Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 27 October 2016[1]

Case C-406/15

Petya Milkova
v
Izpalnitelen direktor Agentsiata za privatizatsia i sledprivatizatsionen kontrol

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling — Social policy — Equal treatment in employment and occupation — National legislation affording special protection to disabled employees in the event of dismissal — No such rules for the benefit of disabled civil servants — Permissibility — Directive 2000/78/EC — Articles 4 and 7 — United Nations Convention on the Rights of Persons with Disabilities — Article 5(2) — Extension of the national protective rules to benefit disabled civil servants)

I – Introduction

1. The request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) is concerned with the interpretation of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,[2] in particular Articles 4 and 7 thereof, and with Article 5(2) of the United Nations Convention on the Rights of Persons with Disabilities ('the UN Disability Convention').[3]

2. That request follows an action brought by Petya Milkova against a decision which led to the termination of her employment relationship on the ground that the post which Ms Milkova, who has a disability, had held in her capacity as a civil servant had been cut. She complains that the government department which employed her did not apply to her the Bulgarian legislation which affords special protection to specific categories of sick person in the event of dismissal, but only where such persons are employees.

1 — Original language: French

2 — Council Directive of 27 November 2000 (OJ 2000 L 303, p. 16).

3 — The Convention was adopted by the United Nations General Assembly on 13 December 2006 and entered into force on 3 May 2008.

3. The referring court asks the Court whether national legislation of this kind is compatible with the abovementioned provisions of the UN Disability Convention and Directive 2000/78. In the event that this is not the case, it asks whether the obligation incumbent on a Member State to comply with those two instruments requires that, in a situation such as that in the dispute in the main proceedings, the benefit of the national rules conferring protection exclusively on disabled employees [4] be extended to civil servants with the same type of disability.

4. I should say at the outset that, in my view, such a situation does not fall within the substantive scope of Directive 2000/78 and that there will not therefore be any need to interpret the provisions of that directive in the present case, not even in the light of the UN Disability Convention. Nevertheless, I shall make a number observations in this regard, which I shall present in the alternative.

II – Legal context

A – International law

5. The UN Disability Convention was approved on behalf of the European Community by Council Decision 2010/48/EC [5] and was ratified by the Republic of Bulgaria in 2012. [6]

6. Under the first paragraph of Article 1 thereof, 'the purpose of [that Convention] is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. The second paragraph of that article defines disabled persons as being 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

7. Article 4 of the UN Disability Convention, entitled 'General obligations', states in paragraph 1 that 'States Parties undertake to ensure and promote the full reali[s]ation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability …'.

8. Article 5 of that Convention, entitled 'Equality and non-discrimination', provides:

'1. States Parties recogni[s]e that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

…'

4 — I would point out that, although the Bulgarian legislation in question refers to a series of 'illnesses' conferring entitlement to that protection, and not strictly to 'disability', the referring court addresses the issue raised in the present case from the more specific point of view of disability because it is dealing with a dispute concerning a disabled person.

5 — Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 L 23, p. 35). As a result, the European Union holds periodic dialogues with the relevant UN Committee (see the Commission's '2015 Report on the Application of the EU Charter of Fundamental Rights', COM(2016) 265 final, p. 8, footnote 30).

6 — Law adopted on 26 January 2012 and published in DV No 12 of 10 February 2012.

9. Article 27 of that Convention, entitled 'Work and employment', provides as follows:

'1. States Parties recogni[s]e the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the reali[s]ation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

…'

B – EU law

10. Recital 27 of Directive 2000/78 states that, 'in its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community, [7] the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, [8] affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons'.

11. In accordance with Article 1 thereof, 'the purpose [of that 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'.

12. Article 2 of Directive 2000/78, entitled 'Concept of discrimination', states in paragraph 1 that, for the purposes of that 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'. Paragraph 2 thereof defines the concepts of 'direct discrimination' and 'indirect discrimination' within the meaning of that directive.

13. Article 3 of that directive, entitled 'Scope', provides in paragraph 1(c) that, '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 … employment and working conditions, including dismissals and pay'.

14. Article 4 of that directive is entitled 'Occupational requirements' and provides in paragraph 1 that, 'notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.

7 — OJ 1986 L 225, p. 43.

8 — OJ 1999 C 186, p. 3.

15. Article 7 of Directive 2000/78, entitled 'Positive action', is worded as follows:

'1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.'

C – Bulgarian law

1. The kodeks na truda (Labour Code)

16. Under Article 328(1), point 2, of the kodeks na truda (Labour Code),[9] 'an employer may terminate a contract of employment by giving notice in writing to the employee within the periods provided for in Article 326(2) … in the event that … posts are cut'.

17. Article 333(1), point 3, entitled 'Protection in the event of dismissal', provides that, 'in the cases defined [in Article] 328(1), points 2, 3, 5 and 11, … the employer may carry out dismissals only with the prior consent of the Labour Inspectorate in each particular case:

…

3. [in the case of] a worker suffering from an illness defined in a decree issued by the Minister for Health'.

2. Naredba No 5/1987 (Decree No 5/1987)

18. Under Article 1 of Naredba No 5/1987 za bolestite, pri koito rabotnitsite, boleduvashti ot tyah, imat osobena zakrila saglasno chl. 333, al. 1, ot kodeksa na trud, izdadena ot Ministerstvoto na narodnoto zdrave i Tsentralniyat savet na balgarskite profesionalni sayrééduzi (Decree No 5/1987 on illnesses entitling the employees suffering from them to the special protection provided for in Article 333(1) of the Labour Code, adopted by the Minister for Public Health and the Central Council of Bulgarian Trade Associations):[10]

'In case of partial liquidation, cutting of posts or cessation of work for longer than 30 days, the undertaking may dismiss employees suffering from the following illnesses only with the prior consent of the relevant district labour inspectorate', those illnesses being 'ischaemic heart disease', 'active tuberculosis', 'oncological illness', 'occupational disease', 'mental illness' and 'diabetes mellitus'.

9 — Published in DV No 26 of 1 April 1986 and DV No 27 of 4 April 1986; entered into force on 1 January 1987.

10 — Adopted on 20 February 1987; published in DV No 33 of 28 April 1987.

3. The zakon za administratsiata (Law on administration)

19. Article 12 of the zakon za administratsiata (Law on administration) [11] is worded as follows:

'(1) The activities of the [public] administration shall be carried out by civil servants and [non-civil-service] employees.

(2) The procedure for the appointment of civil servants and the regulations applicable to them shall be established by law.

(3) The contracts of employment of contractors working within the public administration shall be concluded under the Labour Code.'

4. The zakon za darzhavnia sluzhitel (Law on the civil service)

20. Under Article 1 of the zakon za darzhavnia sluzhitel (Law on the civil service, 'ZDSL'), [12] that Law governs 'the … content and termination of the employment relationship between the State and its civil servants in the exercise and on the occasion of the exercise of their duties, except in so far as a special law provides otherwise'.

21. Article 106(1), point 2, of the ZDSL provides that 'the appointing authority may unilaterally terminate the employment relationship by giving one month's notice … in the event that a post is cut'.

5. The zakon za zashtita ot diskriminatsia (Law on protection against discrimination)

22. According to the order for reference, the zakon za zashtita ot diskriminatsia (Law on protection against discrimination, 'ZZD') [13] is the act that governs protection against all forms of discrimination and contributes towards the elimination of such discrimination by transposing the Community directives on equal treatment.

23. Under Article 4(1) of the ZZD, 'any direct or indirect discrimination based on … disability … or on any other personal characteristic which is provided for by law or by an international convention to which the Republic of Bulgaria is a party shall be prohibited'.

24. Article 21 of the ZZD provides that, 'when exercising its right to terminate an employment contract unilaterally in accordance with Article 328(1), points 2 to 5, 10 and 11, and Article 329 of the Labour Code, or to terminate an employment relationship under Article 106(1), points 2, 3 and 5, of the Law on the civil service, the employer shall apply the same criteria irrespective of the personal characteristics mentioned in Article 4(1)'.

III – The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

25. Ms Milkova suffers from a mental illness which has attracted a disability rating of 50%.

11 — Published in DV No 130 of 5 November 1998; entered into force on 6 December 1998.

12 — Published in DV No 67 on 27 July 1999; entered into force on 27 August 1999.

13 — Published in DV No 86 of 30 September 2003; entered into force on 1 January 2004.

26. From 10 October 2012, she held a post as a civil servant within a Bulgarian government department, the Agentsia za privatizatsia i sledprivatizatsionen kontrol (Privatisation and Post-Privatisation Monitoring Agency, 'the Agency').

27. When the number of posts at the Agency was reduced from 105 to 65, Ms Milkova was sent a letter of notice telling her that her employment relationship would be terminated in one month's time because her post had been cut. Pursuant to a decision taken by the Agency's executive director under Article 106(1), point 2, of the ZDSL, her employment relationship was terminated on 1 March 2014.

28. Ms Milkova brought an action before the Administrativen sad Sofia-grad (Sofia Administrative Court, Bulgaria) claiming that Article 333(1), point 3, of the Bulgarian Labour Code was applicable to her situation and that the Agency should therefore have sought the prior authorisation of the Labour Inspectorate before proceeding to terminate her employment relationship. In his defence, the Agency's executive director submitted that such authorisation was not necessary and that the decision at issue was therefore lawful.

29. The court of first instance dismissed the action on the grounds that, although Ms Milkova has a disability, she did not qualify for the special protection provided for in Article 333(1), point 3, of the Labour Code, since that provision was not applicable to the termination of the employment relationships of civil servants.

30. Ms Milkova lodged with the referring court an appeal on a point of law against that judgment. Taking the view that an interpretation of the provisions of EU law was necessary to resolve the dispute in the main proceedings, the Varhoven administrativen sad (Supreme Administrative Court), by decision of 16 July 2015, received at the Court on 24 July 2015, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does Article 5(2) of the [UN] Convention [on Disabilities] permit the Member States to provide by law for specific advance protection against dismissal only for persons with disabilities who are employees, and not for civil servants with the same disabilities?

(2) Do Article 4 and the further provisions of … Directive 2000/78 … permit a national rule providing for specific protection against dismissal for persons with disabilities who are employees, but not for civil servants with the same disabilities?

(3) Does Article 7 of Directive 2000/78 permit persons with disabilities who are employees, but not civil servants with the same disabilities, to be afforded specific advance protection?

(4) If the first and third questions are answered in the negative: In light of the foregoing facts and circumstances of the present case, is it necessary in order to comply with the provisions of international and Community law that the specific advance protection against dismissal for persons with disabilities who are employees provided for by the national legislator also be applied to civil servants with the same disabilities?'

31. The Bulgarian Government and the European Commission lodged written observations before the Court. By letter dated 27 May 2016, the persons referred to in Article 23 of the Statute of the Court of Justice were invited to reply in writing to a number of questions which had been put to them by the Court. Ms Milkova, the Bulgarian Government and the Commission provided additional observations in response to those questions. No hearing was held.

IV – Analysis

A – Preliminary observations

1. The content and scope of the relevant provisions of Bulgarian law

32. In the grounds of its decision, the referring court highlights the fact that, although, in principle, the Bulgarian legal system guarantees the protection of disabled persons and excludes all discrimination based on disability,[14] in practice, the only mechanisms that operate specifically to that end are directed at a restricted group of disabled persons and do not apply to them all in the same way.

33. It follows from Article 12(1) to (3) of the Law on administration that administrative tasks such as those performed by the public body for which Ms Milkova worked before her employment relationship was terminated may be entrusted either to persons with civil servant status or to contractors with the status of employees subject to the Labour Code.

34. It is also common ground that the mental illness from which Ms Milkova suffers appears on the list of conditions contained in Article 1 of Decree No 5/1987 on illnesses entitling workers suffering from them to special protection under Article 333(1) of the Labour Code. She would therefore have benefited from that protection if she had worked for the Agency as an employee rather than as a civil servant.

35. Under Article 333 read in conjunction with Article 328(1), point 2, of that Code, in order to be able to dismiss an employee with a certain type of disability on the ground that his post has been cut, the employer must seek the prior authorisation of the Labour Inspectorate, which is responsible for assessing what repercussions the proposed dismissal will have on the state of health of the person concerned and, if necessary, for prohibiting it.[15]

36. The Varhoven administrativen sad (Supreme Administrative Court) points out that the ZDSL does not prescribe a similar mechanism for disabled civil servants and that the national case-law, too, does not permit Ms Milkova to benefit from such *ex ante* protection. According to that settled case-law, given that the ZDSL does not make explicit reference to Article 333(1) of the Labour Code, the protective measures provided for in the latter provision cannot, even by analogy, operate to the benefit of a civil servant.

37. The referring court notes that the additional protection which that Code conferred, with effect from 1987, to all persons with certain types of disability was withdrawn from civil servants following the adoption of the ZDSL in 1999, the author of the draft law concerned having given no express indication of the reasons for its withdrawal. That protection continued to be available, however, to all employees, including those whose work forms part of the performance of a task conferred by public law, that legal position having remained unchanged following the Republic of Bulgaria's accession to the European Union on 1 January 2007.

14 — In accordance with Articles 6 and 48 of the Bulgarian Constitution and Article 4 of the Law on Protection Against Discrimination.

15 — In its written observations, the Bulgarian Government adds that the Labour Inspectorate has the merit of being a third party independent of the parties to the employment contract and that it assesses whether or not the dismissal is appropriate with reference not only to its impact on the worker's state of health but also to other factors such as the presence of another appropriate position with the same employer.

38. Thus, the criterion for the contested difference in the treatment of persons with the same disability is whether such a person has the status of civil servant or employee, since anyone with an employment contract is eligible to benefit from the protective measure at issue, whether employed by a private entity or a public body. I would observe that the Commission's pleadings are confusing in this regard, in that they indicate that the differentiation is applied on the basis of whether those persons work in the private or the public sector. [16]

39. The referring court goes on to say that the ZZD, adopted in order to transpose the relevant Community directives, [17] contains an argument in support of the application of a difference of treatment based on whether the employer is a private entity or a public body in cases where the employment relationship is terminated on the ground that the disabled person's post has been cut. In that regard, it submits that Article 21 of that Law draws a distinction between those two scenarios, despite the requirement common to both that the employer apply identical criteria when exercising his right to terminate the disabled person's employment contract or employment relationship unilaterally.

40. That court states that it is unsure of the extent to which the provisions of the UN Disability Convention, the EU Charter of Fundamental Rights ('the Charter') and Directive 2000/78, which, in its view, have laid down common conditions with respect to the equal treatment of all disabled persons, permit the continued existence of that position in Bulgarian law, which gives rise to a difference in the treatment of two categories of vulnerable worker despite the fact that they are both in a similar situation involving the termination of their employment.

2. The subject matter of the questions referred and the order in which they will be dealt with

41. Although the referring court asks the Court first of all about the possible impact in this case of Article 5(2) of the UN Disability Convention, it seems more appropriate to me, as it does to the Commission, to leave the consideration of that matter until after we have examined the twofold issue of the applicability and interpretation of the provisions of Directive 2000/78, which is common to the second and third questions referred.

42. After all, the first question must be understood as asking, in essence, what interpretation is to be given to Directive 2000/78 in the light of that Convention, a matter which is relevant only if that directive is indeed applicable, which, in my view, it is not, for the reasons I shall set out below.

43. Finally, I note that the fourth question referred, which is introduced by a conditional formula, is ancillary to the preceding questions and will not need to be answered if those questions are themselves answered as I propose.

B – The interpretation sought of the provisions of Directive 2000/78 (second and third questions)

1. Inapplicability of Directive 2000/78 in the present case

44. The second and third questions referred both relate to whether the provisions of Directive 2000/78, and more specifically Articles 4 and 7 thereof, permit a Member State to adopt rules, such as the Bulgarian legislation at issue in the main proceedings, which confer on employees suffering from certain illnesses *ex ante* special protection in the event of dismissal but do not however apply to civil servants who may have the same types of disability.

16 — That inaccuracy was also mentioned by Ms Milkova in her written reply to the questions put by the Court.

17 — I note that Article 4(1) of that Law does not contain an exhaustive list of prohibited grounds of discrimination, since it refers to 'any … personal characteristic provided for by law or by an international convention to which the Republic of Bulgaria is party'.

45. These questions must therefore be dealt with together by examining, first of all, whether Directive 2000/78 is indeed applicable in circumstances such as those of the dispute in the main proceedings.

46. As the Bulgarian Government and the Commission note, it is true that, under Article 3(1)(c), that directive applies, 'within the limits of the areas of competence conferred on the [European Union]', 'to all persons, as regards both the public and private sectors, including public bodies, in relation to … employment and working conditions, [which include] dismissals'. To that extent, therefore, the regime to which Ms Milkova was made subject by the public entity that employed her at the time when her civil service employment relationship was terminated may be caught by the substantive scope of that directive. Furthermore, it is common ground that the mental illness from which she suffers does fall with the concept of 'disability', within the meaning of Directive 2000/78, as defined by the Court. [18]

47. However, like the Commission, I take the view that Directive 2000/78 is not applicable to a dispute with the specific features of Ms Milkova's situation, inasmuch as the criterion for the difference of treatment about which she complains is not covered by the provisions of that directive.

48. After all, it is clear from the order for reference that the dispute in the main proceedings is characterised by the fact that Ms Milkova was deprived of the benefit of the Bulgarian legislation affording special protection to employees with conditions such as mental illness in the event of the termination of their employment contract, not because of her disability but on the sole ground that she was a civil servant and not an employee as required by that legislation. [19]

49. The referring court acknowledges that, in the present case, the disputed difference of treatment is based not on the 'personal characteristic' of disability, [20] but on the circumstance that the two groups of disabled persons which are here set against each other — disabled employees, on the one hand, and disabled civil servants, on the other hand — carry out their occupational activities under separate legal frameworks — the former under an employment contract and the latter under the regulations applicable to them as civil servants.

50. However, that court considers that national legislation and case-law such as that applicable to the dispute in the main proceedings may be incompatible with the EU-law requirement to ensure that all disabled persons are treated equally in matters of employment and occupation. It is for that very reason that it is seeking an interpretation of the provisions of Directive 2000/78.

51. In that regard, I would recall that, in accordance with the Court's settled case-law, it is clear from the title of, and preamble to, Directive 2000/78, as well as from its content and purpose, that that directive is intended to establish a general framework for ensuring that everyone benefits from equal treatment in matters of employment and occupation by providing effective protection against *discrimination based on any of the grounds referred to in Article 1 thereof*, [21] which include disability. Thus, Article 2 of that directive expressly provides that the alleged discrimination must be based 'on any of the grounds referred to in Article 1' in order to fall within the scope of that instrument.

18 — That is to say, 'a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'. See, in particular, the judgments of 4 July 2013, *Commission* v *Italy* (C-312/11, not published, EU:C:2013:446, paragraph 56), and of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 53 and the case-law cited).

19 — See points 35 to 38 of this Opinion.

20 — The expression 'personal characteristic' is used in Articles 4 and 21 of the ZZD. The term 'characteristic' is used in recital 23 and Article 4 of Directive 2000/78, in particular in relation to disability.

21 — See the judgments of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222, paragraph 35); of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 50); of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraph 18); and of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 32 and the case-law cited).

52. However, the grounds of discrimination specifically targeted by Directive 2000/78 do not include the particular nature of the working relationship, the criterion on the basis of which the applicant in the main proceedings was the subject of a difference of treatment as a result of which she was excluded from the protection which Article 333(1) of the Bulgarian Labour Code affords to employees and which national case-law refuses to apply by extension to civil servants.

53. Moreover, it is clear from the Court's case-law that, in view of the wording of Article 13 EC (now Article 19 TFEU), from which Directive 2000/78 arises, [22] the scope of the latter cannot be extended by analogy, including by reference to the general principle of non-discrimination, [23] beyond the grounds of discrimination *listed exhaustively* in Article 1 of that directive. [24]

54. Thus, a new differentiating criterion such as, in the present case, the type of employment relationship under which a disabled person works, may not be added to the exhaustive grounds on which that directive prohibits all discrimination. It follows that any difference in treatment as between the civil service staff of a public entity and contractors in the public or private sector, such as that to which, according to the order for reference, Ms Milkova was subjected, is not caught by the principle of non-discrimination as expressed in Directive 2000/78. To that effect, I would recall that the Court has already excluded from the scope of that directive differences of treatment based on the socio-professional category to which the persons concerned belong. [25]

55. I would make the point that, in my view, the mere fact that Ms Milkova is disabled is not in itself sufficient to render Directive 2000/78 applicable in the present case. I would observe in this regard that the Court has held that 'the principle of equal treatment enshrined in the directive in [the] area [of employment and occupation] applies not to a particular category of person[, such as persons with a disability,] but by reference to the grounds mentioned in Article 1 [of that instrument]'. [26]

56. Even though it has been accepted that the scope of Directive 2000/78 must not be interpreted restrictively in relation to those grounds, the fact remains, in my view, that its provisions apply only to infringements of the principle of non-discrimination, as defined by that directive, which are genuinely based, even if only by association, [27] on one of the potential grounds of discrimination exhaustively listed in that act. However, that is not the case in the dispute in the main proceedings, since, as the referring court itself noted, Ms Milkova was treated differently not by reason of her disability, the only one of those listed grounds that is conceivably applicable in the present case, but by reason of her status as a civil servant.

22 — Article 13 EC (now Article 19 TFEU), which is the legal basis for that directive, conferred competence on the Community to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', that list thus being exhaustive. See, in particular, the judgments of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraphs 38 and 46) and 7 July 2011, *Agafiței and Others* (C-310/10, EU:C:2011:467, paragraph 35).

23 — It being recalled that the principle of non-discrimination is one of the general principles of EU law. See the judgments of 11 July 2006, *Chacón Navas* (C-13/05, EU:C:2006:456, paragraph 56) and of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 32).

24 — See, in particular, the judgments of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraph 46); of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 36); and of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraphs 28 and 29).

25 — See the judgments of 7 July 2011, *Agafiței and Others* (C-310/10, EU:C:2011:467, paragraphs 31 to 36), and of 21 May 2015, *SCMD* (C-262/14, not published, EU:C:2015:336, paragraphs 25 to 31), in which the Court held that Directive 2000/78 does not apply to discrimination based on the socio-professional category of the persons concerned, such as their status as pensioners, or their place of work. See, by analogy, the order of 7 March 2013, *Rivas Montes* (C-178/12, not published, EU:C:2013:150, paragraphs 43 and 44), from which it follows that differences of treatment between civil service staff and contractors are not caught by the principle of non-discrimination laid down in the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, which appears as an annex to Directive 1999/70/EC concerning that framework agreement (OJ 1999 L 175, p. 43).

26 — See the judgment of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraph 38 et seq.), in which the Court noted that it does not follow from the provisions of Directive 2000/78 that the principle of equal treatment which that directive is intended to safeguard is confined to persons who themselves have a disability within the meaning of that directive.

27 — In the judgment of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraphs 43 et seq.), the Court considered that the dismissal of an employee without a disability is indeed capable of falling within the scope *ratione personae* of Directive 2000/78, where it has been proved that the less favourable treatment which that employee has suffered by comparison with other people in a situation comparable to his own is *based on the disability of his child*, for whom he is the primary career.

57. I would add that the legislative work commenced in 2008 with a view to amending the substantive scope of Directive 2000/78 does not call that analysis into question.[28] The aim of that work, after all, was to extend implementation of the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation 'outside the labour market',[29] not to extend the list of grounds of discrimination exhaustively specified in that directive, it being worth noting that work on the other two non-discrimination directives the scope of which was extended as part of that revision project followed the same process.[30]

58. In conclusion, since the difference of treatment at issue in the main proceedings, between disabled employees and disabled civil servants, is based on the nature of the employment relationships between those two categories of vulnerable worker and their employer, and given that that distinguishing criterion does not appear in the exhaustive list of grounds of discrimination set out in Article 1 of Directive 2000/78, that instrument is not, in my view, applicable to a situation such as that which gave rise to the dispute pending before the referring court.

59. In those circumstances, there is, to my mind, no need to go on to interpret the provisions of Directive 2000/78 mentioned in the second and third questions referred. The following observations will therefore be presented solely in the event that the Court decides to provide the interpretation sought.

2. The impact, if any, of the Charter in the present case

60. The referring court briefly mentions the Charter in the grounds of its order, but does not in any way spell out how that instrument of EU law might be relevant to the facts of the dispute in the main proceedings. It does not put forward any argument with respect to the impact that might emanate in this case from any of the provisions of that act, which, moreover, is not the subject of the questions referred. The written observations submitted to the Court do not elaborate any further on the matter.[31]

61. However, it is settled case-law that the fundamental rights guaranteed by the Charter are applicable only in situations governed by EU law and that the Court must possess all of the information enabling it to conclude that the situation at issue falls within the scope of EU law in order to be able to rule on the interpretation of provisions from the Charter.[32] Since the referring court has not established that

28 — See the proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [COM(2008) 426 final, p. 2 and 7]. I would point out that that proposal was the subject of further discussion within the Council in June 2016.

29 — That is to say to areas outside work, in other words social protection, social advantages, education, and access to and supply of goods and services, including housing (see recital 9 and Article 3 of the proposal for a Directive, COM(2008) 426 final, pp. 14 and 19).

30 — Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37) also prohibit discrimination based on the grounds specifically identified in their titles.

31 — The Bulgarian Government simply cites Article 26 of the Charter, relating to the 'integration of persons with disabilities', in the section of its written observations entitled 'legal framework', while the equivalent section of the order for reference contains a citation of Articles 21 and 30 of the Charter, which relate to 'non-discrimination' and 'protection in the event of unjustified dismissal' respectively.

32 — See, in particular, the judgment of 13 June 2013, *Hadj Ahmed* (C-45/12, EU:C:2013:390, paragraphs 56 and 57).

the national rules capable of governing the substance of the dispute in the main proceedings [33] had as their purpose the specific and direct implementation of the relevant provisions of EU law, as required by Article 51 of the Charter, [34] the Court should, in my view, find that there is no need to assess the conformity of those rules with the fundamental rights enshrined in that act. [35]

62. Moreover, any interpretation of provisions of EU law — in this instance, the articles from Directive 2000/78 mentioned in the second and third questions referred — given in the light of the provisions of the Charter — and, more specifically, Articles 20, 21, 26 and 30 [36] — is possible only within the limits of the powers conferred on the Court, which here depend on the substantive scope of that directive. Any Charter provisions relied on cannot, in themselves, serve to substantiate the Court's jurisdiction to adjudicate on a legal situation which does not fall within the scope of EU law. [37]

63. I note that the order for reference refers implicitly to a principle prohibiting all forms of discrimination against disabled persons. In that regard, I would recall that, where a question has been referred to the Court for a preliminary ruling on the interpretation of the general principle of non-discrimination based on age as enshrined in Article 21 of the Charter and given specific expression in Directive 2000/78, [38] that question has been examined by reference to that directive alone, [39] in particular in disputes between an individual and a national administrative authority, as in the present case. Logically, the same approach should be adopted with respect to a principle of non-discrimination based on disability, also enshrined in Article 21 of the Charter and given specific expression in Directive 2000/78.

64. Since the latter is not, in my view, applicable in circumstances such as those of the dispute in the main proceedings where the differentiation at issue is based on a criterion other than those exhaustively listed in Article 1 thereof, as I have explained above, [40] I consider that the provisions of that directive cannot be interpreted in the light of the provisions of the Charter in the present case.

33 — That is to say Article 333(1), point 3, read in combination with Article 328(1), point 2, of the Labour Code, as well as Article 106(1), point 2, of the ZDSL, as interpreted by Bulgarian case-law.

34 — Article 51, which defines the 'scope' of the Charter, states, in paragraph 1 thereof, that the provisions of the Charter 'are addressed to … the Member States only when they are implementing Union law' and, in paragraph 2 thereof, that the Charter 'does not extend the field of application of Union law beyond the powers of the Union'. The Court has held in this regard that, 'in order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it' (judgment of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraph 25).

35 — See, in particular, the judgments of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraphs 40 to 43); of 6 March 2014, *Siragusa* (C-206/13, EU:C:2014:126, paragraphs 20 to 33); and of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraphs 32 and 37).

36 — Article 20 provides that 'everyone is equal before the law', Article 21(1), that 'any discrimination based on any ground such as … disability … shall be prohibited', Article 26, that 'the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community', and Article 30, that 'every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices'.

37 — See, in particular, the judgments of 8 May 2013, *Ymeraga and Others* (C-87/12, EU:C:2013:291, paragraph 40), and of 10 July 2014, *Julián Hernández and Others* (C-198/13, EU:C:2014:2055, paragraph 32 and the case-law cited), as well as the order of 23 February 2016, *Garzón Ramos and Ramos Martín* (C-380/15, not published, EU:C:2016:112, paragraph 25).

38 — In the judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraphs 23 and 24), the Court stated that '*as Directive 2000/78* does not itself lay down the general principle prohibiting discrimination on grounds of age but *simply gives concrete expression to that principle in relation to employment and occupation, the scope of the protection conferred by the directive does not go beyond that afforded by that principle*. The EU legislature intended by the adoption of the directive *to establish a more precise framework* to facilitate the practical implementation of the principle of equal treatment and, *in particular, to specify various possible exceptions to that principle*, circumscribing those exceptions by the use of a clearer definition of their scope'. It adds that, '*in order for it to be possible for [that principle] to be applicable* to a situation such as that before the referring court, *that situation must also fall within the scope of the prohibition of discrimination laid down by Directive 2000/78*' (my emphasis).

39 — See, in particular, the judgments of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359, paragraphs 23 and 24); of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 25); of 21 January 2015, *Felber* (C-529/13, EU:C:2015:20, paragraphs 16 and 17); and of 2 June 2016, *C* (C-122/15, EU:C:2016:391, paragraphs 18 and 28 to 30).

40 — See point 51 et seq. of this Opinion.

65. Taking into account the foregoing, I take the view, principally, that there is no need to interpret Articles 4 and 7 of Directive 2000/78 in the present case, even in the light of the provisions of the Charter. I shall nevertheless present a number of observations in the alternative to cater for the eventuality that the Court does not follow that recommendation.

3. Interpretation, in the alternative, of the aforementioned provisions of Directive 2000/78

66. As a preliminary point, I note that, in its observations, the Bulgarian Government devoted extensive submissions to Article 2(5) of Directive 2000/78 [41] with a view supporting its argument that rules such as those at issue in the main proceedings are permissible from the point of view of that provision. [42] However, since the referring court has not specifically asked for an interpretation of that provision, [43] either in the questions referred to the Court or in the grounds of its order for reference, and has not provided any information in this regard, even implicitly, [44] there is to my mind no need for me to comment, purely in the alternative, on this matter. I shall simply note that, as the Bulgarian Government acknowledges, Article 2(5) has been interpreted strictly in the Court's case-law, on the ground that that provision establishes an exception to the principle of the prohibition of discrimination. [45]

67. As regards Article 4 of Directive 2000/78, which is expressly referred to in the second question, I would observe that the national court has provided no explanation as to how an interpretation of that provision by the Court would be useful for the purposes of resolving the dispute pending before it. [46] Only the Bulgarian Government has submitted observations in relation to paragraph 1 of that article, in which it recalls that the Court has held that that provision must be interpreted strictly since it allows a derogation from the principle of non-discrimination, [47] and states that that paragraph authorises the national legislation in question. [48]

68. On the basis of the facts of the dispute in the main proceedings, I myself find it hard to see how Article 4 of Directive 2000/78 could conceivably be applied here, or, therefore, how its interpretation would be of any use from the point of view of the substance of the case. Under that article, a difference of treatment may not constitute discrimination 'where, *by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out*, such a characteristic constitutes a *genuine and determining occupational requirement*, provided that the

41 — Paragraph 5 provides that Directive 2000/78 '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'.

42 — The Bulgarian Government submits in particular that 'the stability of the civil service employment relationship, enshrined in the ZDSL, ensures the effective and foreseeable implementation of the work of the public administration, in the interests of society and the maintenance of public order'.

43 — While it is true, as the Bulgarian Government states, that the second question referred asks the Court whether 'Article 4 and the further provisions of … Directive 2000/78 … permit' such rules, in my view, that expression is principally concerned with the interpretation of Article 4 in conjunction with other provisions of that directive.

44 — Although the Court may extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute (see, in particular, the judgments of 1 October 2015, *Doc Generici*, C-452/14, EU:C:2015:644, paragraph 34, and of 29 September 2016, *Essent Belgium*, C-492/14, EUC:2016:732, paragraph 43), that information seems to me to be lacking in the present case so far as concerns any interpretation of the abovementioned Article 2(5).

45 — See, in particular, the judgment of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 46 and the case-law cited).

46 — In accordance with Article 94 of the Rules of Procedure of the Court, it is essential that the national court give at the very least some explanation of the reasons for the choice of the provisions of EU law of which it seeks an interpretation and regarding the link that it establishes between those provisions and the national legislation applicable to the dispute before it (see, in particular, the judgments of 10 March 2016, *Safe Interenvíos*, C-235/14, EU:C:2016:154, paragraph 115, and of 5 July 2016, *Ognyanov*, C-614/14, EU:C:2016:514, paragraphs 19 and 20).

47 — See the judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 47 and the case-law cited).

48 — The Bulgarian Government bases its argument in that regard on 'the existing protection of the rights of persons with a disability, enshrined in the ZDSL', and on 'the need to ensure that the necessary conditions are in place to allow the public administration to perform its tasks effectively and foreseeably, in the interests of society'.

objective is legitimate and the requirement is proportionate'.[49] The Bulgarian legislation at issue here, however, introduces a difference of treatment in that it affords special protection to employees but not to civil servants, although it has the particular feature of also being applicable to employees working in the public sector, who, therefore, may well carry out the same occupational activities as civil servants. Thus, the differentiating criterion at issue does not involve a 'characteristic' which is 'related to any of the grounds referred to in Article 1 [of Directive 2000/78]' and constitutes 'a genuine and determining occupational requirement' in accordance with the conditions for the application of Article 4 as defined by the Court's case-law.[50]

69. In any event, it seems to me that the content of Article 4, as interpreted in the Court's foregoing judgments, does not in any way support the view that such national legislation is incompatible with the requirements of EU law.

70. As regards Article 7 of Directive 2000/78, which is the subject of the third question, the referring court states that 'it is unclear to what extent the rules adopted by the Republic of Bulgaria, which constitute specific measures to protect persons with disabilities but only where they work under an employment relationship, even if they were applied in the public sector, would constitute positive action within the meaning of Article 7'.

71. In that regard, I note that Article 7(1) states that 'the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1' with a view to 'ensuring full equality in practice'.[51] Article 7(2) reinforces the possibility of taking positive action by providing for measures aimed more specifically at disabled persons,[52] in so far as these have the objective of protecting their health and safety at work or promoting their integration into the working environment.[53]

72. Those provisions, which preserve the sovereignty of the Member States,[54] recognise the right, but not the obligation, of those States to take action to make positive corrections to inequalities that exist in fact. After all, as was noted during the preparatory work on Directive 2000/78,[55] 'equal treatment by itself may not be enough if it does not lead to real equality'[56] and 'may also imply recognising special rights for specific groups of people'.[57]

49 — My emphasis. Likewise, recital 17 of Directive 2000/78 states that it 'does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training'.

50 — See the judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 66 and the case-law cited).

51 — See also recital 26 of Directive 2000/78.

52 — In the judgment of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraphs 40 and 42), the Court stated that these are 'provisions concerning positive discrimination measures in favour of disabled persons themselves'.

53 — It follows from Article 2(b)(ii) of Directive 2000/78 that such measures taken for the benefit of disabled persons do not constitute indirect discrimination.

54 — It seems to me that Article 7 of Directive 2000/78 places measures of positive discrimination outside the ambit of that directive, recital 27 of which recalls in relation to such measures that, 'in its Recommendation [86/379], the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people'.

55 — See the Commission's explanations concerning Article 6 (now Article 7) of the proposal that led to the adoption of Directive 2000/78 [COM(1999) 565 final], which refer to the Court's case-law relating to positive action in favour of women (see in that regard, in particular, the judgments of 11 November 1997, *Marschall*, C-409/95, EU:C:1997:533, paragraph 28 and the case-law cited, and of 28 March 2000, *Badeck and Others*, C-158/97, EU:C:2000:163, paragraph 23).

56 — In its proposal for the amendment of Directive 2000/78 [COM(2008) 426 final, p. 10], the Commission recalls that, in many cases, 'formal equality does not lead to equality in practice' and states that equivalent provisions on 'positive action' appear in all directives based on Article 13 EC (now Article 19 TFEU), which concern non-discrimination.

57 — It has also been said that 'positive actions lead not to formal equality, "in the sense of equal treatment between individuals from different groups", but to substantive equality, in the sense of equality between groups, that is to say collective equality' (see *Droit du travail européen: questions spéciales*, edited by Martin, D., Morsa, M., Gosseries, P., and Buelens, J., Larcier, Brussels, 2015, 539).

73. Like the Bulgarian Government and the Commission, I take the view that, if legislation such as that at issue in the main proceedings is regarded by the Court as falling within the scope of Article 7 of Directive 2000/78, in particular paragraph 2 thereof, as the Bulgarian Government submits,[58] there is nothing in those provisions to indicate that a Member State cannot restrict to a specific group of persons, in this instance [non-civil service] employees, the benefit of the measures which it has adopted with a view to protecting their health.[59]

74. Consequently, I consider, in the alternative, that, if the Court decided to interpret Articles 4 and 7 of Directive 2000/78, they would have to be interpreted as meaning that they do not preclude such legislation.

C – The limited impact of the provisions of the UN Disability Convention (first question)

1. The wording of the first question referred

75. On the face of it, the first question referred, which concerns whether 'Article 5(2) of the [UN Disability] Convention permit[s] [national legislation such as that at issue in the main proceedings]' seems to amount to a request that the Court interpret a provision which does not fall within the scope of either primary or secondary EU law. However, such an interpretation falls outside the Court's jurisdiction under Article 267(1) TFEU.

76. Then again, it is clear from the grounds of the order for reference that that question is justified by the need, in the light of the Court's case-law,[60] for Directive 2000/78 to be interpreted in accordance with the UN Disability Convention. According to the referring court, that Convention, and, more specifically, Article 5(2) thereof,[61] requires 'persons with disabilities to be afforded fair and effective statutory protection against *discrimination of any kind regardless of the nature of their disability, and not merely by reason of certain* protected *characteristics laid down in EU secondary legislation*'.[62]

77. The first question must therefore be understood as seeking to determine, in essence, whether an interpretation of Directive 2000/78 in the light of that Convention would support the view that EU law precludes legislation such as that at issue in the main proceedings, inasmuch as the latter introduces a difference of treatment between employees and civil servants with the same type of disability, even though the distinguishing criterion employed in that legislation is not the disability but the difference in the nature of the employment relationships between those two categories of disabled person and their employer, and notwithstanding the fact that the latter criterion does not appear in the list of prohibited grounds of discrimination set out exhaustively in Article 1 of that directive.

58 — In that regard, I would recall, however, that the relevant provisions of Bulgarian law are concerned with the protection of workers suffering from one of the illnesses specified in those provisions, not specifically with disabled persons as such (see points 17 and 18 and footnote 4 of the present Opinion).

59 — See point 35 of this Opinion.

60 — In that regard, the national court makes express reference to the judgment of 18 March 2014, *Z.* (C-363/12, EU:C:2014:159).

61 — Under the abovementioned paragraph 2, 'States Parties shall [not only] prohibit all discrimination on the basis of disability[, but also] *guarantee to persons with disabilities* equal and effective legal *protection against discrimination on all grounds*' (my emphasis).

62 — My emphasis.

78. I should say here and now that part of the fourth question referred also needs to be reformulated,[63] inasmuch as it refers to 'compl[iance] with the provisions of international … law', an expression by which the national court appears to refer more specifically — albeit without explicitly saying so — to the UN Disability Convention and the impact that the obligation to comply with that Convention would have as regards the means to be employed in order to remedy the existence of any discrimination in circumstances such as those of the dispute in the main proceedings.[64]

2. The limited scope of the effects of the UN Disability Convention from the point of view of EU law

79. In its written reply to the questions put by the Court, the Bulgarian Government submitted that it is clear from Article 5(2) and (4) read in conjunction with Article 27(1)(g) and (h)[65] and Article 4(1)(d) and (e),[66] of the UN Disability Convention that that Convention draws a distinction between the obligations incumbent on States as regards the rights of disabled persons in the public sector and their obligations as regards the rights of that same category of persons in the private sector, and that it is therefore permissible to use such a distinguishing criterion in national rules of law.[67] The Bulgarian Government submits that, because of the specific features of the employment relationship under which civil servants work,[68] the Bulgarian legislation does not create a legal loophole requiring that protective measure to be applied by analogy to civil servants finding themselves in the situation provided for in Article 106(1), point 2, of the ZDSL.

80. In its written observations, the Commission argues that, since the provisions of the national legislation at issue do not fall within the scope of Directive 2000/78 and there are no other EU rules which are applicable, it is for the Member State concerned, namely the Republic of Bulgaria, to ensure compliance with the requirements of the UN Disability Convention, which are enforceable against it as a contracting party to that convention.

81. In that regard, I would recall that, like the Bulgarian Government and the Commission, the Court has already repeatedly held that, given that the European Union approved the UN Disability Convention, the provisions of the latter form an integral part of the EU legal order,[69] and have done so since that Convention's entry into force.[70]

63 — It being recalled that, according to settled case-law, the Court has the power to reformulate the questions referred to it in order to provide the national court with an answer which will be of use to it and enable it to determine the case before it (see, in particular, the judgment of 17 January 2013, *Hewlett-Packard Europe*, C-361/11, EU:C:2013:18, paragraph 35).

64 — See also point 96 et seq. of this Opinion.

65 — Subparagraphs (g) and (h) provide that the States Parties to that Convention must take appropriate measures, in particular, to 'employ persons with disabilities in the public sector' and to 'promote the employment of persons with disabilities in the private sector'.

66 — Subparagraphs (d) and (e) provide that the States Parties to that Convention must undertake, in particular, to 'ensure that public authorities and institutions act in conformity with [that Convention]' and to 'take all appropriate measures to eliminate discrimination on the basis of disability by any person, organi[s]ation or private enterprise'.

67 — In that regard, I would raise the immediate objection that it is incorrect to take the view that the discrimination complained of in the dispute in the main proceedings is based on a distinction between disabled persons who perform functions in the public sector and those who work in the private sector (see also point 38 of the present Opinion).

68 — In its written observations on the *first question referred*, the Bulgarian Government put forward an argument to the effect that the situation of civil servants is not comparable with that of employees, and inferred from this that there is 'no need to examine the other questions referred'. In this regard, I would simply note that the test to determine whether the situations of the categories of person concerned are comparable is relevant to the task of ascertaining whether, in the present case, there is direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78. However, those arguments are redundant and do not therefore need to be analysed, in my view, as I consider that that directive is not applicable to a dispute such as that in the main proceedings.

69 — Unlike the provisions of international agreements to which the European Union has not acceded, such as the International Covenant on Civil and Political Rights adopted on 16 December 1966 by the United Nations General Assembly (see the judgment of 28 July 2016, *Conseil des ministres*, C-543/14, EU:C:2016:605, paragraph 23).

70 — See, in particular, the judgments of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222, paragraph 30); of 18 March 2014, *Z.* (C-363/12, EU:C:2014:159, paragraph 73); and of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 68).

82. Contrary to what Ms Milkova states in her written reply to the questions put by the Court,[71] it is clear from settled case-law that the obligations imposed by that Convention apply to the contracting parties and that, since the provisions of that Convention are subject, in their implementation or their effects, to the adoption of subsequent acts by the contracting parties,[72] they do not constitute, from the point of view of their content, unconditional and sufficiently precise provisions, from which it follows that they do not have a direct effect in EU law.[73]

83. Nevertheless, the Court has held that the appendix to Annex II to Decision 2010/48 expressly mentions Directive 2000/78 among the '[EU acts] which refer to matters governed by the [UN Disability] Convention', more particularly in the field of 'independent living and social inclusion, work and employment'. As the Bulgarian Government states in its written observations, the Court has inferred from this that that Convention can be relied upon for the purposes of interpreting Directive 2000/78, which must as far as possible be interpreted in a manner that is consistent with that Convention, owing to the primacy of international agreements concluded by the European Union over instruments of secondary law.[74]

84. Thus, following the European Union's ratification of the UN Disability Convention, the Court adapted its definition of the concept of 'disability' within the meaning of Directive 2000/78 by reproducing the terminology used in the second paragraph of Article 1 of that Convention,[75] and defined the concept of 'reasonable accommodation' within the meaning of Article 5 of that directive[76] by reference to the wording of the fourth paragraph of Article 2 of that Convention.[77]

85. However, I consider that, in the present case, there is no need to interpret Directive 2000/78 in the light of the UN Disability Convention, since the dispute in the main proceedings does not, in my view, fall within the scope of that directive, for the reasons set out above.[78] The following observations are therefore presented purely in the alternative, for the sake of completeness.

3. Interpretation, in the alternative, of Directive 2000/78 in the light of the UN Disability Convention

86. By its first question, the referring court asks the Court, in essence, to determine whether the substantive scope of Directive 2000/78 could be construed extensively in the light of the content of Article 5(2) of the UN Disability Convention.[79]

71 — Ms Milkova submits that Article 5(2) of the UN Disability Convention — which guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds — is applicable on the ground that that provision creates sufficiently precise, clear and unconditional obligations, and that it follows from this that the Bulgarian ZDSL must be reformed.

72 — Thus, in the case of the European Union, Annex II to Decision 2010/48 contains a declaration relating to the extent of the Union's competence in matters governed by the UN Disability Convention, as well as an appendix setting out a list of the acts of EU law relating to the matters governed by that Convention.

73 — Since that international agreement is by way of a programme for the contracting parties, it follows, in particular, that it is impossible to review the validity of an act of EU law, such as Directive 2000/78, from the point of view of the UN Disability Convention. See the judgments of 18 March 2014, *Z.* (C-363/12, EU:C:2014:159, paragraphs 85 to 90) and of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 69).

74 — See, in particular, the judgments of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222, paragraphs 29, 31 and 32); of 18 March 2014, *Z.* (C-363/12, EU:C:2014:159, paragraphs 72, 74 and 75); and of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraphs 68 and 70).

75 — See, in particular, the judgments of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222, paragraphs 36 to 39); of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraph 53); and of 26 May 2016, *Invamed Group and Others* (C-198/15, EU:C:2016:362, paragraph 33), as well as the Opinion of Advocate General Bot in *Daouidi* (C-395/15, EU:C:2016:371, paragraph 40 and the legal literature cited). In its '2014 Report on the Application of the [Charter]' (COM[2015] 191 final, p. 14), the Commission also made the point that, 'whereas there is no legal obligation in the Charter to align interpretation with United Nations treaties, the CJEU does refer to UN instruments for interpretation of rights under EU law', in particular the UN Disability Convention.

76 — Under Article 5, employers must take appropriate measures, in particular, to enable a person with a disability to have access to, participate in, or advance in employment, unless such measures would impose a disproportionate burden on the employer.

77 — See the judgments of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222, paragraphs 48 et seq.) and of 4 July 2013, *Commission* v *Italy* (C-312/11, not published, EU:C:2013:446, paragraph 58).

78 — See point 44 et seq. of this Opinion.

79 — In that regard, see points 76 and 77 of the present Opinion.

87. In its written reply to the questions put by the Court, the Commission contended that Article 5(2) serves to give explicit expression, in the context of disability, to the principles of equality and non-discrimination formulated in paragraph 1 of that article. It stated that that provision does not confer more extensive protection than that already offered by Articles 2 and 5 of Directive 2000/78.[80] Moreover, it submits that the principle of 'equal and effective legal protection [of disabled persons] against discrimination on all grounds' provided for in paragraph 2 is applicable only where the discrimination is based on disability, which is not the situation in the present case, according to the Commission.

88. I myself would observe that it is clear both from Article 2[81] and from Article 4[82] of the UN Disability Convention that that Convention specifically prohibits *discrimination* of any kind *on the basis of disability*.[83] The same is true, in particular,[84] of Article 27 of that Convention, paragraph 1(a) of which prohibits 'discrimination on the basis of disability with regard to all matters concerning all forms of employment', in particular 'continuance of employment', which includes protection, if appropriate, in the event of termination of an employment relationship. The difference of treatment applied by the provisions of Bulgarian law at issue in the main proceedings, on the other hand, is based on the nature of the employment relationship, not on Ms Milkova's disability.

89. Moreover, I consider that the purpose of the UN Disability Convention is to ensure *equal treatment not between all categories of disabled person* but between persons with a disability and those not incapacitated in this way. It is after all clear from many of its provisions that that Convention is intended to promote *the equality of disabled persons 'with others'*.[85] That point of external comparison[86] appears in the second paragraph of Article 1, which defines the subject matter of the Convention, in particular the meaning for its purposes of 'persons with disabilities', and refers expressly to 'an equal basis with other[persons]'.[87] A variant is used in Article 7, which talks of an 'equal basis with other children'.[88] Likewise, Article 2 defines 'discrimination on the basis of disability' by reference to the exercise of the rights and freedoms in question by 'disabled persons on an equal

80 — Articles 2 and 5 being concerned with the 'concept of discrimination' and 'reasonable accommodation for disabled persons' respectively.

81 — Which defines only 'discrimination *on the basis of disability*' (my emphasis).

82 — Under the first sentence of Article 4(1), 'States Parties undertake to ensure and promote the full reali[s]ation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability' (my emphasis). Subparagraph (e) of that paragraph confirms that view.

83 — Even though some of that Convention's provisions mention other potential grounds of discrimination (see, in particular, recitals (p) and (s), as well as Article 8(1)(b)).

84 — See also, in particular, recital (h), the first paragraph of Article 25 and Article 28(1) and (2) of that Convention.

85 — I note that some provisions of the draft convention (see Annex I to the Report of the Working Group to the Ad Hoc Committee on the UN Disability Convention, published on 27 January 2004, UN Doc. A/AC.265/2004/WG/1) contained the formulation 'on an equal footing', which is less explicit than the forms of words used in the final text. This was true of Articles 1 and 7(2), as well as Articles 18, 21 and 24 of that draft. Articles 9, 13 and 14, on the other hand, referred more precisely to 'on an equal basis *with other persons*' (my emphasis).

86 — The 'relative nature' of the right to equality as provided for by that Convention has been emphasised by Waddington, L., 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities, *European Yearbook of Disability Law*, *Volume 4*, edited by Quinn, G., Waddington, L., and Flynn, E., Volume 4, Intersentia, Cambridge, 2013, 177.

87 — A similar definition of that concept can be found in point (e) of the preamble to that Convention.

88 — See also point (r) of the preamble to that Convention.

basis with others'.[89] The latter expression is used in a long series of articles in that Convention relating to the rights of disabled persons which that Convention is intended to promote and protect and the full and equal enjoyment of which it seeks to ensure,[90] as well as, more specifically in the present case, in Article 27, concerning employment and occupation.[91]

90. The Court has adopted a similar formulation in its judgments relating to those concepts contained in Directive 2000/78 which have been interpreted in conformity with the provisions of the UN Disability Convention, such as the concepts of 'disability' or 'reasonable accommodation'. In that regard, the Court has repeatedly referred to barriers which may 'hinder the full and effective participation of [a disabled person] in professional life *on an equal basis with other workers*',[92] rather than to equality between various categories of disabled person. It seems to me that it was in this spirit that the European Union ratified that Convention.[93]

91. I therefore consider that the provisions of the UN Disability Convention are not intended to capture a situation such as that in the dispute in the main proceedings and that, in any event, an interpretation of Directive 2000/78 that is consistent with those provisions cannot have the effect of calling into question the exhaustive nature of the grounds of discrimination listed in Article 1 of that directive[94] in such a way as to add to that list the ground relating to the different nature of the employment relationships under which two categories of disabled person work.

92. Consequently, if the Court found it necessary in the present case to interpret Directive 2000/78 in accordance with the UN Disability Convention, the foregoing considerations would, in my view, require that the concept of 'discrimination based on disability' within the meaning of that directive be defined as referring to a situation where persons with a disability are treated less favourably or are put at a particular disadvantage *by comparison with 'others'*, that is to say persons who, while not exhibiting that characteristic, are otherwise in a situation equivalent to that of the former group. Similarly, for the purposes once again of the application of that directive, 'the principle of equal treatment' would, in so far as it relates to persons with a disability, have to be understood as ensuring equality between that group of persons and persons not incapacitated on such a long-term basis.

93. Finally, I note, with regard more specifically to the present case, that there is nothing in any of the provisions of that Convention to indicate that the contracting States have an obligation, in so far as they are able, to keep a disabled person in employment where his post has been cut, and that Ms Milkova is therefore entitled to the more favourable treatment which she has sought.

89 — '"*Discrimination on the basis of disability*" means any *distinction*, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, *on an equal basis with others*, of all human rights and fundamental freedoms' (my emphasis).

90 — That is to say, Article 9, on accessibility; Article 10, on the right to life; Article 12, on recognition before the law; Article 13, on access to justice; Article 14, on liberty and security of person; Article 15, on freedom from torture or cruel, inhuman or degrading treatment or punishment; Article 17, on protecting the integrity of the person; Article 18, on liberty of movement and nationality; Article 19, on living independently and being included in the community; Article 21, on freedom of expression and opinion and access to information; Article 22, on respect for privacy; Article 23, on respect for home and the family; Article 24, on education; Article 29, on participation in political and public life; and Article 30, on participation in cultural life, recreation, leisure and sport.

91 — The wording of Article 27(1) is reproduced in part in point 9 of the present Opinion. Paragraph 2 of that article states that 'States Parties shall ensure that persons with disabilities are … protected, *on an equal basis with others*, from forced or compulsory labour' (my emphasis).

92 — My emphasis. See, in particular, the judgments of 11 April 2013, *HK Danmark* (C-335/11 and C-337/11, EU:C:2013:222, paragraphs 38, 41, 47 and 54); of 4 July 2013, *Commission* v *Italy* (C-312/11, not published, EU:C:2013:446, paragraphs 56 and 59); of 18 March 2014, *Z.* (C-363/12, EU:C:2014:159, paragraphs 76 and 80); and of 18 December 2014, *FOA* (C-354/13, EU:C:2014:2463, paragraphs 53, 59 and 60).

93 — Thus, the Commission's press release relating to the ratification of that Convention (press release of 5 January 2011, IP/11/4) states that the UN Disability Convention 'commits parties to making sure that people with disabilities fully can enjoy their rights *on an equal basis with all other citizens*' (my emphasis).

94 — See point 51 et seq. of this Opinion.

94. Even if Article 5(2) of the UN Disability Convention is directed at situations not covered by Directive 2000/78, as the referring court appears to consider, this would make no difference in my opinion, given that the provisions of that Convention are not directly applicable in EU law [95] and their bearing on that directive is therefore meant to be confined to an interpretation of its provisions which is consistent with the Convention, the scope of that directive being defined by its own provisions.

95. In conclusion, I consider, principally, that there is no need here to interpret Directive 2000/78 in the light of the UN Disability Convention and, in the alternative, that, if the Court does not share my view, it should so interpret it as meaning that the purpose of that Convention is to ensure equal treatment not between different categories of disabled person but between all persons with a disability and those without one.

D – The possibility of extending the personal scope of the national rules protecting disabled employees (fourth question)

96. The fourth question is raised in the alternative, since it is asked in the event that the Court answers 'the first and third questions … in the negative'.

97. The referring court is asking, in essence, whether the obligation — incumbent on the authorities of the Republic of Bulgaria — to comply with the provisions of both international law and EU law requires that, in a situation such as that in the dispute in the main proceedings, the scope of the national rules protecting disabled employees, whether employed in the private or the public sector, in the event of dismissal [96] be extended in such a way that those protective rules also benefit civil servants with the same type of disability, so as to comply with the principle of equal treatment in employment and occupation. That is the stance which Ms Milkova has taken. [97]

98. It is clear from the order for reference that that question is linked to the fact that the Bulgarian legislation at issue is applied strictly by the national courts [98] and that that rigorous approach might prove to be inconsistent with the provisions of EU law as interpreted in particular in the light of the UN Disability Convention, [99] which require fair and effective statutory protection against discrimination for all disabled persons.

99. Like the Bulgarian Government and the Commission, I consider that, in the light of the restrictive replies which I am proposing should be given to the preceding questions and given the conditional nature of the fourth question, there is no need to answer the latter question or, therefore, to devote any specific submissions to it.

95 — See point 82 of this Opinion.

96 — That is to say, the rules laid down in Article 333(1), point 3, of the Labour Code, read in conjunction with Article 328(1), point 2, of that Code.

97 — In her written reply to the questions put by the Court, Ms Milkova submitted that, since the national legislation at issue creates a difference in the treatment of disabled persons, even though that difference is based on the employment relationship rather than the disability, Article 333(1), point 3, of the Labour Code must also be applied to disabled workers who are civil servants, by analogy with those who are employees, and that, by including a provision to that effect in the Law on the civil service, that legislation must be brought into line with the rules of EU law.

98 — See point 35 et seq. of this Opinion.

99 — So far as concerns a Member State's 'compl[iance] with the provisions of international law', which is mentioned in the fourth question referred, I would recall that the Court does not have jurisdiction to give a preliminary ruling on such a point of law and that the wording of that question must be reformulated in that regard (see point 75 et seq. of the present Opinion).

100. In the final alternative and to the extent that what follows is relevant, as regards the role that may fall to the national courts of ensuring that a Member State fully discharges its obligations under EU law, which, to my mind, is the issue underpinning the fourth question referred, I would simply refer to the Court's case-law on that subject, and, more specifically, to the judgments relating to discrimination introduced by rules of national employment law. [100]

V – Conclusion

101. In the light of the foregoing, I propose that the Court's answer to the questions referred for a preliminary ruling by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) should be as follows:

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that it is not applicable to a situation in which the difference of treatment which the national legislation introduces as between employees and civil servants with the same types of disability is based on the criterion not of disability but of the nature of the employment relationship between those two categories of disabled person and their respective employers.

100 — On the duty incumbent on national courts to interpret a rule of national law in such a way as to enable it to be applied in accordance with the requirements of EU law, see, in particular, the Opinion of Advocate General Mengozzi in *Fenoll* (C-316/13, EU:C:2014:1753, point 55 et seq. and the case-law cited); the Opinion of Advocate General Bot in *DI* (C-441/14, EU:C:2015:776, point 42 et seq.); and the judgment of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 28 et seq. and the case-law cited).