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JUDGMENT OF THE COURT (Grand Chamber)

13 September 2011 (\*)

(Directive 2000/78/EC – Articles 2(5), 4(1) and 6(1) – Prohibition of discrimination on grounds of age – Airline pilots – Collective agreement – Clause automatically terminating employment contracts at age 60)

In Case C-447/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesarbeitsgericht (Germany), made by decision of 17 June 2009, received at the Court on 18 November 2009, in the proceedings

**Reinhard Prigge,**

**Michael Fromm,**

**Volker Lambach**

v

**Deutsche Lufthansa AG,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, K. Schiemann, D. Šváby, Presidents of the Chambers, R. Silva de Lapuerta, E. Juhász, P. Lindh (Rapporteur), M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Cruz Villalón,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2011,

after considering the observations submitted on behalf of:

- Mr Prigge, Mr Fromm and Mr Lambach, by E. Helmig and J. Rodríguez Nieto, Rechtsanwälte,
- Deutsche Lufthansa AG, by K. Streichardt and C. Kremser-Wolf, Rechtsanwältinnen,
- the German Government, by J. Möller and C. Blaschke, acting as Agents,
- Ireland, by D. O'Hagan, acting as Agent, assisted by D. Keane, SC,
- the European Commission, by J. Enegren and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 May 2011,  
gives the following

## **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 2(5), 4(1) and 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) ('the Directive').
- 2 The reference has been made in proceedings between, on the one hand, Mr Prigge, Mr Fromm and Mr Lambach and, on the other hand, their employer Deutsche Lufthansa AG ('Deutsche Lufthansa') concerning the automatic termination of their employment contracts at age 60 pursuant to a clause in a collective agreement.

### **Legal context**

#### *European Union ('EU') legislation*

- 3 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.
- 4 Recitals 23, 25 and 26 to the Directive state:
  - '(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate ...

...

- (25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines [in 2000, approved by the European Council of Helsinki on 10 and 11 December 1999] 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.

...

- (36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.'

- 5 Article 2 of the Directive, entitled 'Concept of discrimination', states:

'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;

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

6 Article 3 of the Directive, entitled 'Scope', states at paragraph 1(c) that it applies to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and working conditions, including dismissals and pay.

7 Article 4 of the Directive, entitled 'Occupational requirements', provides at paragraph 1:

'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

8 Article 6 of the Directive, entitled 'Justification of differences of treatment on grounds of age', states at paragraph 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.'

9 Article 16 of the Directive provides:

'Member States shall take the necessary measures to ensure that:

...

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements ... are, or may be, declared null and void or are amended.'

10 The first paragraph of Article 18 of the Directive states:

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

In order to take account of particular conditions, Member States may, if necessary, have an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.'

11 The Federal Republic of Germany made use of that option, so that the provisions of the Directive relating to discrimination on grounds of age and disability were to be transposed in that Member State by 2 December 2006 at the latest.

*Legislation governing the pilot profession*

International legislation

12 International legislation in relation to private, professional and airline pilots is developed by an international institution, the Joint Aviation Authorities, in which the Federal Republic of Germany participates. Part of that legislation, the Joint Aviation Requirements – Flight Crew Licensing 1 ('the JAR-FCL 1') was adopted on 15 April 2003.

13 The JAR-FCL 1 was published by the Federal Ministry of Transport, Construction and Housing in the *Bundesanzeiger* No 80a on 29 April 2003.

14 Paragraph 1.060 of JAR-FCL 1 states:

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

(a) Age 60-64:

The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport operations except:

- (1) as a member of a multi-pilot crew and provided that,
- (2) such holder is the only pilot in the flight crew who has attained age 60.

(b) Age 65:

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

National legislation

15 Article 20(2) of the Rules on the authorisation of aviation operations (Luftverkehrs-Zulassungsordnung), as amended by the Rules amending the provisions of air law governing crew (Verordnung zur Änderung luftrechtlicher Vorschriften über Anforderungen an Flugbesatzungen) of 10 February 2003 (BGBI. 2003 I, p. 182) provides:

'The conditions of professional qualification and the examinations in order to acquire a licence, the scope, including qualifications, length of validity, extension and renewal, as well as the other conditions of development of the rights attached to a licence or a qualification, are governed by the regulation on aviation staff ...' (Verordnung über Luftfahrtpersonal).

16 Article 4 of the First implementing regulation concerning the regulation on aviation staff (Erste Durchführungsverordnung zur Verordnung über Luftfahrtpersonal) of 15 April 2003 (Bundesanzeiger No 82b, of 3 May 2003) states:

'From the age of 60 and until the age of 65, the holder of a professional or airline pilot's licence, issued in the Federal Republic of Germany, or a licence obtained in accordance with Article 46(5) of the regulation on aviation staff may also exercise the rights conferred by that licence in aircraft with at least one pilot engaged in the commercial transportation of passengers, mail and/or freight, limited to the territory of the Federal Republic of Germany.

From the age of 65, the holder of a pilot's licence may no longer pilot an aircraft engaged in the commercial transportation of passengers, mail and/or freight.'

#### The Collective Agreement No 5a

17 The employment relationship between the parties to the main proceedings is governed by General Collective Agreement No 5a for members of Deutsche Lufthansa flight crews, in the version in force from 14 January 2005 ('Collective Agreement No 5a').

18 Article 19(1) of Collective Agreement No 5a is worded as follows:

'The employment relationship shall terminate, without notice of termination, at the end of the month on which the 60th birthday falls. ...'

#### *National legislation on employment and equal treatment*

19 Article 14 of the Law on part-time working and fixed-term contracts, amending and repealing provisions of employment law (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen) of 21 December 2000 (BGBI 2000 I, p. 1966, 'the TzBfG') states:

'(1) A fixed-term employment contract may be entered into if there are objective grounds for doing so ...'

20 The General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz), of 14 August 2006 (BGBI. 2006 I. p. 1897, 'the AGG'), transposed the Directive.

21 Paragraphs 1 to 3, 7, 8 and 10 of the AGG state:

'Paragraph 1 – Objective of the Law

The objective of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual orientation.

#### Paragraph 2 - Scope

(1) Discrimination on one of the grounds listed in Paragraph 1 is prohibited under this law as regards:

...

2. Conditions of employment and work, including remuneration and conditions for dismissal and those appearing in collective agreements and

individual employment contracts, in particular, and measures taken during the course and on termination of an employment relationship and in the case of career advancement.

...

### Paragraph 3 – Definitions

(1) There is direct discrimination if a person is treated less favourably, on a ground mentioned in Paragraph 1, than another person is, has been or would be treated in a comparable situation ...

...

### Paragraph 7 – Prohibition of discrimination

(1) Employees must not be discriminated against on a ground mentioned in Paragraph 1 ...

(2) Provisions in agreements which infringe the prohibition of discrimination in subparagraph 1 are void.

...

### Paragraph 8 – Permissible different treatment on grounds of occupational requirements

(1) A difference in treatment on any of the grounds referred to in Paragraph 1 is lawful if, by reason of the nature of the occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

...

### Paragraph 10 – Permissible different treatment on grounds of age

(1) Paragraph 8 notwithstanding, a difference of treatment on grounds of age is also permissible if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

...'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

- 22 Mr Prigge, Mr Fromm and Mr Lambach were employed for many years by Deutsche Lufthansa as pilots then flight captains.
- 23 Their employment contracts terminated in 2006 and 2007 respectively when they reached 60 years of age, pursuant to Article 19(1) of Collective Agreement No 5a.
- 24 The applicants to the main proceedings, considering themselves to be the victims of discrimination on grounds of age, contrary to the Directive and the AGG, brought an action before the Arbeitsgericht Frankfurt am Main (Frankfurt am Main Labour Court) for a declaration that their employment relationship with Deutsche Lufthansa had not terminated at the end of the month during which they reached 60 years of age and an order that Deutsche Lufthansa should continue their employment contracts.

25 The Arbeitsgericht Frankfurt am Main dismissed their action and the Landesarbeitsgericht Hessen (Higher Labour Court) dismissed their appeal. The applicants therefore lodged an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court).

26 That court states that, until the entry into force of the AGG, it considered that provisions such as Article 19(1) of Collective Agreement No 5a were valid. Indeed, in so far as Article 14(1) of the TzBfG allows the duration of an employment contract to be limited where there is an objective reason to limit it, it considered that an age limit provided for by a collective agreement could also be justified by an objective reason, within the meaning of Article 14(1).

27 The Bundesarbeitsgericht considers that, in application of the principle of autonomy of the social partners and the freedom that they have in the carrying out of their legislative power, the social partners may lay down provisions limiting the duration of employment contracts by fixing an age limit. However, as that normative power is shared with the State, the State has specified that the limitation on the duration of employment contracts must be justified by an objective reason. The social partners however have a margin of appreciation in the definition of that objective reason. It follows from those principles that fixing an age limit of 60 for Deutsche Lufthansa pilots fell within the competence of the social partners.

28 Except in the case where the age limit is based on the opportunity for the employee to obtain a retirement pension, the national court considers that the limitation of the duration of the employment contract based on the age of the employee is only justified where, because of the activity the employee performs, the passing of a certain age presents a risk. That condition is fulfilled in the case of pilots. The age-limit for pilots guarantees not only the proper performance of the activity but, in addition, protection of the life and health of crew members, passengers and persons in the areas over which aircraft fly. Age is objectively linked to the reduction of physical capabilities.

29 According to the national court, the fact that international and national rules as well as other collective agreements do not totally prohibit, but limit, acting as a pilot after age 60, confirms that the performance of that profession after that age presents a risk. In fixing the age-limit at 60, the social partners are still within the limits of their normative power.

30 The Bundesarbeitsgericht considers the fact that other collective agreements governing the pilots of other companies in Deutsche Lufthansa's group do not provide for an age-limit of 60 does not undermine the principle of equality. Those other agreements were negotiated by different social partners and for other companies.

31 The Bundesarbeitsgericht asks whether, after the entry into force of the Directive and the AGG, an interpretation of Article 14(1) of the TzBfG that is in accordance with EU law has the effect of rendering the age-limit of 60 for Deutsche Lufthansa pilots invalid.

32 According to the national court, Article 19(1) of Collective Agreement No 5a contains a difference in treatment directly based on age. It considers that the objective intended to be achieved by the limiting the age of pilots to 60 is to guarantee air traffic safety. It therefore asks whether or not that difference in treatment is contrary to the Directive and/or to the general principles of EU law.

33 Firstly, the national court asks whether the age limit provided for in Article 19(1) of Collective Agreement No 5a falls within the scope of the Directive. As it is based on the objective of air traffic safety, that measure is necessary for public security within the meaning of Article 2(5) of the Directive. However, the Bundesarbeitsgericht questions whether collective agreements may amount to 'measures laid down by national law' within the meaning of that provision.

34 Secondly, and in the event that the age-limit measure falls within the scope of the Directive, that court questions whether the objective of air traffic safety may be included among the objectives referred to in Article 6(1) of the Directive. It notes that, to interpret that provision, the Court, to date, has merely ruled on measures pursuing objectives relating to social policy without expressly ruling on measures pursuing other objectives. If the objective of guaranteeing air traffic safety is included among those referred to in Article 6(1) of the Directive, it must be ascertained whether the limitation of the age of pilots to 60 is appropriate and necessary for the achievement of that objective.

35 Finally, thirdly, the Bundesarbeitsgericht asks whether the limitation of the age of pilots to 60 can be justified by applying Article 4(1) of the Directive. Indeed, guaranteeing air traffic safety may constitute a legitimate objective allowing the imposition of an occupational requirement related to age. In that case, that court asks whether the age limit can be fixed by the social partners within the framework of a collective agreement or whether it falls within the legislative power of the State. In that regard, the national court notes that the national legislation merely limits, not prohibits, acting as a pilot between 60 and 65 years.

36 In those circumstances the Bundesarbeitsgericht decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 2(5), Article 2(4) and/or Article 6(1), first sentence, of Directive 2000/78 and/or the general Community-law principle which prohibits discrimination on grounds of age be interpreted as precluding rules of national law which recognise an age-limit of 60 for pilots established by collective agreement for the purposes of air safety?'

### **Consideration of the question referred**

#### *Preliminary observations*

37 In order to respond to the question asked, it must first be examined, on the one hand, whether the clause in the collective agreement at issue in the main proceedings falls within the scope of the Directive and contains a difference in treatment on grounds of age and, on the other hand, whether the Directive must be interpreted as precluding differences in treatment based on age from being included in collective agreement clauses such as that at issue in the main proceedings.

38 In relation to the application of the Directive, it should be noted that the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of EU law and which has been given specific expression in the Directive in the domain of employment and occupation (see, to that effect, Case C-555/07 *Küçükdeveci* [2010] ECR I-0000, paragraph 21). The prohibition of all discrimination on grounds, *inter alia*, of age is incorporated in Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter'), which, from 1 December 2009, has the same legal status as the treaties.

39 Moreover, it is apparent from both its title, preamble, content and purpose that the Directive seeks to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which include age (see Case C-499/08 *Ingeniørforeningen i Danmark* [2010] ECR I-0000, paragraph 19).

40 It follows from Article 3(1)(c) of the Directive that it applies to all persons, both in the public and private sectors, including public bodies, in relation to, *inter alia*, employment and working conditions, including dismissals.

41 In providing that the pilots' employment relationship terminates, without need for notice to terminate the employment contract, at the end of the month in which their

sixtieth birthdays fall, Article 19(1) of Collective Agreement No 5a concerns the employment conditions of those workers, within the meaning of Article 3(1)(c) of the Directive. The Directive therefore applies to situations such as those that gave rise to the dispute before the national court.

- 42 As regards the issue whether the measure in question in the main proceedings contains a difference of treatment on grounds of age for the purposes of Article 2(1) of the Directive, it should be recalled that under that provision, 'the "principle of equal treatment" means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1' of the Directive. Article 2(2)(a) of the Directive states that, for the purposes of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 of the Directive.
- 43 In this case, Article 19(1) of Collective Agreement No 5a provides that the employment relationship of a Deutsche Lufthansa pilot that falls under Collective Agreement No 5a automatically terminates when he attains 60 years of age.
- 44 Such a pilot is in a comparable situation to that of a younger pilot performing the same activity for the benefit of the same airline company and/or falling under the same collective agreement. The first pilot whose employment contract terminates automatically when he attains 60 years of age is treated in a less favourable manner, on grounds of his age, than the second.
- 45 It is therefore apparent that the measure at issue in the main proceedings operates a difference of treatment based directly on grounds of age for the purposes of Article 1 of the Directive in conjunction with Article 2(2)(a) thereof.
- 46 It should be noted that the fact that the national legislation, in this case, according to the national court, Article 14(1) of the TzBfG, may authorise, for an objective reason, a collective agreement to provide for the automatic termination of employment contracts at a specified age does not dispense with the requirement that the collective agreement at issue must be in accordance with EU law and, more particularly, the Directive (see, to that effect, Case C-45/09 *Rosenbladt* [2010] ECR I-0000, paragraph 53).
- 47 The right to collective negotiation set out at Article 28 of the Charter must, within the scope of EU law, be performed in accordance with EU law (see, to that effect, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, 'Viking Line'* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).
- 48 Therefore, where they adopt measures which fall within the scope of the Directive, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect the Directive (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 22).
- 49 Thus, it is clearly apparent from Article 16(1)(b) of the Directive that collective agreements must, the same as legislative, regulatory or administrative provisions, respect the principle implemented by the Directive.
- 50 As the national court has requested that the Court interpret Articles 2(5), 4(1) and 6(1) of the Directive, the clause of the collective agreement at issue in the main proceedings must be examined with regard to each of those provisions and the objective or objectives pursued by that measure in turn.
- 51 It is apparent from the explanations provided by the national court that the social partners provided for the automatic termination of employment contracts of pilots of 60 with the objective of guaranteeing air traffic safety. In its observations, the German government considers that the age limit agreed upon by the social partners is

necessary for the protection of health. Excluding pilots aged over 60 from air traffic allows the risk of an accident to be avoided and the health of pilots, passengers and persons in the areas over which aircraft fly to be protected. The Directive must be interpreted in light of those considerations.

*Interpretation of Article 2(5) of the Directive*

- 52 Article 2 of the Directive, entitled 'Concept of discrimination', defines the principle of equal treatment for the purposes of the Directive. Under Article 2(1), that principle is defined by the absence of any direct or indirect discrimination on any of the grounds referred to in Article 1 of the Directive.
- 53 Article 2(2) to (4) of the Directive defines the behaviour that is considered to be discrimination within the meaning of Article 2(1) of the Directive.
- 54 Under Article 2(5) of the Directive, the Directive is 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others'.
- 55 In adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of the Directive, the principles set out by that latter do not apply to measures containing differences in treatment on one of the grounds referred to in Article 1 of the Directive, on condition, however, that those measures are 'necessary' for the achievement of the abovementioned objectives.
- 56 Moreover, as Article 2(5) establishes an exception to the principle of the prohibition of discrimination, it must be interpreted strictly. The terms used in Article 2(5) also suggest such an approach (see, to that effect, Case C-341/09 *Petersen* [2010] ECR I-0000, paragraph 60).
- 57 It must therefore be examined, on the one hand, whether air traffic security is included in the objectives set out in Article 2(5) of the Directive and, on the other hand, whether Article 19(1) of Collective Agreement No 5a constitutes a measure provided for by national legislation within the meaning of that provision.
- 58 As regards air traffic safety, it is apparent that measures that aim to avoid aeronautical accidents by monitoring pilots' aptitude and physical capabilities with the aim of ensuring that human failure does not cause accidents are undeniably measures of a nature to ensure public security within the meaning of Article 2(5) of the Directive.
- 59 In relation to the issue of whether a measure adopted by way of collective agreement can be a measure provided for by national law, it must be noted, as did the Advocate General at paragraph 51 of his Opinion, that the EU legislature, at Article 2(5) of the Directive, referred to measures falling within 'national law', and that neither Article 4(1) nor 6(1) of the Directive refer to any specific legal instrument.
- 60 The Court has already held that the social partners are not bodies governed by public law (see, in the context of Article 3(10) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1), *Laval un Partneri*, paragraph 84).
- 61 That ruling does not however prevent Member States from authorising, through rules to that effect, social partners from adopting measures, within the meaning of Article

2(5) of the Directive, in the domains referred to in that provision that fall within collective agreements. Those security clearance rules must be sufficiently precise so as to ensure that they fulfil the requirements set out in the said Article 2(5).

62 In relation to the measure at issue in the main proceedings, the social partners considered that it was appropriate to limit the possibility for pilots to act as pilots to age 60 for reasons of the safety of passengers, persons in areas over which aircraft fly and the safety of pilots themselves. That measure pursues objectives relating to public security and the protection of health and falls within collective agreements.

63 However, as has been set out at paragraphs 14 and 16 herein, national and international legislation considered that it was not necessary to prohibit pilots from acting as pilots after age 60 but merely to restrain those activities. Therefore, the prohibition on piloting after that age, contained in the measure at issue in the main proceedings, was not necessary for the achievement of the pursued objective.

64 It follows from those considerations that Article 2(5) of the Directive must be interpreted as meaning that Member States may authorise, through rules to that effect, the social partners to adopt measures within the meaning of Article 2(5) in the areas referred to in that provision that fall within collective agreements on condition that those rules of authorisation are sufficiently precise so as to ensure that those measures fulfil the requirements set out in Article 2(5). A measure such as that at issue in the main proceedings, which fixes the age limit from which pilots may no longer carry out their professional activities at 60 whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and protection of health, within the meaning of the said Article 2(5).

*Interpretation of Article 4(1) of the Directive*

65 Under Article 4(1) of the Directive 'Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [of the Directive] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

66 It is apparent from the wording of that provision that, in order not to constitute discrimination, the difference in treatment must be based on a characteristic related to one of the grounds referred to in Article 1 of the Directive and that characteristic must constitute a 'genuine and determining' occupational requirement. The Court has held that it is not the ground on which the difference in treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (see Case C-229/08 *Wolf* [2010] ECR I-0000, paragraph 35).

67 As regards airline pilots, it is essential that they possess, *inter alia*, particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age (see, to that effect, with regard to the profession of fireman, *Wolf*, paragraph 41). It follows that possessing particular physical capabilities may be considered as a 'genuine and determining occupational requirement', within the meaning of Article 4(1) of the Directive, for acting as an airline pilot and that the possession of such capabilities is related to age.

68 In relation to the objective pursued by the measure, as was stated at paragraph 51 herein, the national court indicated that the social partners have provided for the automatic termination of employment contracts of pilots at the age of 60 with the aim of guaranteeing air traffic safety.

69 Such an objective constitutes a legitimate objective within the meaning of Article 4(1) of the Directive.

70 It is also necessary to examine whether, in deciding that it is from the age of 60 that airline pilots no longer possess the physical capabilities to carry out their occupational activity, the social partners imposed a proportionate requirement.

71 In that regard, it should be noted that recital 23 to the Directive states that it is in 'very limited' circumstances that a difference of treatment may be justified where a characteristic related, *inter alia*, to age constitutes a genuine and determining occupational requirement.

72 Moreover, in so far as it allows a derogation from the principle of non-discrimination, Article 4(1) of the Directive must be interpreted strictly (see, by analogy, in relation to discrimination on grounds of sex, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 36 and Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 23, as well as, in relation to Article 2(5) of the Directive, to that effect, *Petersen*, paragraph 60).

73 As was set out at paragraphs 14 and 16 herein, both national and international legislation provide that pilots may continue to carry out their activities, under certain restrictions, between 60 and 65. Thus, national and international authorities consider that, until the age of 65, pilots have the physical capabilities to act as a pilot, even if, between 60 and 65, they do so only as a member of a crew in which the other pilots are younger than 60.

74 For their part, the social partners consider that, after the age of 60, pilots falling within Collective Agreement No 5a can no longer carry out their activities, even with certain restrictions. Moreover, the reasons for which those pilots are considered as no longer possessing the physical capabilities to act as a pilot from the age of 60 are not apparent from the information in the file or the observations presented to the Court.

75 In fixing at 60 the age-limit from which airline pilots falling within Collective Agreement No 5a are considered as no longer possessing the physical capabilities to carry out their occupational activity, while national and international legislation authorise the carrying out of that activity, under certain conditions, until the age of 65, the social partners imposed on those pilots a disproportionate requirement within the meaning of Article 4(1) of the Directive.

76 It follows from those considerations that Article 4(1) of the Directive must be interpreted as precluding a clause in a collective agreement, such as that at issue in the main proceedings, that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities to carry out their professional activity while national and international legislation fix that age at 65.

*Interpretation of Article 6(1) of the Directive*

77 The first paragraph of Article 6(1) of the Directive states that a difference of treatment on grounds of age shall not constitute discrimination if it is objectively and reasonably justified, within the context of national law, 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.

78 As has been stated at paragraphs 51 and 68 herein, the national court has stated that the social partners provided for the automatic termination of employment contracts of pilots age 60 with the objective of guaranteeing air traffic safety.

79 It must be examined whether such an objective is a legitimate aim within the meaning of the first paragraph of Article 6(1) of the Directive.

80 In that regard, it must be noted that, while the list is not exhaustive, the legitimate aims set out in that provision are related to employment policy, labour market and vocational training.

81 The Court has also held that aims that may be considered 'legitimate' within the meaning of the first paragraph of Article 6(1) of the Directive 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 (see Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 46, and Case C-88/08 *Hütter* [2009] ECR I-5325, paragraph 41).

82 It is apparent from that information that an aim such as air traffic safety does not fall within the aims referred to in the first paragraph of Article 6(1) of the Directive.

83 It follows from the foregoing that the question referred should be answered as follows:

- Article 2(5) of the Directive must be interpreted as meaning that Member States may authorise, through rules to that effect, the social partners to adopt measures within the meaning of Article 2(5) in the areas referred to in that provision that fall within collective agreements on condition that those rules of authorisation are sufficiently precise so as to ensure that those measures fulfil the requirements set out in Article 2(5). A measure such as that at issue in the main proceedings, which fixes the age limit from which pilots may no longer carry out their professional activities at 60 whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and protection of health, within the meaning of the said Article 2(5).
- Article 4(1) of the Directive must be interpreted as precluding a clause in a collective agreement, such as that at issue in the main proceedings, that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities to carry out their professional activity while national and international legislation fix that age at 65.
- the first paragraph of Article 6(1) of the Directive must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision.

### **Costs**

84 Since these proceedings are, for the parties to the main proceedings, a step in the action 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 (Grand Chamber) hereby rules:

**Article 2(5) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the Member States may authorise, through rules, the social partners to adopt measures within the meaning of Article 2(5) in the areas referred to in that provision that fall within collective agreements on condition that those rules of authorisation are sufficiently precise so as to ensure that those measures fulfil the requirements set out in Article 2(5). A measure such as that at issue in the main proceedings, which fixes the age limit from which pilots may no longer carry out their professional activities at 60 whereas national and international legislation fixes that age at 65, is not a measure that is necessary for public security and protection of health, within the meaning of the said Article 2(5).**

**Article 4(1) of Directive 2000/78 must be interpreted as precluding a clause in a collective agreement, such as that at issue in the main proceedings, that fixes at 60 the age limit from which pilots are considered as no longer possessing the physical capabilities to carry out their professional activity while national and international legislation fix that age at 65.**

**The first paragraph of Article 6(1) of Directive 2000/78 must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision.**

[Signatures]

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\* Language of the case: German.