

PETERSEN

JUDGMENT OF THE COURT (Grand Chamber)

12 January 2010\*

In Case C-341/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Sozialgericht Dortmund (Germany), made by decision of 25 June 2008, received at the Court on 24 July 2008, in the proceedings

**Domnica Petersen**

v

**Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,**

joined parties:

**AOK Westfalen-Lippe,**

\* Language of the case: German.

**BKK-Landesverband Nordrhein-Westfalen,**

**Vereinigte IKK,**

**Deutsche Rentenversicherung Knappschaft-Bahn-See — Dezernat 0.63,**

**Landwirtschaftliche Krankenkasse NRW,**

**Verband der Angestellten-Krankenkassen eV,**

**AEV — Arbeiter-Ersatzkassen-Verband eV,**

**Kassenzahnärztliche Vereinigung Westfalen-Lippe,**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President of the Third Chamber, acting for the President, E. Levits, P. Lindh (Rapporteur), Presidents of Chambers, C.W.A. Timmermans, A. Rosas, P. Küris, A. Borg Barthet, A. Ó Caoimh and L. Bay Larsen, Judges,

Advocate General: Y. Bot,  
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2009,

after considering the observations submitted on behalf of:

- Ms Petersen, by H.-J. Brink, Rechtsanwalt,
  
- the German Government, by M. Lumma and N. Graf Vitzthum, acting as Agents,
  
- Ireland, by D. O'Hagan, acting as Agent, assisted by P. McGarry BL,
  
- the Italian Government, by I. Bruni, acting as Agent, assisted by M. Russo, avvocato dello Stato,
  
- the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Commission of the European Communities, by V. Kreuzschitz, J. Enegren and B. Conte, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 3 September 2009,

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of Article 6 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').
  
- <sup>2</sup> The reference was made in the course of proceedings between Ms Petersen and the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (Appeals board for dentists for the district of Westphalia and Lippe) concerning the board's refusal to authorise Ms Petersen to practise as a panel dentist after the age of 68 years.

## Legal context

### *Community legislation*

3 The Directive was adopted on the basis of Article 13 EC. Recitals 9, 11 and 25 in the preamble to the Directive read as follows:

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

...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

...

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to

distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.’

4 As stated in Article 1 of the Directive, its purpose is ‘to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’.

5 Article 2 of the Directive 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(1)(a) and (c) of the Directive provides:

‘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:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

(c) employment and working conditions, including dismissals and pay’.

7 Article 6(1) of the Directive provides:

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

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.’



- 8 In accordance with the first paragraph of Article 18 of the Directive, it was to be transposed into the legal systems of the Member States by 2 December 2003 at the latest. The second paragraph of Article 18 provided, however, that:

‘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 ...’

- 9 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.

### *National legislation*

- 10 The General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897, ‘the AGG’) transposed the Directive. That law did not abolish or amend the age limit applicable to panel dentists, set out below.
- 11 The Law on the safeguarding and structural improvement of the statutory health insurance scheme (Gesetz zur Sicherung und Strukturverbesserung der gesetzlichen Krankenversicherung) of 21 December 1992 (BGBl. 1992 I, p. 2266, ‘the GSG 1993’) introduced a maximum age limit for panel doctors, which, since 14 November 2003, has appeared in the third sentence of Paragraph 95(7) of Book V of the Social Security Code (Sozialgesetzbuch, BGBl. 2003 I, p. 2190, ‘the SGB V’).

12 That third sentence of Paragraph 95(7) provides that, from 1 January 1999, admission to practise as a panel doctor expires at the end of the calendar quarter in which the panel doctor completes his 68th year.

13 Under the second sentence of Paragraph 72(1) of the SGB V, that provision applies by analogy to panel dentists.

14 The referring court explains that the age limit was an accompanying measure to Paragraph 102 of the SGB V, which introduced an admission system for doctors (dentists) based on regional demand, likewise applicable from 1 January 1999.

15 The statement of reasons for the GSG 1993 reads as follows:

‘The growth in the number of panel doctors represents a significant cause of excessive rises in expenditure in the statutory health insurance scheme. In view of the constantly increasing number of panel doctors, there is a need to limit the number of panel doctors. The surplus supply cannot be curbed only by restrictions on admission, at the expense of the young generation of doctors. To that end, the introduction of a mandatory age limit for panel doctors is also necessary.’

<sup>16</sup> According to the information provided by the referring court, that age limit applies subject to the following four exceptions, the first three of which are in the relevant legislation, while the fourth follows from it:

- The person concerned had practised as a panel doctor (dentist) for less than 20 years when he or she reached the age of 68, and had been admitted to practise as such before 1 January 1993; in that case the admission is extended at the latest to the expiry of that period of 20 years;
  
- A shortage of panel doctors (dentists) exists or is impending in certain areas in the region of admission;
  
- In the event of illness, leave or participation in training events by a doctor (dentist);
  
- Since the legislation relates only to doctors (dentists) practising in the panel system, outside that system doctors and dentists can practise without being subject to any age limit.

<sup>17</sup> By the Law amending the legislation on panel doctors and other laws (*Gesetz zur Änderung des Vertragsarztrechts und anderer Gesetze — Vertragsarztänderungsgesetz*) of 22 December 2006 (BGBl. 2006, p. 3439), the legislature repealed Paragraph 102 of the SGB V, which laid down quotas for doctors (dentists) depending on regional demand, with effect from 1 January 2007, but retained the age limit at issue in the main proceedings.

## **The main proceedings and the reference for a preliminary ruling**

- 18 Ms Petersen, who was born on 24 April 1939, reached the age of 68 in 2007. She was admitted to practise as a panel dentist from 1 April 1974.
- 19 By decision of 25 April 2007, the Zulassungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (Admissions board for dentists for the district of Westphalia and Lippe) found that Ms Petersen's authorisation to provide panel dental care would expire on 30 June 2007.
- 20 Ms Petersen lodged a complaint against that decision, arguing in particular that it was contrary to the Directive and the AGG.
- 21 When her complaint was rejected by a decision of the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Ms Petersen brought proceedings against that decision before the Sozialgericht Dortmund (Social Court, Dortmund).
- 22 That court states that the dismissal of Ms Petersen's complaint is lawful under national law. It refers in this respect to the positions taken by the Bundessozialgericht (Federal Social Court) and the Bundesverfassungsgericht (Federal Constitutional Court), which regard the age limit at issue in the main proceedings as justified, albeit for different reasons. The Bundessozialgericht considers that the age limit made it possible to ensure a balanced sharing of burdens between the generations and remains of use for preserving the employment opportunities of young panel dentists. However, according to the referring court, that justification is no longer valid following the abolition of quotas for panel dentists and the end of excess supply of care.

- 23 The referring court accepts, on the other hand, the objective referred to by the Bundesverfassungsgericht in a judgment of 7 August 2007. According to that judgment, the age limit is justified by the need to protect patients insured under the statutory health insurance scheme against the risks presented by older panel dentists whose work is no longer the best. The Bundesverfassungsgericht maintained the position it had adopted in a previous judgment of 1998 and held that the legislature, in view of the discretion available to it, was not required to provide for an individual examination of the physical and mental capacity of every panel doctor who has reached the age of 68. On the contrary, the legislature was entitled to adopt general rules based on experience. The Bundesverfassungsgericht also held that the failure to mention the protection of the health of insured persons in the statement of reasons for the law was immaterial, and pointed out that, when it assessed the constitutionality of a rule of law, it took all aspects into account and was not restricted by the statement of reasons.
- 24 The referring court is uncertain, however, whether that analysis is also valid with respect to the Directive. It considers that the age limit at issue in the main proceedings is not a measure within the meaning of Article 2(5) of the Directive, since the protection of health, as the legislature itself considered, was not the reason for the adoption of the provision concerned. Nor does the age limit constitute a genuine and determining occupational requirement within the meaning of Article 4(1) of the Directive, in view of the exceptions which were laid down. Finally, the referring court is doubtful as to the compatibility of the age limit with Article 6(1) of the Directive.
- 25 That court is uncertain whether the protection of the health of insured persons, referred to by the Bundesverfassungsgericht, can constitute a legitimate aim within the meaning of Article 6(1) of the Directive, given that that aim did not in fact correspond to the intention of the legislature.
- 26 Finally, the referring court observes that the age limit at issue in the main proceedings has a very punitive effect on panel dentists who wish to continue practising beyond that limit, since 90% of the population are covered by the statutory health insurance scheme

based on the panel system. It wonders whether a less restrictive measure such as a case-by-case examination of individual situations would be conceivable.

27 In those circumstances, the Sozialgericht Dortmund decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘1. May the statutory regulation of a maximum age limit for admission to practise a profession (in this case, to work as a panel dentist) be an objective and reasonable measure to protect a legitimate aim (in this case, the health of patients insured under the statutory health insurance scheme) and an appropriate and necessary means of achieving that aim within the meaning of Article 6 of [the Directive] if it is derived solely from an assumption, based on “general experience”, that a general drop in performance occurs from a certain age, without any account being taken of the individual capacity of the specific person concerned?
  
2. If Question 1 is to be answered in the affirmative, may a legitimate (legislative) aim within the meaning of Article 6 of [the Directive] (in this case, the protection of the health of patients insured under the statutory health insurance scheme) be taken to exist even where that aim was entirely irrelevant to the national legislature in the exercise of its legislative discretion?
  
3. If Question 1 or 2 is to be answered in the negative, may a law enacted prior to the adoption of [the Directive] which is incompatible with that directive be disapplied by virtue of the primacy of European law, even where the national law transposing the directive (in this case, the [AGG]) makes no provision for such a legal consequence in the event of a breach of the prohibition of discrimination?’

## The questions referred for a preliminary ruling

### *Admissibility of the reference for a preliminary ruling*

28 The German Government submits, in its written observations, that the reference for a preliminary ruling is inadmissible, in view of the imminent change to the German legislation which will have the consequence of abolishing the prohibition of practising as a panel dentist beyond the age of 68.

29 On this point, suffice it to say that, as the Advocate General observes in point 32 of his Opinion, the circumstance that such a change is about to be made is not relevant. According to the information in the order for reference, Ms Petersen had her admission to practise as a panel dentist withdrawn and was deprived of the possibility of carrying on that activity from 30 June 2007. It follows that the Court's answer to the questions referred will be decisive for the outcome of the main proceedings and that the reference for a preliminary ruling is admissible.

### *Questions 1 and 2*

30 By its first and second questions, which should be considered together, the referring court essentially asks whether Article 6(1) of the Directive precludes a national measure setting a maximum age for practising as a panel dentist, in this case 68 years, in order to protect the health of patients insured under the statutory health insurance scheme, since it is thought that the performance of those dentists declines from that age. It wishes to know whether the fact that that aim was not taken into account by the legislature is relevant.

- 31 To answer those questions, it must be examined whether the legislation at issue in the main proceedings falls within the scope of the Directive, whether it introduces a difference of treatment on grounds of age, and, if so, whether the Directive precludes that difference of treatment.
- 32 In the first place, as regards the scope of the Directive, it follows from Article 3(1)(a) and (c) of the Directive that it applies, within the framework of the areas of competence conferred on the Community, to all persons in relation to conditions for access to employment, to self-employment or to occupation, and to employment and working conditions, including dismissals and pay (see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 43, and Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 24).
- 33 The measure at issue in the main proceedings lays down a maximum age for practising as a panel dentist within the statutory health insurance scheme. As appears from the information supplied by the referring court, 90% of patients are covered by that scheme. It follows that for a dentist to be unable to practise in the panel scheme is liable to limit the demand for the services he offers. Consequently, by fixing an age above which access to and exercise of the activity of panel dentist are no longer possible, the third sentence of Paragraph 95(7) of the SGB V affects conditions for access to employment, to self-employment or to occupation within the meaning of Article 3(1)(a) and employment and working conditions within the meaning of Article 3(1)(c) of the Directive.
- 34 In the second place, as regards the question whether the legislation at issue in the main proceedings contains a difference of treatment on grounds of age in relation to employment and occupation, it must be noted that, under Article 2(1) of the Directive, for the purposes of the Directive, the ‘principle of equal treatment’ is to mean that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the Directive. Article 2(2)(a) states that, for the purposes of the application of Article 2(1), direct discrimination is to be taken to occur where one



person is treated less favourably than another in a comparable situation, on any of the grounds referred to in Article 1 of the Directive (see *Palacios de la Villa*, paragraph 50, and *Age Concern England*, paragraph 33).

- 35 The application of a provision such as the third sentence of Paragraph 95(7) of the SGB V has the consequence that persons, in this case panel dentists, are treated less favourably than other persons practising the same profession on the ground that they have exceeded the age of 68 years. Such a provision introduces a difference of treatment on grounds of age within the meaning of the Directive.
- 36 In the third place, it must be examined whether the difference of treatment resulting from the application of the third sentence of Paragraph 95(7) of the SGB V is compatible with the Directive.
- 37 The aim pursued by the measure at issue in the main proceedings must be identified, in order to determine the provisions of the Directive by reference to which the measure must be examined.
- 38 The referring court mentioned several objectives: first, the protection of the health of patients covered by the statutory health insurance scheme, it being thought that the performance of dentists declines after a certain age; second, the distribution of employment opportunities among the generations; and third, the financial balance of the German health system. It only relied on one of them however, namely the first, while pointing out that that objective did not correspond to the intention of the legislature.

- 39 It should be noted that the referring court did not refer to *travaux préparatoires*, Parliamentary debates or a statement of reasons for the law which would explain why the provision laying down the age limit at issue in the main proceedings was retained when the accompanying provision laying down quotas for doctors (dentists) depending on regional demand was repealed.
- 40 As the Court has previously held, where the national legislation in question does not specify the aim pursued, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary (see *Palacios de la Villa*, paragraph 57, and *Age Concern England*, paragraph 45).
- 41 The German Government stated in its observations at the hearing before the Court that the legislature had intended to keep the age limit at issue in the main proceedings for a limited observation period, in order to ascertain whether the problems connected with the excess supply of care provided by panel dentists had indeed disappeared despite the abolition of the quotas. The legislature thought it prudent, while awaiting the results of that exercise, to maintain a measure intended to limit the number of panel dentists, and hence expenditure on health, by providing that dentists who had reached the age of 68 could no longer practice in the panel scheme. Maintaining the age limit thus, according to the government, pursued the original objective of the GSG 1993, which was primarily to control public health expenditure.
- 42 In the main proceedings, it is ultimately for the national court, which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to seek out the reason for maintaining the measure in question and thus to identify the objective it pursues.

43 In order to give the national court an answer which will be of use to it in giving judgment in the main proceedings, it should be examined whether the Directive precludes a difference of treatment on grounds of age such as in the main proceedings, having regard to all three objectives that have been adduced.

The first and third objectives adduced

44 The first and third objectives may be considered together. The first directly concerns the field of the health of patients, considered from the point of view of the competence of doctors and dentists. The third, although relating to the financial balance of the statutory health insurance scheme, also concerns that field, but considered from a different angle.

45 It follows from the case-law that not only the objective of maintaining a high-quality medical service but also that of preventing the risk of serious harm to the financial balance of the social security system are covered by the objective of protection of public health in so far as they both contribute to achieving a high level of protection of health (see, to that effect, Case C-372/04 *Watts* [2006] ECR I-4325, paragraphs 103 and 104, and Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraphs 46 and 47).

46 As the Advocate General observes in point 53 of his Opinion, if the age limit of 68 laid down in the third sentence of Paragraph 95(7) of the SGB V were an instrument forming part of a policy of planning dental care provision aimed at curbing the rise in healthcare expenditure under the statutory health insurance scheme, it would pursue the objective of protection of public health, considered from the point of view of preserving the financial balance of the statutory health insurance scheme.

47 As regards the relevant provisions of the Directive, the referring court considers that the compatibility with the Directive of the measure at issue in the main proceedings must be examined from the point of view of Article 6(1) of the Directive.

48 It should be recalled, however, that the fact that the referring court has, formally, worded the question referred for a preliminary ruling with reference to certain provisions of Community law does not prevent the Court from providing that court with all the elements of interpretation which may be of assistance in adjudicating in the case pending before it, whether or not it has referred to them in the wording of its questions. It is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision making the reference, the points of Community law which require interpretation in view of the subject-matter of the dispute (see Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 81).

49 Article 2(5) of the Directive expressly mentions the protection of health. In accordance with that provision, the Directive is without prejudice to measures laid down by national law which, in a democratic society, are necessary *inter alia* for the protection of health.

50 The first and third objectives must therefore be examined from the point of view of Article 2(5).

51 In the case of a measure in the field of health, it should be recalled that, in accordance with the case-law and with Article 152(5) EC, the Member States retain power to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and delivery of health services and medical care. The Member States must indeed exercise that power in compliance with Community law, but, when assessing whether that obligation has been complied with, account must be taken of the fact that a Member State may determine the level of protection which it wishes to afford to public health and the way in which that level is to be achieved. Since the level of

protection may vary from one Member State to the other, Member States must be allowed discretion (see *Hartlauer*, paragraphs 29 and 30, and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraphs 18 and 19).

52 In view of that discretion, it must be accepted that, in the context of Article 2(5) of the Directive, a Member State may find it necessary to set an age limit for the practice of a medical profession such as that of a dentist in order to protect the health of patients. That consideration applies whether the objective of the protection of health is considered from the point of view of the competence of dentists or the financial balance of the national healthcare system. As regards the latter, it cannot be ruled out that the rising number of panel dentists led to an excessive increase in the supply of healthcare, resulting in an excessive level of expenditure to be borne by the State, and that the departure of the oldest of those dentists makes it possible to reduce that expenditure and avert a risk of serious harm to the balance of the social security system. As to setting the age limit at 68, that age may be regarded as sufficiently high to serve as the endpoint of admission to practise as a panel dentist.

53 To assess whether the measure is necessary in relation to the objective pursued, it must also be ascertained whether the exceptions to the age limit at issue in the main proceedings interfere with the consistency of the legislation in question by leading to a result that is contrary to that objective. It must be remembered that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (see *Hartlauer*, paragraph 55).

54 As stated in paragraph 16 above, the rule at issue in the main proceedings is subject to four exceptions. The second and third exceptions cover a lack of panel dentists because there is a shortage of them in certain regions or because of their illness, absence on leave

or participation in training courses. In those cases, patients insured under the statutory health insurance scheme can be treated by dentists aged over 68.

55 Those exceptions clearly do not interfere with the objective of the protection of health. On the contrary, they are intended to ensure that the patients concerned can still be treated. Moreover, being designed for situations in which there is a shortage of supply of dental care, they are by their nature incapable of creating an excess of that supply liable to interfere with the financial balance of the national healthcare system.

56 The first exception concerns panel dentists who were admitted to practise by 1 January 1993 but who, on reaching the age of 68, have not completed 20 years' practice in the panel scheme. According to the observations submitted to the Court, this exception is intended to avoid disadvantaging dentists who, at the time of the entry into force of the legislation at issue in the main proceedings, despite already being in an older age group, had not practised for long enough for the purposes of entitlement to a pension. The exception concerns more particularly panel dentists from the former German Democratic Republic. According to the German Government, which was not contradicted on this point, the dentists covered by this exception represent only a precisely defined group, however, and the exception is moreover temporary, since it is to end after a period of at most 20 years.

57 Having regard to those factors which reduce the scope of the first exception, it must be considered that it does not impair the consistency of the legislation at issue in the main proceedings in relation to the objective of the protection of the health of patients covered by the statutory health insurance scheme, both from the point of view of the competence of panel dentists and from that of the financial balance of the statutory health insurance scheme.

58 The fourth exception does not appear as such in the legislation but derives from its scope. The third sentence of Paragraph 95(7) of the SGB V concerns only dentists

practising under the panel system. Outside that system, dentists can thus practise their profession at any age, and patients can consequently be treated by dentists older than 68.

59 The Court has allowed certain exceptions to rules adopted on grounds of the protection of health, but these were limited in time and scope (see Case C-531/06 *Commission v Italy* [2009] ECR I-4103, paragraph 73).

60 To assess the effect of the fourth exception on the consistency of the measure at issue in the main proceedings from the point of view of Article 2(5) of the Directive, account must also be taken of the nature and wording of that provision. As it is 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.

61 A measure to which there is so broad an exception as that for dentists practising outside the panel system cannot be regarded as essential for the protection of public health. If the aim of the age limit at issue in the main proceedings is the protection of patients' health, from the point of view of the competence of the practitioners concerned, clearly patients are not protected where the exception applies. The exception thus appears to run counter to the objective pursued. Moreover, it is not limited temporally and, although no figures have been supplied, it potentially applies to all dentists and appears liable to concern a not inconsiderable number of patients.

62 Consequently, if the objective pursued by the measure at issue in the main proceedings is the protection of the health of patients, from the point of view of the competence of doctors and dentists, that measure lacks consistency because of the fourth exception

mentioned above. In that case the age limit imposed on panel dentists is not necessary for the protection of health within the meaning of Article 2(5) of the Directive.

<sup>63</sup> If, on the other hand, the aim of the measure is to preserve the financial balance of the public healthcare system, the fourth exception does not interfere with the objective pursued. That system belongs to a sphere for which the State has financial responsibility, and by definition does not extend to the private health system. Consequently, the introduction of an age limit which applies only to panel dentists, in order to control public health sector expenditure, is compatible with the objective pursued. The fact that dentists practising outside the statutory health insurance scheme are not concerned does not therefore interfere with the consistency of the legislation in question.

<sup>64</sup> In so far, therefore, as the measure maintaining that age limit is intended to prevent a risk of serious harm to the financial balance of the social security system in order to achieve a high level of protection of health, which is for the national court to ascertain, the measure may be regarded as compatible with Article 2(5) of the Directive.

The second objective adduced

<sup>65</sup> According to the order for reference, the Bundessozialgericht took the view that the age limit at issue in the main proceedings was justified by a second objective, namely to share out among the generations employment opportunities in the profession of panel dentist. That objective was also relied on, in the alternative, by the German Government in its oral observations.



- 66 That objective is not provided for in Article 2(5) of the Directive. It should, on the other hand, be examined whether it could constitute a legitimate aim within the meaning of Article 6(1) of the Directive.
- 67 In accordance with Article 6(1) of the Directive, the aims which may be regarded as 'legitimate' within the meaning of that provision are inter alia legitimate employment policy, labour market or vocational training objectives.
- 68 The Court has previously held that the encouragement of recruitment undeniably constitutes a legitimate social policy or employment policy objective of the Member States, and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers (see *Palacios de la Villa*, paragraph 65). Similarly, a measure intended to promote the access of young people to the profession of dentist in the panel system may be regarded as an employment policy measure.
- 69 It remains to be ascertained whether, in accordance with Article 6(1) of the Directive, the means used to achieve that aim are 'appropriate and necessary'.
- 70 In this respect, in view of developments in the employment situation in the sector concerned, it does not appear unreasonable for the authorities of a Member State to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones. As to the setting of the age limit at 68, that age, as observed in paragraph 52 above, would appear to be sufficiently high to serve as the endpoint of admission to practise as a panel dentist.

71 The question arises, however, of whether the application of an age limit is appropriate and necessary for achieving the aim pursued. Where the number of panel dentists in the labour market concerned is not excessive in relation to the needs of patients, entry into that market is usually possible for new practitioners, especially young ones, regardless of the presence of dentists who have passed a certain age, in this case 68. In that case the introduction of an age limit might be neither appropriate nor necessary for achieving the aim pursued.

72 The German Government stated at the hearing, without being contradicted, that the age limit at issue in the main proceedings did not apply in regions in which there was a shortage of panel dentists. It also submitted that, in the field of health, it is important that the State is able to make use of its discretion to take the necessary measures, not only when faced with a current problem of excess medical supply, but also where there is a latent risk of such a problem occurring.

73 On this point, having regard to the discretion available to the Member States recalled in paragraph 51 above, it must be acknowledged that, faced with a situation in which there is an excessive number of panel dentists or with a latent risk that such a situation will occur, a Member State may consider it necessary to impose an age limit such as that at issue in the main proceedings, in order to facilitate access to employment by younger dentists.

74 However, it is for the national court to ascertain whether such a situation exists.

75 If that were the case, it would still remain to be ascertained whether the measure at issue in the main proceedings is consistent, taking into account the four exceptions set out in paragraph 16 above.

- 76 The first three exceptions, designed either for specific situations in which there is a shortage of panel dentists or for a limited period of time, do not interfere with the objective of promoting the entry to the labour market of young panel dentists. The fourth exception concerns the non-panel sector and has no effect whatever on the entry to the labour market of young dentists practising in the panel system.
- 77 It follows that, if the aim of a measure such as that at issue in the main proceedings is the sharing out of employment opportunities among the generations within the profession of panel dentist, the resulting difference of treatment on grounds of age may be regarded as objectively and reasonably justified by that aim, and the means of achieving that aim as appropriate and necessary, provided that there is a situation in which there is an excessive number of panel dentists or a latent risk that such a situation will occur.
- 78 The answer to the first and second questions is therefore that:
- Article 2(5) of the Directive must be interpreted as precluding a national measure, such as that at issue in the main proceedings, setting a maximum age for practising as a panel dentist, in this case 68 years, where the sole aim of that measure is to protect the health of patients against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists;
  
  - Article 6(1) of the Directive must be interpreted as not precluding such a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim;

- It is for the national court to identify the aim pursued by the measure laying down that age limit, by ascertaining the reason for maintaining the measure.

### *Question 3*

- 79 The third question relates to the consequences to be drawn from a finding that a national rule prior to the Directive is incompatible with the Directive, where national law does not make provision for disapplying such a rule.
- 80 The Court has held that all administrative bodies are subject to the obligation to respect the primacy of Community law (see, inter alia, Case 103/88 *Costanzo* [1989] ECR 1839, paragraph 32, and Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 30). That applies to an administrative body such as the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe. The fact that the national provisions at issue in the main proceedings were already in existence before the entry into force of the Directive is immaterial. It is also immaterial that those provisions did not make provision for the national court to disapply them in the event of their incompatibility with Community law.
- 81 Consequently, the answer to the third question is that, if legislation such as that at issue in the main proceedings, having regard to its objective, were contrary to the Directive, it would be for the national court hearing a dispute between an individual and an administrative body such as the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe to decline to apply that legislation, even if it were prior to the Directive and national law made no provision for disapplying it.

## Costs

<sup>82</sup> Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **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 precluding a national measure, such as that at issue in the main proceedings, setting a maximum age for practising as a panel dentist, in this case 68 years, where the sole aim of that measure is to protect the health of patients against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists.**

**Article 6(1) of Directive 2000/78 must be interpreted as not precluding such a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim.**

**It is for the national court to identify the aim pursued by the measure laying down that age limit, by ascertaining the reason for maintaining the measure.**

2. **If legislation such as that at issue in the main proceedings, having regard to its objective, were contrary to Directive 2000/78, it would be for the national court hearing a dispute between an individual and an administrative body such as the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe to decline to apply that legislation, even if it were prior to that directive and national law made no provision for disapplying it.**

[Signatures]