Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 21 March 2017[1]

Case C-190/16

Werner Fries
v
Lufthansa CityLine GmbH

(Request for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany))

(Transport Policy — Air transport — Commission Regulation No 1178/2011 — Validity of Point FCL.065(b) of Annex I to Regulation No 1178/2011 — Article 15(1) and Article 21(1) of the Charter of Fundamental Rights of the European Union (‘the Charter’) — Freedom to choose an occupation and right to engage in work — Equal treatment on the basis of age — Age limit of 65 for pilots engaged in commercial air transport — Aviation safety — Definition of ‘commercial air transport’ — Ferry flights and training and examination activities)

I. **Introduction**

1. Mr Fries worked as a pilot for Lufthansa CityLine GmbH (‘Lufthansa CityLine’). When he turned 65, the airline refused to continue employing him although, under the applicable collective agreement, the contract would not expire for another two months. The airline considered that the employment could not continue since, under EU law, holders of pilot licences having attained the age of 65 shall not act as pilots of aircraft engaged in commercial air transport. Mr Fries nonetheless contends that his employment with Lufthansa CityLine could have continued for the remaining two months before he reached the pensionable age. For that period he could have acted as an instructor, examiner, and as a pilot of ferry flights.

2. It is in this context that the referring court, first, questions the validity of the EU law provision establishing the age limit — point FCL.065(b) of Annex I to Commission Regulation (EU) No 1178/2011 (‘point FCL.065(b’)[2] — in the light of the prohibition of discrimination on grounds of age (Article 21(1) of the Charter) and the right to engage in work and to pursue a freely chosen occupation (Article 15(1) of the Charter). Second, if that provision were to be held as valid, the referring court enquires about the interpretation of the term ‘commercial air transport’. More specifically, it wishes to know whether that term includes flights for the purposes of training and examination and ferry flights.

1 — Original language: English.

2 — Regulation of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council (OJ 2011 L 311, p. 1), as amended by Commission Regulation (EU) No 290/2012 of 30 March 2012 (OJ 2012 L 100, p. 1).

II. **Legal framework**

A. **Regulation No 216/2008**

3. Regulation No 1178/2011, at issue in the present case, implements Regulation (EC) No 216/2008.[3] Recitals 1, 3, 4, 7, and 8 of the latter regulation are worded as follows:

'(1) A high and uniform level of protection of the European citizen should at all times be ensured in civil aviation, by the adoption of common safety rules and by measures ensuring that products, persons and organisations in the Community comply with such rules and with those adopted to protect the environment. This should contribute to facilitating the free movement of goods, persons and organisations in the internal market.

…

(3) The Chicago Convention already provides for minimum standards to ensure the safety of civil aviation and environmental protection relating thereto. Community essential requirements and rules adopted for their implementation should ensure that Member States fulfil the obligations created by the Chicago Convention, including those vis-à-vis third countries.

(4) The Community should lay down, in line with standards and recommended practices set by the Chicago Convention, essential requirements applicable to aeronautical products, parts and appliances, to persons and organisations involved in the operation of aircraft, and to persons and products involved in the training and medical examination of pilots. The Commission should be empowered to develop the necessary implementing rules.

…

(7) Aeronautical products, parts and appliances, operators involved in commercial air transport, as well as pilots and persons, products and organisations involved in their training and medical examination, should be certified or licensed once they have been found to comply with essential requirements to be laid down by the Community in line with standards and recommended practices set by the Chicago Convention. The Commission should be empowered to develop the necessary implementing rules for establishing the conditions for the issue of the certificate or the conditions for its replacement by a declaration of capability, taking into account the risks associated with the different types of operations, such as certain types of aerial work and local flights with small aircraft.

(8) For non-commercial operations, the operational and licensing rules should be tailored to the complexity of the aircraft and a related definition should be set out.'

4. Article 2(1) of Regulation (EC) No 216/2008 provides that 'the principal objective of this Regulation is to establish and maintain a high uniform level of civil aviation safety in Europe'.

3 — Regulation of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (OJ 2008 L 79, p. 1), as amended by Commission Regulation (EC) No 690/2009 of 30 July 2009 (OJ 2009 L 199, p. 6), Regulation (EC) No 1108/2009 of the European Parliament and of the Council of 21 October 2009 (OJ 2009 L 309, p. 51) and Commission Regulation (EU) No 6/2013 of 8 January 2013 (OJ 2013 L 4, p. 34).

B. **Regulation No 1178/2011**

5. Recital 11 of Regulation No 1178/2011 is worded as follows:

'In order to ensure a smooth transition and a high uniform level of civil aviation safety in the Union, implementing measures should reflect the state of the art, including best practices, and scientific and technical progress in the field of pilot training and aircrew aero-medical fitness. Accordingly, technical requirements and administrative procedures agreed by the International Civil Aviation Organisation (ICAO) and the Joint Aviation Authorities until 30 June 2009 as well as existing legislation pertaining to a specific national environment, should be considered.'

6. Article 1(1) of Regulation No 1178/2011 provides that that regulation lays down detailed rules for, inter alia, 'different ratings for pilots' licences, the conditions for issuing, maintaining, amending, limiting, suspending or revoking licences, the privileges and responsibilities of the holders of licences, the conditions for the conversion of existing national pilots' licences and of national flight engineers' licences into pilots' licences, as well as the conditions for the acceptance of licences from third countries'.

7. Article 3 of Regulation No 1178/2011, in the version that is applicable to the facts, establishes that: 'Without prejudice to Article 7, pilots of aircraft referred to in Article 4(1)(b) and (c) and Article 4(5) of Regulation (EC) No 216/2008 shall comply with the technical requirements and administrative procedures laid down in Annex I and Annex IV to this Regulation.'

8. Point FCL.010 of Annex I to Regulation No 1178/2011 ('point FCL.010') contains the definitions applicable to the FCL part (flight crew licensing). It provides that '"commercial air transport" means the transport of passengers, cargo or mail for remuneration or hire'.

9. Point FCL.065 of Annex I to Regulation No 1178/2011, entitled 'Curtailment of privileges of licence holders aged 60 years or more in commercial air transport', in the version applicable to the proceedings before the referring court,[4] provides that:

'(a) Age 60-64. Aeroplanes and helicopters. The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport except:

(1) as a member of a multi-pilot crew; and

(2) provided that such a holder is the only pilot in the flight crew who has attained the age of 60 years.

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

III. **Facts, procedure and preliminary questions**

10. Mr Fries had been employed by Lufthansa CityLine since 1986. He was captain on an aircraft of the Embraer type. He was also tasked with instructing other pilots.

4 — That provision has been amended by Commission Regulation (EU) 2015/445 of 17 March 2015 (OJ 2015 L 74, p. 1). See point (1) of Annex I: '(a) Age 60-64. Aeroplanes and helicopters. The holder of a pilot licence who has attained the age of 60 years shall not act as a pilot of an aircraft engaged in commercial air transport except as a member of a multi-pilot crew. (b) Age 65. Except in the case of a holder of a balloon or sailplane pilot licence, the holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport. (c) Age 70. The holder of a balloon or sailplane pilot licence who has attained the age of 70 years shall not act as a pilot of a balloon or a sailplane engaged in commercial air transport.'

11. In October 2013, Mr Fries turned 65. Lufthansa CityLine requested that Mr Fries return the resources provided to him for work purposes by 31 October 2013. After that date, he was no longer employed by Lufthansa CityLine. According to the airline, upon reaching the age of 65, Mr Fries could no longer be employed as a pilot due to the age limitation established in point FCL.065(b) in Annex I to Regulation No 1178/2011.

12. However, the contract of employment between Lufthansa CityLine and Mr Fries was supposed to come to an end on 31 December 2013. This was due to the rule contained in the applicable collective agreement providing for the expiration of contracts once the retirement age of the statutory pension regime has been reached. Mr Fries would reach that retirement age when he turned 65 years and two months.

13. As a consequence, there is a difference of two months between the date on which Lufthansa CityLine ceased to employ Mr Fries and the date when, according to the collective agreement, the employment contract should have come to an end.

14. Mr Fries contends that it was possible for him to fulfil the employment contract for the remaining two months following his 65th birthday, until he reached the retirement age. He could still pilot ferry flights and act as an instructor and examiner, in accordance with the licences he held. For the period at issue, Mr Fries still possessed: the licence to operate commercial aircraft (ATPL) including that for the Embraer aircraft type; authorisation as a Type Rating Instructor (TRI) to train pilots in aircraft and in simulators for the Embraer aircraft type; authorisation as a Type Rating Examiner (TRE) to conduct examinations in aircraft and in simulators for the purposes of obtaining or extending licences for the Embraer aircraft type; and approval as a Senior Examiner (SEN) to conduct examinations for Type Rating Examiners (TREs) irrespective of the aircraft type.

15. Mr Fries brought an action seeking remuneration for the months of November and December 2013. It is apparent from the written observations lodged at the Court that the action was upheld for the most part before the first and second instance courts.

16. Both parties have appealed to the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany). Lufthansa CityLine seeks the dismissal of the action whereas Mr Fries seeks full payment of the amount requested.

17. The referring court explains that, according to national law, [5] if an employment contract capable of being fulfilled exists, the employer would be in default if he does not accept the performance duly offered to him by the employee. In that case, the employee can demand the agreed remuneration for the services not rendered as the result of the default. However, if the employee is not in a position to perform the obligation, the employer's default in acceptance would be precluded. If it is impossible for the employee to perform the agreed tasks in the employment contract in part or in full, the employer would have a duty to consider his or her rights and interests under national law: this means providing the employee with other tasks that he is capable of performing. If the employer breaches this duty he may be opening him or herself up to liability and the payment of damages.

18. It is in those circumstances that the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is FCL.065(b) in Annex I to Commission Regulation (EU) No 1178/2011 … compatible with the prohibition of discrimination on grounds of age under Article 21(1) of [the Charter]?

5 — Paragraphs 241(2), 293, 297 and 615 of the Bürgerliches Gesetzbuch (BGB, German Civil Code).

(2) Is FCL.065(b) in Annex I to [Regulation No 1178/2011] compatible with Article 15(1) of the Charter, according to which everyone has the right to engage in work and to pursue a freely chosen or accepted occupation?

(3) If the first and second questions are answered in the affirmative:

(a) Are so-called ferry flights operated by an air carrier transporting no passengers and no cargo or mail also covered by the term 'commercial air transport' within the meaning of FCL.065(b) or the definition of that term in FCL.010 in Annex I to [Regulation No 1178/2011]?

(b) Are training and the conducting of exams in which a pilot over the age of 65 remains in the cockpit of the aircraft as a non-flying crew member covered by the term 'commercial air transport' within the meaning of FCL.065(b) or the definition of that term in FCL.010 in Annex I to [Regulation No 1178/2011]?'

19. Mr Fries, Lufthansa CityLine, the Italian Government and the European Commission have presented written observations in the present case.

IV. **Assessment**

20. This Opinion is structured as follows. First, I shall address the compatibility of point FCL.065(b) with Article 21(1) and Article 15(1) of the Charter (Section A). Second, since I conclude that that provision is in my view compatible with the abovementioned Charter rights, I offer the interpretation of the term 'commercial air transport' in points FCL.010 and FCL.065(b) (Section B).

A. **Compatibility of point FCL.065(b) with the Charter**

21. Point FCL.065(b) in Annex I to Regulation No 1178/2011 lays down an age limitation to act as a pilot: it establishes that holders of pilot licences having attained the age of 65 shall not act as pilots of aircraft engaged in commercial air transport. By its first and second questions, the referring Court asks whether that age restriction is compatible with the Charter: first with the prohibition of discrimination on grounds of age under Article 21(1) and, second, with the right to engage in work and to pursue a freely chosen or accepted occupation under Article 15(1). I shall examine the compatibility of the provision at issue with both rights in turn.

1. ***Article 21(1) of the Charter***

22. According to Article 21(1) of the Charter, any discrimination based on age is prohibited. As an expression of the general principle of EU law of equal treatment, enshrined in Article 20 of the Charter,[6] the prohibition of discrimination entails that: (a) comparable situations must not be treated differently, (b) to the detriment of the protected group, (c) on the basis of one of the protected grounds, (d) unless such treatment is objectively justified by an objective of general interest recognised by the EU and respects the principle of proportionality.

6 — See, to that effect, judgments of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 43), and of 29 April 2015, *Léger* (C-528/13, EU:C:2015:288, paragraph 48), as well as the case-law cited therein.

(a) ***Different treatment of comparable situations***

23. Point FCL.065(b) mandates different treatment of persons who are in a comparable situation. A licence holder subject to the limitation of 65 years of age to be able to work as a pilot of aircraft engaged in commercial air transport certainly bears more similarities than differences to a younger pilot who has a licence to perform the same activity.[7] Both are subject to the same regulatory regime within which they compete for essentially the same jobs.

(b) ***To the detriment of the protected group***

24. Pilots having attained the age of 65, for whom the performance of the activity of piloting aircraft engaged in commercial air transport is not allowed, are treated in a less favourable manner because of their age.[8] They are banned from exercising a certain type of activity.

(c) ***On the basis of a protected ground***

25. The only criterion upon which the limitation established by point FCL.065(b) is age, which is one of the 'suspect grounds' expressly listed in Article 21(1) of the Charter.

(d) ***Justification***

26. The prohibition of discrimination on grounds of age in Article 21(1) of the Charter is, however, not absolute. Limitations are allowed according to the requirements established in Article 52(1) of the Charter.

27. In order to put forward possible grounds that may justify the difference of treatment in the present case, the Commission has claimed that resort should be had, by analogy, to the permissible exceptions to the equal treatment principle under Directive 2000/78/EC.[9] The Commission considers that the age requirement at issue is 'necessary for public security' according to Article 2(5) of Directive 2000/78. The Commission further maintains that the age limitation at issue is covered by Article 4(1) of that directive, as it relates to a 'genuine and determining occupational requirement' for professional pilots and that it is proportionate to the legitimate objective pursued.

28. It is not disputed that Directive 2000/78 is not applicable in the present case. What is at issue is the validity of an EU secondary law rule in the light of a provision of primary law — the Charter.

29. Directive 2000/78 represents a concrete expression of the non-discrimination principle in the field of employment and occupation. Thus, the analytical framework under Article 21(1) of the Charter is bound to be similar. For this reason, the categories and interpretation developed under the directive may serve as inspiration to flesh out the content of Article 21(1) of the Charter. In particular, the two provisions of the directive relied on by the Commission show the European legislature's attempt to reach a compromise between competing interests by allowing justifications for national measures enabling differences in treatment to be directly based on age.[10] Finally, taking due account of the directive is also warranted by the need for a coherent approach to judicial review of EU law and national law in the field of non-discrimination on grounds of age in employment.

7 — See, to that effect, judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 44).

8 — See, by analogy, judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 44).

9 — Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

10 — See, to that effect, judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 55).

30. In this context, the notion of 'genuine occupational requirements', advanced by the Commission on the basis of Directive 2000/78, represents a specific avenue for the justification of unequal treatment in the field of employment that is equally applicable in the framework of Article 21(1) of the Charter. The Court has stated that a difference of treatment based on grounds such as age, sex or disability does not constitute an infringement of Article 21(1) of the Charter 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'.[11] The genuine and determining occupational requirement is not, per se, the 'suspect' ground on which the difference of treatment is based — age — but a characteristic related to it.[12] In this case, the characteristic related to age means particular physical capabilities which diminish with age.[13] This has already been declared by the Court as a 'genuine and determining occupational requirement' for acting as an airline pilot.[14] To constitute a permissible limitation to the non-discrimination principle enshrined in Article 21(1) of the Charter, that requirement must pursue a legitimate objective and be proportionate.[15]

31. The assessment of whether the measure at issue can be justified as a genuine and determining occupational requirement effectively overlaps with the limitation requirements established in Article 52(1) of the Charter, which ultimately articulates the examination of permissible limitations to the rights enshrined in Article 21(1) of the Charter.

32. Article 52(1) of the Charter allows limitations if they are provided for by law, respect the essence of the rights concerned and, subject to the principle of proportionality, are necessary and genuinely meet the objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.[16]

33. It is not disputed that the age limitation in the present case is *provided for by law*: it is expressly laid down in point FCL.065(b) in Annex I to Regulation No 1178/2011. Furthermore, it cannot be said that the age limitation at issue impinges upon the *essential content* of the principle of non-discrimination as it has limited scope.[17]

34. Therefore, I shall now examine whether the age limitation (1) pursues a legitimate objective and (2) whether it complies with the requirements of proportionality.

1) *Legitimate objective*

35. In the present case, the Commission, the Italian Government and Lufthansa CityLine argue that the measure at issue pursues the objective of attaining and maintaining a high uniform level of civil aviation safety in Europe. That objective, as Lufthansa CityLine claims, is also connected with the protection of life and human health.

11 — Judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 49).

12 — See, to that effect, with regard to Article 4(1) of Directive 2000/78, judgments of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3, paragraph 35); of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 66); and of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 36).

13 — See judgments of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3, paragraph 41); of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 37); and of 15 November 2016, *Salaberria Sorondo* (C-258/15, EU:C:2016:873, paragraph 34).

14 — See judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 67).

15 — Judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 49).

16 — See, for example, judgments of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 42); of 29 April 2015, *Léger* (C-528/13, EU:C:2015:288, paragraphs 51 and 52); and of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 50).

17 — See, to that effect, judgment of 29 April 2015, *Léger* (C-528/13, EU:C:2015:288, paragraph 54).

36. The objective of establishing and maintaining a high uniform level of civil aviation safety in the Union is expressly laid down in recital 1 and Article 2(1) of Regulation No 216/2008, which forms the legal basis of Regulation No 1178/2011. The latter regulation also echoes this very objective in its recitals 1 and 11.

37. There is no doubt in my mind that air traffic safety, like safety in other transport sectors,[18] is an objective of general interest recognised by the Union.[19]

2) *Proportionality*

38. It should now be assessed whether the measure at issue genuinely meets the objective of attaining air traffic safety, whether it is necessary to achieve that objective and whether the disadvantages caused are not disproportionate to the aims pursued.

39. The Italian Government and Lufthansa CityLine consider that the age criterion of 65 is appropriate and necessary to the objective pursued. Mr Fries acknowledges that an age limit is appropriate to attain the objective of achieving a high and uniform level of safety, as experience dictates that physical and mental capacities tend to diminish with age. However, he estimates that the age limitation of 65 is not necessary.

i) *Appropriateness*

40. In my opinion, there is little doubt that, in principle, the age limitation at issue is suitable to meet the objective pursued. As the Court has declared in *Prigge*, it is essential that commercial pilots have certain physical capabilities.[20] Some of those capabilities inevitably diminish with time.

41. An age limitation of 65 years of age appears, therefore, to be a suitable measure to meet the objective of a high level of air traffic safety.[21]

42. Mr Fries, however, questions the internal consistency of the rule at issue in the present case, relying on the judgment of the Court in *Petersen*.[22] He submits that the age limit of 65 does not consistently pursue the objective of air transport safety because it does not apply to non-commercial air transport, where safety risks are also a concern.

43. I do not share this view. The fact that the age restriction at issue only applies to pilots of aircraft engaged in commercial air transport, far from affecting the consistency of the rule in the pursuance of the alleged legitimate objective, in fact reinforces the proportionate nature of the measure.

44. It is apparent that in the field of aviation, different rules apply to different kinds of operations regarding the different safety levels required, based on a hierarchy of risks, where commercial air transport ranks higher.

18 — With regard to road safety see, for example, judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 51, and the large amount of case-law cited therein.)

19 — See, to that effect, judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 68 and 69).

20 — Judgment of 13 September 2011, C-447/09, EU:C:2011:573, paragraph 67.

21 — In this regard, the Court held in its judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 67) that possessing particular physical capabilities related to age may be considered as a 'genuine and determining occupational requirement', since 'as regards airline pilots, it is essential that they possess, inter alia, particular physical capabilities in so far as physical defects in that profession may have significant consequences. It is also undeniable that those capabilities diminish with age'.

22 — Judgment of 12 January 2010, C-341/08, EU:C:2010:4.

45. By imposing the age limitation only on commercial air transport, Regulation No 1178/2011 put in place a compromise solution, applying more stringent standards taking into account the higher risks connected to the number of persons and the importance of the air safety interests affected.[23]

ii) *Necessity*

46. Mr Fries argues, however, that the age limit he was subjected to goes beyond what is necessary. He puts forward two arguments.

47. As a first line of argument, Mr Fries submits that there is no scientific evidence that pilots aged 65 do not satisfy the requirements of commercial air transport. By way of example he points to certain States outside the EU that do not have such age limits.

48. Second, Mr Fries states that health and capacity are by their nature personal and specific to each pilot. Therefore, an individualised approach to their assessment should be taken. The presumption of deteriorating physical capacities cannot be applied generally to all individuals. Therefore, age should not be a self-contained criterion. Less stringent measures could take into account one's capacities on an individual level. Mr Fries underlines that there is the possibility of determining such capacities through a system of medical checks. He points out that, for licence holders aged 60 and over, the duration of validity of the required medical certificates is lowered to six months according to point MED.A.045(a)(2)(ii) of Annex IV to Regulation No 1178/2011. He also noted that pilots remain subject to recurrent training and review of their professional aptitude, as provided for by point ORO.FC.230 of Regulation (EU) No 965/2012.[24]

49. In my view, the arguments put forward by Mr Fries cannot be upheld. I will analyse both these arguments in turn.

– *Fixing the age limit at 65*

50. The fact that physical capabilities generally diminish with age is hardly a questionable fact. What may be open to debate, however, is where exactly to draw the line. It is therefore true that, as Mr Fries has argued, there might be some medical uncertainty as to the determination of the precise age limit above which medical fitness can no longer be presumed.[25]

51. However, the decision to establish an age limit and the precise determination of that limit involves complex assessments of a medical and technical nature. That translates into the European legislature enjoying a wide margin of appreciation in setting up such limits.[26]

52. The choices of the EU legislature must, even in that case, be based on objective criteria, and ensure that fundamental rights are observed.[27] Standards set at the international level may be considered to form a crucial element of such objective criteria.

23 — Different rules for non-commercial and commercial operations are contained, inter alia, in Regulation No 216/2008, in Regulation No 1178/2011 and in Regulation No 695/2012. See recitals 7 and 8 of Regulation No 216/2008, cited in point 3 of this Opinion. See also the European Air Safety Agency's (EASA) explanation of the different air operations, at https://www.easa.europa.eu/easa-and-you/general-aviation/operations-general-aviation#group-easa-related-content.

24 — Commission Regulation of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation No 216/2008 (OJ 2012 L 296, p. 1).

25 — The establishment of fixed age limits has been and continues to be the object of much debate. See, for example, Document AN-WP/7982 'Appendix C — Upper age limits for flight crew members', ICAO, 2006, which compiles the different positions of States and different associations about the age 60 rule, before the ICAO raised the age limit to 65 in 2006. See also: Aerospace Medical Association, Aviation Safety Committee, Civil Aviation Safety Subcommittee, 'The age 60 rule', *Aviation, Space, and Environmental Medicine*, Vol. 75, No 8, 2004, pp. 708 to 715. See also, for the debate in the United States of America, the 'Report to the Federal Aviation Administration' of the Age 60 Aviation Rulemaking Committee, of 29 November 2006.

26 — See, in particular, judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraphs 52 and 64 and the case-law cited).

27 — See, in particular, judgment of 22 May 2014, *Glatzel* (C-356/12, EU:C:2014:350, paragraph 53 and the case-law cited).

53. The age limit of 65 is in line with the standards elaborated by the International Civil Aviation Organisation (ICAO) in the framework of the Chicago Convention, which are given ample weight by both Regulation No 216/2008 and Regulation No 1178/2011.[28]

54. In particular, point 2.1.10 of Annex I to the Chicago Convention provides for the limitation of privileges for pilots who have turned 60, and for the curtailment of privileges of pilots who are aged 65. Point 2.1.10.1 of that annex establishes that Contracting States shall not permit the holders of pilot licences to act as pilot-in-command of an aircraft engaged in international commercial air transport operations if the licence holders have reached the age of 60 or, if there is more than one pilot and the other pilot is younger than 60, when they have reached the age of 65.[29] Point 2.1.10.2 of that annex contains, moreover, a recommendation, according to which, a Contracting State, having issued pilot licences, should not permit the holders thereof to act as co-pilot of an aircraft engaged in international commercial air transport operations if the licence holders have attained their 65th birthday.

55. The current age limitations in the framework of the Chicago Convention result from an amendment which, after much debate in the framework of the ICAO, raised the upper age limit from 60 to 65.[30] The upper age limit of 65 also reflects the rule established in the framework of the Joint Aviation Authorities.[31]

56. Such international standards are a valuable element in the assessment of proportionality of the provision at issue in the present case. As they are based on extensive professional debate and expertise, they lay solid ground for the justification of the age limit, acting as objective and reasonable references for decision-makers.[32] They demonstrate the consensus and good practice in a technical field which is international by nature.[33]

57. The fact that age limits have changed in different versions of the EU regulation at issue,[34] as well as in the framework of international standards, does not render the rule disproportionate or arbitrary. On the contrary, the laudable effort of decision-makers in adapting the rules to the evolution of knowledge, social developments, and international best practices cannot be used as an argument to downplay the necessity of the age limitation.

58. In sum, the EU legislature's decision to set the age limit at 65 appears to be fully in line with international standards in the field, in addition to being sensibly adapted and evolving over the years. To call such a standard into question would require rather a robust case supported by strong evidence, which has not been presented in this case.

28 — See, inter alia, recitals 3, 4 and 7, and Article 2(d) of Regulation No 216/2008 and recital 11 of Regulation No 1178/2011.

29 — Convention on International Civil Aviation, signed on 7 December 1944, with the subsequent modifications. According to Article 38 of the Chicago Convention States Parties which deem it necessary to adopt regulations or practices differing from those established by an international standard, shall notify the ICAO of the differences between its own practice and that established by the international standard. See, for example, the report presented by Japan on 'Relaxation of age limit of pilots engaged in air transport and ensurement of the health management system in airlines', which explains the decision to raise the age limit to 68, Document A39-WP277, Working Paper, ICAO, 29.8.2016.

30 — Amendment 167 to Annex I to the Chicago Convention, adopted by the ICAO Council on 10 March 2006. For the discussion surrounding this amendment, see Document AN-WP/7982, cited in footnote 25.

31 — See the former Joint Aviation Requirements (JAR) — Flight Crew Licensing 1 (JAR-FCL 1), Joint Aviation Authorities, as amended the 1 December 2006.

32 — See, to that effect, Human Rights Committee, Communication No 983/2001 of 25 March 2003, CCPR/C/77/D/983/2001, point 8(3). In that case, which concerned Article 26 of the International Covenant on Civil and Political Rights, the Committee declared that it could not conclude that the difference in treatment was not based on objective and reasonable considerations, having in mind that, in order to justify the mandatory age limit of 60 at the time, the State had referred to the then applicable ICAO standard.

33 — Regarding the value of those international standards, see judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 73) and Opinion of Advocate General Cruz Villalón in *Prigge and Others* (C-447/09, EU:C:2011:321, point 66).

34 — Point FCL.065 was amended in 2015, see footnote 4.

– *Age as the only criterion*

59. Mr Fries also contests that the provision in question relies on age as the *sole* criterion. Merely by attaining the age of 65, a person can no longer act as a pilot of aircraft engaged in commercial air transport. However, in my view, in a case like the present one, the lack of an individualised approach also does not fail to comply with the criterion of necessity.

60. By setting a general upper age limitation in the particular field of commercial air transport, the EU legislature, following international practice, has adopted a regulatory approach that combines an individualised approach based on medical and competence checks (up until the age of 60), and a progressive limitation of the privileges of licence holders in commercial aviation over that age.

61. In my view, such a regime reflects a legitimate regulatory choice. After a certain age, when medical risks are considered to have increased, the legislature adds to the individualised approach by virtue of medical and competence reviews certain additional conditions for the 60 to 64 age group, and finally, it excludes the possibility to act as pilot of aircraft engaged in *commercial* air transport for those having attained the age of 65. By doing so, it embeds proportionality into the rule, adapting the limitations progressively with increases in age. It does so by laying down a general rule which operates uniformly, on the basis of a general risk assessment by the EU decision-maker under its margin of appreciation, ensuring its foreseeability, workability and manageability both by private actors and public authorities.

62. The latter elements of foreseeability and workability of the rule ought to be underlined here. Mr Fries' second argument aiming at the interplay between a general rule and an individual case could in fact be used universally for calling into question any generally applicable rule that involves age. However, general rules, as their name indicates, are created by a *generalisation*. They are justified as long as it can be maintained that, in general, they properly apply in a reasonable majority of cases. This of course also means that there might potentially be individual exceptions. This does not mean, however, that the general rule must be reconsidered and replaced by an individual, case-by-case assessment. If it did, there could be no general rules.

– *Proportionality stricto sensu*

63. Finally, taking due account of the importance of the objective of a high level of air traffic safety and its impact on the rights of others, as well as the risks associated with commercial air transport, it appears that the provision at issue has balanced the rights of pilots attaining the age of 65 and the particular requirements of air traffic safety. The provision, the validity of which is challenged in the present case, cannot therefore be regarded as imposing disproportionate disadvantages on the persons affected by the age limitation in relation to the objectives pursued.

(e) ***Interim conclusion***

64. As a result of the foregoing, I propose that the answer to the first question be that the examination of the first question referred by the Bundesarbeitsgericht (Federal Labour Court) has not revealed any reasons capable of affecting the validity of point FCL.065(b) of Annex I to Regulation No 1178/2011 in the light of Article 21(1) of the Charter.

2. ***Article 15(1) of the Charter***

(a) ***Analysis***

65. The referring court also seeks to establish the validity of point FCL.065(b) in the light of Article 15(1) of the Charter.

66. According to Article 15(1) of the Charter, ‘everyone has the right to engage in work and to pursue a freely chosen or accepted occupation’. That right enhances personal autonomy and self-realisation, with human dignity serving as its foundation.[35]

67. It is not disputed that the age limit at issue constitutes a restriction to the exercise of the occupation of pilot. It limits the possibility to act as pilot of aircraft engaged in commercial air transport. However, Article 15(1) of the Charter does not contain absolute rights. Limitations are permitted according to the parameters laid down in Article 52(1) of the Charter recalled in point 32 of this Opinion.[36]

68. Mr Fries has submitted that the age limitation imposed by the rule at issue is contrary to Article 15(1) of the Charter, since it affects the *essence of that right*.

69. This view, in my opinion, cannot be upheld. As already noted in point 33 of this Opinion, due to its limited scope, the current age limitation to fly as a pilot in the particular field of commercial air transport cannot be considered to adversely affect the very essence of the right to pursue a freely chosen occupation. It affects the possibility to pursue a professional career in a certain sector with regard to a particular activity, at a limited stage: it operates in the later years of a professional career, which are close(r) to, even if they do not coincide with, retirement. It does not cover — and already foreshadowing my answer to the third preliminary question asked — all the potential tasks associated with the occupation of pilot. It only applies to the possibility to pilot a commercial aircraft, as defined in point FCL.010 of Annex I to Regulation No 1178/2011.

70. Relying on the overriding importance of the objective of safety of air transport, and having in mind the decision-maker’s margin of appreciation in this field, the considerations on the legitimacy of the objective and the proportionality of the provision whose validity is challenged made under Article 21(1) of the Charter are also largely applicable in the context of Article 15(1).[37]

71. There is, however, a distinctive argument that was advanced with regard to the proportionality of the measure: the fact that the age limitation is applicable regardless of retirement age. Thus, the referring court has voiced concerns that point FCL.065(b) applies irrespective of whether the pilots affected have or have not met the national requirements to receive an old-age pension. In Germany, as in other EU Member States, the age of retirement is not always set at age 65 and has been and continues to be postponed for coming generations. Those concerns have also been put forward by Mr Fries.

72. The Italian Government submits that this argument is not pertinent. The problems raised by the gap between the upper age limit for acting as a pilot and pensionable age are a matter for national law. The particular interests of the economic nature of individuals shall not prevail over legitimate interests such as safety and security.

73. In my opinion, proper consideration should be given to the effects of the rule at issue on the right to pursue a freely chosen occupation, bearing in mind the element related to access to retirement and pension rights. This assessment, in my view, appertains to the exercise of balancing the individual and general interests at stake. That is precisely a function of fundamental rights review.

35 — To that effect, see my Opinion in *Lidl* (C-134/15, EU:C:2016:169, point 26).

36 — Judgments of 30 April 2014, *Pfleger and Others* (C-390/12, EU:C:2014:281, paragraph 58), and of 7 July 2016, *Muladi* (C-447/15, EU:C:2016:533, paragraph 51).

37 — The principle of non-discrimination on grounds of age in employment and the right to pursue an occupation are closely intertwined. This is shown by the fact that the European Committee of Social Rights examines questions related to discrimination under Article 1(2) of the European Social Charter, under which the Contracting Parties undertake ‘to protect effectively the right of the worker to earn his living in an occupation freely entered upon’. According to the Explanations to the Charter of Fundamental Rights, this provision inspired Article 15(1) of the Charter. See European Committee of Social Rights, decision on the merits of 2 July 2013, *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, complaint No 74/2011, paragraphs 104 and 105.

74. The rights protected by Article 15(1) of the Charter are affected by age limitations to exercise a profession or by compulsory retirement ages.[38] Moreover, the interference with the right to pursue a freely chosen occupation becomes more serious when the exercise of a profession is compulsorily interrupted regardless of whether the professional life of an individual has come to an end according to the applicable national provisions regulating retirement and access to pension rights.

75. However, in the present case, the fact that first, point FCL.065(b) expressly excludes only one type of activity — piloting commercial aircraft — and that, second, it does so, in comparison to the overall length of a professional career, for only a relatively limited time period, leads me to the conclusion that the measure at issue does not impose on the individuals affected a disproportionate disadvantage.

76. Finally, it should be added that beyond being the yardstick for review of validity, Article 15(1) of the Charter also plays the role of interpretative guideline for the third question posed by the national court, namely the definition of the term 'commercial air transport'.

(b) ***Interim conclusion***

77. In conclusion, it is my view that the examination of the second question posed by the referring court has not revealed any reasons capable of affecting the validity of point FCL.065(b) of Annex I to Regulation No 1178/2011 in the light of Article 15 of the Charter.

B. **Interpretation of the term 'commercial air transport'**

78. The referring court further asks about the interpretation of the term 'commercial air transport' in point FCL.065(b). According to that court, if the validity of that provision is upheld — as I have proposed it should be — Mr Fries' claim under national law would depend on whether, inter alia, he was still authorised to carry out so-called ferry flights and/or could still work as an instructor and examiner on board an aircraft despite reaching the age of 65.

79. Lufthansa CityLine submits that, considering the important objectives of air transport safety and the protection of human life and health, persons having attained 65 years of age shall not be authorised to act as a pilot in commercial airlines. According to this view, the possibility to pilot ferry flights and to be engaged in training or examining activities in the cockpit in the course of a flight shall be excluded for persons having attained the age of 65.

80. Mr Fries, the Italian Government and the Commission maintain the contrary view: ferry flights — which do not transport passengers, cargo or mail — as well as training and examining activities where a pilot over the age of 65 sits in the cockpit of the aircraft as a non-flying crew member, are not covered by the term 'commercial air transport' within the meaning of FCL.065(b), having due regard to the definition of that term in FCL.010 in Annex I to Regulation No 1178/2011.

81. I agree. In my view, the textual, systematic, as well as purposive interpretations confirm the latter reading of the term 'commercial air transport'.

38 — The Court has declared, in relation to Directive 2000/78, in cases concerning compulsory retirement ages or automatic termination of employment, that the prohibition of discrimination on grounds of age must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter. See, for example judgments of 21 July 2011, *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508, paragraph 62), and of 5 July 2012, *Hörnfeldt* (C-141/11, EU:C:2012:421, paragraph 37).

1. ***Textual interpretation***

82. First, point FCL.065(b) provides that 'the holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in commercial air transport'.

83. In order to interpret the term 'commercial air transport' in point FCL.065(b), it is necessary to refer to the definition of that term in point FCL.010. That latter provision establishes definitions applicable to the whole 'FCL part' to which both provisions belong.

84. Point FCL.010 provides that '"commercial air transport" means the transport of passengers, cargo or mail for remuneration or hire'.

85. Thus, in order for an activity to fall within 'commercial air transport', three elements have to be present at the same time. First, there has to be 'transport'. Second, either passengers, cargo or mail must be the subjects to be transported. Third, there has to be remuneration or hire.

86. As far as *ferry flights*[39] are concerned, even if it could perhaps be said that there is 'transport' because the aircraft is moved along, the second element, that is, the presence of passengers, cargo, or mail, is missing. There might be transport of the plane, but not transport of passengers, cargo, or mail. On the natural meaning of the words, to suggest that for ferry flights the empty plane itself is 'cargo', seems to me as departing significantly from the wording of the provision.[40]

87. As for *training and examination activities*, both the first and second elements are missing. In those activities, even if persons can be 'moved around', there is no transportation in the sense that moving persons from point A to point B is the main purpose of the activity.[41]

88. It is only the remuneration element that could be present in both, depending on the contractual or other arrangement in the individual case. This is, however, not enough to bring those activities within the realm of the definition of 'commercial air transport'.

2. ***Systemic interpretation***

89. From a systemic point of view, taking into account other provisions of Regulation No 1178/2011, it is to be noted that the validity of licences is not affected by point FCL.065(b). That provision only curtails the privileges attached to the licences to the extent that they are covered by the specific limitation to act as a pilot of an aircraft in the commercial air transport sector. As Mr Fries has put forward, the revocation and suspension of licences is regulated separately, in point FCL.070 of the regulation. It is also noteworthy, as the Italian Government points out, that point MED.B.010 of Annex IV to Regulation No 1178/2011 contains a specific rule regarding the medical requirements to issue Class 1 medical certificates, according to which 'an extended cardiovascular assessment shall be completed at the first revalidation or renewal examination after age 65 and every 4 years thereafter'.

90. It is therefore clear that point FCL.065(b) is not supposed to have any broader impact and repercussions except for the one exclusion it itself expressly regulates.

39 — The referring court poses the question with regard to 'Leerflüge' (literally, 'empty flights'). The submissions of the parties in the main proceedings refer to 'Leer- und Überführungsflüge', which corresponds to 'ferry flights'. Ferry flights can be understood as 'a flight for the purpose of returning an aircraft to base, delivering an aircraft from one location to another, or moving an aircraft to and from a maintenance base'. Crane, D., *Dictionary of Aeronautical Terms*, 5th ed., Aviation Supplies & Academics, Newcastle, Washington, 2015, p. 210.

40 — A (disassembled or whole) airplane or its parts can of course be transported as normal cargo in the hold of another airplane.

41 — See, by analogy, judgment of 28 July 2016, *Robert Fuchs* (C-80/15, EU:C:2016:615, paragraph 36), and my Opinion in that case (C-80/15, EU:C:2016:104, point 42).

91. Moreover, a broader systemic interpretation, in the light of Commission Regulation No 965/2012 also supports the previous results.

92. The arguments of Lufthansa CityLine seem to rely on the assumption that *all* activities of pilots in the framework of a commercial airline amount to ‘commercial air transport’. However, that argument can be readily dismissed, as the Italian Government rightly submits, by having recourse to Regulation No 965/2012 — also adopted on the basis of Regulation No 216/2008.

93. Article 2(1) of Regulation No 965/2012 defines the notion of ‘commercial air transport’ in essentially the same terms as in point FCL.010. According to point ORO.AOC.125 of Annex III to Regulation No 965/2012,[42] holders of air operator certificates may conduct non-commercial operations with aircraft otherwise used for commercial air transport under certain conditions listed in that provision.

94. The latter point is important. It confirms the possibility of operators, normally engaged in commercial air transport, being engaged in other operations for which the age limitation at issue does not apply.

3. ***Purposive interpretation***

95. As Lufthansa CityLine has put forward, the objective of the rule at issue is to achieve a high and uniform level of safety in the air transport sector. That objective is pursued by Regulation No 1178/2011 and Regulation No 216/2008 in line with the principle of proportionality.

96. However, it is precisely in line with the proportionality principle that only commercial air transport operations posing higher risks and liable to produce more devastating consequences have been subject to the age limitation. By not generally applying that age limit to other activities outside piloting aircraft in the field of commercial air transport, the EU decision-maker has not departed from the safety objective. For other activities that are not affected by the high risk that commercial air transport entails, the rules concerning the obligation to renew medical certificates every six months after the age of 60[43] have been considered a sufficient safeguard.

97. In this regard, as Mr Fries submits and as the referring court makes note of in its third question, as an instructor and/or examiner over the age of 65, the pilot does not actively operate the aircraft. He is merely present in the cockpit as a member of the non-flying crew. As a result, he does not have control over the aircraft and his activities do not directly affect the safety of the flight.

98. Finally, as Mr Fries has rightly argued, the age limit entails both a restriction with regard to the non-discrimination principle and to the right to freely pursue an occupation. As it entails in itself an exception regarding the activity of piloting, and also a limitation to the right recognised in Article 15(1) of the Charter, it should not be interpreted extensively. There is therefore no valid reason for extending that rule, in spite of its textual and systemic features, beyond the activity it expressly provides for.

42 — Point ORO.AOC.125: ‘Non-commercial operations of aircraft listed in the operations specifications by the holder of an AOC (a) The holder of an AOC may conduct non-commercial operations with an aircraft otherwise used for commercial air transport operations that is listed in the operations specifications of its AOC, provided that the operator: (1) describes such operations in detail in the operations manual, including: (i) identification of the applicable requirements; (ii) a clear identification of any differences between operating procedures used when conducting commercial and non-commercial operations; (iii) a means of ensuring that all personnel involved in the operation are fully familiar with the associated procedures; (2) submits the identified differences between the operating procedures referred to in (a)(1)(ii) to the competent authority for prior approval. (b) An AOC holder conducting operations referred to in (a) shall not be required to submit a declaration in accordance with this Part.’

43 — Point MED.A.045(a)(2)(ii) of Annex IV to Regulation No 1178/2011 limits the validity of Class 1 certificates to 6 months for those having attained 60 years of age. According to point MED.A.030(f) of the same annex, ‘applicants for and holders of a commercial pilot licence (CPL), a multi-crew pilot licence (MPL), or an airline transport pilot licence (ATPL) shall hold a Class 1 medical certificate’.

4. *Interim conclusion*

99. In sum, it is my view that the answer to the third question should be that the term 'commercial air transport' in point FCL.065(b) of Annex I to Regulation No 1178/2011 should be interpreted, according to the definition provided for in point FCL.010 of the same annex, as not covering either so-called ferry flights operated by an air carrier transporting no passengers and no cargo or mail, or training activities and the conducting of exams in which a pilot over the age of 65 remains in the cockpit of the aircraft as a non-flying crew member.

V. **Conclusion**

100. In the light of the foregoing, I suggest that the Court answer the questions referred by the Bundesarbeitsgericht (Federal Labour Court, Germany) as follows:

— The examination of the first and second questions posed by the referring court has not revealed any reasons capable of affecting the validity of point FCL.065 of Annex I to Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008, in the light of Article 15(1) and Article 21(1) of the Charter.

— The term 'commercial air transport' in point FCL.065(b) of Annex I to Regulation No 1178/2011 should be interpreted, according to the definition provided for in point FCL.010 of the same annex, as not covering either so-called ferry flights operated by an air carrier that does not transport passengers, cargo, or mail, or training activities and the conducting of examinations in which a pilot over the age of 65 remains in the cockpit of the aircraft as a non-flying crew member.