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Headscarf bans in the public workplace before the Court of Justice: *OP v. Commune d'Ans* or the Art of Ambiguity

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Abstract

OP v Commune d'Ans, handed down on 28 November 2023, is the fifth judgment issued by the Court of Justice of the European Union on a ban on the wearing of religious symbols in employment, but the first to concern a public workplace. This article argues that the judgment does not help clarify the issue. It is ambiguous and provides only vague guidance to national courts. Two aspects of its reasoning are particularly puzzling: firstly, the absence of any discussion on the very meaning and implications of the neutrality of the public service; and secondly, the recognition of a margin of discretion not only for states but also for sub-state entities, such as municipalities, in determining the concrete content of that principle.

Keywords

Religion or belief, discrimination, equality, human rights, headscarf

OP v Commune d'Ans, handed down on 28 November 2023 following a reference for a preliminary ruling from the Labour tribunal of Liège in Belgium, is the fifth judgment issued by the Court of Justice of the European Union (CJEU) on a ban on the wearing of religious symbols in employment.[1] Once again the case originated in the complaint of a Muslim female worker who challenged her employer's decision to forbid her from wearing a headscarf at work, alleging religious discrimination. Yet, whereas all previous judgments – *Achbita* (2017), *Bougnaoui* (2017),[2] *WABE and*

1. Case C-148/22, *OP v. Commune d'Ans*, ECLI:EU:C:2023:924.
2. Case C-157/15, *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203 and Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme v. Micropole SA,* ECLI:EU:C:2017:204. On these two cases, see L Vickers, 'Achbita and Bougnaoui: One Step Forward and Two Steps Back for Religious Diversity in the Workplace', 8(3) ELLJ (2017), 232–257;

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Müller (2021),[3] and *L.F. v. S.C.R.L.* (2022)[4] – concerned bans imposed by private companies, *OP v. Commune d'Ans* is the first case submitted to the Court of Justice concerning a similar measure applied by a public administration.

It is no coincidence that of the six cases brought before the Court of Justice in relation to religious symbols bans to date, three – *Achbita*, *L.F.* and *OP* – were submitted by a Belgian Court. The issue of the wearing of religious symbols in employment is deeply divisive in Belgian politics and society. The controversy is particularly acute where public employment is concerned. Over the last 15 years, several Bills have been proposed, both at federal and regional levels, aimed at prohibiting the wearing of any religious, political, or philosophical clothing or item by public agents.[5] None of them has been adopted, due to the lack of a political majority. The Belgian Council of State has issued qualified opinions on these Bills.[6] In practice, different policies are applied from one public entity to another. At the municipal level, a number of municipalities prohibit their staff from wearing such items, while others allow them to do so, either generally or only when they are not in contact with the public.[7] A number of legal actions have been brought before Belgian courts against such bans, resulting in rulings in different directions.[8]

However, it is doubtful that the judgment of the Court of Justice in *OP v. Commune d'Ans* will help clarify the issue. As will be argued, this judgment is ambiguous and provides only vague guidance to national courts. In what follows, I will first summarise the previous case law of the CJEU on religious symbols bans in employment (I). I will then briefly describe the facts giving rise to the dispute in the main proceedings, (II) and set out the answer given by the Court of Justice to the questions raised by the referring court (III), before submitting the CJEU's ruling to critical discussion (IV).

Howard, 'Islamic Headscarves and the CJEU: *Achbita* and *Bougnaoui'*, 24(3) MJECL (2017), 348–366; E Bribosia and I Rorive, 'Affaires *Achbita* et *Bougnaoui*: entre neutralité et préjugés', 112 *Rev. trim. dr. h.* (2017), 1017–1037; E Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? *Achbita and Bougnaoui'*, 55 CMLR (2018), 589–624.

3. Joined Cases C-804/18 & C-341/19, *IX v. WABE eV and MH Müller Handels GmbH v. MJ*, ECLI:EU:C:2021:594. On this judgment, see J Mulder, 'Religious neutrality policies at the workplace: Tangling the concept of direct and indirect religious discrimination. *WABE and Müller'*, 59 CMLR (2022), 1501–1522 and E Howard, 'Headscarves and the CJEU: Protecting fundamental rights and pandering to prejudice, the CJEU does both', 29(2) MJECL (2022), 245–262.
4. C-344/20, *L.F. v. S.C.R.L.*, ECLI:EU:C:2022:774. See E Howard, '*LF v SCRL* and the CJEU's Failure to Engage with the Reality of Muslim Women in the Labour Market', 52(4) ILJ (2023), 997-1014.
5. See i.a. *Proposition de loi visant à appliquer la séparation de l'État et des organisations et communautés religieuses et philosophiques non confessionnelles* (*Doc. Parl.*, Sénat, 2007–2008, No. 351/2); *Proposition de décret modifiant certaines dispositions du Code de démocratie locale et de la décentralisation* (*Doc. Parl.*, Parlement wallon, 2009–2010); *Proposition d'ordonnance visant à assurer la neutralité et l'impartialité des agents des services publics de la Région de Bruxelles-Capitale et à interdire le port de signes convictionnels ostentatoires dans l'exercice de leurs fonctions* (*Doc. Parl.*, Parlement de la Région de Bruxelles-Capitale, 2020–2021, No. A-380/1).
6. See Belgian Council of State, Opinion No. 69.726/AG of 12 May 2022; Opinion No. 48.042/AG of 20 April 2010 and Opinion No. 44.521/AG of 20 May 2008.
7. See Opinion of A.G. Collins in *OP*, ECLI:EU:C:2023:378, para. 73.
8. Compare *tribunal du travail francophone de Bruxelles*, 8 June 2015, RG No. 12/7482/A (which finds no discrimination) with *tribunal du travail francophone de Bruxelles*, 16 Novembre 2015, RG No. 13/7828/A (which finds indirect discrimination) and *tribunal du travail francophone de Bruxelles*, 3 May 2021, RG No. 19/1755/A (which finds direct discrimination).

I. Previous case law on religious symbols bans in employment

In previous judgments, the Court of Justice established that only where certain conditions are met can a ban on the wearing of religious symbols imposed by a private employer be considered compatible with the prohibition of discrimination on grounds of religion or belief laid down in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.[9]

The foundations of this case law were laid down in *Achbita* and *Bougnaoui*. Where such a ban is aimed solely at the Muslim headscarf, it constitutes a difference of treatment based directly on religion. Under Directive 2000/78, such a direct distinction can only be justified under very strict conditions: apart from the specific case of churches and other organisations whose ethos is based on religion or belief, a distinction directly based on a characteristic related to religion or belief will only be lawful if, by reason of the nature of the occupational activities or 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.[10] In *Bougnaoui*, the Court held that an employer's wish to satisfy a customer's desire not to deal with a worker wearing a Muslim headscarf cannot be regarded as a genuine and determining occupational requirement.[11] On the other hand, when an undertaking adopts an internal rule prohibiting the wearing of any visible sign of religious, philosophical or political convictions, it does not, according to the Court, introduce a direct difference of treatment because it treats all the employees in the same way by requiring them, in a general and undifferentiated manner, to 'dress neutrally'.[12] Such a rule may, however, give rise to a difference of treatment *indirectly* based on religion if it appears that the facially neutral obligation it imposes in fact creates a particular disadvantage for persons adhering to a particular faith.[13] In order for such a measure not to be classified as indirect discrimination, it must be proved that it is objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary. In *Achbita*, the Court stated that an employer's wish to display an image of neutrality towards customers is a legitimate objective, which falls within the scope of the freedom to conduct a business recognised in Article 16 of the EU Charter of Fundamental Rights.[14] However, a ban on the wearing of any religious symbol will only be an appropriate and necessary means of meeting this objective if the policy is 'genuinely pursued in a consistent and systematic manner'[15] and if it is limited to what is strictly necessary to achieve that aim. Importantly, the latter condition entails that the measure can only apply to workers who interact with customers. Moreover, employees who insist on wearing a religious symbol must be offered, as far as possible, a post that does not involve any visual contact with those customers.[16]

In the *WABE and Müller* judgment, the Court refined these principles. It stated that while an employer's desire to pursue, in relations with its customers, a policy of religious, philosophical or political neutrality may be regarded as legitimate, such an aim can only objectively justify a difference in treatment indirectly based on religion or belief if the employer demonstrates that this

9. O.J. 2000, L 303.
10. Art. 4(1) of Directive 2000/78. Concerning ethos-based organizations, see Art. 4(2).
11. Case C-188/15, *Bougnaoui*, para. 40–41.
12. Case C-157/15, *Achbita*, para. 30.
13. Case C-157/15, *Achbita*, para. 34.
14. Case C-157/15, *Achbita*, para. 38.
15. Case C-157/15, *Achbita*, para. 40.
16. Case C-157/15, *Achbita*, para. 42–43.

policy meets a 'genuine need'.[17] It is thus not enough for an undertaking to merely express a preference for a policy of exclusion of religious, philosophical or political symbols for such a ban to be *ipso facto* justified; it must establish that it has a genuine need, in view of its specific circumstances, to apply such a policy. The Court added in the *L.F.* judgment that this interpretation stems from a concern to encourage tolerance and respect for diversity as well as 'to avoid abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items or clothing'.[18] The *WABE and Müller* judgment also provides guidance on how to assess the existence of a 'genuine need'. In particular, account may be taken of the rights and legitimate expectations of customers or users (such as, in the case of a crèche, the right of parents to ensure the education and teaching of their children in accordance with their religious and philosophical convictions) as well as the adverse consequences that the employer would suffer in the absence of such a policy, given the nature of its activities or the context in which they are carried out.[19] Preventing social conflict within the company may also be considered as such a need when it appears that tensions linked to differences of belief have arisen in the past. This objective may justify a ban on the wearing of religious symbols by employees when they are in contact with each other.[20] Another important clarification is that a ban that does not cover 'all visible forms of expression of political, philosophical or religious beliefs', but is limited to 'conspicuous, large-sized signs of political, philosophical or religious beliefs', cannot be considered appropriate and necessary to achieve the objective of neutrality. It therefore constitutes indirect discrimination.[21] Such a rule is also likely to constitute direct religious discrimination when the size of the sign appears to be inextricably linked to one or more specific religions.[22]

II. The dispute in the main proceedings

The complainant in the main proceedings had worked for the municipality of Ans since 2016 as a lawyer specialising in public contracts. She held the position of 'head of office', with virtually no contact with users of the public service. In February 2021, she asked to be allowed to wear a headscarf at work. The municipal board rejected her request and provisionally forbade her from wearing any religious item while performing her duties. On 29 March 2021, it introduced a new provision into the local authority's employment regulations prohibiting all municipal workers from displaying any visible sign that might reveal their religious, philosophical or political beliefs, both in their contacts with the public and in their working relationships with their superiors and colleagues.

The complainant brought an action before the Liège Labour tribunal, alleging discrimination on the grounds of religion. The tribunal issued its judgment on 24 February 2022. It accepted that, prior to the amendment to the work regulations, there was already an unwritten rule prohibiting municipal employees from wearing religious symbols in the performance of their duties. However, it found that in practice, discrete religious symbols, such as tattoos or earrings in the shape of a cross, or symbols displayed at Christmas or St Nicholas celebrations, were tolerated by the municipality. Accordingly, it found that by prohibiting the applicant from wearing a headscarf in the period

17. Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 64.
18. C-344/20, *L.F.*, para. 41.
19. Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 65–67 and 70.
20. Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 75–76.
21. Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 78.
22. Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 73.

preceding the amendment of the employment regulations, the local council treated her differently from her colleagues directly based on her religious conviction. Given that she performed her duties mainly without any contact with the public, this distinction could not be justified by a genuine and determining occupational requirement. The tribunal therefore concluded that she had suffered direct religious discrimination.

As for the new provision inserted in the work regulations, it did not, in the view of the tribunal, introduce any direct discrimination, since it prohibited all religious symbols. However, it did create a particular disadvantage for certain employees and, as such, potentially entailed indirect discrimination. The tribunal highlighted, in this regard, the inconsistent application by the municipality of its policy of exclusion of religious symbols, in view of its tolerance of discrete religious items. Additionally, it held that the objective of preserving the neutrality of the public service could not justify the contested measure insofar as it applied to the complainant when she performed her duties without any contact with users of the public service. Accordingly, the tribunal ruled that the applicant should be temporarily allowed to wear a visible religious symbol when working in the back office, but not when in contact with the public or exercising a position of authority.

The tribunal also decided to refer two questions to the CJEU. First, it asked the Court whether Article 2(2)(a) and (b) of Directive 2000/78, which prohibits direct and indirect discrimination, could 'be interpreted as permitting a public administration to put in place an entirely neutral administrative environment and thus to prohibit all members of staff from wearing [signs which might reveal religious beliefs], whether or not they are in direct contact with the public'. Secondly, it asked whether this prohibition is compatible with Directive 2000/78, given that it 'appears mostly to affect women, and may thus constitute disguised discrimination on grounds of gender'.

This second question stemmed from the finding that the ban on the wearing of religious, philosophical, and political symbols, although neutral on the face of it, in practice mainly affects women who, because of their religious convictions as Muslims, wish to wear the headscarf. Given this gendered impact, several authors have argued that such a measure potentially constitutes indirect gender discrimination.[23] It would have been interesting to hear the Court of Justice's analysis in this respect. However, the Court refused to examine this question. It stressed that sex discrimination in employment is covered not by Directive 2000/78 referred by the Liège tribunal, but by Directive 2006/54.[24] It also criticised the referring court for failing to provide any details on the factual elements likely to point to indirect gender discrimination in the present case, or on the reasons why a resolution of that question would be necessary for the resolution of the dispute in the main proceedings.[25]

III. The Court of Justice's answer

The first question raised by the referring court concerned whether and to what extent the objective of preserving the neutrality of the public service could justify a so-called policy of 'exclusive

23. See among others Howard, '*LF v SCRL* and the CJEU's Failure to Engage with the Reality of Muslim Women in the Labour Market', *op. cit.*, at 1009–1010.
24. C-148/22, *OP*, para. 48. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. 2006, L 204.
25. C-148/22, *OP*, para. 49.

neutrality', that is a general ban, imposed on all members of staff of a public administration whatever their function, on wearing any sign likely to reveal their religious, political, or philosophical beliefs, having regard to the prohibition of direct and indirect discrimination based on religion or belief under Directive 2000/78.

Recalling its previous case law, the Court observed that the policy adopted by the municipality of Ans did not involve any issue of direct discrimination given that it consisted in a general and indiscriminate prohibition of any visible sign of beliefs, unless the referring court determined that in fact, despite the terms of the work regulations, the applicant in the main proceedings had been treated differently from other workers who had been permitted to wear religious or philosophical symbols.[26] The Court thus focused on the question of whether such a general prohibition may constitute indirect discrimination, considering that it may in practice put persons adhering to a specific religion or belief at a particular disadvantage. It stated that such a policy of 'exclusive neutrality' may be regarded as objectively justified by a legitimate aim, within the meaning of Directive 2000/78. It added, however, that another policy of neutrality, 'such as a general and undifferentiated permission for the wearing of visible signs of belief – philosophical or religious in particular – including in contacts with users, or a prohibition on the wearing of such signs limited to situations involving such contacts', would also be legitimate.[27] The Court of Justice indeed considered that each Member State, but also, 'where appropriate', each infra-State body, 'in compliance with the powers conferred on them, must be afforded a margin of discretion in designing the neutrality of the public service which it intends to promote in the workplace',[28] depending on its own context and the place it intends to give to religion and philosophical beliefs in the public sector.[29]

Yet, the Court stressed that this discretion must go hand in hand with supervision by the national and EU courts to ensure that the measures taken are justified in principle and proportionate.[30] Referring to its previous judgments, the Court restated that, in order not to be deemed indirectly discriminatory, a ban on the wearing of religious signs must be appropriate and necessary to achieve the objective pursued. This presupposes, on the one hand, that it is genuinely pursued in a consistent and systematic manner, and therefore targets any visible manifestation of beliefs, and, on the other hand, that it is limited to what is strictly necessary.[31]

IV. The ambiguities of the Court of Justice's ruling

The Court of Justice's ruling in *OP v. Commune d'Ans* raises more questions than it answers. Two aspects of its reasoning are particularly puzzling: firstly, the absence of any discussion on the very meaning and implications of the public service neutrality (1); secondly, the recognition of a margin of discretion for states but also for sub-state entities, such as municipalities, in determining the concrete content of that principle (2).

26. C-148/22, *OP*, para. 28.
27. C-148/22, *OP*, para. 33. See also para. 41.
28. C-148/22, *OP*, para. 33.
29. C-148/22, *OP*, para. 33–34.
30. C-148/22, *OP*, para. 34.
31. C-148/22, *OP*, para. 37–39.

1. The missing discussion of the meaning of the public service's neutrality

While preserving the neutrality of the public service is the sole objective invoked by the municipality to justify the contested measure, at no point does the Court of Justice attempt to explain why prohibiting all members of the administration's staff from wearing signs revealing their religious or philosophical convictions is necessary to guarantee that neutrality.

It is not self-evident, however, that such a measure is necessary to preserve neutrality. The obligation of a democratic state to be neutral basically means that it cannot promote a particular belief to the detriment of others, nor favour people who adhere to a particular religion, philosophy, or political doctrine: it must respect the freedom of all individuals to determine their own conception of the good life, and treat everyone equally, whatever their beliefs.[32] Neutrality is therefore not an end in itself: as various political philosophers have pointed out, it is a means to guarantee some higher principles, namely, equality and freedom.[33]

Public employees, through whom the state operates, are naturally themselves subject to a duty of neutrality. But what obligations does this entail? There is no doubt that these employees must be neutral in their actions; they cannot treat certain users more favourably than others because of their beliefs. The duty of public servants to be neutral is therefore a corollary of the right to non-discrimination. But does this requirement of neutrality also imply obligations relating to their external appearance? This is a matter of debate. For some, the obligation of neutrality for public employees is limited to the 'neutrality of acts'. Others, on the other hand, claim that guaranteeing neutrality also requires neutralising the appearance of public employees; the latter should refrain from wearing any sign or garment that might reveal their adherence to a particular belief. This obligation of 'neutrality of appearance' is justified not by the desire to prevent discrimination – no one maintains that an employee will become biased in his or her actions simply because he or she wears clothing that reveals a certain belief – but to avoid raising doubts in the minds of users as to the neutrality and impartiality of the administration's staff.[34] This distinction between a concept of neutrality limited to the actions of the employee and one that extends to his or her appearance overlaps with another distinction often used in the legal literature in Belgium, and taken up by the Court of Justice in the *OP* judgment, that between 'inclusive neutrality' (which allows the wearing of religious or philosophical signs) and 'exclusive neutrality' (which excludes the wearing of such signs).

Since the 'neutrality of appearance' is intended to prevent users' confidence in the administration from being undermined if they become aware of an employee's religious convictions, a ban on wearing religious or philosophical signs based on this justification seems to only make sense when it is applied to employees who are in visual contact with the public. When a staff member works out of sight of users, the latter are unaware that he or she may be wearing a religious symbol and cannot therefore be afftected by it. This was the reasoning followed by the Court of Justice, in the context of a private business, in *Achbita*. Noting that the objective pursued by the

32. See further J Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach', 6(1) OJLR (2017), 24–47.

33. See W Kymlicka, 'Liberal individualism and Liberal Neutrality', (1989) *Ethics*, 883–905; R Dworkin, 'Liberalism', in Hampshire (ed.), *Public and Private Morality* (CUP, 1978), pp. 113–143; J Maclure and Ch Taylor, *Secularism and Freedom of Conscience* (Harvard University Press, 2011); J Baubérot et M Milot, *Laïcités sans frontières* (Seuil, 2011), at 78–81.

34. On the distinction between 'neutrality of action' and 'neutrality of appearance', see S Van Drooghenbroeck, 'Les transformations du concept de neutralité de l'État : quelques réflexions provocatrices', in J Ringelheim (ed.), *Le droit et la diversité culturelle* (Bruylant, 2011), pp. 75–120.

company in prohibiting its employees from wearing religious symbols was to project an image of neutrality towards its customers, the Court held that this measure could only be regarded as necessary to achieve the aim pursued if it applied only to employees who came into contact with customers.[35] In *OP*, however, the Court indicates that a ban on religious symbols extending to all members of the administration's staff, whether in contact with the public or not, is one of the possible concepts of neutrality in the public service. But it does not provide any explanation as to why such a measure, including when it applies to workers without contact with the public, might be deemed necessary for the neutrality of the administration. It does refer to the desire to guarantee 'to the users of its services' as well as 'the members of its staff' 'an administrative environment devoid of visible manifestations of beliefs, philosophical or religious in particular',[36] but it does not indicate in what way the rights or interests of the other administration employees would be threatened by the fact of working alongside a colleague who, through their dress, reveals their religious or philosophical belief.

In his opinion on this case, Advocate General Anthony Collins proposes a more rigorous approach, based on the Court's previous case law. He notes that, in order to justify its intention to establish an 'entirely neutral administrative environment', the municipality 'merely refers to an 'overriding social need', the existence of which it seeks to demonstrate by reference to laconic and abstract statements only'.[37] In the Advocate General's view, it should be for the referring court to ascertain whether the municipality has sufficiently demonstrated that its choice of a policy of 'exclusive neutrality' meets a genuine need, in accordance with the teaching of the *WABE and Müller* judgment.[38] The Advocate General suggests that this need may arise either on legal grounds or on factual grounds. From a legal point of view, he notes that Belgian law does not provide a clear definition of the implications of the principle of neutrality as regards the wearing of religious symbols by members of the administration. The municipality of Ans was therefore under no obligation under Belgian law to introduce the rule in question.[39] There remains the possibility of justifying this policy of 'exclusive neutrality' on factual grounds. The Advocate General cites as an example the possible existence, within the municipality, of strong community tensions or serious social problems or, within the municipal administration, acts of proselytism or a concrete risk of conflicts between staff linked to such convictions. But he insists that the local authority must provide concrete proof of such circumstances and that the referring court must assess their relevance.[40]

2. The recognition of a margin of discretion for states as well as sub-state entities

A second intriguing element in the Court of Justice's ruling is its holding that a margin of discretion must be recognised not only for states but also, 'where appropriate', for sub-state entities, in determining the concept of neutrality that they intend to implement in the public workplace. The Court

35. C-157/15, *Achbita*, para. 42.
36. C-148/22, *OP*, para. 40.
37. Opinion of A.G. Collins in *OP*, para. 67.
38. Opinion of A.G. Collins in *OP*, para. 68.
39. Opinion of A.G. Collins in *OP*, para. 69–71. The Advocate General also concludes from there that the constitutional identity of Belgium, within the meaning of Article 4(2) of the Treaty on the European Union, is not at issue in this case (para. 72).
40. Opinion of A.G. Collins in *OP*, para. 73.

justifies this position on the grounds that Directive 2000/78 establishes only a general framework for equal treatment and that there is no consensus at EU level as to the place that may be accorded to religion and philosophical beliefs in the public sector.[41] It adds that the EU legislator did not itself, in Directive 2000/78, effect the necessary reconciliation between the freedom of religion and the legitimate aims that may be invoked to justify an indirect difference of treatment.[42]

Recognising a margin of appreciation on the part of state authorities to specify the meaning and implications of public service neutrality appears in itself relevant. It is indeed a constitutional principle, the interpretation of which, beyond a minimal consensus, varies among EU states, depending on the prevailing vision of the relationship between state and religions.[43] But this does not entail that a state should be allowed to decide at its own discretion that a measure likely to give rise to indirect discrimination is objectively justified by the preservation of neutrality, without having to demonstrate it.[44]

The Court had already suggested in *WABE and Müller* that Directive 2000/78, insofar as it relates to the management of religion, leaves the Member States a margin of discretion.[45] In that case, however, the reference to such a margin served to underpin the conclusion that national provisions on freedom of religion affording greater protection against discrimination than that provided by Directive 2000/78 could be taken into account by the national courts as provisions covered by Article 8(1) of the Directive, which authorises Member States to adopt or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive. The reference to a margin of appreciation in this context was criticised by several authors, who saw it as a source of confusion and observed that the Court could have reached the same conclusion by relying solely on the freedom left to the Member States by Article 8(1) of Directive 2000/78 to maintain provisions more favourable to equal treatment.[46]

To support the use of the concept of a margin of discretion, the Court, in *WABE and Müller*, referred to the judgment *Centraal Israëlitisch Consistorie van België* issued in 2020.[47] In the latter case, however, the idea of such a margin was not raised in relation to standards of equal treatment, but in relation to reconciling the requirements of animal welfare with respect for religious freedom. The Court highlighted that Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing states that the Union and the Member States shall 'pay full regard to the welfare requirements of animals while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious

41. Case C-148/22, *OP*, para. 34.
42. Case C-148/22, *OP*, para. 35.
43. A.G. Collins observes in his opinion on the case that restrictions imposed on the freedom of public sector employees to manifest their political, philosophical or religious beliefs in the performance of their duties may be of such importance in some Member States that it forms part of their constitutional identity referred to in Article 4(2) of the Treaty on European Union (para. 46). However, he finds that this is not the case in Belgium where constitutional law does not appear to impose such an exclusive conception of neutrality (para. 72).
44. See E Howard, 'The Court of Justice and headscarves at work: discretion in EU anti-discrimination law: a dangerous precedent (Case C-148/22 OP v Commune d'Ans)', *EU Law Live*, 5th December 2023,https://eulawlive.com/op-ed-the-court-of-justice-and-headscarves-at-work-discretion-in-eu-anti-discrimination-law-a-dangerous-precedent-case-c-148-22-op-v-commune-dans-by-erica-howard/. See also E Howard, '*Op v Commune d'Ans*: Another Steop in the Wrong Direction for Headscarf-Wearing Women', forthcoming in ILJ.
45. Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 86.
46. See Mulders, *op. cit*., at 1519-1520 and Howard, 'Headscarves and the CJEU', *op. cit.*, at 159–160.
47. Case C-336/19, *Centraal Israëlitisch Consistorie van België*, ECLI:EU:C:2020:1031. The Court refers to this case in Joined Cases C-804/18 & C-341/19, *WABE and Müller*, para. 86–87.

rites (…)'. From this, it inferred that the Regulation 'does not itself effect the necessary reconciliation between animal welfare and the freedom to manifest religion, but merely provides a framework for the reconciliation which Member States must achieve between those two values'.[48] Referring to the case law of the European Court of Human Rights on freedom of religion, the Court observed that, given the lack of consensus at EU level, Member States must be allowed a margin of appreciation in deciding whether and to what extent a restriction on the right to manifest religion or belief is necessary.[49]

The issues at stake in *OP v Commune d'Ans*, as in *WABE and Müller*, are different. They relate primarily to the prohibition of discrimination on grounds of religion, rather than to freedom of religion. Directive 2000/78, which was applicable to these cases, lays down common rules for the protection of equal treatment but mentions nowhere the concept of the neutrality of the state or the public service. To be sure, it provides that a measure entailing a particular disadvantage for people adhering to a certain faith may be justified by a legitimate aim. But there is nothing in the Directive to indicate that the other conditions required for such a measure not to constitute indirect discrimination no longer apply where the objective invoked consists in a certain conception of public service neutrality. And while the purpose of this Directive is to establish 'a general framework' for combating discrimination, it nevertheless sets a minimum level of protection that the Member States must guarantee. They may ensure a higher level of protection, but they may not opt for a lower level.

The observations made in *OP* regarding the existence of a margin of discretion where the management of religion is at issue contrast with the approach taken by the Court of Justice in *Vera Egenberger* (2018).[50] The Court had to determine whether, in the context of recruitment, a church or other organisation whose ethos is based on religion or belief may itself determine, without external control, the occupational activities for which religion, by reasons of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of Directive 2000/78. The referring court emphasised that the autonomy of religious societies is guaranteed by the German Constitution. It therefore asked whether Article 17 TFEU, under which the Union respects the status under national law of churches and religious associations or communities, might affect the interpretation of Directive 2000/78. The Court was not impressed by the fact that a constitutional provision was at stake. It responded unambiguously that where a church or other relevant organisation, in order to justify a decision such as the rejection of a job applicant, claims that by reason of the nature of the activities concerned or the context in which it is carried out, religious or belief constitutes a genuine, legitimate and justified occupational requirement having regard to its ethos, 'it must be possible for such an assertion to be the subject, if need be, of effective judicial review by which it can be ensured that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied in the particular case'.[51] As for Article 17 TFEU, it ruled that it could not justify that compliance with these criteria escape an effective judicial review.[52]

48. Case C-336/19, *Centraal Israëlitisch Consistorie van België*, para. 47.
49. Case C-336/19, *Centraal Israëlitisch Consistorie van België*, para. 67.
50. Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:C:2018:257.
51. Case C-414/16, *Vera Egenberger*, para. 55 and 59.
52. Case C-414/16, *Vera Egenberger*, para. 56–58. For a comparison between this latter judgment and the Court of Justice's case-law on the wearing of religious symbols, see E Sharpston, 'Religion in the Workplace', in K Lenaerts *et al.* (eds), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* (Bloomsbury Publishing, 2021), pp. 247–260.

In any event, in *OP*, the Court not only recognises that states have a margin of appreciation in defining the concept of public service neutrality, but also potentially sub-state entities, including local governments. It thus places municipalities, which in Belgium represent the first tier of local government and are devoid of any constituent power, on the same footing as states. It seems to recognise that a very large number of entities (there are 581 municipalities in Belgium) may have the power to decide whether to adopt an 'exclusive' or 'inclusive' concept of neutrality. However, these two options are not equivalent from the viewpoint of EU law: 'exclusive neutrality' has an impact on the right to non-discrimination and religious freedom. Applied to all public employees, it has the effect of excluding Muslim women who wear a headscarf out of religious belief from any possibility of employment in the public administration. Would the answer to the question of whether this measure meets the requirements of Directive 2000/78 depend on a discretionary choice that each municipality could make and not on objective elements that the municipality would have to demonstrate?

The Court's reasoning is in fact ambiguous. When referring to a margin of appreciation for infra-State bodies, it first specifies that such a margin should be afforded to them 'where appropriate' and 'in compliance with the powers conferred upon them'.[53] National courts will thus have to check that the possibility of choosing the concept of public service neutrality to be implemented in the workplace does indeed fall within the remits of the entity at stake under national law.. Second, the Court of Justice justifies the recognition of such a margin by referring to the municipality's 'specific context'. It emphasises that this margin must go hand in hand with a supervision by the national and EU courts, consisting in ascertaining whether the rule adopted by the administrative body is not only justified in principle but also whether it is appropriate, necessary and proportionate to that objective in the light of the context in question.[54] The referring court must, 'in the light of all the factors characteristic of the context in which that rule was adopted', weigh up the rights and interests involved, taking into account, on the one hand, the right to freedom of thought, conscience and religion, which has as its corollary the prohibition of discrimination on grounds of religion, both enshrined in the Charter of Fundamental Rights of the European Union (Articles 10 and 21), and, on the other hand, the principle of neutrality, pursuant to which the public administration seeks to guarantee users and its employees a neutral administrative environment.[55] Although the Court does not refer to the obligation, set out in the *WABE and Müller* judgment, to demonstrate that the measure meets a real need, it cites this judgment on several occasions, which indicates that it considers it to be relevant to the analysis of the case in question.

In the light of these factors, the judgment in *OP* can be interpreted as meaning that a municipal authority may choose a policy of prohibiting all members of its staff from displaying visible religious signs, provided that this falls within its power under national law and that it can demonstrate that this policy is necessary to guarantee the neutrality – or the image of neutrality – of the public service, or some other legitimate objective, having regard to the specific circumstances with which it is confronted. This interpretation has the advantage of being in line with the Court's previous case law on the wearing of religious symbols. This in fact reflects the approach taken to date by the Council of State in Belgium: in its opinions on Bills aimed at excluding the wearing of any item revealing the religious, philosophical, or political convictions of public employees, the Council has always carried out a stringent proportionality review. It has held that the desire to strengthen

53. Case C-148/22, OP, para. 33.
54. Case C-148/22, *OP v. Commune d'Ans*, para. 34 and 41.
55. Case C-148/22, *OP v. Commune d'Ans*, para. 40.

public confidence in the neutrality of the public service can only justify such a ban insofar as it applies to public officials who, by virtue of the duties they perform, may, by wearing a religious symbol, give the public the impression of a lack of neutrality on the part of the authorities.[56] Another justification is therefore needed to justify a ban that would be imposed on all staff without distinction – a justification whose factual reality must be demonstrated.[57]

V. Conclusion

On reading this judgment, it is difficult to escape the impression that, faced with an issue that it knew to be politically very sensitive in some EU Member States, the Court preferred to avoid adopting a clear-cut position. Its judgment is ambiguous and open to several interpretations. It thus leaves a wide margin of manoeuvre for the national courts to determine, based on their national law and their own reading of the CJEU case law on religious symbols bans in employment taken as a whole, in what circumstances such a measure, when adopted by a public administration, can be reconciled with the requirements of non-discrimination law.

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56. See Opinion No. 44.521/AG of 20 May 2008; Opinion No. 48.042/AG of 20 April 2010, para. 4.5 and Opinion No. 69.726/AG of 12 May 2022, para. 27.
57. Opinion No. 69.726/AG of 12 May 2022, para. 12, 27 et 29.