Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

5 July 2017 *

(Reference for a preliminary ruling — Air transport — Regulation (EU) No 1178/2011 — Annex I, point FCL.065(b) — Holders of a pilot's licence who have attained the age of 65 prohibited from acting as pilots of aircraft engaged in commercial air transport — Validity — Charter of Fundamental Rights of the European Union — Article 15 — Freedom of occupation — Article 21 — Equal treatment — Discrimination on grounds of age — Commercial air transport — Concept)

In Case C-190/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 27 January 2016, received at the Court on 5 April 2016, in the proceedings

Werner Fries

v

Lufthansa CityLine GmbH,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, E. Regan, J.-C. Bonichot, A. Arabadjiev and S. Rodin, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Fries, by M. Mensching, Rechtsanwalt,

— Lufthansa CityLine GmbH, by C. Schalast, Rechtsanwalt,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Palatiello, avvocato dello Stato,

— the European Commission, by D. Martin, W. Mölls and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2017,

* Language of the case: German.

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity or, in the alternative, the interpretation of point FCL.065(b) in Annex I to Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2011 L 311, p. 1).

2 The request has been made in proceedings between Mr Werner Fries and Lufthansa CityLine GmbH ('Lufthansa'), an airline established in Germany, concerning the payment of the remuneration allegedly owed by Lufthansa to Mr Fries, related to the months of November and December 2013.

Legal context

International law

The Chicago Convention

3 The Convention on International Civil Aviation, signed in Chicago on 7 December 1944 ('the Chicago Convention'), has been ratified by all the Member States of the European Union, but the European Union is not itself a party to it. The Chicago Convention established the International Civil Aviation Organisation (ICAO), which, as provided in Article 44, has the objective of developing the principles and techniques of international air navigation and promoting the planning and development of international air transport.

4 Under the heading 'Personnel licensing', Annex I to the Chicago Convention, adopted by the ICAO Council, consolidates the standards and recommended practices governing the issuing of licences to flight crew members (pilots, flight engineers and flight navigators), air traffic controllers, aeronautical station radio operators, maintenance technicians and flight operations officers. In particular, the annex contains the following provisions:

> '2.1.10.1 A Contracting State, having issued pilot licences, shall not permit the holders thereof to act as pilot-in-command of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 60th birthday or, in the case of operations with more than one pilot where the other pilot is younger than 60 years of age, their 65th birthday.
>
> 2.1.10.2 Recommendation — A Contracting State, having issued pilot licences, should not permit the holders thereof to act as co-pilot of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 65th birthday.'

The JAR-FCL 1

5 International legislation regarding private, professional and airline pilots is developed by an international institution, the 'Joint Aviation Authorities', in which the Federal Republic of Germany participates. Part of that legislation, the Joint Aviation Requirements — Flight Crew Licensing 1 ('the JAR-FCL 1'), was adopted on 15 April 2003. The JAR-FCL 1 was published by the Federal Ministry of Transport, Construction and Housing in the *Bundesanzeiger* No 80a on 29 April 2003.

6 Paragraph 1.060 of JAR-FCL 1 states:

‘Curtailment of privileges of licence holders aged 60 years or more:

(a) Age 60-64:

The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport operations except:
(1) as a member of a multi-pilot crew
(2) such holder is the only pilot in the flight crew who has attained age 60.

(b) 65 years:

The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport operations …’

European Union law

Regulation (EC) No 216/2008

7 Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ 2008 L 79, p. 1), provides in Article 2(1) thereof:

‘The principal objective of this Regulation is to establish and maintain a high uniform level of civil aviation safety in Europe.’

Regulation No 1178/2011

8 Recitals 1 and 11 of Regulation No 1178/2011 are worded as follows:

‘(1) Regulation (EC) No 216/2008 aims at establishing and maintaining a high uniform level of civil aviation safety in Europe. That Regulation provides for the means of achieving that objective and other objectives in the field of civil aviation safety.

…

(11) In order to ensure a smooth transition and a high uniform level of civil aviation safety in the Union, implementing measures should reflect the state of the art, including best practices, and scientific and technical progress in the field of pilot training and aircrew aero-medical fitness. Accordingly, technical requirements and administrative procedures agreed by the International Civil Aviation Organisation (ICAO) and the Joint Aviation Authorities until 30 June 2009 as well as existing legislation pertaining to a specific national environment, should be considered.’

9 Article 3 of Regulation No 1178/2011, entitled ‘Pilot licensing and medical certification’, provides:

‘Without prejudice to Article 7, pilots of aircraft referred to in Article 4(1)(b) and (c) and Article 4(5) of Regulation (EC) No 216/2008 shall comply with the technical requirements and administrative procedures laid down in Annex I and Annex IV to this Regulation.’

10 Under the heading ‘Definitions’, point FCL.010 in Annex I to Regulation No 1178/2011 states:

‘For the purposes of this Part, the following definitions apply:

…

“Commercial air transport” means the transport of passengers, cargo or mail for remuneration or hire.

…’

11 Under the heading ‘Curtailment of privileges of licence holders aged 60 years or more in commercial air transport’, point FCL.065 in Annex I to that regulation provides the following:

‘(a) Age 60-64. Aeroplanes and helicopters. The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport except:
(1) as a member of a multi-pilot crew; and
(2) provided that such a holder is the only pilot in the flight crew who has attained the age of 60 years.

(b) 65 years. The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport.’

German law

12 Under the heading ‘Duties arising from a relationship of obligation’, Paragraph 241(2) of the German Civil Code (Bürgerliches Gesetzbuch (‘BGB’)) states:

‘A relationship of obligation may, depending on its content, require each party to have regard for the other party’s rights, legally protected interests and other interests.’

13 Under Paragraph 280(1) of the BGB, ‘[i]f the person owing the obligation breaches a duty arising from the obligation, the obligee may seek damages for the damage caused thereby’.

14 Under the heading ‘Default in acceptance’, Paragraph 293 of the BGB states:

‘The obligee shall be in default if he does not accept the performance offered to him.’

15 Paragraph 297 of the BGB, entitled ‘Inability of the obligor’, provides that:

‘The obligee shall not be in default if the obligor is, at the time of the offer, not in a position to perform that obligation.’

16 Under the heading ‘Remuneration in the case of default in acceptance and business risk’, Paragraph 615 of the BGB provides:

‘If the person entitled to services is in default in accepting the services, the party owing the services may then demand the agreed remuneration for the services not rendered as the result of the default without being obliged to provide subsequent service.

…’

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 Mr Fries, the applicant in the main proceedings, was employed as a captain by Lufthansa during the period from 1986 to 31 December 2013. He was also involved in training other pilots under an additional agreement to his employment contract.

18 During the month of October 2013, the applicant in the main proceedings attained the age of 65. On 31 December 2013, his employment contract expired because he had reached the ordinary retirement age in the public pension scheme, in accordance with the applicable collective agreement.

19 As from 31 October 2013, Lufthansa no longer employed Mr Fries, claiming that, under point FCL.065(b) in Annex I to Regulation No 1178/2011, he was no longer entitled to work as a pilot of an aircraft engaged in commercial air transport from that date.

20 It is apparent from the order for reference that, during the period from 31 October to 31 December 2013, Mr Fries still possessed his licence to operate commercial aircraft (ATPL) including that for the Embraer aircraft type, was still a Type Rating Instructor (TRI) for training pilots in aircraft and in simulators for the Embraer aircraft type, was still a Type Rating Examiner (TRE) for conducting examinations in aircraft and in simulators for the purposes of obtaining or extending licences for the Embraer aircraft type and still held approval as a Senior Examiner (SEN) to conduct examinations for Type Rating Examiners (TREs), whatever the aircraft type.

21 Mr Fries claims, before the Bundesarbeitsgericht (Federal Labour Court, Germany), that Lufthansa's refusal to employ him as a pilot is illegal and has requested that Lufthansa be ordered to pay the remuneration related to the months of November and December 2013.

22 In this respect, the referring court notes that, according to the national legislation, the employer is 'in default' if he does not, in an employment contract capable of fulfilment, accept the performance duly offered to him by the employee. In such a case, although the employee is not working, he may demand from the employer the remuneration that he would have received if the employer had accepted the performance of the work within the period of default. However, the employer's default in acceptance of the offer to perform work is excluded if the employee is not in a position to perform it. If it is impossible for the employee to perform, in whole or in part, the obligation agreed in the employment contract, the employer is required to provide the employee with other work that he is capable of performing. The employer may be required to pay damages if it fails to perform that obligation.

23 Lufthansa takes the view that no default in acceptance of Mr Fries' offer to perform work can be attributed to it, in the months of November and December 2013, since the applicant in the main proceedings, under point FCL.065(b) in Annex I to Regulation No 1178/2011, upon reaching the age of 65, no longer had the right to work as a pilot of an aircraft engaged in commercial air transport, with the result that he was not in a position to perform the obligation agreed from 1 November 2013 until the end of the employment relationship.

24 However, the referring court has doubts as to the validity of point FCL.065(b) in Annex I to that regulation in the light of the Charter of Fundamental Rights of the European Union ('the Charter') and, in particular, of the prohibition of discrimination on grounds of age under Article 21(1) of the Charter and the right to engage in work and to pursue a freely chosen or accepted occupation under Article 15(1) thereof.

25 Furthermore, should point FCL.065(b) in Annex I to the regulation be compatible with the Charter, the referring court considers that Mr Fries would be able to assert his claim for damages, in accordance with the national legislation, if it were the case that, upon reaching the age of 65, he could still carry out ferry flights and/or work as a trainer and examiner on board an aircraft. Such a claim would

depend on an interpretation of the term 'commercial air transport' within the meaning of point FCL.065(b) in Annex I to Regulation No 1178/2011, read in conjunction with point FCL.010 in that annex.

26 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is FCL.065(b) in Annex I to Commission Regulation (EU) No 1178/2011 compatible with the prohibition of discrimination on grounds of age under Article 21(1) of the Charter?

2. Is FCL.065(b) in Annex I to Regulation No 1178/2011 compatible with Article 15(1) of the Charter, according to which everyone has the right to engage in work and to pursue a freely chosen or accepted occupation?

3. If the first and second questions are answered in the affirmative:
   (a) Are so-called ferry flights operated by an air carrier carrying no passengers, cargo or mail also covered by the term "commercial air transport" within the meaning of FCL.065(b) [in Annex I] or the definition of that term [set out] in FCL.010 in Annex I to Regulation No 1178/2011?
   (b) Are training and the conducting of examinations in which a pilot over the age of 65 remains in the cockpit of the aircraft as a non-flying crew member covered by the term "commercial air transport" within the meaning of FCL.065(b) [in Annex I] or the definition of that term [set out] in FCL.010 in Annex I to Regulation No 1178/2011?'

Consideration of the questions referred

The first and second questions

27 By its first and second questions, which should be considered together, the referring court asks, in essence, whether point FCL.065(b) in Annex I to Regulation No 1178/2011 is valid in the light of Article 15(1) or Article 21(1) of the Charter.

28 In order to answer those questions, it must be determined, first, whether the EU legislature infringed the principle of non-discrimination laid down in Article 21(1) of the Charter, according to which 'any discrimination based on any ground such as … age … shall be prohibited', when it prohibited holders of a pilot's licence who have attained the age of 65 from acting as pilots of an aircraft engaged in commercial air transport. Secondly, it is necessary to examine whether, by imposing such a prohibition, the EU legislature infringed the right to engage in work and to pursue a freely chosen or accepted occupation, laid down in Article 15(1) of the Charter, as regards the licence holders affected by the prohibition.

Article 21(1) of the Charter

29 The principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter, of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression.

30 The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100, paragraph 28 and case-law cited).

31 Accordingly, it must be ascertained, in the first place, whether point FCL.065(b) in Annex I to Regulation No 1178/2011 establishes a difference in treatment based on age.

32 Under that provision, holders of a pilot's licence are prohibited from acting as pilots of an aircraft engaged in commercial air transport upon reaching the age of 65.

33 Point FCL.065(b) in Annex I to Regulation No 1178/2011 thus gives holders of a pilot's licence who have attained the age of 65 less favourable treatment than those under the age of 65.

34 Consequently, it must be held that that provision establishes a difference in treatment based on age.

35 It must be examined, in the second place, whether that difference in treatment is nevertheless compatible with Article 21(1) of the Charter in that it satisfies the criteria set out in Article 52(1) thereof.

36 It should be noted, in that regard, that Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

37 It is common ground that prohibiting holders of a pilot's licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport must be regarded as provided for by law, within the meaning of Article 52(1) of the Charter, since it stems from point FCL.065(b) in Annex I to Regulation No 1178/2011.

38 Furthermore, as the Advocate General observed in point 33 of his Opinion, that limitation respects the essential contents of the principle of non-discrimination. That limitation does not call into question the principle as such, as it concerns only the question, limited in scope, of restrictions on performing pilot duties in order to ensure the safety of aviation (see, by analogy, judgment of 29 April 2015, *Léger*, C-528/13, EU:C:2015:288, paragraph 54).

39 However, it must still be determined whether that limitation meets an objective of general interest, within the meaning of Article 52(1) of the Charter, and if so, whether it observes the principle of proportionality within the meaning of that provision.

40 As regards the objective pursued by point FCL.065(b) in Annex I to Regulation No 1178/2011, it should be observed that, as is apparent from the title of the regulation, the latter lays down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation No 216/2008. Regulation No 1178/2011 was thus adopted to implement the provisions of Regulation No 216/2008.

41 As point FCL.065(b) in Annex I to Regulation No 1178/2011 is a measure for the implementation of Regulation No 216/2008, it must therefore be held that the provision at issue in this case pursues the same objective as the latter regulation, namely, to establish and maintain a high uniform level of civil aviation safety in Europe, as is clear both from Article 2 of Regulation No 216/2008 and from recitals 1 and 11 of Regulation No 1178/2011.

42 However, it should be recalled that, as regards aviation safety, when interpreting Article 2(5) and Article 4(1) of 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), the Court has held that the objective of guaranteeing air traffic safety constitutes a legitimate objective within the meaning of those provisions (see, to that effect, judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraphs 58 and 69).

43 In those circumstances, it must be held that the objective of establishing and maintaining a high uniform level of civil aviation safety in Europe constitutes an objective of general interest.

44 It must therefore be ascertained whether, by prohibiting holders of a pilot's licence who have attained the age of 65 from acting as the pilot of an aircraft engaged in commercial air transport, point FCL.065(b) in Annex I to Regulation No 1178/2011 imposes a proportionate requirement, that is, whether such a measure is appropriate for attaining the objective pursued and does not go beyond what is necessary in order to attain it.

45 Concerning, first of all, the appropriateness of such a provision in the light of the aim pursued, it is clear from the case-law of the Court that, as regards air traffic safety, measures that aim to avoid aeronautical accidents by monitoring pilots' aptitude and physical capabilities with the aim of ensuring that human failure does not cause accidents are undeniably measures of a nature to ensure air traffic safety (see, by analogy, judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 58).

46 Furthermore, it should be noted that, after stating that it is essential that airline pilots possess sufficient physical capabilities, in so far as physical defects may have significant consequences for that profession, the Court held that it is undeniable that those capabilities diminish with age (see, to that effect, judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 67).

47 Consequently, as they make it possible to prevent a reduction of those physical capabilities after the age of 65 causing accidents, the provisions of point FCL.065(b) in Annex I to Regulation No 1178/2011 are appropriate for achieving the objective of general interest pursued.

48 Nevertheless, it must be observed, in accordance with settled case-law, that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner, and that exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law (judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paragraphs 85 and 86).

49 In that regard, it is apparent from the wording of point FCL.065(b) in Annex I to Regulation No 1178/2011 that the age limit of 65 is not applicable in the field of non-commercial air transport. According to Mr Fries, such an exclusion affects the consistency of that point in the light of the aim pursued, thus rendering the restriction disproportionate.

50 However, by imposing such an age limit in the sole context of commercial air transport, the EU legislature took into consideration the differences between that type of transport and non-commercial air transport, namely, inter alia, the greater technical complexity of aircraft used in commercial air transport and the higher number of persons concerned in that field, with such differences justifying different rules being imposed in order to ensure air traffic safety for both types of transport.

51 In those circumstances, the fact that the age limit of 65 applies only in the field of commercial air transport appears likely to strengthen rather than weaken the proportionate nature of the measure concerned.

52 Accordingly, prohibiting holders of a pilot's licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport is an appropriate means of maintaining an adequate level of civil aviation safety in Europe.

53 Next, as regards the issue of whether such a measure goes beyond what is necessary for achieving its objective and unduly prejudices the interests of holders of a pilot's licence aged over 65, that measure must be viewed against its legislative background and account must be taken both of the hardship that

it may cause to the persons concerned and of the benefits derived from it by society in general and by the individuals who make up society (see, by analogy, judgment of 5 July 2012, *Hörnfeldt*, C-141/11, EU:C:2012:421, paragraph 38 and the case-law cited).

54 In that respect, it should be recalled that point FCL.065(b) in Annex I to Regulation No 1178/2011 forms part of the rules laid down by the EU legislature defining the requirements applicable to civil aviation aircrew in order to guarantee that that crew is qualified, conscientious and competent to exercise optimally the functions assigned to it, and with a view to improving aviation safety.

55 Since pilots of aircraft are an essential element in the chain of actors in air navigation, the competence of these specialists remains one of the principal guarantees of the reliability and safety of civil aviation. In that context, adopting measures to ensure that only those persons having the necessary physical capabilities are authorised to pilot aircraft is essential for the purpose of minimising the risk of failures due to human error.

56 In such circumstances, it does not appear unreasonable for the EU legislature, by taking into consideration the importance of human factors in the field of civil aviation and the progressive reduction of the physical capabilities necessary for acting as an airline pilot over the years, to find it necessary to fix an age limit for acting as a pilot in the commercial air transport sector, in order to maintain an adequate level of civil aviation safety in Europe.

57 As to the fixing of the age limit specifically at 65, Mr Fries disputes such a limit by claiming, in particular, first, that no increased danger linked to the use of pilots aged 65 or over in commercial air transport has been shown by any scientifically proven medical data and that, secondly, the deterioration of physical and mental capabilities does not begin at a specified age, but depends on factors unique to each individual, including life history in particular.

58 Such arguments cannot, however, be accepted.

59 First of all, it must be recalled that the EU legislature enjoys broad discretion as to complex medical questions, such as that of whether the particular physical capabilities necessary to act as an airline pilot are not found in persons over a certain age, and that, where there is uncertainty as to the existence or extent of risks to the health of individuals, the EU legislature may take protective measures without having to wait until the reality and the seriousness of those risks become fully apparent (see, by analogy, judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paragraphs 64 and 65).

60 Given the close link between civil aviation safety and the protection of crew members, passengers and the residents of areas under flight paths, when the EU legislature decides to fix an age limit such as that at issue in the present case, it is open to it, faced with scientific uncertainties, to give priority to measures of which it is certain that they guarantee a high level of safety, provided that they are based on objective data.

61 In that regard, first of all, it should be noted that the age limit of 65 may be regarded as sufficiently high to serve as the endpoint for authorisation to practise as a pilot in the field of commercial air transport (see, by analogy, judgment of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 52).

62 Next, it should be noted that point FCL.065(b) in Annex I to Regulation No 1178/2011 reflects the international rules on the subject of international commercial air transport, to which, moreover, recital 11 of that regulation explicitly refers, which fix the same age limit.

63 As the Advocate General observed in point 56 of his Opinion, given that such rules are based on extensive professional debate and expertise, they are, as objective and reasonable references for decision-makers, of particular relevance in assessing the proportionality of the provision of EU law at issue in the present case.

64 Furthermore, in view of the discretion available to it, the EU legislature cannot be regarded as required to provide for an individual examination of the physical and mental capacity of every holder of a pilot's licence over the age of 65, rather than for an age limit.

65 In this respect, as the Advocate General stated, in particular in points 60 and 61 of his Opinion, the legislature chose to combine an individualised approach for the 60 to 64 age group with the age limit of 65, which represents, in the light of the foregoing considerations, a choice firmly rooted in the relevant international rules, which are themselves based on the current state of medical expertise in that field.

66 In addition, it must be stressed that that age limit does not have the automatic effect of forcing the persons concerned to withdraw definitively from the labour market, as that limit does not establish a mandatory scheme of automatic retirement and does not necessarily entail the termination of the employment contract of an employee on the ground that he has reached the age of 65 (see, by analogy, judgment of 5 July 2012, *Hörnfeldt*, C-141/11, EU:C:2012:421, paragraph 40).

67 Point FCL.065(b) in Annex I to Regulation No 1178/2011 does not exclude holders of a pilot's licence who have attained the age of 65 from all activity in the field of air transport, but prohibits those licence holders only from acting as pilots in the commercial air transport sector.

68 In those circumstances, it must be held that prohibiting holders of a pilot's licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport does not go beyond what is necessary for achieving the objective of general interest pursued.

69 It follows from the foregoing that difference in treatment on grounds of age established by point FCL.065(b) in Annex I to Regulation No 1178/2011 is compatible with Article 21(1) of the Charter.

Article 15(1) of the Charter

70 Article 15(1) of the Charter affirms the right of everyone to engage in work and to pursue a freely chosen occupation.

71 In the present case, the application of point FCL.065(b) in Annex I to Regulation No 1178/2011 entails a restriction of the freedom to choose an occupation of holders of a pilot's licence who have attained the age of 65, because they may no longer, as from the date of their 65th birthday, act as pilots in the field of commercial air transport.

72 Nevertheless, as has already been observed in paragraph 36 of the present judgment, Article 52(1) of the Charter accepts that limitations may be made to the exercise of the rights and freedoms recognised by the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

73 As regards, in particular, the freedom to choose an occupation and the freedom to conduct a business, it must be borne in mind that, according to the case-law of the Court, the freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function. Consequently, restrictions may be imposed on the exercise of those freedoms, provided

that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (judgment of 6 September 2012, *Deutsches Weintor*, C-544/10, EU:C:2012:526, paragraph 54 and the case-law cited).

74 As observed in paragraph 37 of the present judgment, prohibiting holders of a pilot's licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport must be regarded as provided for by law, within the meaning of Article 52(1) of the Charter.

75 Furthermore, the prohibition in question does not affect the actual substance of the freedom to choose an occupation, since it merely imposes certain restrictions on the professional activity of holders of a pilot's licence who have attained the age of 65.

76 Concerning the objective pursued by the measure at issue, it is apparent from paragraphs 40 to 43 of the present judgment that point FCL.065(b) in Annex I to Regulation No 1178/2011 is intended to establish and maintain a high uniform level of civil aviation safety in Europe, which constitutes an objective of general interest.

77 As regards observance of the principle of proportionality, it is clear from paragraphs 45 to 52 of the present judgment that the measure at issue in the present case is appropriate for ensuring attainment of the objective of general interest pursued.

78 Furthermore, all of the considerations set out in paragraphs 53 to 68 of the present judgment support the conclusion that the EU legislature, by laying down the provision whose validity is challenged, has weighed the requirements of aviation safety against the individual right of holders of a pilot's licence aged over 65 to engage in work and to pursue a chosen occupation, in a way that cannot be regarded as disproportionate in relation to the objective pursued.

79 Accordingly, prohibiting holders of a pilot's licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport, referred to in point FCL.065(b) in Annex I to Regulation No 1178/2011, is compatible with Article 15(1) of the Charter.

80 Having regard to the foregoing considerations, it must be held that consideration of the first and second questions has revealed nothing that might affect the validity of point FCL.065(b) in Annex I to Regulation No 1178/2011 in the light of Article 15(1) or Article 21(1) of the Charter.

The third question

81 By its third question, the referring court asks, in essence, whether point FCL.065(b) in Annex I to Regulation No 1178/2011 must be interpreted as prohibiting the holder of a pilot's licence who has attained the age of 65 from acting as a pilot in ferry flights, operated by an air carrier carrying no passengers, cargo or mail, and working as an instructor and/or examiner on board an aircraft, without being part of the flight crew.

82 In order to answer that question, it should be recalled that, under point FCL.065(b) in Annex I to that regulation, the holder of a pilot's licence who has attained the age of 65 years may not act as a pilot of an aircraft engaged in commercial air transport.

83 It is thus apparent from the very wording of that provision that only those situations cumulatively meeting three conditions, namely, that the holder of a pilot's licence concerned has attained the age of 65, that he acts as a pilot of an aircraft and that that aircraft is engaged in commercial air transport, fall under the restriction laid down by that provision.

84 In that context, it is important to note that point FCL.010 in Annex I to Regulation No 1178/2011 explicitly defines the concept of 'commercial air transport' as the transport of passengers, cargo or mail for remuneration or hire.

85 As far as ferry flights are concerned, as is apparent from the order for reference and the wording of the third question, they are not used for the transport of passengers, cargo, or mail.

86 Furthermore, as regards activities associated with the training and examination of pilots, it is common ground that, even though he remains in the cockpit of the aircraft, the holder of a pilot's licence acting as an instructor and/or examiner does not pilot the aircraft.

87 It must therefore be held that neither ferry flights nor activities associated with the training and examination of pilots fall within the scope of the measure referred to in point FCL.065(b) in Annex I to Regulation No 1178/2011.

88 In the light of the foregoing considerations, the answer to the third question is that point FCL.065(b) in Annex I to Regulation No 1178/2011 must be interpreted as prohibiting the holder of a pilot's licence who has attained the age of 65 neither from acting as a pilot in ferry flights, operated by an air carrier carrying no passengers, cargo or mail, nor from working as an instructor and/or examiner on board an aircraft, without being part of the flight crew.

Costs

89 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Consideration of the first and second questions has revealed nothing that might affect the validity of point FCL.065(b) in Annex I to Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, in the light of Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union.**

2. **Point FCL.065(b) in Annex I to Regulation No 1178/2011 must be interpreted as prohibiting the holder of a pilot's licence who has attained the age of 65 neither from acting as a pilot in ferry flights, operated by an air carrier carrying no passengers, cargo or mail, nor from working as an instructor and/or examiner on board an aircraft, without being part of the flight crew.**

[Signatures]