



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 7 February 2013¹

Case C-476/11

HK Danmark, acting on behalf of Glennie Kristensen
v
Experian A/S

(Request for a preliminary ruling from the Vestre Landsret (Denmark))

(Equal treatment in employment and occupation — Directive 2000/78/EC Prohibition on discrimination on grounds of age — Occupational social security schemes — Employer contributions to occupational pension — Fixed contribution system — Increases in the amount of contribution according to age — Article 6(2) of the Directive — Extent of exemption)

I – Introduction

1. May an undertaking graduate the amount of employer contributions to an occupational pension scheme according to the age of its employees or does that constitute discrimination prohibited on grounds of age? That is the question raised in the request for a preliminary ruling from the Vestre Landsret, which gives the Court of Justice the opportunity further to clarify its case-law on discrimination on the ground of age.²

2. Specifically, the Vestre Landsret wishes to know whether an occupational pension scheme which provides for contributions to be increased on the basis of age is covered by Article 6(2) of the Equal Treatment Directive.³ This is the first time that the Court of Justice has been asked to interpret this provision.⁴

1 — Original language: German.

2 — See, in that regard, the leading judgment in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 and Cases C-499/08 *Ingeniørforeningen i Danmark* [2010] ECR I-9343, '*Andersen*' and C-152/11 *Odar* [2012] ECR.

3 — 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').

4 — Another aspect of Article 6(2) of the Directive is before the Court in Case C-546/11, *Toftgaard*. See my Opinion of today's date in that case.

II – Legal framework

A – *Union law*

3. The framework for this case in EU law is determined by the Directive. Under 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. Article 2 of the Directive is entitled ‘Concept of discrimination’ and provides as follows:

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

(2) For the purposes of paragraph 1:

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

...’

5. The scope of the Directive is defined in Article 3:

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

...

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

...

(3) This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

...’

6. Article 6 of the Directive, which governs the '[j]ustification of differences of treatment on grounds of age', provides as follows:

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

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (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;

...

(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.'

B – *National law*

7. The Directive was transposed into Danish law by the Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. (Forskelsbehandlingslov) ('the Law on equal treatment').⁵

8. Article 1 of the Law on equal treatment contains a definition of the concept of discrimination which corresponds to that in Article 2 of the Directive. Paragraph 2(1) prohibits discrimination against employees, inter alia, in relation to recruitment, dismissal and pay. Paragraph 2(3) contains a basis for a claim for payment of an amount of compensation in the event of discrimination.

9. Article 6a of the Law on equal treatment transposes Article 6(2) of the Directive. Under that article:

'Notwithstanding Articles 2 to 5, the present law does not preclude the fixing of ages for admission to occupational social security schemes or the use, in the context of such schemes, of age criteria in actuarial calculations. The use of age criteria must not result in discrimination on the grounds of sex.'

III – Facts and reference for a preliminary ruling

10. Ms Kristensen was employed by Experian A/S ('Experian') from November 2007 to October 2008 as an employee in the after-sales service department.

⁵ — Law No 459 of 12 June 1996 on the prohibition of unequal treatment in the employment market. Amending Law No 1417 of 22 December 2004 incorporated the criteria of age and disability into the Law on equal treatment. The amending Law entered into force in December 2004.

11. Experian has an occupational pension scheme. There is no obligation on Experian, under either statute or a collective agreement, to offer an occupational old-age pension. The system is based on the employment contract entered into between Experian and its employee. Membership of the occupational pension scheme is mandatory for all Experian employees and commences automatically after nine months of working for the company. The scheme provides for Experian to pay two thirds of the contributions and the employee in each case to pay the remaining third. The amount of the contributions is determined by a percentage of the basic salary and is graduated as follows:

- Employees under 35 years of age: employee contribution 3% – Experian contribution 6%;
- Employees aged between 35 and 45 years: employee contribution 4% – Experian contribution 8%;
- Employees aged over 45 years: employee contribution 5% – Experian contribution 10%.

12. Ms Kristensen was 29 years of age when she entered into employment with Experian. Accordingly, Experian paid 6% of her basic salary into the occupational pension scheme, as provided for in the contract of employment. Ms Kristensen's monthly remuneration thus consisted of the agreed basic salary in the amount of DKK 21 500.00, plus the employer's occupational pension contribution in the amount of 6%, so that her total salary amounted to DKK 22 790.00 per month. If Ms Kristensen had been between the ages of 35 and 45 she would have received DKK 23 220.00 per month, on the basis of the higher employer contribution to the occupational pension and, if she had been over 45, she would have received DKK 23 650.00 per month.

13. The applicant in the main proceedings, the Handels- og Kontorfunktionærernes Forbund Danmark (HK),⁶ acting on behalf of Ms Kristensen, considers that that amounts to an infringement of the prohibition on discrimination on the ground of age pursuant to Article 2 of the Law on equal treatment and is seeking compensation and back payment of the pension contributions.

14. In the view of the referring court the question arises whether the interpretation proposed by Experian to the effect that insurance contributions which increase with age are permissible under Article 6a of the Law on equal treatment is compatible with Article 6(2) of the Directive.

15. Accordingly, the Vestre Landsret stayed the proceedings by order of 14 September 2011, lodged at the Court Registry on 19 September 2011, and referred the following questions to the Court of Justice for a preliminary ruling:

- '(1) Must the exception in Article 6(2) of [the Directive] concerning the determination of age limits for admission or entitlement to retirement or invalidity benefits be interpreted as allowing Member States able generally to except occupational social security schemes from the prohibition in Article 2 of the directive of direct or indirect discrimination on grounds of age in so far as that does not bring about discrimination on grounds of sex?
- (2) Must the exception in Article 6(2) of [the Directive] concerning the determination of age limits for admission or entitlement to retirement or invalidity benefits be interpreted as not precluding a Member State from maintaining a legal situation in which an employer can pay, as part of pay, pension contributions which increase with age with the result, for example, that the employer pays a pension contribution of 6% for employees under 35, 8% for employees from 35 to 44 and 10% for employees over 45, provided that does not lead to discrimination on the ground of sex?'

6 — Danish Association of commercial and office employees.

IV – Proceedings before the Court of Justice

16. HK, Experian, the Danish Government and the European Commission have lodged written and oral submissions in the proceedings before the Court. In addition, the Belgian, German, Netherlands, and Spanish Governments have lodged written submissions.

V – Legal assessment

First question

17. In regard to the first question referred for a preliminary ruling by the Vestre Landsret I, like the Commission, have doubts as to whether the question is relevant to the outcome of the dispute. Whether the specific pension scheme is covered by the Directive may be inferred from the answer to the second question referred, so that an interpretation of Article 6(2) going beyond that is not necessary for the determination of the main proceedings. I shall not therefore answer the first question referred.

Second question

18. By its second question the Vestre Landsret wishes to know whether the Directive allows a Member State to maintain in force a legal situation in which an employer provides for contributions which increase with age in the context of occupational pensions.

19. In principle, the Directive prohibits discrimination in employment and occupation. However, Article 6 allows the Member States to provide for certain cases where specific measures do not constitute discrimination on the ground of age. Denmark availed itself of the power laid down by Article 6(2) and incorporated the provision into national law by means of Article 6a of the Law on equal treatment. It is clear from the reference for a preliminary ruling that the Danish Ministry for Work interprets Article 6a of the Law on equal treatment as meaning that an occupational pension scheme, such as that operated by Experian, falls under that provision and is therefore lawful.

20. The question is therefore whether that interpretation is compatible with Article 6(2) of the Directive. Essentially, it must therefore be considered whether an occupational pension scheme, such as that operated by Experian, may be brought within the terms of Article 6(2).

1. Applicability of the Directive

21. First of all it must be determined whether the Directive applies. Article 3(1)(c) of Directive 2000/78 provides that the Directive is to apply ‘within the limits of the areas of competence conferred on the Community, to all persons, as regards both the public and private sectors, including public bodies, in relation to employment and working conditions, including dismissals and pay’.

22. However, in the light of Article 3(3) read in conjunction with recital 13 in the preamble to the Directive, its scope excludes social security or social protection schemes, the benefits of which are not equivalent to ‘pay’ within the meaning given to that term for the application of Article 157 TFEU, and payments of any kind made by the State with the aim of providing access to employment or maintaining employment.⁷

⁷ — See Case C-147/08 *Römer* [2011] ECR I-3591, paragraph 32, and Case C-267/06 *Maruko* [2008] ECR I-1757, paragraph 41.

23. As the Commission and Belgian Government also state, the applicability of the Directive depends in the present case on whether the employer's contributions to the occupational pension may be equated with pay within the meaning of Article 157(2) AEUV.⁸ That is in my opinion the case.

24. According to the settled case-law of the Court of Justice, 'pay' within the meaning of Article 157(2) TFEU includes 'any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.'⁹ As Advocate General Jääskinen most recently pointed out in his Opinion in the *Römer* case,¹⁰ the Court of Justice thus interprets the concept of pay widely to include all kinds of pension benefits.

25. With regard to occupational pension payments, the Court of Justice has in this connection already determined that they are to be regarded as pay.¹¹ It is true that the present case, unlike *Barber*¹² and the other cases cited,¹³ concerns not the payment of the pension to an employee in retirement but the regular contributions made by the employer to the pension scheme. The payments by Experian are thus not fixed payments to an employee (defined payment schemes) but fixed contributions to the pension (defined contribution schemes). However, payments of contributions are also to be regarded as pay.

26. First of all, the contributions constitute current regular remuneration since they are made monthly for every Experian employee after nine months' employment. Secondly, the obligation to pay arises exclusively out of the employment contract and the contribution payment is made exclusively for Experian employees.¹⁴ It is therefore made directly on the basis of the employment relationship and as consideration for employment with Experian. It is true that the payment is not made directly to the employee himself but to his personal pension account. Upon enquiry by the Court at the hearing, Experian stated, however, that each employee has access to his own pension account and decides himself how to invest the savings amount in order later to draw a pension. Accordingly, the amount of the contribution is to be regarded as pay within the meaning of Article 157(2) TFEU.¹⁵

2. Unequal treatment within the meaning of Article 2(2) of the Directive

27. As is apparent from Article 1 read in conjunction with Article 2(1), the Directive prohibits both direct and indirect discrimination on the ground of age in employment or occupation; any unjustified unequal treatment is to be regarded as discrimination.¹⁶

8 — Since this case relates to a purely occupational pension scheme and not a State payment system or one equated thereto, the exception in Article 3(3) of the Directive plainly does not apply. In particular the payments are not governed directly by statute but exclusively by the employment contract and only apply to a specific group of employees, namely employees of Experian. See Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 22.

9 — See Case 80/70 *Defrenne* [1971] ECR 445, paragraph 6; Case 12/81 *Garland* [1982] ECR 359, paragraph 5; *Barber*, cited in footnote 8 above, paragraph 12; and *Römer*, cited in footnote 7 above, paragraph 32.

10 — Opinion in *Römer*, cited in footnote 7 above, point 54.

11 — See Case 170/84 *Bilka* [1986] ECR 1607, paragraph 22; *Barber*, cited in footnote 8 above, paragraph 28; and Case C-50/96 *Schröder* [2000] ECR I-743, paragraph 27. See also the thirteenth recital in the preamble to Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), which states: '[i]n its judgment of 17 May 1990 in Case C-262/88, the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty'.

12 — See *Barber*, cited in footnote 8 above.

13 — See footnote 11.

14 — *Barber*, cited in footnote 8 above, paragraph 25.

15 — That result also accords with Case C-152/91 *Neath* [1993] ECR I-6935, paragraph 29, in which the Court looked at the specific contractual obligation of the employer when considering the question of classification of a payment as pay. In the case of Experian, the contract of employment provides only that the payment of the contribution is an obligation. It lays down no obligation as to the later payment of a pension.

16 — See, in that regards, my Opinion in *Andersen* (cited in footnote 2 above, point 28) and the references made therein, and the last sentence of the 25th recital in the preamble to the Directive: '[i]t is therefore essential to distinguish between differences in treatment which are justified ..., and discrimination which must be prohibited'.

28. Pursuant to Article 2(2)(a) in conjunction with Article 1 of the Directive, direct discrimination on the ground of age is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation; in other words the underlying unequal treatment is directly linked to age.

29. As the referring court states, the pay of Experian employees comprises the basic pay for each individual and the pension contributions which increase with age. Since Ms Kristensen was under 35 years of age during her employment, the employer's contribution paid in her regard to the pension scheme amounted to 6% of her basic salary. Her monthly total remuneration (basic salary + 6% employer's contribution) was therefore lower than the amounts that an older employee would have received (basic salary + 8% employer's contribution, for employees over 35, and basic salary + 10% employer's contribution, for employees over 45). The smaller amount of remuneration and thus the less favourable treatment is directly linked to age. Experian's occupational pension scheme therefore gives rise to direct discrimination on the ground of age within the meaning of Article 2(2)(a) read in conjunction with Article 1 of the Directive.

3. Justification of differences of treatment

30. Graduated pension contributions do not however unlawfully discriminate on the ground of age if the differences of treatment are justified.

a) Justification under Article 6(2) of the Directive

31. Experian takes the view that the pension scheme falls under Article 6(2) of the Directive and is therefore justified. HK takes the opposite view. HK also argues that Article 6(2) does not apply to this case in any event.

i) Applicability of Article 6(2) of the Directive

32. Article 6(2) makes provision for age-related differential treatment in the context of occupational social security schemes. HK challenges the provision's applicability to this case, arguing that there is no discrimination in the context of such a scheme but rather that discrimination occurs at an earlier stage, namely at the time of the payment. Experian cannot therefore rely on Article 6(2). However, I am not persuaded by that argument.

33. The payment by Experian is made to the pension scheme account of the relevant employee as a contribution to the occupational pension scheme. It is therefore without doubt a payment in the context of the occupational pension scheme. As stated above,¹⁷ that payment is to be regarded as pay within the meaning of Article 157(2) TFEU, which is a requirement for the applicability of the Directive.

34. Were one, however, to argue, as HK does, that Article 6(2) does not apply where the payments in the context of an occupational social security scheme constitute pay, Article 6(2) would be rendered devoid of purpose. Affirmation of the Directive's applicability to occupational social security schemes would then automatically result in Article 6(2) being rendered inapplicable. The fact that, in order for it to be applicable to such schemes, the Directive requires the specific employer's contribution to be equated to pay, while simultaneously containing an exception for occupational social security schemes, shows that HK's argument is incorrect and that classification of a payment as pay cannot automatically exclude the applicability of Article 6(2).

¹⁷ — See point 22.

35. Therefore, the employer's contributions constitute a payment in the context of an occupational social security scheme, with the result that Article 6(2) of the Directive is applicable.

ii) The requirements laid down by Article 6(2)

36. The question then arises whether the occupational pension scheme at issue is covered by the provision. Article 6(2) contains three variants¹⁸ permitting the application of age criteria: first, the fixing of age limits as a prerequisite for the membership of an occupational social security scheme,¹⁹ secondly, the fixing of age limits for drawing an old age pension or disability benefits and, thirdly, the application of age limits for actuarial calculations.

– Age limits as a condition of membership

37. The first variant of Article 6(2) allows the fixing of age criteria as a condition of membership of occupational social security schemes. The difference in treatment in relation to the amount of contribution on the basis of the age of the employee would therefore be justified if the increases in line with age represented a condition of membership of Experian's pension scheme.

38. When interpreting Article 6(2), it must be borne in mind that the Directive does not itself lay down the principle of equal treatment in the field of employment and work, which has its source in various international instruments and in the constitutional traditions common to the Member States. The Directive merely seeks to lay down a general framework for combating various forms of discrimination in those areas, including on the ground of age.²⁰ The Court has recognised the prohibition on discrimination on the ground of age as an expression of this general principle of Union law.²¹ The Directive merely gives specific effect to that principle.²² In addition, Article 6(1) TEU recognises the Charter of fundamental Rights of the European Union and the Treaties as having the same legal value. Article 21(1) of the Charter prohibits 'any discrimination based on ... age'. For that reason, exceptions to the prohibition on discrimination must be interpreted narrowly.²³

39. HK and the Spanish Government are therefore of the view that Experian's pension scheme is not covered by Article 6(2) of the Directive. They argue that increases in line with age do not represent a 'condition' of membership. Since each employee is automatically a member of the occupational pension scheme after nine months' employment, membership as such is independent of age. The increases in line with age rather concern unequal treatment in regard to the form which membership takes, in other words the nature of membership, which is not covered by Article 6(2).

40. However, I share the view of Experian, the German, Belgian and Netherlands Governments and the Commission that Article 6(2) does apply to this case. It is true, as HK and Spain correctly state, that exceptions to the prohibition on discrimination are to be interpreted narrowly.²⁴ The requirement as to narrow interpretation does not, however, preclude measures which are more lenient than measures which would be permitted even if interpreted more narrowly. That is the situation here.

18 — This applies at least as regards the German, French, English, Spanish and Italian language versions of the Directive which I have compared. At first sight, the wording of the Danish language version of the Directive contains only two variants, namely membership of occupational social security schemes ('*adgang til*') and the use, in those schemes, of age criteria in actuarial calculations ('*anvendelse af alderskriteriet inden for rammerne af disse ordninger*'). However, that difference is, in my view, of no relevance in the present case, since the fixing of age limits for membership is also referred to in the Danish language version of the Directive and Experian's retirement scheme is already justified by virtue of the first variant.

19 — It does not, however, include membership of all occupational social security schemes but only of those which relate to old age or disability. See on this my Opinion in Case C-546/11 *Toftgaard*, of today's date.

20 — Case C-144/04 *Mangold* [2005] I-9981, paragraph 74, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 20.

21 — See *Mangold*, cited in footnote 20 above, paragraph 75.

22 — See *Kücükdeveci*, cited in footnote 20 above, paragraph 21.

23 — See Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 60.

24 — See also, in that regard, point 38 of this Opinion.

41. On its plain wording, Article 6(2) of the Directive permits age limits as a condition for membership. Experian could therefore offer a scheme where, for example, employees under 35 were categorically excluded from the occupational pension scheme. Being excluded from membership undoubtedly has more far reaching consequences for an employee than being admitted on lower contributions.

42. However, if membership itself can be made conditional on particular age limits, it should also be possible to offer a scheme whereby all employees irrespective of age may be members of the occupational pension scheme and only the specific amount of the contribution differs according to age. Otherwise the Directive would have the contradictory outcome of prohibiting a milder form of unequal treatment, while permitting a more far-reaching form of unequal treatment.

43. The increases in line with age provided for by Experian represent a less restrictive solution than age limits under which participation is categorically excluded. It is therefore covered by the first variant of Article 6(2) of the Directive.

– Requirement of an additional test of proportionality

44. Some of the parties to the proceedings disagreed over whether there ought to be a proportionality test in the context of Article 6(2). HK considers that there should be, pointing out that Article 6(2) constitutes an exception to the prohibition on discrimination and so must always be proportionate. Experian and the Danish Government take the opposite view. In their opinion Article 6(2) contains a ‘general’ exception to the prohibition on discrimination on the ground of age, so that a proportionality test is not required. I agree.

45. First of all, the wording of the provision when compared to Article 6(1) supports that interpretation. Although Article 6(1) provides for a proportionality test, there is no such requirement in Article 6(2). If the legislature had required an additional test of proportionality, it would have done so expressly. It follows *a contrario* that no such proportionality test is necessary in the context of Article 6(2).

46. This difference between Article 6(1) und (2) is also clear from the drafting history of the provision. The original draft directive contained only rules on old-age pensions as a further sub category of Article 5,²⁵ (which later became what is now Article 6(1)). Article 5 expressly required that differences of treatment to be ‘objectively and reasonably justified by a legitimate aim and ... appropriate and necessary to the achievement of that aim’. Later drafts of the Directive contained the rules on occupational pensions now in Article 6(1),²⁶ and were therefore subject to the condition of a test of proportionality.

47. As is clear from the document of the Council of the European Union of 20 October 2000 (No. 12494/00, p. 15) the rules on occupational social security schemes were inserted only at a later stage and finally framed in a new paragraph (see the proposal for Article 6(3) in the Council document, which corresponds to the current Article 6(2) of the Directive). The wording on the proportionality test in Article 6(1) was not, however, incorporated. The 25th recital in the preamble to the Directive was inserted²⁷ in this connection, and stipulates that differences in treatment in connection with age require specific provisions which may vary in accordance with the situation in Member States. The fact that the legislature formulated a new paragraph with different wording for occupational social

25 — See Article 5(b) and (c) of the Commission’s Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation of 25 November 1999, COM(1999) 565 final, p. 23.

26 — See the version of Article 6(1) in the document of the Council of the European Union of 11 October 2000 (No 12269/00, p. 15), which mentions the phrase ‘occupational social security schemes’. Occupational social security schemes were first mentioned in the European Union Council document of 1 March 2000 (No 6434/00, p. 4(g) and in Article 5(b)).

27 — See the annex to the document of the Council of the European Union of 12 October 2000 (No 12270/00 ADD 1, p. 5).

security schemes shows that such schemes are subject to different conditions in regard to the prohibition on discrimination than measures under Article 6(1). Otherwise it might have been possible to let the rule stand as a further subsection of Article 6(1) or expressly to require a proportionality test.

48. The broader scheme of the Directive also reinforces that reading. As the Danish Government states, there are rules at other points in the Directive which expressly require a proportionality test and others which do not. So, for example, Article 3(4), which relates to the armed forces, provides for an exception to the principle of age discrimination without expressly requiring a proportionality test. Article 4(1), on the other hand, provides that a difference of treatment in occupational life constitutes discrimination only ‘provided that the objective is legitimate and the requirement is proportionate’. Thus the legislature laid down a clear distinction between situations which are in principle excepted from the prohibition on discrimination and those which are subject to an additional proportionality test.

49. That interpretation also corresponds to the purpose of Article 6(2). The aim of the provision is to remove obstacles which stand in the way of broadening occupational provision for old age and to guarantee the functionality of occupational pension schemes. Since the existing rules in the various Member States are both very varied and highly complex, it is appropriate that the Member States should have a broad discretion in that context.²⁸

50. It follows from the above that, contrary to the view of HK, an additional proportionality test is not necessary. Against that background, it is true that one might wonder whether Article 6(2) infringes the Charter on the basis that it provides for a blanket exception to the prohibition on discrimination, but does not require a proportionality test. The validity of that provision is not, however, the subject of this reference for a preliminary ruling.

– Interim conclusion

51. In sum, it may be said that the pension scheme offered by Experian is covered by Article 6(2) of the Directive.

b) Justification under Article 6(1) of the Directive

52. If the Court does not share that view, it is necessary to consider justification under Article 6(1) of the Directive. Experian relies on this in the alternative. Although the referring court did not ask for an interpretation of Article 6(1) of the Directive, in order to provide it with a useful answer I shall none the less give my view in the alternative.

53. Article 6(1) of the Directive states that a difference of treatment on the ground 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.²⁹ Ultimately, therefore, what matters is that the underlying measure is based on a legitimate aim and meets the proportionality test.³⁰

28 — See in that regard the document of the Council of the European Union of 11 October 2000 (No 12270/00 ADD 1, p. 3) in which the United Kingdom refers to that discretion.

29 — See *Odar*, cited in footnote 2, paragraph 37.

30 — See my Opinion in *Andersen*, cited in footnote 2, points 42 to 47.

54. It is a matter for the national court, which alone is responsible for determining the facts of the dispute before it, as well as for the interpretation of the applicable national law, to determine whether and, where appropriate, to what extent ‘legitimate’ aims within the meaning of Article 6(1) of the Directive may justify a provision. The Court of Justice may, however, give the national court guidance for an interpretation in its ruling.³¹

i) Legitimate aim

55. So far as the purpose of a measure is concerned, the Court has already determined that the Member States and, if appropriate, the social partners at national level enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.³² In each case, however, the aims in question must be socio-political in nature, such as those relating to employment and working conditions or professional training.³³

56. Experian claims that graduating contributions by age is intended to enable older employees to save a sufficient sum in their pension account, even if they only begin their career with Experian at a late stage in their working life.

57. Secondly, it is the intention that younger staff be included in the pension scheme at an early stage. However they also generally have an interest in having a greater proportion of their salary available to them rather than it being invested in a pension. Graduating contributions by age (including employee contributions) is thus intended to contribute to reducing the burden on younger employees.

58. With the aim of enabling older employees to save a sufficient sum to realise worthwhile pension payments even where the period over which they make contributions is shorter and younger employees to be included in the pension scheme at an early stage, without placing an excessive financial burden on them through contributions aimed at an as yet distant goal, the Experian pension scheme is pursuing legitimate socio-political goals in the fields of employment policy and the labour market. Seen in the context of those objectives, a difference in treatment based on age is in principle justifiable in the light of the employment-related advantages which arise (see Article 6(1), read in conjunction with Article 6(2)(b), of the Directive).

59. Yet it remains to be determined whether, in order to attain those legitimate aims, it is proportionate to increase the employer’s contributions with the increasing age of the employee. As is clear from the wording of Article 6(1), graduation by age is proportionate if it is ‘appropriate and necessary’ and leads to the aims in view being attained without excessively prejudicing younger workers.

ii) Measure not manifestly unsuitable

60. Graduation by age grading is ‘appropriate’ if it is likely to attain the aim in view, that is to say, to enable older employees to save up a sufficiently large sum on their pension account and to enable younger employees to take part in the scheme at an early stage, without at the same time burdening them too heavily financially.

31 — Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraphs 47 and 48, and Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 40 and the case-law cited.

32 — See *Mangold* cited in footnote 20 above, paragraph 63, and *Palacios de la Villa*, cited in footnote 2 above, paragraph 68.

33 — See *Age Concern England* cited in footnote 31 above, paragraphs 47 and 48; Case C-88/08 *Hütter* [2009] ECR I-5325, paragraph 41; and Case C-447/09 *Prigge and Others* [2011] ECR I-8003, paragraph 80 et seq.

61. In light of the wide discretion enjoyed by the Member States in regard to the choice of measures for attaining their aims in the field of employment and social policy,³⁴ the role of the Court is limited to ensuring that the measures taken do not appear *unreasonable*,³⁵ or to put it another way, that the measures taken are *not clearly inappropriate* for attaining the aim pursued.³⁶

62. Graduating contributions by age does not appear to be inappropriate for attaining the aims sought. It is entirely understandable that a higher contribution amount is necessary for older employees who begin their career with Experian late and therefore pay into the pension scheme over a shorter period, so that at the end of their career they have a sufficient amount to their credit. The Experian scheme also allows younger employees to participate.

iii) Necessity

63. The graduation of contributions by age must in addition also be necessary. A measure is ‘necessary’ where the legitimate aim pursued could not have been achieved by more lenient and equally suitable means.

64. A less stringent alternative that may be contemplated in order to ensure that older employees have a sufficient amount to their credit on their pension account would be to treat all employees in the same way in regard to contributions (corresponding to the percentages which currently apply to employees over 45). The aim of not overburdening younger employees could not however be attained by this means, since under this scenario the employee contributions would be correspondingly higher as well.

65. What may also be problematic is the fact that Experian provides for flat-rate higher contributions to be paid by all older employees without taking into account whether their need is in fact greater. The increase in contributions in fact benefits every older employee regardless of whether he or she is an employee with many years’ service who has been able to save up contributions at Experian over a long period (and accordingly does not have an increased need for contribution amounts), or a new employee (who may not hitherto have saved anything or only small amounts). Nor, moreover, is there any differentiation in the case of new employees according to whether they already have a sufficient occupational pension as a result of earlier employment.

66. The question is therefore whether a graduation of contribution amount based on need or possibly a graduation of contribution amounts according to the (theoretically possible) duration of the working period may be considered a less stringent and equally effective measure for the attainment of the aims pursued.

34 — *Palacios de la Villa* (cited in footnote 2 above, paragraph 68); *Mangold* (cited in footnote 20 above, paragraph 63); *Age Concern England* (cited in footnote 31 above, paragraph 51); and *Küçükdeveci*, cited in footnote 20 above, paragraph 38; see to the same effect the 25th recital in the preamble to the Directive, which states that differences in treatment in connection with age ‘require specific provisions which may vary in accordance with the situation in the Member States’ (cited in *Palacios de la Villa*, cited in footnote 2 above, paragraph 69).

35 — *Palacios de la Villa* (cited in footnote 2 above, paragraph 72) and *Petersen* (cited in footnote 23 above, paragraph 70).

36 — See my Opinion in *Andersen* (cited in footnote 2 above, point 54).

67. However, in this respect regard must be had to the margin of discretion enjoyed by the Member States in the field of social policy.³⁷ It is true that that discretion must not be allowed to undermine the principle of the prohibition of discrimination on the ground of age.³⁸ Yet it is in principle possible, for reasons of simplification, to dispense with examination of the individual case and to allocate employees to specific categories by means of a standardised categorisation on the basis of general criteria.³⁹ Consequently, only such (less stringent) measures may be required as are feasible in the context of a functional scheme and are economically viable.

68. In addition, it must be borne in mind that it is not the task of an undertaking to provide an occupational pension scheme tailored to the individual need of each employee. Securing a sufficient basic pension provision is rather the task of the State system to which the Directive does not apply. It can therefore only be relevant that the occupational pension scheme in question is itself properly provided for. Experian wishes to offer its employees a functioning occupational pension scheme, irrespective of the commencement date of their period of employment and of their earlier employment. In addition, Experian argued that it is not technically possible for the individual needs of an employee to be verified. For this reason it is presumably also not possible to offer contributions graduated according to need.

69. A further problem could arise in that the amount of the total contribution to the pension scheme is structured variably. With regard to the inclusion of younger employees from whom a lower amount of provision for old age is initially required, the question arises whether that can also be attained merely by a variable structuring of the employee contribution where the employer's contribution remains the same. The employer's contribution has no actual effect on the net salary actually available to younger employees. Whether the employer's contribution is higher or lower is therefore not 'noticeable' by the younger employee; only the employee contribution has a direct effect on the actual monthly amount available to the employee. Whether that amounts to an (economically) reasonable alternative cannot be determined in the light of the information available. It is thus a matter for the national court to consider.

iv) No excessive disadvantaging

70. Even if graduation by age is the least restrictive means of attaining the legitimate aims pursued, it remains to be determined whether the rules give rise to younger employees being placed at an excessive disadvantage. According to the principle of proportionality, measures which adversely affect a right guaranteed by EU law – here the prohibition of discrimination on the ground of age – must not occasion disadvantages for the individual which are disproportionate to the aims pursued.⁴⁰

71. In this connection, it must be borne in mind that the system is obligatory for all employees who therefore do not have the choice of opting out of contributing to the pension scheme and having the corresponding contributions paid out to them instead. Moreover, Experian's argument that younger employees who seek a higher total salary could negotiate this individually is not persuasive. It cannot be for an individual employee to prevent or iron out by means of individual negotiation the less favourable treatment on the ground of age that is inherent in a system. That applies *a fortiori* owing to the weaker negotiating position in which an employee normally finds himself in relation to an employer.

37 — See paragraph 55 of this Opinion

38 — *Age Concern England*, cited in footnote 31 above, paragraph 51 and the case-law cited. See also my Opinion in *Andersen*, cited in footnote 2 above, point 63 and in Case C-19/02 *Hlozek* [2004] ECR I-11491, point 59.

39 — See, also, my Opinions in *Andersen* (cited in footnote 2 above, point 62) and *Hlozek* (cited in footnote 38 above, points 57 and 58).

40 — See my Opinion in *Andersen*, cited in footnote 2 above, points 67 and 68, together with the judgments in Case 265/87 *Schröder* [1989] ECR 2237, paragraph 21; Joined Case C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 47; Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 68; and *Andersen*, cited in footnote 2 above, paragraph 47.

72. In this case it is not however to be ruled out that the disadvantages of the unequal treatment are offset by the corresponding advantages. It is true that the unequal treatment amounts to up to 4% of the basic salary and therefore, in the case of Ms Kristensen, to DKK 860⁴¹ less per month. That is without question a significant sum. Yet it must be remembered that Ms Kristensen derives benefit from the Experian occupational pension scheme first of all because monthly contributions are made to her old age pension. Secondly, lower employer's contributions also mean lower employee contributions so that Ms Kristensen herself only had to transfer 3% of her basic salary to her pension account. Had she been over 45 years of age her own percentage would have been 5%. However, these are matters to be weighed up in the final analysis by the national court.

v) Interim conclusion

73. In summary, a measure such as that at issue in the present case can be justified, provided that the graduation by age of contributions provided for pursues the aim of enabling older employees to save up a sufficient pension amount even if they start work at the undertaking in question later in their career, and graduation by age is at the same time intended to include younger employees in the occupational pension scheme at an early stage without overburdening them with pension contributions in their initial years of service. However, that applies only in so far as no other equally appropriate practicable measures for attaining those aims can be taken by economically reasonable means, which have a less disadvantageous effect on younger employees, and the disadvantages of unequal treatment are also not out of proportion to the advantages of the scheme.

vi) Promotion of loyalty to the employer

74. The Belgian Government also points out that the measure could also be intended to bind employees to the undertaking for longer. Experian did not comment at the hearing on whether graduation by age was also intended to pursue this goal. It is therefore a matter for the national court to inquire whether this is the case and whether graduated contributions amount to a kind of premium on loyalty to the employer.

75. If that were the case, that would in principle be a legitimate aim. Graduation by age also appears, at least in regard to younger employees, appropriate to bind employees to the undertaking for longer. It must however be borne in mind that graduation of contributions is not related to the period of employment in the undertaking but is granted irrespective of that factor and thus also benefits employees who commence employment with Experian only very late in their career. Graduation by age is therefore not necessary on that score alone. Rather the more lenient and effective means of linking the amount of the contribution to participation in the undertaking rather than to age could be considered. That is for the national court to consider if it includes that aim within its purview.

VI – Conclusion

76. I therefore propose that the Court should answer the questions referred to it as follows:

- (1) Article 6(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation allows a Member State to maintain in force a legal situation in which an employer may, as part of pay, make contributions graduated by age to an occupational pension scheme by, for example, paying a pension contribution of 6% for employees under 35 years of age, 8% for employees between 35 and 44 years of age and 10% for employees over 45 years of age.

⁴¹ — DKK 860 at the time of the application before the national court was equivalent to approximately EUR 115.50.

- (2) Such a pension scheme can also be justified under Article 6(1) of Directive 2000/78 provided that the graduation by age of contributions provided for pursues the aim of enabling older employees to save up a sufficient pension amount even if they start work at the undertaking in question later in their career and graduation by age at the same time is intended to include younger employees in the occupational pension scheme at an early stage without overburdening them with pension contributions in their initial years of service. However, that applies only in so far as no other equally appropriate practicable measures for attaining those aims can be taken by economically reasonable means, which have a less disadvantageous effect on younger employees and the disadvantages of unequal treatment are also not out of proportion to the advantages of the scheme.