OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 28 April 2010[1]

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1. The present reference for a preliminary ruling under Article 234 EC [2] concerns agreements under which an employment relationship ends in principle without notice of termination where the employee has reached the standard retirement age for a statutory old-age pension ('standard retirement age'). The lawfulness and economic expediency of such standard retirement ages have been the subject of heated discussion. [3] The referring court is seeking to ascertain whether a standard retirement age which has been agreed in a collective agreement is compatible with the prohibition of discrimination on grounds of age under Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. [4] The present proceedings give the Court an opportunity, following its judgments in *Palacios de la Villa*, [5] *Age Concern England*, [6] and *Petersen*, [7] in particular, to develop and clarify its case-law on Article 6 of that directive, under which the Member States may provide that differences of treatment on grounds of age do not constitute discrimination if they are objectively justified by a legitimate aim.

I — Applicable law

A — Community law [8]

2. Directive 2000/78 established a general framework for equal treatment in employment and occupation.

3. According to recital 14 in the preamble to the directive, the directive is without prejudice to national provisions laying down retirement ages.

4. Under recital 25 in the preamble to the directive, the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances

2 — In accordance with the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007 (OJ 2007 C 306, p. 1), the preliminary ruling procedure is now regulated in Article 267 of the Treaty on the Functioning of the European Union.

3 — For an introduction to the issues involved and an overview see O'Cinneide, C., Diskriminierung aus Gründen des Alters und Europäische Rechtsvorschriften, Europäische Gemeinschaften 2005, p. 45 to 47. For critical views see Bredt, S.,'Compulsory retirement as an instrument to strengthen labour market opportunities for young employment seekers? An annotation to the European Court of Justice's decision C-411/05 – Palacios de la Villa,' European Journal of Social Security, 2008, p. 190 et seq.; Temming, F.,'The Palacios Case: Turning Point in Age Discrimination Law?,' European Law Reporter, 2007, p. 382 et seq.

4 — OJ 2000 L 303, p. 16.

5 — Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531.

6 — Case C-388/07 *Age Concern England* [2009] ECR I-1569.

7 — Case C-341/08 *Petersen* [2010] ECR I-47.

8 — In this Opinion the expression 'Community law' is used in so far as Community law still applies *ratione temporis* and not Union law.

and therefore require specific provisions which may vary in accordance with the situation in Member States. According to that recital, it is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

5. Under Article 1 of the directive, the purpose of the directive 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.

6. Article 2 of the directive defines the concept of discrimination. Under paragraph 1 of that provision, the 'principle of equal treatment' means, for the purposes of that directive, that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1. Under Article 2(2)(a), direct discrimination 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 any of the grounds referred to in Article 1.

7. Article 3 of the directive regulates its scope. Under Article 3(1)(c), the directive applies 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.

8. Article 6 of the directive concerns justification of differences of treatment on grounds of age. Article 6(1) provides:

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order

to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

9. The first paragraph of Article 18 of the directive provides:

'Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.'

10. Under the first sentence of the second paragraph of Article 18 of the directive, in order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003 to implement the provisions of the directive on age and disability discrimination. Because the Federal Republic of Germany requested such an additional period to implement the directive, the implementation period did not expire for that Member State until 2 December 2006.

B — National law

1. Book VI of the Sozialgesetzbuch

11. The third sentence of Paragraph 41(4) of Book VI of the Sozialgesetzbuch (German Social Security Code;'SGB VI'), in the version applicable between 1 January 1992 and 31 July 1994, read as follows:

'An agreement under which an employment relationship is intended to end at a date when the employee has an entitlement to an old-age pension shall be effective only if the agreement was concluded or confirmed by the employee within the last three years prior to that date.' [9]

9 — BGBl. I 1989, p. 2261.

12. The successor provision applicable between 1 August 1994 and 31 July 2007, laid down in the third sentence of Paragraph 41(4) of the SGB VI, provided:

'An agreement which provides for the termination of an employee's employment relationship without notice of termination at a date when the employee may claim an old-age pension before reaching the age of 65 years shall be deemed, vis-à-vis the employee, to have been concluded on reaching the age of 65, unless the agreement was concluded or confirmed by the employee within the last three years prior to that date.' [10]

13. The successor provision applicable since 1 January 2008, laid down in the second sentence of Paragraph 41 of the SGB VI, provides:

'An agreement which provides for the termination of an employee's employment relationship without notice of termination at a date when the employee may claim an old-age pension before reaching the standard retirement age shall be regarded, vis-à-vis the employee, as having been concluded on reaching the standard retirement age, unless the agreement was concluded within the last three years prior to that date or was confirmed by the employee within the last three years prior to that date.' [11]

2. The General Law on equal treatment

14. The German legislature adopted the Allgemeines Gleichbehandlungsgesetz (General Law on equal treatment, 'AGG') of 14 August 2006 [12] in order to implement Directive 2000/78. According to Paragraph 1 of that Law, the object of the AGG is to prevent or eliminate discrimination on grounds of race, ethnic origin, gender, religion or belief, disability, age or sexual orientation.

15. Under Paragraph 2(4) of the AGG, the provisions on general and individual protection against dismissal apply exclusively to dismissals.

16. Upon the entry into force of the AGG, Paragraph 10 of the AGG read as follows:

'Permissible difference of treatment on grounds of age

Paragraph 8 notwithstanding, a difference of treatment on grounds of age is also permissible if it is objective and reasonable and justified by a legitimate aim. The means of

10 — BGBl. I 1994, p. 1797.

11 — BGBl. I 2007, p. 554.

12 — BGBl. I, 2006, p. 1897.

achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

…

5. an agreement which provides for the termination of the employment relationship without notice of termination at a date when the employee may claim an old-age pension; this shall be without prejudice to Paragraph 41 of the SGB VI,

…

7. an individual or collective agreement on protection from dismissal for employees of a certain age and with a certain length of service, provided that it does not seriously and grossly reduce the protection of other employees against dismissal through the application of social criteria under Paragraph 1(3) of the Kündigungsschutzgesetz (Law on protection against dismissal).'

17. Point 7 was repealed, however, with effect from 12 December 2006.[13] In the version of Paragraph 10 of the AGG applicable to the present case, point 7 is thus no longer in force.

13 — BGBl. I, 2007, p. 2742.

3. The collective agreement

18. The Rahmentarifvertrag für die gewerblichen Beschäftigten in der Gebäudereinigung (Framework collective agreement for industrial employees in the commercial cleaning sector;'RTV'), which was agreed in 2004 and is applicable to the situation in the present case, was concluded for the employers by the Bundesinnungsverband des Gebäudereiniger-Handwerks (Federal Guild of Commercial Cleaning Service Contractors) and for the workers by the Industriegewerkschaft Bauen-Agrar-Umwelt (Industrial Union for Building, Agriculture and the Environment). Paragraph 19(8) of the RTV states:

'Unless otherwise agreed in individual agreements, the employment relationship shall end upon the expiry of the calendar month in which the employee is entitled to an old-age pension, excluding a pension which the employee may claim before the applicable retirement age, and at the latest upon the expiry of the month in which the employee has reached the age of 65.'

19. In earlier framework collective agreements, a provision comparable to Paragraph 19(8) of the RTV was agreed for the first time from 8 May 1987. The age of 65 has been used since August 1987. The RTV was declared by the Federal Ministry of the Economy and Employment to be generally applicable with effect from 1 January 2004. The declaration of general application means that the RTV also applies to employers and workers who are not already bound by it by

virtue of their membership of an employer's association or a trade union. Paragraph 19(8) of the RTV was not amended before, upon or after the entry into force of the AGG.

20. In the Federal Republic of Germany, the standard retirement age is progressively being increased from 65 to 67. However, in the case of the applicant, born in 1943, the standard retirement age of 65 continues to apply.

II — Facts

21. The defendant in the main proceedings ('the defendant') is a commercial cleaning undertaking. Several employees who are older than 65 and even older than 70 work for the defendant undertaking.

22. The applicant in the main proceedings ('the applicant') was born on 26 May 1943, is married, and has a son with a degree of disability of 100 %. Her husband is a pensioner. For 39 years the applicant has cleaned a barracks for the federal armed forces in Hamburg-Blankenese, and since 1 November 1994 for the defendant. The applicant is not a member of a trade union.

23. Under the employment contract between the defendant and the applicant of 10 October 1994 ('the contract'), the applicant was employed as a 'cleaner in the barracks'. Her working hours were two hours per day, and ten hours per week. The defendant paid the applicant a final remuneration of EUR 307.48 gross. The contract contains a reference to the RTV.

24. By letter of 14 May 2008, the defendant informed the applicant, with reference to Paragraph 19(8) of the RTV, that her employment relationship would end on 31 May 2008, i.e. upon the expiry of the calendar month in which she had reached the age of 65 and thus the standard age of the statutory old-age pension. By letter of 18 May 2008 the applicant objected to the termination of the employment relationship. She stated that she wished to continue working and offered her services again. Since 1 June 2008 the defendant has no longer employed the applicant, but offered her temporary employment pending the outcome of the legal procedings. From 1 June 2008, the applicant received a pension under the statutory old-age insurance scheme. This amounts to EUR 253.19 gross per month, or EUR 228.26 net.

III — Proceedings before the referring court

25. On 28 May 2008, the applicant brought an action before the referring court. She takes the view that her employment relationship with the defendant continued to exist after 31 May 2008 and sought forms of order to that effect. The defendant argues, with reference to Paragraph 19(8) of the RTV, that the employment relationship has been terminated and claims that the action should be dismissed. The referring court considers the reference to the RTV contained in the contract to be ineffective, but believes that Paragraph 19(8) of the RTV is applicable by virtue of the declaration of general application. It has doubts as to the compatibility of Paragraph 19(8) of the RTV with the principle of non-discrimination on grounds of age under Directive 2000/78.

26. The referring court has obtained information from the parties to the collective agreement on the reasoning underlying Paragraph 19(8) of the RTV and from the Federal Ministry of the Economy and Employment on the reasoning behind its declaration of general application. Only the party to the collective agreement on the employers' side replied.

IV — Questions referred and procedure before the Court of Justice

27. By order for reference of 20 January 2009, lodged with the Registry of the Court of Justice on 26 February 2009, the referring court asked the following questions:

'1. Following the entry into force of the AGG are the rules under collective law, which discriminate based on age, compatible with the prohibition of age discrimination in Article 1 and Article 2(1) of … Directive 2000/78 …, without the AGG expressly permitting this (as was previously the case in Paragraph 10 Sentence 3 Point 7 of the AGG)?

2. Does a national rule that permits the state, the parties to a collective agreement and the parties to an individual employment contract to specify the automatic termination of an employment relationship upon reaching a specific fixed age (in this case: reaching the age of 65), contravene the prohibition of age discrimination laid down in Article 1 and Article 2(1) of … Directive 2000/78 … if, according to established practice in place for several decades in the Member State, clauses of this type have consistently applied to the employment relationships

of nearly all workers, irrespective of the prevailing economic, social and demographic state of affairs and the actual labour market situation?

3. Does a collective agreement that permits an employer to end an employment relationship at a specific fixed age (in this case: reaching the age of 65), contravene the prohibition of age discrimination laid down in Article 1 and Article 2(1) of... Directive 2000/78... if, according to established practice in place for several decades in the Member State, clauses of this type have consistently applied to the employment relationships of nearly all workers, irrespective of the prevailing economic, social and demographic state of affairs and the actual labour market situation?

4. Does a state that declares a collective agreement permitting employers to end employment relationships at a specific fixed age (in this case: reaching the age of 65) to be generally applicable and upholds this extension contravene the prohibition of age discrimination laid down in Article 1 and Article 2(1) of... Directive 2000/78..., if this is effected irrespective of the prevailing economic, social and demographic state of affairs and irrespective of the actual labour market situation?'

28. On 23 February 2010 a hearing took place at which the representatives of the applicant and of the defendant, the German, Danish and United Kingdom Governments, and the Commission participated, supplemented their submissions and answered questions.

V — The general objection raised by the Irish Government to the jurisdiction of the Court of Justice

29. In the view of the Irish Government, the Court does not have jurisdiction to answer the questions referred for a preliminary ruling. It claims that the Court has already answered similar questions in *Age Concern England*.[14] The Court's job has therefore already been done.

30. This objection must be rejected. According to settled case-law, national courts and tribunals have the power, under Article 234 EC, to refer questions of interpretation to the Court even if the Court has already answered

14 — Cited in footnote 6 of this Opinion.

similar questions. [15] The Court therefore also has jurisdiction to answer the questions referred for a preliminary ruling in such cases.

VI — Preliminary remarks on the applicability of Directive 2000/78 and the relevant provision

31. Before I examine the four questions relating to the interpretation of Articles 1 and 2(1) of Directive 2000/78 asked by the referring court, I would like briefly to consider the preliminary question of the applicability of Directive 2000/78 (A) and the relevant provision of that directive in the present case (B).

A — The applicability of Directive 2000/78

32. Under Article 3(1)(c), the directive is applicable to a case like the present one. Under that provision, the directive applies to dismissals. A rule like Paragraph 19(8) of the RTV, under which an employment relationship ends in principle if the employee has reached the relevant retirement age, concerns the conditions under which a person is dismissed. The applicability of the directive is also supported by recital 14, under which the directive is without prejudice to national provisions laying down retirement ages. That recital merely states that the directive does not affect the power of the Member States to determine retirement ages. It does not therefore preclude the application of the directive to national measures governing the conditions for termination of employment contracts where the standard retirement age has been reached. [16]

B — The relevant provision of Directive 2000/78

33. In its order for reference the referring court mentions only Articles 1 and 2(1) of Directive 2000/78. In this connection, it must be stated, first of all, that a rule like Paragraph 19(8) of the RTV constitutes direct discrimination on grounds of age within the meaning of Article 1 and Article 2(1)(a) of

15 — Joined Cases 28/62 to 30/62 *Da Costa and Others* [1963] ECR 81, and Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 15. However, in such a case the question may arise whether the obligation on a national court of last instance to make a reference under the third paragraph of Article 234 EC can cease to apply and whether the Court answers the question referred by order.

16 — See Case C-411/05 *Palacios de la Villa*, cited in footnote 5, paragraphs 42 to 47.

the directive since, under that rule, the applicant's employment relationship ends in principle upon reaching the standard retirement age of 65. She is therefore treated less favourably, directly on grounds of her age, than an employee who has not yet reached that age. [17]

34. However, the first subparagraph of Article 6(1) of the directive provides that no unlawful discrimination on grounds of age exists if a difference of treatment on grounds of age, within the context of national law, is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary. The referring court did not expressly mention that provision in its questions. Since its questions refer substantively to that provision, however, they must be interpreted as seeking an interpretation of Article 6(1) of the directive.

VII — The first question

35. In its first question, the referring court points out that the third sentence of Paragraph 10 of the AGG in the version applicable to the present case no longer provides for a situation in which the agreement of a standard retirement age under a collective agreement is expressly permitted. In this connection it states that under an earlier version of the third sentence of Paragraph 10 of the AGG there had been such express provision in point 7. After the repeal of that point 7, however, there was no longer any such provision in the third sentence of Paragraph 10 of the AGG. Building on this reading of the third sentence of Paragraph 10 of the AGG, the referring court wishes to know whether it is compatible with Article 6(1) of the directive for the social partners to agree a standard age limit under a collective agreement as in Paragraph 19(8) of the RTV, even if this is no longer expressly permitted by the third sentence of Paragraph 10 of the AGG.

A — Arguments of the parties

36. The applicant, the defendant, the German Government and the Commission argue that point 7 of the third sentence of Paragraph 10 of the AGG, which has now been repealed, was not applicable to standard retirement ages. They claim that that point related to provisions under which employees enjoy special protection against dismissal with age. A standard retirement age, as in Paragraph 19(8) of the RTV does not, however, provide for the termination of a contract through dismissal, but through time limitation. Such a case is covered by point 5

17 — Case C-411/05 *Palacios de la Villa*, cited in footnote 5, paragraph 51; Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 33 et seq.; Case C-341/08 *Petersen*, cited in footnote 7, paragraph 34 et seq.

of the third sentence of Paragraph 10 of the AGG, which remains in force. The referring court did not make any comments on that provision.

37. In the view of the German Government, the applicant and the defendant, the first question is inadmissible because the statements made by the referring court on point 7 of the third sentence of Paragraph 10 of the AGG are not relevant to the outcome of the case. The German Government also considers the first question to be inadmissible because the referring court failed to address point 5 of the third sentence of Paragraph 10 of the AGG, which is relevant to the decision.

38. Substantively, the defendant, the Governments of the participating Member States and the Commission argue, with regard to the first question, that the agreement of a standard retirement age under a collective agreement is compatible with Article 6(1) of the directive. The defendant refers to recital 36 in the preamble to the directive, under which its implementation may be entrusted to the parties to the collective agreement. The German Government points out that the points in the third sentence of Paragraph 10 of the AGG are merely general examples. A difference of treatment on grounds of age could also therefore be based on the general clause laid down in the first and second sentences of Paragraph 10 of the AGG, in which the general conditions under the first subparagraph of Article 6(1) of the directive were transposed. The directive can also be implemented by means of a general clause, which can then be utilised in the context of a collective agreement or an individual employment contract.

39. The applicant considers such an approach to be incompatible with Article 6(1) of the directive. A collective agreement is not an appropriate means of achieving the legitimate aims within the meaning of Article 6(1) of the directive. Rather, under that provision, the national legislature must itself provide which differences of treatment on grounds of age do not constitute discrimination. No specific aims are mentioned in the AGG either. It is not therefore possible to examine those aims.

B — Assessment

1. Admissibility

40. The referring court alleges that standard retirement ages are no longer expressly mentioned in the third sentence of Paragraph 10 of the AGG. In view of the clear wording of point 5 of the third sentence of Paragraph 10 of the AGG, which is still in force, it is not possible, in the final analysis, to comprehend this interpretation. [18] However, in preliminary ruling proceedings under Article 234 EC the national courts and the Court of Justice are in a relationship of cooperation in which the national courts alone have jurisdiction to interpret and apply national law. [19] The Court does not therefore have the power to review the interpretation of national rules by the referring court.

41. A limit is reached where the question referred is manifestly not relevant to the outcome of the dispute. [20] However, this cannot be taken to be the case on the basis of the statements made by the referring court concerning the third sentence of Paragraph 10 of the AGG. Furthermore, answering the first question gives the Court the opportunity to give the referring court guidance on the interpretation of Article 6(1) of the directive. The first question is therefore admissible.

2. Compatibility with Article 6(1) of Directive 2000/78

42. By its first question, the referring court is seeking to ascertain whether it is compatible with Article 6(1) of the directive for the social partners to agree a standard retirement age clause under a collective agreement, although this is would not be permitted under any of the general examples under the third sentence of Paragraph 10 of the AGG.

43. In order to give the referring court a useful answer for dealing with the case before it, I think it appropriate first to provide some guidance on the identification of national rules under which a special power may be

18 — The reason may be that in footnote 1 of the order for reference the referring court understands the notion of 'seniority rule' in fairly general terms as a rule which discriminates on the basis of on age. However, the authors cited by the referring court on p. 30 and 31 of the order for reference seem to have used that notion only for rules on dismissals.

19 — Case C-330/07 *Jobra* [2008] ECR I-9099, paragraph 17, and the case-law cited.

20 — Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 21, and Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 28.

granted to agree standard retirement ages in collective agreements.

(a) National rules under which a special power may be granted to agree standard retirement ages in collective agreements

44. In examining whether there exists a national rule from which the grant of such a power can be derived, the referring court must first consider all the national rules under which such a power may *expressly* be granted. In this connection, it should be mentioned that the applicant, the defendant, the German Government and the Commission take the view that point 5 of the third sentence of Paragraph 10 of the AGG is clearly relevant.

45. In the event that, this being the case, the first question is not irrelevant, it should also be pointed out that Article 6(1) of the directive does not require the national legislature to regulate differences of treatment on grounds of age which do not constitute discrimination in just *one* law. In trying to identify a national power held by the social partners to agree standard retirement ages under a collective agreement the referring court is not therefore restricted to the AGG.

46. This also appears to be possible under national law. According to the German Government, the general examples referred to in the third sentence of Paragraph 10 of the AGG are not exhaustive. A special power can therefore also be granted under other laws. In its order for reference the referring court cited a judgment of the Bundesarbeitsgericht (BAG) of 18 June 2008. [21] In that judgment, the BAG derived, in respect of the legal situation prior to the entry into force of the AGG, a special statutory power to agree standard retirement ages in collective agreements from Paragraph 41 of the SGB VI. If the referring court does not consider point 5 of the third sentence of Paragraph 10 of the AGG to be relevant, it will therefore have to examine in particular whether the grant of a special power may also follow from Paragraph 41 of the SGB VI.

47. Lastly, it is not a condition under Article 6(1) of the directive that the national rule

21 — See p. 14 to 29 of the order for reference.

which permits the collective agreement of standard retirement age clauses must indicate the express reason why a standard retirement age does not constitute discrimination on grounds of age. In the absence of the express indication of the justification in the provision in question, it is important that other elements, taken from its general context, enable the underlying aims to be identified for the purposes of judicial review of their legitimacy and whether the means put in place to achieve those aims are appropriate and necessary. [22]

48. If the referring court therefore finds that a national rule like point 5 of the third sentence of Paragraph 10 of the AGG or Paragraph 41 of the SGB VI does give the social partners the power to agree standard retirement ages under a collective agreement, but the relevant justification does not follow expressly from such rules, it will have to take into account the general context of those rules. The justification may in particular follow from the explanatory memorandum for the law. This does not necessarily have to be the explanatory memorandum for the law containing the rule in question. In a case like the present one, where the collective agreement of standard retirement ages was prohibited by law for a certain period, but was then permitted again and has continued to be allowed since then, the justification may, inter alia, follow from the explanatory memorandum of the law by which the prohibition of the collective agreement of standard retirement ages was repealed.

49. On the basis of the statements regarding national law made by the referring court in its order for reference, it must reasonably be assumed that having regard to the abovementioned comments it will identify a special statutory power held by the social partners to agree standard retirement ages under a collective agreement.

50. It is not therefore necessary, in principle, in the present case to examine the question whether the collective agreement of standard retirement ages might also be compatible with Article 6(1) of the directive if there were no provision for such a special statutory power in national law.

22 — Case C-411/05 *Palacios de la Villa,* cited in footnote 5, paragraph 57; Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 45; Case C-341/08 *Petersen*, cited in footnote 7, paragraph 40.

(b) Additional comments on the implementation of the directive by the social partners

Implementation by the social partners on the basis of Article 18 of the directive

51. Merely for the sake of completeness, it should be pointed out that under the first paragraph of Article 18 of the directive the directive may also be implemented by the social partners.

52. The first specific condition for such implementation is that the social partners make a joint request. The referring court would therefore have to examine whether such a request has been made in this case.

53. The second specific condition is that the Member States are required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this directive. The referring court would therefore have to examine whether a rule like the first and second sentences of Paragraph 10 of the AGG ensure this sufficiently. [23]

54. Thirdly, it is to some extent doubtful whether the social partners have the power to implement Article 6(1) of the directive. Those doubts are based on reasons relating to the nature of the legitimate aims as aims in the public interest. The fixing of aims in the public interest is political in character and is thus incumbent on the Member State. [24]

55. I do not consider these doubts to be relevant, at least in a case like the present one. It should be pointed out, first of all, that on the basis of the wording of the first paragraph of Article 18 of the directive the possibility of implementation by the social partners is not restricted to certain provisions of the directive. Implementation of Article 6(1) of the directive by the social partners is not therefore expressly precluded. Irrespective of whether those doubts as to a purely autonomous collective formulation of Article 6(1) of the directive are justified, they do not appear to me to be relevant in a case like the present one. A distinction must be drawn between the fixing of a legitimate aim and the reliance on a legitimate aim already fixed by the national legislature. Where the legislature has already fixed the legitimate aim and indicated the means of achieving that aim, I do not

23 — I do not wish to study this question any further at this point, but refer to points 101 to 107 of this Opinion.

24 — See Wiedemann, H., Thüsing, G., 'Der Schutz älterer Arbeitnehmer und die Umsetzung der Richtlinie 2000/78/EG', in: *Neue Zeitschrift für Arbeitsrecht*, 2002, p. 1234 et seq., 1238; Bros, C., in Däubler, W., Bertzbach, M., *Allgemeines Gleichbehandlungsgesetz*, Nomos, 2007, Paragraph 10, section 6.

think that it is ruled out that the social partners may rely on it. [25]

Collective agreement on the basis of a 'naked' general clause

56. On the other hand, it would appear to be incompatible with Article 6 of the directive for a national legislature merely to transpose the conditions laid down in the first subparagraph of Article 6(1) of the directive in a general clause and to refer to implementation by the social partners on the basis of such a 'naked' general clause. There would not then be adequate implementation of Article 6(1) by the Member State. The first subparagraph of Article 6(1) of the directive requires the Member State to *provide* that differences of treatment on grounds of age do not constitute discrimination. The first subparagraph of Article 6(1) of the directive thus leaves it primarily to the Member States to identify such differences of treatment which are not discrimination. The conditions laid down in the first subparagraph of Article 6(1) of the directive make clear that such proposed differences of treatment must be objectively justified. A general adoption of the conditions under which such differences of treatment may be justified does not, however, itself constitute *provision* by the Member State. Reference also cannot be made to autonomous collective formulation by the social partners in such a case, at least where no joint request has been made by the social partners. Such a request is a specific condition for entrusting the implementation of the directive to the social partners under Article 18 of the directive.

3. Conclusion

57. It must therefore be stated that a collectively agreed standard retirement age may be compatible with Article 6(1) of Directive 2000/78 if the social partners have been granted a special power by a national rule which satisfies the conditions laid down in Article 6(1) of the directive. Such a national rule may also satisfy the conditions laid down in Article 6(1) of the directive if the justification for standard retirement ages not constituting discrimination on grounds of age does

25 — In this case, however, as a rule – and also probably in the present case – a special national power can be taken to exist. The question then arises whether or not the Member State has already implemented Article 6(1) of the directive. On this question, see point 109 et seq. of this Opinion.

not follow expressly from the rule in question. In the absence of the express indication of the justification, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that provision to be identified and that these are sufficiently specific to allow an objective review of justification.

58. A collectively agreed standard retirement age may also be compatible with the directive if the conditions for entrusting the implementation of the directive to the social partners under the first paragraph of Article 18 are satisfied. Those conditions include, in particular, a joint request made by the social partners.

VIII — The other questions referred for a preliminary ruling

59. By its other questions, the referring court is seeking to ascertain whether it is compatible with Article 6(1) of Directive 2000/78 if a national rule permits the state, the parties to a collective agreement and the parties to an individual employment contract to agree a standard retirement age if the social partners in question agree a standard retirement age by collective agreement on the basis of that rule and if that collectively agreed standard retirement age clause is then declared to be generally applicable. In this connection, the referring court points out that in the Federal Republic of Germany standard retirement age clauses have for some time applied to the employment relationships of nearly all workers, irrespective of the prevailing economic, social and demographic state of affairs and the actual labour market situation.

60. It must reasonably be assumed that, having regard to the abovementioned comments, the referring court will identify point 5 of the third sentence of Paragraph 10 of the AGG and Paragraph 41 of the SGB VI as granting a special statutory power to agree standard retirement ages. In this connection it should be stated that the national rule which the referring court has described in abstract terms in the second question is very similar to those provisions. In order to give the referring court a useful answer to the questions it has referred, I will therefore assume hereinafter that a national rule like point 5 of the third sentence of Paragraph 10 of the AGG or Paragraph 41 of the SGB VI is at issue.

A — Admissibility

61. In the view of the Irish Government, these questions are not admissible. First of all, they are not questions of interpretation, but of the application of the directive. Secondly, the Court's jurisdiction to interpret Community law is limited with regard to Article 6 of the directive.

62. These objections must be rejected.

63. In the relationship of cooperation between the Court of Justice and the national courts under Article 234 EC the national court alone has jurisdiction to apply Community law. However, the Court does have jurisdiction to answer questions asked by the national court in connection with the application of Article 6 of the directive as regards its interpretation.

64. Furthermore, the Member States do enjoy broad discretion within the framework of Article 6(1) of the directive. [26] However, that discretion enjoyed by the Member States is subject to limits which may be exceeded in the case of manifestly disproportionate measures. [27] The Court therefore has jurisdiction to hear questions by which the referring court wishes to ascertain whether Article 6(1) of the directive is to be interpreted as meaning that if certain circumstances exist it must be assumed that the broad discretion enjoyed by the Member States has been exceeded and that provision has therefore been infringed. Such questions seek an interpretation of Article 6(1) of the directive.

B — The subject of the other questions referred for a preliminary ruling

65. In a case like the present one, one possible approach is merely to examine whether a collectively agreed rule which has been declared

26 — Case C-411/05 *Palacios de la Villa*, cited in footnote 5, paragraph 68, Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 51.

27 — See Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraphs 37 to 43. In that judgment the Court had regard to the general principle of non-discrimination on grounds of age. However, the Court appears to take the view that this principle of primary law can be fleshed out by the secondary-law Directive 2000/78 in such a way that it also applies if the directive cannot be applied between private individuals. In such cases, in examining the general principle, the Court appears to apply conditions which correspond to those under Directive 2000/78, with the result that inferences can be drawn as to the interpretation of the directive. In my view, it needs to be discussed whether the legal construct to the effect that a general legal principle or a fundamental right is fleshed out by secondary legislation so that it can ultimately also be applied between private individuals when the secondary legislation itself is not applicable is acceptable. There is no need to engage in that discussion in the present case because the application of the general legal principle is ultimately not relevant.

generally applicable like Paragraph 19(8) of the RTV is compatible with Article 6 of the directive. That clause of the collective agreement ultimately justifies the difference of treatment on grounds of age.

66. However, such an approach would disregard the fact that there are two distinct measures in the present case. Through a rule like point 5 of the third sentence of Paragraph 10 of the AGG and Paragraph 41 of the SGB VI the social partners are granted the statutory power to agree standard retirement ages under a collective agreement. Even if no direct discrimination on grounds of age takes place at this level, it is possible to infer from such a rule certain standards and ideas held by the national legislature as to which aims are intended to be pursued through the agreement and application of standard retirement ages. The grant of the power on a statutory basis can thus be reviewed as to its compatibility with Article 6(1) of the directive even though that review will naturally remain fairly abstract. Since the specific difference of treatment on grounds of age ultimately takes place only through the agreement of a standard retirement age clause like Paragraph 19(8) of the RTV, a review must also be conducted of its compatibility with Article 6 of the directive.

67. I consider the latter approach to be preferable. A two-stage review allows a clear distinction to be drawn between the compatibility of the legislative framework with Article 6(1) of the directive, on the one hand, and the compatibility with that provision of the individual collectively agreed standard retirement ages, on the other. [28] Such a distinction would appear to be appropriate, not least for reasons of legal certainty, since the incompatibility of the legislative framework could have effects, beyond the specific case, for all collectively agreed standard retirement ages in the Federal Republic of Germany.

C — The statutory power of the social partners to agree standard retirement ages under a collective agreement

68. As has already been explained, the review of the compatibility of a rule like point 5 of the third sentence of Paragraph 10 of the AGG with Article 6(1) of the directive is not

28 — Bayreuther, F., 'Altersgrenzen nach der Palacios-Entscheidung des EuGH', *Der Betrieb*, 2007, p. 2425 et seq., 2426, is also right to point out that this approach allows a clearer review to be conducted. Koch, E., 'Neujustierung des Verhältnisses zwischen EuGH und nationalen Arbeitsgerichten – oder ein Ausrutscher?', *Recht der Arbeit*, 2008, p. 238 et seq., 240 also criticises the confusion of the objectives of a collective agreement and of a statutory measure.

a review of a specific standard retirement age, but a review of the statutory power of the social partners to agree standard retirement ages.

69. It should be pointed out at this stage that the second question is worded in very broad terms and also covers cases which are manifestly irrelevant to the outcome of the present dispute. The second question covers not only the questions which are relevant to the decision here, namely whether it is compatible with Article 6(1) of the directive to entrust the power to regulate standard retirement ages to the social partners or the state, [29] but also the question whether it would be lawful to entrust that power to the parties to an individual employment contract. I will not address the latter question since it is not relevant to the outcome of the dispute.

70. In my view, the review of the compatibility of a statutory provision which grants the social partners the power to agree standard retirement ages under a collective agreement with Article 6(1) of the directive requires the following steps to be taken: First of all, the referring court must identify the aim pursued by the legislature in granting the power (1). It must also examine whether the identified aim satisfies the conditions under Article 6(1) of the directive, i.e. whether it is a legitimate aim and is sufficiently specific (2). Furthermore, it must review whether the application of standard retirement ages can be an appropriate and necessary means of achieving the legitimate aims identified. At the level of the statutory grant of the power this can be reviewed only in abstract terms (3). Lastly, the question arises whether it is compatible with Article 6 of the directive to entrust the power to the social partners, as is provided for in point 5 of the third sentence of Paragraph 10 of the AGG (4).

1. Identification of the aims pursued

71. The applicant points out that there was no express mention of the aims pursued in point 5 of the third sentence of Paragraph 10 of the AGG. As has already been explained above, a justification is not necessarily ruled out in such a case since the aim pursued may also follow from elements taken from the general context of the measure concerned. [30]

29 — The question of the transfer of the power to the state would appear to be related to the declaration of general application.

30 — See point 47 et seq. of this Opinion.

72. The order for reference cites a judgment of the BAG of 18 June 2008. According to that judgment, the German legislature considered the reintroduction of the possibility of agreeing standard retirement ages under a collective agreement to be necessary because if workers continued working beyond retirement age this would block jobs for young workers and the labour market could be eased by the new recruitments which are generally possible. [31] In identifying these aims, the BAG based its view on the explanatory memorandum for the law by which the possibility of agreeing standard retirement ages under a collective agreement was reintroduced. [32]

73. It is ultimately for the referring court to identify the aims pursued by a rule like point 5 of the third sentence of Paragraph 10 of the AGG (or, if applicable, Paragraph 41 of the SGB VI). However, because the referring court has mentioned only the aims identified by the BAG, I will examine those aims below.

2. The conditions relating to the aims

(a) Legitimacy

74. The referring court must also examine whether the identified aims are legitimate aims within the meaning of the first subparagraph of Article 6(1) of the directive. The aims identified by the BAG are aims of employment policy and alleviation of unemployment. As the Court has already stated on several occasions, the legitimacy of those aims under the first subparagraph of Article 6(1) of the directive cannot reasonably be called into question. [33]

(b) Sufficiently specific

75. Furthermore, the referring court must examine whether those aims are specific enough to allow an effective review of the objective justification for the differences of treatment on grounds of age which are used in pursuit of those aims. This must also be taken to be the case with the aims identified by the BAG. Contrary to the view taken by

31 — p. 21 and 22 of the order for reference.

32 — Loc. cit.

33 — Case C-411/05 *Palacios de la Villa,* cited in footnote 5, paragraph 64 et seq., Case C-341/08 *Petersen*, cited in footnote 7, paragraph 68.

the applicant, the sufficiently specific nature of those aims is not precluded per se by the fact they can be inferred from elements taken from the general context of the measure concerned.

(c) Temporal aspect

76. Lastly, the objection cannot be raised against the compatibility of the aims identified that the German legislature fixed those aims in 1994, long before the entry into force of Directive 2000/78 and before the expiry of the implementation period. Because directives are binding only as to the result to be achieved, the crucial factor is whether those aims are legitimate aims within the meaning of Article 6(1) of the directive, but not when those aims were fixed.

3. Objective justification

77. Since it is examined at legislative level only whether the grant of the power of the social partners to agree standard retirement ages under a collective agreement is compatible with Article 6(1) of the directive, there can be no comprehensive review of the justification for a specific standard retirement age at that level. However, it is clear from a legislative framework like point 5 of the third sentence of Paragraph 10 of the AGG and Paragraph 41 of the SGB VI that the German legislature essentially considers the collective agreement and application of standard retirement ages to be appropriate for pursuing the aims of employment policy and alleviation of unemployment. This assessment made at legislative level may be reviewed having regard to its compatibility with Article 6(1) of the directive.

(a) Arguments of the parties

78. The applicant argues that standard retirement ages do not come under any of the categories set out in the second subparagraph of Article 6(1) of the directive. It is also clear from the drafting history of the directive that standard retirement ages are not compatible with Article 6(1) of the directive. The applicant further claims that in examining proportionality under Article 6(1) of the directive high requirements are to be imposed on the justification for a difference of treatment on grounds of age. Lastly, she points out that no new jobs are created through standard retirement ages, but existing jobs are redistributed at the expense of older workers.

79. The other parties point out that the Member States enjoy broad discretion. In the view of the Commission, however, it must be regarded as inconsistent for the German legislature, on the one hand, to provide for standard retirement ages and, on the other, to raise the standard retirement age. The German Government points out that the gradual raising of the standard retirement age and the allowing of standard retirement ages pursue different political objectives.

(b) Assessment

The importance of the general examples in the second subparagraph of Article 6(1) of Directive 2000/78

80. It should be pointed out, first of all, that Article 6(1) of Directive 2000/78 cannot be interpreted as meaning that only differences of treatment on grounds of age which come under one of the categories under the second subparagraph of Article 6(1) of the directive may be justified. As is clear from the words 'among others' in the second subparagraph of Article 6(1) of the directive, the categories listed there are not exhaustive. Differences of treatment which do not come under those categories are not therefore excluded from justification, but must be assessed with reference to the conditions laid down in the first subparagraph of Article 6(1) of the directive. [34]

81. Against this background, the applicant's comment that the first proposal drafted by the Commission contained a general example covering standard retirement ages, but not the second, cannot be accepted. As is clear from the drafting history for the directive, the general example in question was removed on the initiative of the Parliament. The intention was to avoid giving the impression that that general example has 'already been found to be objectively justified'. [35] The Parliament considered that this was not desirable at a time when thinking about the social importance of the age factor was undergoing rapid change. [36]

82. However, it cannot be inferred from that deletion that categories which do not come under the abovementioned general examples cannot be objectively justified. In addition to the clear wording of the second subparagraph of Article 6(1) of the directive, its drafting history also militates against this. For example, in the Opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, consideration was given to replacing

34 — Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 43.

35 — See the legislative proposal by Parliament on p. 26 of the Report on the Proposal for a Council directive establishing a general framework for equal treatment in employment and occupation of 21 September 2000 (A5-0264/2000).

36 — Loc. cit.

the objective justification test provided for under the first subparagraph of Article 6(1) of the directive with a list of the generally accepted grounds for exceptions to the ban on direct discrimination on grounds of age. The rapporteur was essentially in favour of this approach, but did not pursue it because she thought that 'it is questionable whether there is yet sufficient consensus within society concerning the acceptability or otherwise of ages to allow such an approach.' [37]

83. The fact that standard retirement ages are not mentioned in the second subparagraph of Article 6(1) of the directive does not therefore mean per se that they are incompatible with Article 6(1) of the directive. The crucial factor is whether they are compatible with the conditions laid down in the first subparagraph of Article 6(1) of the directive.

The compatibility of standard retirement ages with the first subparagraph of Article 6(1) of Directive 2000/78

84. Under the first subparagraph of Article 6(1) of the directive, it is for the Member States which provide for differences of treatment on grounds of age to justify those differences. I will therefore begin by considering the appraisal by the national legislature. I will then explain the test applicable under the first subparagraph of Article 6(1) of the directive. Lastly, I will examine whether the appraisal by the national legislature, applying that test, is consistent with the criteria for an objective justification.

— The appraisal by the legislature

85. In its order for reference, the referring court cites the grounds of the judgment of the BAG of 18 June 2008. They state that the termination of employment relationships by means of an age limit creates job opportunities for younger workers. It is also intended to ease the strain on the labour market. Outside periods of full employment only a limited number of jobs are available. An age limit whereby the employment relationship is terminated upon reaching a certain age, which gives entitlement to receipt of an old-age pension, leads to a fair distribution of those jobs. Through the loss of a job held for many years on reaching retirement age, job opportunities are generally created for other workers who have shorter working hours, are threatened by unemployment or are looking for work. Those workers are therefore given the opportunity to build up their own old-age pension and, through their contributions to the statutory pension insurance scheme, also provide financing for retirement benefits for workers affected by the age limit, provided they are in

37 — See the Opinion of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, loc. cit., p. 56.

receipt of an old-age pension from the statutory pension insurance scheme. Through the continual departure of workers as a result of a standard age limit, the new generations entering the labour market are given an opportunity to acquire vocational knowledge soon after their training, the value of which would otherwise be diminished in the case of periods of longer unemployment. In addition, an age limit based on the standard retirement age eases the strain on the national labour market. Workers leaving the undertaking upon reaching the standard retirement age do not, as a rule, look for subsequent employment on the labour market because of their old-age pension provision. Other workers therefore have the opportunity to obtain the jobs which become vacant as a result of the age-related departure. Even if there is no new recruitment of a worker who has previously been seeking employment, but the job is occupied by an existing employee of the undertaking, the strain on the labour market is eased in so far as the unemployment of that worker is prevented through the age-related departure. [38]

— The limited degree of scrutiny

86. As Community law stands in relation to the present case, the Member States and the social partners enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving that aim. [39] For that reason, the Court applies only a very limited set of review criteria in the examination under the first subparagraph of Article 6(1) of the directive as to whether a difference of treatment on grounds of age is appropriate and necessary having regard to the legitimate aim pursued.

— The review of that appraisal

87. In *Palacios de la Villa* [40] and *Petersen*, [41] the Court held that it does not appear unreasonable for the authorities of a Member State to take the view that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones. This approach, according to which the application of standard retirement ages cannot necessarily be regarded as an

38 — See p. 19 to 22 of the order for reference.

39 — Case C-411/05 *Palacios de la Villa,* cited in footnote 5, paragraph 68, Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 51.

40 — Case C-411/05 *Palacios de la Villa,* cited in footnote 5, paragraph 72.

41 — Case C-341/08 *Petersen*, cited in footnote 7, paragraph 70.

unlawful means of pursuing the aims of employment policy and alleviation of unemployment has been criticised in legal literature.

88. The objection is raised, first of all, that the assumption that age limits provided recruitment opportunities for younger workers is based on older economic studies. The majority of more recent studies, on the other hand, have shown that increasing employment, including employment of older workers, has a positive effect on economic growth and therefore also a positive impact on employment among younger workers. [42]

89. From a legal perspective, this objection cannot be accepted. Under the first subparagraph of Article 6(1) of the directive, it is for the Member States to provide for differences of treatment on grounds of age which do not constitute discrimination. However, in the field of social and employment policy the Member States enjoy broad discretion. For that reason, it cannot be for the Court of Justice to substitute its own assessment of such complex issues for that of the national legislature. The broad discretion applies not only to the Member States' decision to pursue a particular aim and the means they intend to use for that purpose. In reality, it also covers a discretion as regards future projections and, within the scope of that discretion, also the choice of the macroeconomic studies on which the national legislature bases its assumptions. Against this background, it is not compatible with the account to be taken of the broad discretion enjoyed by the Member States and the role of the Court for these macroeconomic assumptions taken by the national legislature to be called into question by reference to the results of new macroeconomic studies.

90. The objection is also raised against this finding of the Court that Article 6(1) of the directive must be interpreted as meaning that it has 'autonomous Community-law substance'. Consideration of the European employment strategy, it is argued, reveals that standard retirement ages are not compatible with it. [43]

91. This objection is likewise unconvincing. Consideration of the employment guidelines cannot mean, at the level of interpretation of the directive, that the application of standard retirement ages must be regarded as unlawful, and nor can a legal restriction of the broad

42 — Bredt, S., cited in footnote 3, p. 195 et seq., with further references; Temming, F., cited in footnote 3, p. 385; Tissandier, H., 'L'actualité de la jurisprudence communautaire et internationale', *Revue de jurisprudence sociale*, 2008, p. 97 et seq., 99; O'Cinneide, C., cited in footnote 3, p. 47.

43 — See Koch, E., (cited in footnote 28), p. 240. Bredt, S., cited in footnote 3, p. 197 et seq.

discretion enjoyed by the Member States be inferred from those guidelines.

92. With regard to the interpretation of Article 6(1) of the directive, it should be stated that recital 7 in the preamble to the directive refers to the employment chapter in the EC Treaty and recital 8 states that the employment guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 emphasised the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force. It is also stressed in recital 25 that the prohibition of age discrimination is an essential part of meeting the aims set out in the employment guidelines and encouraging diversity in the workforce.

93. However, this does not suggest that the application of standard retirement ages under the first subparagraph of Article 6(1) of the directive must be regarded as an unlawful means of pursuing the aims of employment policy and alleviation of unemployment. As is clear from the abovementioned drafting history of the directive, [44] the Community legislature deliberately decided against providing for an exhaustive list of generally accepted grounds for exceptions to differences of treatment on grounds of age in Article 6(1) of the directive. Rather, Article 6(1) of the directive is obviously based on an approach whereby it is for the Member States in principle to determine differences of treatment on grounds of age which do not constitute discrimination, provided that these can be objectively justified. It is clear that such an approach precludes 'autonomous Community-law substance' from recital 25, under which differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which 'may vary in accordance with the situation in Member States'.

94. The drafting history and the recitals in the preamble to the directive therefore preclude an approach under which Article 6(1) of the directive is interpreted as containing an autonomous statement as to whether certain measures are lawful or unlawful. The unlawfulness of a certain means can therefore only follow from an examination of the objective justification which is to be carried out under the first subparagraph of Article 6(1) of the directive having regard to the broad discretion enjoyed by the Member States.

44 — See point 82 of this Opinion.

95. Lastly, it cannot be argued convincingly that the broad discretion enjoyed by the Federal Republic of Germany at the relevant time was restricted by the Employment Guidelines adopted on the basis of Article 128 EC. The guidelines may be the result of a political consensus, but since that political consensus was not given binding effect in the form of a legal measure, they cannot restrict the discretion enjoyed by the Member States. [45]

(c) Conclusion

96. In my opinion, the Court was therefore correct in its finding that it does not appear unreasonable for the national authorities to take the view that the application of age limits may make it possible to promote the employment of younger workers having regard to the broad discretion enjoyed by the Member States.

45 — Krebber, S., in: Callies, C., Ruffert, M., *EUV/EGV*, 3rd edition 2007, Article 128(6) EC rightly points out that the employment guidelines under Article 128 EC are politically, but not legally binding as they must merely be taken into account by the Member States. This does not create any legal obligation, as the only penalty for failure to take them into account under Article 128(4) EC is that the Community can make recommendations. It would be absurd only to link the penalty of a non-binding recommendation to failure to comply with an obligation.

4. Entrusting the power to the social partners

97. Lastly, it must be examined whether entrusting the power to agree standard retirement ages under a collective agreement to the social partners is compatible with the directive.

98. As has been explained above, [46] the entrusting of such a power would be possible in accordance with the first paragraph of Article 18 of the directive. One condition for this is that a joint request is made by the social partners. It is not known whether such a request was made in the present case.

99. I will therefore examine below whether entrusting the power, as provided for in the first and second sentences and point 5 of the third sentence of Paragraph 10 of the AGG, can be compatible with the directive even without a request from the social partners to that effect. A condition is, first of all, that the Member State also ultimately guarantees that in such a scenario the conditions under the first subparagraph of Article 6(1) of the directive are complied with (a). Secondly, the question arises whether a scenario as provided for in the first and second sentences and point 5 of the third sentence of Paragraph 10 of the AGG can be regarded as the implementation of the first subparagraph of Article 6(1) of the directive by the national legislature, with the result that a joint request by the social partners, which is required for

46 — See points 51 to 55 of this Opinion.

implementation by the social partners under the first paragraph of Article 18 of the directive, would no longer be necessary (b).

(a) Guaranteeing compliance with the conditions laid down in the first subparagraph of Article 6(1) of Directive 2000/78

100. It is settled case-law that even where the Member States involve the social partners in the implementation of a directive, they must guarantee that the results imposed by the directive are ultimately achieved. [47]

101. In assessing the compatibility of such a rule with the first subparagraph of Article 6(1) of the directive, it must be borne in mind, first of all, that by granting this power to the social partners, the German legislature is pursuing legitimate aims within the meaning of the first subparagraph of Article 6(1) of the directive and has laid down a means, namely the application of standard retirement ages, which cannot be regarded as unreasonable for achieving those legitimate aims. Therefore, the power of the social partners under a rule like point 5 of the third sentence of Paragraph 10 of the AGG is reduced to decisions as to whether they agree standard retirement ages for the economic sector for which they are competent and how they organise those limits within the scope of the law.

102. An argument in favour of the compatibility with the first subparagraph of Article 6(1) of the directive of entrusting such a limited power is that it allows the social partners to opt, with considerable flexibility, for application of the standard retirement age mechanism so that due account may be taken, on the basis of their knowledge of the economic sector, of the specific features of the jobs in question. [48] This approach thus allows the fundamental right to autonomy in collective bargaining, which is also recognised in Community law, to be realised. [49]

103. A rule like point 5 of the third sentence of Paragraph 10 of the AGG would not be

47 — Case 235/84 *Commission* v *Italy* [1986] ECR 2291, paragraph 22; Case C-234/97, *Fernández de Bobadilla* [1999] ECR I-4773, paragraph 19; and Case C-306/07 *Ruben Andersen* [2008] ECR I-10279, paragraph 26.

48 — See Case C-411/05 *Palacios de la Villa,* cited in footnote 5, paragraphs 70 and 74.

49 — With regard to the fundamental right to autonomy in collective bargaining, see point 204 of my Opinion of 14 April 2010 in Case C-271/08, pending before the Court, the wording of Article 6 of the European Social Charter, Article 6 of the revised European Social Charter, point 12 of the Community Charter of Fundamental Social Rights for Workers, and Article 28 of the Charter of Fundamental Rights.

compatible with Article 6(1) of the directive, however, if the social partners were not required to take into consideration, in the exercise of their limited power, whether the conditions laid down in the first subparagraph of Article 6(1) of the directive are also satisfied, as regards their area of economic activity, that is to say, whether the agreement of a standard retirement age is objectively justified having regard to the aim pursued.

104. In this connection, the German Government has pointed out that even if the general example under point 5 of the third sentence of Paragraph 10 fits the case, it must also always be examined whether the general conditions laid down in the first and second sentences of Paragraph 10 of the AGG (which correspond to the conditions for objective justification under the first subparagraph of Article 6(1) of the directive) are satisfied. A judicial review of a collectively agreed standard retirement age may therefore be carried out to ascertain whether it satisfies the conditions for objective justification. This follows from the wording of the third sentence of Paragraph 10 of the AGG, under which justified differences of treatment *may* include in particular the general examples mentioned in the individual points.

105. In the third sentence of Paragraph 10 of the AGG the German legislature employed the legislative technique of 'general examples', which is established in national law. This means that if the conditions under point 5 are satisfied that indicates that the general conditions laid down in the first and second sentences of Paragraph 10 of the AGG are satisfied. Even if the general example under point 5 is satisfied, however, it must always be examined whether the general conditions laid down in the first and second sentences of Paragraph 10 of the AGG are satisfied. The presumption established by the general example in point 5 can be rebutted in that examination. It is clear to those applying the law that the conditions laid down in the first and second sentences of Paragraph 10 of the AGG (which correspond to the conditions for objective justification under the first subparagraph of Article 6(1) of the directive) must always be examined too.

106. In my view, the statements made by the German Government should not be dismissed. First of all, this interpretation of the third sentence of Paragraph 10 of the AGG is

also advocated in German legal literature. [50] Secondly, the use of the word 'may' in the third sentence of Paragraph 10 of the AGG cannot be simply explained by the non-exhaustive character of the list of general examples. This is already clear from the use of the expression 'in particular' in the third sentence of Paragraph 10 of the AGG.

107. It is ultimately for the referring court to decide on the interpretation of point 5 of the third sentence of Paragraph 10 of the AGG. However, a rule like point 5 of the third sentence of Paragraph 10 of the AGG would not appear to be necessarily incompatible with the first subparagraph of Article 6(1) of the directive, since it appears at least to be open to an interpretation in conformity with the directive.

108. This does not mean that I consider Paragraph 10 of the AGG as a whole to be without problems. As has already been mentioned above, there are certainly doubts as to the compatibility of such a provision with the first subparagraph of Article 6(1) of the directive in so far as a difference of treatment on grounds of age may be justified only by the 'naked' general clauses in the first and second sentences of Paragraph 10 of the AGG. [51] However, the present case relates only to the compatibility of the general example under point 5 of the third sentence of Paragraph 10 in conjunction with the conditions under the first and second sentences of Paragraph 10 of the AGG, and only in so far as this permits *the social partners* to agree standard retirement ages under a collective agreement.

(b) The necessity of a request under the first paragraph of Article 18 of Directive 2000/78

109. Lastly, the question arises whether in a case like the present one a joint request by the social partners under the first paragraph of Article 18 of the directive is necessary. This would be the case if a standard retirement age agreed collectively on the basis of point 5 of the third sentence of Paragraph 10 of the

50 — See Bauer, J., Göpfert, B., Krieger, S., *Allgemeines Gleichbehandlungsgesetz*, 2008, Paragraph 10, section 25, who point out that even if the general example is relevant there must be a proportionality test in the individual case. Roloff, in: Beck'scher Online-Kommentar Arbeitsrecht, 1 December 2009, Paragraph 10, section 11, points out that if the general examples are satisfied there is a possible justification, but it is not mandatory. Fuchs, in: Bamberger, Roth, *Beck'scher Online-Kommentar BGB*, 1 November 2009, Paragraph 10 of the AGG, section 2, also points out that for each point the legitimate aim, objectivity and appropriateness of the provision must be considered.

51 — See point 56 of this Opinion.

AGG were to be regarded as the implementation of the directive by the social partners.

110. In my view, this question must be answered in the negative in circumstances like those of the present case. First of all, with the first and second sentences and point 5 of the third sentence of Paragraph 10 of the AGG, the national legislature itself has already largely implemented Article 6(1) of the directive with regard to the possibility of agreeing standard retirement ages. With the general example in point 5 of the third sentence of Paragraph 10 of the AGG, the German legislature has made provision for a case where it considers a certain difference of treatment on grounds of age to be lawful, but subject to the condition of an objective justification in the individual case. [52] In my opinion, it is therefore no longer possible to speak in qualitative terms of implementation by the social partners within the meaning of the first paragraph of Article 18 of the directive. Secondly, it should be pointed out that Paragraph 19(8) of the RTV is effective vis-à-vis the applicant in the present case not directly on the basis of the collective agreement, but only on the basis of the declaration of general application. In this respect, the validity of Paragraph 19(8) of the RTV is ultimately attributable to a state measure. In a similar case the Court did not make the compatibility with Article 6 of the directive of an age limit originally agreed collectively and then adopted by law dependent on whether a request had originally been made by the social partners. [53]

5. Conclusion

111. It must therefore be stated that, as Community law stands in relation to the present case, the grant of a statutory power of the social partners to agree standard retirement ages under a collective agreement, as laid down in the first and second sentences and point 5 of the third sentence of Paragraph 10 of the AGG, is to be regarded as compatible with Article 6(1) of Directive 2000/78 at least where, through such provisions, the national legislature pursues the aims of employment policy and alleviation of unemployment, if it requires the social partners always to examine, before agreeing such a standard retirement age, whether this is objectively justified having regard to the pursuit of those aims and if that examination is subject to judicial review.

52 — According to Roloff, cited in footnote 50, paragraph 11, the general examples in the third sentence of Paragraph 10 of the AGG are cases where the legislature makes clear what it considers to be lawful and what is not, thereby defining legitimate aims.

53 — See Case C-411/05 *Palacios de la Villa,* cited in footnote 5.

D — The standard retirement age in Paragraph 19(8) of the RTV

112. A collectively agreed standard retirement age like Paragraph 19(8) of the RTV, agreed by the social partners on the basis of a statutory power like point 5 of the third sentence of Paragraph 10 of the AGG or Paragraph 41 of the SGB VI, which was possibly relevant before the entry into force of the AGG, is compatible with Article 6(1) of the directive if the social partners have taken its conditions into account. The referring court must thus examine whether in agreeing such a standard retirement age the social partners pursued a legitimate aim within the meaning of the first subparagraph of Article 6(1) of the directive and whether the application of such a standard retirement age is objectively justified for the economic sector for which the parties to the collective agreement are competent.

1. Identification of the aims pursued

113. In its order for reference, the referring court stated that no specific aims are apparent from Paragraph 19(8) of the RTV. As has already been mentioned above,[54] this does not necessarily rule out a justification. It is sufficient that the aim pursued is evident from elements taken from the general context of the measure concerned.

114. In its judgment of 18 June 2008, which is cited by the referring court, the BAG found that Paragraph 19(8) of the RTV pursues, first of all, aims of employment policy and alleviation of unemployment, secondly aims of corporate recruitment and personnel planning, and thirdly a balanced age structure in business.[55] The employers' representatives have also pointed out that these aims were pursued.

115. In this connection, it must be reiterated that it is for the referring court to identify the aims pursued by Paragraph 19(8) of the RTV. Because the referring court mentioned only the above aims stated by the BAG and the parties to the collective agreement, I will consider those aims in the further examination.

2. The conditions relating to the aims

116. As far as the aims of employment policy and alleviation of unemployment are

54 — See point 47 et seq. of this Opinion.

55 — p. 16 to 20 of the order for reference.

concerned, the legitimacy of those aims is beyond doubt. Those aims are also sufficiently specific. In this respect I refer to the considerations set out above. [56] The fact that the version of Paragraph 19(8) of the RTV applicable in the present case was agreed in 2004, at a time when the period for implementation of the directive by the Federal Republic of Germany, which ended on 2 December 2006, had not yet expired and the AGG was still in force does not preclude the aims pursued from being regarded as legitimate aims within the meaning of Article 6(1) of the directive. As is clear from the third paragraph of Article 249 EC, under which a directive is binding only as to the result to be achieved, it is sufficient, for the purposes of implementation of the directive, that in agreeing Paragraph 19(8) of the RTV the parties to the collective agreement pursued an aim which is to be regarded as a legitimate aim within the meaning of Article 6 of the directive. It is not necessary for it to have laid down that aim specifically having regard to the implementation of Article 6(1) of the directive.

3. The pursuit of several aims which are not all legitimate aims

117. On the other hand, in my view the referring court must carry out a more precise review of whether corporate recruitment and personnel planning and balanced age structure in business constitute legitimate aims per se. These are not employment policy, labour market or vocational training aims mentioned in the first subparagraph of Article 6(1) of the directive. The list in the first subparagraph of Article 6(1) of the directive is not exhaustive, as is evident from the word 'including'. However, the Court has pointed out that all the aims mentioned in the first subparagraph are in the public interest. Purely individual reasons particular to the employer's situation, such as the aims of cost reduction or improving competitiveness cannot therefore be regarded as legitimate aims within the meaning of that provision. [57] The recruitment and personnel structure of an undertaking and the balanced age structure in the undertaking, it seems to me, at least prima facie, should be categorised as such individual reasons. [58] However, the referring court must examine whether, in the pursuit of those aims, aims which may be regarded as being in the public interest might also be pursued.

118. In a case like the present one, where, with the standard retirement age, the parties

56 — See point 74 et seq. of this Opinion.

57 — Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 46.

58 — See also Roloff, cited in footnote 50, paragraph 11, who points out that such aims are ultimately geared to no longer having to employ workers of a certain age.

to the collective agreement pursued various aims, not all of which can easily be regarded as legitimate aims within the meaning of the first subparagraph of Article 6(1) of the directive, it is sufficient if the difference of treatment on grounds of age is justified having regard to one legitimate aim. Thus, the Court did not raise any objection to the fact that a national rule may recognise, in the pursuit of legitimate aims, a certain degree of flexibility for employers. [59]

4. Objective justification

119. The referring court must also examine whether Paragraph 19(8) of the RTV is objectively justified by the pursuit of the legitimate aims of employment policy and alleviation of unemployment.

(a) The appraisal by the parties to the collective agreement

120. The employers' representatives indicated to the referring court that the parties to the collective agreement had carried out an appraisal to balance the interest of continuing the employment relationship on the worker's side and the interest in terminating the relationship on the employer's side. The workers' representatives took into consideration the legitimate economic interest in safeguarding the economic livelihood and the intangible interest in professional self-fulfilment by continuing the employment relationship beyond the age of 65. It also took into consideration the fact that in the case of workers who reach the standard retirement age there is in principle a guarantee that basic needs will be covered by a pension and that a standard retirement age would improve considerably the recruitment and advancement prospects of other, younger workers. The employers' representatives took into account the need for appropriate and predictable personnel and recruitment planning with a view to a balanced age structure in business. Account was also taken of the employment and labour-market objectives of the legislature, as expressed in Paragraph 41 of the SGB VI. Furthermore, upon any renegotiation of the framework collective agreement, including in 2004, the parties to the collective agreement were required to subject the individual provisions to an examination whether and to what extent an amendment was necessary having regard to social-policy, demographic and labour-policy conditions. The result of that appraisal was that the justification of the standard retirement age contained in Paragraph 19(8) of the RTV continued to exist. [60]

59 — Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 46.

60 — See the tariff information in Annex 5 to the defendant's submissions.

(b) Examination of the appraisal

121. The referring court will have to examine whether this appraisal satisfies the conditions under the first subparagraph of Article 6(1) of the directive. In this regard it must bear in mind that, as Community law stands at present, the social partners enjoy broad discretion. [61] It must also be borne in mind, in my opinion, that it must be assumed in principle, in the case of a collective agreement, that the rights of workers, including older workers, have been taken into consideration by the employees' representatives.

122. In its order for reference, the referring court pointed out a number of particular legal and factual circumstances which cast doubt on an objective justification of Paragraph 19(8) of the RTV. I will therefore examine below whether Article 6(1) of the directive is to be interpreted to the effect that a collectively agreed standard retirement age like Paragraph 19(8) of the RTV cannot be regarded as objectively justified if those particular circumstances exist.

61 — Case C-411/05 *Palacios de la Villa*, cited in footnote 5, paragraph 68.

Unchanged use of standard retirement ages

123. First of all, the referring court points out that the standard retirement age of 65 years in the commercial cleaning sector has been applied unchanged for many years. There is no evident influence on the labour market situation or economic and demographic growth. The standard retirement age is not used to resolve or mitigate specific situations.

— Arguments of the parties

124. In the view of the applicant and of the Commission, this results in Paragraph 19(8) of the RTV being incompatible with Article 6 of the directive. The Commission has doubts as to the claim made by the employers' representatives that the parties to the collective agreement had, in principle, reviewed the individual clauses having regard to social-policy, economic, social, demographic and labour-market conditions upon any renegotiation of the RTV. Mere generalisations are

not enough to show that the aim of the measure is capable of justifying derogation from the principle of non-discrimination.

However, the legislature deliberately changed that legal situation on the ground that it was not tenable in view of unemployment, including among younger workers. The legislature has maintained that decision for the last 15 years, since there has been mass unemployment throughout that period and there has been a broad political and social consensus that unemployment had reached much too high a level.

125. In the view of the defendant, the German Government and the United Kingdom Government, Paragraph 19(8) of the RTV is compatible with Article 6 of the directive. The defendant points out that, according to the parties to the collective agreement, an appraisal balancing the interests of workers and employers produced that provision. The social partners had the necessary information on the relevant sector. They could therefore take due account of the specific features of the jobs in question. The defendant also points out that unemployment in areas of activity carried out by the low-skilled has been very high. It was not therefore necessary to amend Paragraph 19(8) of the RTV in the view of the parties to the collective agreement. The German Government has doubts as to the description of the facts given by the referring court, according to which the standard retirement ages are applied in Germany independently of the labour market situation and the economic and demographic state of affairs. Collectively agreed standard retirement ages were ineffective in the period between 1 January 1992 and 31 July 1994.

126. In the view of the United Kingdom Government, measures relating to the retirement age also apply in the long term or in general, since they may form part of a regulatory framework for the long-term functioning of the labour market. Such rules are not therefore limited to resolving a specific situation. Excessively frequent changes would also lead to uncertainty among workers and employers. The important factor is that the measures were sufficiently justified at the time they were adopted. Furthermore, the measures are results of collective bargaining. The employees' representatives took the view that those rules were an appropriate element of labour market regulation.

— Assessment

Temporal aspects

127. With regard to Paragraph 19(8) of the RTV it should be pointed out, first of all, from a temporal point of view, that when it was agreed in 2004 the AGG had not entered into force, and nor had the time-limit for the implementation of the directive (2 December 2006) expired. However, Paragraph 19(8) of the RTV applies in the present case to a situation which occurred after the expiry of the implementation period for Directive 2000/78.

128. Since Member States are not released from their obligation to implement a directive by entrusting powers to the social partners, the crucial factor in the present case is whether the parties to the collective agreement carried out an appraisal before the expiry of the implementation period which satisfies the conditions laid down in the first subparagraph of Article 6(1) of the directive. It is not absolutely necessary, however, that the parties to the collective agreement carried out such an appraisal consciously having regard to Article 6(1) of the directive. It is sufficient if that appraisal substantively satisfies the conditions laid down in Article 6(1) of the directive.

129. It is therefore for the referring court to examine whether, in agreeing Paragraph 19(8) of the RTV, the parties to the collective agreement carried out an appraisal which satisfies the conditions laid down in the first subparagraph of Article 6(1) of Directive 2000/78.

130. That question must be distinguished from the question of the time frame within which the parties to the collective agreement, which have already agreed a standard retirement age consistent with Article 6 of the directive, must react to changes in the relevant economic sector. In this connection, regard must also be had to aspects of legal certainty. Excessively frequent changes to the relevant collective agreements are likely to shake the confidence of employers and workers in the stability of the legal order. Consequently, where standard retirement ages are agreed collectively, it would appear to be sufficient in principle, having regard to confidence in the stability of the legal order and autonomy in collective bargaining, for changes to be taken into consideration only in the next round of negotiations. However, this is subject to the condition that there are opportunities to adjust the collective agreements at least in the medium term.

Specific examination for the individual economic sector

131. The social partners do enjoy broad discretion within the framework of Article 6(1)

of the directive. However, consideration of the broad discretion and the autonomy in collective bargaining enjoyed by the social partners must not mean that the principle of non-discrimination on grounds of age is eroded. The purpose of Article 6(1) of the directive is to subject existing or newly introduced differences of treatment on grounds of age, including standard retirement ages, to an objective justification check.

132. Generalised claims that a standard retirement age is in principle liable to contribute to employment policy and the alleviation of unemployment are not enough to show that it is objectively justified for the economic sector for which the parties to the collective agreement are competent. [62] In principle, it is not therefore sufficient that the parties to the collective agreement invoke the general labour market situation or considerations put forward by the national legislature. The situation may be different where those considerations are transferable to the economic sector for which the parties to the collective agreement are competent.

133. Furthermore, it is not possible simply to draw inferences as to the objective justification of the application of a standard retirement age clause for the economic sector for which the parties to the collective agreement are competent solely from the fact that standard retirement ages are, or are not, applied in other economic sectors. Rather, the relevant parties to the collective agreement must examine the objective justification for the application of a standard retirement age specifically for the economic sector in question.

134. The referring court must therefore examine whether a standard retirement age like Paragraph 19(8) of the RTV is justified having regard to the aims pursued of employment policy and alleviation of unemployment in the commercial cleaning sector. [63]

No restriction to special measures

135. It would appear to be irrelevant, on the other hand, that a standard retirement age like Paragraph 19(8) of the RTV is not a temporally limited special measure. It cannot be inferred from the first subparagraph of Article 6(1) of the directive that the difference of treatment on grounds of age must be limited

62 — Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 51, with reference to Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 75 and 76.

63 — See also Bayreuther, F., cited in footnote 28, p. 2425.

temporally and may be used only to resolve a special situation. Under the first subparagraph of Article 6(1) of the directive, it is important only whether the application of a standard retirement age is objectively justified by the legitimate aim.

136. If the referring court, like the BAG, concludes that Paragraph 19(8) of the RTV is based on the notion that in periods of less than full employment a fair distribution of only a limited number of available jobs is necessary, and if the application of a standard retirement age, having regard to the wide discretion of the Member States, cannot be considered unreasonable for the abovementioned reasons, [64] the application of that standard retirement age must be regarded as justified as long as the relevant economic sector is characterised by high unemployment.

No obligation to recruit young workers

137. The referring court also points out that a rule like Paragraph 19(8) of the RTV does not provide for any binding obligation on the employer to recruit other workers to replace workers whose employment relationship ends when they reach the standard retirement age. It cannot be determined empirically, and it is not known, whether employers engage new recruits even without such an obligation if a worker's employment relationship ends when they reach the standard retirement age.

— Arguments of the parties

138. In the applicant's view, this means that a standard retirement age like Paragraph 19(8) of the RTV is inappropriate.

139. The German Government, on the other hand, argues that the German legislature and the Government itself took the view that as a rule employers recruit other younger workers to replace workers who leave because they have reached the standard retirement age.

64 — See points 87 to 96 of this Opinion.

— Assessment

Rather, an abstract approach detached from the specific case must be adopted. [66]

140. The fact that a standard retirement age does not entail any obligation to recruit another worker to replace the worker who has reached the standard retirement age does not necessarily mean that that standard retirement age is not compatible with Article 6(1) of the directive.

The possibility of re-employing workers above the standard retirement age

141. As has already been mentioned above, [65] the broad discretion enjoyed by the Member States, and in this case the parties to the collective agreement, in reality also covers a discretion as regards projections for the future. Such a discretion also includes the possibility of relying on the assumption of typical courses of events. If such assumptions do not appear manifestly unreasonable, they must be respected by the Court, since it would otherwise substitute its own assessment for that of the social partners.

143. Furthermore, the referring court points out that a person whose employment relationship ends when they reach the standard retirement age may not be rejected on account of their age when they apply to another employer or even to their original employer. The applicant considers that this fact is likely to result in a standard retirement age clause like Paragraph 19(8) of the RTV being incompatible with Article 6 of the directive.

142. The assumption that the termination of the employment relationship of older workers when they reach the standard retirement age is likely to increase the employment prospects of younger workers cannot be regarded as manifestly unreasonable. In my view, the relevant factor is not whether such new recruitment takes place in each individual case.

144. In my view, this fact likewise does not necessarily result in a standard retirement age clause like Paragraph 19(8) of the RTV being incompatible with Article 6(1) of the directive. It should be pointed out, first of all, that in *Palacios de la Villa* the Court considered that a collectively agreed age limit of 65,

65 — See point 89 of this Opinion.

66 — See also Bauer, J.-H., Krieger, S., 'Das Orakel aus Luxemburg: Altersgrenzen für Arbeitsverhältnisse zulässig – oder doch nicht?', in *Neue Juristische Wochenschrift*, 2007, p. 3672, 3674.

which led to compulsory retirement, was not necessarily unjustified having regard to employment-policy objectives. [67]

145. If a new appointment or a re-employment is possible under German employment law, this suggests that a standard retirement age like Paragraph 19(8) of the RTV is, comparatively, a less onerous measure. Against this background, it is not clear to me why a rule which applies under German law and which is a less onerous encroachment on the prohibition of discrimination on grounds of age in comparison with compulsory retirement should rule out the justification of a standard retirement age. It does restrict the pursuit of the aims of employment policy and alleviation of unemployment; however, there is also a concomitant curtailment of the encroachment on the principle of equal treatment on grounds of age.

146. In so far as the objection might be raised that this is inconsistent, it should be pointed out, first of all, that in an area in which the Member States have broad discretion, the Court can undertake only a very limited consistency check. [68] However, a manifest inconsistency cannot be taken to exist according to the information provided by the referring court. The German system can certainly be construed to the effect that collectively agreed standard retirement ages like Paragraph 19(8) of the RTV are intended to offer younger workers an employment opportunity. In the interest of employers and workers who have reached the standard retirement age, however, where such workers prove themselves (possibly again) to be the best candidate for a job, it does not insist on that aim. In my view, such an approach does not appear to be manifestly inconsistent. The referring court has not indicated any possible abuse either.

The possibility of an extension of the employment relationship by mutual agreement

147. The referring court also has doubts as to the compatibility of a standard retirement age like Paragraph 19(8) of the RTV with Article 6(1) of the directive because it provides for the possibility of an extension of the employment relationship by mutual agreement beyond the standard retirement age. As the labour market stands at present, employers are therefore in practice offered the possibility of freely parting with older workers.

67 — Case C-411/05 *Palacios de la Villa*, cited in footnote 5, paragraphs 2, 11, 13, 15, 21, 72 and 75.

68 — The Court carried out a consistency test in Case C-341/08 *Petersen*, cited in footnote 7, paragraphs 75 to 77.

Several employees who are over the age of 70 work in the defendant's undertaking.

— Arguments of the parties

148. In the view of the applicant, the Italian Government and the Commission, this results in an incompatibility with Article 6(1) of the directive. In a standard retirement age clause only legitimate aims within the meaning of Article 6 of the directive may be taken into account. If, however, the employer is actually free to decide whether to employ a worker after reaching the standard retirement age, account would also be taken of individual reasons specific to the employer's situation. This is not an objective difference of treatment within the meaning of Article 6(1) of the directive. Furthermore, there is no evident procedure like that in *Age Concern England*.[69] The Italian Government questions whether a standard retirement age clause like Paragraph 19(8) of the RTV actually accords the employer such *de facto* discretion.

149. The German Government points out in particular that the 'favourability' principle applies under German labour law. In an individual employment contract, it is always possible to derogate from the provisions of a collective agreement in favour of a worker. For that reason, Paragraph 19(8) of the RTV does not include a unilateral flexibility rule in favour of the employer. The Commission's view results in a considerable restriction of autonomy in collective bargaining.

— Assessment

150. The possibility of an extension of the employment relationship by mutual agreement beyond the standard retirement age likewise would not seem to be a factor which necessarily rules out an objective justification of Paragraph 19(8) of the RTV. Article 6(1) of the directive only requires that a difference of treatment on grounds of age is objectively justified by a legitimate aim. It is not therefore detrimental if a rule like Paragraph 19(8) of the RTV also pursues other non-legitimate aims which are taken into account in connection with such a standard retirement age. It must only be ensured that the difference of treatment on grounds of age is justified fully by the legitimate aim pursued.

69 — Cited in footnote 6, paragraph 14.

151. The possibility of an extension of the employment relationship by mutual agreement beyond the standard retirement age does not justify a difference of treatment on grounds of age, but tempers it. In so far as an incompatibility with Article 6(1) of the directive is alleged, it is therefore ultimately being alleged that a standard retirement age like Paragraph 19(8) of the RTV opens up the possibility, *in connection with* a difference of treatment on grounds of age, of a difference of treatment *on some other ground*.

152. In so far as the Commission bases its view on the wording of the first subparagraph of Article 6(1) of the directive, according to which the difference of treatment must be objective, that argument is not persuasive. That view can certainly be based on the German version of the first subparagraph of Article 6(1) of the directive, under which the *difference of treatment* must be *objective* and reasonable. Other language versions of that provision, on the other hand, cannot be construed to the effect that the objectivity of the difference of treatment constitutes a separate criterion. For example, in the French, English, Dutch, Spanish, Italian and Slovenian versions, it is merely required that the differences of treatment on grounds of age must be *objectively justified*.[70] It cannot therefore be inferred from the first subparagraph of Article 6(1) of the directive that the difference of treatment itself must also be objective.

153. An interpretation under which the difference of treatment must also be objective would also seem to me to be difficult to reconcile with the broad discretion enjoyed by the Member States in the field of employment and social policy. It also does not seem to be compatible with the Court's finding that Article 6 of the directive does not preclude, in the pursuit of the legitimate aims under Article 6(1) of the directive, a certain degree of flexibility being granted to employers.[71]

154. Discretion enjoyed by the employer in deciding on the extension of the employment relationship by mutual agreement beyond the standard retirement age does not therefore preclude a collectively agreed standard retirement age being compatible with Article 6(1) of the directive.

70 — See in the French version '*objectivement et raisonnablement justifiées*', in the English '*objectively and reasonably justified*', in the Dutch '*objectief en redelijk worden gerechtvaardigd*', in the Spanish '*justificadas objetiva y razonablemente*', in the Italian '*oggettivamente e ragionevolmente giustificate*', and in the Slovenian '*objektivno in razumno utemeljujejo*'.

71 — Case C-388/07 *Age Concern England*, cited in footnote 6, paragraph 46.

Inadequacy of pension entitlements

155. Lastly, the referring court points out that the applicant, and typically part-time workers in the commercial cleaning trade, could not acquire adequate statutory old-age pension entitlements. Their remuneration generally does not offer any scope for creating reserves or for concluding additional insurance policies. The idea that upon reaching the standard retirement age departing workers would not seek any subsequent employment cannot really hold in the low-wage sector.

— Arguments of the parties

156. The applicant refers to her own situation. Her old-age pension is not adequate because she has been caring for her disabled son. Paragraph 19(8) of the RTV is not consistent with the requirement laid down by the Court in *Palacios de la Villa*[72] to the effect that a reasonable old-age pension is a condition for the compatibility of an age limit with Article 6 of the directive.

157. The defendant points out that workers in Germany are entitled to a statutory pension on reaching the standard retirement age. Those whose statutory pension entitlement is not sufficient upon reaching the standard retirement age receive basic protection covering the basic necessities.

158. In the view of the German Government and the United Kingdom Government, it is relevant only that workers affected by the age limit can claim a contributory pension when they leave their employment relationship. A general examination must be employed; the individual situation of the worker does not need to be examined. Otherwise, workers who have worked full-time for a business would be placed at a disadvantage.

72 — Case C-411/05 *Palacios de la Villa,* cited in footnote 5, paragraph 73.

— Assessment

159. In my opinion, the fact that upon reaching the standard retirement age the applicant has not acquired adequate statutory old-age pension entitlements does not necessarily mean that a collectively agreed standard retirement age like Paragraph 19(8) of the RTV is not compatible with Article 6(1) of the directive.

160. In paragraph 73 of the judgment in *Palacios de la Villa*,[73] the Court held that the compulsory retirement measure could not be regarded as unduly prejudicing the legitimate claims of the workers concerned. In this connection it stressed that the age limit in question was not based only on a specific age, but also took account of the fact that the persons concerned were entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which could not be regarded as unreasonable.

161. In my view, however, the Court did not intend to state that a standard retirement age is compatible with Article 6(1) of the directive only if the worker affected in the individual case receives an adequate old-age pension. The Court did not focus primarily on the amount of the old-age pension received in the specific case, but on the protection of the legitimate expectations of the worker in question. However, the present case does not appear to concern the protection of legitimate expectations, since the applicant's employment relationship ended when she reached the standard retirement age, as she had to expect.

162. The referring court's doubts are instead based on the fact that the applicant does not receive an adequate amount of old-age pension. As a reason it states that she had to work for years on a part-time basis because care for her seriously disabled son required a large amount of time.

163. Whilst understanding the applicant's particular situation, I do not consider this to be a factor which should be taken into account in connection with the compatibility of a standard retirement age with Article 6(1) of the directive. The inadequacy of the applicant's old age pension in the present case can be explained by the fact that, because of her particular living situation, the applicant could work only on a part-time basis. This has only a slight connection with the principle of non-discrimination on grounds of age. Rather, the

73 — Cited in footnote 5.

question whether and to what extent a worker should be supported by society because they are caring for a disabled relative is, first and foremost, a social question which is to be answered by the Member States.

164. There is no need in the present case to answer the question whether the application of a standard age limit can be regarded as objectively justified even where workers are not able to cover their basic necessities, since it is undisputed that the applicant's basic necessities are covered in the present case by the basic State protection.

165. The referring court also pointed out that a part-time worker in the commercial cleaning sector typically could not acquire adequate statutory old-age pension entitlements. However, it is not clear from the order for reference why workers in that economic sector work only on a part-time basis. Furthermore, I do not see any compelling reason to resolve the actual problem – that part-time work possibly does not enable adequate pension entitlements to be accumulated – by means of the prohibition of discrimination on grounds of age.

5. Conclusion

166. It is therefore for the referring court to examine the compatibility of a standard retirement age like Paragraph 19(8) of the RTV with the first subparagraph of Article 6(1) of the directive, having regard to the above elements. However, the particular legal and factual circumstances mentioned in the order for reference do not necessarily result in incompatibility with Article 6(1) of the directive.

IX — General conclusion

167. As a final conclusion, it must be stated, first of all, that a collectively agreed standard retirement age may be compatible with Article 6(1) of Directive 2000/78 if the social partners have been granted a special power by a national rule which satisfies the conditions laid down in Article 6(1) of the directive. Such a national rule may also satisfy the conditions laid down in Article 6(1) of the directive if the

justification for standard retirement ages not constituting discrimination on grounds of age does not follow expressly from the rule in question. In the absence of the express indication of the justification, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that provision to be identified and these are sufficiently specific to allow an objective review of justification

168. A collectively agreed standard retirement age may also be compatible with the directive if the conditions for entrusting the implementation of the directive to the social partners under the first paragraph of Article 18 are satisfied, which would include a joint request made by the social partners.

169. Secondly, it must be stated that, as Community law stands in relation to the present case, a power of the social partners, granted by law, to agree and organise standard retirement ages within a prescribed framework under a collective agreement, as laid down in the first and second sentences and point 5 of the third sentence of Paragraph 10 of the AGG, is to be regarded as compatible with Article 6(1) of Directive 2000/78 at least where, by means of those national provisions, the national legislature pursues the aims of employment policy and alleviation of unemployment, if those provisions require the social partners always to examine, before agreeing standard retirement ages, whether this difference of treatment on grounds of age is objectively justified having regard to the pursuit of those aims in the economic sector for which they are competent and if that examination is subject to judicial review.

170. Thirdly, it must be stated that a standard retirement age declared to be generally applicable like Paragraph 19(8) of the RTV, which was agreed before the expiry of the implementation period for Directive 2000/78, but has not been substantively changed since then and applies to a situation which occurred after the expiry of the implementation period for the directive is compatible with Article 6(1) of the directive if, in agreeing that standard retirement age or in a subsequent examination before the expiry of the implementation period for Directive 2000/78, the parties to the collective agreement carried out an appraisal whether the application of such a difference of treatment on grounds of age is objectively justified for the pursuit of the legitimate aims fixed by the legislature for the economic sector in question. The facts that a rule like Paragraph 19(8) of

the RTV firstly is not applied as a temporally restricted special measure, secondly does not provide for a binding obligation to recruit a new worker, thirdly allows an extension of the employment relationship by mutual agreement beyond the standard retirement age and fourthly does not take into account the specific amount of pension insurance entitlements do not per se necessarily result in such a standard retirement age being incompatible with Article 6(1) of Directive 2000/78.

171. Should the referring court conclude that Paragraph 19(8) of the RTV is not compatible with the first subparagraph of Article 6(1) of the directive, it must examine whether it can take this into consideration within the framework of an interpretation of Paragraph 10 of the AGG in conformity with the directive. If that is possible, it is not necessary to have recourse to a general principle of non-discrimination on grounds of age 'given expression by Directive 2000/78'.

X — Conclusion

172. On the basis of the above considerations, I propose that the Court answer the questions asked by the referring court as follows:

'1. A collectively agreed standard retirement age may be compatible with Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation if the social partners have been granted a special power by a national rule which satisfies the conditions laid down in Article 6(1) of the directive or if the conditions for entrusting the implementation of the directive to the social partners under the first paragraph of Article 18 are satisfied.

2. The power of the social partners, granted by law, to agree and organise standard retirement ages by collective agreement, as laid down in national provisions like the first and second sentences and point 5 of the third sentence of Paragraph 10 of the Allgemeines Gleichbehandlungsgesetz, is to be regarded as compatible with Article 6(1) of Directive 2000/78 where, by means of those national provisions, the national legislature pursues the aims of employment policy and alleviation of unemployment, if those provisions require the social partners always to examine, before agreeing standard retirement ages, whether they are objectively justified having regard to the pursuit of those aims and if that examination is subject to judicial review.

3. A standard retirement age declared to be generally applicable like Paragraph 19(8) of the Rahmentarifvertrag für die gewerblichen Beschäftigten in der Gebäudereinigung is compatible with Article 6(1) of the directive if, before the expiry of the implementation period for the directive, the parties to the collective agreement carried out an appraisal whether the application of such a difference of treatment on grounds of age is objectively justified for the pursuit of the legitimate aims fixed by the legislature for the economic sector in question. The facts that a rule like Paragraph 19(8) of the RTV firstly is not applied as a temporally restricted special measure, secondly does not provide for a binding obligation to recruit a new worker, thirdly allows an extension of the employment relationship by mutual agreement beyond the standard retirement age and fourthly does not take into account the specific level of pension insurance entitlements do not per se necessarily result in such a standard retirement age being incompatible with Article 6(1) of Directive 2000/78.'