Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 31 May 2016[1]

**Case C-157/15**

**Samira Achbita**
**and**
**Centrum voor gelijkheid van kansen en voor racismebestrijding**
**v**
**G4S Secure Solutions NV**

(Request for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium))

(Fundamental rights — Directive 2000/78/EC — Equal treatment in employment and occupation — Concept of discrimination based on religion or belief — Distinction between direct and indirect discrimination — Justification — Company ban on the wearing of visible religious, political or philosophical symbols — Religious and ideological neutrality — Dismissal of a female employee of Muslim faith on account of her firm intention to wear an Islamic headscarf in the workplace)

## I – Introduction

1. Is a private employer permitted to prohibit a female employee of Muslim faith from wearing a headscarf in the workplace? And is that employer permitted to dismiss her if she refuses to remove the headscarf at work? These are, in essence, the questions which the Court must answer, for the first time in the present case, from the point of view of EU law, and, more specifically, in the light of the prohibition on discrimination based on religion or belief.

2. There is no need to highlight here the social sensitivity inherent in this issue, particularly in the current political and social context in which Europe is confronted with an arguably unprecedented influx of third-country migrants and the question of how best to integrate persons from a migrant background is the subject of intense debate in all quarters.

3. Ultimately, the legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities.

4. Much of the Islamic headscarf debate has been and continues to be correspondingly heated. In recent years, it has formed the subject of cases before a number of courts both inside and outside the European Union and has attracted extensive attention both in the media and in legal literature.

1 — Original language: German.

5. From the point of view of EU law, the framework for resolving the issue is the Anti-Discrimination Directive, Directive 2000/78/EC,[2] a question concerning the interpretation of which has here been referred to the Court of Justice by a high-level Belgian court. A very similar question also forms the subject of Case C-188/15 (*Bougnaoui and ADDH*), which originated in France and is currently pending.

6. In both cases, the Court is expected to give a landmark decision the impact of which could extend beyond the specific context of the main proceedings and be ground-breaking in the world of work throughout the European Union, at least so far as the private sector is concerned. The working conditions applicable to public-sector employees (such as in schools, administrative authorities and courts, as well as in private undertakings entrusted with the provision of public services) may be distinguished by certain special features, but these are irrelevant to the present case. Nor is there any need here to address the legal issues relating to the conduct of individuals in public spaces (such as that of passersby on streets and squares, users in public institutions and customers in restaurants or shops).

## II – Legal context

### A – EU law

7. The EU-law framework applicable to this case is determined by Directive 2000/78. The purpose of that directive, according to Article 1 thereof, is:

'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

8. Under the heading 'concept of discrimination', Article 2 of Directive 2000/78 provides as follows:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, …

…

2 — Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16); 'Directive 2000/78' or simply 'the Directive'.

5. 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.'

9. The scope of Directive 2000/78 is defined in Article 3 thereof:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…'

10. Finally, reference must be made to Article 4(1) of Directive 2000/78, which appears under the heading 'occupational requirements' and provides as follows:

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 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.'

## B – National law

11. The legislation applicable in Belgium during the period material to the dispute in the main proceedings was the Law to combat discrimination of 25 February 2003,[3] which was adopted in transposition of Directive 2000/78.

12. Under Article 2(1) of that Law, direct discrimination occurs:

'where a difference in treatment which is not objectively and reasonably justified is directly based on sex, 'race', colour, background, national or ethnic origin, sexual orientation, civil status, birth, property, age, faith or belief, current or future health status, disability or a physical characteristic.'

13. Under Article 2(2) of the same Law, indirect discrimination occurs:

'where an apparently neutral provision, criterion or practice, as such, has a detrimental effect on persons to whom one of the grounds of discrimination listed in Article 1 applies, unless that provision, criterion or practice is objectively and reasonably justified'.

14. By judgment of 6 October 2004, the Arbitragehof (Belgian Court of Arbitration) (the current Grondwettelijk Hof (Belgian Constitutional Court)) declared the exhaustive list of individual grounds of discrimination in Article 2 of the Law to combat discrimination to be incompatible with the Belgian Constitution. Thereafter, Article 2 was applicable to all cases of discrimination, irrespective of the ground on which they were based.[4]

3 — *Belgisch Staatsblad* of 17 March 2003, p. 12844.

4 — Judgment No 157/2004 of the Arbitragehof.

15. The Law to combat discrimination has since been replaced by the Law of 10 May 2007 combating certain forms of discrimination.[5] However, that new law was not yet applicable at the time of the facts of the main proceedings.

## III – Facts and main proceedings

16. G4S Secure Solutions NV ('G4S') is an undertaking that provides, inter alia, not only security and guarding services but also reception services to various customers from the public and private sectors. On 12 February 2003, Ms Samira Achbita joined G4S as a receptionist under an employment contract of indefinite duration.

17. G4S employees are not permitted to wear any religious, political or philosophical symbols while on duty. Initially, that prohibition applied only as an unwritten company rule. With the approval the G4S works council, the following written formulation was incorporated into the G4S employee code of conduct with effect from 13 June 2006:

'employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them'.

18. Without objecting to that company rule, Ms Achbita, who was already a Muslim at the time when she joined the company, wore a headscarf, exclusively outside working hours, for a period of more than three years. In April 2006, she announced that, in future, she intended to wear a headscarf during working hours as well, for religious reasons. The company management pointed out that this was at odds with the neutrality sought by G4S.

19. On 12 May 2006, following a period of sickness, Ms Achbita reported that she would be returning to work, wearing her headscarf, on 15 May 2006. On 12 June 2006, on account of her firm intention, as a Muslim woman, to wear the Islamic headscarf, Ms Achbita was dismissed. She received a severance allowance.

20. On 26 April 2007, Ms Achbita brought before the Arbeidsrechtbank te Antwerpen[6] an action for damages for wrongful dismissal against G4S, seeking, in the alternative, damages for infringement of the Law to combat discrimination. In 2009, the Belgian Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for Equal Opportunities and Combating Racism; 'the Centrum')[7] joined the proceedings as an intervener supporting the form of order sought by Ms Achbita.

21. By judgment of 27 April 2010, the Arbeidsrechtbank (Labour Court) dismissed the action brought by Ms Achbita on the ground that no direct or indirect discrimination was present. On appeal, the Arbeidshof te Antwerpen[8] also dismissed her claims, by judgment of 23 December 2011, on the ground that, in the light of the lack of consensus in case-law and legal literature, G4S was under no obligation to assume that its internal ban was illegal, and that Ms Achbita's dismissal could not therefore be regarded as manifestly unreasonable or discriminatory. The Belgian Hof van Cassatie,[9] the referring court, now has pending before it an appeal in cassation against that judgment at second instance which was lodged by both Ms Achbita and the Centrum.

5 — *Belgisch Staatsblad* of 30 May 2007, p. 29016.

6 — Labour Court, Antwerp.

7 — This is a Belgian public body that was created by statute in 1993 and is entrusted, in particular, with the task of combating racism and various forms of discrimination. The Centrum is known to the Court, inter alia, from *Feryn* (Case C-54/07).

8 — Antwerp Higher Labour Court.

9 — 'Court of Cassation'.

## IV – Request for a preliminary ruling and procedure before the Court

22. By judgment of 9 March 2015, lodged at the Court Registry on 3 April 2015, the Court of Cassation stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 [establishing a general framework for equal treatment in employment and occupation] 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?'

23. In the preliminary ruling proceedings before the Court, written observations were submitted by G4S, the Centrum, the Belgian and French Governments and the European Commission. The same parties were also represented at the hearing of 15 March 2016, in which the United Kingdom also participated. The oral procedure in Case C-188/15 took place on the same day.

## V – Assessment

24. The subject matter of this request for a preliminary ruling is the concept of 'discrimination on the grounds of religion or belief' within the meaning of Articles 1 and 2 of Directive 2000/78.

25. *Discrimination* is an unjustified difference of treatment.[10] While a clear distinction between the concepts of 'difference of treatment' and 'discrimination' is almost entirely lacking in the wording of Directive 2000/78, it is apparent that the EU legislature also proceeds on the assumption that it is 'essential to distinguish between differences in treatment which are justified … and discrimination which must be prohibited'.[11]

26. Unlike in the parallel Case C-188/15, in the present preliminary ruling proceedings, the question referred to the Court is, strictly speaking, concerned only with the concept of direct discrimination under Article 2(2)(a) of Directive 2000/78, and thus, ultimately, also with the distinction between direct and indirect discrimination, but not with whether discrimination (or a difference of treatment) — of whatever kind — is justified. This may be because the Belgian Court of Cassation seems to take it as read that, in a case such as this, indirect discrimination is justifiable, but direct discrimination is not.

27. However, as I shall explain in more detail below, even a direct difference of treatment is eminently justifiable under certain conditions. At the same time, it must be borne in mind that the justification for a direct difference of treatment and the justification for an indirect difference of treatment are both subject to compliance with certain requirements of EU law. Consequently, in order to provide

10 — See my Opinion in *Andersen* (C-499/08, EU:C:2010:248, point 28).

11 — See in that regard — albeit in relation to age discrimination — the last sentence of recital 25 of Directive 2000/78. See also the wording of Article 4(1) of that directive, according to which Member States may provide that, subject to the conditions of justification specified there, 'a difference of treatment … shall not constitute discrimination'. Similarly, see the — not always consistent — case-law, such as, for example, on age discrimination, the judgment in *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 27).

the national court with an answer which will be of use to it,[12] and against the background of an inconsistent practice of national courts both inside and outside the European Union, the Court should not refrain in the present case from addressing the issue of discrimination in full, including any applicable justification for it. The Commission too rightly called for this approach at the hearing.

28. I shall first consider briefly the scope of Directive 2000/78 (see, in that regard, section A immediately below), before turning to the concept of discrimination based on religion (see section B below) and, finally, taking a view on the possible justifications (see, lastly, section C).

## A – The scope of Directive 2000/78

29. According to Article 3(1)(c) thereof, Directive 2000/78 applies 'within the limits of the areas of competence conferred on the Community … to all persons, as regards both the public and private sectors, including public bodies, in relation to … employment and working conditions, including dismissals and pay'.

30. Since the ban on wearing Islamic headscarves in the workplace, which resulted from a general company ban on visible religious symbols, was instrumental in G4S's termination of Ms Achbita's employment, it is a condition of dismissal within the meaning of Article 3(1)(c) of Directive 2000/78. The present case thus falls within the scope of that directive.

31. France points out the fact that, according to the introductory phrase of Article 3(1), Directive 2000/78 applies only within the limits of the competences conferred on the Community (now, the European Union). France considers that the Directive is therefore not intended to apply to situations concerning the national identities of the Member States. In particular, it takes the view that the application of the Directive to the public service ('*service public*') is subject to certain restrictions arising from the constitutional principle of secularism[13] ('*laïcité*') operated in France. In that connection, France relies on the European Union's duty, enshrined in Article 4(2) TEU, to respect the national identities of Member States inherent in their fundamental structures, political and constitutional.

32. In this regard, it should be noted at the outset that these proceedings do not concern employment in the public service. That said, the division of competences between the European Union and its Member States follows from the treaties. The European Union's obligation under Article 4(2) TEU to respect the national identities of its Member States does not in itself support the inference that certain subject areas or areas of activity are entirely removed from the scope of Directive 2000/78.[14] It requires rather that the *application* of that directive must not adversely affect the national identities of the Member States. National identity does not therefore limit the scope of the Directive as such, but

12 — On the need to provide the national court with an answer that is of use to it and, where necessary, even to address aspects of EU law that are not expressly referred to in the request for a preliminary ruling, see the judgments in *SARPP* (C-241/89, EU:C:1990:459, paragraph 8), *Aventis Pasteur* (C-358/08, EU:C:2009:744, paragraph 50), *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve* (C-562/13, EU:C:2014:2453, paragraph 37) and *Neptune Distribution* (C-157/14, EU:C:2015:823, paragraphs 33 and 34), as well as, with respect specifically to Directive 2000/78, the judgments in *Wolf* (C-229/08, EU:C:2010:3, paragraph 32), *Petersen* (C-341/08, EU:C:2010:4, paragraph 48) and *Hay* (C-267/12, EU:C:2013:823, paragraph 23).

13 — See the first sentence of Article 1 of the Constitution of the French Republic of 4 October 1958. See also, in that regard, the judgments of the European Court of Human Rights (ECtHR) in *Leyla Şahin v. Turkey* (no. 44774/98, § 56, 29 June 2004) and *Ebrahimian v. France* (no. 64846/11, § 47, ECtHR 2015).

14 — See, to that effect, the judgments in *Sayn-Wittgenstein* (C-208/09, EU:C:2010:806, paragraphs 92 to 94) and *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraphs 86 and 87), in which the Court, there too, treated national identity within the meaning of Article 4(2) TEU not as a limit to the scope of EU law but as a legitimate aim justifying the curtailment by the Member States of rights which individuals enjoy under the guarantee of EU law.

must be duly taken into account in the interpretation of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment.[15] Moreover, even France acknowledged, at the hearing before the Court, that such an approach is a viable way of preserving national identity.

## B – The concept of discrimination based on religion

33. As is apparent from Article 1 in conjunction with Article 2(1) of Directive 2000/78, that directive combats both direct and indirect discrimination based on religion or belief in employment and occupation. For the purposes of the present case, there is no need to draw a more precise distinction between 'religion' and 'belief'. For the sake of simplicity, I shall therefore refer only to 'discrimination based on religion' or 'religious discrimination'.

### *1. The religious significance of the present case*

34. What constitutes 'religion' is an inherently complex matter in which objective factors combine with elements of each individual's subjective convictions.

35. The term 'religion' used in Article 1 of Directive 2000/78 must be understood in a broad sense. It includes not only the faith of an individual as such (*forum internum*) but also the practice and manifestation of that religion, including in public spaces (*forum externum*). It is apparent from the title, preamble and Article 1 of Directive 2000/78 that its purpose is to combat discrimination in employment and occupation. The overarching objective of that directive is to create a working environment that is free from discrimination.[16] If this objective is to be achieved to best effect, the scope of that directive cannot be defined restrictively.[17] This is particularly true given that Directive 2000/78 puts into practice the principle of equal treatment, which is one of the founding principles of EU law, is in the nature of a fundamental right and has been enshrined prominently in Article 21 of the Charter of Fundamental Rights.[18]

36. Similarly, the second sentence of Article 10(1) of the Charter of Fundamental Rights states that religious freedom includes, inter alia, the freedom of every person, in public or in private, to manifest his or her religion, in particular through practice.

37. A broad interpretation of the concept of 'religion' certainly does not mean that a person's behaviours or actions are automatically protected by law simply because they spring from some kind of religious conviction.[19]

15 — See, in that regard, point 125 of this Opinion, below.

16 — See also, to that effect, the judgments in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraph 19), *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 39) and *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 28).

17 — See, to the same effect, with respect to the related Directive 2000/43/EC, the judgments in *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 43) and *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 42 and 66).

18 — Judgments in *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 21) and *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 38).

19 — See, to that effect, the judgments of the ECtHR in *Leyla Şahin v. Turkey* (no. 44774/98, § 105, 29 June 2004), *S.A.S. v. France* [GC] (no. 43835/11, § 125, ECtHR 2014 (extracts)) and *Ebrahimian v. France* (no. 64846/11, § 54, ECtHR 2015), relating to Article 9 ECHR.

38. In the present case, however, it follows unambiguously from the order for reference that Ms Achbita — like many other Muslim women — wears her headscarf for religious reasons, and there is no reason to doubt the sincerity of her religious motivation. Following the approach taken by the European Court of Human Rights (ECtHR) in relation to Article 9 ECHR [20] and the practice of many national courts and institutions, [21] the Court of Justice too should regard the foregoing as a factor linking this case to religion to an extent sufficient to bring it within the substantive scope of the EU-law prohibition on religious discrimination.

### *2. The distinction between direct and indirect discrimination*

39. The focus of interest for the referring court is the question of whether the contested ban constitutes direct or indirect religious discrimination.

40. The distinction between direct and indirect discrimination is legally significant primarily because the possible justifications may vary depending on whether the underlying difference of treatment is directly or indirectly linked to religion. In particular, the possible objectives which may legitimately be relied on in order to justify a direct difference of treatment based on religion are fewer than those capable of justifying an indirect difference of treatment. [22]

41. While G4S proceeds on the premiss that there is no discrimination at all, and France and the United Kingdom, on the other hand, assume the commission of indirect discrimination, Belgium and the Centrum consider that there is direct discrimination. [23] The Commission supports a finding of indirect discrimination in the present Case C-157/15 and an assumption of direct discrimination in the parallel Case C-188/15. The practice of national courts in such cases is also inconsistent. [24]

42. *Direct religious discrimination* within the meaning of Directive 2000/78 is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on account of religion (Article 2(2)(a) in conjunction with Article 1); the underlying difference of treatment is therefore directly linked to religion. On the other hand, there is support only for an assumption of *indirect religious discrimination* where an apparently neutral provision, criterion or practice would put persons having a particular religion at a particular disadvantage compared with other persons (Article 2(2)(b)).

43. On cursory examination, a ban such as that imposed by G4S could be regarded as constituting direct discrimination within the meaning of Article 2(2)(a) of the Directive. It is certainly the case that, in so far as the internal company rule expressly prohibits G4S employees from wearing visible signs of their religious beliefs in the workplace, the wording of that company rule is directly linked to religion. Pursuant to that rule, Ms Achbita, an employee of Muslim faith, was dismissed because she insisted on wearing an Islamic headscarf at work in accordance with her religious beliefs, or, rather, because she refused to remove that headscarf during working hours.

20 — See the recent judgments of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, § 83, 84 and 97, ECtHR 2013) and *Ebrahimian v. France* (no. 64846/11, § 21 to 28 and 63, ECtHR 2015).

21 — See, for example, the recent case-law of the Bundesverfassungsgericht (German Federal Constitutional Court) (order of 27 January 2015, 1 BvR 471/10, DE:BVerfG:2015:rs20150127.1bvr047110, paragraphs 83 to 87), the Højesteret (Danish Supreme Court) (judgment of 21 January 2005, Ufr.2005.1265H), the Cour de cassation (French Court of Cassation) (judgment no. 13-28.369, 'Baby Loup', FR:CCASS:2014:AP00612) and the decision-making practice of the College voor de Rechten van de Mens (Netherlands Institute for Human Rights) (decision [Oordeel] no. 2015-145 of 18 December 2015); see also — outside the European Union — the case-law of the U.S. Supreme Court (judgment of 1 June 2015, No. 14–86, EEOC v. Abercrombie & Fitch Stores, 575 U.S. _2015).

22 — See to that effect, not least, my Opinion in *Andersen* (C-499/08, EU:C:2010:248, point 31) and — in relation to the related Directive 2000/43 — my Opinion in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:170, point 73); see also the judgment in *Hay* (C-267/12, EU:C:2013:823, paragraph 45).

23 — In case C-188/15, Sweden has also stated that it is in favour of an assumption of direct discrimination.

24 — See, in particular, the decisions of national courts and offices cited in footnote 21 above.

44. What is more, in its previous case-law concerning various EU-law prohibitions on discrimination, the Court has generally adopted a broad understanding of the concept of direct discrimination, and has, it is true, always assumed such discrimination to be present where a measure was inseparably linked to the relevant reason for the difference of treatment.[25]

45. However, all of those cases were without exception concerned with individuals' immutable physical features or personal characteristics — such as gender,[26] age or sexual orientation — rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here.

46. In the light of the foregoing, it appears that, on closer examination, a ban such as that at issue here cannot properly be classified as constituting direct discrimination.

47. The deciding factor for the purposes of assuming the presence of direct religious discrimination as defined in Article 2(2)(a) of Directive 2000/78 is that, *on account of religion*, one person 'is treated less favourably than another is, has been or would be treated'.

48. There is nothing in the present case to indicate that an individual was 'treated less favourably'. As I shall explain in more detail at length, there is no evidence here either of discrimination perpetrated against the members of one religious community as compared with the followers of other religions, or of discrimination perpetrated against religious individuals as compared with non-religious individuals or professed atheists.

49. It must be emphasized first of all that the ban at issue applies to all visible religious symbols without distinction. There is therefore no discrimination *between religions*. In particular, all of the information available to the Court indicates that the measure in question is *not* one directed specifically against employees of Muslim faith, let alone specifically against *female* employees of that religion. After all, a company rule such as that operated by G4S could just as easily affect a male employee of Jewish faith who comes to work wearing a kippah, or a Sikh who wishes to perform his duties in a Dastar (turban), or male or female employees of a Christian faith who wish to wear a clearly visible crucifix or a T-shirt bearing the slogan 'Jesus is great' to work.

50. It is true that the Directive, the scope of which is to be interpreted broadly,[27] prohibits not only discrimination based on *a* religion but any form of discrimination based on religion *per se* (Article 2(1) in conjunction with Article 1 of Directive 2000/78 and Article 21 of the Charter of Fundamental Rights). Even from this point of view, however, a case such as that at issue does not support the assumption of direct religious discrimination.

51. It must be borne in mind, after all, that a company rule such as that operated by G4S is not limited to a ban on the wearing of visible signs of *religious* beliefs, but, at one and the same time, also explicitly prohibits the wearing of visible signs of political or philosophical beliefs. The company rule is therefore an expression of a general company policy which applies without distinction and is neutral from the point of view of religion and ideology.

25 — See, for example, the judgments in *Dekker* (C-177/88, EU:C:1990:383, paragraphs 12 and 17), *Handels- og Kontorfunktionærernes Forbund* (C-179/88, EU:C:1990:384, paragraph 13), *Busch* (C-320/01, EU:C:2003:114, paragraph 39), *Kiiski* (C-116/06, EU:C:2007:536, paragraph 55), *Kleist* (C-356/09, EU:C:2010:703, paragraph 31), *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraphs 23 and 24), *Maruko* (C-267/06, EU:C:2008:179, paragraph 72), *Römer* (C-147/08, EU:C:2011:286, paragraph 52) and *Hay* (C-267/12, EU:C:2013:823, paragraphs 41 and 44); see also, to that effect, the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 76, 91 and 95).

26 — I shall not consider the rare special case of gender reassignment in the present context; see, in that regard, my Opinion in *Association Belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2010:564, footnote 36).

27 — See, in that regard, not least point 35 and footnote 17 of this Opinion.

52. That requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear).

53. In the present case, therefore, this leaves only a difference of treatment between employees who wish to give active expression to a particular belief — be it religious, political or philosophical — and their colleagues who do not feel the same compulsion. However, this does not constitute 'less favourable treatment' that is directly and specifically linked to religion.

54. The mere fact that the prohibition on the wearing of visible religious symbols in the workplace may constitute an interference with the freedom of religion [28] (Article 10 of the Charter of Fundamental Rights [29]) does not call for a different analysis. That is because not every potential interference with that freedom must necessarily be classified as discriminatory, let alone as directly discriminatory, from the point of view of the principle of equal treatment.

55. The position would certainly be different, it is true, if a ban such as that at issue here proved to be based on stereotypes or prejudice in relation to one or more specific religions — or even simply in relation to religious beliefs generally. In that event, it would without any doubt be appropriate to assume the presence of direct discrimination based on religion. [30] According to the information available, however, there is nothing to indicate that that is the case.

56. All things considered, therefore, a ban such as that at issue here cannot be regarded as *direct* discrimination based on religion (Article 2(2)(a) of Directive 2000/78).

57. However, since such a rule is in practice capable of putting individuals of certain religions or beliefs — in this case, female employees of Muslim faith — at a particular disadvantage by comparison with other employees, it may, if it is not justified in some way, constitute *indirect* religious discrimination (Article 2(2)(b) of Directive 2000/78).

## C – Possible justifications

58. In the event that a ban such as that imposed by G4S is classified as — indirect or even direct — discrimination based on religion, it remains to be considered whether the underlying difference of treatment can be justified under Directive 2000/78 or whether, in the absence of such a justification, it constitutes prohibited discrimination.

59. An *indirect* difference of treatment based on religion [31] may be objectively justified by a legitimate aim, provided only that the measure at issue — in this instance, the ban on visible political, philosophical and religious symbols — is appropriate and necessary for achieving that aim (Article 2(2)(b)(i) of Directive 2000/78).

28 — On the freedom of religion, see also point 113 of this Opinion, below.

29 — See, for example, the judgments of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10, § 83, 84 and 97, ECtHR 2013) and *Ebrahimian v. France* (no. 64846/11, § 47, ECtHR 2015), both concerning Article 9 ECHR.

30 — As is clear from the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 82), the Court considers a measure taken on the basis of stereotypes and prejudices in relation to a particular group of individuals to be an indication of direct discrimination (based on ethnic origin).

31 — See, in that regard, my foregoing submissions, in particular at point 57 of this Opinion.

60. Legitimate aims within the meaning of Article 2(2)(b)(i) of Directive 2000/78 include without any doubt the aims expressly recognised by the EU legislature itself, that is to say, on the one hand, compliance with special occupational requirements (Article 4(1) of the Directive) and, on the other hand, protection of the rights and freedoms of others (Article 2(5) of the Directive). I shall focus on those two aims now.

61. Both those provisions give specific expression in secondary legislation to the limits to which the principle of equal treatment and non-discrimination enshrined in Article 21 of the Charter of Fundamental Rights is subject, like all fundamental rights of the European Union (see generally in this regard Article 52(1) of the Charter).

62. Moreover, since Article 2(5) and Article 4(1) of the Directive are always applicable irrespective of the kind of discrimination involved, my comments on these two grounds of justification will be valid even if the Court — contrary to my suggestion above — assumes that the present case involves direct discrimination based on religion rather than indirect discrimination.

63. The parties to the proceedings strongly disagree on the question of whether a ban such as that at issue here pursues a legitimate aim, let alone a legitimate aim within the meaning of either of the aforementioned provisions of the Directive, and the question whether it passes the proportionality test. While G4S answers those questions in the affirmative, the Centrum, Belgium and France answer them in the negative. The Commission too is somewhat sceptical.[32] The practice of national courts on this issue is inconsistent.[33]

64. I shall address the abovementioned issues first from the point of view of occupational requirements (Article 4(1) of Directive 2000/78; see, in that regard, section 1 immediately below) and then from the point of view of protection of the rights and freedoms of others (Article 2(5) of the Directive; see, in that regard, section 2 further below).

### *1. The ban at issue as a genuine and determining occupational requirement (Article 4(1) of Directive 2000/78)*

65. Under Article 4(1) of Directive 2000/78, 'Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [of the Directive] 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'.

66. Put simply, occupational requirements within the meaning of Article 4(1) of the Directive which arise from the nature of an activity or the context in which it is carried out may be the expression of a legitimate aim and therefore constitute an objective reason capable of justifying a difference of treatment based on religion, with the result that no prohibited discrimination is present.

32 — In Case C-188/15, the Commission goes so far as to express the firm view that justification under Directive 2000/78 is not possible.

33 — See once again the decisions of national courts and authorities cited in footnote 21 above.

67. Contrary to what the wording of Article 4(1) of the Directive may suggest at first glance ('… Member States may provide …'), the occupational requirements justifying a difference of treatment need not necessarily be officially laid down by Member States in the form of laws or decrees. It is, on the contrary, sufficient that an undertaking applies a rule imposing such a requirement within its organisation. [34] That is precisely the case at G4S, the ban at issue having been based on an internal company rule which was even adopted with the approval of the works council.

68. The fundamental prerequisite for the application of Article 4(1) of the Directive is, then, as the Court has already made clear, that it is not the *ground* on which the difference of treatment is based — in this instance, religion — but a *characteristic* related to that ground which must constitute a genuine and determining occupational requirement. [35]

69. That is the case here inasmuch as G4S does not prohibit its employees from belonging to a particular religion or from practising that religion, but requires only that they refrain from wearing certain items of clothing, such as the headscarf, which may be associated with a religion. The issue, therefore, is whether an employer is permitted to stipulate as an occupational requirement that a female employee must comply with a number of specifications relating to certain characteristics of her external appearance, and in particular certain aspects of her clothing, if these may have a religious significance.

70. Article 4(1) of Directive 2000/78 makes permission to do so subject to two conditions: first, there must be a 'genuine and determining occupational requirement'; and, secondly, that requirement must be a 'proportionate' one which was laid down in pursuit of a 'legitimate' objective.

### *(a) The criterion of the genuine and determining occupational requirement*

71. First, it must be examined whether a ban such as that at issue here can even be regarded as an occupational requirement within the meaning of Article 4(1) of Directive 2000/78 in the first place, let alone a genuine and determining one. Most of the parties to the proceedings argue that it cannot.

#### *i) The occupational requirement*

72. As a derogation from a fundamental prohibition on discrimination, Article 4(1) of Directive 2000/78 must be interpreted strictly. [36] Support for this approach can be found not only in the comparatively restrictive wording of that provision, [37] but also in the preamble to the Directive, [38] which states with particular emphasis that the abovementioned ground of justification should apply only 'in very limited circumstances'.

73. Even on the most restrictive interpretation, however, Article 4(1) of the Directive leaves some scope for giving consideration to a dress code laid down by a particular undertaking. After all, that provision is concerned not only with the performance of the 'occupational activities' as such but also with 'the context in which they are carried out'. As the word 'or' in Article 4(1) of the Directive

34 — See, to that effect, the judgments in *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 59 in conjunction with paragraphs 68 and 69), which concerned a provision in a collective agreement which had been approved by the social partners.

35 — See the judgments in *Wolf* (C-229/08, EU:C:2010:3, paragraph 35, final sentence), *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 66) and *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 36).

36 — See the judgments in *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 72) and *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 47).

37 — The bar for the application of that ground of justification is set relatively high even in the way in which it is worded, inasmuch as the EU legislature insists on 'particular occupational activities', 'a genuine and determining occupational requirement' and that 'the objective [be] legitimate and the requirement … proportionate'.

38 — Recital 23 of Directive 2000/78.

illustrates, moreover, the substance of 'the context in which they are carried out' is entirely independent from that of the 'nature of the … occupational activities'. Consequently, either of those two elements can in and of itself serve as a ground of justification for a difference of treatment based on religion.

74. When applied to a case such as this, the foregoing means that Article 4(1) of the Directive does not by any means make provision only for the requirements governing the operational processes associated with the work of a receptionist in an undertaking or authority (such as, for example, welcoming visitors, providing information, carrying out entry checks or opening and closing gates and barriers), but also takes into account, in so far as these represent the 'context in which [the occupational activities] are carried out', the conditions under which those services are provided. [39]

75. While the work of a receptionist can as such be performed just as well with a headscarf as without one, one of the conditions of carrying out that work may nonetheless be compliance with the dress code laid down by the employer (e.g. the obligation to wear work attire or a uniform and the ban, if any, on wearing visible religious, political or philosophical symbols), in which case the employee carries out her work in a context in which she must refrain from wearing her headscarf.

76. Some undertakings may consciously set themselves the goal of recruiting a colourful and diversified workforce and turn the very diversity that it showcases into its brand image. However, an undertaking — such as G4S in this case — may just as legitimately decide on a policy of strict religious and ideological neutrality and, in order to achieve that image, demand of its employees, as an occupational requirement, that they present themselves in a correspondingly neutral way in the workplace.

*ii) Genuine and determining occupational requirement*

77. However, in accordance with Article 4(1) of Directive 2000/78, compliance with a specific dress code — and the associated obligation, at issue here, to refrain from wearing a headscarf — can be imposed on an employee only if this constitutes a 'genuine and determining occupational requirement'.

78. Thus, the bar set for justifying differences of treatment based on religion is high but not insurmountable.

79. In particular, in a case such as this, recourse to Article 4(1) of the Directive cannot automatically be ruled out on the basis of the Court's case-law to the effect that discrimination cannot be justified on purely economic grounds. [40] On the contrary, the whole purpose of that provision is to make it possible to justify differences of treatment on economic — or more precisely, business — grounds, albeit only under strict conditions laid down by the EU legislature.

80. The question of whether, in view of the nature of the activity concerned or the context in which it is carried out, specific occupational requirements can be regarded as being genuine and determining, and, if so, which ones, must be assessed in accordance with objective criteria, taking into account all the relevant circumstances of the case in question.

39 — The importance of the context in which and time at which a religious belief is proclaimed is also recognised by the ECtHR; see, for example, the judgments in *Leyla Şahin v. Turkey* (no. 44774/98, § 109, 10 November 2005) and *S.A.S. v. France* [GC] (no. 43835/11, § 130, ECtHR 2014 (extracts)), as well as Judge O'Leary's observations on the judgment in *Ebrahimian v. France* (no. 64846/11, section III of the partly concurring and partly dissenting opinion, ECtHR 2015).

40 — See, to that effect, for example, the judgments in *Dekker* (C-177/88, EU:C:1990:383, paragraph 12), *Mahlburg* (C-207/98, EU:C:2000:64, paragraph 29), *Tele Danmark* (C-109/00, EU:C:2001:513, paragraph 28 and 29) and *Schönheit und Becker* (C-4/02 und C-5/02, EU:C:2003:583, paragraph 85). See also *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 77).

81. At the same time, the employer must be allowed a degree of discretion in the pursuit of its business, the basis for which lies ultimately in the fundamental right of freedom to conduct a business (Article 16 of the Charter of Fundamental Rights).[41] Part of that freedom is the employer's right, in principle, to determine how and under what conditions the roles within its organisation are organised and performed and in what form its products and services are offered.

82. Aside from the very obvious cases where strict compliance with a particular dress code is essential, not least for reasons of hygiene or safety at work (such as, for example, in hospitals,[42] laboratories, kitchens, factories or on construction sites), an employer may require its workers to behave and dress in a particular way at work in other circumstances too, which may be part of a company policy which it has formulated.[43] This is particularly true if the work of the employees concerned — like that of Ms Achbita here — brings them into regular face-to-face contact with customers.[44]

83. Rules to that effect are common. They may be limited to a particular style of dress (for example, the requirement for male employees in various public and private organisations to wear a suit and tie, or for sales staff in department stores and clothes shops to follow a particular fashion) or, in certain cases, may also include the requirement to wear specific work attire or a uniform (such as in the case of police officers, soldiers and security company and airline employees, whose clothes inspire both respect and trust and also serve to make them distinctive and recognisable).

84. In the light of the foregoing, it would appear, on an objective examination taking into account the employer's discretion in the pursuit of its business, by no means unreasonable for a receptionist such as Ms Achbita to have to carry out her work in compliance with a particular dress code — in this case, by refraining from wearing her Islamic headscarf. A ban such as that laid down by G4S may be regarded as a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78.

### *(b) The criteria of legitimate objective and proportionate requirement*

85. It remains to be considered whether a ban such as that imposed by G4S constitutes a proportionate occupational requirement with a legitimate objective. Those two additional criteria, which are laid down in the final clause of Article 4(1) of Directive 2000/78, effectively make it clear that the employer's discretion in pursuing its business by determining occupational requirements is subject to limits imposed by EU law.

86. While one criterion (that 'the requirement [be] proportionate') simply calls to mind the principle of proportionality,[45] to which I shall turn later (see, in that regard, section ii below), the other criterion (that 'the objective [be] legitimate') makes it clear that, in laying down occupational requirements, the employer cannot pursue any arbitrary aim of its choosing, but only ones that are legitimate (see, in this regard, section i hereafter).

41 — See also, on the freedom to conduct a business, point 134 of this Opinion, below.

42 — See, in that regard, the judgment of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, §§ 98 and 99, ECtHR 2013).

43 — See also, to that effect, the judgment of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, § 94, ECtHR 2013), in which 'the employer's wish to project a certain corporate image' was considered to be 'undoubtedly legitimate'.

44 — The situation may be different, however, in the case of employees whose work does not involve face-to-face contact with customers (such as telephone operators in a call centre or administrative staff in an undertaking's accounts department or in the claims department of an insurance undertaking).

45 — That is particularly apparent from the French version ('pour autant que … l'exigence soit *proportionnée*') and the English wording ('provided that … the requirement is *proportionate*') of the final clause of Article 4(1) of Directive 2000/78; emphasis added. See also, to that effect, the judgment in *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 45).

*i) Legitimate objective*

87. The assessment of whether the objective pursued by an employer is legitimate calls for a normative approach taking into account not least the fundamental values of the European Union and the essential aims which it pursues (Articles 2 and 3 TEU). Moreover, prominent reference to those values and aims is also made in the preamble to Directive 2000/78. [46]

88. When applied to a case such as this, the foregoing means that the dress code which an undertaking such as G4S lays down for its employees, including any ban on headscarves contained there, may serve as justification for a difference of treatment based on religion only if that dress code and the corporate image or corporate identity to which it gives expression are themselves legitimate and, in particular, compliant with EU law.

89. For example, if an undertaking wished to create for itself a corporate identity that promoted an inhuman ideology, that course of action would be blatantly at odds with the fundamental values of the European Union (Article 2 TEU). A dress code based on that identity would not pursue a 'legitimate' objective within the meaning of the final clause of Article 4(1) of Directive 2000/78 and would not therefore be capable of justifying any form of discrimination between employees.

90. The position is much the same when it comes to the undertaking's consideration of the wishes of third parties. An undertaking can and must, by definition, take into careful account the preferences and wishes of its business partners, in particular its customers, in its business practices. It would otherwise be unable to sustain its presence on the market. It nonetheless cannot pander blindly and uncritically to each and every demand and desire expressed by a third party.

91. If, for example, a customer, even an important customer, sought to make a demand on an undertaking to the effect that he be served only by employees of a particular religion, ethnic origin, colour, sex, age or sexual orientation, or only by employees without a disability, this would quite obviously not constitute a legitimate objective [47] on the basis of which the undertaking concerned could lay down for its employees occupational requirements within the meaning of Article 4(1) of Directive 2000/78. [48]

92. On the other hand, any customer may, with all good intentions, demand for his or her own part to be served without discrimination, courteously and to a basic standard of politeness. [49] It is perfectly legitimate for an undertaking to make the meeting of such expectations on the part of its customers a condition of employment for its staff and, therefore, a genuine and determining occupational requirement within the meaning of Article 4(1) of Directive 2000/78. [50]

46 — See, in particular, recitals 1, 4 and 5 of Directive 2000/78.

47 — Rare exceptions prove the rule. Thus, for example, it may be legitimate, in certain narrowly defined situations (for example, after having been raped), for female patients to wish to be treated by female staff in hospitals and general practice surgeries. It may also be legitimate, to allow passenger searches — at airports, for example — to be carried out as a rule by security employees of the same sex.

48 — See, to that effect, the judgment in *Feryn* (C-54/07, EU:C:2008:397), which concerned a situation in which an entrepreneur, allegedly responding to the wishes of his customers, publicly declared that he did not want to hire 'Moroccans' (see, in that regard, the Opinion of Advocate General Poiares Maduro in that case, EU:C:2008:155, in particular points 3 and 4, and 16 to 18).

49 — For example, it would be entirely legitimate, not to say only natural, for customers going to a shop, restaurant, hotel, doctor's surgery, swimming pool or theatre to wish not to be discriminated against on account of their religion, ethnic origin, skin colour, sex, age or sexual orientation, or because they are disabled. To that effect, the ECtHR, for example, endorsed the dismissal of an employee who had refused on the basis of her religious beliefs to provide certain services to same-sex couples (judgment in *Eweida and Others v. the United Kingdom*, no. 48420/10 and others, § 109, ECtHR 2013).

50 — It would, for example, be unacceptable for a male employee of an undertaking to refuse to shake hands with or speak to female customers.

93. In the present case, the headscarf ban is part of G4S's policy of religious and ideological neutrality, which the undertaking imposed on itself. Such a policy of neutrality does not exceed the bounds of the discretion it enjoys in the pursuit of its business. This is particularly true given that G4S is an undertaking that provides, inter alia, not only surveillance and security services but also reception services to a broad range of customers in the public and private sectors and its employees must be able to work flexibly for all of those customers.

94. In such a case, a policy of neutrality is absolutely crucial, not only because of the variety of customers served by G4S, but also because of the special nature of the work which G4S employees do in providing those services, which is characterised by constant face-to-face contact with external individuals and has a defining impact not only on the image of G4S itself but also and primarily on the public image of its customers.

95. As France rightly highlighted in that connection, it is essential not least to avoid the impression that external individuals might associate with G4S itself or with one of its customers, or even attribute to the latter, the political, philosophical or religious beliefs publicly expressed by an employee through her dress.

*ii) Proportionality test ('the requirement [must be] proportionate')*

96. Next, it remains to be examined whether a prohibition such as that imposed by G4S constitutes a requirement that is 'proportionate' within the meaning of Article 4(1) of Directive 2000/78, that is to say whether it passes the proportionality test. [51]

97. According to settled case-law, the principle of proportionality is one of the general principles of EU law. It requires that measures adopted to achieve the legitimate objectives pursued by the legislation in question must be appropriate and not go beyond what is necessary in order to achieve those objectives. [52] When there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. [53]

98. Significantly more elegant but substantively identical is the wording of the settled case-law of the French courts, for example, to the effect that a measure must be 'appropriate, necessary and proportionate to the objective it pursues'. [54] Similarly concise is the formula coined by German case-law, which requires that an interference with fundamental rights 'must serve a legitimate purpose and be an appropriate, necessary and reasonable means of achieving that end'. [55]

51 — See again, in that regard, point 86 of footnote 45 to this Opinion.

52 — See the judgments in *Maizena and Others* (137/85, EU:C:1987:493, paragraph 15), *United Kingdom* v *Council* (C-84/94, EU:C:1996:431, paragraph 57), *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 122), *Digital Rights Ireland* (C-293/12 and C-594/12, EU:C:2014:238, paragraph 46) and *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67).

53 — See the judgments in *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21), *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81) and *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86); see also, to that effect, the judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 91).

54 — In the French original: 'adaptée, nécessaire et proportionnée à la finalité qu'elle poursuit'; see, for example, Conseil constitutionnel (French Constitutional Court), decisions no. 2015-527 QPC of 22 December 2015 (FR:CC:2015:2015.527.QPC, paragraphs 4 and 12) and no. 2016-536 QPC of 19 February 2016 (FR:CC:2016:2016.536.QPC, paragraphs 3 and 10); similarly, see Conseil d'État (French Council of State), judgment no. 317827 of 26 October 2011 (FR:CEASS:2011:317827.20111026).

55 — See, in that regard, for example, the more recent case-law of the Bundesverfassungsgericht (German Federal Constitutional Court), e.g. BVerfGE 120, 274, 318 f (DE:BVerfG:2008:rs20080227.1bvr037007, paragraph 218). 'Reasonable' is here synonymous with 'proportionate *stricto sensu*'.

99. In a case such as this, the proportionality test is a delicate matter in the context of which the Court of Justice, following the practice of the ECtHR in relation to Article 9 ECHR and Article 14 ECHR,[56] should grant the national authorities, in particular the national courts, a measure of discretion which they may exercise in strict accordance with EU rules. In this regard, the Luxembourg Court does not necessarily have to prescribe a solution that is uniform throughout the European Union. Rather, it would be sufficient, in my opinion, for the Court to indicate to the national court all of the material factors that it must take into account in carrying out the proportionality test but otherwise to leave to that court the actual task of striking a balance between the substantive interests involved.

– *Whether the ban is appropriate for achieving the objective pursued*

100. It must first be considered whether a ban such as that at issue is, as an occupational requirement, *appropriate* for achieving the legitimate objective pursued by the undertaking G4S.

101. In principle, there can be no doubt that it is appropriate. For if all the employees concerned were to carry out their work without displaying visible religious symbols, and employees of Muslim faith such as Ms Achbita accordingly refrained from wearing Islamic headscarves, this would contribute towards implementing the corporate policy of religious and ideological neutrality which G4S has imposed on itself.

102. Purely for the sake of completeness, I would make the further point, however, that an occupational requirement may not be appropriate for achieving the objective pursued if its content is not clearly and unambiguously recognisable to employees. That said, in the present case there is nothing to indicate that the contested company rule is in any way unclear or ambiguous. It is common ground that, even in the period prior to 13 June 2006, when it would appear that the company rule did not yet exist in written form, the ban on the wearing of visible religious, political and philosophical symbols at G4S already constituted an unwritten company rule. In the proceedings before the Court, no doubts have been raised as to the content of that unwritten rule.

103. Moreover, a rule containing occupational requirements must not be contradictory and must be applied and enforced consistently by the employer in relation to all of its employees. Such a rule is, after all, appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.[57] In the present case, however, there is nothing to indicate that the contested company rule operated by G4S might in some way not have been consistent or systematically enforced. Not least in this regard does the present case differ from that in *Eweida and Others v. the United Kingdom*, which was brought before the ECtHR a number of years ago.[58]

– *Whether the ban is necessary for achieving the objective pursued*

104. The second question must be whether a ban such as that at issue was *necessary* for achieving the objective pursued. In this regard, it needs to be examined whether that objective could have been achieved by means more lenient than a ban. France in particular has called for such an examination, noting that a company rule such as that operated by G4S could be regarded as being ‘too general and indiscriminate’. The Commission expressed a similar view.

56 — See the judgments of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, §§ 84, 88, 94 and 109, ECtHR 2013) and *Ebrahimian v. France* (no. 64846/11, §§ 56 and 65, ECtHR 2015).

57 — See the judgment in *Petersen* (C-341/08, EU:C:2010:4, paragraph 53); see also, in relation to the requirement of consistency, the landmark judgment in *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55) and, recently, the judgment in *Hiebler* (C-293/14, EU:C:2015:843, paragraph 65).

58 — In its judgment in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, § 94, ECtHR 2013), the ECtHR considers there to have been a violation of Article 9 ECHR not least because the undertaking concerned had previously permitted, or at least tolerated, the wearing of visible religious symbols by individual employees.

105. G4S could conceivably — as the Commission suggests in its submissions — provide its female employees with a uniform including an optional headscarf or veil accessory in a matching colour and style which could be worn on a voluntary basis by female Muslim employees expressing a wish to do so.

106. Such an approach would undoubtedly be less intrusive for employees such as Ms Achbita than the headscarf ban applicable at G4S, since the persons concerned could continue to wear a head covering to work, albeit one which is provided by the employer or the form of which in any event complies with the latter's specifications.

107. It must be borne in mind, however, that such an approach is much less satisfactory, not to say entirely inappropriate, for the purposes of achieving the objective of religious and ideological neutrality which G4S has laid down as an occupational requirement. After all, an employee who wears an Islamic headscarf displays a visible religious symbol whether or not the headscarf matches the colour and style of his work clothes. What is more, if the religious symbol forms part of the uniform, the employer actually departs from the path of neutrality which it has itself elected to follow.

108. An alternative solution might be for an employer such as G4S to move employees such as Ms Achbita to back-office positions in which they would have no significant face-to-face contact with external individuals, or, to avoid any risk of conflict, to deploy them only with customers which have no objection to the employment of receptionists who wear visible and conspicuous signs of religious belief such as the Islamic headscarf.

109. However, militating against such an approach, under which each case is individually assessed and analysed from the point of view of its potential to give rise to specific conflict, is, once again, the fact that it would be a far less appropriate means of implementing the company policy of religious and ideological neutrality. For, even if a female employee is sent to work as a receptionist with a G4S customer that tolerates the Islamic headscarf, clothing such as that worn by Ms Achbita will continue to undermine the policy of neutrality pursued by her own employer, G4S.

110. I would add purely for the sake of completeness that the search for alternative forms of deployment for each individual employee itself places on the employer a substantial additional organisational burden with which not every undertaking can necessarily cope. In this regard, it is worth noting in particular that the EU legislature generally provides 'reasonable accommodation' in relation only to persons with disabilities, 'in order to guarantee compliance with the principle of equal treatment' (Article 5 of Directive 2000/78). So far as other grounds for differences of treatment are concerned, in particular religion, however, it would be more consistent with the position adopted by the legislature in Directive 2000/78 for employers not to be required to make such provision.[59] While that position certainly does not preclude employers from nonetheless seeking individual solutions tailored to the circumstances involved, one should not impose a particularly significant organisational burden on them. For there are some religious customs which the employee does not necessarily have to observe in the workplace but can generally perform outside work as well.

111. All things considered, therefore, a ban such as that operated by G4S constitutes a measure that is necessary for the purposes of implementing a company policy of religious and ideological neutrality. Less intrusive but equally suitable alternatives for achieving the objective pursued by G4S have not been identified during the proceedings before the Court.

59 — The legal position is different in the United States of America, where, within the scope of Title VII of the 1964 Civil Rights Act, the employer has an obligation to provide 'religious accommodation' (42 U.S.C. § 2000e-2; in that regard, see, most recently, the judgment of the U.S. Supreme Court of 1 June 2015, Case 14-86, EEOC v. Abercrombie & Fitch Stores, 575 U.S. _ 2015).

– *No undue prejudice to employees*

112. Finally, the third issue to be examined is proportionality *sensu stricto*. According to that principle, measures must not, even if they are appropriate and necessary for achieving legitimate objectives, give rise to any disadvantages which are disproportionate to the objectives pursued. In other words, therefore, it must be ensured that a ban such as that at issue does not have the effect of unduly prejudicing the legitimate interests of employees.[60] Ultimately, this means that a fair balance must be struck between the conflicting interests of employees such as Ms Achbita, on the one hand, and undertakings such as G4S, on the other.

113. On the one hand, it must be recognised here that, for many people, religion is an important part of their personal identity. Even though an employee may not rely directly on the freedom of religion as against his private employer (Article 10 of the Charter of Fundamental Rights) because that freedom is binding only on the EU institutions and — in the implementation of EU law — the Member States (Article 51(1) of the Charter), that fundamental right is nevertheless one of the foundations of a democratic society[61] and an expression of the system of values on which the European Union is founded (see also, in that regard, Article 2 TEU). Accordingly, the values expressed by the freedom of religion also have repercussions, at least indirectly, on private employment relations. Within the scope of Directive 2000/78, it is important to take due account of those values, from the point of view of the principle of equal treatment, when seeking to strike a fair balance between the interests of employers and employees.[62]

114. On the other hand, it must be borne in mind that a ban such as that at issue here is concerned not so much with religion *per se*, that is to say with a person's faith (*forum internum*) or his or her membership of a religious community, if that is the case. After all, an undertaking such as G4S does not — so far as it is possible to tell — select its employees according to their religious affiliation,[63] or use their religious affiliation as a criterion for affording better or worse treatment in employment and occupation. Rather, the basis for the difference of treatment associated with a ban such as that operated by G4S is confined to the fact that the external manifestation of their religion by employees is visible from their clothing, and thus to a single aspect of their religious practice (*forum externum*).

115. It is true that that kind of religious practice (as recognised by EU law in the second sentence of Article 10(1) of the Charter of Fundamental Rights), too, is without any doubt an important part of the realisation of an individual's potential, to which attention is devoted in Directive 2000/78.[64]

116. However, unlike sex, skin colour, ethnic origin, sexual orientation, age or a person's disability, the practice of religion is not so much an unalterable fact as an aspect of an individual's private life, and one, moreover, over which the employees concerned can choose to exert an influence. While an employee cannot 'leave' his sex, skin colour, ethnicity, sexual orientation, age or disability 'at the door' upon entering his employer's premises, he may be expected to moderate the exercise of his religion in the workplace, be this in relation to religious practices, religiously motivated behaviour or (as in the present case) his clothing.

117. In this regard, the measure of restraint which an employee can be required to exercise depends on a comprehensive assessment of all the relevant circumstances of the case in question.

60 — See, to that effect, the judgments in *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 73) and *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraph 47), both relating to the issue of age discrimination under Directive 2000/78.

61 — See, to that effect, in relation to Article 9 ECHR, the judgments of the ECtHR in *Leyla Şahin v. Turkey* (no. 44774/98, § 104, 10 November 2005), *S.A.S. v. France* [GC] (no. 43835/11, § 124, ECtHR 2014 (extracts)) and *Ebrahimian v. France* (no. 64846/11, § 54, ECtHR 2015).

62 — See also, ultimately to the same effect, the judgment of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, § 94 and 99, ECtHR 2013) concerning Article 9 ECHR.

63 — G4S itself estimates the share of its employees who are of Muslim faith to be in the region of 11%.

64 — Recital 9 of Directive 2000/78.

118. First, the decisive criterion when it comes to the use of religious symbols as part of an individual's dress is how visible and conspicuous the elements in question are in relation to the overall appearance of the employee. [65] In case of doubt, a small and discreetly worn religious symbol — in the form of an earring, necklace or pin, for example — is more likely to be permitted than a noticeable head covering such as a hat, turban or headscarf. Moreover, employees who are required to wear work attire or a uniform may be subject to stricter prohibitions on the wearing of visible religious symbols than persons who are largely free to choose the clothes they wear to work.

119. Secondly, it is a fact that, in case of doubt, more restraint may be expected of an employee in a prominent role or a position of authority than of an employee working at a lower level. Moreover, an employee whose work brings him into frequent and diverse face-to-face contact with external individuals may be required to exercise greater restraint than an employee who works exclusively in the back office and has no such contact with customers.

120. Thirdly, it is worth noting that a company rule such as that operated by G4S requires only *neutrality* from employees in relation to their own religious, political and philosophical beliefs. A duty simply to exercise restraint in such a way can be expected of employees much more than an active obligation to adopt a particular position on religious, political or philosophical issues or to act in accordance with a particular doctrine. [66]

121. Fourthly, it is important to take into account, when striking a balance between the interests involved, whether differences of treatment on other grounds are also present. The fact, for example, that a ban imposed by the employer puts not only employees of a particular religion but also employees of a particular sex, colour or ethnic background at a particular disadvantage (Article 2(2)(b) of Directive 2000/78) might indicate that that ban is disproportionate. So far as it is possible to tell, a company rule such as that, at issue, operated by G4S is capable of affecting men just as much as women, [67] and, moreover, does not appear to put employees of a particular colour or ethnic background at a particular disadvantage.

122. Fifthly and finally, the broader context surrounding any conflict between an employee and his employer in connection with the wearing of visible religious symbols in the workplace may also play a role.

123. On the one hand, the principle of equal treatment enshrined in Article 21 of the Charter of Fundamental Rights and given specific expression in Directive 2000/78 is expressly intended to make it easier for disadvantaged groups to gain access to employment and occupation, in order thus to promote their participation in economic, cultural and social life and the realisation of their potential. [68] In this connection, it 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.

65 — See also, to that effect, the judgment of the ECtHR in *Eweida and Others v. the United Kingdom* (no. 48420/10 and others, § 94, ECHR 2013), concerning Article 9 ECHR.

66 — The only scenario in which the latter obligation might conceivably arise is probably in undertakings that pursue ideological aims, in accordance with the conditions laid down in Article 4(2) of Directive 2000/78.

67 — See again, in that regard, the example given in point 49 of this Opinion, above.

68 — See recitals 9 and 11 of Directive 2000/78.

124. On the other hand, in the specific case of a headscarf ban, we should not rush into making the sweeping assertion that such a measure makes it unduly difficult for Muslim women to integrate into work and society. Ms Achbita's case in particular makes this readily apparent. Ms Achbita worked as a receptionist for G4S for approximately three years without wearing an Islamic headscarf at work and was thus fully integrated into working life as a Muslim woman, despite the headscarf ban. It was not until after more than three years of working for G4S that she insisted on being allowed to come to work in a headscarf and, as a result, lost her job.

125. Finally, it is important, when interpreting and applying the principle of equal treatment, to have regard also to the national identities of Member States inherent in their fundamental structures, both political and constitutional (Article 4(2) TEU). In relation to an issue such as that under consideration here, this may mean that, in Member States such as France, where secularism has constitutional status and therefore plays an instrumental role in social cohesion too,[69] the wearing of visible religious symbols may legitimately be subject to stricter restrictions (even in the private sector[70] and generally in public spaces[71]) than in other Member States the constitutional provisions of which have a different or less distinct emphasis in this regard.

126. In the light of all those considerations, there is much to support the argument that a ban such as that at issue here does not unduly prejudice the legitimate interests of the employees concerned and must therefore be regarded as proportionate.

127. Ultimately, however, it is for the referring court to strike a fair balance between the conflicting interests, taking into account all the relevant circumstances of the case, in particular the size and conspicuousness of the religious symbol, the nature of the employee's activity and the context in which she must perform her activity, as well as the national identity of Belgium.

### *(c) Intermediate conclusion*

128. All things considered, a ban such as that imposed by G4S may therefore be regarded as being a genuine, determining and legitimate occupational requirement, within the meaning of Article 4(1) of Directive 2000/78, which is in principle capable of justifying differences of treatment — whether direct or indirect — based on religion, provided that the principle of proportionality is respected.

129. Consequently, the ban at issue fully satisfies the requirements governing a legitimate aim within the meaning of Article 2(2)(b)(i) of Directive 2000/78 if the requirements laid down in Article 4(1) of the Directive are met and proportionality is ensured.

### *2. The ban at issue as analysed from the point of view of the protection of the rights and freedoms of others (Article 2(5) of Directive 2000/78)*

130. In addition to its classification as an occupational requirement within the meaning of Article 4(1) of Directive 2000/78, a ban such as that at issue here can in principle also be analysed from the point of view of the protection of the rights and freedoms of others referred to in Article 2(5) of Directive 2000/78. As is apparent from the latter provision, the Directive is without prejudice to measures laid down by national law which, in a democratic society, are necessary, inter alia, for the protection of the rights and freedoms of others.

69 — See again, in that regard, point 31 and footnote 13 of this Opinion.

70 — In the *Baby Loup* case, for example, the French Cour de cassation (Court of Cassation) decided in plenary session that a privately-owned crèche could impose a requirement of neutrality on its staff (judgment no. 13-28.369, FR:CCASS:2014:AP00612).

71 — See the judgment of the ECtHR in *S.A.S. v. France* [GC] (no. 43835/11, § 121, 122, 147 and 153 to 159, ECHR 2014 (extracts)).

131. In adopting that provision, which did not even feature in the Commission's original proposal,[72] the EU legislature, in the area of employment and occupation, intended to prevent and 'arbitrate' a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society.[73]

### *(a) The rights and freedoms of others in question*

132. The wearing by male or female employees of visible signs of their religious beliefs, such as, for example, the Islamic headscarf,[74] in the workplace may be prejudicial to the rights and freedoms of others in two principal respects: on the one hand, it may have an impact on the freedoms not only of their colleagues but also of the undertaking's customers (particularly from the point of view of the negative freedom of religion); on the other hand, the employer's freedom to conduct a business may be adversely affected.

133. The request for a preliminary ruling from the Belgian Court of Cassation puts G4S's company rule under the microscope only from the point of view of that undertaking's policy of neutrality. Accordingly, when examining the protection of the rights and freedoms of others, I shall focus specifically on the issue of the freedom to conduct a business.

134. In a Union which regards itself as being committed to a social market economy (second sentence of Article 3(3) TEU) and seeks to achieve this in accordance with the requirements of an open market economy with free competition (Articles 119(1) TFEU and 120 TFEU), the importance that attaches to the freedom to conduct a business is not to be underestimated. That fundamental right, which, previously, already constituted a general principle of EU law,[75] is now enshrined in a prominent position in Article 16 of the Charter of Fundamental Rights.

135. Consequently, the possibility cannot automatically be ruled out that Article 2(5) of Directive 2000/78, in so far as it concerns the protection of the freedom to conduct a business, tolerates a derogation from the prohibition on discrimination.

### *(b) The concept of measures for the protection of the rights and freedoms of others*

136. However, the fundamental freedom to conduct a business, which may itself be the subject of a broad range of restrictions,[76] does not automatically justify such a derogation from the prohibition on discrimination. Rather, Article 2(5) of Directive 2000/78, which, as an exception to the principle of equal treatment, must be interpreted strictly,[77] presupposes the existence of specific *measures* for the protection of the rights and freedoms of others.

72 — Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (99) 565 final (OJ 2000 C 177 E, p. 42).

73 — Judgment in *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 55, first sentence). Individuals or organisations in particular who, under the guise of religion, commit criminal offences, breach public security and public order or prejudice the rights and freedoms of others are not to be permitted to rely on the prohibition of discrimination.

74 — For other examples, see point 49 of this Opinion above.

75 — See, inter alia, the judgments in *Nold* v *Commission* (4/73, EU:C:1974:51, paragraphs 13 and 14), *Hauer* (44/79 EU:C:1979:290, paragraphs 15, 16 and 32), *ABNA and Others* (C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, paragraph 87) and *Deutsches Weintor* (C-544/10, EU:C:2012:526, paragraph 54); in those cases, the expressions 'freedom to pursue an economic activity' and 'freedom to choose an occupation' were occasionally used as synonyms.

76 — Judgment in *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 46).

77 — Judgments in *Petersen* (C-341/08, EU:C:2010:4, paragraph 60), *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 56) and *Hay* (C-267/12, EU:C:2013:823, paragraph 46).

137. Unlike occupational requirements within the meaning of Article 4(1), such measures must also, in accordance with Article 2(5) of the Directive, emanate from or at least be authorised by a public authority.[78] After all, in referring to 'measures laid down by national law', Article 2(5) of the Directive adheres closely to the rule laid down in Article 9(2) ECHR, concerning the freedom of religion, to the effect that the only restrictions permitted are those that 'are prescribed by law and are necessary in a democratic society', inter alia, 'for the protection of the rights and freedoms of others'.

138. It is true that a company rule such as that operated by G4S, on which the ban at issue here is founded, is not, as such, a measure that emanates from a public authority or that is based on a sufficiently precise authorisation issued by a public authority.[79] There is at least nothing that would indicate to the Court the existence in national law of a specific statutory authorisation which is capable of serving as the legal basis for a measure such as that imposed by G4S.

139. At most, the statutory provisions enacted at national level with a view to transposing Article 4(1) of Directive 2000/78 could thus be regarded as authorising the adoption of measures within the meaning of Article 2(5) of the Directive. To that extent, however, Article 4(1) would have to be regarded as a *lex specialis* in relation to Article 2(5) of Directive 2000/78 and as giving specific expression to what the EU legislature considers to be appropriate by way of measures for the protection of the freedom to conduct a business.

### *(c) Intermediate conclusion*

140. On balance, it must therefore be concluded that, in a case such as this, Article 2(5) of Directive 2000/78 carries no significance independent of that of Article 4(1) as a ground of justification for a difference of treatment based on religion. The question of whether a ban such as that operated in the present case by G4S is justified must therefore be assessed exclusively by reference to Article 4(1) of the Directive.

## VI – Conclusion

141. In the light of the foregoing submissions, I propose that the Court's answer to the request for a preliminary ruling from the Belgian Hof van Cassatie (Court of Cassation) should be as follows:

(1) The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive.

(2) Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, in so far as the principle of proportionality is observed in that regard.

In that connection, the following factors in particular must be taken into account:

— the size and conspicuousness of the religious symbol,

78 — Judgment in *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 59 to 61 and 64).

79 — See the judgment in *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 61 and 64).

— the nature of the employee's activity,

— the context in which she has to perform that activity, and

— the national identity of the Member State concerned.