Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 6 December 2018 [1]

Case C-24/17

Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst
v
Republik Österreich

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Prohibition of discrimination on the ground of age — National system for the remuneration and advancement of contractual public servants — Legislation of a Member State found to be discriminatory — Adoption of new legislation to remedy that discrimination — Procedures for the transition of the persons concerned to the new system — Perpetuation of the difference in treatment — Justifications — Right to compensation — Right to effective judicial protection — Article 45 TFEU — Regulation (EU) No 492/2011 — Freedom of movement for workers — No barrier)

I. Introduction

1. The request for a preliminary ruling made by the Oberster Gerichtshof (Supreme Court, Austria) concerns the interpretation of Article 45 TFEU, Articles 20, 21 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Articles 1, 2, 6 and 17 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2] and Article 7(1) of Regulation (EU) No 492/2011 on freedom of movement for workers within the Union. [3]

2. This request was submitted in the context of a dispute between the Österreichischer Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst (Austrian Confederation of Trade Unions, Public Service Union, 'the ÖGB') and the Republik Österreich ('the Republic of Austria') concerning the lawfulness of the federal system for the remuneration and advancement of contractual public servants adopted by Austria at the beginning of 2015 in order to put an end to discrimination on the ground of age, following the judgment in *Schmitzer*. [4]

3. In essence, the referring court wonders, first of all, whether EU law — and more particularly Articles 1, 2 and 6 of Directive 2000/78 and Article 21 of the Charter — preclude the procedures chosen by the Austrian legislature for the transition of contractual public servants from the old remuneration and advancement system to that new system. I consider that that is indeed the case, for the reasons which I shall set out this Opinion.

1 Original language: French.

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

3 Regulation of the European Parliament and of the Council of 5 April 2011 (OJ 2011 L 141, p. 1).

4 Judgment of 11 November 2014 (C-530/13, EU:C:2014:2359). On the stages in the evolution, in line with judgments of the Court, of Austrian law on remuneration and advancement in the civil service, see, in particular, point 15 et seq. of this Opinion.

4. Next, in the event that, as I recommend, the Court should answer the first question in the affirmative, the referring court asks whether financial compensation should be granted, in particular on the basis of Article 17 of Directive 2000/78, to contractual public servants who were treated unfavourably by the old system. I consider that a nuanced answer should be given to that question, based, rather, on Article 16 of that directive.

5. In the contrary situation, where the first question would be answered in the negative, the referring court seeks to ascertain whether national legislation such as that called in question deprives the persons concerned of the right to an effective remedy, within the meaning of Article 47 of the Charter. Although I consider that it will not be necessary for the Court to rule on that subsidiary question, I shall nonetheless present some observations on that subject.

6. Last, the Court is asked to determine whether EU law — in particular, Article 45 TFEU, Article 7(1) of Regulation No 492/2011 and Articles 20 and 21 of the Charter — preclude earlier periods of activity of a contractual public servant being taken into account differently, namely in full or in part, depending on the status of his former employer. I am of the view that EU law does not stand in the way of national provisions such as those at issue in the main proceedings.

7. I would emphasise that there are close links between this case and Case C-396/17, *Leitner*, which is the subject of a separate Opinion delivered on the same date as this Opinion. [5]

II. Legal framework

A. European Union law

1. Directive 2000/78

8. Article 1 of Directive 2000/78 states that the purpose of that directive is 'to lay down a general framework for combating discrimination on the grounds of … age … as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

9. Article 2 of that directive, entitled 'Concept of discrimination', defines, in paragraph 1, the 'principle of equal treatment' as meaning that there 'shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1'. Article 2(2)(a) states that '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'.

10. Article 6 of that directive, entitled 'Justification of differences of treatment on grounds of age', provides in the first subparagraph of paragraph 1 that 'notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the

5 More particularly, the first two questions for a preliminary ruling referred in this case (in other words, Question 1(a) and Question 1(b)) are similar to the first, second and fourth questions referred by the Bundesverwaltungsgericht (Federal Administrative Court, Austria) in Case C-396/17, *Leitner*, which concerns the Austrian system for remuneration and advancement of civil servants, while the present case concerns the system applicable to contractual public servants, two complementary and equivalent systems. I would point out that in these two cases both the respective applicants in the main proceedings, who have the same representative, and the Austrian Government and the European Commission have submitted observations which are essentially similar with respect to those common aspects, which will be reflected in this Opinion.

means of achieving that aim are appropriate and necessary'. The second subparagraph of paragraph 1 states that 'such differences of treatment may include … the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment …'.

11. Article 9 of that directive, entitled 'Defence of rights', provides in paragraph 1 that 'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended'.

12. Article 16 of Directive 2000/78, entitled 'Compliance', provides in point (a) that 'Member States shall take the necessary steps to ensure that … any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'.

13. Article 17 of that directive, entitled 'Sanctions', states that 'Member States shall lay down the rules on sanctions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive …'.

2. Regulation No 492/2011

14. Article 7(1) of Regulation No 492/2011, which is found in Section 2 (entitled 'Employment and equality of treatment') of Chapter I of that regulation, states that 'a worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and, should he become unemployed, reinstatement or re-employment'.

B. Austrian law

1. Le VBG 2010

15. The classification of contractual servants in the salary scale and their advancement, which as a general rule occurs every two years, are governed by the Vertragsbedienstetengesetz 1948[6] (Law of 1948 on contractual servants, 'the VBG 1948'), as adapted on a number of occasions, in particular in order to take account of judgments of the Court delivered in disputes relating to the pertinent provisions of Austrian law.

16. Following the judgment in *Hütter*,[7] the VBG 1948 was amended by a federal law published on 30 August 2010[8] (the VBG 1948 as amended by that law, 'the VBG 2010').

6 BGBl., 86/1948.

7 Judgment of 18 June 2009 (C-88/08, EU:C:2009:381), in which the Court interpreted Articles 1, 2 and 6 of Directive 2000/78 as 'precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, *excludes periods of employment completed before the age of 18 from being taken into account* for the purpose of determining the incremental step at which contractual public servants of a Member States are graded' (paragraph 51, emphasis added).

8 BGBl. I, 82/2010.

17. Paragraph 19(1) of the VBG 2010 stated that 'advancement shall be determined on the basis of a reference date' and that 'unless otherwise provided in this paragraph, the period required for advancement to the second incremental step for each job category shall be five years and two years for other incremental steps'.

18. Paragraph 26(1) of the VBG 2010 provided that 'subject to the restrictions set out in subparagraphs 4 to 8 the reference date to be taken into account for the purposes of advancement by an incremental step shall be calculated by counting backwards from the date of appointment for periods after 30 June of the year in which nine school years were completed or ought to have been completed after admission to the first level of education …'.

2. The amended VBG

19. Following the judgment in *Schmitzer*,[9] the wording of Paragraphs 19 and 26 of the VBG 1948 was again amended, with retroactive effect, under a federal law published on 11 February 2015[10] (the VBG 1948 as amended by that law, 'the VBG 2015').

20. Furthermore, in order to comply with a judgment of the Verwaltungsgerichtshof (Administrative Court, Austria),[11] a federal law published on 6 December 2016[12] further amended the VBG 1948 (in the version resulting from that law, 'the VBG 2016' and, taken together with the VBG 2015, 'the amended VBG'), as regards the date of the entry into force of Paragraphs 19 and 26 of the VBG 2015.

21. Under the heading 'Grading and advancement', Paragraph 19(1) of the VBG 2015 provides that 'grading and further advancement shall be determined on the basis of remuneration seniority'.

22. Under the heading 'Remuneration seniority', Paragraph 26 of the VBG 2015 states:

'1. Remuneration seniority shall comprise the length of the periods effective for advancement spent in the employment relationship, plus the length of the accreditable previous service periods.

2. Periods shall be added to remuneration seniority as previous service periods which are completed

(1) in an employment relationship with a local authority or municipal association of a Member State of the European Economic Area, the Turkish Republic or the Swiss Confederation;

(2) in an employment relationship with an organisation of the European Union or with an intergovernmental organisation of which [the Republic of] Austria is a member;

(3) in which the contractual public servant was entitled to a pension for injury … based on the Heeresversorgungsgesetz (Law on protection of the armed forces) and

(4) for service in … military service …, training service …, civilian service …, obligatory military service.

9 Judgment of 11 November 2014 (C-530/13, EU:C:2014:2359), in which the Court, inter alia, interpreted Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78 as 'precluding national legislation which, *with a view to ending age-based discrimination, takes into account* periods of training and service prior to the age of 18 *but* which, *at the same time, introduces — only for civil servants who suffered that discrimination* — a *three-year extension to the period required in order to progress from the first to the second incremental step* in each job category and each salary group' (paragraph 45, emphasis added). The provisions at issue in *Schmitzer*, which concerned civil servants, was analogous to those concerning contractual servants in the present case.

10 BGBl. I, 32/2015.

11 Judgment of 9 September 2016 (Ro 2015/12/0025-3).

12 BGBl. I, 104/2016.

3. Apart from the periods listed in subparagraph 2, periods of exercising a relevant occupation or relevant administrative traineeship up to a maximum of 10 years in total shall also be accredited as previous service periods. …'

23. According to Paragraph 100(70)(3) of the VBG 2016, 'in the version of the Federal Law published in the BGBl. I, 32/2015, the following shall enter into force: … Paragraphs 19 and 26, including their headings, on 1 July 1948; all the versions of those provisions published before 11 February 2015 shall cease to apply in current and future procedures …'.

3. The amended GehG

24. The Gehaltsgesetz 1956[13] (Law on salaries 1956, 'the GehG 1956') was also reformed pursuant to the abovementioned federal laws published on 11 February 2015 and 6 December 2016 respectively[14] (the GehG 1956 in the version resulting from those two laws, 'the amended GehG').

25. It follows from Paragraph 94a of the amended VBG that, 'for the purposes of the transition of contractual servants in the remuneration system newly created by the federal law published in the BGBl. I, 32/2015, it is appropriate to apply Paragraphs 169c, 169d and 169e of the [amended] GehG', which concern the reclassification of public servants already in service in the new remuneration and advancement regime.

26. Under the heading 'Transition of existing employment relationships', Paragraph 169c of the amended GehG states, in subparagraphs 1 to 9:

'1. All civil servants in the job categories and salary groups specified in Paragraph 169d who were employed on 11 February 2015 shall be reclassified in the new remuneration system created by this Federal Act in accordance with the following provisions solely on the basis of their previous salaries. Civil servants shall initially be ranked in a salary grade in the new remuneration system based on their previous salary in which that previous salary is preserved. …

2. The transition of the civil servant to the new remuneration system shall occur through a fixed determination of his or her remuneration seniority. The fixed determination shall be based on the transition amount. The transition amount is the full salary excluding any extraordinary advancements, which was calculated based on the monthly pay of the civil servant for February 2015 (transition month). …

2a. The base salary for that salary grade which was actually applied to the salaries paid for the transition month shall be used as the transition amount (grading according to the payslip). There shall be no assessment of whether the reason for and amount of the salary payments were correct. A subsequent correction of the salary payments shall be taken into account only in so far as when calculating the transition amount

(1) actual errors are corrected which occurred during inputting in an automated data processing system, and

(2) erroneous inputting clearly departs from the intended inputting as shown by the documents already existing at the time of the inputting.

…

13 BGBl. 54/1956.

14 See points 19 and 20 of this Opinion, describing the circumstances of those two reforms.

2c. Subparagraphs 2a and 2b transpose into Austrian law, in the field of the Staff Regulations of federal employees and teaching personnel of the Länder, Articles 2 and 6 of Directive 2000/78 … as interpreted in the judgment [in *Specht and Others*].[15] The procedures for the transition of civil servants appointed before the entry into force of the federal reform of remuneration in 2015 were therefore fixed in the new remuneration regime and provide that the salary grade at which they are now placed is to be determined solely on the basis of the salary acquired under the old remuneration regime, although that regime was based on discrimination on the ground of the age of the civil servant and although that subsequent advancement to a higher salary grade is now calculated solely on the basis of professional experience since the entry into force of the reform of remunerations in 2015.

3. The remuneration seniority of reclassified civil servants shall be fixed in line with the period of time required for advancement from the first salary grade (from the first day) to that salary grade within the same job category for which the next lower salary is cited as an amount to the transition amount in the version applicable on 12 February 2015. If the transition amount is the same as the lowest amount cited for a salary grade within the same job category, this salary grade shall be the determining one. All comparable amounts shall be rounded to full euros.

…

6. … If the civil servant's new salary is below the transition amount, a maintenance premium equal to the difference in the amount, taken into consideration for the calculation of the retirement pension, shall be paid to him as a supplementary premium … until he reaches a salary level higher than the transition amount. The comparison of the amounts shall include any seniority premiums or exceptional advancements.

…

9. In order to maintain expectations connected with a future advancement, the exceptional advancement or the seniority premium in the old remuneration regime, a maintenance premium, taken into consideration for the calculation of the retirement pension, shall be payable to the civil servant as a supplementary premium …, as soon as he reaches the transitional grade …'

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

27. The ÖGB, which represents, in particular, contractual servants having a private employment relationship with the Republic of Austria, brought an action against the Republic of Austria before the Oberster Gerichtshof (Supreme Court), seeking a declaration that the provisions of the remuneration and advancement regime which has been applicable since the reform of the VBG 1948 at the beginning of 2015[16] continue to be contrary to EU law and an order that other procedures be implemented in favour of those concerned.

28. In support of its action, the ÖGB claimed that the discrimination on the ground of age resulting from the old regime was maintained by the new regime, because the remuneration payable for February 2015 is taken into account in the new regime as a reference point for the reclassification of the servants concerned for salary purposes. It added that those servants were unable to seek a review of the legality of that remuneration, owing to the retroactive abolition of the 'advancement reference date' which had thus far been applicable.

15 Judgment of 19 June 2014 (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005).

16 See point 19 et seq. of this Opinion.

29. Furthermore, it maintained that the distinction between the previous periods of service completed with a local authority of a Member State of the European Economic Area (EEA) or an entity treated as equivalent, which must be taken into account in full, and those completed with other employers, which are taken into account only to a limited extent, is contrary to the interpretation of EU law given by the Court. [17]

30. The Republic of Austria disputed those claims: first, it contended that the legislation adopted in 2015 was consistent with the Court's case-law. [18] It also contested the argument alleging a breach of the right to an effective remedy.

31. Second, the ÖGB claimed that it was consistent with EU law that that legislation takes into consideration in full only previous periods of activity completed in the context of an employment relationship involving special proximity with the public service.

32. In that context, by order of 19 December 2016, received at the Court on 18 January 2017, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Is EU law, in particular Articles 1, 2 and 6 of Directive 2000/78…, in conjunction with Article 21 of the Charter …, to be interpreted as precluding national legislation under which a remuneration system which (in relation to the accreditation of previous service periods completed before the age of 18) discriminates on grounds of age is replaced by a new remuneration system, under which, however, the transition of existing public servants to the new remuneration system occurs in such a way that the new system is implemented retroactively to the date on which the original law entered into force, but the initial grading in the new remuneration system is based on the salary actually paid under the old remuneration system for a specific transition month (February 2015), with the result that the previously existing age discrimination continues in terms of its financial effects?

(b) If the answer to [Question 1(a)] is in the affirmative; is EU law, in particular Article 17 of Directive 2000/78, to be interpreted as meaning that existing public servants who were discriminated against in the old remuneration system in relation to the accreditation of previous service periods completed before the age of 18 must receive financial compensation if that age discrimination continues in terms of its financial effects even after transition to the new remuneration system?

(c) If the answer to [Question 1(a)] is in the negative: is EU law, in particular Article 47 of the Charter …, to be interpreted as meaning that the fundamental right to effective legal protection enshrined therein precludes national legislation under which the age-discriminatory remuneration system is no longer to apply in current and future procedures and the transition of the remuneration of existing public servants to the new remuneration system is to be based solely on the salary calculated or paid for the transition month?

17 In that regard, the ÖGB referred to the judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* (C-514/12, EU:C:2013:799).

18 The Republic of Austria referred to 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); of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38); and of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561).

(2) Is EU law, in particular Article 45 TFEU, Article 7(1) of Regulation [No 492/2011] and Article 20 et seq. of the Charter, to be interpreted as precluding legislation under which previous service periods completed by a contractual public servant:

– in an employment relationship with a local authority or municipal association of a Member State of the [EEA], the Republic of Turkey or the Swiss Confederation, or with an organisation of the European Union or an intergovernmental organisation of which [the Republic of] Austria is a member, or with any similar body, must be accredited in their entirety,

– in an employment relationship with another employer, only when exercising a relevant occupation or relevant administrative traineeship, must be accredited up to a maximum of 10 years in total?'

33. Written observations were lodged before the Court by the ÖGB, the Austrian Government and the European Commission.

34. By letters dispatched on 14 June 2018, the Court sent a request for clarification, with which the referring court complied, and put a question for a written answer, which the ÖGB, the Austrian Government and the Commission answered.

35. At the hearing on 12 September 2018, those parties and interested persons presented oral observations.

IV. Analysis

A. Preliminary observations

36. The present case concerns the new Austrian legislation on the procedures whereby experience acquired before entering the service is taken into consideration for the purposes of the classification and advancement of contractual public servants. That remuneration system, resulting from the reform of the VBG 1948 at the beginning of 2015, is similar to that introduced at the same time for civil servants. [19]

37. Under that new system, the classification of a contractual servant on the remuneration scale and his subsequent advancement in grade are no longer determined according to a 'reference date', a fictional starting point, but according to 'seniority' in that scale. [20] In order to calculate his seniority, in addition to the duration of the current employment relationship, the duration of activities before entering the service is taken into account, provided that those activities are expressly considered relevant, and the extent to which they are taken into account varies according to the type of employer: they are taken into account in full when those activities were carried out with designated public bodies, but only up to a maximum of 10 years in total in other cases. [21]

19 In the latter regard, see also footnote 5 of this Opinion.

20 See Paragraph 19(1) of the VBG 2015, in contrast to the version of that provision in the VBG 2010.

21 See Paragraph 26(1) to (3) of the VBG 2015.

38. Contractual servants who were in service at the entry into force of the reform,[22] which is applicable retroactively,[23] are transferred to the new remuneration system by means of a reclassification which operates schematically as follows.[24] First of all, all the servants concerned are classified in a level of the new system on the basis of the previous remuneration. Next, their seniority is determined on a fixed basis in the remuneration scale, according to a 'transition amount' which corresponds to the salary grade that actually determined the remuneration paid by the employer for February 2015, known as the 'transition month', while the regularity of that remuneration can be reviewed only in the case of substantive and manifest inputting errors.[25]

39. The questions referred by the Oberster Gerichtshof (Supreme Court) ask the Court, in essence, to determine whether the new legislation in question perpetuates, with respect to contractual servants already in service, the age-based discrimination contrary to EU law that was found to exist in the judgment in *Schmitzer*,[26] as the ÖGB asserts, or whether that is not in fact the case, as the defendant in the main proceedings contends.

40. The referring court raises a question, first of all, about the compatibility with EU law of the procedures whereby the transition of contractual servants from the old Austrian remuneration and advancement regime, which was found to be discriminatory, to the new regime, is carried out (Section B). It points, more particularly, to the fact that the transition is carried out without financial compensation for servants who were treated unfavourably by the old system (Section C). It also observes, as a subsidiary point, that the new regime does not allow the reclassified servants to obtain a review of the reference element fixed according to the rules of the old regime, which might deprive them of the right to effective judicial protection (Section D). Last, it wonders whether EU law precludes the rules under which earlier periods of activity must be taken into account in full or only in part, depending on the status of the employer with whom they were completed (Section E).

B. The procedures for the transition of contractual servants from the old remuneration and advancement regime to the new regime (Question 1(a))

41. By the first part of its first question, the referring court asks, in essence, whether EU law, in particular Articles 1, 2 and 6 of Directive 2000/78 in conjunction with Article 21 of the Charter, must be interpreted as meaning that it precludes national legislation under which a discriminatory remuneration regime is replaced by a new regime when the transition to the new scheme of all contractual servants in service is done in such a way that their initial classification in the new regime

22 More specifically, those in service on 11 February 2015.

23 In accordance with Paragraph 100(70)(3) of the VBG 2016, the effects of Paragraphs 19 and 26 of the VBG 2015 are to be retroactive to 1 July 1948, the date of the entry into force of the VBG 1948, also with regard to current or future procedures.

24 The details of the transfer process are set out in Paragraph 169c of the amended GehG, a provision applicable to contract agents pursuant to Paragraph 94a of the amended VBG.

25 As stated in subparagraphs 1 to 2a of Paragraph 169c of the amended GehG, where it is mentioned, in particular, that the relevant procedure involves 'grading according to the payslip'.

26 Judgment of 11 November 2014 (C-530/13, EU:C:2014:2359), the substance of which is set out in footnote 9 of this Opinion.

is made by reference to a salary paid for a given month that was calculated in accordance with the old regime.[27] I observe at the outset that, by the words used for the purposes of its question,[28] the referring court explicitly indicates that it considers a priori that the earlier discrimination is perpetuated by the legislation in question.[29]

42. On that point, the ÖGB submits that, since the legislation at issue in the main proceedings provides that the reclassification of the contractual servants already in service is to be made on the basis of the remuneration paid in February 2015, fixed in a discriminatory manner, the discrimination on the ground of age originating under the old remuneration regime continues because of that link[30] and that the grounds relied on in support of that legislation are not consistent with EU law. The Austrian Government does not deny that the effects of the discrimination created by the old regime might thus endure, but it asserts that the procedures chosen to put the transition of those servants to the new remuneration regime into effect are not only justified by legitimate objectives but also appropriate and necessary in order to achieve those objectives. On the other hand, the Commission maintains that such legislation is not compatible with the requirements arising under Articles 2 and 6 of Directive 2000/78, since it maintains a difference in treatment on the ground of age that is not duly justified. I am also of that view, for the reasons set out below.

43. First of all, as regards the *provisions* referred to in the present question for a preliminary ruling, I observe that the principle of non-discrimination on the ground of age is enshrined in Article 21 of the Charter and at the same time given material form in Directive 2000/78, but that the question should be examined from the aspect of that directive, in the context of a dispute such as that in the main proceedings, since the national measures at issue fall within the scope of that directive.[31] Furthermore, since neither the object of Directive 2000/78 nor the factors of discrimination which it prohibits, as defined in Article 1, are directly explored in the present case, it does not seem necessary in my view that the Court should interpret that provision.

44. Next, as regards the *complaints* formulated with respect to the national legislation at issue in the main proceedings, it seems to me that that legislation is disputed from the aspect of the procedures whereby servants who were in service when the 2015 reform was adopted are transferred from the old remuneration regime, which was found to be discriminatory,[32] to the new regime. In other words, it falls to be determined whether the provisions in question are liable to perpetuate the discrimination on the ground of age that derived from the old regime, before considering whether those provisions are objectively and reasonably justified and thus escape the prohibition laid down in Directive 2000/78.

27 I note that a similar problem is raised by the first question submitted in the related Case C-396/17, *Leitner*, which is the subject of my Opinion of the same date as this Opinion.

28 Namely 'with the result that the previously existing age discrimination continues in terms of its financial effects'.

29 Nonetheless, it wonders, in particular, whether lessons might be learnt in the present case from the judgments of the Court concerning the similar developments in German law on this subject. It refers, in particular, to 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). In his Opinion in *Stollwitzer* (C-482/16, EU:C:2017:893, point 6 and footnote 18), Advocate General Mengozzi explains that those cases 'concerned, on the one hand, the remuneration system that was applicable, at both federal and regional level [in Germany], to public sector contractual employees and public servants, and was based essentially on criteria concerned with age and, on the other, the procedures for switching from that salary system to a system that was not based on discriminatory criteria'.

30 The ÖGB submits that, according to the judgment cited in footnote 11 of this Opinion, the Verwaltungsgerichtshof (Administrative Court) considered, with regard to the 2015 remuneration reform, that 'it is not … conceivable that the collective transition — at the most compatible with EU law — of existing civil servants to the new system, on the basis of a position which they occupied in the old discriminatory system, may simply eliminate the discrimination that existed during the previous periods'.

31 In fact, the Member States and the social partners must respect Directive 2000/78 when adopting measures which fall within the scope of that directive, which gives specific expression, in the field of employment and occupation, to the principle of non-discrimination on the ground of age (see, in particular, judgments of 21 January 2015, *Felber*, C-529/13, EU:C:2015:20, paragraphs 15 to 17, and of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraphs 16 and 17).

32 In accordance with the judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359), the substance of which is set out in footnote 9 of this Opinion.

45. *First*, as regards the *existence of discrimination on the ground of age*, I note that in the words of Article 2(2)(a) of Directive 2000/78, direct discrimination is to 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 the ground of, inter alia, age.

46. In addition, I recall that in the judgment in *Schmitzer*,[33] which gave rise to the reform at issue here,[34] the Court considered that the Austrian legislation that preceded that reform involved a difference in treatment which was directly based on age within the meaning of that provision and that that difference was not properly justified by legitimate objectives and was therefore caught by the prohibition laid down in Article 2(2)(a).

47. Furthermore, the Court has repeatedly held that where the reclassification of a category of persons in a new remuneration system is made solely by reference to an age-related parameter derived from the old system, national provisions of that type may perpetuate the difference in treatment on the ground of age within the new system.[35]

48. In the present case, Paragraph 169c of the amended GehG, in conjunction with Paragraph 94a of the amended VBG, provides that the reclassification of contractual servants in service is to be carried out 'solely on the basis of their previous salaries,[36] which were themselves based on age. Those provisions thus perpetuate a discriminatory situation in which servants who were treated unfavourably by the old system receive less remuneration than that received by other servants, although their situations are comparable, solely on the ground of their age when they completed the earlier activities to be taken into account.

49. The referring court expresses the same view. Referring to the case-law of the Court referred to above, the Austrian Government acknowledges, moreover, that those provisions of the new remuneration system are apt to prolong the discriminatory effects of the old system.[37] In addition, the Commission maintains that it is clear from the national *travaux préparatoires* that the Austrian legislature quite deliberately chose a method having such consequences.[38]

50. It is therefore in my view undeniable that legislation such as that at issue perpetuates a discriminatory situation, namely the difference in treatment directly based on age within the meaning of Article 2(2)(a) of Directive 2000/78 found by the Court in the judgment in *Schmitzer*.[39] The forms of discrimination that existed before the reform in question will thus inevitably continue, and will do so not merely on a temporary, but on a lasting and indeed permanent basis.[40]

33 Judgment of 11 November 2014 (C-530/13, EU:C:2014:2359, paragraphs 35 and 44).

34 See point 19 et seq. of this Opinion.

35 See judgments of 8 September 2011, *Hennigs and Mai* (C-297/10 and C-298/10, EU:C:2011:560, paragraphs 84 to 86); 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, paragraphs 57 to 60); and of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561, paragraphs 38 to 40).

36 More specifically, in the words of subparagraph 2 of Paragraph 169c, the reclassification is based on a 'transition amount' corresponding to the full salary paid in respect of the 'transition month', namely February 2015, which is calculated in accordance with the old remuneration system.

37 According to the Austrian Government, 'the Republic of Austria is aware that rules which, for the transition of existing employees from a remuneration system which is discriminatory on the ground of age to a new system, provide that the classification in the new remuneration system is to be effected solely on the basis of the salary paid to them in accordance with the old remuneration system — which was discriminatory on the ground of age — are apt to perpetuate discrimination caused by the old remuneration system'.

38 In the words of the extract cited by the Commission, taken from the explanations concerning the Government Bill relating to the law to amend Paragraph 169c of the GehG 2015, which was subsequently published in the BGBl. I, 104/2016 (see the annexes to the verbatim transcript of National Council 1296 of the XXVth legislature, p. 2, available at the following internet address: https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01296/fname_564847.pdf): 'The (Austrian) legislature therefore knowingly chooses this method of transition and thus deliberately and expressly perpetuates discrimination, in order to avoid loss of income for employees in service and to guarantee them a level of income and prospects of income on which they have relied for many years'.

39 Judgment of 11 November 2014 (C-530/13, EU:C:2014:2359).

40 I shall return to this latter aspect in points 60 and 61 of this Opinion.

51. *Second*, as regards the possible *justification for the difference in treatment* which thus persists, it should be borne in mind that Article 6 of Directive 2000/78 allows the characterisation as direct discrimination within the meaning of Article 2, and therefore the resulting prohibition, to be disregarded if the differences in treatment on the ground of age are 'objectively and reasonably justified by a legitimate aim', of the type listed in Article 6,[41] and if 'the means of achieving that aim are appropriate and necessary'.

52. In accordance with settled case-law, in the context of a reference for a preliminary ruling, although it is ultimately for the national court, which has sole jurisdiction to assess the facts and to determine whether and to what extent the internal legislation at issue in the main proceedings meets those requirements, the Court of Justice, which is called on to provide answers that are of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, that are likely to enable the national court to give judgment in the particular case pending before it.[42]

53. As concerns the *aims* that are likely to justify the content of the legislation at issue, the referring court[43] and the Austrian Government submit that the transition procedures adopted in the 2015 reform were designed to avoid the overwhelming difficulties that would have been caused if each of the numerous servants concerned had been assessed individually;[44] to ensure, moreover, that the operation remains cost-neutral for the State; and, last, to prevent significant reductions in income for those servants.

54. It follows from the Court's case-law that justifications based on possible administrative difficulties and an increase in financial burdens cannot in principle be a legitimate ground for non-compliance with obligations arising from the prohibition of discrimination on the ground of age laid down in Directive 2000/78. However, the Court has accepted that an individual examination of each particular case cannot be insisted on in order to establish individually previous periods of activity, since the management of the scheme concerned must remain technically and economically viable.[45]

55. Furthermore, it is common ground that the intention, explicitly expressed by the Austrian legislature,[46] to provide a category of persons with a guarantee that they will be transferred to the new system without any financial loss, in accordance with their acquired rights and with the protection of legitimate expectations, constitutes a legitimate employment policy and labour market aim,[47] which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the ground of age.[48]

56. Since the national legislation at issue in the main proceedings does in fact pursue a legitimate aim within the meaning of Article 6 of Directive 2000/78, it is appropriate, next, to consider whether the means employed to that end are appropriate and necessary in order to achieve that aim, in accordance with that provision.

41 Namely, in the words of Article 6(1), justified by a legitimate aim 'including legitimate employment policy, labour market and vocational training objectives'.

42 See, in particular, judgments of 14 March 2017, *G4S Secure Solutions* (C-157/15, EU:C:2017:203, paragraph 36), and of 25 July 2018, *Dyson* (C-632/16, EU:C:2018:599, paragraph 54).

43 The referring court refers specifically to the reasoning set out in the *travaux préparatoires* to the reform (Bericht des Verfassungsausschusses, 457 BlgNR XXV. GP, 2).

44 More specifically, the Austrian Government claims that, even only at federal level, around 160 000 cases would have had to be examined in the context of the transition to the new remuneration regime and that an individual examination could therefore not have been carried out in a short time.

45 See, in particular, 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, paragraphs 77 to 80), and of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraph 36 and the case-law cited).

46 As may be seen from the extract from the national *travaux préparatoires* cited in footnote 38 of this Opinion.

47 See, in particular, judgments of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561, paragraph 42), and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 41).

48 See, in particular, judgment of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraph 37 and the case-law cited).

57. As regards the *appropriateness* of such provisions, I seriously doubt, as do the referring court and the Commission, that the disputed element of the 2015 reform, namely the reclassification of all contractual servants in service 'solely on the basis of their previous salaries', [49] may be considered appropriate in order to achieve the aim of protecting both the acquired rights and the legitimate expectations of all those concerned by that mechanism.

58. In fact, it is apparent from the information provided by the referring court that the Austrian legislature adopted various measures designed to ensure that all those persons, whether or not they were treated favourably by the old regime, did not suffer a significant loss of salary on account of that reform. [50] The very fact that such measures had to be adopted, in addition to the mechanism based on the previous remuneration which is being challenged, suggests that that mechanism is not alone, and therefore in itself, capable of preserving the acquired rights and the legitimate expectations of those concerned.

59. In addition, as regards the *necessity* of provisions such as those at issue in the main proceedings, I consider that the mechanism adopted in 2015 goes beyond what is necessary in order to achieve the abovementioned objective. As the Commission submits, [51] and notwithstanding the Austrian Government's opinion to the contrary, other types of measures, less punishing for the persons who were treated unfavourably by the old system, [52] might have been implemented in order to preserve the acquired rights and the legitimate expectations of all the servants concerned, [53] without, in my view, the new regime becoming technically and economically unmanageable. [54]

60. That observation is in my view necessary, especially, in the light of the unlimited duration of the new mechanism, which makes no provision for a gradual convergence of the treatment given to servants treated unfavourably by the old regime with the treatment given to those treated favourably, so that in the medium or indeed the short term, and in any event following a foreseeable period, the former will 'catch up' and enjoy the advantages granted to the latter. [55]

49 According to the procedures described in footnote 36 of this Opinion.

50 In the light of the order for reference and the explanations subsequently provided by the referring court, it seems to me that a number of mechanisms were envisaged, at different stages in the transition process, in order to avoid any significant reduction of the remuneration of the reclassified persons (in particular, a level normally called the 'maintenance' level and two successive maintenance premiums, in accordance with subparagraphs 6 and 9 of Paragraph 169c of the amended GehG). The referring court states that the mechanisms in question 'do not serve to compensate for the salaries which are discriminatory on the ground of age which are linked to the transition amount'.

51 The Commission observes that 'in order to satisfy the criterion of the protection of legitimate expectations with regard to a certain level of remuneration, it is sufficient, it seems, to maintain the salary previously received. Thus the advancement in salary grade for all [contractual servants] might be aligned in the same way; in order to ensure compliance with the principle of protection of legitimate expectations, however, the [servants] who suffer a de facto loss of income might be paid the salary which they received until then if the salary were detached from the remuneration grade in which they should actually be classified, until they reach the grade corresponding to that salary. That mechanism would admittedly maintain certain effects of the old discrimination, namely the income-related effects, but *only for a transitional period of foreseeable duration*' (emphasis added).

52 I note that in the context of the previous reform, in 2010, the Austrian legislature had chosen to conduct a case-by-case examination, instead of carrying out an automatic, fixed reclassification, as the ÖGB emphasises.

53 I would emphasise that a different methodology was adopted by the Republic of Austria, and recently held by the Court to be consistent with EU law, in a similar context of transition to a new remuneration regime, which also dates from 2015. See judgment of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 45), where it is emphasised that 'the Austrian legislature, in adopting Paragraph 53a of the 2015 Federal Law on Railways, had due regard for the balance to be struck between the elimination of discrimination on grounds of age on the one hand and the preservation of rights acquired under the former legal system on the other'.

54 Within the meaning of the case-law referred to in point 54 of this Opinion.

55 See, to that effect, 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, paragraphs 83 to 85), where it was emphasised that 'the difference in pay would diminish, and, in some cases, fade away after a few years'.

61. In that regard, I recall that the Court has already held that the aim in question cannot justify a measure that, as in the present case, maintains definitively the age-based difference in treatment which the reform of a discriminatory regime is designed to eliminate. Such a measure, even if it is capable of ensuring the protection of acquired rights and legitimate expectations with regard to civil servants who were treated favourably by the previous regime, is not appropriate for the purpose of establishing a non-discriminatory regime for civil servants who were treated unfavourably by that previous regime.[56]

62. Last, it should be noted that the argument put forward by the Austrian Government that the Gewerkschaft Öffentlicher Dienst (Civil Service Union, Austria) gave its consent with respect to the procedures of the reform in question cannot call the foregoing analysis in question. Just like the Member States, the social partners must comply with the obligations arising under Directive 2000/78,[57] even though their role may be central when certain rules are being drawn up.[58]

63. Accordingly, I consider that, in spite of the wide discretion recognised to the Member States and social partners in the choice not only of the pursuit of a given social policy and employment policy objective, but also in the definition of the measures apt to achieve that objective,[59] the Austrian legislature could not reasonably consider it appropriate and necessary to adopt national provisions such as Paragraph 169c of the amended GehG in conjunction with Paragraph 94a of the amended VBG.

64. In the light of all of those considerations, I am of the view that Articles 2 and 6 of Directive 2000/78 must be interpreted as precluding procedures whereby contractual servants in service are transferred from an old discriminatory remuneration regime to a new regime, such as those laid down by the national legislation at issue in the main proceedings.

C. The need to pay financial compensation to the contractual servants treated unfavourably (Question 1(b))

65. It should be noted that the referring court submits the second part of its first question in case the Court should first decide that age-based discrimination is perpetuated by national legislation such as that at issue in the main proceedings. Since I recommend that the first part of the first question be answered in the affirmative, I consider that the Court will find it necessary to answer the second part of that question.

56 See judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359, paragraphs 43 and 44).

57 The consent of a trade union might in my view be decisive where a difference in treatment on the ground of age is continued on a temporary basis, but not if its effects continue indefinitely.

58 See, in particular, judgment of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraphs 68 to 70 and the case-law cited).

59 See, in particular, judgments of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraphs 31 and 46), and of 19 September 2018, *Bedi* (C-312/17, EU:C:2018:734, paragraph 59).

66. The referring court seeks here to ascertain, in essence, the legal consequences that must be inferred from the finding that a breach of the principle of non-discrimination is maintained by a mechanism such as that at issue, relating to the transition of contractual servants to a new remuneration and advancement regime. More specifically, it asks whether 'EU law, in particular Article 17 of Directive 2000/78', requires the grant of financial compensation [60] to servants already in service who suffered discrimination on the ground of age by the effect of the old remuneration and advancement regime, in the light of previous judgments of the Court. [61]

67. Without referring expressly to Article 17 of Directive 2000/78, the ÖGB maintains that, until EU law is correctly applied, the disadvantaged persons should enjoy the same advantages as the advantaged persons. The Austrian Government has not submitted specific observations on this second part of the first question. [62] The Commission, after making special reference to Article 17 in its observations and considering that financial compensation might be payable in the present case, finally suggests that the answer should be that in the absence of a system consistent with that directive, the servants treated unfavourably by the previous regime should be granted the same advantages as those enjoyed by the servants treated favourably by that regime, as regards the periods of service completed before the age of 18 that are taken into account, and also advancement in the remuneration scale.

68. Although my view is essentially similar to the Commission's final proposal, I nonetheless consider that *Article 17* of Directive 2000/78, which is mentioned in the present question, is not the appropriate legal basis on which to decide whether or not it is necessary to grant financial compensation to the persons discriminated against in such circumstances. [63]

69. In fact, I would observe that Article 17, which concerns the sanctions that Member States must impose on those responsible for infringements of the national provisions adopted in order to transpose that directive, [64] does not cover the present situation, which concerns the way in which a Member State must where appropriate provide a remedy [65] for discrimination arising not from an infringement of those national provisions which should attract an appropriate sanction, [66] but from failure by those national provisions themselves to comply with the requirements of EU law.

60 It seems to me, in the light of the wording of this question and of the parts of the order for reference relating to it, that the referring court is asking whether the Austrian legislature ought to have provided for financial compensation in the actual legislation at issue and not whether State liability might possibly be incurred because of the absence of such a measure.

61 The referring court states that the Austrian legislature chose to 'implement the transition of existing public servants to the new remuneration system without having to reclassify public servants on an individual basis and in a cost neutral way without having to pay financial compensation'. It considers that, unlike the arrangements giving rise to 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), and of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561), under which all officials in service were potentially affected, it would be possible here to measure the discrimination applied, and therefore the compensation to be granted to the employees harmed, against the yardstick of 'the group of people who first completed previous service periods after the age of 18'.

62 The Austrian Government referred to this problem at the hearing, in the context of its reply, and, conversely, it commented in detail on the second question submitted in the related Case C-396/17, *Leitner*, which is the subject of my Opinion also of today's date, a question likewise seeking an interpretation of Article 17 of Directive 2000/78.

63 Although I realise that the Court had referred to Article 17 in its 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 87 and paragraph 4 of the operative part), in answer to the fourth question referred to it in that case; that judgment is referred to in the grounds of the order for reference which concern the question under examination here.

64 Article 17 states that these sanctions 'may comprise the payment of compensation to the victim', but 'must be effective, proportionate and dissuasive'.

65 It should be emphasised that this applies to the State *qua* legislature, although in the present case it is also the employer of the persons concerned.

66 As was at stake, for example, in the case that gave rise to the judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 73).

70. I consider it more appropriate to refer, in this situation, to the provisions of *Article 16* of Directive 2000/78, which concerns the Member States' obligation to amend their national rules in order to ensure that they comply with the principle of non-discrimination, as the Court has done on several occasions, including quite recently in similar contexts where national remuneration regimes have been recast because of discrimination.[67] I therefore propose to answer the present question by taking the provisions of Article 16 of that directive into account.[68]

71. In that regard, the Court has already held that while Article 16 requires Member States to ensure that their national legislation is consistent with EU law, it leaves them free to choose, among the various measures capable of putting an end to prohibited discrimination, the one that in their view is the most appropriate for that purpose. In accordance with that case-law, the elimination of discrimination on the ground of age, such as that at issue in the main proceedings, does not necessarily mean that the worker who suffered discrimination under the previous statutory regime will automatically enjoy the right to receive, with retroactive effect, financial compensation consisting in the difference between the salary which he would have received in the absence of discrimination and that which he actually received, or future increases in salary. That will be the case only if, and as long as, measures to restore equal treatment have not been adopted by the national legislature. In that case, observance of the principle of equality can be ensured only by granting to persons in the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter regime being, for want of the correct application of EU law, the only valid point of reference remaining.[69]

72. To my mind, the legislation at issue corresponds to the latter situation, since I consider, for the reasons set out in the context of Question 1(a),[70] that the measures adopted by the Austrian legislature with a view to the transition of the contractual servants in service to the new remuneration and advancement regime do not allow equal treatment to be restored for servants who were treated unfavourably by the old regime.[71] Since the new legislation maintains the discriminatory effects of the previous legislation,[72] respect for the principle of equal treatment means that those persons should be granted the same advantages as those enjoyed by the contractual servants who were treated favourably by the old regime, as regards both the periods of service completed before the age of 18 that are taken into account and advancement in the remuneration scale.[73] More specifically, I understand the

67 See, in particular, judgments of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraphs 41 to 43, where the Court specifically distinguishes the *respective objectives of Articles 16 and 17* of Directive 2000/78 and states that Article 17 is *not relevant* to the question, similar to the present question, raised in that case); of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561, paragraph 48); and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 28 et seq.).

68 In fact, in accordance with settled case-law, the Court may find it necessary, in a spirit of cooperation and in order to provide the referring court which an answer which will be of use to it, to consider provisions of EU law which the referring court has not referred to in its question for a preliminary ruling (see, in particular, judgment of 7 August 2018, *Smith*, C-122/17, EU:C:2018:631, paragraph 34 and the case-law cited).

69 See, in particular, judgments of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraphs 44 to 49 and the case-law cited), and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraphs 28 to 34).

70 See point 41 et seq. of this Opinion.

71 Namely the public servants who have been treated less favourably, under that old system, as regards the periods of activity completed before the age of 18 that are taken into account for the purposes of determining their remuneration and their advancement.

72 As was the case, by way of comparison, in the national legislation at issue in the case that gave rise to the judgment of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, see in particular paragraph 48), and unlike the legislation at issue in the case that gave rise to the judgment of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, see in particular paragraphs 31 to 34).

73 I would emphasise that the present situation is to be distinguished from the situations that gave rise to the two judgments mentioned by the referring court, in that, in those cases and unlike in the present case, it was not possible to designate a category of persons who had been placed in a more favourable position by the national legislation at issue, so that there was no valid point of reference (see 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, paragraphs 81 and 93 to 97, and of 9 September 2015, *Unland*, C-20/13, EU:C:2015:561, paragraph 47).

case-law referred to above as meaning that the reinstatement of equal treatment may go as far as requiring that financial compensation be granted to the disadvantaged servants if a re-balancing in their favour is not achieved, as soon as possible,[74] by any other means appropriate to ensure the convergence required under EU law.

73. It is in that sense that, in my view, Article 16 of Directive 2000/78 must be interpreted in order to provide a helpful answer to the second part of the first question.

D. The acceptability of the new remuneration and advancement regime by reference to the right to effective judicial protection (Question 1(c))

74. I would emphasis, above all, that Question 1(c) is raised only if Question 1(a) should be answered in the negative, namely if the Court should find that national legislation such as that at issue in the main proceedings no longer infringes the provisions of EU law, in that that legislation has indeed put an end to the discrimination on the ground of age that was previously found to exist. Since I propose, on the contrary, that Question 1(a) be answered in the affirmative, I consider that the Court will not have to answer this question. Nonetheless, in the interest of completeness, I shall submit a few observations in that respect.

75. By this question,[75] the Oberster Gerichtshof (Supreme Court) seeks to ascertain whether EU law, and more particularly Article 47 of the Charter, must be interpreted as meaning that the fundamental right to effective judicial protection precludes national legislation which provides that the old remuneration and advancement system, which was found to be discriminatory, can no longer be applied in all procedures, both current and future,[76] and that the transition of the contractual servants already in service to the new system is effected solely on the basis of the salary paid for the month during which the transition takes place.[77] The referring court tends to the view that such legislation is compatible with EU law, on the ground that 'Article 47(1) of the Charter requires only the existence of court proceedings in which the appropriate and required measures needed for a declaration or dismissal of an infringement of one's rights in an individual case may be taken'.

76. On the other hand, the ÖGB asserts that the retroactive elimination of the advancement factor which was applicable until the adoption of the reform at issue[78] deprives the persons concerned of the possibility of securing a review, by an independent tribunal, of the lawfulness of the salary which is now taken as the basis of the reclassification,[79] and therefore deprives those concerned of the right to

74 See, by analogy, judgment of 21 June 2007, *Jonkman and Others* (C-231/06 to C-233/06, EU:C:2007:373, paragraph 38 and the case-law cited), where it is stated that, following a judgment given by the Court on an order for reference from which it is apparent that national legislation is incompatible with EU law, it is for the authorities of the Member States concerned to take the measures necessary to ensure that EU law is complied with on their territory and that, while they retain the choice of the measures to be taken, *those authorities must 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. See also Opinion of Advocate General Bot in *Winner Wetten* (C-409/06, EU:C:2010:38, point 119).

75 I note that an interpretation of Article 47 of the Charter is also sought, in a similar legal context, by the second and fourth questions referred in the related Case C-396/17, *Leitner*, which is the subject of my Opinion also dated today.

76 In this instance, in application of Paragraph 100(70)(3) of the VBG 2016 (see also footnote 23 of this Opinion).

77 In this case it follows from Paragraph 169c(1) to (2a) of the amended GehG, read in conjunction with Paragraph 94a of the amended VBG, that contractual servants in service on 11 February 2015 are to be reclassified in the new system 'solely on the basis of their previous salaries' according to a 'transition amount' which corresponds to the salary paid for 'February 2015 (transition month)' and is therefore fixed in application of the old system. Under subparagraph 2a, 'there shall be no assessment of whether the reason for and amount of the salary payments were correct' and only actual and obvious errors in the inputting of the data may be corrected.

78 Namely, in Austrian law, the 'advancement reference date', which was taken as the decisive criterion in the old remuneration and advancement system.

79 Namely, here, the remuneration paid for February 2015. The ÖGB states that various actions brought in that respect by civil servants have been rejected, on the ground that the old provisions were no longer applicable, while explaining that it is not aware of any decisions relating to actions brought by contractual servants, as in the dispute in the main proceedings.

effective judicial protection enshrined in Article 47 of the Charter.[80] The Austrian Government has not submitted observations on this question.[81] The Commission, for its part, considers, as a subsidiary point, that Article 47 should if necessary be interpreted as meaning that it does not preclude such national provisions. I also share that view, for the following reasons.

77. First of all, I consider that it is indisputable that the present case concerns a situation in which a Member State has implemented EU law, within the meaning of Article 51(1) of the Charter, and that the federal legislature was therefore required to respect the fundamental rights guaranteed in Article 47 of the Charter, and more specifically the right of individuals to enjoy effective judicial protection of the prerogatives which EU law confers on them.[82] I note that such protection, moreover, is also expressly provided for in Directive 2000/78,[83] the transposition of which was explicitly mentioned in the terms of the legislation at issue here.[84]

78. In addition, it should be borne in mind that each Member State has a certain autonomy in that regard, which allows it to define the procedural rules of judicial actions designed to ensure the protection of the rights which individuals derive from EU law, provided that those rules observe the two limits established in the Court's consistent case-law, namely the principle of equivalence and the principle of effectiveness.[85] As has already been made clear, the requirements arising from Article 47 of the Charter which have been identified by the Court are both limited and dependent on multiple factors and, in particular, it appears that the right to an effective remedy does not mean that the competent national courts are necessarily in a position, in all circumstances, to vary contested decisions as regards all the factors on which they are based.[86]

79. Furthermore, owing to the links between the first paragraph of Article 47 of the Charter and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[87] it is appropriate to take into account the case-law of the European Court of Human Rights on Article 13 of that Convention.[88] It is apparent from that case-law that the right to an effective remedy before a tribunal must enable those concerned to rely on the rights and freedoms enshrined in that Convention, it being understood that that right places an obligation on States, the scope of which varies depending on the nature of the applicant's complaint, and the effectiveness of the remedy does not depend on the certainty of a favourable outcome for the applicant.[89]

80 It is apparent from the order for reference that in the main proceedings the Republic of Austria maintained, conversely, in its capacity of defendant, that there had been no 'infringement of the right to judicial access or [the right to] effective legal protection (Article 47 of the Charter)', arguing that those principles 'are fundamental procedural rights/guarantees whose contents are further detailed, which require the existence of an entitlement in substantive law but do not include entitlement to a positive decision on the merits'.

81 On the other hand, it has expressed its views on the second question referred in the related Case C-396/17, *Leitner*, which also concerns Article 47 of the Charter.

82 See, by analogy, judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 49), and of 13 September 2018, *UBS Europe and Others* (C-358/16, EU:C:2018:715, paragraphs 51 and 52).

83 See recital 29 et seq. and Article 9(1) of Directive 2000/78.

84 See the first sentence of Paragraph 169c(2c) of the amended GehG.

85 In accordance with that case-law, those rules 'must not be any less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by the legal order of the European Union (principle of effectiveness)' (see, in particular, judgment of 26 September 2018, *Belastingdienst/Toeslagen* (suspensory effect of the appeal), C-175/17, EU:C:2018:776, paragraph 39).

86 See opinion of Advocate General Bobek in *Banger* (C-89/17, EU:C:2018:225, points 77 to 80, 91 and 102 to 107, and the judgments and Opinions cited), where it is emphasised, in particular, that 'the scope and intensity of judicial review required by the principle of effectiveness depends on the content and nature of the relevant principles and rules of EU law implemented through the national decision challenged' (point 102).

87 Convention signed in Rome on 4 November 1950.

88 See, in particular, my Opinion in *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2017:395, points 70 and 71), and judgment of 26 September 2018, *Belastingdienst/Toeslagen* (suspensory effects of the appeal) (C-175/17, EU:C:2018:776, paragraph 35).

89 See, in particular, ECtHR, 13 December 2012, *De Souza Ribeiro v. France* (CE:ECHR:2012:1213JUD002268907, § 79), and ECtHR, 13 April 2017, *Tagayeva and Others v. Russia* (CE:ECHR:2017:0413JUD002656207, § 618).

80. In this instance, I note that, in the context of the new Austrian remuneration and advancement regime, the scope of the substantive review which the national courts have jurisdiction to carry out with respect to the 'transition amount', which determines the reclassification of the contractual servants concerned,[90] is narrow.[91] That review may cover only inaccuracies resulting from the incorrect inputting of the relevant data,[92] and not any irregularity in the calculation of the salary on which that amount is based, which is carried out on the basis of the old remuneration regime.

81. However, as both the referring court and the Commission observe, all those affected by the reform complained of — namely the contractual servants already in service, whether they were treated favourably or unfavourably by the old regime — have remedies that allow them to secure a review of the lawfulness of the system under which they are transferred to the new remuneration and advancement regime.[93] That judicial review of the validity of the rules in question may be carried out, in particular, by reference to the requirements of EU law,[94] and any incompatibility of the reform with those requirements can thus be identified. The judicial action brought in the main proceedings,[95] which gave rise to the present request for a preliminary ruling, also reveals the existence and the effectiveness of those remedies. The persons concerned are therefore able to bring proceedings before the Austrian courts to enforce the rights which they derive from EU law, in conditions which in my view are compatible with the abovementioned content of the fundamental right to an effective remedy, within the meaning of Article 47 of the Charter, and, more specifically, make it possible to ensure compliance with the obligations arising from Directive 2000/78.

82. Consequently, if the Court should adjudicate on Question 1(c), I propose that its answer should be that Article 47 of the Charter must be interpreted as not precluding national provisions such as those referred to in that question.

E. The variable degree to which previous periods of activity are taken into account (Question 2)

83. By its last question, the referring court asks the Court, in essence, whether EU law — in particular Article 45 TFEU, Article 7(1) of Regulation No 492/2011 and Articles 20 and 21 of the Charter — must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, which provides that the previous periods of activity of a contractual public servant are to be taken into account, for the purposes of the classification and advancement of that contractual servant, differently depending on the status of the former employer, namely in full when those activities were carried out with a local authority of a Member State of the EEA or a comparable public sector entity, or only in part, in the other situations.[96]

90 See the terms of the provisions set out in footnote 77 of this Opinion.

91 Just as the subject matter of disputes of the same kind that may be brought beforehand before the competent administrative authorities is limited.

92 It seems to me that the purpose of that restriction is to allow the transition to the new system to be made automatically and to avoid an increase in the actions that may be brought with regard to the salary taken as the basis, that might be brought not only by persons treated unfavourably by the old system but also by persons who were treated favourably.

93 I recall that the Court has already emphasised how important it is, from the aspect of the judicial review guaranteed by Article 47 of the Charter, that the national court be able to review the legality of the decision challenged before it (see, in particular, judgment of 16 May 2017, *Berlioz Investment Fund*, C-682/15, EU:C:2017:373, paragraphs 56, 59, 84 and 89).

94 The referring court states that this review is also carried out by reference to constitutional law.

95 Like the other judicial actions referred to by the ÖGB (see footnote 79 of this Opinion).

96 More specifically, in this instance Paragraph 26 of the amended VBG provides, in subparagraph 2, that remuneration seniority is to take into account in full the earlier periods of activity completed by a contractual servant 'in an employment relationship with a local authority or municipal association of a Member State of the [EEA], the Turkish Republic or the Swiss Confederation', 'an organisation of the European Union or … an intergovernmental organisation of which [the Republic of] Austria is a member', or indeed another similar entity. On the other hand, it follows from subparagraph 3 of that paragraph that earlier periods of activity completed with other categories of employers are to be taken into account only up to a maximum of 10 years in total and on condition that the occupation or administrative traineeship is regarded as relevant.

84. On that point, the ÖGB claims that legislation of that type would be contrary to the principle of equal treatment of nationals of the Member State concerned and the nationals of other Member States, without specifying the constituent elements of that alleged discrimination, and asserts that the discrimination is not justified by any legitimate ground. Conversely, the Austrian Government and the Commission maintain that EU law does not preclude such legislation. I share the latter viewpoint, for the following reasons.

85. First of all, as regards 'Article 20 et seq. of the Charter', relating to equality before the law and non-discrimination, which to my mind merely supplement the other provisions cited in the present question for a preliminary ruling,[97] I note that Article 52(2) of the Charter provides that the rights expressly recognised by the Charter which are the subject of provisions in the Treaties, which include the right of freedom of movement for workers guaranteed by Article 45 TFEU, are to be exercised under the conditions and within the limits defined in those Treaties. It follows that, in order to answer the question referred, an analysis of Article 45 TFEU is sufficient.[98]

86. Next, I recall that Article 45(2) TFEU states that freedom of movement for workers is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. It follows from the Court's case-law that Article 7(1) of Regulation No 492/2011 constitutes a specific expression of that prohibition within the specific field of conditions of employment and work and both provisions must therefore be interpreted in the same way.[99]

87. As both the referring court and the Commission submit, paragraph 4 of Article 45 TFEU provides that the provisions of that article are not to apply to employment in the public service,[100] but I consider that that exception does not apply in the present case, since the legislation at issue does not limit access to such posts solely to Austrian nationals and since the dispute in the main proceedings seems to relate to persons who have already been admitted to pursue their activities with the Austrian public administration.[101]

88. The Court has consistently held that the principle of equal treatment enshrined in both Article 45 TFEU and Article 7 of Regulation No 492/2011 prohibits not only direct discrimination on the ground of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[102]

97 In the grounds of its order relating to this question, the referring court mentions principally Article 45 TFEU and Article 7 of Regulation No 492/2011, adding that it 'takes the view that the admissibility of [a] differentiation [such as that at issue] would have to be seen from the perspective of the principle of equality anchored in EU law (Article 20 of the Charter)'.

98 To that effect, see judgments of 4 July 2013, *Gardella* (C-233/12, EU:C:2013:449, paragraphs 39 and 41), and of 7 April 2016, *ONEm and M.* (C-284/15, EU:C:2016:220, paragraphs 33 and 34).

99 See, in particular, judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* (C-514/12, EU:C:2013:799, paragraph 23 and the case-law cited), and also, by analogy, as regards Article 7(2), judgment of 15 December 2016, *Depesme and Others* (C-401/15 to C-403/15, EU:C:2016:955, paragraphs 34 and 35).

100 A concept defined, in particular, in the judgment of 10 September 2014, *Haralambidis* (C-270/13, EU:C:2014:2185, paragraph 43 et seq.), from which it follows, in essence, that the fact that tasks involve the exercise of powers of a public law nature and the safeguard of the general interests of the State means that Member States are justified in reserving those tasks to their own citizens.

101 The derogation provided for in Article 45(4) TFEU, on a strict interpretation, concerns only access by nationals of other Member States to certain functions in the public administration and cannot therefore deprive a worker, once he is accepted in the service of the public administration of a Member State, of the application of the rules set out in paragraphs 1 to 3 of that article (see, in particular, judgments of 6 October 2015, *Brouillard*, C-298/14, EU:C:2015:652, paragraphs 31 and 32, and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraphs 34 and 35).

102 See, in particular, judgments of 5 February 2015, *Commission* v *Belgium* (C-317/14, EU:C:2015:63, paragraph 23), and of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraph 35).

89. In the present case, I consider that the existence of direct discrimination can easily be ruled out, since the legislation at issue does not give rise to any difference in treatment on the ground of the nationality of the contractual servants concerned. [103] In fact, the previous periods of activity are taken into account in full or only in part not according to whether the persons concerned are Austrian citizens or foreign citizens, but according to whether those periods were completed with one of the public sector entities listed by the federal legislature or with an employer of any other category.

90. As regards the possible existence of indirect discrimination, I recall that the legislation of a Member State, even if it applies regardless of nationality, must be regarded as indirectly discriminatory within the meaning of the abovementioned provisions of EU law if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the migrant worker at a particular disadvantage, unless objectively justified and proportionate to the aim pursued. [104]

91. In this instance, the criterion on the basis of which the contested difference in treatment operates may be represented as being whether the servant concerned exercised his previous activities, which he wishes to be taken into account, in the public service or in the private sector, irrespective of the Member State in which he exercised them. [105] However, I consider that such a criterion of distinction, based on the nature and not the place of those activities, is not capable, given its neutrality in geographic terms, of affecting the workers of other Member States more than Austrian workers. It is therefore not capable of treating the former category of persons less favourably and of thus giving rise to indirect discrimination. I would add that, in the light of the foregoing elements, the provision at issue in the main proceedings cannot be considered to be analogous to that giving rise to the judgment on which the ÖGB seeks to rely in support of its complaint forming the subject matter of the present question for a preliminary ruling. [106]

92. Furthermore, since the legislation in question expressly provides that previous periods of activity in the public service completed on the territory of other Member States of the EEA are to be taken into account in the same way as when they were completed on Austrian territory, [107] I consider that it does not give rise in that respect to a barrier to the freedom of movement for workers provided for in Article 45 TFEU. On the one hand, that legislation does not impede the free entry of workers from other Member States to the Austrian public service, since their seniority is taken into account on the same terms as for Austrian workers and, on the other hand, the legislation does not have the effect of preventing or deterring Austrian workers from entering the employment market of another Member State. [108]

103 The Commission correctly notes that the second question concerns all the servants to whom the new system applies, while the first question focuses on the fate of servants who were already in service when that system entered into force.

104 See, in particular, judgments of 2 March 2017, *Eschenbrenner* (C-496/15, EU:C:2017:152, paragraphs 36 and 37), and of 22 June 2017, *Bechtel* (C-20/16, EU:C:2017:488, paragraph 39).

105 See, by analogy, my Opinion in *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2018:627, points 30 and 31).

106 Namely the judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* (C-514/12, EU:C:2013:799), in which Article 45 TFEU and Article 7(1) of Regulation No 492/2011 were interpreted as 'precluding national legislation under which, in determining the reference date for the purposes of the advancement of an employee of a local or regional authority to the next pay step in his grade, account is to be taken of all uninterrupted periods of service completed with that authority, but of only a proportion of any other periods of service' (paragraph 45). The Court observed, in particular, that the legislation at issue in that case was liable to place workers from other Member States at a disadvantage owing to the high likelihood that they had accrued professional experience outside Austria before entering the employ of Land Salzburg (see paragraph 28). Such a factor of connection to a specific Member State is lacking in the present case.

107 See, by analogy, Opinion of Advocate General Mengozzi in *Stollwitzer* (C-482/16, EU:C:2017:893, point 32), and judgment of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 46).

108 It should be made clear that in either case the fact that workers 'entering' or 'leaving' may, after exercising their freedom of movement, benefit from working conditions — in particular remuneration or procedures for taking seniority into account — which are less favourable than those existing in their State of origin does not call that analysis into question, since Article 45 TFEU does not guarantee them the right to move within the Union that would be neutral in social matters. On that subject, see also my Opinion in *Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach* (C-437/17, EU:C:2018:627, point 47 et seq.).

93. *By way of a subsidiary matter*, if the Court should nonetheless find that indirect discrimination or a barrier exists as a result of national legislation such as that applicable to the dispute in the main proceedings, it should be borne in mind that it has consistently been held that indirect unequal treatment based on nationality is not prohibited provided that it is objectively justified and proportionate to the objective pursued and, furthermore, that a barrier to freedom of movement for workers may also be declared compatible with EU law on the same conditions. [109]

94. To my mind, such legislation might be properly justified by the pursuit of a legitimate objective. As the Austrian Government submits, the Court has repeatedly accepted that rewarding experience acquired in a particular field, which enables the worker to perform his duties better, constitutes a legitimate aim of pay policy, from which it follows that employers are, as a general rule, [110] free to take into account only such previously completed periods of activity when determining remuneration. [111] To my mind, it is therefore consistent with EU law that the legislation at issue here has the effect of specifically favouring professional experience acquired in the public sector by comparison with that acquired in the private sector, in order to determine the classification in grade and therefore the remuneration of contractual public servants.

95. As regards the proportionality of the measures adopted by the Austrian legislature, I shall say merely — and still as a subsidiary point —, first, that the Member States enjoy a broad discretion when defining measures for achieving a specific social policy and employment objective [112] and, second, that it does not seem to me that measures of such a type would be inappropriate or would go beyond what is necessary [113] to achieve the legitimate objective referred to above. [114]

96. Consequently, I propose that the answer to the referring court's last question should be that Article 45 TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted as not precluding national legislation which provides that, for the purposes of the classification and advancement of a contractual public servant, only previous periods of activity which he has completed in the service of a local authority of a Member State of the EEA or of other public sector entities treated as equivalent are to be taken into account.

V. Conclusion

97. In the light of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) Articles 2 and 6 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 which, for the purposes of taking periods of activity before the age of 18 into account, replaces a remuneration system that was found to be discriminatory on the ground of age by a new remuneration system, but provides that the transition to the new system of all the persons already in service is to be carried out by determining their initial classification in the new

109 See, in particular, judgment of 7 March 2018, *DW* (C-651/16, EU:C:2018:162, paragraph 31).

110 Provided that discrimination on the ground of age is not introduced under the guise of that legitimate objective (see, in particular, judgment of 18 June 2009, *Hütter*, C-88/08, EU:C:2009:381, paragraph 47).

111 See, in particular, 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 48), and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraphs 39 and 40).

112 See, in particular, Opinion of Advocate General Mengozzi in *Stollwitzer* (C-482/16, EU:C:2017:893, points 28 to 29 and the case-law cited), and judgment of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180, paragraph 45).

113 In accordance with the criteria of the test of proportionality consistently applied by the Court in such matters (see, in particular, judgments of 14 December 2016, *Bragança Linares Verruga and Others*, C-238/15, EU:C:2016:949, paragraph 44 et seq., and of 7 March 2018, *DW*, C-651/16, EU:C:2018:162, paragraph 31).

114 In that regard, the Austrian Government claims, correctly in my view, that the criterion of distinction chosen is appropriate to activity in the civil service, since such activity habitually requires a certain level of loyalty, reliability and personal integrity.

system on the basis of a salary paid for a specific month and calculated in accordance with the old system, so that the discrimination on the ground of age is maintained in terms of its financial effects.

(2) Article 16 of Directive 2000/78 must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, where a system which eliminates discrimination on the ground of age in a manner consistent with the requirements of that directive has not yet been adopted, the reinstatement of equal treatment entails granting to those treated unfavourably by the old regime the same advantages as those enjoyed by the persons treated favourably by that regime, as regards not only the taking into account of periods of service completed before the age of 18, but also advancement in the remunerations scale.

(3) Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as not precluding national legislation which provides that, for the purposes of the classification and advancement of contractual public servants, previous periods of activity are to be taken into account in full when the persons concerned completed them in the service of a local authority of a Member State of the European Economic Area or other public sector entities treated as equivalent, while those periods are taken into account only in part in other situations.