From Achbita to WABE

Description

The Author examines the main differences between the CJEU decisions in the *Achibita* and *WABE* cases, both of which relate to neutrality policies pursued by private employers that prohibit employees from displaying religious or political symbols. The A. argues that in the *WABE* decision, the Court: (1) requires for the neutrality policy to meet a genuine need on the part of that employer, which it is for the employer to demonstrate, taking into consideration the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; (2) considers that such difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, entailing such policy to be pursued in a consistent and systematic manner; (3) requires that the prohibition on displaying religious or political symbols is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

L'Autore esamina le principali differenze delle decisioni della Corte di giustizia *Achibita* e *WABE*, entrambe relative a politiche di neutralità perseguite da datori di lavori privati, che vietano ai lavoratori di esporre simboli religiosi o politici. A parere dell'A., in *WABE*, la Corte: 1) esige che la politica di neutralità risponda a una reale esigenza del datore di lavoro, che spetta a quest'ultimo dimostrare, tenendo conto delle legittime richieste di clienti o utenti e delle conseguenze negative che tale datore di lavoro subirebbe in assenza della politica di neutralità, tenuto conto della natura delle sue attività e del contesto in cui esse sono svolte; 2) considera la differenza di trattamento è appropriata al fine di garantire la corretta applicazione della politica di neutralità del datore di lavoro, il che implica che tale politica sia perseguita in modo coerente e sistematico; 3) prescrive che il divieto di esporre simboli religiosi o politici sia limitato a quanto strettamente necessario in considerazione dell'effettiva portata e gravità delle conseguenze negative che il datore di lavoro cerca di evitare adottando tale divieto.

Read the decision

In *IX v Wabe eV* and *MH Müller Handels* GmbH v MJ, two cases are at the heart of the preliminary references[1]. The first case concerns an undertaking that employs 600 workers in crèches. At the heart of the case is a childcare worker who, after a period of parental leave, attempts to return to work on two occasions. On each occasion, she reveals that she is wearing a headscarf. The employer instructs her to remove the headscarf. This instruction relates to an internal regulation that explicitly forbids wearing visible political, philosophical or religious symbols in the workplace. It only applies to the teachers who are in contact with the children and the parents. This regulation came into being after the *Achbita* judgment and the modalities seem to be a reprint of it. The lady is sent back twice as an orderly and a disciplinary warning is acted upon twice in her personnel file. The proceedings on the merits concern the removal of those decisions from the personnel file.

The second case position concerns a sales assistant cashier in a shop who appears at work wearing a headscarf at some point. The employer solved this situation by giving her another job, where she could

wear her headscarf. Although neither the judgment nor the conclusion clarify this, it appears that this is a job in *back office*. In June 2016, the employer asked her to remove her headscarf in that position as well. She refuses to do so and is subsequently sent home. The employer acts quickly by adopting an internal regulation within the month, which prohibited the wearing of *large, conspicuous* political, philosophical or religious signs at work. He then ordered the lady to resume work without wearing such large and conspicuous signs. In the proceedings on the substance brought before the referring court (the *Bundesarbeitsgericht*), she seeks a declaration that the instruction is invalid. The instruction used by the employer preceded the *Achbita* judgment and the formula differs from the "doctrine" used in that judgment on a number of important points. Indeed, the prohibition is limited to "large and conspicuous" signs. A striking difference with the *Achbita* case concerns the finding that the German employer did offer a *back-office* job that allowed her to work wearing a headscarf. Why he considered at a certain moment that the performance of that function or the labour organisation no longer allowed this, is completely unclear.

The Court of Justice shall classify and paraphrase the questions referred for a preliminary ruling in the following order.

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

The Court unequivocally denies that question. This answer is not surprising. The Court had already stated this with identical wording in the *Achbita* judgment. What is important is that "such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference of treatment based on a criterion that is inextricably linked to religion or belief"[2]. The Court does, however, distinguish such beliefs within the meaning of Directive 2000/78 from "political or other opinions"[3]. This *obiter dictum* probably prevents the useful use that can be made of the Directive 2000/78 to curb discrimination on the basis of political or trade union convictions. In more positive terms, it demonstrates the added value of e.g. the current Belgian transposition legislation which prohibits discrimination on both grounds.

What the Court refuses to accept is that there may well be a distinction between citizens who wish to express convictions and those who do not experience such a need. If a religion imposes a certain praxis, such a need is evident. However, the Court refuses to accept this difference to be relevant.

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

In my view, the Court of Justice answers this question with much more nuance than in *Achbita,* where it held that such justification presupposes that:

1. that that policy meets a genuine need on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or

users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out;
2. that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner;
3. that the prohibition in question is limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition[4].

By way of comparison, in *Achbita,* the Court ruled poorly that "the pursuit by the employer, in relations with its customers, of a policy of political, philosophical and religious neutrality" constituted a legitimate aim and that the means of achieving that aim had to be appropriate and necessary[5].

A substantial difference with *Achbita* seems to me to concern the first condition in particular. In *Achbita,* the Court gave the impression that it was assuming, without question, that a policy of neutrality *necessarily* constituted a legitimate objective.

The foundation that the Court gave for that legitimacy concerned the freedom to conduct a business. Article 16 CFREU acted as a catalyst to legitimize and facilitate indirect discrimination. The approach to this freedom was highly subjective and close to arbitrary. It was precisely at this point that a distinction was made between the objective approach to the justification of direct discrimination and the more subjective justification of indirect discrimination. In the case of direct discrimination, this objectivity follows from the way in which the substantive occupational requirements are defined in Article 4 of Directive 2000/78. Indeed, direct discrimination can only be justified to the extent that Member States expressly provide that "a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". In *Micropole*, the Court of Justice sought to give an objective interpretation to these notions of "nature" and "context"[6].

The Court now introduces some objectivity to the legitimate objectives that justify indirect discrimination, in spite of what the foundation in the employer's freedom of enterprise might suggest. The wish is no longer the father of the idea and even less of the legitimacy. The Court literally states: "that being said, the mere desire of an employer to pursue a policy of neutrality – while in itself a legitimate aim – is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate."[7].

In a recently defended doctoral thesis on corporate neutrality that preceded this judgment, Leopold Van Bellingen pays attention to two distinct dimensions of neutrality[8]. The thesis has the great merit of clearly mapping out the objectives of neutrality. The recent judgment of the Court of Justice aptly demonstrates the legal relevance of this research. The author considers this neutrality both from the internal dimension of the management of the enterprise as a working community and from the external dimension of the enterprise in its relation to the outside world. In the latter case, its image is at stake. His analysis has the merit of distinguishing the instrumental dimension of neutrality from a more teleological dimension. Instrumental neutrality serves other objectives, such as the efficient

management of the enterprise, social peace or concern for one's image, whereas in a more teleological view, neutrality is promoted to an objective in itself. Neutrality then becomes part of the identity of the firm. If you like, the undertaking is then created after the image of the neutral State. The approach of the Court of Justice seems to me to bear witness to the need to objectively anchor a policy of neutrality within the freedom to conduct a business. The question arises whether within that framework there is still room, after this judgment, to consider neutrality as an end in itself, irrespective of any underlying objective.

Some subjectivity remains. First of all, contrary to direct discrimination, justification does not presuppose any initiative on the part of Member States. Secondly, the Court states that justification presupposes a "genuine need on the part of the employer" and it is up to the employer to demonstrate it [9].

The use of the word 'need' is somewhat ambiguous. The Court does make it clear that the objectivity of the need cannot be demonstrated by hiding behind subjective customer complaints or discriminatory customer demands[10].

The rights and legitimate expectations of clients and users must be distinguished from complaints and discriminatory demands[11]. In the case of the children's care centres, the Court therefore takes into account "the right of parents, recognised in Article 14 of the Charter, to ensure that their children are educated and trained in accordance with their religious, philosophical and educational beliefs".

If one were to apply this reasoning to the facts of the *Achbita* case, the question could be asked as to what rights or legitimate expectations the clients of G4 Secure Solutions could present *in concrete terms,* so that the company should take them into account. In my view, what is certain is that it is not (or no longer) appropriate to sublimate non-legitimate expectations by means of an abstract principle of neutrality contained in a rule.

The Court states in paragraph 67 that "in assessing whether there is a genuine need on the part of the employer within the meaning of paragraph 64 above, particular relevance should be attached to the fact that the employer has adduced evidence that, in the absence of such a policy of political, philosophical and religious neutrality, its freedom to conduct a business, recognised in Article 16 of the Charter, would be undermined in that, given the nature of its activities or the context in which they are carried out, it would suffer adverse consequences"[12].

The notions of the nature or context of the activities appear in the provision on "occupational requirement". It is therefore logical that the same concepts should be given a similarly restrictive interpretation in the context of indirect discrimination. However, the use of the word "adverse consequences" introduces a very mercantile dimension into a balancing of interests at a point in the architecture where proportionality is not yet an issue. Indeed, this element refers to legitimacy. As these are cumulative conditions, however, adverse consequences of failure to honour non-legitimate reasons cannot in themselves make a difference.

In my opinion, the approach of the Court also shows an objectivist approach for another reason. Objectivating means, among other things, indicating which objectives (read: goals) a policy serves. Employers will in fact have to indicate which underlying objective the "neutrality policy" serves. In another part of the judgment, the Court mentions some legitimate underlying objectives of a policy of neutrality, namely "the avoidance of social conflicts" and "a neutral *attitude* towards clients". The

second objective is clearly unfortunate. The only meaningful way to explain it is to interpret neutrality in the sense of inclusive neutrality.

The third question examined by the Court concerned the issue of whether a kind of neutrality policy could be tolerated *lightly*, whereby a ban would apply only to the wearing of large, conspicuous signs representing a political, philosophical or religious conviction. Now it does not take much imagination to see that such a policy spares Christians who wear small crucifixes and Jewish brothers who wear yarmulkes, but that this criterion could be particularly disadvantageous for those Muslim women and why not Sikhs who wear headscarves and turbans. After all, one can wear small crucifixes but not small headscarves, unless one has a small head.

The Court's answer is categorical at first sight. Indirect discrimination resulting from an internal rule of a company which prohibits the wearing of visible signs of political, philosophical or religious beliefs at work, with a view to guaranteeing a policy of neutrality within the company, can only be justified if the prohibition applies to *any* visible manifestation of a political, philosophical or religious belief. The Court follows up this argument in the operative part by a less categorical one. Indeed, "A prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs *is liable* to constitute direct discrimination on the grounds of religion or belief, which cannot in any event be justified on the basis of that provision"[13].

Although this formula sounds more nuanced, the Court itself states that:

? "In that regard, it should be noted that a policy of neutrality within an undertaking, such as that referred to by the first question in Case C?341/19, can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality"[14].

In doing so, it seems to substitute its judgment for that of the judge on the merits.

The question of the size of headscarves obviously brings to mind an important consideration in the Eweida judgment of the Strasbourg Court. In this ruling, the Strasbourg Court did take into account the "discreet" nature of the religious symbol worn by Mrs Eweida when balancing the freedom of religion and British Airways' interest in preserving its "corporate image". According to the Court, the crucifix, which was modest in size, could not possibly harm her "professional appearance"[15]. In fact, this passage was used by Advocate General Rantos to argue that a company regulation which only prohibited conspicuous and large signs was justifiable[16].

A comparison between both judgments shows that for the Strasbourg Court the size of the sign is relevant, whereas for the Luxembourg Court size is not.

How can this be explained? The Court of Justice is strongly focused on the preliminary question of whether a certain situation constitutes direct or indirect discrimination. If unequal treatment arises on the basis of a characteristic linked to a foundation, direct discrimination is involved. The *Achbita* doctrine in fact encourages employers to devise rules that restrict all employees equally in the enjoyment of freedom of religion. The approach of the Strasbourg Court is focused on the restriction of freedom of religion. The finer the net that catches employees, the more proportionate that restriction

will be. This observation, however, does not alter the fact that, in this hypothesis, employees can still test such restrictions against the combination of Article 9 and Article 11 of the ECHR.

In the fourth and final part of the judgment, the Court synthesises two questions for a preliminary ruling in order to reach a very fundamental point: the relationship between freedom of religion and the principle of non-discrimination.

This discussion is linked to the scope of Article 8 of Directive 2000/78.

This Article provides that “Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive”.

In so doing, the national court disregards the potential inherent in Article 2(5), which provides that “this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.”

In this regard, the Court ruled that “Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) of that directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief”[17].

The reliance on this article suggests that provisions which guarantee religious freedom allow for a more generous protection of citizens who believe they have been the victims of discrimination on the basis of religion over and above the justification for such forms of discrimination permitted by the Directive.

The Court refers in this context to the “margin of discretion” that Member States have to stretch the concept of discrimination and to set higher requirements for what can justify the principle of equal treatment[18]. Since Article 9 of the ECHR has an effect on national law, one may point to some remarkable discrepancies that do exist between the test to which the Strasbourg Court subjects restrictions on the freedom of religion and the Luxembourg test[19]. In this respect, I already pointed out in a previous article that the Strasbourg Court imposed a *prescribed by law* requirement that, in my opinion, is distinct from the systematic application of a policy of neutrality. It should also be noted that the mere fact that Eweida was indeed given a job *in the back office did not* liberate *British Airways*. The Strasbourg Court has also clearly stated that corporate image is in no way a value which needs to be protected in the same way as the conventional freedom of religion.

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[1]H vJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ.*

[2] H vJ, C-804/18 and C-341/19, *IX v. Wabe eV and MH Müller Hadels GmbH v MJ.* § 52.

[3] H vJ, C-804/18 and C-341/19, *IX v. Wabe eV and MH Müller Hadels GmbH v MJ.* § 47.

[4] H vJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ.* (operative part).

[5] ECJ, C-157/15 (Samira Achbita, Centre for Equal Opportunities and Opposition to Racism v G4S Secure Solutions NV) (operative part)

[6] ECJ, C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme ADDH) v. Micropole SA.*

[7]ECJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ.* § 64

[8] L. Van Bellingen, *La neutralité de l'entreprise privée,* Louvain La Neuve, 2021, 663p.

[9] ECJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ,* § 64

[10]H vJ, C-804/18 and C-341/19, *IX v. Wabe eV and MH Müller Hadels GmbH v MJ,* § 66.

[11] H vJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ,* § 65

[12] H vJ, C-804/18 and C-341/19, *IX v. Wabe eV and MH Müller Hadels GmbH v MJ.* § 67.

[13] ECJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ.* (operative part).

[14] ECJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ,* § 77.

[15] ECHR, 15 January 2013, no. *48420/10, 59842/10, 51671/10 and 36516/10),* § 94.

[16] See Opinion of AG Rantos in ECJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ.*

[17]H vJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ.* (operative part).

[18] ECJ, C-804/18 and C-341/19, *IX v Wabe eV and MH Müller Hadels GmbH v MJ,* § 87.

19] F. Dorssemont, "Vrijheid van religie op de werkplaats en het Hof van Justitie : terug naar cuius regio, illius religio ?", *RRS* 2016, 65-105.

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