JUDGMENT OF THE COURT (Second Chamber)

21 July 2011 *

In Joined Cases C-159/10 and C-160/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Frankfurt am Main (Germany), made by decisions of 29 March 2010, received at the Court on 2 April 2010, in the proceedings

Gerhard Fuchs (C-159/10),

Peter Köhler (C-160/10)

v

Land Hessen,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Rosas, U. Lõhmus, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 5 April 2011,

after considering the observations submitted on behalf of:

— the *Land* Hessen, by M. Deutsch, Rechtsanwalt,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— Ireland, by D. O'Hagan and B. Doherty, acting as Agents,

— the European Commission, by V. Kreuschitz and J. Enegren, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The references have been made in proceedings between Mr Fuchs and Mr Köhler, respectively, and the *Land* Hessen concerning their retirement at the age of 65.

Legal context

European Union ('EU') law

Directive 2000/78

3 Recitals 8, 9 and 11 in the preamble to Directive 2000/78 provide:

'(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They

also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

…

(11) Discrimination based on … age … may undermine the achievement of the objectives of the [EU] Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.'

4 Recital 25 in Directive 2000/78 states:

'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 and therefore require specific provisions which may vary in accordance with the situation in Member States. 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 Article 1 of Directive 2000/78 states that its 'purpose … 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(1) and (2)(a) of Directive 2000/78 provides:

'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'.

7 Article 3(1) of Directive 2000/78, headed 'Scope', provides:

'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;

...'

8 Article 6(1) and (2) of Directive 2000/78 provides:

'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;

(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.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

National legislation

9 The Federal legislature transposed Directive 2000/78 into German law by the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897), as amended by Paragraph 15(66) of the Law of 5 February 2009 (BGBI. 2009 I, p. 160).

10 The Federal legislature adopted the provisions relating to the retirement of permanent civil servants of the *Länder* and municipalities set out in Paragraph 25 of the Federal Law governing the legal status of civil servants of the *Länder* (Beamtenstatusgesetz) of 17 June 2008 (BGBl. 2008 I, p. 1010), as amended by Paragraph 15(16) of the Law of 5 February 2009 (BGBl. 2009 I, p. 160), in the following terms:

'Permanent civil servants shall retire on reaching the retirement age.'

11 That provision does not itself determine that retirement age, but leaves it to the *Länder* to do so.

12 Paragraph 50 of the Law on the civil service of the *Land* Hessen (Hessisches Beamtengesetz), as amended by the Law of 14 December 2009 ('HBG'), sets the compulsory retirement age for civil servants of the *Land* Hessen as follows:

'(1) Permanent civil servants shall retire at the end of the month in which they reach the age of 65 (age limit).

(2) In derogation from subparagraph 1, the following provisions shall apply to the permanent civil servants listed below:

1. Public school teaching staff shall retire at the end of the last month of the school year in which they reach the age of 65;

2. Professors, university or college lecturers, members of the science or arts staff and teaching staff with special responsibilities in higher education establishments of the *Land* shall retire at the end of the last month of the semester in which they reach the age of 65;

(3) If it is in the interests of the service, retirement may, at the request of the civil servant concerned, be postponed beyond the age of 65 for periods of no more than one year, subject to an overall retirement age limit that shall not exceed 68. The decision shall be taken by the highest authority in the hierarchy or by such authority as it shall designate.'

13 The national court states that, until 1992, the continued employment of civil servants beyond retirement age was permitted if it was requested and not precluded by the interests of the service. From 1992, such continued employment was subject to the requirement that it should be in the interests of the service.

14 The HBG includes a special provision concerning the retirement age of civil servants appointed for a fixed term after being directly elected, such as mayors or local councillors. These are to retire on reaching the age of 71 if their term of office has not come to an end by that date.

15 At federal level, until 12 February 2009 the general retirement age applicable to civil servants was fixed at 65 years. Since that date the legislation has provided for that retirement age to be raised gradually to 67 years. At the material time as regards the main proceedings, similar provisions had been adopted in certain *Länder* but not in the *Land* Hessen.

16 Beyond the civil service, since 1 January 2008, Paragraph 35 of Book VI of the Code of social law (Sozialgesetzbuch, sechstes Buch), which applies to employed persons governed by private law, has also provided for the age at which a person is to be entitled to an old-age pension to be raised gradually to 67 years. Under transitional provisions, that age remains fixed at 65 years for persons born before 1 January 1947.

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

17 The facts of the disputes in the main proceedings are virtually identical and the questions referred by the national court are the same.

18 The applicants in each of the main proceedings, Mr Fuchs and Mr Köhler, both born in 1944, worked as State prosecutors until they reached the age of 65 in 2009, the age at which they should normally have retired pursuant to Paragraph 50(1) of the HBG.

19 The applicants each applied to continue to work for a further year, pursuant to Paragraph 50(3) of the HBG.

20 The Ministry of Justice of the *Land* Hessen having rejected their applications on the grounds that it was not in the interests of the service for them to remain in post; the applicants in the main proceedings lodged an objection at the Ministry of Justice and also made an application for interim measures to the Verwaltungsgericht Frankfurt am Main (Frankfurt am Main Administrative Court) (Germany).

21 That court granted the applications for interim measures thus submitted, and ordered the *Land* Hessen to continue to employ Mr Fuchs and Mr Köhler. The decisions handed down by the Verwaltungsgericht Frankfurt am Main were, however, the subject of an appeal to the Hessischer Verwaltungsgerichtshof (Hessen Administrative Court) (Germany), which set aside the decisions and dismissed the applications for interim measures submitted by the applicants. Since 1 October 2009, the applicants have no longer been able to perform their duties as State prosecutors and have been paid a retirement pension.

22 As their objections were also dismissed by decisions of the Ministry of Justice of the *Land* Hessen, Mr Fuchs and Mr Köhler brought an action before the Verwaltungsgericht Frankfurt am Main against those decisions.

23 The Verwaltungsgericht Frankfurt am Main has doubts as to the compatibility of the retirement age set in respect of the duties of prosecutor with, in particular, Article 6 of Directive 2000/78. In its view, the compulsory retirement at the age of 65 of persons performing those duties constitutes discrimination on grounds of age, contrary to the provisions of Directive 2000/78.

24 The national court explains that the provision at issue was introduced at a time when the view was taken that fitness for work declines after that age. Current research

shows that such fitness varies from one person to another. Furthermore, the increase in life expectancy had led the legislature to raise to 67 – for federal civil servants and private-sector employees – the general age limit for retirement and entitlement to a pension. The HBG provides, moreover, that civil servants appointed following an election may perform their duties until the age of 71.

25 According to the national court, it is apparent from the observations of the *Land* Hessen accompanying the HBG as applicable in 1962 that the HBG was intended to promote the employment of younger people and thus to ensure an appropriate age structure. Such an aim does not, however, according to that court, constitute objective justification, for there is not under national law a sufficiently precise criterion for the definition of an age structure that could be described as favourable or unfavourable. Nor does such an aim serve the public interest; it serves the individual interest of the employer. In any event, the *Land* Hessen has not described what it regards as the appropriate nature of or reasons for the age structure. The figures it has provided establish that a significant proportion of the public ministry's staff already comprises young people. The national court adds that recent studies show that there is no correlation between the compulsory retirement of persons who have reached the age limit and younger persons entering the profession. The national court also queries whether the figures which relate to the *Land* Hessen alone and, within that *Land*, to civil servants governed by public law, who represent only a small fraction of the staff of that *Land* and of the employees of the Member State concerned, are capable of demonstrating the existence of an aim in the public interest, and whether such an aim needs to be placed at a higher level, notably that of all civil servants and staff of the *Land* Hessen, or even of all civil servants and staff of that Member State.

26 The national court adds that the retirement of prosecutors does not always result in a recruitment exercise to fill newly-vacated posts. In this way, it suggests, the *Land* Hessen is endeavouring to make budgetary savings.

27 In addition, certain measures lack coherence. This applies in particular to the possibility of keeping an employee in post until the age of 68 notwithstanding an irrebuttable presumption that he is unfit for service from the age of 65, the restriction of voluntary retirement before the age of 65 and the raising of the retirement age already provided for in certain legislative texts.

28 In those circumstances the national court decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Are the rules laid down in the [HBG] on the compulsory retirement age for civil servants based on an aim in the public interest in accordance with standards of [EU] law?

The following main questions arise in this respect:

— What specific requirements in [EU] law should such an aim prescribed in the public interest satisfy? What additional issues relating to the clarification of the facts of the case should the referring court consider?

— Does an interest in saving budgetary resources and labour costs, in the present context by avoiding the recruitment of new staff and so reducing expenditure on personnel, represent a legitimate aim within the meaning of Article 6(1) of Directive 2000/78 …?

— Can an employer's aim of enjoying a degree of planning certainty as regards the retirement of civil servants be recognised as a legitimate aim in the public interest, even if every employer governed by the [HBG] or the [Federal Law

on the status of civil servants of the *Länder*] may develop and implement staff management ideas of his own?

— Can an interest in a "favourable age stratification" or "favourable age structure" be recognised as an aim in the public interest, despite the absence of general standards or statutory rules on what constitutes a correct age stratification or age structure?

— Can an interest in creating opportunities for the promotion of civil servants already in place be regarded as a legitimate aim in the public interest within the meaning of Article 6(1) of Directive 2000/78 …?

— Does the adoption of rules on retirement ages to preclude individual legal disputes with older employees over their continued fitness for service constitute the pursuit of a legitimate aim in the public interest?

— Does the reference to the public interest within the meaning of Article 6(1) of Directive 2000/78 … presuppose a labour market policy concept extending beyond individual employers in the area of employment, and if so, how uniform and binding must it be?

— Is it in fact possible for individual employers to pursue aims in the public interest for groups of employees, limited here to civil servants governed by the [HBG], with retirement age rules of such limited scope?

— Under what conditions can the aim, which can be pursued by individual employers, but is not mandatory, of occupying posts vacated by retired employees with new recruits, where necessary after existing employees have been promoted, be regarded as being in the public interest within the meaning of Article 6(1) of Directive 2000/78 …? Must the reference to the public interest be backed not only by general claims that the rules serve that purpose, but also by statistics or other findings from which it can be inferred that such an aim is sufficiently serious and can actually be achieved?

2. (a) What specific requirements should be satisfied by the reasonableness and suitability of a retirement age arrangement within the meaning of the rules laid down in the [HBG]?

(b) Are more thorough investigations needed to determine the ratio of the – probable – number of civil servants remaining in service voluntarily after retirement age to the number who wish to receive a full pension on reaching retirement age, if not earlier, and therefore certainly want to leave the service? Would it not be appropriate in this respect to give voluntary retirement preference over compulsory retirement, provided that arrangements are made for pensions to be reduced where they are taken before the set retirement age is reached so as to preclude unreasonable pension budget spending and associated labour costs (voluntary departure rather than compulsion as the more appropriate and, in effect, hardly less suitable arrangement)?

(c) Can it be deemed reasonable and necessary to assume it to be irrefutable that all civil servants cease to be fit for service on reaching a given higher age, such as 65 years in this case, and so automatically to terminate their employment as civil servants at that age?

(d) Is it reasonable for the possibility of remaining employed in the civil service at least until the age of 68 years to be entirely dependent on the employer having special interests, but for employment in the civil service to be terminated with no legal possibility of securing reappointment where no such interests exist?

(e) Does a retirement age arrangement which leads to compulsory retirement, rather than being confined to specifying the conditions for entitlement to a full pension, as permitted under Article 6(2) of Directive 2000/78 …, result in an unreasonable devaluation of the interests of older people relative to the fundamentally no more valuable interests of younger people?

(f) If the aim of facilitating recruitment and/or promotion is deemed to be legitimate, what more precise requirements must actually be satisfied to demonstrate the extent to which such opportunities are actually seized by each employer taking advantage of the retirement age arrangement or by all employers, in and outside the general labour market, to whom the statutory arrangement applies?

(g) In view of the gaps already to be seen in the labour market owing to demographic trends and of the impending need for skilled staff of all kinds, including staff for the public service of the Federal German and *Land* governments, is it reasonable and necessary to force civil servants able and willing to continue working to retire from the civil service at a time when there will soon be a major demand for personnel which the labour market will hardly be able to meet? Will it possibly be necessary in the future to collect sectoral labour market data?

3. (a) What requirements need to be met as regards the coherence of Hessen's and possibly Federal German legislation on retirement ages?

(b) Can the relationship between Paragraph 50(1) and Paragraph 50(3) of the [HBG] be regarded as consistent if the possibility in principle of remaining in employment beyond retirement age depends entirely on the employer's interests?

(c) Should Paragraph 50(3) of the [HBG] possibly be interpreted to mean, in compliance with … Directive [2000/78], that, to preclude unreasonable discrimination on the grounds of age, employment must always continue unless service factors prevent this? What requirements should then be satisfied to prove the existence of any such factors? Must it be assumed in this respect that the interests of the service require continued employment if only because unjustifiable discrimination on the grounds of age would otherwise occur?

(d) How might advantage be taken of such an interpretation of Paragraph 50(3) of the [HBG] for a continuation or resumption of the applicant's employment as a civil servant, even though that employment has meanwhile been terminated? Should, in that case, Paragraph 50(1) of the [HBG] remain inapplicable at least until the age of 68 years?

(e) Is it reasonable and necessary, on the one hand, to impede the taking of voluntary retirement at the age of 60 or 63 years, with a permanent reduction in pension, and, on the other hand, to rule out the voluntary continuation of employment after the age of 65 years unless the employer has, by way of exception, a special interest in its continuation?

(f) Do the rules on retirement ages laid down in Paragraph 50(1) of the [HBG] cease to be reasonable and necessary as a result of the more favourable rules on part-time work on the grounds of age on the one hand and fixed-term civil servants on the other?

(g) What significance for coherence can be attributed to the various rules laid down in employment (public and private sector) and social insurance law which, first, are seeking permanently to raise the age at which a full pension can be drawn, second, prohibit the termination of employment on the grounds that the age specified for the standard retirement pension has been reached and, third, make it compulsory for employment to terminate when that precise age is reached?

(h) Is it relevant to coherence that the gradual raising of retirement ages in the social insurance and civil service law relating to the Federal German authorities and some *Länder* primarily serves the interests of employees in delaying as long as possible the need to meet the more stringent requirements for a full retirement pension? Are these questions insignificant because retirement ages have not yet been raised for civil servants governed by the [HBG], although this is due to become effective in the near future in the case of employees in employment relationships?'

29 By order of the President of the Court of 6 May 2010, Cases C-159/10 and C-160/10 were joined for the purposes of the written and oral procedures and of the judgment.

Consideration of the questions referred

30 The national court raises numerous queries, essentially grouped together into three questions, some of which relate to the interpretation of national law. In this regard, it must be borne in mind that the Court has no power, within the framework of Article 267 TFEU, to give preliminary rulings on the interpretation of rules pertaining to national law. The jurisdiction of the Court is confined to considering provisions of EU law only (see, in particular, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 63).

31 The questions raised must therefore be answered in the light of that limitation.

The first question

32 By its first question the national court asks, in essence, whether Directive 2000/78 precludes a law, such as the HBG, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, subject to the possibility that they may continue to work, if it is in the interests of the service, until the maximum age of 68, if that law has one or more of the following aims: the creation of a 'favourable age structure', planning of staff departures, promotion of civil servants, prevention of disputes or achieving budgetary savings.

33 It is common ground that the termination of contracts of employment of civil servants of the *Land* Hessen, in particular of prosecutors, when they reach the age at which they are entitled to a full pension, namely at the age of 65, constitutes a difference of treatment on grounds of age for the purposes of Article 6(1)(a) of Directive 2000/78.

34 A provision such as Paragraph 50(1) of the HBG affects employment and working conditions, within the meaning of Article 3(1)(c) of Directive 2000/78, by preventing the prosecutors concerned from continuing to work beyond the age of 65. Furthermore, by ensuring that they are treated less favourably than persons who have not reached that age, Paragraph 50(1) of the HBG introduces a difference of treatment directly based on age for the purposes of Article 2(1) of Directive 2000/78.

35 Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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.

36 In order to answer the question raised, it is necessary, therefore, to determine whether that provision is justified by a legitimate aim and whether the means put in place to achieve it are appropriate and necessary.

Whether there is a legitimate aim

37 The Court must begin by considering the consequences of the absence of any specific mention in the HBG of the aim pursued, the consequences arising from an alteration of that aim and its context, and also whether or not it is possible to rely on several aims.

38 It is apparent from the order for reference, first of all, that the HBG does not clearly state the aim pursued by Paragraph 50(1) of the HBG, which sets the retirement age of civil servants at 65.

39 In that regard, the Court has repeatedly held that it cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision. In the absence of such precision, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary (Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraphs 56 and 57; Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 40; and Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 58).

40 With regard to the modification of the aim pursued, it is apparent from the order for reference that, originally, Paragraph 50 of the HBG was based on the irrebuttable presumption that a person is unfit to work beyond the age of 65. At the hearing, however, the representatives of the *Land* Hessen and the German Government emphasised that that presumption should no longer be regarded as underpinning the retirement age, and that the legislature had accepted that people can be fit to work beyond that age.

41 It must be concluded, in that regard, that a change in the context of a law leading to an alteration of the aim of that law does not, by itself, preclude that law from pursuing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

42 Circumstances can change and the law may nevertheless be preserved for other reasons.

43 Thus, in the main proceedings in this instance, in addition to the change regarding the perception of fitness to work beyond the age of 65, the aspect referred to by the national court – that the age limit was introduced during a period of full employment and then maintained during a period of unemployment – could indeed have led to an alteration of the aim pursued, without thereby preventing that aim from being legitimate.

44 As regards reliance on several aims at the same time, it may be seen from the case-law that the coexistence of a number of aims does not preclude the existence of a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

45 That was the case in *Rosenbladt*, in which the Court held, in paragraphs 43 and 45 of its judgment, that aims such as those relied on by the German Government could be regarded as being among the aims referred to in Article 6(1) of Directive 2000/78.

46 The aims relied on may be linked to another (see, to that effect, Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-11869, paragraphs 45, 46 and 68) or classed in order of importance as in *Petersen*, in which, as can be seen from paragraphs 41 and 65 of that judgment, the German Government relied principally on one aim and, in the alternative, on another.

The aims relied on by the national court

47 According to the national court, the aim of Paragraph 50(1) of the HBG is, inter alia, the creation of a 'favourable age structure', which is achieved by the simultaneous presence within the profession at issue – that of prosecutors – of young employees at the start of their careers and older employees at a more advanced stage of theirs.

The *Land* Hessen and the German Government submit that that is the principal aim of that provision. The obligation to retire at the age of 65 is, in their submission, designed to establish a balance between the generations, in addition to which the national court refers to three further aims: efficient planning of the departure and recruitment of staff, encouraging the recruitment and promotion of young people, and avoiding disputes relating to employees' ability to perform their duties beyond the age of 65.

48 The *Land* Hessen and the German Government maintain that the presence within the relevant civil service of staff of different ages also helps to ensure that the experience of older staff is passed on to younger colleagues and that younger staff share recently acquired knowledge, thus contributing to the provision of a high-quality public justice service.

49 It must be noted that, according to the case-law, encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved (*Georgiev*, paragraph 45). The Court has, moreover, held that the mix of different generations of employees can also contribute to the quality of the activities carried out, inter alia by promoting the exchange of experience (see, to that effect, in relation to teaching staff and researchers, *Georgiev*, paragraph 46).

50 In the same way, it must be concluded that the aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy.

51 The national court is, however, uncertain whether a measure such as Paragraph 50(1) of the HBG does not meet the interests of the employer rather than the public interest. In particular, it raises the issue whether the measures adopted by a single *Land* in respect of some of its staff, in this instance permanent civil servants, including prosecutors, do not cover too limited a group to constitute a measure pursuing an aim in the public interest.

52 The Court has held that the aims that may be considered 'legitimate' within the meaning of Article 6(1) of Directive 2000/78 are aims having a public interest nature distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers (see, to that effect, Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 46).

53 It must be observed that aims such as those referred to in paragraph 50 of the present judgment, which take into account the interests of all civil servants concerned, in the context of concerns relating to employment and labour market policy, in order to ensure a high-quality public service – in this instance that of justice – may be regarded as aims of public interest.

54 The Court has held, moreover, that it must be possible for the competent authorities at national, regional or sectoral level to alter the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the Member State concerned (*Palacios de la Villa*, paragraph 70).

55 Thus, the fact that a provision is adopted at regional level does not prevent its pursuing a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. In a State

such as the Federal Republic of Germany, the legislature may take the view that, in the interests of all the persons concerned, it is for the *Länder* rather than the Federal authorities to adopt certain legislative measures covered by that provision, such as the retirement age of permanent civil servants.

56 Retirement that is, in principle, compulsory at the age of 65, as laid down in Paragraph 50(1) of the HBG, must nevertheless also be appropriate and necessary.

57 As regards the appropriateness of such a measure, the *Land* Hessen and the German Government submit that the number of posts, particularly prosecutors' posts, available in the civil service is limited, particularly at the most senior levels. In the face of budgetary constraints, the opportunity of creating new posts is limited. They explain that prosecutors, like all civil servants, are appointed permanently and only rarely resign from their posts voluntarily and prematurely. Thus, the setting of a compulsory retirement age for prosecutors is the only means of ensuring that employment is distributed fairly among the generations.

58 The Court has already accepted in connection with professions in which the number of posts available was limited that retirement at an age laid down by law facilitated access to employment by younger people (see to that effect, in relation to panel dentists, *Petersen*, paragraph 70, and, in relation to university professors, *Georgiev*, paragraph 52).

59 As regards the profession of prosecutor in Germany, it is apparent that access to that profession is limited by the requirement that members should have obtained a special qualification entailing the successful completion of a course of study and a traineeship. In addition, the entry of young people into the profession could be restricted owing to the fact that the civil servants concerned are appointed permanently.

60 That being the case, it does not appear unreasonable for the competent authorities of a Member State to take the view that a measure such as Paragraph 50(1) of the HBG can secure the aim of putting in place a balanced age structure in order to facilitate planning of staff departures, ensure the promotion of civil servants, particularly the younger ones among them, and prevent disputes that might arise on retirement.

61 It must be borne in mind that the Member States enjoy broad discretion in the definition of measures capable of achieving that aim (see, to that effect, *Palacios de la Villa*, paragraph 68).

62 However, the Member States may not frustrate the prohibition of discrimination on grounds of age set out in Directive 2000/78. That prohibition must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union.

63 It follows that particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity in the workforce, which is an aim recognised in recital 25 in Directive 2000/78; moreover, it contributes to the realising of their potential and to the quality of life of the workers concerned, in accordance with the concerns of the European Union legislature set out in recitals 8, 9 and 11 in that directive.

64 However, the interest represented by the continued employment of those persons must be taken into account in respecting other, potentially divergent interests. Those who have reached the age at which they are entitled to a retirement pension may wish to avail themselves of it and to leave work with the benefit of that pension, instead of

continuing to work. Furthermore, clauses on automatic termination of the employment contracts of employees who reach retirement age could, in the interests of sharing work among the generations, promote the entry of young workers into the labour force.

65 Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people's working life or, conversely, to provide for early retirement (see *Palacios de la Villa*, paragraphs 68 and 69). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they do not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (see, to that effect, *Palacios de la Villa*, paragraphs 69 and 71, and also *Rosenbladt*, paragraph 44).

66 In that regard, the Court has accepted that a measure that allows for the compulsory retirement of workers when they reach the age of 65 can meet the aim of encouraging recruitment and be regarded as not unduly prejudicing the legitimate claims of the workers concerned, if those workers are entitled to a pension the level of which cannot be regarded as unreasonable (see, to that effect, *Palacios de la Villa*, paragraph 73). The Court has also held, in regard to a measure requiring the automatic termination of employment contracts at that age, in a sector in which, according to the national court, that measure was liable to cause significant financial hardship to the worker concerned, that that measure did not go beyond what was necessary to achieve the desired aims, in particular the encouragement of recruitment. The Court took into account the fact that the worker was eligible for payment of a pension while at the same time remaining in the labour market and enjoying protection from discrimination on grounds of age (see, to that effect, *Rosenbladt*, paragraphs 73 to 76).

67 In the present cases in the main proceedings, it is apparent from the documents before the Court that prosecutors retire, as a rule, at the age of 65 on a full pension equivalent to approximately 72 % of their final salary. Furthermore, Paragraph 50(3)

of the HBG provides for the possibility of prosecutors working for a further three years until the age of 68 if they so request and if it is in the interests of the service. Finally, national law does not prevent prosecutors from exercising another professional activity, such as that of legal adviser, with no age limit.

68 Taking those matters into account, it must be held that a measure which provides for prosecutors to retire when they reach the age of 65, as laid down under Paragraph 50(1) of the HBG, does not go beyond what is necessary to achieve the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age.

69 It must further be noted that the national court also asks the Court of Justice about the legitimacy, in the light of Article 6(1) of Directive 2000/78, of the aim of achieving budgetary savings.

70 The *Land* Hessen and the German Government have stated, however, that in their view Paragraph 50(1) of the HBG does not pursue such an aim. According to the *Land* Hessen, the fact that certain permanent civil servants – in this instance prosecutors – were not replaced is accounted for by the fact that they were appointed in response to an exceptional increase in particular litigation at a particular time. The *Land* Hessen comments that, leaving those cuts aside, the number of prosecutors has increased since 2006.

71 It is for the national court to ascertain whether the aim of achieving budgetary savings is one that is pursued by the HBG.

72 It should be borne in mind that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (see, in particular, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27 and the case-law cited). In the present case, since it is not altogether obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, or that the problem is hypothetical, the Court must answer the question put forward.

73 As is apparent from paragraph 65 of the present judgment, in the context of the adoption of measures relating to retirement, EU law does not preclude the Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.

74 In that regard, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

75 In the light of the foregoing, the answer to the first question is that Directive 2000/78 does not preclude a law, such as the HBG, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means.

The second question

76 By its second question the national court asks, in essence, what information must be produced by the Member State in order to demonstrate the appropriateness and necessity of the measure at issue in the main proceedings and, in particular, whether statistics or precise data with figures must be supplied.

77 It is clear from paragraph 51 of *Age Concern England* that mere generalisations indicating that a measure is likely to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of derogating from the principle of non-discrimination on grounds of age and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are likely to achieve that aim.

78 The Court has also pointed out, in paragraph 67 of that judgment, that Article 6(1) of Directive 2000/78 imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification.

79 According to recital 15 in Directive 2000/78, the appreciation of the facts from which it may be inferred that there has been discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means, including on the basis of statistical evidence.

80 In order to assess the degree of accuracy of the evidence required, it must be borne in mind that the Member States enjoy broad discretion in the choice of measure they consider appropriate.

81 That choice may, therefore, be based on economic, social, demographic and/or budgetary considerations, which include existing and verifiable data but also forecasts which, by their nature, may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations, which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result.

82 It is for the national court to assess, according to the rules of national law, the probative value of the evidence adduced, which may, inter alia, include statistical evidence.

83 Consequently, the answer to the second question is that, in order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess.

The third question

84 By its third question the national court queries the coherence of a law such as the HBG. Specifically, it raises the question, in essence, whether that law is inconsistent in compelling prosecutors to retire on reaching the age of 65, when (i) it allows them to continue to work until the age of 68 if it is in the interests of the service for them to do so; (ii) it seeks to restrict voluntary retirement at the age of 60 or 63 by a reduction in that case of pension rights; and (iii) the laws applicable to the civil service at Federal level and in a number of other *Länder* and also the Code of social law applicable to

private sector employees provide for the age at which a person may retire on a full pension to be gradually raised from 65 to 67 years.

85 It must be observed, in accordance with settled case-law, that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55, and *Petersen*, paragraph 53).

86 Exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law (see, to that effect, *Petersen*, paragraph 61).

87 With regard to the exception relating to the continued employment of a prosecutor until the age of 68, contained in Paragraph 50(3) of the HBG, it must be noted that this applies only if it is in the interests of the service and if the person concerned makes a request to that effect.

88 At the hearing, the *Land* Hessen indicated that that exception is intended to cover cases where a prosecutor reaches the age of 65 but has been allocated a criminal case in which proceedings have not yet been concluded. In order to avoid possible complications arising as a result of the replacement of the person concerned, the HBG provides, by way of exception, for him to be able to continue to perform his duties. The relevant administration might therefore regard it as preferable, in the interests of the service, to keep that prosecutor in post instead of appointing a replacement who would have to take on a case with which he was unfamiliar.

89 It must be held that such an exception is unlikely to undermine the aim pursued, namely that of guaranteeing a balanced age structure for the purposes of ensuring a high-quality service.

90 An exception of this kind can, on the other hand, mitigate the rigidity of a law, such as the HBG, in the interests of the civil service concerned. While departure and recruitment planning, owing to the automatic retirement of prosecutors when they reach the age of 65, contributes to the proper working of that service, the introduction, in that law, of the exception mentioned in paragraph 88 of the present judgment deals with specific situations in which the prosecutor's departure could be detrimental to the best possible accomplishment of the task conferred on him. In those circumstances, this exception is not incoherent in the light of the law in question.

91 It must be added that other exceptions in the HBG referred to by the national court, such as the continued employment of certain teaching staff for some additional months beyond the age of 65 so as to tie in with the end of a teaching period, or of certain elected persons to tie in with the end of their term of office, are similarly intended to ensure the accomplishment of tasks conferred on the persons concerned and appear no more likely to undermine the aim pursued.

92 According to the national court, another problem in terms of coherence arises from the fact that the HBG seeks to restrict the voluntary retirement of prosecutors who have reached the age of 60 or 63 by means of a provision reducing the amount of the pension granted in such cases, while Paragraph 50(1) of the HBG prevents them from continuing to work beyond the age of 65.

93 It must be observed that the problem of coherence raised by the national court has not been clearly established. A provision such as that referred to by the national court seems, on the contrary, to be the logical consequence of Paragraph 50(1) of the HBG. The implementation of such a provision, which involves planning for staff to retire at the age of 65, actually requires that exceptions to such departures should be limited. A provision reducing the amount of the pension is likely to deter or at least to restrict

the early departures of prosecutors. Such a provision thus contributes to the attainment of the aim pursued and does not support the conclusion that the HBG lacks coherence.

94 The national court also refers to the gradual raising from 65 to 67 of the age at which a person may retire on a full pension, both under the law applicable to the civil service at Federal level and under laws adopted by a number of other *Länder* and also the Code of social law applicable to private sector employees. A similar increase was envisaged by the *Land* Hessen at the material time, but had not yet been adopted.

95 In that regard, the mere fact that, at a given point in time, the legislature envisages changing the law to raise the age at which a person may retire on a full pension does not mean that, from that point on, the existing law is unlawful. It must be acknowledged that any transition from one law to another will not be immediate but will take a certain amount of time.

96 As is apparent from recital 25 in Directive 2000/78, the pace of change can vary from one Member State to another to take account of the particular situation in those States. It can also differ from one region to another, in this instance from one *Land* to another, to take account of particular regional features and to enable the competent authorities to make the necessary adjustments.

97 It follows that the mere fact that a certain period of time may elapse between changes made to the law of one Member State or one *Land* and those made in another State or *Land* for the purpose of raising the age at which a person is entitled to retire on a full pension does not, by itself, mean that the legislation at issue lacks coherence.

98 Consequently, the answer to the third question is that a law such as the HBG, which provides for the compulsory retirement of prosecutors when they reach the age of 65,

does not lack coherence merely because it allows them to work until the age of 68 in certain cases or also contains provisions intended to restrict retirement before the age of 65, and other legislation of the Member State concerned provides for certain – particularly elected – civil servants to remain in post beyond that age and also the gradual raising of the retirement age from 65 to 67 years.

Costs

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

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

1. **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not preclude a law, such as the Law on the civil service of the *Land* Hessen (Hessisches Beamtengesetz), as amended by the Law of 14 December 2009, which provides for the compulsory retirement of permanent civil servants – in this instance prosecutors – at the age of 65, while allowing them to continue to work, if it is in the interests of the service that they should do so, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain**

age, and that it allows that aim to be achieved by appropriate and necessary means.

2. In order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess.

3. A law such as the Law on the civil service of the *Land* Hessen, as amended by the Law of 14 December 2009, which provides for the compulsory retirement of prosecutors when they reach the age of 65, does not lack coherence merely because it allows them to work until the age of 68 in certain cases or also contains provisions intended to restrict retirement before the age of 65, and other legislation of the Member State concerned provides for certain – particularly elected – civil servants to remain in post beyond that age and also the gradual raising of the retirement age from 65 to 67 years.

[Signatures]