Law: Section 37(1) of the Irish Employment Equality Acts 1998–2011 and Ireland's Obligations Under the EU Framework Directive on Employment and Occupation, Directive 2000/78/EC' (2015) 31 Utrecht Journal of International and European Law 33, 41.

[135] Note: Interestingly, the decision from 2014 is not solely a precedent, but concerns the case *IR v JQ*.

[136] *Beschluss des Zweiten Senats - 2 BvR 661/12* [2014] Bundesverfassungsgericht 2 BvR 661/12 [86–89].

[137] Ferdinand Kirchhof, 'Rechtsprechung Im Dialog von Bundesverfassungsgericht Und Europäischem Gerichtshof: Referat Auf Den Hirschberger Gesprächen, 30.10.2018' (2019) 50 Zeitschrift für Arbeitsrecht 163, 168.

[138] *Beschluss des Zweiten Senats - 2 BvR 661/12* (n 136) paras 142, 145.

[139] ibid 115–125.

[140] ibid 118.

[141] Note: In the present case, this means that the dismissal of the doctor for marrying a second time can be considered as lawful.

employers.[142] So far, religious employers, in particular the catholic church has been keen on avoiding judicial proceedings and aim for settlements with non-disclosure agreements.[143] In light of the open wording and the lack of precedents, it can therefore not precluded that the provision will be interpreted in a way, that even ethos-based breweries, lumber mills or hotels benefit from the exemption in Art 4 (2) EFD.[144] Moreover, two decisions of the highest Austrian courts must be mentioned. In 1987, the constitutional court decided, that even internal matters of the church are subject to national law – however the internal matters itself, for instance being a member of a religion can exclusively be defined by the communities themselves.[145] The decision was based on the constitution which stipulates that "Every […] religious society […] has the right to […]administers its internal affairs autonomously […], but is like every society subject to the general laws […]".[146] The Austrian Supreme Court has however interpreted this provision very widely in 1995: it was established that the dismissal of a teacher at a religious school subsequently to his public criticism of religion was lawful under the right to self-determination of religious communities.[147] This was not changed by the fact that, explicitly mentioned in the judgement, the tasks of the teacher were not at the core of religious activities.[148] In Denmark, the legal situation is comparable. In 2018, the Danish Board of Equal Treatment decided that a dog shelter, run by Christian organisation was allowed to reject an applicant as she was not a member of the Church.[149] In 2020, the Board ruled similarly in a case concerning the position as a kitchen assistant in a shelter, run by the Danish National Church. The job offer stated, that a membership is required. In both cases, the Board of Equal Treatment held, that the jobs include pastoral counselling, which justified the unequal treatment.[150] Lastly, Cyprus granted its state church the constitutional right of absolute autonomy and the exclusive right to regulate its internal matters.[151] Thus, a judicial review of the church is explicitly

[142] Dieter Schindlauer, 'Anfrage Bzgl. "Country Report Non-Discrimination. Austria"' (16 June 2022).
[143] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Austria 2021*. (Publications Office 2021) 38 <https://data.europa.eu/doi/10.2838/44445> accessed 29 May 2022.
[144] ibid 38, 39.
[145] Doris Wakolbinger, 'Gutachten Zum Gebot Der Diskriminierungsfreien Stellenausschreibung Gemäß § 23 Abs 1 GlBG' 49 <https://www.gleichbehandlungsanwaltschaft.gv.at/dam/jcr:213b6d6c-eb22-4c3c-84fd-199539fd1b83/Gutachten%20M%C3%A4rz%202013%20final.pdf> accessed 27 June 2022.
[146] Staatsgrundgesetz, Austria 1867. Art. 15.
[147] *OGH 12041995, 9 ObA 31/95* [1995] Oberster Gerichtshof der Republik Österreich 9 ObA 31/95 12.
[148] Peter Hanau and Jürgen Kühling (eds), *Selbstbestimmung der Kirchen und Bürgerrechte: 1. Berliner Gespräche über das Verhältnis von Staat und Religionsgemeinschaften* (1. Aufl, Nomos 2004) 38.
[149] European Commission. Directorate General for Justice and Consumers., *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and 2000/78: Denmark 2021*. (Publications Office 2021) 53 <https://data.europa.eu/doi/10.2838/448342> accessed 29 May 2022.
[150] ibid.
[151] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination: Transposition and Implementation at National Level of Council Directives 2000/43 and*

precluded by constitutional law. Although there is no case law, such an absolute formulation leaves little room for interpretation.

This short summary of national (constitutional) law and case law concerning religious symbols in private employment and the extent of the right to self-determination of religious employers shall illustrate the diversity among the Member States in both matters. What becomes evident is that the judgements of the ECJ cannot be reconciled unproblematically with the constitutions and doctrines of the (constitutional) courts of the Member States. While for some countries, the national law and jurisprudence overlap heavily or can be reconciled easily with the ECJ's case law, it is different for other Member States. Sometimes, the reasoning is similar and the outcome diverges, sometimes already the line of thought is different to the approach of the ECJ.

c) Constitutional Tensions and Conflicts within the European Legal System

After the case law of the ECJ and of the national (constitutional) courts has been presented, this part of the chapter aims at carving out the tensions and conflicts between the two legal orders in ensuring religious freedom. The word "tension" shall be used, when there are certain differences in the jurisprudences, which can however co-exist. The word "conflict" shall not (necessarily) be understood in the sense of an open conflict like *Landtova* or the *PSPP*-judgement, but rather as case law of the two legal orders that cannot be reconciled with each other, thus cannot co-exist.

In a community of law with 27 Member States and thereby 27 national legal orders tensions and even conflicts are inevitable. In order to ensure the effectiveness of EU law, the primacy of EU law has been established by the ECJ as a conflict rule.[152] Therefore, in cases of conflicts between the European and a national legal order, the former takes precedence. Although tensions and conflicts with the national legal orders are not desirable, they can be *a priori* resolved unproblematically through this accepted conflict rule: setting national laws aside and change settled case law can be seen as a "price" which has to be paid for being part in a supranational legal order. Primacy of EU law should however not be confused with an actual superiority of the EU legal order. While this will be assessed in more detail in chapter IV, it

2000/78: Cyprus 2021. (Publications Office 2021) 65 <https://data.europa.eu/doi/10.2838/141421> accessed 29 May 2022.

[152] *Flaminio Costa v ENEL* [1964] European Court of Justice Case 6-64.

shall be stated here that conflicts of fundamental, constitutional nature pose a danger to the viability of the European legal system – and must therefore be avoided.[153]

First, the relationship between the European and the national legal orders concerning their jurisprudence on religious symbols in the workplace will be assessed. In this it has to be reemphasised, that the ECJ has adopted a margin-of-appreciation doctrine, leaving the Member States room for determining their approach towards religious symbols in the workplace. It did not decide that neutrality-policies are at the core of the freedom to conduct a business and *must* be considered lawful. Instead, it follows from the underlying EFD[154] that Member States remain free to adopt higher standards for the protection of fundamental rights.[155] It must be stated, that in two fundamental rights, freedom to conduct a business and freedom of religion are balanced against each other, thus a higher protection of one right would be inevitably to the detriment of the other.[156] Nonetheless, especially *IX v Wabe* and *Müller v MJ* has shown that neutrality rules must be assessed in light of the freedom of religion of the employee, too and thereby opened the door for national courts to assign a higher weight to freedom of religion.

It is beyond doubt that the judgements in Belgium, the *Føtex*-case[157], and the *Acciona*-decision[158] in Spain issued prior to *Achbita*, *Bougnaoui* and *IX v Wabe* and *Müller v MJ* as well as the decision of Swedish Ombudsman[159], pursuant to those judgements are similar in the result and reasoning to the ECJ's approach. Due to the margin-of-appreciation doctrine it cannot be concluded that the Dutch judgement in the *McDonalds*-case[160] give rise to tensions or even conflicts with the jurisprudence of the ECJs judgements. The court solely came to a different conclusion in weighting the conflicting interest of freedom of religion and the wish for neutrality of the employer. This applies in a similar way to the Swedish judgment concerning a Sikh, wanting to wear a turban at work.[161] However, the Court emphasised, different to the ECJ, that Sweden can afford to show its openness and tolerance – and thereby questioned the aim of neutrality as such. As stated above, the Stockholm District Court has rejected that neutrality is

[153] Matej Avbelj, 'Constitutional Pluralism and Authoritarianism' (2020) 21 German Law Journal 1023, 1024.
[154] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation Art 8 (1).
[155] Eleanor Spaventa, 'What Is the Point of Minimum Harmonization of Fundamental Rights? Some Further Reflections on the Achbita Case.' (21 March 2017) <http://eulawanalysis.blogspot.com/2017/03/what-is-point-of-minimum-harmonization.html> accessed 27 June 2022.
[156] Bilz (n 13) 150.
[157] *Føtex* (n 106).
[158] *Acciona* (n 126).
[159] *SAS v Alhassani* (n 112).
[160] *McDonalds* (n 120).
[161] *Sikh Ticket Seller* (n 114).

desirable in the first place by stipulating openness and pluralism as normative principles for Swedish society.

Two national doctrines that however significantly diverge from the ECJ's case law are the French and the German. The French decision in the *Baby Loup*-case[162] is similar in the result, but not in the reasoning to the *Achbita*-case. The judgement stated explicitly that the employer cannot rely on neutrality deriving from the constitutionally enshrined principle of *laïcité*, but only the negative freedom of religion of the children. The aim of neutrality as such was therefore not recognised as legitimate. It remains open whether the French courts considered the freedom of religion of children worth protecting in particular, due to their influenceability. This would mean, that neutrality rules, where the employee solely works vis-à-vis (adult) customers or colleagues would be significantly harder to justify.[163] What needs to be pointed out, is that the court did not weight freedom of religion against the objective of neutrality, but rather freedom *of* religion against freedom *from* religion.

The German judgement[164] diverges also in its reasoning from the ECJ. As stated above, the *Achbita*-judgement follows the idea of "if everybody is discriminated, there is no more discrimination", thus, the ECJ considers religious freedom primarily as a matter of equality.[165] In contrast, the *Bundesverfassungsgericht* assessed the case of the saleswomen wearing a headscarf in light of the freedom of religion as an individual liberty. This leads inevitably to an assessment of the individual situation: it must be examined to what extent the freedom of religion is restricted[166] and how this restriction can be justified. This led in the presented cases to a higher level of protection of fundamental rights for the claimants. Nonetheless, the reversal conclusion of the judgement is that if an employer suffers actual economic losses, he might be able restrict the wearing of religious symbols, without imposing a policy of neutrality.[167] A headscarf, which tends to be more conflictual in countries with a Christian inheritance than a crucifix-necklace, could therefore potentially restricted while the latter remains to be

[162] *Baby Loup v Hafif* (n 102).
[163] Hunter-Henin (n 104) 110.
[164] *Kaufhaus L -Beschluss der 2. Kammer des Ersten Senats* (n 122).
[165] Stéphanie Hennette-Vauchez, 'Equality and the Market: The Unhappy Fate of Religious Discrimination in Europe' (2017) 13 European Constitutional Law Review 744, 748.
[166] Note: Freedom of religion might be less affected, when Christian necklaces are forbidden, compared to a prohibition of headscarves, as the latter can be interpreted as a religious obligation.
[167] Silke Ruth Laskowski, 'Der Streit Um Das Kopftuch Geht Weiter — Warum Das Diskriminierungsverbot Wegen Der Religion Nach Nationalem Und Europäischem Recht Immer Bedeutsamer Wird' (2003) 36 Kritische Justiz 420, 438.

allowed.[168] To make it more specific, in a hypothetical example, fundamental Christians or right-wing movements might boycott a store where employees wear a headscarf, as they feel threatened in their status as dominant religious community or out of rejection of multiculturalism and pluralism. The employer could then prove that he suffered economic losses due to the wearing of headscarves. The mentioned hypothetical reasons apply however either not, or only reduced to Christian symbols: a crucifix-necklace is not only less visible, but it is also less provocative[169] in Member States which are all, to different extents, shaped by Christianity. In light of an empirical reality, with Muslims being a minority and ongoing debates about multiculturalism and identity, the approach of the *Bundesverfassungsgericht* could lead to the fact, that Islamic symbols might be more easily banned by employers as Christian symbols.[170] This scenario would stand in conflict with the jurisprudence of the ECJ.

Generally, the ECJ tried to avoid tensions and conflicts in *Achbita* and *Bougnaoui* by respecting national particularities and refrained from imposing a "one-size-fits-it-all"-solution. It thereby set a minimum standard[171], while allowing national courts and legislators to create a higher level of protection. However, in its effect it does not entirely achieve the aim of accommodating the national approaches to religious symbols at work. The German interpretation led to a higher protection for the applicant in the specific case, it does however not provide a higher standard *per se*. As the French interpretation, the reasoning is based on different conflicting interests compared to the ECJ. The courts have not assigned a lower weight to freedom to conduct a business, like for instance the Dutch court, but assessed freedom of religion as a fundamental right. Depending of the facts of the case this can lead to a higher standard, but also to a lower one, as shown with the hypothetical example above. The standard is therefore not *higher* but *different*. Art 8 (1) EFD allows however only for *higher* national standards. Art 53 CFR also allows generally for higher national fundamental right standards. With the *Melloni*-judgement, the ECJ has however established, that these higher national standards can only be realized if the "primacy, unity and effectiveness" of EU law is not compromised.[172] As the French Court

[168] Stephan Wagner, 'Kopftuch in Beschäftigungsverhältnissen – Zu Den Auswirkungen Der EuGH-Urteile in Den Rechtssachen Achbita u.a. (Rs. C-157/15) Und Bougnaoui u.a. (Rs. C-188/15) Auf Den Nationalen Grundrechtsschutz' (2018) 53 Europarecht 724, 743.
[169] Note: This shall not be misunderstood as a headscarf in itself being provocative, but rather that some movements and groups consider it as provocation.
[170] See Christine Langenfeld, 'Die Diskussion Um Das Kopftuch Verkürzt Das Problem Der Integration, (Zugleich Anmerkung Zu BVerfG, U. v. 24.09.2003 - 2 BvR 1436/02 -)' (2004) 52 Recht der Jugend und des Bildungswesens 4, 6. Her elaborations concern the headscarf in public employment, the reasoning of the Bundesverfassungsgericht has however been identical.
[171] Note: neutrality rules must be applied in a genuine and systematic manner and cannot be imposed in response to a request of a customer.
[172] *Melloni v Ministerio Fiscal* [2013] European Court of Justice C-399/11 [60].

of Cassation and the German *Bundesverfassungsgericht* adopted *a priori* different approaches, their doctrines cannot co-exist with the jurisprudence of the ECJ. Therefore, both national doctrines cannot be subsumed under the *Melloni*-doctrine nor under Art 8 (1) EFD.[173] Thus, the liberal approach of the ECJ succeeded in accommodating the jurisprudence of most Member States, however led to a conflict with established case law in France and Germany. The courts in both countries based their reasoning in the case of the saleswomen, respectively *Baby Loup* on different premises, while the ECJ assessed the cases as a question of non-discrimination.

Concerning the privileges of religious employers, the relationship becomes slightly more complex. Again, the majority of all Member States have either not transposed the exemption in Art 4 (2) EFD, or in a manner that is compliant with the Directive. In several Member States inconsistencies with this provision exist, either in the positive law or in the case law of their constitutional courts. As stated above, Ireland, Bulgaria, Hungary, Greece, Lithuania and Poland have transposed Art 4 (2) EFD incompliantly, by allowing religious employers to discriminate not only on grounds of religion but also on other grounds, for instance sexual orientation.[174] Although this incompliance might be traced back to the status of churches in general and thereby constitutional law, the mal-transposition of a Directive alone cannot constitute a constitutional conflict. The national transpositions in Ireland, Greek, Polish and Bulgarian law should therefore rather be seen as tensions, that can be resolved with interpretation in conformity and potentially a clarifying reference of the respective national courts in a preliminary ruling procedure. The Hungarian and Lithuanian law provide not only in the transposition of the EFD wider privileges than foreseen by the EU legislator, but the special role of the churches is also enshrined in other legislative acts. Namely, privileges are established in the Hungarian Act on Churches and the National Public Education Act, as well as the Lithuanian Labour Code and the Lithuanian Agreement with the Holy See, a concordat.[175] Nevertheless, except the Lithuanian concordat are all acts ordinary laws and should therefore be considered as tensions, which can be resolved through primacy of EU law – without creating

[173] Wagner (n 168) 743, 744.
[174] European Commission. Directorate General for Justice and Consumers. and others, *Country Report* (n 134) 53, 54; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 134) 66; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 134) 64; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 134) 55; European Commission. Directorate General for Justice and Consumers. and others, *Country Report* (n 134) 50; Dunne (n 134) 41.
[175] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 134) 66–68; European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 134) 62–64.

a constitutional conflict between the legal orders.[176] The Lithuanian agreement with the Holy See, an international Treaty concluded before the accession to the EU, states that religion teachers require a permission by the local priest. This raises not only questions of public international law[177], but also about the compliance with Art 4 (2) EFD, as the church would be able to make characteristics such as sexual orientation a condition for the permission. Nevertheless, as it only applies to religion teachers, a very wide understanding of the *Egenberger*-jurisprudence might be able to accommodate this national particularity, too.

In the above-mentioned Member States, the EU regulations on privileges for religious employers have given rise to tensions, which are however not of a constitutional nature – and can therefore be resolved through primacy. Although these tensions are not desirable, they are inevitable in a legal system with 27 Member States.

In contrast to this are the legal arrangements and judgements in Austria, Cyprus, Germany and Denmark.

The Danish cases in 2018 and 2020, pursuant to the judgements of the ECJ have shown, that the Board of Equal Treatment, in a decision which became final, refrains from substantially assessing whether the occupational requirement is sufficiently linked to the job.[178] This reluctance resembles the German plausibility-doctrine of the *Bundesverfassungsgericht* – contrary to the *Egenberger*-judgement. It has however to be stressed, that although the judgement became final, the decision was issued by the Board of Equal Treatment, thus neither a court nor the Danish Supreme Court. Thus, the legal situation can be seen as conflict, which is however not of constitutional nature.

The German *Bundesverfassungsgericht* and its "plausibility"-control concerning occupational requirements is settled case law and is based on the GG and the *Reichskonkordat*. The concordat, concluded in 1933 by the national socialist regime, granted the catholic church certain privileges, for instance religious education in public schools or church tax.[179, 180] It is

[176] Leonard FM Besselink, *A Composite European Constitution* (Europa Law Pub 2007) 9 <https://public.ebookcentral.proquest.com/choice/publicfullrecord.aspx?p=433364> accessed 20 May 2022.
[177] See van den Brink (n 27) 108, 109.
[178] European Commission. Directorate General for Justice and Consumers., *Country Report Non-Discrimination* (n 149) 53.
[179] 'Vor 85 Jahren: Vatikan Und Deutsches Reich Unterzeichnen "Reichskonkordat"' (*Bundeszentrale für politische Bildung*, 16 July 2018) <https://www.bpb.de/kurz-knapp/hintergrund-aktuell/272739/vor-85-jahren-vatikan-und-deutsches-reich-unterzeichnen-reichskonkordat/>.
[180] Note: The national socialist regime aimed at gaining further power and restricting resistance through the concordat in return for the mentioned privileges. See ibid.

an international treaty with the Holy See, comparable to the Lithuanian agreement.[181] The right to self-determination, stemming from the GG and the *Reichskonkordat* prohibits that courts review the occupational requirements under secular standards. Instead, they must limit themselves to a plausibility-control of the self-perception of the church. This self-restraint is fundamentally in conflict with the *Egenberger*-judgement. Although both courts balance the same conflicting interests, access to justice and negative freedom of religion against (collective) freedom of religion, the judges come to different outcomes. Based on constitutional law, the *Bundesverfassungsgericht* held that the occupational requirements of religious bodies cannot be reviewed under secular standards – and therefore not be subject to the control of national courts.

While the decision of the Austrian constitutional court of 1987 can still be reconciled with the *Egenberger*-judgement, it is different for the judgement in 1995. As mentioned above, the court has explicitly stated that the tasks of the teacher were not at the core of religious activities. The ECJ has however established in its recent decision, that a sufficient direct link between the occupational requirement and the activity is needed. As the tasks of the teacher were not of religious nature, it can be questioned whether the requirement of religious compliance is sufficiently linked to the activity. Although it is clear from the case law, that the religious communities are subject to the laws, the right to self-determination is interpreted very wide by the Supreme Court, which is hardly reconcilable with the jurisprudence of the ECJ.

In Cyprus, the right to self-determination for the Greek-Orthodox Church's is protected by Art 110 (1) of the constitution. The provision states that the church has the exclusive right to regulate and administer its internal affairs.[182] This absolute autonomy can hardly be reconciled with the obligation of national courts to review occupational requirements by religious employers. With the exclusive right to regulate internal matters, the constitution does not only grant the Greek-Orthodox Church the possibility to discriminate based on other grounds that religion, but also precludes judicial control.[183]

In summary, the jurisprudence of the ECJ on the privileges of religious employers has given rise to tensions and conflicts in several Member States. While many Member States have transposed the EFD compliantly, certain states granted the religious communities a wider right to self-determination. In regard to discrimination on other grounds than on religion, national

[181] van den Brink (n 27) 110.
[182] European Commission. Directorate General for Justice and Consumers. and others, *Country Report Non-Discrimination* (n 151) 65.
[183] ibid 65, 66.

law is rather in conflict with the legislation itself, and only indirectly with the jurisprudence of the ECJ. With regard to Denmark, it has to be stated, that the national case law is likely to be contrary to *Egenberger*, however, the decisions were only issued by the Board of Equal Treatment and not based on constitutional law. Thus, it cannot be seen as a constitutional conflict. The case law of the highest courts or of constitutional courts, as well as constitutional provisions in Germany, Austria and Cyprus are however irreconcilable with the jurisprudence with the ECJ.

IV. Supremacy and a European Protection of the Freedom of Religion

After having presented the European and national jurisprudence on religious freedom, and the tensions between the two examined, the relationship between the legal orders will be assessed on a more abstract level. In order to understand the potentially arising constitutional conflicts around religious freedom, a theoretical groundwork needs to be laid. Therefore, this chapter will first briefly clarify the demarcation in jurisdiction between the ECJ and the national constitutional courts. After that, the different theories on supremacy and the constitutional order of the ECJ will be presented, as well as the limits to supremacy of EU law.

a) EU- and national Fundamental Rights Protection – Complementing or Alternative?

The EU-system of fundamental rights protection, the CFR, is contrary to the ECHR or national constitutions not generally applicable, but only to the Member States when implementing EU law.[184] This limitation in scope raises the question, whether the CFR "replaces" the national fundamental rights protection when it is applicable or whether it forms an additional layer.

The idea that the CFR is applicable instead of national fundamental rights has been referred to as "separation theory".[185] This would mean that when the Member States are implementing EU law in the sense of Art 51 (1) CFR, they would be bound by the Charter, and not by national fundamental rights. This theory of two separated orders of fundamental rights protection is rooted in the historical development of the EU fundamental rights protection and the *Solange-*

[184] Charter of Fundamental Rights of the European Union Art 51 (1).
[185] Bilz (n 13) 28.

judgements of the *Bundesverfassungsgericht*.[186] In *Solange II*, the *Bundesverfassungsgericht* clarified that it would refrain from a judicial review of EU law and the acts of national bodies based on EU law; thereby also implying that the application of the Charter precludes the application of the GG.[187, 188] However, in light of an expansive interpretation of Art 51 (1) CFR by the ECJ[189], the *Bundesverfassungsgericht* has changed its view recently, in favour of a cumulative application of the CFR and national fundamental rights.[190]

The EU literature always leaned towards the concept that the CFR does not replace the national legal orders, but rather overlaps, thus forming an additional layer for the protection of fundamental rights.[191] This means, that national fundamental rights can still be applied, as long as it is reconcilable with the European fundamental rights protection. This is also reflected in the jurisprudence of the ECJ.[192] Moreover, Art 53 CFR, allowing for the application of higher fundamental rights standards in the Member States, is based on the assumption that national and European fundamental rights can be applied in parallel and do not preclude each other.[193]

Thus, in light of the recent developments in the European protection of fundamental rights, the separation theory, as stipulated by the *Bundesverfassungsgericht* in the *Solange II* judgement cannot be upheld anymore.[194] The codification of EU fundamental rights in the Charter and the wide interpretation of its scope by the ECJ result in a far-reaching system of fundamental rights protection. Under the separation theory, the national fundamental rights would simply be supplanted and become irrelevant – something that was not intended by the CFR nor is in the interest of national (constitutional) courts.[195] Therefore, it must be assumed that the CFR overlays national fundamental rights, however without replacing them. The national constitutions remain, *a priori*, applicable. While this means that national fundamental rights catalogues are not replaced, a parallel application can also lead to conflicts.

[186] *Solange I - Beschluss vom 29051974* [1974] Bundesverfassungsgericht BvL 52/71 [44–46]; *Solange II - Beschluss vom 22101986* [1986] Bundesverfassungsgericht 2 BvR 197/83 [123–125].
[187] Note: This is only the case when the national bodies do not have a margin of discretion in the implementation of EU law.
[188] *Solange II - Beschluss vom 22.10.1986* (n 186) para 127.
[189] See e.g. *Åklagaren v Hans Åkerberg Fransson* [2013] European Court of Justice C-617/10.
[190] *Recht auf Vergessen I - Beschluss des Ersten Senats vom 6 November 2019* [2019] Bundesverfassungsgericht 1 BvR 16/13 [43, 63–65].
[191] See Bilz (n 13) 30.
[192] See e.g. *Texdata Software GmbH* [2013] European Court of Justice C-418/11 [72].
[193] Bilz (n 13) 31.
[194] Note: this shall however not be misinterpreted as the *Solange II* judgement having no relevance anymore.
[195] Bilz (n 13) 32.

b) Supremacy of EU law

The research question hints at the arising tensions between the Member States and the EU concerning the objective of effective protection and, most notably, the uniform interpretation of religious freedom, due to the diverging views on religious freedom in the Member States. In order to understand the roots of these tensions, and to develop reconciling approaches, the relationship between the two legal orders must be clarified. At the core of this, is the question of the ultimate authority, thus which order takes precedence in a case of a conflict.

As the EU law literature has not been entirely consistent in its terminology[196], the used terms shall be clarified. The concepts of "ultimate authority" and "supremacy" are centred around the question which legal order is superior to the other, thus a matter of hierarchy.[197] In contrast "primacy" is solely a conflict rule from which no statement about a hierarchy can be derived.[198]

With the Treaty of Maastricht, a constitutional debate around the EU and its Member States became increasingly salient, fuelled by judgements of constitutional courts, the failed European Constitution and the further European integration with Treaty changes and the ratification of the CFR.[199] Many legal scholars engaged in constitutional reflection in order to develop a theory to appropriately describe the EU legal order, including a position concerning the ultimate authority within the legal system. At the beginning of the EU[200], the dominant perspective was monistic[201], so assuming that European law and national law form one legal order with a clear hierarchy of norms.[202] Monism is based on the premise that all legal system are based on one basic norm, the *Grundnorm*, on which all provisions are ultimately based and from which the hierarchy of norms can be derived. Monism does not determine whether national or European law is superior[203], but only that there can be only one *Grundnorm*, establishing an unambiguous

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[196] Tomi Tuominen, 'Reconceptualizing the Primacy–Supremacy Debate in EU Law' (2020) 47 Legal Issues of Economic Integration 245, 246, 247.
[197] Matej Avbelj, 'Supremacy or Primacy of EU Law-(Why) Does It Matter?: Supremacy or Primacy of EU Law' (2011) 17 European Law Journal 744, 745, 753.
[198] Tuominen (n 196) 251.
[199] Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 European Law Journal 125, 125.
[200] Note: the beginning of the EU shall be understood as the European Coal and Steel Community, not the formal beginning with the Treaty of Maastricht.
[201] Ingolf Gunnar Anton Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 Columbia Journal of European Law 349, 384.
[202] Torben Spaak, 'Kelsen on Monism and Dualism' in Marko Novakovic (ed), *Basic Concepts of Public International Law: Monism and Dualism* (lter DOO and Faculty of Law, University of Belgrade, Institute of Comparative Law 2013) 323 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231530>.
[203] Note: *Inter alia* Jellinek argued, that the *Grundnorm* is at the national level, as the states voluntarily created international law and committed themselves to be bound by it. Kelsen himself has argued, that the *Grundnorm* must be at international law, with *pacta sunt servanda* as norm of customary international law. According to Kelsen, Jellineks argumentation would lead to a rejection of international in general, as then international law would then always based on the respective national legal orders, which leads the concept of international law *ad*

hierarchy of norms, like in a national legal order.[204] The Treaty of Maastricht gave rise to more complex approaches.[205] Instead of applying models developed for national states, scholars developed a new, pluralistic perspective, which takes the particularities of the EU into account.

In the following, the theories Constitutional Pluralism, Multilevel Constitutionalism and Composite Constitutionalism will be discussed, with a particular focus on their approach towards the question of ultimate authority within the EU legal order. These theories have been chosen based on their relevance, considering the discussion in legal literature and their theoretical thickness. The choice of a theory and its premises inevitably influences the analysis based on it.[206] However, none of the above-mentioned theories can claim to be undisputed or without theoretical shortcomings. Therefore, three convincing theories will be discussed, including their strengths and weaknesses, in order to encompass several perspectives on the European constitutional order. This theoretically-open approach shall contribute to the validity of the thesis.

The theory of "Constitutional Pluralism" rejected the monistic view of influential scholars like Kelsen and adopted a more realistic perspective: there is no hierarchy between the national and the EU legal order and both orders claim to be supreme over the other.[207] Instead, the approach is integrative, trying to accommodate the claims of authority of the EU as well as of the Member States.[208] By recognizing both claims as legitimate, Constitutional Pluralism leaves however the very core of the constitutional debate unanswered, the question of ultimate authority remains open.[209] While such a view would be inconceivable for a national state, it takes into account the particularities of the EU as a supranational organisation. Those in favour of Constitutional Pluralism, *inter alia*, Miguel Poiares Maduro, respond to that point of critique two-fold: on the empirical level, the theory successfully describes the EU constitutional system, neither the national nor the EU legal order subordinated itself ultimately.[210] Therefore, a theory should

absurdum. See in that regard Markus D Fyrnys, 'Primat Des Völkerrechts – Die Völkerrechtslehre Hans Kelsens' (2006) 3 Studentische Zeitschrift für Rechtswissenschaft Heidelberg 237.

[204] Ines Weyland, 'The Application of Kelsen's Theory of the Legal System to European Community Law: The Supremacy Puzzle Resolved' (2002) 21 Law and Philosophy 1, 23.

[205] Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 European Law Journal 389, 412.

[206] Giacinto della Cananea, 'Is European Constitutionalism Really "Multilevel"?' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 283, 286.

[207] Leonardo Pierdominici, 'The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?' (2017) 9 Perspectives on Federalism E, 124.

[208] Matej Avbelj, 'The Federal Constitutional Court Rules for a Bright Future of Constitutional Pluralism' (2020) 21 German Law Journal 27, 28.

[209] Pierdominici (n 207) 127.

[210] Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism', *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 73, 74 <https://www-bloomsburycollections-

depict this ambiguity and uncertainty, too. As Maduro summarizes it concisely: "Empirically, the open question remains open."[211] Constitutional Pluralism however also claims to have a normative relevance. In this, it is stated that the question of ultimate authority *should* remain unanswered, deduced from the fact that the national claims and the EU claim to have supremacy are equally legitimate.[212] From this assumption follows that neither of them can be superior to the other. Instead, both sides should engage in "self-policing", in other words, a judicial dialogue in order to avoid conflicts in the first place.[213] Moreover, the exchange between the ECJ and national constitutional courts should also result in jurisprudence which accommodates the respective claim of authority of the other legal order.[214] Through this, the national and the EU legal order do not become a threat for each other and thereby avoid constitutional conflicts.[215] Thus, according to Constitutional Pluralism, the Member States and the EU can both claim legitimately to have the ultimate authority.[216] This should however not be seen as a weakness or a paradox, but rather as an empirical fact, and normatively as an inevitable result, which becomes unproblematic through discursive practice by the ECJ and the national constitutional courts.

However, it has to be mentioned, that the lack of answer to the question of the ultimate authority makes the Constitutional Pluralism fragile. The theory has been developed in the aftermath of the Treaty of Maastricht, thus a new, immature structure.[217] Nonetheless, over the years the EU has changed further and so did the jurisprudence of the national constitutional courts. For a long time, judicial dialogue, even though sometimes silent, seemed to work; even the vocal *Bundesverfassungsgericht* adopted a policy of "all bark and no bite"[218] – thus open constitutional conflicts could be avoided. This has however changed in the last years. In cases of conflicts, the shortcomings of Constitutional Pluralism become more evident. With its pluralistic view and its undecidedness towards the question of ultimate authority, Constitutional Pluralism is prone to abuses.[219] Decisions by national constitutional courts in the Czech

com.proxy.library.uu.nl/book/constitutional-pluralism-in-the-european-union-and-beyond/ch4-three-claims-of-constitutional-pluralism>.
[211] ibid 74.
[212] Pierdominici (n 207) 127.
[213] Gareth Davies, 'Constitutional Disagreement in Europe and the Search for Pluralism', *Constitutional Pluralism in the European Union and Beyond* (2010) 269 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1559323>.
[214] Neil Walker, 'Constitutional Pluralism Revisited' (2016) 22 European Law Journal 333, 334.
[215] Pierdominici (n 207) 127.
[216] Poiares Maduro (n 210) 75.
[217] Walker (n 214) 337.
[218] R Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 Maastricht Journal of European and Comparative Law 136, 147.
[219] Pierdominici (n 207) 144.

Republic, Hungary, Germany and, most recently, Poland shed light on the instability inherent to Constitutional Pluralism.[220] When, in the words of above, the courts in the Member States start to "bite", thus a conflict arises, the theory reaches its limits. Therefore, Constitutional Pluralism has been described as creating a "stability in instability"[221].

In conclusion, Constitutional Pluralism claims, that from an empirical perspective, there is no hierarchy between the EU legal order and the national ones, while both however claim to have the ultimate authority. On the descriptive level, the question therefore simply remains open. Normatively, Constitutional Pluralism argues that this is the inevitable result from the assumption that both sides claim to have the authority legitimately. Although Constitutional Pluralism has received much criticism, it remains, especially concerning its descriptive accuracy highly valuable.

Another theory that shall be presented is Multilevel Constitutionalism. The theory, developed by Ingolf Pernice describes the European constitutional order as one of different levels.[222] With the creation of the EU, another "constitutional layer" was added to the national constitutional orders of the Member States.[223] This however shall not indicate a hierarchy between the two levels. Multilevel Constitutionalism also acknowledges, that the two levels are not entirely separate, but depend on each other and influence each other.[224] For instance, the Treaties and their interpretation determine the division of competences and therefore the regulatory area of the constitutions. On the other hand, the national constitutions form the legal basis of the Treaties and, as will be shown below, also pose certain limits to European integration.[225] One aspect, in which Multilevel Constitutionalism diverges from Constitutional Pluralism is the perspective on how the legal orders interact with each other. While the latter remains arguably vague in that question, Multilevel Constitutionalism states the legal orders complement each other. Thus, although the legal orders are interdependent, they do not overlap.[226] Therefore, there can be, in theory, no conflict or competition, because the regulatory tasks and fields of the

[220] ibid 21–26; Julian Scholtes, 'Populism and the Crisis of Constitutional Pluralism' in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (1st edn, Cambridge University Press 2022) 409, 411–413 <https://www.cambridge.org/core/product/identifier/9781009031103%23CN-bp-11/type/book_part> accessed 24 June 2022.
[221] Poiares Maduro (n 210) 125.
[222] della Cananea (n 206) 284, 295.
[223] Ingolf Pernice, 'Multilevel Consitutionalim in the European Union' (2002) 27 European Law Review 511, 515.
[224] Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (n 201) 373.
[225] Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 Common Market Law Review 703, 713–714.
[226] Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (n 201) 379.

Treaties and the constitutions are clearly divided, reinforced by the principle of subsidiarity.[227] Concerning the question of the ultimate authority, Multilevel Constitutionalism relies to some extent on classic constitutional theory: the citizens as source of power, the citizens as a root of sovereignty.[228] Pernice thereby departs from the classic discourse in EU law literature, which is often centred around the sovereignty of the Member States and chooses a *demos*-based perspective.[229] He states that EU citizens have necessarily a double-role, being an EU citizen as well as a citizen of the national state. Due to this, the question of ultimate authority cannot be answered, as within this double-role, no hierarchy can exist.[230] Pernice stresses that the hierarchy of norms, based on primacy of EU law, can only be regarded as a functional hierarchy, however not in the sense that the EU legal order is generally superior to the national legal orders.[231] Thus, also in this theory the question of ultimate authority remains open, yet based on a different reasoning. Potential tensions shall be resolved by a judicial dialogue, similar to the theory of Constitutional Pluralism. However, Multilevel Constitutionalism assumes that tensions, and thereby potential conflicts can be avoided in the first place, as the legal orders are separated, thus, the tasks are clearly divided.[232]

Nonetheless, this conceptualisation of the relationship of the legal orders received some critique. First, the image of "levels" is not ideal because it indicates that there is a hierarchy[233] – contrary to what the theory of Multilevel Constitutionalism actually states. Besides this terminological remark, the assumption of a clear-cut separation must be questioned. Although Pernice acknowledges the interdependency and the reciprocal influence of the national and the EU legal order, he fails to see that the two orders do not only complement each other but also intersect each other.[234] For instance, in the protection of fundamental rights, the national and the EU legal order empirically influenced and shaped each other. More importantly, the scope and the division of tasks was and is not as clear, as Pernice assumes.

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[227] ibid.
[228] Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (n 225) 709.
[229] Neil Walker, 'Multilevel Constitutionalism: Looking Beyond the German Debate' in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (2009) 146 <http://www.ssrn.com/abstract=1550912> accessed 28 June 2022.
[230] Pernice, 'Multilevel Consitutionalim in the European Union' (n 223) 8.
[231] Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (n 201) 384.
[232] Ingolf Pernice and Ralf Kanitz, 'Fundamental Rights and Multilevel Constitutionalism in Europe' (2004) 7 Walter Hallstein-Institut 20 <https://www.rewi.hu-berlin.de/de/lf/oe/whi/publikationen/whi-papers/2004/whi-paper0704.pdf> accessed 27 June 2022.
[233] Walker (n 229) 145.
[234] Besselink, *A Composite European Constitution* (n 176) 6.

A theory that addresses these remarks is Composite Constitutionalism. The theory of Leonard Besselink follows the idea of Multilevel Constitutionalism, in the sense that with the EU Treaties and the creation of an organisation with unilateral powers, another constitutional layer was added. He disagrees however with the two legal orders being separate, in fact they overlap and rely on each other.[235] In the field of fundamental right protection, Besselink even argues that the national constitutions were building blocks for the European legal order.[236] Therefore, according to Composite Constitutionalism, the two legal orders are interdependent and, in contrast to the assumption of Multilevel Constitutionalism, inextricably interwoven. Besselink used the image of the European legal system as a two-component-glue, where both adhesives need to work equally together in order to stick – if one part overtakes, things fall apart.[237] This does however not mean that the European legal system is a mixture of 27 national and one supranational legal order. Instead, the legal orders remain autonomous, but form a compound structure together.[238] Art 4 (2) TEU can be seen as an example of this compositeness of the EU legal system, the respect for national (constitutional) identities: the Treaties refer and, to some extent incorporate the national constitutions, thus they are not separate legal orders but overlap and interact with each other.[239] This is reinforced by the fact, that the boundaries of the "national identities" are determined by national courts, hence a European provision is interpreted solely by national courts – which fits much more to the concept of a composite constitutional order than one of "levels". Concerning the question of final authority, Composite Constitutionalism cannot provide a definite answer either. However, Besselink's approach towards the answer is different. He argues that a conflict rule and therefore a certain hierarchy is necessary in a legal system. While, according to Besselink, Constitutional Pluralism ignores the problem and under Multilevel Constitutionalism conflicts cannot arise in the first place as the legal orders are separate levels, Composite Constitutionalism acknowledges the need for a more differentiated perspective. Identical to Multilevel Constitutionalism, Besselink argues that there is a functional hierarchy in the European legal system, the precedence of EU law – from which can however not be deduced that the EU legal order is *per se* superior to the national legal orders.[240] This "functional hierarchy" is however not absolute: while it is widely recognized that EU law takes precedence over national ordinary law, the situation is different concerning constitutional

[235] ibid.
[236] ibid 13–15.
[237] ibid 6.
[238] Leonard FM Besselink, 'The Notion and Nature of the European Constitution After the Lisbon Treaty' [2008] SSRN Electronic Journal 262 <http://www.ssrn.com/abstract=1086189> accessed 20 May 2022.
[239] Besselink, *A Composite European Constitution* (n 176) 6, 16.
[240] ibid 8, 9.

law. In this, the national constitutional courts seem to make a difference between normal constitutional law and provisions that are fundamental.[241] In the terminology of EU law, this can be regarded as the differentiation between the constitutions as a whole and the constitutional identity in the sense of Art 4 (2) TEU. The constitutional identity is however not a demarcation line between the legal orders, in the sense of separated levels, but, as explained above, an incorporation of fundamental national constitutional understandings in the EU legal order. Thus, invoking the national constitutional identity does not question the European legal system, but only limits the functional hierarchy, due to the particular sensitivity in a specific field.

To summarize, the question of supremacy and ultimate authority is answered by none of the presented theories. This can however not be considered as a weakness per se, but should rather be seen as a result of the empirical accuracy – opposed to the prior monistic theories. What however contributes to the answer of the research question, is how the relationship between the legal orders is conceptualised and where the legal scholars locate the underlying reasons for the lack of a hierarchy. For Constitutional Pluralism the judicial dialogue between the ECJ and the constitutional courts is essential, in order to avoid conflicts. By accommodating the claims of the respective counterpart(s), the legal orders can co-exist without colliding – while potential conflicts remain unaddressed. Multilevel Constitutionalism argues, that Constitutional Pluralism is therefore fragile and conceptualises the legal orders as levels, that are interdependent, but eventually autonomous and separate. The two "levels" complement each other and thereby avoid conflicts by staying within their spheres and not threatening the existence of the domain of the other. In contrast, Composite Constitutionalism states, that the legal orders are highly interwoven and overlap. Therefore, the need for a conflict rule is more urgent. Primacy of EU law creates a functional hierarchy, without creating an actual superiority. This is also reflected in the fact, that this hierarchy is not absolute but limited by fundamental constitutional norms.

c) Supremacy Locks

As shown above, the question of supremacy, and therefore of ultimate authority cannot be answered finally. After presenting different theoretical approaches to conceptualise this openness and unclarity, this chapter assesses the limits to the (functional) supremacy of EU law. While legal scholars developed theories to explain the relationship between the legal

[241] ibid 9.

orders, the constitutional courts of several Member States and the ECJ issued judgements that show the practical importance of the theories developed by academia – competing for the ultimate authority, however while mostly avoiding open conflicts. The limits set by the national constitutional courts, the "supremacy locks", can be divided in three sub-categories: *ultra vires*, fundamental rights and constitutional identity. Although all supremacy locks overlap to some extent, the different substance and genesis of the claims justify the separated assessment.

i. *Ultra vires*

The EU as a supranational organisation is built upon the principle of conferral. Thus, the EU has no *Kompetenz-Kompetenz*, but can only exercise power that has been conferred to the European level by all Member States.[242] The conferral of power is, from a national perspective, necessarily based on the constitutions. In some Member States, this is explicitly mentioned, in others it resulted from systematic or teleological interpretations by the constitutional courts.[243] In both cases, the national constitutions form the legal basis for the conferral of power – and thereby also the limits of it.[244] The *ultra-vires* control is paradoxically not only a supremacy lock by the national courts, but belongs also to the jurisdiction of the CJEU: acts of EU institutions must be declared unlawful, if they lack a legal basis.[245] However, the CJEU cannot be the only competent court in that issue, because as a European institution in itself, it might become a judge in its own cause.[246] Thus, the national constitutional courts reserved themselves the right to review acts of the institutions or even judgements of the ECJ concerning the competences of the EU.[247]

The *ultra-vires* argument is ultimately based on popular sovereignty, thus the democratic principle.[248] If an EU institution acts *ultra vires*, it acts outside of its conferred competence based on the respective national constitution. These national constitutions are based on the sovereignty of the national *demos*. Therefore, an *ultra vires* act violates ultimately the

[242] Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 395, 423–426.
[243] Bruno de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' (1995) 2 Maastricht Journal of European and Comparative Law 145, 150–154.
[244] Kelemen (n 218) 148.
[245] Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979, 984.
[246] Benedikt Riedl, 'Ultra Vires Control and European Democracy' (*Verfassungsblog*, 18 June 2021) <https://verfassungsblog.de/ultra-vires-control-and-european-democracy/> accessed 27 June 2022.
[247] Pierdominici (n 207) 125.
[248] Riedl (n 246).

democratic participatory rights of the citizens[249]. Thus, the control concerning the EU competences follows the chain of legitimacy back to the citizen.[250] With the *ultra vires* control, the constitutional courts created, in the words of Andreas Voßkuhle, former president of the *Bundesverfassungsgericht*, an "emergency brake"[251] for national constitutional courts to safeguard national competences under an ongoing European integration and competence creeping.

Important cases in which national courts disapplied EU law, due to an *ultra-vires* argument were for instance the *Landtova*-case by the Czech constitutional Court[252] or the Danish *Ajos*-judgement[253]. The *Bundesverfassungsgericht* also reviewed EU legal acts in the light of the conferred competences, *inter alia* related to the ECB: while in *Gauweiler* the action of the ECB was considered lawful, the court held in *Weiss* that the ECB and the ECJ acted *ultra vires*.[254]

The case law of the national constitutional courts show that the *ultra vires*-claim is not only a theoretical possibility, but indeed used as a supremacy lock. On the one hand, this shall ensure that the EU cannot create its own *Kompetenz-Kompetenz*. On the other hand, the conferral and division of competences is complex and ambiguous. This makes the *ultra vires*-control inevitably prone to abuses.[255] Due to this, the *Bundesverfassungsgericht* repeatedly stressed that the control has to be executed with "*Europarechtsfreundlichkeit"*, an openness[256] towards EU law.[257] Nevertheless, all three above-mentioned judgements, in which an EU act was declared *ultra vires* have been criticized for being strongly influenced by national interests and other extra-judicial factors, such as a preference for certain economic policies or asserting oneself against the ECJ.[258]

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[249] Note: In their role as national citizens, not as EU-citizens, see the "double-role" above.
[250] Riedl (n 246).
[251] Andreas Voβkuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund' (2010) 6 European Constitutional Law Review 175, 195.
[252] Robert Zbiral, 'Czech Constitutional Court, Judgment of 31 January 2012, Pl. Ús 5/12: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires' (2012) 49 Common Market Law Review 1, 2–4.
[253] Helle Krunke and Sune Klinge, 'The Danish Ajos Case: The Missing Case from Maastricht and Lisbon' (2018) 3 European Papers - A Journal on Law and Integration 157, 167.
[254] Matt Richardson, 'Productive Dialogue or Perverse Discussion? An Analysis of the German and English Judicial Approaches to Supremacy of European Law.' (2020) 5 Anglo-German Law Journal 124, 144; Franz C Mayer, 'The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court's PSPP Decision of 5 May 2020' (2020) 16 European Constitutional Law Review 733, 733.
[255] Pierdominici (n 207) 144.
[256] Note: the literal translation would even be "friendliness".
[257] See e.g. *PSPP - Judgment of the Second Senate of 5 May 2020* [2020] Bundesverfassungsgericht 2 BvR 859/15 [112].
[258] See Julio Baquero Cruz, 'Another Look at Constitutional Pluralism in the European Union: Another Look at Constitutional Pluralism in the European Union' (2016) 22 European Law Journal 356, 367; Gabor Halmai, 'Nationali(Ist) Constitutional Identity? Hungary´s Road to Abuse Constitutional Pluralism' [2017] EUI LAW,

ii. Fundamental Rights

Another field in which the courts of the Member States repeatedly emphasised the limits of supremacy of EU law is the area of fundamental rights. This can be explained by the fact that the protection of fundamental rights is at the core of the tasks of modern national states.[259] Moreover, contrary to a common narrative, the EU is not based on the protection of fundamental rights, neither is it its natural field of action.[260] In fact, the supranational protection of fundamental rights via the EU was only added step-by-step over decades. After the originally economical community turned into a more political union with unilateral powers, the need for fundamental rights protection at that level arose increasingly. A landmark decision in that regard was the *Solange I*-decision[261] by the *Bundesverfassungsgericht* in 1974. In this it declared that the level of fundamental rights protection in the EU was insufficient, and as long as (*solange*) the level of protection is not comparable to the one provided by the German constitution, the *Bundesverfassungsgericht* cannot relinquish its jurisdiction in favour for the ECJ.[262] Through this, the German judges made clear that fundamental rights cannot be circumvented through a conferral of power – in the same time the *Bundesverfassungsgericht* strengthened its own position in the European legal system. *Solange II* was then a reaction to the changes in the jurisprudence of the ECJ, which developed a fundamental rights jurisprudence based on the rights and principles common to the Member States.[263] Thus, the *Bundesverfassungsgericht* changed its approach and stated that it would refrain from a review as long as (*solange*) the ECJ ensures the effective protection of these rights.[264] It further clarified in its further jurisprudence, that "ensuring effective protection" does not mean that the ECJ necessarily comes to the same outcome as the *Bundesverfassungsgericht* would do, but rather not a general failure in the protection of fundamental rights.[265] The *Solange*-saga shows the sensitivity that the protection of fundamental rights brings to the relationship between the national courts and the CJEU. With limiting the absolute supremacy of EU law in *Solange I*, the *Bundesverfassungsgericht* emphasised that the constitutionally enshrined fundamental

Working Paper 17 <http://rgdoi.net/10.13140/RG.2.2.18351.53929> accessed 24 May 2022; Wendel (n 245) 991.

[259] Asteris Pliakos and Georgios Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from Melloni' (2015) 34 Yearbook of European Law 97, 99.

[260] Stijn Smismans, 'The European Union's Fundamental Rights Myth: The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45, 45–47.

[261] *Solange I - Beschluss vom 29.05.1974* (n 186).

[262] ibid 56.

[263] Richardson (n 254) 133.

[264] *Solange II - Beschluss vom 22.10.1986* (n 186) para 132.

[265] Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 ICL Journal 170, 194.

rights level poses a limit to the absolute supremacy. Similarly, the Italian constitutional court has developed a doctrine of "*controlimiti*".[266] Due to the accommodation of EU law within the Italian constitution through Art 11, the Italian constitutional court held, that supremacy can only be granted under the condition that EU law complies with basic principles or fundamental rights.[267] The doctrine has however never been successfully invoked, nevertheless in the *Taricco*-saga an open conflict could only be avoided through an intensive judicial dialogue.[268]

The case law of the ECJ shows however a slightly different picture. As stated above, the court developed a fundamental-rights jurisprudence based on the rights and principles common to the Member States.[269] With the CFR, and its ratification with the Treaty of Lisbon, the EU created a codified catalogue – and therefore achieved a higher level of legal certainty, compared to the relatively vague reference to what is "common" to the Member States. This codification did however not necessarily result in less tensions and conflicts within the legal system. For instance, the above-mentioned *Melloni*-judgement has led to broad discussions after the ECJ decided, that higher national fundamental right standards can only be applied, if the primacy, unity and effectiveness of EU law are not compromised.[270] Thereby it subordinated the aim of a high level of protection to supremacy of EU law.[271]

Reading the case law of national courts on the one hand and of the CJEU on the other hand, it becomes, once again, evident that the exact boundaries of fundamental rights as supremacy lock are not defined. What is however clear, is that fundamental right forms a sensitive topic, a frangible point in the European legal system.[272] Both sides aim for a high level of protection, which can however also be used a disguise for strengthening their own authority.[273] It must

[266] Paul Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Seventh edition, Oxford University Press 2020) 330.
[267] Mart Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community' (1990) 12 Michigan Journal of International Law 173, 181.
[268] Costanza Di Francesco Maesa, 'Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity' (2018) 1 eucrim – The European Criminal Law Associations' Forum 50, 52–54 <https://eucrim.eu/articles/effectiveness-and-primacy-eu-law-v-higher-national-protection-fundamental-rights/> accessed 2 June 2022.
[269] Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011) 321.
[270] *Melloni v Ministerio Fiscal* (n 172) para 60.
[271] Leonard FM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39 European Law Review 531, 25.
[272] Pliakos and Anagnostaras (n 259) 100.
[273] See Brun-Otto Bryde, 'The ECJ's Fundamental Rights Jurisprudence— a Milestone in Transnational Constitutionalism', *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 121 <https://www-bloomsburycollections-com.proxy.library.uu.nl/book/the-past-and-future-of-eu-law-the-classics-of-eu-law-revisited-on-the-50th-anniversary-of-the-rome-treaty/ch3-4-the-ecj-s-fundamental-rights-jurisprudence-a-milestone-in-transnational-constitutionalism>; Besselink, 'The Parameters of Constitutional Conflict after Melloni' (n 271) 25.

therefore be determined on a case-to-case basis, through judicial dialogue to stake out the boundaries of the limits – to national interests, as well as to supremacy of EU law.

iii. Constitutional Identity

With the Treaty of Maastricht, Art 4 (2) TEU was introduced, stating that "The Union shall respect […] their (the Member States) national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[274] This, to which in the following will be referred as "constitutional identity", does not constitute a supremacy lock in *stricto sensu*: the EU institutions are bound by the Treaties, thus EU law, to respect the national constitutional identities. Therefore, it rather forms a legal basis to invoke national claims *within* the EU legal order.[275] A supremacy lock however is a lock that the national legal order invokes against the European legal order, thus from the "outside". The constitutional identity is not invoked in a proceeding at the ECJ, but unilaterally by the national constitutional courts. While Art 4 (2) TEU is a self-limitation of the EU, the constitutional identity as a supremacy lock is self-limitation of the Member States concerning the conferral of power.[276] Nevertheless, it shows the value the EU assigns to the identities of the national constitutions. Constitutional identity as a supremacy lock was developed by several constitutional courts, *inter alia*, the German and the Italian one, especially around proposed Treaty changes. Through this, the outlines of „identity" have been carved out.[277] In light of the European project and its ambitions enshrined in the Treaties, it cannot be assumed that the national constitutions in their entirety form the constitutional identity, as it would undermine the uniformity and the effectiveness of EU law.[278] Parts of constitutions that have been repeatedly named as part of the constitutional identity were the statehood, the state organization, such as a federalist or centralist structure, democratic rights, the rule of law and the essence of fundamental rights.[279] This also shows that there is a certain overlap between the constitutional identities and fundamental rights as supremacy locks. The above-mentioned aspects can give an idea of what constitutes a constitutional identity, they remain however in themselves

[274] Stephan W Schill and Armin von Bogdandy, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417, 1435.
[275] See e.g. *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] European Court of Justice C-208/09 [93–95].
[276] Martin Belov (ed), *Peace, Discontent and Constitutional Law: Challenges to Constitutional Order and Democracy* (Routledge, Taylor & Francis Group 2021) 112.
[277] Schill and von Bogdandy (n 274) 1440.
[278] ibid 1420.
[279] ibid 1440.

ambiguous. The most detailed judgement in that regard was the *Lisbon*-decision by the *Bundesverfassungsgericht*.[280] In this it stated, that areas which influence the citizen's life significantly belong to the constitutional identity and cannot be regulated by the EU. Examples for these sensitive fields are, *inter alia*, criminal law, the monopoly of force, fiscal policies, the social state and decisions of cultural importance, for instance family law, the educational system or, most importantly for this thesis, dealing with religious communities.[281] This gives more guidance; however, it has to be mentioned that a judgement by one constitutional court of 27 Member State cannot define and dictate how "constitutional identity" has to be interpreted. Nevertheless, what can be followed from the foregoing is, what does *not* form the constitutional identity. Firstly, it must be clear that the constitutional identity must be based on the constitution, thus it cannot be confused with a cultural or historical identity.[282] This also means, that pre-political or pre-constitutional discourses cannot be part of a constitutional identity.[283] Moreover, the Bundesverfassungsgericht has stressed that the national constitutional identity must always be determined with a *Europarechtsfreundlichkeit*.[284] Through this it shall be ensured, that the constitutional identity is not abused as a backdoor to undermine EU law for national interest and non-fundamental peculiarities.

V. Analysis of the Jurisprudence of the European Court of Justice

After the case law of the ECJ and of the national courts on religious freedom has been presented, in chapter III and the theoretical foundations of the European legal system have been laid in the foregoing chapter, this part of the thesis will assess the jurisprudence of the ECJ in light of the findings of chapter IV. Thus, the constitutional conflicts, which have been pointed out in chapter III c), will be analysed in more detail, considering the supremacy locks and the supremacy theories.

a) Resolving Unresolvable Conflicts – Primacy as a Panacea?

[280] ibid 1439.
[281] *Lissabon - Urteil des Zweiten Senats* [2009] Bundesverfassungsgericht 2 BvE 2/08 [249, 252].
[282] Note: Cultural and historical identities inevitably influence the constitution, thus indirectly they can be part of the constitutional identity, too.
[283] Schill and von Bogdandy (n 274) 1430.
[284] ibid 1449, 1450.

After the frangible points in the jurisprudence on religious freedom in the EU legal system have been pointed out above, it is necessary to examine how open conflicts can be avoided. While primacy is established as a conflict rule, chapter IV has illustrated that the "functional hierarchy" cannot be confused with an actual superiority of the EU legal order. Thus, primacy is not absolute. Therefore, the conflicts, explained in chapter III c) will be assessed in light of the supremacy locks and the supremacy theories.

i. The Jurisprudence in light of supremacy locks

After it has been established in chapter III c) that the jurisprudence of the ECJ on religious freedom has led to potential conflicts of constitutional nature and therefore of significance for the European legal system, it needs to be assessed whether, and how these conflicts can be resolved. The general conflict rule, primacy of EU law, is limited by the supremacy locks, therefore it has to be assessed whether one of the national doctrines and understandings can be upheld against EU law by relying on supremacy locks. For this, it has to be mentioned that based on the existing literature and the case law of the constitutional courts, it can only be assumed whether a supremacy lock could be invoked against the precedence of EU law. Consequently, the analysis will be limited to whether invoking supremacy locks can be justified and reasoned not whether this will certainly be the case. This does however not adversely affect the value of this chapter[285], as the ECJ should aim for avoiding constitutional conflicts in the first place. The supremacy locks should be, as Voßkuhle said, considered as an emergency brake – thus, it is desirable to not create emergencies in the first place.

First, the jurisprudence on religious symbols in the workplace will be examined.

Although the EU has no competences in religious matters, it is evident, that the EU legislator can regulate in the field of the labour market and anti-discrimination.[286] An *ultra vires*-claim would therefore be far-fetched.

Secondly, fundamental rights as a supremacy lock must be assessed. Inevitably, ruling on matters that touch upon fundamental rights is sensitive, especially in light of the complexity of the European legal system. The *Solange I & II* judgements can hardly be invoked by France or

[285] Note: To the contrary, a sound analysis cannot predict the decisions of the constitutional courts. First, the precedents are very limited and the existing decisions have been often driven by extra-judicial factors. See Wendel (n 245) 991.

[286] Hedvig Bernitz and Victoria Enkvist, *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (Hart Publishing 2020) 52 <http://www.bloomsburycollections.com/book/freedom-of-religion-an-ambiguous-right-in-the-contemporary-european-legal-order> accessed 9 January 2022.

Germany for two reasons: First, the *Achbita*-judgement does not lead to a lower standard of fundamental rights protection than at national level in *stricto sensu*. In the *Baby-Loup* case, the result has been identical, as the ban was considered as lawful. In the German case, an "*Achbita*-approach" would have in effect led to a lower standard of protection, as the claimant would not have been allowed to wear the headscarf at work. However, the level of protection is, as indicated earlier, not per se *lower*, it is solely *different*.[287] Moreover, it has to be stated that the Bundesverfassungsgericht qualified its *Solange*-jurisprudence in the *Bananas*-case. Thus, not every divergence in fundamental rights-judgements triggers necessarily the *Solange*-doctrine.[288]

Concerning national constitutional identity, the French *laïcité* might constitute a part of the French identity. It is not only deeply rooted in the French history and culture, but is also constitutionally enshrined and has massive impact on religious communities in France.[289] Nevertheless, the Court explicitly stated that the principle of *laïcité* applies only to public bodies and can therefore not be invoked by private companies. Thus, a violation of the constitutional identity by the ECJ's jurisprudence cannot be assumed. In 2009, the *Bundesverfassungsgericht* decided in its *Lisbon*-judgement that "dealing with religious communities" belongs to the constitutional identity. While at first sight, an interference with the freedom of religion of a person of faith might be subsumed under this category, it can ultimately not convince. Firstly, it is necessary that the "constitutional identity" must be interpreted strictly, moreover with "*Europarechtsfreundlichkeit*".[290] Secondly, the *Bundesverfassungsgericht* elaborated later in the judgement that "dealing with religious communities" means the self-determination of states in the sense of the legal status of churches and other religious communities.[291] Thus, the individual religious freedom cannot be considered as a constitutional identity.

From the foregoing has to be concluded that none of the supremacy locks could be reasonably invoked against the judgements of the ECJ concerning wearing religious symbols in the workplace. Although conflicts with two Member States arose, they were not fundamental and existential in nature. Thus, primacy of EU law can "resolve" the contrary interpretative approaches by giving precedence to EU law, because no risk for the viability of the EU legal

[287] Wagner (n 168) 743, 744.
[288] Peters (n 265) 194.
[289] Kevin Boyle and Juliet Sheen, *Freedom of Religion and Belief.* (Taylor and Francis 2013) 294, 295 <http://grail.eblib.com.au/patron/FullRecord.aspx?p=178634> accessed 2 June 2022.
[290] Mattias Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' (2021) 27 European Public Law 465, 482.
[291] *Lissabon - Urteil des Zweiten Senats* (n 281) para 260.

system derives from this. Hence, the ECJ was able to largely accommodate the diversity among the Member States by setting a minimum standard and granting the national legislators and judiciaries a margin of discretion in drawing the fine line between the conflicting interests at stake.

After having assessed the constitutional conflict around religious symbols at work, the second part of this sub-chapter will examine the supremacy locks concerning the jurisprudence on privileges for religious employers.

Similar to the argumentation above, it can be fairly argued, that the EU is certainly competent to regulate in the field of the labour market and anti-discrimination, meaning that it did not act *ultra vires*.[292] However, it has to be mentioned, that contrary to freedom of religion as an individual fundamental right, the Member States have explicitly enshrined in the Treaties that the EU "respects and does not prejudice" the status of religious communities in the Member States.[293] Thus, although the Member States have conferred powers in a variety of areas, the conferral is limited by this provision. Due to diversity among the Member States and the resulting lack of consensus concerning the legal status of religious communities as well as the sensitivity of the matter, this area has been excluded from conferral of competences. However, with *Egenberger*, the ECJ has subordinated the right to self-determination of churches to the right to judicial protection. Without judging this decision from a normative perspective, it its evident, that this alters the legal status of religious communities in some Member States, namely Germany, Austria, Cyprus and, to some extent Denmark, too. On the one hand, it must be argued that the EU legislator took due regard of Art 17 TFEU by introducing an exemption to anti-discrimination law for religious bodies with Art 4 (2) EFD.[294] Through this, the national particularities and the right to self-determination have been balanced against the aim of eliminating discrimination. Moreover, it is inevitable that EU legislation affects fields where competences have not been conferred to the supranational level, legislation on religious slaughter or the taxation of churches have also not led to *ultra vires* claims by any Member States.[295] It should also be stressed, that the EU did not explicitly regulate the legal status of churches, but rather, introduced with *Egenberger* a minimum standard of judicial review in

[292] Bernitz and Enkvist (n 286) 52.
[293] Treaty on the Functioning of the European Union 2007 Art 17 (1).
[294] Heiko Sauer, 'Kirchliche Selbst-bestimmung Und Deutsche Verfassungsidentität: Überlegungen Zum Fall „Egenberger"' (*Verfassungsblog*, 3 May 2019) <https://verfassungsblog.de/kirchliche-selbstbestimmung-und-deutsche-verfassungsidentitaet-ueberlegungen-zum-fall-egenberger/> accessed 6 January 2022.
[295] Bernitz and Enkvist (n 286) 52.

order to protect individuals from discriminatory treatment.[296] In addition to that, at least the *Bundesverfassungsgericht* committed itself to being *europarechtsfreundlich*, meaning that high standards need to be fulfilled for finding an exceeding of competences. In light of the foregoing, declaring the *Egenberger*-judgement *ultra vires* seems to be rather cherry picking in favour of the national *status quo* than genuinely protecting national competences.

On the other hand, it must be stated that although Art 17 TFEU has been taken into account, it can be questioned whether Art 4 (2), in light of *Egenberger*, *de facto* respects the provision. The Member States intended to create a safe-space for regulating the relationship to the church, as this topic is inextricably linked to historical, culture and political backgrounds, that are unique for every Member State.[297] The legislator and ultimately the ECJ failed to take this into account and delivered with *Egenberger* a judgement that "lacks dogmatic subtlety and sensitivity"[298]. With making the decisions of religious communities subject to judicial review, the EU undoubtedly interfered with the legal status of those entities. Regardless of the normative question which privileges a religious body should enjoy, a certain special status can be justified and is not inherently contrary to the rule of law. For instance, the important role religion can have for the society or that a judicial review can only be based on rational, secular standards – something that a religion cannot bring up.[299] That a catholic priest can only be male, thus discriminating all women can, in a strict sense, hardly be considered as a genuine and determining occupational requirement – priests in the protestant church for instance can be female, too. From a secular, non-religious perspective it is not evident, why women would not be able to fulfil the tasks a catholic priest has. Nevertheless, it would undoubtedly be too intrusive for the right to self-determination to oblige the catholic church to break their own law and change a centuries-old tradition.[300] This example illustrates how fragile and sensitive the judicial review of religious bodies is. While is widely accepted that religious bodies can impose far-reaching requirements for jobs like the priest, it is significantly more complex for other jobs: In the Danish cases, the mere contact to persons as an employee of the church seemed to suffice. The Bundesverfassungsgericht applies only its limited control, because occupational requirements by religious employers are considered a religiously-motivated decision. As religions are inherently irrational, the court refrains from an assessment whether the

[296] Bilz (n 13) 366.
[297] Weiler (n 28) 766.
[298] Hans Michael Heinig, 'Why Egenberger Could Be Next' (*Verfassungsblog*, 19 May 2020) <https://verfassungsblog.de/why-egenberger-could-be-next/> accessed 5 January 2022.
[299] Machado (n 5) 479.
[300] Bernitz and Enkvist (n 286) 106, 108.

occupational requirement is genuine and legitimate in a legal sense but only decides whether the reasoning of the religious employer is, following its self-understanding, plausible. While a democratic society can surely establish that such a lack of judicial control cannot be tolerated, it can also be justified to decide democratically, that religious communities enjoy certain privileges. Only time can tell, whether one of the concerned national constitutional courts will declare the *Egenberger*-judgement *ultra vires* – the appeal of the Diakonie is still pending at the *Bundesverfassungsgericht*.[301] What shall however suffice for the purposes of this thesis is the conclusion that an *ultra vires*-claim can certainly be substantiated. This is also reflected in the literature[302], in which many scholars mentioned, that the *Bundesverfassungsgericht* could respond with an *ultra vires*-judgement to *Egenberger*.

Secondly, the courts, particularly in Germany, Cyprus, Denmark and Austria could invoke a violation of the constitutional identity through *Egenberger*.

With regard to Denmark, it has already been stated above, that the conflict is not of constitutional nature, thus arguing that the decisions of the Board for Equal Treatment constitute a part of the Danish constitutional identity would be unreasonable.

The situation is however different for Austria, Cyprus and Germany. As stated above, the national constitutional courts have been mostly relatively vague concerning what the constitutional identity means – and what not. It is certain that in all three cases, the negative definition does not exclude the legal status of churches from being part of the constitutional identity: the privileges of churches are either explicitly enshrined in the constitutions or derived from it by the respective constitutional court, thus, neither pre-political nor pre-constitutional.[303] It has been stated that the national identity cannot be interpreted as the constitution in its entirety. Instead, only certain parts of it, fundamental provisions, for instance for the state organization constitute a part of the constitutional identity. Whether the Member States have an established state church or not is in itself a fundamental question, that is influenced not only by the national history, but also by the deeply political-normative question what role religion, or more specifically the church, should have in a modern democracy.[304] The variety of institutional arrangements among the Member States show how sensitive the regulation of this relationship is and how individual the "answers" to the question are. This

[301] Sauer (n 294).
[302] Wendel (n 290) 486–488; Mayer (n 254) 1120, 1121.
[303] Note: This is also reflected in the fact, that it is settled case law. For instance, *laïcité* is enshrined in the French constitution, however it is highly contested what it entails exactly. Thus, unless it is unambiguously defined by the constitutional court, it could be regarded as pre-constitutional, too.
[304] Weiler (n 28) 763.

thesis cannot assess to what extent privileges for religious communities are justified or unjustified and whether they are granted non-discriminatorily. Nevertheless, it has to be stressed that the exemptions for religious communities from secular law, that most Member States have implemented, show in themselves the importance of the state-church relationship.[305] This already suggests, that the legal status of religious communities can potentially constitute a part of the constitutional identity. As an identity can by its definition not be assessed in abstract but is different for every Member State, the situation in Austria, Germany and Cyprus will be examined separately.

In Austria, the drafters of the constitution have already acknowledged the need to grant the established churches privileges, while in the same time not creating a legal vacuum. Although the privileges have been interpreted widely in the presented judgements, to the detriment to state control, this can be seen as an indication that the judicial control to which *Egenberger* obliges is intrusive but does not touch upon the constitutional identity. The jurisprudence of the court does not preclude a judicial review of churches *per se*, but rather aims at creating a practical concordance between the interest of the church and of the state.[306] Thus, the closer a matter is to the core of religion, the higher is the standard of justification for an interference by the state.[307] Hence, the self-perception of the church is relevant, resembling the plausibility-doctrine of the *Bundesverfassungsgericht*, but is it not decisive in itself.[308] By creating a concordance with the interests of the state, Austria's constitution does not grant an absolute right to self-determination to the established churches. Therefore, especially in light of the wording of the provision, it can hardly be assumed that the *Egenberger*-judgement violates the constitutional identity of Austria.

Concerning the German constitutional identity, two settled doctrines clash: In the above-mentioned *Lisbon*-judgement, the *Bundesverfassungsgericht* has already explicitly mentioned that the legal status of religious communities belongs to the German constitutional identity. It is undoubted that the legal status of the churches is affected through the *Egenberger*-judgement. Thus, an interference with the German constitutional identity could be invoked. On the other hand, the constitutional identity has to be interpreted narrowly, in order to ensure the effectiveness and uniformity. Therefore, the German legal literature has repeatedly held that the

[305] Beek (n 8) 29.
[306] Florian Scholz, *Kirchliches Arbeitsrecht in Europa: rechtliche Rahmenbedingungen der Beschäftigung von Arbeitnehmern durch die Kirchen in Deutschland, England, Österreich und Frankreich unter besonderer Berücksichtigung staatskirchenrechtlicher Grundlagen* (1. Auflage, Lambertus 2021) 230.
[307] ibid.
[308] ibid.

national constitutional identity is limited to the protected provisions of Art 79 GG, the "eternity clause"[309].[310] This provision does include freedom of religion as a fundamental right, but not Art 140 GG, regulating the status of the church through the concordat. It therefore depends how narrowly the *Bundesverfassungsgericht* interprets the constitutional identity and Art 79 GG. However, the *Egenberger*-judgement could be interpreted as undermining the democratic rights of German citizens, which are protected through the eternity-clause.[311, 312] Thus, it is not unlikely or far-fetched that the *Egenberger*-judgement will be considered as violating the German constitutional identity. As stated above, this is a realistic possibility as the appeal of the Diakonie is still pending.[313]

The literature on the definition of the Cypriote constitutional identity is unfortunately rather limited. What is however clear, is that the history of the Cypriot island is highly intertwined with, and shaped by religion. The first president of Cyprus[314], after the independence in 1960 was Makarios III, who was the archbishop of the Church of Cyprus in the same time.[315] Such an overlap or double-position of the clergy and the state is unprecedented in the EU. This reflects also the crucial role the Church of Cyprus had in the nation-building process.[316] Moreover, religion has played and still plays an important role in the ethnic conflicts between Greek Cypriots and Turkish Cypriots. As one of the most religious EU Member State, religion has served as an identity-creating element throughout the history of the country.[317] Nonetheless, it has to be mentioned that a societal or cultural identity is not protected, as it is pre-constitutional. Thus, the mere number of religious citizens cannot constitute a constitutional identity, neither can the historical role of the church in itself. However, the high influence of the church, also in the political sphere indicate that the Church of Cyprus enjoys a special role, including far-reaching privileges. In light of the constitutional enshrined right to absolute self-determination, this can surely amount to being part of the constitutional identity. Therefore, the

[309] Note: The „eternity-clause" entrenches the protection of the dignity of humans and certain fundamental principles, which cannot be removed or amended.
[310] Wendel (n 290) 468.
[311] Sauer (n 294).
[312] Note: This was the underlying argument of the *ultra vires*-claim in the *Weiss*-decision, showing that the Bundesverfassungsgericht is open to such a broad understanding of Art 38 GG.
[313] Sauer (n 294).
[314] Note: The president of Cyprus is not solely a representative position, but the head of state.
[315] Dilek Latif, 'Dilemmas of Religious Education, Freedom of Religion and Education in Cyprus' (2022) 13 Religions 96, 101.
[316] Marisa Ferentiou, 'Religious and National Identification in the Republic of Cyprus' 39 <https://thesis.eur.nl/pub/60951/Ferentinou-Marisa.pdf>.
[317] A Emilianides, Constantinos Adamides and Evi Eftychiou, 'Allocation of Religious Space in Cyprus' (2011) 23 The Cyprus Review 97, 99; Ferentiou (n 316) 11.

Egenberger and *IR v JQ*-judgements can be considered as a violation of the national constitutional identity of Cyprus.

In summary, it seems that Austria's constitutional identity is not violated by the ECJ's jurisprudence. However, for Germany and Cyprus such a claim can be reasonably substantiated.

Invoking fundamental rights as a supremacy lock against the jurisprudence of the ECJ cannot convince. Although the right to self-determination is derived from individual freedom of religion, the judgement cannot be considered as violating the core of this fundamental right.

Therefore, the *Egenberger*- and *IR v JQ*-jurisprudence can be considered as an *ultra vires*-act and as an interference with the constitutional identity of Germany and Cyprus. While it cannot be determined whether one of the two countries will actually invoke these supremacy locks against the decision, the analysis has shown, that the ECJ certainly took the risk of creating a constitutional conflict.

In conclusion, the ECJ has adopted two different approaches in the two case groups, which is reflected in the analysis of the jurisprudence in light of supremacy locks. In the cases on religious symbols at work, the ECJ adopted a liberal approach with giving much leeway to national courts and the Member States to determine how to balance the freedom to conduct a business and freedom of religion. That constitutional tensions and conflicts could not be avoided lays to some extent in the very nature of a supranational court ruling in in sensitive matters in a heterogenous community. Nevertheless, these tensions and conflicts can be resolved to some extent through a functional hierarchy: the Member States accepting primacy of EU law over national law as price for being member in the EU. For the jurisprudence on the privileges of religious employers, the picture is to some extent different. First, it remains unclear whether the ECJ has respected Art 17 TFEU in its judgements or whether it acted *ultra vires*. Second, the legal status of churches can certainly be part of the national constitutional identity of Member States. Thus, while strengthening the negative freedom of religion of employees and the right to judicial protection, the court has risked an open constitutional conflict with its Member States.

ii. The jurisprudence in light of the supremacy theories

After having pointed out, where the frangible points within the EU legal system concerning religious freedom are, it will be assessed how the jurisprudence of the ECJ fits the concepts of the above-mentioned supremacy theories.

As stated above, the theory of Constitutional Pluralism ends, where constitutional conflicts start. Consequently, from the viewpoint of this theory, it is essential, that conflicts are avoided in the first place. As this should be achieved through self-policing, judicial dialogue and by accommodating the claim of the "other side", the ECJ's jurisprudence on religious freedom must be criticized. Art 17 TFEU leaves no doubt about the sensitivity and value that the Member States have attributed to the legal status of religious communities – different to freedom of religion, which has been supranationalized with the CFR. Self-policing in practice would therefore be limiting oneself to the conferred competences. In addition to that, the *Lisbon*-judgement by the *Bundesverfassungsgericht* can surely be interpreted as a signal to the ECJ to refrain from intrusive judgements concerning the legal status of religious communities. Although the cooperation between the ECJ and national courts should be a dialogue rather than a monologue of the *Bundesverfassungsgericht*, the *Lisbon*-judgement, contrary to other judgements on supremacy locks, is well-reasoned and based on extensive elaborations on democratic principles and the foundations of modern democracies. This should not be confused with a final limit to EU integration or being valid for all Member States, however, the ECJ would, in the course of accommodating the claim of German judges, need to provide more doctrinal depth on why the right to self-determination of religious communities must be subordinated to judicial protection and negative freedom of religion. Therefore, the ECJ has failed to accommodate the claim of authority of Member States, established in Art 17 TFEU and therefore ultimately of the national constitutional courts. From the perspective of Constitutional Pluralism, it would have been therefore more desirable to grant the national courts not only a margin of discretion concerning religious symbols at work, but also regarding the privileges of religious employers.

This applies similarly to Composite Constitutionalism. Interestingly, religious freedom in itself supports the assumption of this theory: the EU legal order and the national ones are inextricably intertwined, the national interpretations of freedom of religion influence the European interpretation; the jurisdiction in the *Egenberger*- and *IR v JQ*-cases inevitably interferes with the national competence to uphold the legal status of religious communities. As, according to Besselink the functional hierarchy ends, where it touches sensitive matters, namely the national

constitutional identity, the *Egenberger*- and *IR v JQ*-judgements have to be questioned. It has been pointed out in the foregoing part, that with the legal status of churches the national constitutional identity is potentially at stake. Art 4 (2) TEU is at the very heart of Besselink's elaborations on the constitutional order of the EU, as it is a prime example of the compound structure with the European legal order incorporating the national constitutional order. Thus, leaving the Member States a margin of discretion concerning the legal status of religious communities, concerning their constitutional identity would have been preferential. In Besselink's picture of the two-component glue, *Egenberger* and *IR v JQ* can be considered as the European legal order taking over and becoming dominant: it will be seen if that weakens the stability of the European legal system.

The perspective of Multilevel Constitutionalism diverges to some extent. Although the legal orders are interdependent, they are separate levels with different competences. Concerning the jurisprudence on the legal status of religious communities, the outcome, although not the reasoning would be similar to the two foregoing theories: allowing for national differences by granting the judiciary and the legislators a margin of discretion. While for the above-mentioned theories the main argument was "avoiding conflicts in sensitive matters", the reasoning under Multilevel Constitutionalism would be centred around Art 17 TFEU and the division of competences. The Member States have explicitly excluded the legal status of religious communities from the conferral of powers; thus, it does not belong to the European level. As it is inevitable, that the ECJ also has to rule on matters where the EU has no competences, it should be restrained and cautious in its judgements in these cases. Thus, especially the analysis of *ultra vires*-claims concerning religious freedom is relevant for Multilevel Constitutionalism. Concerning religious symbols in the workplace, the ECJ could have adopted an even closer scrutiny. It does not only touch upon anti-discrimination law and labour law, in which the EU has a strong role but also freedom of religion and freedom to conduct a business as fundamental rights, which belong with the CFR to the European legal order, too. Hence, these matters belong from the perspective of Multilevel Constitutionalism to the European level, which allows for a stronger approach compared to the judgements the ECJ has issued. Close scrutiny should however not be confused with a higher protection of freedom of religion *per se*: a balance of conflicting rights is to some extent a zero-sum game, a higher protection of freedom of religion would be to the detriment of the freedom to conduct a business and *vice versa*.[318] Thus, the perspective of Multilevel Constitutionalism does not necessarily lead to more religious freedom

[318] Bilz (n 13) 150.

in the EU, but the Court could have set higher standards for the assessment, for instance whether the aim of neutrality is more important in certain sectors and jobs or to what extent certain religious symbols are more essential for the exercise of their freedom of religion than others.

The ECJ has actually applied a relatively strict control on the privileges of religious employers while leaving a margin of discretion in cases of religious symbols at the workplace.[319] This is not only problematic concerning supremacy locks, but also questionable with regard to supremacy theories. While from the perspective of Constitutional Pluralism and Composite Constitutionalism a restrained jurisprudence on the privileges of religious employers would have been preferable, under the theory of Multilevel Constitutionalism the jurisprudence on religious freedom would be different in its entirety. While also leaving a margin of discretion concerning the legal status of religious communities, the ECJ could exercise a closer scrutiny in its judgements on religious symbols in the workplace.

b) Effective Protection of Religious Freedom – an Attempt in Conciliation

This thesis has carved out in which points the jurisprudence of the ECJ on religious freedom creates constitutional tensions and conflicts, to what extent these conflicts are resolvable via supremacy, thus the "functional hierarchy" and how the judgements fit into the different theoretical frameworks of the European constitutional order. Through this, shortcomings of the ECJ's reasoning in both case-groups became evident. Instead of solely criticizing the existing jurisprudence, this last part shall, based on the foregoing analysis, develop an approach of protecting religious freedom effectively and interpret it uniformly without putting the stability and viability of the European constitutional system at risk. The interpretations of the ECJ concerning religious freedom have been criticized by legal scholars for many reasons.[320] This attempt however aims at creating a practical concordance between the effective judicial protection for individuals and avoiding constitutional conflicts between the legal orders.

Concerning religious symbols at work, the ECJ has chosen to attribute a high value to the freedom to conduct a business and subordinated the individual freedom of religion to the aim of neutrality. This approach can inter alia be explained through the lack of consensus among the Member States, which has been illustrated in chapter III b).[321] As freedom to conduct a

[319] Lucy Vickers, 'Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: The Need for Proportionality.' (2019) 5 International Labor Rights Case Law journal 75, 79.
[320] See Howard (n 38) 133.
[321] Ronan McCrea, 'Faith at Work: The CJEU's Headscarf Rulings' (*EU Law Analysis*, 17 March 2017) <http://eulawanalysis.blogspot.com/2017/03/faith-at-work-cjeus-headscarf-rulings.html> accessed 27 June 2022.

business is a fundamental right and requires protection as well, a balance between the conflicting right must be made – while accommodating the diverging national jurisprudences, too. Nevertheless, the ECJ has a relatively strong mandate in anti-discrimination law and freedom of religion. Therefore, it should exercise a stricter control concerning the aim of neutrality of the employer.[322] In its judgements, the court has simply accepted it, without further substantiation or explanation. The ECJ would provide a higher standard of protection for freedom of religion, if the aim for neutrality must be justified. Freedom to conduct a business is not absolute, thus, requiring a justification, why neutrality of its workers is necessary does not touch upon the core of freedom to conduct a business. Moreover, with this approach, the ECJ could resolve inconsistencies in its own case law: In *Achbita*, neutrality was simply accepted, in *Bougnaoui* it was held that the wish of a customer cannot justify a policy of neutrality. This raises the question, what, if not the (anticipated) wishes of customers and the corresponding (potential) economic disadvantages legitimises the aim for neutrality.[323] For instance, the need for neutrality for a private security company might be explained based on the recognizability these jobs require or based on a higher risk of conflicts. This would give rise to tensions with the case law in Belgium or Denmark, however neutrality rules would not be *a priori* forbidden but only require more justification. Thus, the national courts still have a margin of discretion and the very core of the freedom to conduct a business is not touched upon. Moreover, the ECJ could consider the claimant's perspective more. With its judgement in *IX v Wabe* and *Müller v MJ*, the ECJ already incorporated the critique of some scholars and allowed the individual dimension, thus the value of the religious symbol of the claimant to be taken into account by national courts. This allows not only for a potentially higher protection of freedom of religion, but also shows awareness of its own role as a supranational court, which should the leave the assessment of certain issues to national courts.

In light of a lack of consensus, the margin-of-discretion approach of the ECJ is sensible.[324] As freedom to conduct a business is not an absolute right, the court could however achieve a higher level of protection of freedom of religion, if it applied higher standards to the aim of neutrality. This is reconcilable with national case law and leaves a margin of discretion for national particularities but achieves a higher level of protection for the individual freedom of religion.

[322] See Erica Howard, 'Headscarves Return to the CJEU: Unfinished Business' (2020) 27 Maastricht Journal of European and Comparative Law 10, 13, 19.
[323] Howard (n 38) 116.
[324] Sarah Haverkort-Speekenbrink, *European Non-Discrimination Law: A Comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia 2012) 107.

With regard to the privileges of religious employers, the ECJ should have applied the caution and self-restraint which can be seen in the *Achbita*- and *Bougnaoui*-judgements. As analysed above, the legal status of churches is a highly sensitive topic, linked to national history and identity and is therefore protected through Art 17 TFEU. In the same time, the negative freedom of religion and the right to judicial protection are at stake. While religious communities can enjoy some special rights, creating a lacuna in judicial review sits uncomfortably with the rule of law and the principle of effective judicial protection, which are both fundamental for the EU. Religious, especially Christian employers are, depending on the Member States major employers, meaning that excluding them from anti-discrimination law leads to less job opportunities for people of different or no faith.[325] Therefore it is normatively desirable that religious employers are subject to judicial review, too. This is also reinforced by Art 4 (2) EFD itself: granting certain privileges makes only sense, if the limits of the exemptions are subject to judicial control. Otherwise, religious communities could have been excluded from all secular law, as it would be up to them, to decide to what extent they are bound by it. Nevertheless, applying judicial control to religious communities, like in *Egenberger* or *IR v JQ* leads to fundamental constitutional conflicts with Germany and Cyprus. Creating a practical concordance between these the right to self-determination and the principle of effective judicial protection is merely impossible, as the aims are inherently opposed to each other. Therefore, the choice of interpretation depends highly on the self-understanding of the court: The ECJ as a driver in European integration, creating uniformity and a level-playing field, or the ECJ as a supranational court which rules within a fragile constitutional system, bound by the principle of conferral. This thesis has not only pointed the frangible points in the European legal system out, but also analysed that the legal status of religious communities is certainly part of these points and a highly sensitive area. Hence, it must be concluded that the ECJ should have left the Member States a margin of discretion in order to avoid the risk of a constitutional conflict. Although this sits uncomfortably with the effective protection of negative freedom of religion and effective judicial protection, it has to be recalled, that the EU is a supranational organisation, which is ultimately based on the principle of conferral. Making religious communities subject to judicial review and closing the lacuna is the task of the national legislators, the "Masters of the Treaties" and ultimately of the citizens – and not of the judiciary.

To conclude, the ECJ should set higher justification standards concerning the aim for neutrality concerning the interests of employers for neutrality-policies. Through this, a higher standard in

[325] Vickers (n 29) 43.

the protection of freedom of religion would be achieved, without undermining the freedom to conduct a business. The value of the religious symbol for the individual can be included by national courts via the jurisprudence in *IX v Wabe* and *Müller v MJ*. Thus, the national courts still have a certain margin of discretion, justified through the sensitivity of the topic, while achieving a higher minimum level of protection of freedom of religion. Concerning the privileges of religious employers, the ECJ should be more self-restrained in light of the arising conflicts with national constitutional identities. Although this might be undesirable from a normative perspective, which aims at a uniform and high European protection of fundamental rights and a strong rule of law, the judges should grant the national courts a wide margin concerning the extent to which the respective religious communities are subject to judicial review.

VI. Conclusion

This thesis aimed at examining to what extent religious freedom in the EU can be ensured in light of the diverging understandings of religion and freedom of religion among the Member States. Throughout the thesis it has become evident, that religious freedom is a highly sensitive topic, related to fundamental rights, the division of competences and national constitutional identities. The jurisprudence of the ECJ can be described as a double-track approach: leaving a margin of discretion regarding prohibitions of religious symbols at work while imposing a clear standard of judicial review of religious communities and their occupational requirements. This is not only questionable in light of the supremacy locks but also from the perspective of different theories describing the EU constitutional system. In its judgements on the occupational requirements of denominational employers, the ECJ has strengthened the negative freedom of religion and the right to judicial protection, however neglecting the potential consequences for the stability of the European constitutional system.

Religious freedom is a complex concept, which is protected through freedom of religion as an individual right, including the *forum internum* and *externum*. Moreover, this freedom of religion entails also a collective dimension, thus a right to self-determination for religious communities. This right is also enshrined explicitly in some national constitutions. Lastly, anti-discrimination law contributes to religious freedom, too. As the interpretation and implementation of existing laws on religious freedoms is heavily influenced by historical, cultural and societal factors,

which are unique to each Member State, the EU is a highly heterogenous community in this matter.

Concerning neutrality rules, which prohibit religious symbols, the ECJ adopted a margin of appreciation approach. By setting only a minimum standard for neutrality rules in *Achbita* and *Bougnaoui* it left national courts leeway concerning the balance between freedom to conduct a business and the individual freedom of religion. In matters of occupational requirements by religious employers, the Court conducted a much stricter control and ruled that national courts must assess whether the requirements are genuine, legitimate and justified. While this can be reconciled with the existing case law of many Member States, it gave rise to tensions and conflicts in others: Concerning religious symbols in the workplace, France conducted a balance between the positive and negative freedom of religion, while the German court assessed the individual freedom of religion, instead of the right to non-discrimination. This should however only be considered as tension rather than a conflict. Due to the margin of appreciation granted to the Member States, national differences can be widely accommodated. In contrast to this, the stricter control concerning occupational requirements led to significant tensions and conflicts. Especially the constitutional law and case law in Austria, Cyprus, Denmark and Germany are hardly reconcilable with the ECJs jurisprudence.

In a union of 27 Member States, tensions and conflicts are to some extent inevitable. Primacy is an established conflict rule to resolve these, however cannot be confused with an actual superiority of the EU legal order, as reflected in the presented supremacy theories. This can also be seen in the supremacy locks, which have been developed by the national constitutional courts. Tensions and conflicts are not desirable but to a certain degree inevitable, however, when these arising issues can be subsumed under ultra vires acts, violation of the core of fundamental rights or the national constitutional identity, primacy of EU law as a conflict rule becomes ineffective: The supremacy locks are the demarcation line, showing until where the functional hierarchy reaches – and where not.

The analysis has therefore been centred around assessing the tensions and conflicts in light of the supremacy locks. In this it became evident, that the liberal approach of the ECJ concerning religious symbols in the workplace successfully avoided constitutional conflicts with the national legal orders. To the contrary, the judgements in *Egenberger* and *IR v JQ* can be considered as *ultra vires* as well as interfering with the national constitutional identity of Cyprus and Germany. Even under a strict, *europarechtsfreundlicher* interpretation of both concepts, there are strong arguments in favour of this conclusion. While it cannot be said, whether one of

the two Member States will indeed invoke these supremacy locks, as this is influenced by extra-judicial factors, too, it suffices to determine, that the ECJ deliberately took the risk of creating a constitutional conflict.

Moreover, the jurisprudence of the ECJ on religious freedom raises doubts in light of the supremacy theories. Constitutional Pluralism suggests caution and self-policing in sensitive matters, which the ECJ did successfully for religious symbols at work, but not concerning the occupational requirements by religious employers. This applies similar Composite Constitutionalism, where the national constitutional identity plays an important role. Due to this, the ECJ should have been significantly more self-restrained in its judgements on the occupational requirements by denominational employers. For Multilevel Constitutionalism, the argumentation is however more centred around the division of competences: Freedom of religion and the freedom to conduct a business are both enshrined in EU law, hence these matters belong to the European "level". Therefore, the court could have executed a much closer scrutiny, without interfering with the national "level". In turn, the ECJ would need to be much more restrained concerning the review of occupational requirements by religious employers, as this necessarily regulates the legal status of churches, which is excluded from the EU competencies by Art 17 TFEU.

Developing a consistent jurisprudence, which balances and protects conflicting rights fairly while taking the diverging constitutional understandings of religious freedom among the Member States into account is undoubtedly challenging. Moreover, as fundamental rights of individuals, organizations and undertakings are colliding, there is no ideal, perfect solution. However, this thesis aimed at carving out, where tensions and conflicts with the national legal orders are fundamental, thus where an open constitutional conflict is threatening and, conversely, where not. If the ECJ would leave a margin of discretion wherever a national particularity would preclude a uniform interpretation, the strength of the European legal order would be significantly undermined. It would not only adversely affect the uniformity, but also the effectiveness of the European legal system. The analysis has pointed out, that for religious symbols in the workplace the margin of appreciation-approach avoided successfully fundamental conflicts. From the perspective of the European constitutional system, the ECJ could have even adopted a closer scrutiny. Although there is a lack of consensus among the Member States, it has not become evident that a slightly stricter approach would have led to fundamental conflicts. Regarding the judicial review of religious employers and their occupational requirements it became clear, that a much more liberal and restrained approach

would have been more desirable from the perspective of the European constitutional order. With its *Egenberger*- and *IR v JQ*-judgements, the ECJ has strengthened the right to judicial protection and the individual negative freedom of religion. This however failed to acknowledge the constitutional reality of Germany, Cyprus and ultimately the EU as a whole, which remains based on the principle of conferral.

In light of these findings, it must be concluded that the ECJ should have adopted a stricter control in cases concerning religious symbols in the workplace, for instance a higher standard of justification for the need of neutrality or the need of the individual to wear a certain symbol based on their religious beliefs. This would lead to more religious freedom in the EU, without creating constitutional conflicts. In regard to occupational requirements by religious employers, the ECJ should have been more self-restrained and left the Member States' judiciary more leeway, in order to avoid a constitutional conflict. While this is undesirable concerning the uniformity of EU law and concerning the protection of negative freedom of religion and the right to effective judicial protection, it acknowledges the complexity of a supranational legal order and the jurisprudence within it.

Religious freedom is an essential characteristic for liberal democracies and therefore all Member States of the EU. Although it is not an absolute right, restrictions must be justified, regardless whether it concerns the individual freedom of religion or the collective freedom of religion. To what extent religious freedom should be subordinated to conflicting rights such as the freedom to conduct a business, the right to be free from religion or the right of access to justice cannot be determined in this thesis, but must be ultimately decided by the citizens. This thesis however has carved out how the balance between these conflicting rights can be found from the perspective of the European constitutional order. The sensitivity of the matter makes the jurisprudence on religious freedom in a supranational community difficult. The ECJ should however reconsider its jurisprudence; taking the risk of a constitutional conflict and its consequences seriously and trying to accommodate national doctrines. Uniformity is not an end in itself, rather can the European Union afford to uphold cultural and historical differences and respect national constitutional identities – ultimately reflected in its motto "United in Diversity".

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