OPINION OF ADVOCATE GENERAL KOKOTT delivered on 6 May 2010 [1]

I — Introduction

1. These preliminary ruling proceedings provide the Court with an opportunity to clarify its case-law on age discrimination in relation to severance conditions for older workers. [2] The Court is also called upon for the first time to state its position on the distinction between direct and indirect discrimination on grounds of age.

2. The matter under examination is a provision of Danish employment law which provides that workers who have been in continuous employment with an employer for a long period of time are to receive an allowance in the event of their dismissal. However, such a severance allowance is not awarded to persons who are already eligible for an old-age pension. That applies even where the worker concerned wishes to seek new employment and would have to sustain financial losses in connection with his pension, for example in the form of an early retirement reduction, if he took immediate retirement.

3. The contentious question whether the prohibition of discrimination on grounds of age under European Union law may also have direct effect in a relationship between individuals [3] ('horizontal direct effect') has no bearing on this case, as the dispute in the main proceedings concerns a 'vertical' legal relationship involving a worker and his public employer. [4]

1 — Original language: German.

2 — See, fundamentally, Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531.

3 — Case C-144/04 *Mangold* [2005] ECR I-9981, in particular paragraph 77, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, in particular paragraph 51; for a review of that case-law, see, *inter alia*, the Opinions of Advocate General Mazák in *Palacios de la Villa* (in particular points 79 to 97 and 105 to 139) and Advocate General Sharpston in Case C-427/06 *Bartsch* [2008] ECR I-7245, in particular points 31 to 65 and 79 to 93.

4 — The situation is different in Case C-45/09 *Rosenbladt*, pending, the hearing which was held on the same day as that in this case and the Opinion which was delivered by Advocate General Trstenjak on 28 April 2010.

II — Legal framework

A — *European Union law*

4. The European Union law relevant to this case is Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. [5] According to Article 1 thereof, 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.'

5. Under the heading '[c]oncept of discrimination', Article 2 of Directive 2000/78 provides as follows:

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

(2) For the purposes of paragraph 1:

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

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

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

…

…'

5 — OJ 2000 L 303, p. 16.

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

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

…

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

…'

7. Article 6 of Directive 2000/78, concerning '[j]ustification of differences of treatment on grounds of age', reads, in extract, as follows:

'(1) 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;

…'

8. Article 18(1) of Directive 2000/78 prescribes the time-limit for transposition as 2 December 2003.

B — *National law*

9. As regards Danish law, the legislation relevant to this case is the Lov om retsforholdet mellem arbejdsgivere og funktionærer (Funktionærlov) ('the FL'). [6]

6 — Law on salaried employees, as amended by Law No 224 of 19 May 1971 and Law No 287 of 24 April 1996 (see re-publication notice LBK No 68 of 21 January 2005).

10. Paragraph 2a of the FL reads as follows:

'(1) In the event of dismissal of a salaried employee who has been continuously employed in the same [undertaking] for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.

(2) The provision laid down in subparagraph (1) shall not apply if the employee is entitled to an old-age pension on termination of the employment relationship.

(3) No severance allowance shall be payable, if the employee will – on termination of the employment relationship – receive an old-age pension from the employer and the employee has joined the pension scheme in question before attaining the age of 50 years.

...

(5) The provision laid down in subparagraph (1) shall be correspondingly applicable in the event on unjustified dismissal.'

11. As the referring court states, the Danish Højesteret,[7] in its settled case-law,[8] interprets Paragraph 2a(3) of the FL as meaning that the mere possibility of receipt of an old-age pension precludes entitlement to a severance allowance irrespective of whether the dismissed worker actually wishes to draw a pension. This holds true even if payment of the pension at the time of dismissal leads to a reduction of the old-age pension by comparison with the benefit that would have been paid in the event of later retirement (early retirement reduction).

III — Facts and main proceedings

12. Mr Ole Andersen, who was born on 31 May 1943, was employed as a case officer with the Region Syddanmark[9] (formerly Sønderjyllands Amtsråd)[10] for 27 years from 1 January 1979. By letter of 22 January 2006, the Region Syddanmark terminated his employment at the end of August 2006 and gave as grounds for doing so its lack of confidence in Mr Andersen's ability to perform his job in a satisfactory and impartial manner. In an arbitration award, however, it was later found that Mr Andersen was not guilty of the non-performance of duties attributed to him and he was accordingly granted compensation

7 — Supreme Court of Denmark.

8 — See the judgment of the Højesteret of 7 December 1988, *Ugeskrift for Retsvæsen* 1989, p. 123 H.

9 — Region of Sourthern Denmark.

10 — Southern Jutland Regional Council.

equivalent to four months' salary for unfair dismissal. [11]

13. Following his dismissal, Mr Andersen also brought a claim, by e-mail of 2 October 2006, for a severance allowance equivalent to three months' salary under Paragraph 2a(1) of the FL, on the basis of having completed over 18 years' service with the Region Syddanmark. By letter of 14 October 2006, the Region Syddanmark refused to pay the severance allowance by reference to Paragraph 2a(3) of the FL. In its letter, it stated that Mr Andersen was not entitled to the allowance as he had already reached the age of 63 when he left his employment and could therefore claim his entitlement to an old-age pension.

14. During his employment with the Region Syddanmark, Mr Andersen belonged to a collective pension scheme provided for under a collective agreement. Of the monthly pension contributions payable, Mr Andersen was responsible for one third, while the Region Syddanmark paid two thirds. Under the rules governing that pension scheme, Mr Andersen had the option of taking retirement and drawing an old-age pension from the age of 60.

15. The amount of the pension provided for in the collective agreement depends, inter alia, on when the person entitled to the pension chooses to take retirement. If he defers his retirement, he qualifies for a higher monthly pension. According to the information, undisputed in this regard, supplied by the Region Syddanmark in the proceedings before the Court, [12] the situation in this case was as follows: if Mr Andersen's contributions had ceased on 1 August 2006 and he had taken immediate retirement, his annual pension would have amounted to DKK 125 374; on the other hand, if he had continued to pay contributions in the same amount until 1 June 2008, and had postponed his retirement until that date, it would have risen to DKK 152 611. [13]

16. Mr Andersen did not wish to take retirement after he was dismissed. Instead, he registered himself as a job seeker.

17. On 12 July 2007, the Ingeniørforeningen i Danmark, [14] which is a trade union representing the interests of engineers in

11 — According to the concurring statements of the parties to the main proceedings, that compensation is based on Paragraph 2b of the FL and can be combined with the allowance, at issue here, under Paragraph 2a of the FL (see also Paragraph 2a(5) of the FL).

12 — The Region Syddanmark refers in this connection to the information received by Mr Andersen's counsel on 30 January 2008 from the Danske civil- og akademiingeniørers Pensionskasse (Danish Civil and Academy Engineers pension fund).

13 — In addition, from 1 January 2007, insured persons had the possibility of switching to a new pension scheme, which would have resulted in an increase in Mr Andersen's old-age pension from 1 June 2008 to DKK 167 411 per year if he had stopped paying contributions from 1 August 2006, and to DKK 176 544 per year if he had continued to pay contributions up to 1 June 2008.

14 — Danish Society of Engineers.

Denmark, brought an action on behalf of Mr Andersen against the Region Syddanmark for payment of a severance allowance equivalent to three months' salary. The action is pending before the Vestre Landsret, the referring court. The claimant submits, in essence, that the provisions of Paragraph 2a(3) of the FL, under which Mr Andersen was refused the severance allowance, give rise to discrimination on grounds of age. The defendant disputes this.

IV — The reference for a preliminary ruling and the proceedings before the Court of Justice

18. By order of 14 November 2008, received at the Court Registry on 19 November 2008, the Vestre Landsret stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is the prohibition of direct or indirect discrimination on grounds of age contained in Articles 2 and 6 of Council Directive 2000/78 to be interpreted as precluding a Member State from maintaining a legal situation whereby an employer, upon dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, must, upon termination of the salaried employee's employment, pay an amount equivalent to one, two or three months' salary respectively, [while] this allowance is not to be paid where the salaried employee, upon termination of employment, is entitled to receive an old-age pension from a pension scheme to which the employer has contributed?'

19. In the proceedings before the Court, written and oral observations have been submitted not only by the two parties to the main proceedings but also by the Governments of Denmark and Germany and by the European Commission. The Netherlands and Hungarian Governments have also taken part in the written procedure.

V — Assessment

20. By its question, the referring court wishes to ascertain, in essence, whether a national provision under which dismissed workers are not entitled to a statutory severance allowance where they are already entitled to an old age-pension upon termination of their employment infringes Articles 2 and 6 of Directive 2000/78.

A — *Preliminary remark on the application of Directive 2000/78*

1. Distinction between the directive and the general principle of the prohibition of age discrimination

21. As the Court has held,[15] Directive 2000/78 does not itself lay down the principle of equal treatment in employment and occupation, but, according to the title and Article 1 thereof, seeks only 'to lay down a general framework for combating various forms of discrimination in those areas, including on grounds of age'. The prohibition of age discrimination must be regarded as a general principle of European Union law.

22. On the basis of those considerations, the Court has, until today in two cases regarding references for preliminary rulings, relied directly on the general legal principle of the prohibition of age discrimination,[16] stating that it is the responsibility of the national court to 'set aside', where necessary, any provision of national law which may conflict with that prohibition.[17] However, this appears to be a makeshift arrangement for the purposes of resolving issues of discrimination in legal relationships between individuals, in which Directive 2000/78 is not as such directly applicable and cannot therefore replace national civil or employment law.[18]

23. The idea of an in-depth reappraisal and examination of the doctrinal basis of the controversial horizontal direct effect of general legal principles or fundamental rights between individuals is certainly appealing,[19] but would be excessive here. In this case, the Court is faced with a vertical relationship in which Mr Andersen, as a worker, can unquestionably rely directly on the principle of equal treatment laid down in Directive 2000/78 as

15 — *Mangold* (paragraphs 74 and 75) and *Kücükdeveci* (paragraphs 20 and 21).

16 — On the controversial derivation of that general legal principle, see the Opinions of Advocate General Tizzano in *Mangold* (points 83 and 84), Advocate General Mazák in *Palacios de la Villa* (points 79 to 97), Advocate General Sharpston in *Bartsch* (points 79 to 93) and my Opinion in Case C-550/07 P *Akzo and Akros* v *Commission* [2010], case pending before the court, point 96.

17 — *Mangold* (paragraph 77) and *Kücükdeveci* (paragraph 51).

18 — *Kücükdeveci* (paragraph 46 and case-law cited).

19 — See in this regard, for example, the Opinions of Advocate General Tizzano in Mangold (points 83, 84 and 100), Advocate General Mazák in *Palacios de la Villa* (points 133 to 138) and Advocate General Sharpston in *Bartsch* (points 79 to 93), and the case-law cited.

against his public employer.[20] It is therefore quite sufficient to answer the question referred by the Vestre Landsret by reference only to that directive, which gives specific expression to the general legal principle of non-discrimination on grounds of age.[21] Indeed, this is the approach which the Court has adopted in judgments in other recent cases relating to age discrimination which also involved vertical legal relationships.[22]

2. Scope *ratione personae, materiae* and *temporis* of Directive 2000/78

24. Article 3(1)(c) of Directive 2000/78 provides that that directive applies 'within the limits of the areas of competence conferred on the Community…to all persons, as regards both the public and private sectors, including public bodies, in relation to … employment and working conditions, including dismissals and pay'.[23]

25. As a salaried employee of a Danish regional authority, Mr Andersen worked 'in the public sector' or for a 'public body' and therefore fell within the scope *ratione personae* of Directive 2000/78.

26. The provision contained in Paragraph 2a of the FL regulates entitlement to a severance allowance in the event of dismissal by an employer. That allowance is a cash benefit which falls within the scope of the employment and working conditions provided for under Article 3(1)(c) of Directive 2000/78, it being immaterial for the purposes of its legal assessment whether it is regarded as a condition of dismissal or pay. The fact that that allowance is granted only after termination of the employment relationship does not preclude its classification as a benefit deriving from an employment relationship; nor does the fact that it derives from a statutory provision.[24]

20 — It is settled case-law that individuals may rely on the provisions of a directive as against the State, in particular in its capacity as employer, whenever those provisions appear, as far as their subject-matter is concerned, to be unconditional and precise (see inter alia Case 152/84 *Marsall* [1986] ECR 723, paragraph 49; Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 57; and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 193. This usually arises in connection with the prohibitions against discrimination laid down in European Union law (see point 90 of my Opinion in *Impact* and, with specific regard to the direct applicability of a prohibition of discrimination in the context of conditions of employment and dismissal, *Marshall*, paragraphs 52 to 55).

21 — *Kücükdeveci* (paragraph 21).

22 — Case C-88/08 *Hütter* [2009] ECR I-5325; as well as Case C-229/08 *Wolf* [2010] ECR I-1; and Case C-341/08 *Petersen* [2010] ECR I-47.

23 — See also in this regard *Hütter* (paragraph 34).

24 — On the inclusion of cash benefits paid *after termination of the employment relationship*, see Case C-267/06 *Maruko* [2008] ECR I-1757, paragraphs 40 to 44. On cash benefits paid by the employer *on the basis of a statutory provision*, see inter alia Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 16 to 18; Case C-173/91 *Commission* v *Belgium* [1993] ECR I-673, paragraph 17; and Case C-220/02 *Österreichischer Gewerkschaftsbund* [2004] ECR I-5907, paragraph 36; although the last judgment cited related to the principle of equal pay for men and women, it is directly transposable to Directive 2000/78.

The Directive is therefore also applicable *ratione materiae*.

27. Likewise, the provisions of Directive 2000/78 are applicable to the main proceedings *ratione temporis*, as Mr Andersen's employment was terminated on 22 January 2006, that is to say more than three years after the time-limit for transposing that directive had expired (see Article 18(1) of the Directive).

B — *Assessment of a provision such as the Danish provision by reference to Directive 2000/78*

28. Under Article 1 in conjunction with Article 2(1), Directive 2000/78 prohibits age discrimination in employment and occupation. Discrimination is a difference in treatment which is not justified. [25] Thus, in order to determine whether a provision such as Paragraph 2a(3) of the FL gives rise to discrimination on grounds of age, it must first be examined whether that provision brings about a difference in treatment based on age (see in this regard section 1 immediately below); if so, it must be considered whether that difference in treatment is justified (see in this regard section 2 below). [26]

1. Difference in treatment within the meaning of Article 2(2) of Directive 2000/78

29. As is clear from Article 1 in conjunction with Article 2(1), Directive 2000/78 combats both direct and indirect discrimination on grounds of age in employment and occupation.

30. *Direct age discrimination* for the purposes of Directive 2000/78 occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of age (Article 2(2)(a) in conjunction with Article 1); [27] the fundamental difference in treatment is therefore linked

25 — See in this regard the last sentence of recital 25 in the preamble to Directive 2000/78: '[i]t is therefore essential to distinguish between differences in treatment which are justified … and discrimination which must be prohibited'. See to the same effect *Mangold* (paragraph 58), *Palacios de la Villa* (paragraph 52) and *Kücükdeveci* (paragraphs 32 and 33).

26 — This, moreover, is the approach taken by the Court inter alia, in *Wolf* (paragraph 25) and *Petersen* (paragraph 31).

27 — See also *Palacios de la Villa* (paragraph 50); Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 33; *Hütter* (paragraph 37), *Wolf* (paragraph 28); *Petersen* (paragraph 34); and *Kücükdeveci* (paragraph 28).

directly to age. By contrast, mere *indirect discrimination* is to be assumed to exist where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons (Article 2(2)(b)).

31. The distinction between direct and indirect discrimination is legally significant primarily because the possible justifications vary depending on whether the fundamental difference in treatment is directly or indirectly linked to age. [28] The possible justifications for an *indirect difference in treatment* based on age are framed in very general terms in Article 2(2)(b)(i) of Directive 2000/78 ('objectively justified by a legitimate aim'), whereas a *direct difference in treatment* based on age is justifiable only by social policy considerations for the purposes of Article 6(1) of the Directive, [29] by specific occupational requirements within the meaning of Article 4(1) of the Directive [30] or by public policy requirements for the purposes of Article 2(5) of the Directive. It follows from this that the possible objectives which may be relied on in order to justify a direct difference in treatment based on age are fewer than those capable of justifying an indirect difference in treatment, even though the proportionality test requirements are essentially the same.

32. The workers covered by Paragraph 2a(3) of the FL are all in the same situation: they have been dismissed by their employer after a long period of at least twelve years' continuous service. None the less, for the purposes of the severance allowance at issue here, they are treated differently depending on whether or not they are already eligible for an old-age pension co-financed by their employer.

33. On the face of it, such a distinction according to the existence or non-existence of a redeemable pension entitlement indicates only an indirect difference in treatment, since, by referring to such a pension entitlement, the provision contained in Paragraph 2a(3) of the FL seems to be based on a neutral criterion

28 — See also to this effect *Age Concern England* (in particular paragraphs 58, 62 and 65).

29 — See *Age Concern England* (paragraphs 46, first sentence, 49 and 52) and *Hütter* (paragraph 41), in which the Court makes clear that 'the aims which may be considered "legitimate" within the meaning of Article 6(1) Directive 2000/78, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are *social policy objectives*, such as those related to employment policy, the labour market or vocational training' (my emphasis).

30 — *Wolf* (in particular paragraphs 35 and 45).

only the practical effects of which are borne predominantly by older workers.

34. However, that view, which was taken in particular by the Danish Government and the Commission in this case, is too restrictive. It disregards the fact that direct discrimination may also occur where a difference in treatment is based on a criterion which appears to be neutral at first sight but is in reality inextricably linked to the ground for differentiation prohibited by the European Union legislature.

35. For example, the Court has held that direct (and not merely indirect) discrimination on grounds of sex occurs where an employer's action is linked to the existence or non-existence of pregnancy, [31] as pregnancy is directly linked to the sex of an employee.

36. That case-law on equal treatment for men and women can be transposed to the principle of equal treatment under Directive 2000/78 at issue here. [32] Accordingly, a direct difference in treatment based on age must be assumed to exist not only where one person is treated less favourably than another is, has been or would be treated in a comparable situation expressly on grounds of age, but also where such treatment is afforded to that person on the basis of a criterion which is inextricably linked to – absolute or relative [33] – age.

37. This is the case with a provision such as Paragraph 2a(3) of the FL, which withholds entitlement to a severance allowance from workers who are already eligible for an old-age pension, in that such a provision affects only workers who have already reached the minimum age which they must be in order to receive an old-age pension (minimum pensionable age). More specifically, under the collective-agreement-based pension scheme to which Mr Andersen belongs, as in most

31 — Case C-177/88 *Dekker* [1990] ECR I-3941, paragraphs 12 and 17, and Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13, as well as Case C-320/01 *Busch* [2003] ECR I-2041, paragraph 39, and Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 55.

32 — See to the same effect the Opinion of Advocate General Sharpston in Case C-73/08 *Bressol and Others* [2010] ECR I-2735, point 53, according to which the definition of direct discrimination as developed in connection with equal treatment for men and women can be adapted to suit direct discrimination on any prohibited ground.

33 — On the distinction between absolute and relative age, see the Opinion of Advocate General Sharpston in *Bartsch* (points 96 and 97 and 104 and 105).

other such schemes in Denmark, [34] only workers who are at least 60 years of age qualify for an old-age pension. Only workers who have reached a certain age fall within the scope *ratione personae* of Paragraph 2a(3) of the FL. They alone do not benefit from the severance allowance provided for in Paragraph 2a(1) of the FL. Conversely, workers with the same length of service who have not yet reached that minimum pensionable age retain their entitlement to a severance allowance.

38. Just as reference to pregnancy can affect only female workers, the Danish legislature's reference to eligibility for an old-age pension affects only workers who have reached the minimum pensionable age and thus a certain age. The criterion of the existence or non-existence of an entitlement to an old-age pension, which determines whether a worker with a long period of continuous service receives a severance allowance, is thus not an objective criterion but one that is directly linked to the age of the person concerned.

39. A provision such as Paragraph 2a(3) of the FL therefore gives rise to a direct difference in treatment on grounds of age for the purposes of Article 2(2)(a) in conjunction with Article 1 of Directive 2000/78. [35]

2. Justification for the difference in treatment

40. However, a provision such as Paragraph 2a(3) of the FL is capable of giving rise to age discrimination as prohibited by Directive 2000/78 only in so far as the direct difference in treatment on grounds of age contained in it is not justified. The requirements of European Union law with respect to the justification for such a difference in treatment are set out in Article 2(5), Article 4(1) and

34 — See in this regard the undisputed statements made by the claimant before the national court in the proceedings before the Court of Justice.

35 — See to the same effect *Age Concern England* (paragraph 63), in which the reference to 'retirement age' was regarded as a 'form of direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78'.

Article 6 of Directive 2000/78. [36] Only the latter provision, more specifically paragraph 1 thereof, is relevant to this case.

(a) Requirements in respect of justification under Article 6(1) of Directive 2000/78

41. Under the first subparagraph of Article 6(1) of Directive 2000/78, 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'.

42. By that rather unwieldy form of words, Directive 2000/78, in essence, does nothing other than set out the general requirements governing the justification of differences of treatment recognised under European Union law. The introductory phrase 'objectively and reasonably justified' is in substance no different from the following part of the sentence, 'justified by a legitimate aim … and … appropriate and necessary'. [37]

43. The Court has already made it clear that no independent significance is to be attached to the adverb 'reasonably' [38] used in the phrase 'objectively and reasonably' in the first part of the sentence contained in the first subparagraph of Article 6(1) of Directive 2000/78. [39]

36 — On Article 4 of Directive 2000/78 as a suitable ground of justification for direct differences in treatment on account of age, see *Wolf*; on Article 6 of Directive 2000/78 as a suitable ground of justification for direct differences in treatment on account of age, see *Age Concern England* (in particular paragraph 62); the Court also examined cases involving the justification of direct differences in treatment on grounds of age by reference to Article 6 of the Directive in *Mangold*, *Palacios de la Villa*, *Hütter*, *Petersen* and *Kücükdeveci*.

37 — The phrase 'objectively and reasonably justified' (French: 'objectivement et raisonnablement justifiées') probably owes its origin to the case-law of the European Court of Human Rights (ECHR) on Article 14 of the [ECHR], where it is likewise used as the formula for introducing the scheme for examining the legitimate aim and proportionality of a difference in treatment: 'According to the [European] Court [of Human Rights]'s case-law, a difference of treatment is discriminatory, for the purposes of Article 14 [of the ECHR], if it has no objective and reasonable justification', that is if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (*Gaygusuz v. Austria*, judgment of 16 September 1996, ECHR 1996-IV, p. 1141, § 42).

38 — In the French-language version, 'raisonnablement'.

39 — *Palacios de la Villa* (paragraphs 56 and 57) and *Age Concern England* (paragraphs 65 and 67).

44. Other terms used in the first subparagraph of Article 6(1) of the Directive also express ideas which are ultimately self-evident.

45. Thus, the term 'objective' emphasises that the facts and considerations relied on in order to justify a difference in treatment must be verifiable. The word 'objective' also indicates that irrelevant considerations, in particular those closely connected with the differentiation criteria prohibited by Article 1 of Directive 2000/78, cannot be used to justify a difference in treatment on grounds of age. Rather, such a difference in treatment, like any provision, may pursue only 'legitimate aims',[40] examples of which are given in Article 6(1) of the directive.

46. Finally, the phrase 'appropriate and necessary' in the second part of the sentence contained in the first subparagraph of Article 6(1) of Directive 2000/78 describes the proportionality test usually applied in European Union law.

47. In short, therefore, a direct difference of treatment on grounds of age is justified under Article 6(1) of Directive 2000/78 if the measure giving rise to it is based on a *legitimate aim* and passes the *proportionality test*.

(b) Legitimate aim

48. The wording of the actual legislation does not provide any information on the aims pursued by Paragraph 2a(3) of the FL. It gives no indication as to why dismissed workers who already qualify for an old-age pension financed by their former employer are not to benefit from the severance allowance.

49. This does not mean, however, that a provision such as the Danish one is automatically excluded from justification under Article 6(1) of Directive 2000/78. On the contrary, other indicators taken from the general context of

40 — The terminological distinction between objectives that are 'legitim' (legitimate) and 'rechtmäßig' (lawful) is a peculiarity of the German-language version; a similar difference in wording can also be found in the Italian-language version ('finalità legittima' and 'giustificati obiettivi'). In all the other language versions, however, that is to say the Bulgarian, Czech, Danish, English, Greek, Spanish, Estonian, French, Latvian, Lithuanian, Hungarian, Maltese, Dutch, Polish, Portuguese, Romanian, Slovak, Slovene, Finnish and Swedish versions of the first subparagraph of Article 6(1) of Directive 2000/78, this problem does not arise: in some cases, an adjective corresponding to 'legitim' or 'rechtmäßig' is used only once anyway and in others the same adjective is used twice.

the statutory provision may help identify the aim behind it. [41]

50. In this case, the drafting history of the legislation at issue, to which both the Vestre Landsret and some of the parties to the proceedings have referred, sheds some light on the aims of Paragraph 2a(3) of the FL. [42] According to those documents, the Danish legislature proceeded on the premiss that dismissed workers who are eligible for an old-age pension usually leave the labour market. They should not therefore benefit from the severance allowance under Paragraph 2a(1) of the FL, the purpose of which is 'to facilitate the move to new employment for older salaried employees' who have worked for the same employer for many years.

51. By seeking to facilitate the reintegration into the labour market of older workers who need to find new work after losing their job through no fault of their own and thereby to make their move to new employment socially bearable, the Danish legislature undoubtedly pursues a legitimate social policy aim in the context of employment policy and the labour market. A difference in treatment on grounds of age in relation to conditions of dismissal or pay is therefore, in principle, justifiable on the basis of such an aim (first subparagraph of Article 6(1) in conjunction with Article 6(1)(a) of Directive 2000/78). [43]

(c) Proportionality test

52. It must still be examined, however, whether it was proportionate to the achievement of that legitimate aim to restrict the persons entitled to the allowance under Paragraph 2a of the FL to workers who are not yet eligible for an old-age pension when they leave their employment, in accordance with Paragraph 2a(3) of the FL as interpreted by the Danish courts. In other words, it must be considered whether restricting the persons entitled to the allowance as the Danish legislature has done was 'appropriate and

41 — *Palacios de la Villa* (paragraphs 56 and 57), *Age Concern England* (paragraphs 44 and 45) and *Petersen* (paragraphs 39 and 40).

42 — Explanatory notes to the draft law at the time when the provision at issue was incorporated into the FL (*Folketingstidende* 1970-1971, Annex A, Column 1334). The considerations applicable at that time were confirmed more recently when Directive 2000/78 was transposed in relation to age discrimination, more specifically by the explanatory notes to Draft Law L 92 (*Folketingstidende* 2004-2005 [1st Collection], Annex A, p. 2686, 2701), which eventually led to the enactment of Law No 1417 of 22 December 2004.

43 — See to the same effect *Mangold* (paragraphs 59 to 61); *Palacios de la Villa* (paragraphs 65 and 66); and *Kücükdeveci* (paragraphs 35 and 36).

necessary' for the purposes of achieving its social policy aim and whether this has undue adverse effects on those workers from whom the severance allowance is withheld. [44]

(i) Appropriateness (no manifestly unsuitable measure)

53. The means used by the national legislature – in this case, restricting entitlement to the severance allowance to persons not yet eligible for an old-age pension – are 'appropriate' within the meaning of the second part of the sentence contained in the first subparagraph of Article 6(1) of Directive 2000/78 if they are *suitable* for achieving the legitimate aim pursued, that is to say to make it financially easier for older workers who still need to find work after they have been dismissed to move to new employment. [45]

54. It is recognised in settled case-law that the Member States enjoy a broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. [46] In the light of the prerogative of the Member States to make such an assessment, the role of the Court is confined to ensuring that the measures adopted do *not* appear *unreasonable*, [47] or, to put it another way, that the measures adopted are *not manifestly unsuitable* for achieving the aim pursued.

55. A provision such as Paragraph 2a(3) ensures that only workers not yet eligible for an old-age pension benefit from the severance allowance. The only persons entitled to it, therefore, are those who are highly likely to remain on the labour market and to seek new employment. A severance allowance awarded exclusively to that clearly defined category of persons unquestionably achieves the aim pursued by the legislature of assisting only long-serving members of staff who are

44 — On the last requirement, see *mutatis mutandis Palacios de la Villa* (paragraph 73).

45 — The use of the adjective 'angemessen' in the German-language version of the first subparagraph of Article 6(1) of Directive 2000/78 is unusual. As a glance at other language versions shows (English: 'appropriate', French: 'appropriés', Italian: 'appropriati', Spanish 'adecuado', Portuguese 'apropriados', Dutch: 'passend'), the adjective 'geeignet' would have been more fitting in German. Using the term 'geeignet' would also have made it possible to avoid the misleading repetition of 'angemessen' in the first and second parts of the sentence in that provision, as other language versions managed to do.

46 — *Mangold* (paragraph 63); *Palacios de la Villa* (paragraph 68); *Age Concern England* (paragraph 51); *Hütter* (paragraph 45); and *Kücükdeveci* (paragraph 38). See also to the same effect recital 25 in the preamble to Directive 2000/78, which states that differences in treatment in connection with age 'require specific provisions which may vary in accordance with the situation in the Member States' (cited in *Palacios de la Villa*, paragraph 69).

47 — *Palacios de la Villa* (paragraph 72) and *Petersen* (paragraph 70).

actually moving to new employment. It also serves to minimise the inappropriate use or misuse of the severance allowance by persons who, in fact, are no longer looking for work and intend to rely on their old-age pension.

56. The claimant in the main proceedings and the Commission raise the objection that, contrary to the express aim of the Danish legislature, the severance allowance under Paragraph 2a(1) of the FL benefits not only 'older workers' but also younger workers who started their career at a comparatively early stage and have a long period of service with the same employer behind them. A worker may thus complete the 12, 15 or 18 years of service necessary for entitlement to a severance allowance before reaching the age of 40 if he began working for his employer at a sufficiently early stage and has not broken that service. That obligation calls into question the consistency of the provision contained in Paragraph 2a of the FL.

57. It is true that a national provision is suitable for ensuring the attainment of the objective pursued only 'if it genuinely reflects a concern to attain it in a consistent and systematic manner'.[48] If the national legislature genuinely wanted to afford financial protection only to workers moving to new employment who have already reached a relatively advanced age, it would in fact be inconsistent to grant the severance allowance also to younger workers with the same length of service.

58. However, as the Region Syddanmark and the Danish Government have made clear in the proceedings before the Court, the severance allowance is actually intended to benefit *all* workers who have worked for the same employer for a relatively long period of time because the move to new employment is particularly difficult for such workers irrespective of their age. In those circumstances, there are no grounds to question the consistency of a provision such as the Danish one.[49]

48 — See in this regard, generally, Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55, and Case C-169/08 *Presidente del Consiglio dei Ministri* ('Sradegna') [2009] ECR I-10821, paragraph 42 *in fine*, as well as, with specific regard to the justification of differences in treatment on grounds of age, *Petersen* (paragraph 53) and *Hütter* (paragraphs 46 and 47, concerning the contradictory nature and lack of internal consistency of the national provision at issue).

49 — In its more recent case-law, the Court too attaches importance to the requirement that workers should be treated equally in relation to their length of service irrespective of the age at which they were engaged (see *Hütter*, paragraphs 47 to 50, and *Kücükdeveci*, paragraphs 29 to 31 and 40 to 42).

59. In short, therefore, a provision such as Paragraph 2a(3) of the FL does not appear to be manifestly unsuitable for achieving the social policy aim pursued by the legislature. It is therefore 'appropriate' within the meaning of Article 6(1) of Directive 2000/78.

(ii) Necessity

60. A provision such as Paragraph 2a(3) of the FL is 'necessary', however, only where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means.

61. The problem here is that, in Paragraph 2a(3) of the FL, the Danish legislature denies entitlement to a severance allowance to *all* workers with a redeemable pension entitlement, irrespective of whether the persons concerned actually want to take retirement or wish to carry on working.

62. As I have already said, the Member States have a broad margin of discretion in choosing measures capable of achieving the aims of their employment and social policy. [50] In principle, that discretion also includes the possibility, for reasons of simplicity, of refraining from examining a given individual case and, instead, of classifying workers considered as a whole into particular categories on the basis of general criteria, [51] even though this may entail a loss of fairness in certain individual cases.

63. However, the discretion enjoyed by the Member States in the area of social policy cannot have the effect of undermining the principle of non-discrimination on grounds of age. [52]

64. That is exactly what is happening in this case. A provision such as Paragraph 2a(3) of the FL, which automatically exempts the employer from the obligation to pay a severance allowance as soon as a pension entitlement becomes redeemable, all but invites the employer to dismiss primarily workers who have reached the minimum pensionable age. It becomes financially more attractive for the

50 — See point 54 of this Opinion and the case-law references in footnote 46.

51 — See my Opinion in Case C-19/02 *Hlozek* [2004] ECR I-11491, points 57 and 58.

52 — *Age Concern England* (paragraph 51); see to the same effect Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 75, Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 57, and Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611, paragraph 29; see also my Opinion in *Hlozek* (point 59).

employer to select for dismissal from among its employees with the same length of service those who have reached a certain age (the minimum pensionable age).

65. That aside, less drastic means could have been used to ensure that the severance allowance is granted to workers who are actually still on the labour market and looking for new work. The Danish legislature, for example, could have made payment of the severance allowance subject to the condition that the worker concerned must actually register as a job seeker for a certain minimum period of time and refrain from claiming payment of his old-age pension until that period has expired. In order at the same time to spare the employer undue administrative expenditure, the employee could have been required to furnish evidence of job seeking, without prompting, at predetermined times. As the Commission states, the employee could also have been obliged to pay back an allowance inappropriately or abusively claimed.

66. In those circumstances, a provision such as Paragraph 2a(3) of the FL goes beyond what is necessary to ensure that the severance allowance is payable only to persons who still need to find a new job after they have been dismissed, as the legislature intended.

(iii) Undue adverse effects on workers

67. However, even if a provision such as Paragraph 2a(3) of the FL were considered necessary for the purpose of achieving the legitimate aim pursued by the national legislature, it would still have to be examined whether the provision has undue adverse effects on the legitimate expectations of the workers.

68. That additional criterion, which the Court established in *Palacios de la Villa*, [53] essentially gives expression to the general principle of proportionality applicable under European Union law. According to that principle, measures *must not cause disadvantages which are disproportionate to the aims pursued*, even if those measures are appropriate and necessary for meeting legitimate objectives [54] (criterion known as 'proportionality in the narrow sense'). In other words, the social policy aim pursued at national level must be reconciled as far as possible with the requirements of the principle of equal treatment, [55] and the Member State concerned is required

53 — See to that effect *Palacios de la Villa* (paragraph 73).

54 — Settled case-law. See *inter alia* Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21, Joined Cases C-96/03 and C-97/03 *Tempelman und van Schaijk* [2005] ECR I-1895, paragraph 47, and Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 86.

55 — Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 39, concerning the principle of equal treatment for male and female workers, and *Mangold* (paragraph 65, concerning the principle of equal treatment laid down in Directive 2000/78.

'to find the right balance between the different interests involved'. [56]

69. It may be in the interests of the workers concerned, despite their entitlement to an old-age pension, to seek further gainful employment even after losing their long-term job. It is important in this respect that, under European Union law, everyone has the right to work and to pursue their occupation (Article 15(1) of the Charter of Fundamental Rights of the European Union [57]). That European fundamental right also applies to the Member States in the implementation of European Union law, such as, for example, Directive 2000/78, relevant here (Article 51(1) of the Charter of Fundamental Rights). In the interpretation and application of existing national legislation account must also be taken of situations which have not yet come to an end. [58]

70. A provision such as Paragraph 2a(3) of the FL makes it more difficult for workers who are already eligible for an old-age pension to continue to exercise their right to work because – unlike other workers with the same length of service – they are not financially supported by a severance allowance when they move to new employment. The objective pursued by Directive 2000/78 of assisting older workers with a view to increasing their participation in economic life [59] is likewise less easily achievable on this basis.

71. A fair balance must of course be struck between the interest of the workers concerned in continuing to work and the other interests at stake. The Court thus recognised in *Palacios de la Villa* that it may be justifiable on employment and labour-market policy grounds to subject workers who have reached the age-limit provided for to 'compulsory retirement'. [60]

72. There is certainly nothing in principle to prevent Member States – and the social partners – from adopting less drastic measures than compulsory retirement: a provision such as Paragraph 2a(3) of the FL does not prohibit workers with a redeemable pension

56 — *Palacios de la Villa* (paragraph 71).

57 — The Charter of Fundamental Rights of the European Union was solemnly proclaimed first on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and then a second time on 12 December 2007 in Strasbourg (OJ 2007 C 303, p. 1).

58 — See to this effect the case-law stating that a new provision applies directly to the future effects of a situation which arose under the former provision; see Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8), Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50), Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 43, and Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 46). Moreover, this explains why the Court referred to the Charter as binding primary law in *Kücükdeveci* (paragraph 22) and Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 44.

59 — Recital (9) in the preamble to Directive 2000/78.

60 — *Palacios de la Villa* (in particular paragraph 73).

entitlement from continuing to work. The persons concerned simply no longer receive the same degree of financial assistance in seeking new employment as other workers who are not yet eligible for an old-age pension. As the Danish and German Governments point out, this takes into account inter alia the legitimate interests of employers in limiting their financial burden in the event of dismissal. [61]

73. Nevertheless, even the loss of a mere entitlement to financial assistance during the move to new employment may have serious adverse effects on the interests of a dismissed worker. This occurs where taking immediate retirement entails for the worker concerned a considerable early retirement reduction or other substantial cuts in income by comparison with the maximum amount of pension which he would otherwise be able to draw. In such circumstances, it is very much in his interests to continue working. The longer he actually works, the higher his pension expectation will usually be and the less he will have to sustain a reduction of his pension on account of his early retirement, if that is the case.

74. The example of Mr Andersen illustrates this clearly: if he had decided to take immediate retirement upon leaving his employment in August 2006, he would have been entitled to an annual old-age pension of DKK 125 374. [62] On the other hand, if he had continued making contributions in the same amount until 1 June 2008, and had deferred taking retirement until that time, his old-age-pension would have risen to DKK 152 611 per year, [63] in other words, it would have increased nominally by more than 20 % after only another two years.

61 — The Court has indeed held that 'purely individual motives specific to the employer's situation, such as cost reduction or improving competitiveness', are not as such capable of justifying a direct difference in treatment on grounds of age. At the same time, however, it has not ruled out the possibility that employers' interests may be taken into account in the pursuit of employment and labour-market policy objectives in the general interest. It was therefore legitimate that, when formulating the entitlement to a severance allowance under Paragraph 2a of the FL, the Danish legislature also took into consideration the employers' interest in averting an excessive financial burden; see in this regard *Age Concern England* (paragraph 51). In *Kücükdeveci* too, the Court by no means held to be insignificant objectives such as 'greater flexibility in personnel management' or alleviating the employer's burden in connection with the dismissal of certain categories of employee (paragraph 39); rather, it considered that the legislation chosen by the legislature '[was] not appropriate for achieving that aim' (paragraph 40).

62 — On 31 August 2006, this would have been equivalent to EUR 16 807,64, that is to say approximately EUR 1 400 per month.

63 — On 1 June 2008, this would have been equivalent to EUR 20 460,56, that is to say approximately EUR 1 705 per month.

75. Ultimately, of course, it falls within the broad discretion available to the national legislature (and the social partners) in the context of employment and social policy to assess to what extent workers must tolerate early retirement reductions or other cuts in income by comparison with the maximum amount of pension which they would otherwise have been able to draw. As far as can be seen, however, the Danish legislature gave as little consideration to this issue when introducing Paragraph 2a(3) of the FL [64] at issue here as it did when subsequently implementing Directive 2000/78. [65] The Danish legislature did not exercise its discretion in this respect at all.

76. Paragraph 2a(3) of the FL does not differentiate in any way between workers who have reached the standard retirement age and those who have merely reached the minimum retirement age. However, the two groups cannot simply be 'lumped together' because they differ in one crucial respect: receipt of an old-age pension before a person reaches the standard retirement age is normally linked to considerable early retirement reductions which may result in painful financial losses for the person concerned. In addition, the acquired pension rights are themselves usually lower the further a worker is from the standard retirement age.

77. It is true that, since it was amended in 1996, Paragraph 2a(3) of the FL restricts non-entitlement to the severance allowance to cases where the dismissed employee joined his pension scheme before reaching the age of 50. Yet, the only consequence of this is that acquired pension rights in respect of so-called 'minimal pensions' do not affect entitlement to a severance allowance. That does not exclude, however, that a worker may have to sustain considerable early retirement reductions. In extreme cases, this may mean that a worker who joined his pension scheme at the age of 49 and loses his job at the age of 61 will lose his entitlement to the severance allowance under Paragraph 2a(1) of the FL, even though, after twelve years' contributions, he can expect to receive only a relatively small collective-agreement-based old-age pension which, if claimed immediately, would also be subject to an early retirement reduction.

64 — Originally, Paragraph 2a(2) of the FL.

65 — As is clear from the documents before the Court, when implementing Directive 2000/78, the Danish legislature examined Paragraph 2a of the FL only with a view to establishing whether it is objectively justified to withhold the severance allowance *from younger workers*. On the other hand, the question whether *older workers* who are already eligible for an old-age pension are discriminated against on grounds of age by Paragraph 2a(3) of the FL does not seem to have been considered (see also footnote 42 above).

78. All in all, therefore, a provision such as Paragraph 2a(3) of the FL cannot be regarded as reflecting a fair balance of interests. It has undue adverse effects on the workers to whom it applies in that it makes the irrefutable presumption that they will always leave the labour market even if they incur a considerable financial loss in relation to the amount of pension which they would otherwise individually have drawn. However, a worker has a legitimate interest in continuing to work where, if he took immediate retirement, he would have to sustain a considerable early retirement reduction or other substantial cuts in income by comparison with the maximum amount of pension which he would otherwise be able to draw.

79. This case is therefore also fundamentally different from that in *Palacios de la Villa*, in which the applicable Spanish statutory and collective-agreement-based provisions were linked not to the minimum retirement age but to the standard age-limit for early retirement and the claimant had already acquired the maximum pension rights attainable by him. [66]

66 — *Palacios de la Villa* (paragraphs 24, 27 and 30).

(iv) Interim conclusion

80. A provision such as that contained in Paragraph 2a(3) of the FL is not necessary to achieve the aim pursued by it. It also has undue adverse effects on the interests of the workers concerned. For both those reasons, the direct difference in treatment on grounds of age which it entails cannot be justified under Article 6(1) of Directive 2000/78.

3. Consequences for the main proceedings

81. It is settled case-law that the national court is obliged when applying national law to interpret it as far as possible on the basis of the wording and purpose of a directive in order to achieve the result envisaged by the directive and thereby comply with Article 288(3) TFEU. [67]

82. It is true that that obligation to interpret national law in conformity with the directive is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that it cannot serve as a basis

67 — See *inter alia* Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113; *Impact* (paragraph 98); *Angelidaki and Others* (paragraph 197); and *Kücükdeveci* (paragraph 47).

for an interpretation of national law *contra legem*. [68]

83. That aside, however, the principle of interpretation in conformity with the directive requires the national courts to consider national law as a whole and, by applying its interpretative methods, to do whatever lies within their jurisdiction to ensure that the directive concerned is fully effective and to achieve an outcome consistent with the objective pursued by the directive. [69] In doing so, they must fully exercise the discretion accorded to them by national law. [70]

84. It is for the referring court to examine whether and to what extent Paragraph 2a(3) of the FL can be interpreted in conformity with the aforementioned provisions of Directive 2000/78. Without wishing to prejudge the assessment of the Vestre Landsret, which alone has jurisdiction to interpret the national legislation, [71] it seems to me to be perfectly possible to interpret that provision in conformity with the Directive. After all, the current strict application of the derogatory provision contained in Paragraph 2a(3) of the FL is based only on its interpretation by the Danish courts. Its wording ('[i]f the employee will – on termination of the employment relationship – receive an old-age pension …') could also be interpreted as meaning that it covers only persons who *will actually receive* their old-age pension, without necessarily also including persons who merely *may receive* an old-age pension. [72]

85. If Paragraph 2a(3) of the FL could not be interpreted in conformity with the Directive, the provision in the main proceedings would have to be set aside, [73] with the result that the severance allowance under Paragraph 2a(1)

68 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 44 and 47, *Impact* (paragraph 100) and *Angelidaki and Others* (paragraph 199).

69 — *Pfeiffer* (paragraphs 115, 116, 118 and 119); *Impact* (paragraph 101); and *Angelidaki and Others* (paragraph 200); similarly, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, in which the Court states that the national court 'called upon to interpret [national law] is required to do so, as far as possible, in the light of the wording and the purpose of the directive'.

70 — *Colson und Kamann* (paragraph 28); see also Case 157/86 *Murphy and Others* [1988] ECR 673, paragraph 11, and Case C-208/05 *ITC* [2007] ECR I-181, paragraph 68.

71 — Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 103; Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 34; and *Angelidaki and Others* (paragraph 48).

72 — As the Danish Government states in its written observations, the current practice in relation to Paragraph 2a(3) of the FL is based on a teleologically restrictive interpretation of the provision to the effect that the Danish verb 'vil' is understood as meaning 'kan'.

73 — Settled case-law; see, for example, *Marshall* (paragraphs 55 and 56), according to which the principle of equal treatment 'may be relied upon as against a State authority acting in its capacity as employer in order to avoid the application of any national provision which does not conform to [that principle]'; see also *ITC* (paragraph 69) and *Petersen* (paragraphs 80 and 81).

of the FL would also have to be awarded to a person in Mr Andersen's position. As long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. [74]

4. Concluding remarks

86. In order to give the referring court a meaningful answer to the question it has referred for a preliminary ruling, the following should be noted for the sake of completeness.

87. The fact that Paragraph 2a(1) of the FL links payment of the severance allowance to long-term continuous service might indicate that the meaning and purpose of that allowance does not lie exclusively in lending financial assistance in connection with the move to new employment. Such a severance allowance might also – at least partly – serve to reward the worker's long service for his employer.

88. When asked a question to this effect by the Court, the parties to the proceedings were in disagreement as to whether the provision in Paragraph 2a of the FL entails such an element of reward for past service. Whereas the Danish Government, the Region Syddanmark and the Commission say that it does not, the claimant in the main proceedings takes the opposite view. It is ultimately for the national court to form an opinion in this regard. [75]

89. If the provision contained in Paragraph 2a of the FL were intended at least partly to reward long service, this would be an additional compelling reason not to withhold the severance allowance from workers solely because they are already entitled to a pension. After all, for the purposes of rewarding past service, it makes no difference whether a worker is eligible for an old-age pension on leaving his employment or not.

74 — Settled case-law; see inter alia Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149, paragraph 39 and the case-law cited.

75 — *Petersen* (paragraph 42).

VI — Conclusion

90. In view of the foregoing considerations, I propose that the Court should answer the question referred by the Vestre Landsret as follows:

Where workers with a long period of service are granted, in the event of their dismissal, a statutory allowance intended to make it financially easier for them to move to new employment, it is incompatible with Article 2 and Article 6 of Directive 2000/78/EC to withhold that severance allowance from workers who are eligible for an old-age pension on leaving their employment, in so far as no account is taken of:

— whether the worker in question will actually draw an old-age pension at that time or will remain on the labour market; and

— whether taking retirement at that time would entail for the worker in question a considerable early retirement reduction or other substantial losses in connection with the amount of his pension.