

## BRIEFING PAPER

# Employer's Bar on Religious Clothing and European Union Discrimination Law

### BANNING CLOTHES BECAUSE THEY EXPRESS RELIGION IS NOT A “NEUTRAL” EMPLOYMENT RULE

The European Union’s Employment Equality Directive 2000/78 prohibits employers from discriminating on grounds of religion. An employer decided to ban staff from wearing any religious clothing, and claimed that this could be justified because it maintains “neutrality”. The Court of Justice of the European Union will rule whether such a ban violates European Union law. We argue that it does. The European Union is committed by law to pluralism, including of religious expression. It is not “neutral” for an employer to single out people whose religion is expressed through clothing.

1. The Court of Justice of the European Union (CJEU) will soon rule on an important legal question: when does European Union (EU) law permit employers to bar workers from wearing clothing that expresses their religion?
2. EU law – through Employment Equality Directive 2000/78 – bars employers from discriminating on grounds of religion. Ms. Achbita was dismissed from her job because she considered her religion required her to wear a headscarf. Her employer – G4S – claimed that its refusal to allow her to wear a headscarf was “neutral”.
3. The Court should rule that employers cannot adopt clothing rules that limit expression of religion, except under national laws adopted for reasons of public order or a genuine and legitimate occupational requirement. The European Union is committed, by law, to “a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail”.<sup>1</sup> It is not “neutral” to bar citizens from dressing to express their religion; just as it is not neutral to bar them from dressing to express their ethnicity, sexuality or sex. The case provides an opportunity for the Court to give legal guidance on two key issues:
  - a. It is direct discrimination when an employer adopts a clothing rule that treats workers with certain religious beliefs differently from others.
  - b. An employer has no legitimate objective in claiming “neutrality” for a practice which deliberately targets workers who express their religion through clothing: the genuine occupational requirement exception cannot apply.
4. This is the first case raising religious discrimination under the Employment Equality Directive to reach the CJEU, and the ruling could fundamentally shape the law barring discrimination on grounds of religion. The Court should respect and build on its case law in other fields of discrimination to avoid serious impacts on protection from discrimination on grounds such as ethnicity, sexual orientation and sex.
5. The Court’s ruling will have a profound effect on thousands of women across the EU who wear headscarves as a matter of religious conviction; it may either assure their right to enter into the workplace, or make their economic independence precarious, dependent on the whim of individual employers.

## Facts of the Case

6. In Case C-157/15, Ms. Achbita is a Muslim woman who considered her religion required that she should wear a headscarf (not a face covering) when in public, including while at work. After she made this decision known, her employer – G4S – adopted a new written rule on clothing: “It is prohibited for employees at the workplace to bear visible signs of their political, philosophical or religious beliefs, or to perform any kind of ritual that is related to it.” G4S claimed that this had always been an unwritten rule.
7. The Belgian Court of Cassation asked the CJEU for guidance on whether the employer had discriminated directly or merely indirectly. In her opinion issued 31 May 2016, Advocate-General Kokott argued that the ban is not direct discrimination, and that, even as indirect discrimination, it can be justified by the employer’s wishes, since an employer’s desire to maintain a “neutral”

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<sup>1</sup> Treaty of European Union, Article 2.

workplace can constitute a genuine and legitimate occupational requirement that justifies the discrimination.<sup>2</sup> The Court itself must now rule on the issues.

## EU Discrimination Law

8. The values of pluralism and a commitment to combat discrimination and social exclusion are deeply embedded in the founding documents of the European Union. The Treaty of European Union provides:

### Article 2

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

### Article 3

3. The Union shall establish an internal market...It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

9. The Treaty on the Functioning of the European Union provides, in Article 19(1):

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

10. The Charter of Fundamental Rights of the European Union states:

### Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

### Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

### Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

11. The Employment Equality Directive 2000/78 was adopted in 2000 and brought into force by Member States in 2003. The Preamble to the Directive states:

(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

<sup>2</sup> Case C-157/15 *Achbita*, Opinion of Advocate General Kokott, delivered 31 May 2016 ("Advocate General Kokott's Opinion").

- (9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.
- (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.
- (12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community.
12. Article 2 of the Directive bars discrimination on grounds of religion or belief, disability, age or sexual orientation in the field of employment. The CJEU has ruled on cases about all of those grounds, except for “religion or belief”.
13. The Directive specifically prohibits three kinds of discrimination - direct, indirect and harassment. As for direct and indirect discrimination:
- a. Direct discrimination occurs “where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on [grounds of religion or belief]”: Article 2(2)(a).
  - b. Indirect discrimination occurs “where an apparently neutral provision would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless that provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary”: Article 2(2)(b).
14. There are two exceptions where discrimination remains lawful:
- a. The public policy exception in Article 2(5): if national law lays down measures “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.”
  - b. The genuine occupational requirement exception in Article 4: allows that “Member States may provide that a difference of treatment which is based on a characteristic related to [religion or belief] 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.”

## Rule Prohibiting Signs of Religion Is Direct Discrimination

15. The Open Society Justice Initiative argues that a rule that prohibits an employee from manifesting any visible sign of religious belief constitutes direct discrimination on grounds of religion.
16. The Belgian court accepted that Ms. Achbita genuinely considered that wearing a headscarf was necessary to her religion. The power of Ms. Achbita's conviction was such that she refused to remove the headscarf even when it meant her dismissal from employment.

17. Under Article 2(2)(a) of the Employment Equality Directive, there is “direct discrimination” if this rule has the effect of treating certain persons less favourably than others in a comparable situation, on grounds of religion or belief.
18. The question is not whether a rule makes the same demand of all people (e.g. ‘no clothing which is a sign of religious belief’), but whether it has the effect of treating some people differently from other people in a comparable situation, on grounds of religion or belief.
19. A person whose religion does not require them to wear anything that an employer considers a visible sign of religion, but is nonetheless subject to the G4S rule, is in a comparable position to Ms. Achbita. This comparable person is not required to violate their religious precepts and does not face dismissal if they fail to comply.
20. G4S argued that the rule is “neutral” because it barred all visible signs of every political, philosophical or religious belief. Advocate-General Kokott argues that discrimination between employees who believe that their religion requires them to wear religious clothing and those who do not is not less favourable treatment “on grounds of religion”.<sup>3</sup>
21. The Open Society Justice Initiative respectfully disagrees. A company policy to forbid employees to wear visible signs of their religion treats those employees who believe that their religion requires them to wear religious clothing less favourably on grounds of religion. As the courts of Europe have repeatedly accepted, expression of religion is an inherent aspect of religion.<sup>4</sup> Different individuals express their religion differently: through clothing, dietary decisions, attending religious services or other activities. Less favourable treatment of persons whose clothing is chosen as an expression of religious belief, rather than for fashion or other reasons, is less favourable treatment “on grounds of religion”.
22. The Advocate-General correctly accepts that “religion” must be interpreted broadly to include not only the beliefs of an individual, but also their religious practice, including any active expression.<sup>5</sup> It follows that a policy which bars religious practices, especially one which bars them from such practices because they are religious practices, is one which treats persons affected less favourably than others “on grounds of religion”.
23. The Advocate-General’s claim that such treatment is not “directly and specifically linked to religion” is unexplained.<sup>6</sup> However, as the Advocate-General correctly argues, Article 21 of the Charter of Fundamental Rights, which is given specific expression in the Employment Equality Directive, “seeks not least to eliminate traditional prejudices and to break with outdated structures. Under no circumstances, therefore, would it be permissible to perpetuate existing differences of treatment simply because doing so accords with certain traditions, customs or social structures.”<sup>7</sup>
24. The Treaty of European Union (TEU) expressly recognises – and demands respect for – the diversity of the peoples of Europe, including those who visibly manifest their religious beliefs. The purposes of the TEU include “to deepen the solidarity between their peoples while respecting their history, their

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<sup>3</sup> Advocate General Kokott’s Opinion, para. 53.

<sup>4</sup> *Id.*, para. 38, citing judgments of the European Court of Human Rights and national courts.

<sup>5</sup> *Id.*, para. 35.

<sup>6</sup> *Id.*, para. 53.

<sup>7</sup> *Id.*, para. 123.

culture and their traditions". The founding values of the Union include respect for the rights of all, and Article 2 expressly recognizes that in Europe, pluralism, non-discrimination, tolerance, justice and solidarity shall prevail.

25. The peoples of Europe do not share a common religion, a common ethnicity or common modes of dress. The culture and traditions of Europe include a variety of approaches to expression of religious, ethnic or national identity through clothing and other visible signs. At different times and in different parts of Europe, its peoples have chosen to cover their heads for these reasons. Millions of Europeans follow these practices today. The headscarf is worn not only by religious Muslim women, but by many others as well, including Catholic, Jewish, Roma and Kurdish women. Men also cover their heads in Jewish, Muslim and Sikh communities. In a pluralist society, there is no right to be "protected" from seeing clothing that manifests religious belief,<sup>8</sup> as Advocate-General Kokott accepts.<sup>9</sup>
26. A policy barring the headscarf, turban, and kippah is not 'neutral' between religions. To the contrary, such a policy disfavours persons whose religious beliefs require an outward manifestation of those beliefs. It is direct discrimination for employers to require employees who hold these religious beliefs to hide those beliefs as a condition of employment.
27. The French Government argues that bans on religious clothing may be essential to avoid the false attribution to employers of their employee's religion.<sup>10</sup> This argument must be rejected. In a pluralist democracy, permitting employees to dress to respect their religion (or ethnicity, sexuality, or sex) shows nothing more than the employer's proper respect for the different religions (ethnicities, sexualities and sexes) of the peoples of Europe. As the German Constitutional Court has held, "[w]here the State allows a religious expression of an individual teacher or staff member related to wearing a headscarf, it does not make said statement its own nor does it imply any intention of the State."<sup>11</sup> Only in a sectarian society would a customer properly assume that showing this respect implies partiality by the employer.
28. Paradoxically, wrongly characterizing religion-based bans as "neutral" would lead to the very result the French Government fears. Employers who do not ban religious clothing would be reasonably perceived or portrayed as "taking sides" in favour of religious expression and of the religion of their employees. This would promote intolerance of people with religious beliefs.
29. The logic of the Advocate-General's position is that any generalized ban on "active expression" of a characteristic protected by European Union law is not direct discrimination. It would follow that a bar on "active expression" of ethnicity, sex or sexual orientation – for example, a shop policy to refuse entry to persons wearing clothing expressing ethnicity or sexuality – would not be direct discrimination. Under such an interpretation, an employer could require all employees to wear "sex-neutral" clothing. In all these cases, the respondent could – in the Advocate-General's words – argue that persons disadvantaged are only those who "wish to give active expression to a particular" ethnicity, sex or sexual orientation.<sup>12</sup>

<sup>8</sup> See Federal Constitutional Court of Germany, 1 BvR 471/10 and 1 BvR 1181/10, Decision of 27 January 2015, para. 104.

<sup>9</sup> Advocate General Kokott's Opinion, para. 140.

<sup>10</sup> *Id.*, para. 95.

<sup>11</sup> Decision of the German Constitutional Court (note 8, above), para. 104.

<sup>12</sup> Advocate General Kokott's Opinion, para. 53.

30. Clearly, such a view contradicts fundamental principles of EU law, including the objective of the European Union in Article 3(3) TEU “to combat social exclusion and discrimination, and ... promote social justice and protection”.

## No Exceptions Apply that Justify the Discrimination

### No Genuine Occupational Requirement Exception

31. Certain kinds of work can require a worker to have certain characteristics. Article 4(1) of the Directive allows that “Member States may provide” an exemption from the prohibition on discrimination where this characteristic is a “genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.

#### *Belgium had no legal provision*

32. Article 4(1) only applies where “Member States ... provide that a difference in treatment based on a characteristic ... shall not constitute discrimination”. The Advocate-General considered that this condition had been fulfilled simply by virtue of G4S having adopted the rule.<sup>13</sup> This approach should be rejected as contrary to the language and object of the provision. Under the Directive, it is not enough for the employer to decide to adopt a directly discriminatory rule; the adoption of that rule must already have been authorized by a decision of the Member State – whether through law, regulation or administrative measure.<sup>14</sup> Here, Belgium had not provided (nor did G4S claim that it had) that a difference in treatment based on the supposed need for neutral clothing is not discrimination. The Advocate-General refers to *Prigge*, but in that case the Member State had adopted rules authorizing social partners to adopt measures under Article 4(1).<sup>15</sup> The Advocate-General’s approach would nullify the words “Member States may provide”. Furthermore, any rules must be sufficiently precise.<sup>16</sup> However, at the date of Ms. Achbita’s dismissal, the written rule had not come into force.<sup>17</sup>

#### *No legitimate aim*

33. This Court has considered the meaning of “occupational requirement” in cases of age discrimination, ruling that “possession of certain physical capacities” can be an occupational requirement to work in the fire service,<sup>18</sup> or as a police officer.<sup>19</sup>
34. For certain occupations, the worker’s capacity and willingness to wear a uniform may be such a requirement. It may be necessary for employees such as police officers or flight attendants to be readily identifiable as such to the public or customers. In such a situation, a consistent uniform may be necessary to achieve this aim.

<sup>13</sup> *Id.*, para. 67.

<sup>14</sup> See Article 18 of the Employment Equality Directive.

<sup>15</sup> C-447/09 *Prigge*, paras. 59-61. The Court ruled that “Member States [may] authoris[e], through rules to that effect, social partners [to adopt] measures, within the meaning of Article 2(5) of the Directive, in the domains referred to in that provision that fall within collective agreements.” (para. 60), disposing of the question raised also as regards Article 4(1) (para.59).

<sup>16</sup> *Id.*, para. 61.

<sup>17</sup> Ms. Achbita was dismissed on 12 June 2006 and the written rule came into force on 13 June 2006.

<sup>18</sup> C-229/08 *Wolf*, para. 40.

<sup>19</sup> C-416/13 *Vital Perez*, para. 39.

35. But this is a different case. G4S did not require Ms. Achbita to wear a uniform. The “occupational requirement” at issue was to be willing to wear clothing which is not a visible sign of religion.<sup>20</sup>
36. The objective of this policy was not to enable staff to perform their work. The objective was to uphold the image of G4S as an employer where no staff member wears a sign of religion: a supposedly “neutral” employer.
37. G4S claims this objective is legitimate; the Advocate-General agrees.
38. Open Society Justice Initiative contends that such a policy is not legitimate because its premise – that different treatment of persons who wear visible signs of their religion is “neutral” between different religious beliefs – is contrary to the European Union’s fundamental values of pluralism, non-discrimination, tolerance, justice and solidarity. It is contrary to the fundamental right to working conditions that respect the worker’s dignity.
39. Across Europe, employers routinely permit staff to wear clothing that represents a visible sign of their religion, ethnic origin or culture. In June 2016, Scotland included the headscarf as part of a police uniform.<sup>21</sup> Indeed, although in 2006, G4S sacked Ms. Achbita for wearing the headscarf, just six years later G4S incorporated the headscarf into the uniform worn by their security guards at the London Olympics.<sup>22</sup> Such a subsequent incorporation or accommodation of a religious symbol into a corporate dress-code was considered by the European Court of Human Rights as confirming that a company’s earlier prohibition on religious symbols was not tied to any core requirements of the position.<sup>23</sup>
40. G4S’s 2006 decision that, in Belgium, even non-uniformed staff may not wear the headscarf does not serve any legitimate aim. In Europe, wearing the headscarf is neutral as to the religious character of her employer and as to her ability to perform the role of a receptionist.

## Conclusion

41. The Court’s judgment on the Achbita case must give full effect to the objectives expressly adopted by the Member States in the Treaty of European Union, the Charter of Fundamental Rights and implemented by the Employment Equality Directive. These laws direct States and national courts to eliminate employment discrimination on grounds of religion, so that a Europe of plurality, respect for human rights and for minorities, and social inclusion shall prevail. This law goes beyond the protection of the right to freedom of religion expressed in Article 9 ECHR and applied by the European Court of Human Rights to countries within the Council of Europe.
42. In the European Union, neutrality respects the autonomy of workers to express their religion, as it does the expression of their age, disability, ethnicity, sexual orientation and sex. The Court must hold that dismissal for wearing a headscarf in circumstances like those of Ms. Achbita was to subject her to less favourable treatment than other employees on the basis of her religion and

<sup>20</sup> Advocate General Kokott’s Opinion, para. 75.

<sup>21</sup> See e.g. <http://aboutislam.net/muslim-issues/europe/scotland-police-adds-hijab-uniform/#.V137EgoMYU1.facebook>

<sup>22</sup> See photograph of G4S guard wearing headscarf at <http://www.insidethegames.biz/articles/18381/g4s-withdraw-from-bidding-from-brazil-2014-and-rio-2016-security-contracts-after-london-2012-shambles>

<sup>23</sup> *Eweida and others v UK*, ECtHR, Judgment of 15 January 2013, para. 94: “Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.”



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thus direct discrimination. A false notion of 'neutrality' that discriminates against employees on grounds of religious belief is incompatible with the values of the European Union and cannot be a legitimate aim that overrides the fundamental right to equality under European Union law.

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