SUMMARY

2019/29 Eweida versus Achbita: a storm in a teacup? (EU)

Most scholars have argued that the Achbita judgment is not in line with the jurisprudence of the ECtHR, in particular with the Eweida judgment, and gives less protection to the employee than granted by the ECtHR. In this article, I provide a different perspective on the relation between both judgments and nuance the criticisms that followed the Achbita judgment.

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Introduction

Is a private employer allowed to restrict the religious expression of its employees on the work floor? Both the European Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('CJEU') have addressed this question. The ECtHR considered the question in 2013 in the case of *Eweida – v – UK* ('Eweida'), in which the employee invoked Article 9 of the European Convention on Human Rights ('ECHR').[1] The case of Eweida included four joined cases (Eweida, Chaplin, Ladele and McFarlane) of British citizens who had a dispute with their employer with regard to not being allowed to express their religion on the work floor. Only in the Eweida case did the ECtHR determine that a breach of Article 9 ECHR had occurred.

The CJEU also considered the aforementioned question with its preliminary ruling in the two comparable cases of *Achbita – v – G4S Secure Solutions* ('Achbita')[2] and *Bougnaoui – v – Micropole SA* ('Bouganoui'),[3] in which the scope of the principle of non-discrimination on the basis of religion or belief as stated in Directive 2000/78 stood central. In both cases it involved

women who wanted to wear their headscarf on the work floor but were not allowed to do so because of the neutrality policy of their employer. In the Belgian case of Achbita, the difference between direct and indirect discrimination was the main topic of discussion. In the French case of Bougnaoui, the Court of Cassation asked for more clarity with regard to the term of a 'genuine and determining occupational requirement', which provides that a difference of treatment arising from such a requirement does not constitute discrimination.
As becomes clear from these cases, the right of the employee to express their religion is protected by both international and EU law. The case of Achbita in particular has given rise to debate.[4] In this case, the CJEU argued that an employer, under certain conditions, is allowed to establish a neutrality policy that restricts the religious expressions of its employees. Various aspects of this judgment have been criticized. Most scholars argue that the Achbita judgment is not in line with the jurisprudence of the ECtHR, in particular with the Eweida judgment, and gives less protection to the employee than granted by the ECtHR.[5]
This would mean that within Europe a discrepancy exists with regard to the level of protection of the religious freedom of an employee employed by a private employer. Legal uniformity with respect to this subject would in consequence be lacking. The fundamental nature of religious freedom makes a discrepancy between the interpretations of both courts even more problematic, since this very fundamental nature suggests that only one interpretation of the fundamental right should be possible.[6] Moreover, the importance of an unambiguous interpretation of the right to religious freedom is vital because all 28 Member States are party to the ECHR. The Member States are therefore bound to both EU law, including Directive 2000/78, and to the ECHR. A possible discrepancy between the level of protection given by the CJEU and ECHR is therefore not only critical for the litigant, but also for the national courts of the Member States.
If a discrepancy between EU and international law with regard to the aforementioned matter exists, the national courts of the Member States can be faced with a difficult choice: should they follow the line as set out by the CJEU in the Achbita case and risk that their judgment is in conflict with the ECHR, or should they follow the ECHR and the outcome of the Eweida case, while risking that their judgment undermines European law, for example Article 16 of the Charter of Fundamental Rights of the European Union (the 'Charter')?
Considering these possible consequences, it is all the more important to scrutinize whether the Achbita judgment is not in conformity with the jurisprudence of the ECHR and offers less protection to employees when their right to express their religion on the work floor is restricted. In this article, I will explore this question.
In what follows, I will first start with discussing the Eweida case. Second, I will do the same with the case of Achbita. Third, I will elaborate on the criticism given in the literature on the Achbita judgment. Fourth, I will analyze and respond to this criticism. Finally, I will draw a

conclusion which answers the aforementioned research question.

The case of Eweida

Eweida worked for British Airways, a private company. She was a member of the check-in staff. She was a practicing Coptic Christian and wore her cross until 20 May 2016 beneath her uniform, so that the cross was not visible. British Airways had drawn up a new uniform policy in 2004, obliging the employees to ask permission in order to publicly wear religious accessories or clothing. In May 2006, Eweida started to wear her cross openly, without having asked permission from British Airways. When British Airways asked Eweida to conceal or remove the cross, she first refused, but eventually complied. On 7 August 2006, Eweida again wore her cross openly. British Airways warned Eweida that she would be sent home unpaid if she did not conceal the cross. Again, after protest, Eweida met the request of her employer. Then, on 20 September 2006, Eweida once again wore her cross openly at the workplace. This time she refused to conceal or remove her cross and was sent home by British Airways, unpaid. Some time later, British Airways decided to change the uniform policy and allowed its workers to wear their religious symbols openly on the work floor. Eweida returned to work, but British Airways refused to compensate her for the loss of income during the period she was not working.[7]
After Eweida pursued legal action in the United Kingdom, without success, she initiated proceedings at the ECtHR. Eweida argued that the national law of the United Kingdom insufficiently guaranteed her right of religious freedom as laid out in Article 9 ECHR.[8]
The ECtHR started its assessment by stating that the desire to visibly wear a cross is a manifestation of Eweida's religion and therefore falls within the ambit of Article 9 ECHR. The fact that British Airways did not allow Eweida to wear her cross openly, restricts her freedom of religion. Since British Airways is a private company, the court examined whether the United Kingdom had met their positive obligations under Article 9. The court did so by first considering whether the legislation of the United Kingdom offered adequate protection. The court concluded that it did: the legitimacy and proportionality of the measures of British Airways were examined thoroughly by the national courts.
Second, the ECtHR considered whether the balancing of interests by the national courts led to a fair balance between the rights of both parties. The ECtHR concluded that this was not the case. On the one hand, there is the interest of Eweida, who wishes to use her right to religious freedom. The ECtHR emphasizes the importance of this right. On the other hand, there is the interest of British Airways, that wishes to portray a certain corporate image. The ECtHR stated that, although the wish to portray a certain corporate image is "undoubtedly legitimate", the national courts accorded this too much weight. The cross of Eweida was discreet and could not have been detrimental to her professional appearance, there was no evidence that the

religious symbols may have influenced the image of British Airways in a negative manner and the fact that British Airways reviewed its uniform code shows that the prohibition was not that essential in the first place.[9] The court concluded that the United Kingdom had violated its positive obligation under Article 9 ECHR.[10]

The case of Achbita

Achbita was a Muslim and was working as a receptionist for G4S, a private company in Belgium. After having worked for three years for G4S, she informed her employer in April 2006 that she had decided to wear a headscarf on the work floor. Her employer told her that the wearing of a headscarf was in conflict with the neutrality G4S wished to display. This initially unwritten regulation was incorporated in the labour regulations on 26 May 2006 forbidding employees to visibly wear symbols of their political, philosophical or religious convictions as well as to manifest any ritual that follows from that. After Achbita stuck to her intention of wearing a headscarf, she was dismissed on 12 June 2006.[11]
Achbita pursued legal action in Belgium and when proceedings reached the Belgian Court of Cassation, the Court asked the CJEU the following preliminary question:

Should Article 2(2)(a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?[12]

The CJEU noted that Directive 2000/78 does not define the term 'religion'. Since both the ECHR and the Charter interpret the term religion broadly, the CJEU held that the EU legislature would have wanted to join this interpretation when drafting Directive 2000/78. The CJEU then ruled that the prohibition implemented by G4S was applied to all employees and that this therefore did not constitute direct discrimination as provided for in Article 2(2)(a) of Directive 2000/78.
When the national court concludes that the prohibition results in indirect discrimination as referred to in Article 2(2)(b)of Directive 2000/78, then the distinction in treatment can be objectively justified when the aim is legitimate and the means appropriate and necessary.[13]
The CJEU stated that the wish of a company to display a certain image of neutrality with regard to political, philosophical or religious matters should in principle be regarded as legitimate. This desire is acknowledged in Article 16 of the Charter, that codifies the freedom to conduct a business as a fundamental right. The desire to display a certain neutrality becomes more relevant when the prohibition is only applicable to employees who interact with clients. The CJEU then referred to the case of Eweida, stating that from this case it follows that the desire to display a certain corporate image can, within certain limits, restrict

freedom of religion.
The court subsequently held that the prohibition can be regarded as appropriate, if it is maintained consistently and systematically. The prohibition can be regarded strictly necessary, if it only applies to employees who interact with customers. The CJEU ruled that the referring court should consider whether G4S should have offered her another position prior to dismissing her. However, in considering this possibility, the intrinsic restraints of the company should be kept in mind and the company should not be confronted with an extra burden.

Criticism in the literature

Various aspects of the Achbita case have been criticized. Gerards argues that with this judgment the CJEU is of the opinion that a balancing of interests is not necessary when the neutrality policy of the employer is maintained consistently and systematically.[14]
Another recurring criticism concerns the value attached by the CJEU to the interest of the employer to maintain a policy of neutrality. Roozendaal is of the opinion that the value attached to a 'corporate image' in the case of Eweida was thought to be less meaningful by the ECtHR, especially in comparison with freedom of religion. She argues that for an employee, the way the ECtHR assesses a restriction of freedom of religion on the basis of a neutrality policy is more favourable.[15] Gerards argues that the way freedom to conduct a business enjoys priority over religious freedom is at odds with the jurisprudence of the ECtHR, particularly with the Eweida case.[16] Dorssemont states that the importance the CJEU attaches to the freedom to conduct a business in Achbita is hard to reconcile with the way the ECtHR attenuates the importance of a corporate image in Eweida.[17] Steijns argues that the importance attached in Achbita by the CJEU to the wish of a company to display a neutral image appears to be in contradiction with the Eweida case.[18] Hambler argues that the ECtHR in Eweida held the interest of the employer to be intrinsically less important than religious freedom of the employee.[19]
Ouald-Chaib criticizes the ease with which the CJEU considers the neutrality policy to be a legitimate aim. The judgment of the CJEU is being dominated by the freedom to conduct a business, whilst the protection of freedom of religion of the employee is completely lost sight of. She deems it unlikely that the ECtHR would protect the interest of the employer in the same manner. According to Ouald-Chaib, the ECtHR made clear in the Eweida judgment that freedom to conduct a business does not stand on equal footing with the individual's fundamental right to religious freedom.[20] Finally, Brems suggests that an employee would be more successful in challenging a headscarf ban at the ECtHR rather than the CJEU, by invoking Article 9 ECHR instead of the principle of non-discrimination.[21]

Analysis

In my view the aforementioned criticisms that followed the Achbita case should be nuanced. The fact that the CJEU does not execute a proportionality test itself does not in my view mean that the CJEU holds that it is justified to completely omit that test. The CJEU in fact considers the following: "*it is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary*."[22] In this regard, the CJEU explicitly imposes on the national courts the task of executing the balancing of interests and to not restricting the interests more than strictly necessary. In this manner, a proportionality test for the employee is guaranteed by the CJEU. One can criticize the fact that the CJEU does not provide much guidance on how to execute the proportionality test, but considering the fact that religious expressions on the work floor concerns a sensitive topic which is thought of differently in various Member States, it is hardly surprising that the CJEU remains rather cautious in its wording. If the CJEU would indeed be of the opinion that a neutrality policy takes priority over religious freedom when the prohibition only involves employees that interact with clients and is also maintained consistently and systematically, then it would be superfluous to impose the task of balancing the interests on the national judge.
Furthermore, the demand of a consistent and systematically maintained neutrality policy should not be underestimated. I can imagine that an employer will not always meet these requirements effortlessly. Especially when the neutrality policy is formulated quite broadly, the employer can be required to also strictly oversee other kinds of expressions of employees. Think for example about wearing a clothing brand that can be associated with certain politics.[23]
Contrary to Hambler, I do not believe that it follows from the Eweida case that, according to the ECtHR, the interest of displaying a corporate image weighs intrinsically less than the freedom of religion. The ECtHR ruled that the national courts had accorded the display of a corporate image too much weight. This does not mean that such a wish intrinsically weighs less. This becomes even more apparent by the fact that the ECtHR sums up various reasons why the interest of the employer was not that essential at all. If it would weigh intrinsically less, it would not have been necessary for the court to point out why in this case it was accorded too much weight. That, after all, would be superfluous.
After the ECtHR emphasized the importance of religious freedom as a fundamental right, it argued that the cross of Eweida was discreet and not detrimental to her professional appearance. This consideration, in my opinion, puts the fundamental nature of this right in perspective. If the ECtHR would hold the freedom of religion as nearly unassailable, it would not matter whether the cross was discreet or not. One could therefore argue that if the cross was not discreet, the balancing of interest would have a different outcome.[24] If the ECtHR indeed would deem religious freedom to be of fundamental, nearly untouchable importance, it

could have stated that the right of religious freedom in principle enjoys priority over the interest of an employer who wishes to portray a certain image.

Another crucial element in the reasoning of the ECtHR was the fact that British Airways had changed its uniform policy. Changing the policy devalues the argument that a certain policy is necessary for the company. Another important element is the fact that British Airways did allow other religious expressions of, for example, Muslims and Sikhs on the work floor. The uniform policy was therefore not maintained consistently. The CJEU held in the Achbita case that a policy of neutrality should be applied consistently and systematically in order to be admissible. It is therefore quite possible that if Eweida went to the CJEU, she would have had a similar outcome with regard to admissibility of the uniform code.

The ECtHR continued by stating that there was no evidence of other religious expressions having a negative effect on the image of the employer. All these considerations of the ECtHR nuance and weaken the interest of the employer, while the ECtHR first stated that wanting to portray a certain corporate image is undoubtedly legitimate. This shows, in my opinion, that the ECtHR believes that the interest of the employer to portray a corporate image is legitimate, but simply not in this very case because of all the aforementioned facts.

Another criticism that I do not endorse involves that with respect to the way the CJEU has involved Article 16 of the Charter on the freedom to conduct a business in the balancing of interests. Article 16 of the Charter is and continues to be a binding fundamental right. Especially in a case such as Achbita, this fundamental right is relevant and applicable. The CJEU has involved Article 16 of the Charter in its question whether the interest of the employer could be called legitimate. This makes the interest of the employer stronger, but it does not follow from the judgment that Article 16 of the Charter has had influence on other elements of the balancing of interests. Even a legitimate aim has to meet the requirements of proportionality and necessity. I believe that Article 16 of the Charter has merely played a role in qualifying the interest of the employer as legitimate and I do not see what is wrong with that.

It surprises me that the way the CJEU qualifies the interest of the employer is the subject of criticism, while this criticism seems absent with regard to the ECtHR. In the Eweida case the legitimacy of the interest of the employer was not a point of discussion. Even more so, the ECtHR speaks of an "undoubtedly legitimate" aim, without referring to even a statute or judgment. This approach is in my view more problematic than the way the CJEU deals with the matter, because the ECtHR fails to explain in the Eweida case why the aim of the employer at hand was undoubtedly legitimate. The CJEU at least substantiates its position that the interest of the employer to maintain a policy of neutrality is legitimate with a reference to a binding fundamental right. Furthermore, the CJEU is more cautious in its wording. Whilst the ECtHR speaks of an "undoubtedly legitimate" aim, the CJEU mentions that the wish to

maintain a policy of neutrality is "in principle" a legitimate aim.
The foregoing does not mean that one cannot criticize the way both courts accept the legitimacy of the aim of the employer. It seems that for an employer it is not that difficult to argue that it has a legitimate aim, in front of both courts. One may wonder whether we should not ask more from the employer to substantiate why this aim of a corporate or neutral image is really legitimate. Given the infringements an individual may face of their rights, I believe the courts should at least demand that employers prove their aim is unrelated to any form of discrimination.[25]

Conclusion

The stance taken by both the ECtHR and CJEU is closer to one another than would seem at first sight. The above analysis shows that the outcome of the Eweida case should not be generalized and that it should be seen in the context in which it was given. The outcome definitely says something, but the reasoning that led to the outcome says more. The specific elements of the case made that the interest of the employer did not outweigh the interest of the employee. This does not make the ECtHR friendlier towards employees. In the Achbita case the CJEU was more cautious in its wording with regard to the legitimacy of the aim of the employer. Furthermore, the requirements of a consistently and systematically maintained neutrality policy should not be underestimated. The criticism on the Achbita case in relation to the Eweida case is in my view dubious and the lack of criticism towards the Eweida case is surprising. The main difference between both cases is the fact that the employer did not have such a good case in Eweida. In the end, both the Eweida and the Achbita judgment show that the wish to display a certain corporate or neutral image by the employer can be legitimate. A policy that aims at creating this image should at least be maintained in a consistent and systematic manner, while only involving employees that interact with customers. The requirements of proportionality and necessity are guaranteed in both judgments, be it in different ways. The ECtHR did its own balancing of interests, whilst the CJEU imposed this task upon the national judge. Either way, the requirements that need to be met stay the same. Instead of a discrepancy, there rather seems to be a convergency in Europe with regard to the protection of the employee whose employer wishes to restrict religious expressions on the work floor.

Noten
1 ECtHR 15 January 2013, 48420/10, 59842/10, 6167/10 and 36516/10 (Eweida and Others – v – United Kingdom).
2 CJEU 14 March 2017, C-157/15 (Achbita – v – G4S Secure Solutions).
3 CJEU 14 March 2017, C-188/15 (Bougnaoui – v – Micropole SA).
4 For example: L. Vickers, 'Achbita and Bougnaoui: One step forward and two steps back for

religious diversity in the workplace', European Labour Law Journal (8) 2017, p. 232-257; E. Cloots, 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', CMLRev (2) 2018, p. 589-624; E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the workplace', IACL-IACD Blog 27 March 2017, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace; S. Ouald-Shaib & V. David, 'European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it', Strasbourg Observers 27 March 2017, https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/; A. Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui', Industrial Law Journal (47) 2018, p. 149-164.

5 For example: L. Vickers, 'Achbita and Bougnaoui: One step forward and two steps back for religious diversity in the workplace', European Labour Law Journal (8) 2017, p. 232-257; E. Cloots, 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', CMLRev (2) 2018, p. 589-624; J.H. Gerards, annotation at: CJEU 14 March 2017, C-157/15, EHRC 2017/96 (Achbita – v – G4S Secure Solutions); W.L. Roozendaal, annotation at: CJEU 14 March 2017, C-157/15, TAP 2017/213, episode 5 (Achbita – v – G4S Secure Solutions); E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', IACL-IACD Blog 27 March 2017; For example: L. Vickers, 'Achbita and Bougnaoui: One step forward and two steps back for religious diversity in the workplace', European Labour Law Journal (8) 2017, p. 232-257; E. Cloots, 'Safe harbour or open sea for corporate headscarf bans? Achbita and Bougnaoui', CMLRev (2) 2018, p. 589-624; J.H. Gerards, annotation at: CJEU 14 March 2017, C-157/15, EHRC 2017/96 (Achbita – v – G4S Secure Solutions); W.L. Roozendaal, annotation at: CJEU 14 March 2017, C-157/15, TAP 2017/213, episode 5 (Achbita – v – G4S Secure Solutions); E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', IACL-IACD Blog 27 March 2017, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace; S. Ouald-Shaib & V. David, 'European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it', Strasbourg Observers 27 March 2017, https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/; F. Dorssemont, 'Vrijheid van religie op de werkplaats en het Hof van Justitie: terug naar cuius regio, illius religio?', ArA 2017, episode 2, p. 36-65; A. Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from

Achbita and Bougnaoui', Industrial Law Journal (47) 2018, p. 149-164; A. Swarte & J.P. Loof, 'Ontslag vanwege een hoofddoek; de arresten Achbita en Bougnaoui en de Nederlandse rechtspraktijk', NtER 2017, episode 5, p. 118-125.
6 T. Barkhuysen & A.W. Bos, 'Negatief advies van het Hof van Justitie over de toetreding van de EU tot het EVRM. Na de euro-crisis, nu een grondrechtencrisis?', NJB 2015/637, episode 13, p. 805.
7 ECtHR 15 January 2013, 48420/10, 59842/10, 6167/10 and 36516/10 (Eweida and Others – v – United Kingdom), par. 9-13.
8 Ibid., par. 66.
9 Ibid., par. 94.
10 Ibid., par. 95.
11 CJEU 14 March 2017, C-157/15 (Achbita – v – G4S Secure Solutions), par. 10-16.
12 Ibid., par. 21.
13 Ibid., par. 34, 35.
14 J.H. Gerards, annotation at: CJEU 14 March 2017, C-157/15, EHRC 2017/96 (Achbita – v – G4S Secure Solutions), par. 13 and 14.
15 W.L. Roozendaal, annotation at: CJEU 14 March 2017, C-157/15, TAP 2017/213, episode 5 (Achbita – v – G4S Secure Solutions), par. 6.
16 J.H. Gerards, annotation at: CJEU 14 March 2017, C-157/15, EHRC 2017/96 (Achbita – v – G4S Secure Solutions), par. 13 and 14.
17 F. Dorssemont, 'Vrijheid van religie op de werkplaats en het Hof van Justitie: terug naar cuius regio, illius religio?', ArA 2017, episode 2, p. 60.
18 M. Steijns, 'Achbita and Bougnaoui: Raising more Questions than Answers', Eutopia Law 2017, https://eutopialaw. com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/.
19 A. Hambler, 'Neutrality and Workplace Restrictions on Headscarves and Religious Dress: Lessons from Achbita and Bougnaoui', Industrial Law Journal (47) 2018, p. 161.
20 S. Ouald-Shaib & V. David, 'European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it', Strasbourg Observers 27 March 2017, https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/.
21 E. Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace', IACL-IACD Blog 27 March 2017, https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace.

22 CJEU 14 March 2017, C-157/15 (Achbita – v – G4S Secure Solutions), par. 43.
23 You can think of the clothing brand Lonsdale, that has been associated with racism and xenophobia.
24 Which indeed had been argued by M.L.P. Loenen, 'De houdbaarheid van de Nederlandse regulering van religieuze kleding en symbolen op de werkvloer in het licht van de Europese rechtsontwikkeling', NJCM-Bulletin, 2017/35, episode 4, p. 467.
25 The Bilka case may serve as an inspiration. See: CJEU 13 May 1986, 170/84 (Bilka).

Verdict at:
Case number: