Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 23 November 2017 [1]

Case C-482/16

Georg Stollwitzer
v
ÖBB Personenverkehr AG

(Request for a preliminary ruling from the
Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck, Austria)

(Reference for a preliminary ruling — Social policy — Directive 2000/78 — Equal treatment in employment and occupation — Discrimination on grounds of age — Exclusion of practical experience acquired before the age of 18 — Reform of the system of remuneration for contractual employees of the Austrian Federal railways — Transitional arrangements — Perpetuation of the difference in treatment)

Introduction

1. The request for a preliminary ruling referred by the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck, Austria) is one of a number of references for a preliminary ruling made by Austrian administrative courts in order to raise before the Court of Justice the question of the compatibility with the prohibition of discrimination on grounds of age of national rules on the accreditation of previous periods of practical experience for the purposes of grading and classification on the pay scales of contractual employees of public bodies. [2]

2. In the case which gave rise to the judgment of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), the Court was seised of a request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria) on the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [3] as regards the rules applicable to the employment contracts concluded between the universities and their employees. The rules in question provided that the reference date for the purpose of advancement on the salary scale corresponding to the post of each employee, to be fixed at the time of recruitment, [4] was to be established by taking into account the practical experience of the person concerned, but excluding

1 Original language: Italian.

2 I should point out, for the sake of completeness, that the first time rules of that nature were brought to the Court's attention by an Austrian court, the questions referred concerned the interpretation of the Treaty provisions on the free movement of workers; see the judgment of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655), which related to the grading system for contractual teachers and teaching assistants, on the basis of which more stringent criteria were applied when taking into account periods of previous activity which had been spent in another Member State.

3 OJ 2000 L 303, p. 16.

4 Until the reforms that were implemented in 2015, which I shall consider at greater length below, the reference date for career advancement was the central criterion for determining classification within the pay scales for public employees (whether or not contractual employees). That date was fixed on the basis of the date of recruitment. Certain periods of activity completed by the employee before he took up his post were regarded as preceding recruitment and had the effect of backdating the date on which the post was taken up. The reference date for the purpose of advancement was thus a fictitious date, which, on a model career path, corresponded to the date of the employee's18th birthday.

experience acquired before the age of 18. In the main proceedings, the applicant, who was recruited by a university after a period of apprenticeship of three and a half years, only a small proportion of which had been completed after the age of 18, claimed that his employer should pay compensation equivalent to the difference between the salary received for the duration of his contract and the salary to which he would have been entitled had his period of apprenticeship been taken fully into account. The Court held that the difference in treatment on grounds of age stemming from the rules at issue was discriminatory because, even though those rules pursued aims that were to be regarded as legitimate, the means of achieving those aims could not be deemed appropriate within the meaning of Article 6(1) of Directive 2000/78. [5]

3. Following the judgment of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), the Austrian legislature undertook a range of legislative amendments designed to bring the schemes applicable to contractual public employees into line with Directive 2000/78. The Law on Federal railways (Bundesbahngesetz, [6] 'the ÖBB-G') was amended by a law of 2011 ('the ÖBB-G 2011'). [7] In the case of employees and retired employees whose service with Austrian Federal Railways (Österreichische Bundesbahnen, 'the ÖBB') commenced on or before 31 December 2004 and whose individual reference date for the purpose of career advancement was determined on the basis of the 1963 Regulation on Remuneration for employees of the ÖBB (Bundesbahn-Besoldungsordnung 1963, [8] 'the 1963 BO'), Article 53(1) of the ÖBB-G, as amended, provided that the reference date was to be recalculated in accordance with an accreditation criterion that did not make a distinction according to whether such periods had been completed before or after the individual concerned had reached the age of 18. [9] Article 53(2) stipulated that where the individual reference date for the purpose of advancement was recalculated in accordance with paragraph(1), each period required for advancement in each of the first three salary steps was to be extended by one year. [10] In the case which resulted in the judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38), the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court a number of questions on the interpretation of Directive 2000/78, seeking in essence to establish whether the ÖBB-G 2011 was compatible with the directive. In that judgment, the Court held that Directive 2000/78 precluded national legislation, such as the ÖBB-G 2011, which, 'to end discrimination based on age, takes account of the periods of service prior to the age of 18, but which, simultaneously, includes a rule, applicable in reality only to employees who are subject to that discrimination, which extends for one year the period required for advancement in each of the first three salary steps and which, in so doing, definitively maintains a difference in treatment based on age'. [11]

5 See paragraphs 38 to 51 and the operative part of the judgment.

6 Bundesbahngesetz, BGBl. No 852/1992.

7 BGBl I. No 129/2011.

8 BGBl. 170/1963.

9 The criterion applied meant that periods after 30 June in the year during which nine school years were or would have been completed after the commencement of primary education were regarded as preceding the date of recruitment. Accreditable periods continued to be determined by the 1963 BO, according to which the periods completed working for the Austrian railways were to be taken *fully* into account and, save in specific cases, other periods of activity or study *as to 50%*.

10 Article 34 of the Allgemeine Vertragsbedingungen für Dienstverträge bei den Österreichischen Bundesbahnen (General terms and conditions of employment applicable to contracts of employment with the Austrian railways, 'the AVB'), which entered into force on 1 January 1996, stipulated that an employee of the Austrian railways was to advance to the next step in his pay scale every three years, and to the final step after six years, and that advancement was to be determined in accordance with the reference date. Before the amending legislation of 2011, the reference date was calculated, in accordance with Article 35 of the AVB, on the basis of the very same criteria established by the 1963 BO and, consequently, excluded any reference to practical experience gained before the age of 18. According to the case file in the present case, the terms of employment under the AVB ceased to be applied as of 1 January 2005, and the remuneration of employees recruited after that date has been determined on the basis of collective agreements.

11 In an earlier judgment concerning a reference for a preliminary ruling from the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck), which also concerned, among other things, the compatibility with EU law of the new scheme applicable to ÖBB employees, the Court confined itself to answering the question relating to the compatibility with the principles of effectiveness and equivalence of the 30-year limitation period laid down under Austrian law for actions to contest the grading of public servants for the purposes of remuneration, and did not examine the other questions referred to it, because the action in the main proceedings had become time-barred. See the judgment of 16 January 2014, *Pohl* (C-429/12, EU:C:2014:12).

4. In the wake of that judgment, the Austrian legislature once again amended the legislation on the remuneration of ÖBB employees by a law of 2015. It is in fact the reform introduced by that law which is at issue in the national proceedings that have given rise to the request for a preliminary ruling forming the subject matter of this Opinion. That request arose in the context of a case pending in appeal before the referring court between Mr Georg Stollwitzer and the ÖBB Personenverkehr AG ('the ÖBB PV'), a company governed by Austrian law, in which the sole shareholder is the Österreichische Bundesbahnen-Holding AG, which in turn is wholly owned by the Austrian State. [12]

5. I should point out that after the written procedure in the case forming the subject matter of this Opinion had been completed, two further requests for preliminary rulings concerning issues similar to those raised in the present case were referred to the Court by the Oberster Gerichtshof (Supreme Court) [13] and by the Bundesverwaltungsgericht (Federal Administrative Court, Austria). [14] Those requests, which concern the interpretation of Directive 2000/78, and, in the case of the former, Article 45 TFEU, have been made in the context of disputes concerning the system of regrading used — for contractual public servants and civil servants respectively — for the purpose of switching to a new salary scheme, introduced in 2015 [15] and designed to address the age-based discrimination that had resulted from the previous systems, in the light of the judgments of 18 June 2009, in *Hütter* (C-88/08, EU:C:2009:381), [16] of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359) [17] and 28 January 2015 in *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38).

6. I would point out, lastly, that the system of remuneration applied in Germany to federal public servants and to servants of certain Länder has also, on a number of occasions, been the subject of references for preliminary rulings, all of them concerning compliance with the prohibition of discrimination on grounds of age. [18]

Legal context

EU law

7. According to Article 1 of Directive 2000/78, its purpose is to lay down a general framework for combating discrimination on various grounds, including age, as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

12 The referring court states that, although both the ÖBB and the Österreichische Bundesbahnen-Holding are controlled by the State, the contracts of employees of the former are governed exclusively by private law.

13 Pending case C-24/17, *Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst*, see OJ 2017 C 112, p. 20.

14 Pending case C-396/17, *Martin Leitner*.

15 In 2015, a federal law on pay reform was adopted (Bundesbesoldungsreform 2015, BGBl I 32/2015). In 2016, that law was amended by the Besoldungsrechtsanpassungsgesetz, (BGB1 I 104/2016), which was adopted following a judgment of the Verwaltungsgerichtshof (Administrative Court, Austria) of 9 September 2016 (No 2015/12/0025-3). In pending case C-24/17, the legislation at issue is the VBG (Vertragsbedienstetengesetz, Law on contractual employees), which contains provisions on the transfer of contractual employees from the old to the new grading system for the purpose of remuneration.

16 The latter, as has been seen, related to the accreditation system applicable to contractual public servants.

17 In that judgment, the Grand Chamber of the Court criticised, in essentially the same terms used a few months later in the judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38), the extension of the period required for advancement in the first three salary steps which formed part of the 2010 reform of the system for accrediting previous periods of activity applicable to public servants.

18 See the judgments of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560), of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005), and of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561). The cases which resulted in those judgments concerned, on the one hand, the remuneration system that was applicable, at both federal and regional level, to public sector contractual employees and public servants, and was based essentially on criteria concerned with age category and, on the other, the procedures for switching from that salary system to a system that was not based on discriminatory criteria.

8. Article 2 of the directive defines the concept of discrimination. It provides as follows, in paragraphs (1) and (2):

'1. For the purposes of this directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

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

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ...'

9. Article 6 of Directive 2007/78 is headed 'Justification of differences of treatment on grounds of age'. According to the first subparagraph of Article 6(1), Member States may provide that differences of treatment on grounds of age do not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Pursuant to point (b) of the second subparagraph of Article 6(1), such differences in treatment may include, among others, 'the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment'.

10. Under Article 16(a) and (b) of the directive, Member States are to take the necessary measures to ensure that 'any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished' and that 'any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended'.

National law

11. As mentioned earlier in point 4 of this Opinion, following the judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38), the rules for calculating the reference date for the purpose of advancement applied to contractual employees of the ÖBB were once again amended by the Austrian legislature in 2015.

12. Article 53a(2) of the ÖBB-G, in the amended version contained in BGBl I 64/2015 ('the ÖBB-G 2015'), provides that only certain periods of service and/or training completed before or after reaching the age of 18 are to be taken into account when calculating the reference date for the purpose of advancement. Such periods are those completed working for the ÖBB[19] or for undertakings operating in the railway infrastructure and rail transport sector of a Member State of the European Economic Area (EEA) and, subject to certain conditions, of the Republic of Turkey or the Swiss Confederation.

19 As well as referring to the ÖBB, Article 53a(2) of the ÖBB-G 2015 mentions its predecessors and, more generally, the undertakings that emerged from the restructuring of the railway sector.

13. Consequently, the ÖBB-G 2015 ruled out the accreditation, for the purpose of determining the reference date, of all periods of activity not completed specifically in the rail transport and railway infrastructure sector (except for periods of study), which, under the 1963 BO, were included as to 50%. [20]

14. The new accreditation system applies retroactively. Under Article 56(18) of the ÖBB-G 2015, Article 53a of that law is applicable to all employees who joined the Austrian Federal Railways before 31 December 2004. Pursuant to Article 56(19), Article 53a(2) entered into force on 1 April 1963 for employees whose reference date for the purpose of advancement was determined on the basis of the 1963 BO.

15. Article 53a(5) of the ÖBB-G 2015 lays down the rules governing the regrading of employees in the salary steps. This involves recalculating the reference date on the basis of the rules set out in Article 53a(2), once the person concerned has furnished evidence of the previous periods of activity completed.

16. Pursuant to Article 53a(6) of the ÖBB-G 2015, the regrading of employees on the basis of Article 53a(5) may not result in any reduction in the salary received by the employee in the last month preceding publication of the ÖBB-G 2015. Should recalculation of the reference date lead to a reduction in salary, the employee's salary level is to be maintained until the remuneration determined as a result of regrading reaches the previous level of the maintained salary. If, however, recalculation of the reference date leads to the employee being graded in a higher salary step, that employee will be entitled to the corresponding remuneration and, in respect of periods not subject to limitation, to the difference between that remuneration and the salary actually received.

17. Article 53a(7) provides for the introduction of a new penultimate salary step into the pay scales within six months of publication of the ÖBB-G 2015.

The main proceedings, the questions referred and the procedure before the Court

18. Mr Stollwitzer began working for the ÖBB PV on 17 January 1983. His reference date for the purpose of advancement, calculated on the basis of the provisions in force at the time of his recruitment, was 2 July 1980. According to the case file, in order to determine that date, full account was taken of the period during which Mr Stollwitzer did his military service but only half of the period between his 18th birthday and the date of his recruitment, during which time Mr Stollwitzer worked as a plumber and, for a short period, was in receipt of unemployment benefit, was taken into account.

19. On 4 March 2016, Mr Stollwitzer brought an action before the Landesgericht Innsbruck (Regional Court, Innsbruck, Austria) challenging the salary scale in which he had been placed and seeking payment of salary arrears that are not time-barred, relating to the second half of 2009, in the amount of EUR 837.13. Before the court, Mr Stollwitzer contended that, for the purpose of calculating his reference date, the periods of activity which he had completed before his 18th birthday (totalling 1 year, 5 months and 19 days) should also have been taken into account, pursuant to the judgments of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381) and of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38). For its part, the ÖBB PV claimed that the action should be dismissed, arguing that the periods in question could not be taken into account on the basis of Article 53a(2) of the ÖBB-G, as amended in 2015, and that, since that amendment had retroactive effect, Mr Stollwitzer was no longer entitled to have the periods in question taken into account when calculating his reference date.

20 See footnote 9 above.

20. The Landesgericht Innsbruck (Regional Court, Innsbruck) found in favour of the ÖBB PV and dismissed the action by judgment of 1 June 2016. Mr Stollwitzer appealed against that decision before the referring court.

21. The latter court harbours doubts as to whether the accreditation system introduced by the ÖBB-G 2015 is untainted by any form of discrimination. In its view, the new rules exhibit a degree of inconsistency in that they fail to take into account previous periods of activity which, while not included in the accreditable periods provided for under Article 53a(2) of the ÖBB-G 2015, enable the employee to gain experience in the specific sector, making him better able to perform his duties, such as, for instance, periods of activity with public or private transport undertakings or undertakings engaged in the manufacture or operation of railway infrastructure. The result is discrimination in respect of employees who have engaged in equally relevant occupational activity, but not in the employment of companies forming part of the ÖBB group or those listed in Article 53a(2) of the ÖBB-G 2015. As far as the referring court can establish, those employees are, for the most part, those previously discriminated against by the accreditation system laid down by the 1963 BO ('the previous accreditation system'), because accreditable periods under Article 53a(2) of the ÖBB-G 2015 are, as a rule, completed after the age of 18. Similarly, the loss of remuneration that may follow from regrading, because of the freeze on salary introduced by Article 53a(6) of the ÖBB-G 2015, has a greater impact on the group of employees discriminated against under that system. That difference in treatment cannot be justified on the basis of Article 6(1) of Directive 2000/78 because the Austrian legislature was motivated purely by considerations of a budgetary or administrative nature.

22. The referring court also points out that there are 120 actions by federal railway employees currently pending before it on appeal, turning on the same issue as that in the main proceedings, many of them brought at first instance in 2012 after, by judgment of 13 April 2011, upheld by the referring court on 21 September 2011, the Landesgericht Innsbruck (Regional Court, Innsbruck) 'recognised the right of some employees of the ÖBB PV to have taken into account previous periods of service completed before the age of 18, in accordance with the judgment of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381).[21] Many other similar actions are pending before the Landesgericht Innsbruck, while, in Austria as a whole, around 1 000 cases of the same nature are currently pending.

23. According to the case file, by judgment of 2 July 2016, the Verfassungsgerichtshof (Constitutional Court, Austria) declared Article 53a of the ÖBB-G 2015 compatible with the constitution.[22]

24. It is against that background that, by decision of 2 September 2016, the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck) stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

'(1) Is EU law as it currently stands, in particular the general principle in EU law of equal treatment, the general principle of the prohibition of discrimination on grounds of age within the meaning of Article 6(3) TEU and Article 21 of the Charter of Fundamental Rights and the prohibition of discrimination in connection with freedom of movement for workers under Article 45 TFEU and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, to be interpreted as precluding a national rule, such as that at issue in the main proceedings, which, for the removal of discrimination on grounds of age identified by the Court of Justice of the European Union in the judgment [of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38)] (namely the failure to take into account previous periods of service completed before the age of 18 for ÖBB (Austrian Federal Railways) employees takes into account a small number of ÖBB employees discriminated against under the old rules with a period of service completed before the age of 18 (but only those employees who

21 Those actions include those which prompted the requests for preliminary rulings in *Pohl* (C-429/12, EU:C:2014:12) and *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38).

22 ECLI:AT:VFGH:2016:G450.2015.

actually worked for the ÖBB or for similar public railway infrastructure undertakings or railway undertakings in the EU, in the EEA and in those countries connected with the EU by association or free movement arrangements), but does not take into account, for the vast majority of ÖBB employees originally discriminated against, all other periods of service occurring before the age of 18, including in particular those not taken into account which enabled the ÖBB employees concerned better to perform their duties, such as, for example, previous periods of service with private and other public transport companies or infrastructure companies by which the infrastructure used by the employer (rolling stock, rail construction, line construction, electrical and electronic equipment, signal boxes, station construction and the like) is produced, distributed or maintained, or similar undertakings, and therefore in reality ultimately maintains a difference in treatment based on age for the vast majority of the ÖBB employees discriminated against under the old rules?

(2) Does the conduct of a Member State, which is the sole shareholder of a rail transport undertaking and the *de facto* employer of persons employed by that undertaking, where the rights of those employees founded on EU law to additional pay on account of discrimination, inter alia, on the basis of age, which has been recognised by several judgments of the Court of Justice of the European Union (*David Hütter*, *Siegfried Pohl*, *Gotthard Starjakob*), as well as by a number of national court rulings, including a decision of the Oberster Gerichtshof (Supreme Court, Austria) (Case 8 ObA 11/15y) and which the Member State sought to remove for purely fiscal reasons through retroactive changes to the law in the years 2011 and 2015, meet the conditions recognised in the case-law of the Court of Justice for that Member State to incur liability under EU law, in particular the condition that there be a sufficiently serious breach of EU law, in particular of Article 2(1), read in conjunction with Article 1, of Directive 2000/78/EC as interpreted in a number of judgments of the Court of Justice [judgments of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381) of 16 January 2014, *Pohl* (C-429/12, EU:C:2014:12) and of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38)]?

25. The parties to the main proceedings, the Republic of Austria and the European Commission submitted written observations to the Court and presented oral argument at the hearing on 5 July 2016.

Analysis

The first question referred

26. By the first question referred, the national court asks the Court, in essence, whether Directive 2000/78 and Article 45 TFEU preclude legislation, such as the legislation at issue in the main proceedings, concerning the accreditation of previous periods of activity for the purpose of placing in the relevant grade, within the pay scales, contractual public sector employees, which was adopted in order to address the age discrimination identified by the Court in two successive judgments.

27. It is first necessary to determine whether the new rules on accreditation under Article 53a(2) of the ÖBB-G 2015 give rise to age discrimination per se, that is independently of the stipulation that they are to apply retroactively and of the criteria laid down for regrading staff already employed. As we have seen, that article provides that only certain periods of activity and/or training prior to recruitment may be taken into account in calculating the reference date for the purpose of advancement for ÖBB employees. In essence, the new system recognises, regardless of the age at which it was acquired, only practical experience gained with the group of companies to which the entity that recruits the person concerned belongs (as well as, in the cases set out above, similar practical experience acquired outside Austrian territory).

28. In that connection, I should point out that, although the use in a remuneration system of a criterion based on length of service or, as in the present case, on previous practical experience, which attaches weight to a factor linked to time is, by its very nature, likely to give rise to age-related discrimination,[23] the Court has nonetheless clarified that financially rewarding experience gained, which enables the employee better to perform his duties, is, in principle, recognised as a legitimate aim which the employer is free to pursue.[24]

29. The Court has also made clear that the Member States and, where appropriate, the two sides of industry at national level, have broad discretion, in relation not only to whether to pursue a particular aim in the field of social and employment policy, but also in relation to the determination of measures capable of achieving it.[25]

30. A system of remuneration such as that provided for by the ÖBB-G 2015, which, for the purpose of grading workers in the pay scales, takes into account only the practical experience which they have acquired in the specific sector in which the employer operates cannot, in my view, be regarded as incompatible with the prohibition on age discrimination simply because it does not attach any significance to comparable practical experience gained in related sectors, even though, from an objective viewpoint, such experience, just like experience regarded as relevant, enables the worker better to perform his duties. It is true that such a remuneration system accords different treatment for salary purposes to employees with equal years of practical experience gained prior to recruitment. However, that difference in treatment is based on the type of experience claimed and, more specifically, on the nature of the employer with which the activity in question was pursued and, as the Austrian Government rightly contends, does not rely on criteria linked, at least directly, to age, such as, for example, the time when the experience was acquired.[26]

31. It cannot, of course, be ruled out that a remuneration system of that nature may also involve indirect age discrimination, if it were to become apparent that attaching different weight to previous practical experience actually placed at a disadvantage a group of employees principally composed of individuals identifiable by their age or the age at which they acquired the practical experience on which they rely. The referring court appears to contemplate a possibility of that kind with reference to Article 53a(2) of the ÖBB-G 2015 when it states that periods of activity and/or training prior to recruitment completed before the age of 18 are not, as a rule, among those taken into account under that provision. The Court does not, however, have the evidence necessary to assess whether the new accreditation system exclusively or predominantly places at a disadvantage those employees of the ÖBB PV who were previously discriminated against under the old system, that is the employees whose previous practical experience was wholly or partly acquired before the age of 18; in any event, that is an assessment to be made by the national court.

32. As regards the possible incompatibility of the rules on accreditation provided for by Article 53a(2) of the ÖBB-G 2015 with Article 45 TFEU, which the referring court mentions in setting out its first question, but without further elaboration, I shall simply point out, setting aside any other consideration, that, to the extent that, under Article 53a(2), practical experience gained in another

23 In his Opinion in *Cadman* (C-17/05, EU:C:2006:333), Advocate General Poiares Maduro refers, by way of example, to a pay system that places younger workers at a disadvantage by disproportionately rewarding length of service or a pay system that takes no account of workers' experience and thus places older workers at a disadvantage.

24 See the judgments of 3 October 2006, *Cadman* (C-17/05, EU:C:2006:633, paragraphs 34 to 36), and of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381, paragraph 47).

25 See the judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraph 63), and of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604).

26 See, to that effect, the judgment of 7 June 2012, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft* (C-132/11, EU:C:2012:329, paragraph 29).

Member State is taken into account under exactly the same conditions and with the same effects as experience gained in Austria, it does not appear, at least prima facie, that, from that perspective, the Austrian legislation at issue is in breach of the Treaty provisions on the free movement of workers.[27]

33. That said, it is necessary, at this juncture, to consider the effects of the retroactive application of the accreditation system provided for by Article 53a(2) of the ÖBB-G 2015 and of the rules laid down for the regrading of employees, in order to establish whether either of these introduces a new form of discrimination based on age or perpetuates the discrimination identified by the Court in its judgment of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381).

34. In that regard, I would point out that the retroactive application of provisions designed to replace earlier discriminatory rules and to abolish unlawful different treatment is, in itself, a factor that militates in favour of legality being restored, including from the perspective of eliminating the past effects of discrimination. What matters, therefore, are the procedures used to remove discrimination retroactively.

35. On that point, I would draw attention to the fact that the Court had occasion to clarify, in its judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38, paragraph 44), that Article 16 of Directive 2000/78, on the basis of which the Member States are obliged to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished, does not require them to adopt a specific measure where there is a breach of the prohibition of discrimination, but leaves them free to choose between the different solutions suitable for achieving their intended objective, depending on the different situations which may arise.

36. In order to eliminate the discrimination based on age that was identified by the Court in its judgment of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), the Austrian legislature was therefore free to decide, as indeed it did, to amend retroactively the whole system for accrediting previous periods of activity. Simply abolishing the prohibition on the accreditation of practical experience acquired before the age of 18 was just one of the options available to the legislature for compliance with the provisions of Directive 2000/78.

37. Consequently, neither the fact that the new accreditation system has ceased to take account of certain previous periods of activity and/or training that were formerly accreditable (albeit in a discriminatory manner), nor the provision for regrading all ÖBB employees within the salary scales, on the basis of the retroactive application of new rules, are of themselves such as to breach the obligation laid down in Article 16 of Directive 2000/78 to abolish discriminatory national provisions, so long as the aim of eliminating discrimination is actually achieved.

38. The considerations set out above concern the impact of retroactively applying the new accreditation rules. It is now necessary to consider the procedures for regrading, within the pay scales, employees whose reference date for the purpose of advancement has been recalculated on the basis of the rules laid down by Article 53a(2) of the ÖBB-G 2015.

39. As set out above, where, as a result of the recalculation, an employee is graded in a salary step in which the rate of pay is lower than what he received before the entry into force of the ÖBB-G 2015, the previous salary level is maintained under Article 53a(6) of the law. The referring court considers that the provision in question, which applies without distinction to all regraded employees, actually perpetuates the discrimination that existed under the previous system.

27 I would point out that the issue of compatibility with Treaty provisions on free movement of workers of rules laid down in relation to the transition to the new remuneration system for public servants, analogous to those at issue in the request for a preliminary ruling forming the subject matter of this Opinion, was raised in greater detail by the Oberster Gerichtshof (Supreme Court) in pending case C-24/17, cited at point 5 of this Opinion (see the second question referred).

40. In that regard, it should be noted that the ÖBB-G 2015 removes all the effects of past discrimination for employees whose practical experience before the age of 18 was acquired exclusively with companies belonging to the ÖBB group or other entities listed in Article 53a(2) of the ÖBB-G 2015. In addition to being graded as they ought to have been from the beginning of their employment relationship with the ÖBB PV, if the previous accreditation system had been applied in a non-discriminatory fashion, those employees are also accorded the arrears of salary appropriate to that grading in so far as they are not time-barred.

41. Having clarified that point, there is no doubt that, since the 'salary received' to which Article 53a(6) of the ÖBB-G 2015 refers is based on the application of the discriminatory rules of the previous accreditation system, the provision under which that salary is to be maintained for the purpose of transition to the new system — even though it applies without distinction to all ÖBB employees — is liable to perpetuate a difference in treatment that is indirectly age-related as between a group of employees falling into the category of those treated less favourably by the previous accreditation system and a group of employees falling into the category of those treated more favourably by that system.

42. Specifically, this is the case for employees who claim periods of activity and/or training that *are not included* among those taken into account under the new accreditation rules. Employees who completed such periods *before reaching the age of 18* continue, as previously, to be refused accreditation for those periods — albeit for a reason other than the age at which they were completed — both for the purpose of establishing the salary received before the publication of the ÖBB-G 2015, maintenance of which is guaranteed under that law, and for the purpose of the payment of salary arrears that are not yet time-barred. However, in addition to having earned, under the previous accreditation system, a higher salary than their colleagues with the same practical experience, employees who completed periods of activity and/or training that were similar and of equal duration, but did so *after reaching the age of 18*, retain, even after the entry into force of the new system, and despite the fact that the periods in question are no longer accreditable, the salary level to which those periods gave entitlement under the previous accreditation rules.

43. It is necessary to consider whether that difference in treatment, which is indirectly based on age, may be justified under Article 6(1) of Directive 2000/78.

44. In that regard, it is necessary to examine whether the freeze on salaries provided for under Article 53a(6) of the ÖBB-G 2015 is a measure that pursues a legitimate aim and, if so, whether it is appropriate and necessary for the purpose of achieving that aim.[28] It is clear from the order for reference and the observations submitted to the Court by the Austrian Government that the measure pursues the aim of protecting acquired rights.

45. According to settled case-law, the protection of the acquired rights of a category of persons constitutes an overriding reason relating to the public interest.[29] Moreover, in its judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38, paragraph 37), the Court stated that respect for such rights and the protection of the legitimate expectations of employees treated more favourably by the previous accreditation system with regard to their remuneration constitute legitimate employment-policy and labour-market objectives which may justify, for a transition period, the maintenance of earlier pay levels and, consequently, of a system that discriminates on the basis of age.[30]

28 See the judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 62).

29 See the judgments of 6 December 2007, *Commission* v *Germany* (C-456/05, EU:C:2007:755, paragraph 63), of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 90) and of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 64).

30 See paragraph 37. To the same effect, see the earlier judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359, paragraph 42).

46. Article 53a(6) of the ÖBB-G 2015, under which the salary received before the publication of that law is to be maintained if the recalculation of the reference date, and the consequent regrading of ÖBB employees in the pay scales, leads to a drop in pay, contains a measure which is certainly *appropriate* for the purpose of protecting the acquired rights of those ÖBB employees who were treated more favourably by the previous accreditation system.

47. It therefore remains to be established whether or not the measure exceeds what is *necessary* to achieve the aim pursued. An analysis of that nature demands that consideration also be given to those employees treated less favourably by the system in question.

48. As we have seen, the measure freezing the salary received laid down by Article 53a(6) of the ÖBB-G 2015 applies without distinction to employees treated more favourably by the previous accreditation system and to those who were treated less favourably by it. Consequently, it also benefits the latter category of employees where the application of the new rules for calculating the reference date has the effect of reducing the salary they previously received. However, as I had occasion to point out earlier, in the case of those employees treated more favourably by the previous accreditation system, *all* periods of activity and/or training they have completed are taken into consideration when determining the salary received, and thus maintained, pursuant to Article 53a(6) of the ÖBB-G 2015, whereas, in the case of employees treated less favourably by that system, a proportion of those periods, namely those completed before reaching the age of 18, which are not included among the accreditable periods under Article 53a(6) of the ÖBB-G 2015, are not taken into account for that purpose.

49. Clearly, this difference in treatment would not exist if those employees treated less favourably by the earlier accreditation system, who are graded, under the new system, in a salary step below the step they had reached at the time of publication of the ÖBB-G 2015,[31] had all periods of activity and/or training completed before their 18th birthday recognised in the same way as their colleagues who completed similar periods of the same type and duration, but after reaching the age of 18. In those circumstances, the periods in question would constitute, as for employees treated more favourably by the previous system, a component of the salary to be frozen under Article 53a(6) of the ÖBB-G 2015.

50. It is therefore the application of different (and discriminatory) criteria with regard to the *accreditation of the periods taken into consideration for the purpose of determining the reference salary* to which the salary freezing measure provided for by Article 53a(6) is to be applied that perpetuates, even after regrading, a difference in treatment as between employees treated more favourably by the previous accreditation system and some of those treated less favourably by that system.

51. While the aim of protecting the acquired rights of those employees treated more favourably by the earlier accreditation system who would see their salary fall as a result of the entry into force of the ÖBB-G 2015 means it is necessary to continue to apply to them the rules on accreditation under that system, that does not mean that those same rules should continue to be applied in a *discriminatory manner* to employees treated less favourably by that system for whom the ÖBB-G 2015 also involves a drop in pay. In other words, the difference in treatment that results from the application of Article 53a(2) of the ÖBB-G 2015 *is not necessary* for the purpose of attaining the protective aim which it pursues.

31 This involves employees who completed periods of activity and/or training that were not taken into account either by the previous accreditation system (because they predated their 18th birthday) or by the new system (since they are irrelevant).

52. It is true that the situation of the two categories of employees in question is different. There is in fact no doubt that employees treated more favourably by the previous accreditation system can rely on genuine acquired rights, while the same cannot be said of employees treated less favourably by that system. However, that difference stems from the application of a discriminatory salary scheme and cannot, in my view, constitute the sole argument in favour of maintaining an unjustified difference in treatment that perpetuates the discrimination that arose under that scheme.

53. Furthermore, in its judgment in *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38), the Court reiterated, in keeping with its earlier case-law,[32] that where discrimination contrary to EU law has been established, and for as long as measures restoring equal treatment have not yet been adopted, observance of the principle of equality can be ensured only by granting to persons within the category treated less favourably the same advantages as those enjoyed by persons within the more favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining.[33]

54. It follows that once the discriminatory nature of the previous accreditation system had been established by the judgment of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), the employees treated less favourably by that system could rely not only on the *legitimate expectation* that, for the time being at least, the treatment accorded to the employees treated more favourably by that system would be extended to them but also on a genuine *right* to such treatment.[34] Had that treatment been extended to them during the six years that it took to prepare the reform of the rules on accreditation introduced by the ÖBB-G 2015, the application of Article 53a(6) of that law would not have given rise to any difference in treatment.

55. It follows from all of the above considerations that by *de facto* perpetuating the application of the previous, discriminatory accreditation system and failing, for the purpose of the application of Article 53a(6) of the ÖBB-G 2015, to bring the situation of the employees treated less favourably by that system into line with the situation of the employees treated more favourably, the Austrian legislature perpetuated a difference in treatment between categories of ÖBB employees that is not justifiable on the basis of Article 6(1) of Directive 2000/78.

56. In my view, neither budgetary considerations nor considerations of an administrative nature are capable of negating that conclusion. It is in fact settled case-law that neither type of consideration can of itself constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.[35] In that connection, I would add that, since the ÖBB-G 2015 already provides that the situation of each employee is to be individually reviewed in order to calculate the new reference date for the purpose of career advancement, the solution set out above, namely that the reference salary for the purpose of the application of Article 53a(6) of the law should be determined on the basis of the non-discriminatory application of the previous accreditation system, should not, in principle, place an excessive burden on the administration.

57. Similarly, the conclusion I reached in point 55 above is not precluded by the judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005), or by the judgment of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560). In contrast with the cases that gave rise to those judgments, in the main proceedings here, the category

32 See the judgments of 21 June 2007, *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraph 39), and of 22 June 2011, *Landtová* (C-399/09, EU:C:2011:415, paragraph 51).

33 See judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38, paragraph 46).

34 The existence of a legitimate expectation of that nature appears to have been ruled out by the Verfassungsgerichtshof (Constitutional Court) in the judgment cited at point 23 above. However, regardless of any other consideration, the fact that the ÖBB-G 2011 provided that employees treated less favourably under the previous system were to be treated in the same way as those treated more favourably under that system, even though it maintained, as we have seen, discrimination as between the two groups of workers in another respect, suggests that such a legitimate expectation arose.

35 See the judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38, paragraph 36).

of persons treated more favourably and the category treated less favourably by the discriminatory rules are clearly identifiable. In other words, there is, in the words of the Court itself, a *valid point of reference*[36], which makes it possible to bring the situation of the latter category into line with that of the former. Consequently, unlike the situation that characterised the case which gave rise to the judgment of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraph 94), in the present case, the simple transposition of the salaries received under the discriminatory pre-existing regime does not constitute, in the present case, 'the only way of avoiding a reduction in [the] pay' of regraded employees. I would further point out that, when compared with the case that gave rise to the judgment in *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005), fixing the pay received for the purpose of the application of Article 53a(6) of the ÖBB-G 2015, following recalculation of the reference date on the basis of a non-discriminatory application of the previous rules on accreditation, does not present the problems of system viability identified by the Court in that judgment.[37]

58. Should the Court not share the conclusion that I reached at point 55 of this Opinion and, consequently, take the view that the difference in treatment maintained by Article 53a(6) of the ÖBB-G 2015 does not go beyond what is necessary to protect the acquired rights of the ÖBB employees treated less favourably by the accreditation system, it would still be necessary to establish that this difference in treatment is of a merely transitional nature and does not continue for an excessive length of time. I would point out that in the judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38), the Court clearly stated that the aim of protecting the acquired rights and legitimate expectation of employees treated more favourably by a discriminatory system cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the reform of that system, of which such a measure forms part, is designed to eliminate. Such a measure, even if it is capable of ensuring the protection of acquired rights and legitimate expectations, is not appropriate for the purpose of establishing a non-discriminatory system for employees who were treated less favourably.[38]

59. Given the position I reached above, I shall make just two further observations here. First, as regards those employees whose previous practical experience is no longer taken into account on the basis of Article 53a(2) of the ÖBB-G 2015 but who had already reached the final step on their pay scale before the publication of that law, the effects, whether favourable or unfavourable, of the past discrimination are definitive. From that perspective at least, it is not possible to speak in terms of a purely transitional system. Second, those employees treated less favourably by the previous accreditation system who, prior to the publication of the ÖBB-G 2015, would have reached the final step if the periods of activity and/or training completed before the age of 18 (which are no longer recognised under that law) had been taken into account for the purpose of freezing their pay — and for whom therefore the reform of the earlier accreditation system would have been *neutral* — suffer not only the loss of salary components of which they were unlawfully deprived under that system, but also come to a standstill in terms of career advancement, if, at the same time, they have completed periods of activity and/or training that are no longer taken into account after reaching the age of 18.[39] Aside from any other consideration, it is reasonable to question whether such effects are acceptable.

36 Judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38, paragraph 47). There was, however, no valid point of reference in the cases which resulted in the judgments of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 96 in particular), and of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560); see also the judgment of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561, paragraph 47).

37 See judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 78).

38 Paragraph 39. See, to the same effect, the judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359, paragraph 44 and the case-law cited).

39 In that connection, it is not, in my view, clear how the introduction of a new penultimate step before the final pay step, as provided for by Article 53a (7) of the ÖBB-G 2015 can actually compensate for such a loss.

60. Before I conclude my review of the first question referred, I must make it clear that what has been discussed thus far relates solely to the right of employees treated less favourably by the earlier accreditation system to be graded, at the time and for the purpose of transfer to the system provided for under the ÖBB-G 2015, on the pay step, and thus at the pay level, to which they would have been entitled if that system had been applied to them in a non-discriminatory manner. That right must be recognised, even though the ÖBB-G 2015 has radically altered the previous rules on accreditation, to ensure that the new legislation does not perpetuate a difference in treatment that is unnecessary and, consequently, unjustifiable for the purpose of Article 6(1) of Directive 2000/78.

61. It is a different matter when it comes to the right to payment of sums not received by way of salary because of the discriminatory application of the previous accreditation system. As seen above, under the ÖBB-G 2015, the loss of pay suffered by some employees treated less favourably by that system [40] is not being compensated for. [41] As a result of the retroactive application of Article 53a(2) of the ÖBB-G 2015, that loss relates solely to past discrimination. [42] The rules on accreditation under the previous system have in fact been altered with retroactive effect, depriving the national courts of the opportunity to interpret them in accordance with Directive 2000/78 or disapply them [43] in order to accord employees treated less favourably by that system, and not compensated under the ÖBB-G 2015, the salary components of which they were unlawfully deprived.

62. The Court also appears to rule out any possibility — including in circumstances such as those in the main proceedings, that is to say where there is a valid point of reference — that the reform of a discriminatory system of remuneration must necessarily eliminate not only discrimination but also the effects of that discrimination, by in any event according employees treated less favourably by that system the difference between the remuneration they would have received in the absence of that discrimination and that actually received. [44] Although such a solution may raise questions in terms of its compatibility with the principle of effectiveness, [45] the Court seems therefore inclined, in such circumstances, to accord an employee discriminated against solely the option of an action for damages against the State.

63. On the basis of all of the foregoing considerations, I suggest that the Court answer the first question referred for a preliminary ruling to the effect that Articles 2 and 6(1) of Directive 2000/78 must be construed as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of abolishing the discrimination on grounds of age identified by the Court in two successive judgments, provides for contractual employees in the public service to be regraded under a new remuneration scheme that is based on non-discriminatory criteria for the accreditation of previous periods of activity, but which, in applying a rule designed to protect the acquired rights of the regraded employees by freezing the pay they received at a certain date prior to the entry into force of the legislation, makes that rate of pay contingent on the application of the discriminatory accreditation criteria that existed under the previous accreditation system.

40 This affects employees who completed periods of activity and/or training that are no longer accreditable on the basis of the ÖBB-G 2015 before they reached the age of 18.

41 As stated, compensation of that nature is provided solely for employees who completed periods of activity and/or training that are taken into account under the new rules on accreditation before reaching the age of 18.

42 That is to say the difference between the salary that those employees would have been entitled to if the previous accreditation system had been applied to them in a non-discriminatory fashion and the salary they actually received from the time of their recruitment until they were regraded under the ÖBB-G 2015.

43 See the judgment in *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraphs 88 and 89).

44 See the judgment of 28 January 2015, *ÖBB Personenverkehr* (C-417/13, EU:C:2015:38, paragraph 45).

45 According to that principle, any measure taken by a Member State to comply with EU law must be effective (see, on the subject of equal treatment of men and women, the judgment of 21 June 2007, *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraph 28). In that same judgment, the Court also made clear that while, following a judgment given by the Court in response to a reference for a preliminary ruling finding that national legislation is incompatible with EU law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that EU law is complied with within that State, those authorities, while retaining the choice of the measures to be taken, must in particular ensure that national law is changed so as to comply with EU law *as soon as possible* and that the rights which individuals derive from EU law are given *full effect* (paragraph 38).

The second question referred

64. By its second question, the referring court asks the Court of Justice for clarification concerning the conditions that may give rise to the non-contractual liability of the Austrian State in the circumstances of the main proceedings, in particular as regards the existence of a sufficiently serious breach of EU law.

65. Let me say straightaway that I harbour serious doubts as to the admissibility of this question. I do so not from the perspective, raised by the Austrian Government, of the jurisdiction of the referring court to hear an action for damages against the State, an action which, under Austrian law, must be brought before the Verfassungsgerichtshof (Constitutional Court). In that regard, in fact, the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck) cites national case-law which, in its view, confers on the civil courts concurrent jurisdiction with the Verfassungsgerichtshof (Constitutional Court) in certain circumstances that it considers to be present in the main proceedings. Notwithstanding the objections of the Austrian Government, I do not consider it a matter for the Court to call into question the referring court's assertion regarding its own jurisdiction under national law.

66. It is clear, on the other hand, from the order for reference that the claim underlying the dispute in the main proceedings relates solely to the payment of the salary components of which Mr Stollwitzer considers that he has been unlawfully deprived, and that that claim is directed at the ÖBB PV in its capacity as Mr Stollwitzer's employer. Moreover, at the hearing, Mr Stollwitzer confirmed that he had not made any claim for damages against the Austrian State and, consequently, declined to submit observations on the second question, which he considers merely theoretical. Lastly, it is not disputed that the Austrian State is not a party to the main proceedings. Since the hypothetical nature of the second question is, in my view, apparent from the circumstances set out above, I suggest that the Court declare the question inadmissible.

67. Should the Court not follow that suggestion, I shall simply point out that at paragraphs 98 to 107 of the judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005), the Court provided extensive guidance on the criteria which the national court must apply in order to determine whether, in circumstances akin to those of the main proceedings, a Member State incurs liability for the breach of Directive 2000/78.

68. In particular, as regards the first of the three conditions to which the establishment of liability is subject, namely that the rule of EU law infringed is intended to confer rights on individuals, the Court has made clear both that Article 2(1) of Directive 2000/78, read in conjunction with Article 1 thereof, prohibits in a general and unambiguous manner, all direct or indirect discrimination, as regards employment and occupation, that is not objectively justified and is based, inter alia, on the worker's age, and that those provisions are intended to confer on individuals rights that are enforceable against Member States.[46]

69. As regards the third condition, namely the existence of a direct causal link between the breach and the loss or damage sustained by the individual, the Court has specified that it is for the referring court to ascertain, in the national proceedings pending before it, whether such a link exists.[47]

70. Lastly, as regards the second condition, concerning the existence of a sufficiently serious breach of EU law, the Court stated, first, at paragraphs 102 to 105 of that same judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005) that the discretion enjoyed by the Member State constitutes an important criterion in determining whether there has

46 See judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 101).
47 See judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 98).

been a sufficiently serious breach of EU law. It then went on to find that, although the interpretation that the Court gives to a rule of EU law, in the context of a request for a preliminary ruling, clarifies and defines, where necessary, the meaning and implications of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force, it is up to the national court to decide whether, nevertheless, the nature and extent of the obligations on Member States under Article 2(2) of Directive 2000/78 in respect of legislation such as that at issue in the main proceedings which gave rise to the judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005) could not be considered to be clear and precise until the date of the judgment of 8 September 2011, *Hennings and Mai* (C-297/10, EU:C:2011:560), in which the Court found the legislation at issue to be incompatible with that directive. As far as the circumstances of the main proceedings in the present case are concerned, that clarification was provided by way of case-law on 18 June 2009 with the judgment in *Hütter* (C-88/08, EU:C:2009:381), in which the Court analysed a system for the accreditation of periods of activity completed before recruitment identical to the system under the 1963 BO.

71. It seems clear to me from the foregoing that, without prejudice to any analysis of whether there is indeed a causal link with the damage alleged by the individual employee, it follows from the application of the principles set out above that, as from 18 June 2009 at least, the conditions giving rise to the liability of the Austrian State for the harm caused to employees of the ÖBB PV as a result of the application of the previous discriminatory accreditation system have been satisfied.

Conclusion

72. On the basis of all of the foregoing considerations, I suggest that the Court declare the second question referred inadmissible and answer the first question to the effect that Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, for the purpose of abolishing the discrimination on grounds of age identified by the Court in two successive judgments, provides for contractual employees in the public service to be regraded under a new remuneration scheme that is based on non-discriminatory criteria for the accreditation of previous periods of activity, but which, in applying a rule designed to protect the acquired rights of the regraded employees by freezing the pay they received at a certain date prior to the entry into force of the legislation, makes that rate of pay contingent on the application of the discriminatory accreditation criteria that existed under the previous accreditation system.