Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 25 July 2018 [1]

Case C-437/17

Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH
v
EurothermenResort Bad Schallerbach GmbH

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

(Reference for a preliminary ruling — Article 45 TFEU — Regulation (EU) No 492/2011 — Freedom of movement for workers — Prohibition of discrimination on grounds of nationality — Right to paid annual leave — National legislation granting an additional week of paid annual leave to workers with 25 years of service with the same employer)

I. Introduction

1. By its request for a preliminary ruling, the Oberster Gerichtshof (Supreme Court, Austria) asks the Court whether certain provisions of the Urlaubsgesetz [2] (Austrian Law on holidays, 'the UrlG') is compatible with the prohibition of discrimination on grounds of the nationality of workers, provided for in Article 45(2) TFEU and Article 7(1) of Regulation (EU) No 492/2011, [3] and with the principle of freedom of movement for workers enshrined in Article 45(1) TFEU.

2. In essence, the provisions of the UrlG at issue make the grant of a sixth week of paid annual leave subject to the condition of 25 years of service with the same employer — the current employer. In that context, past periods of service completed with other employers can be credited only in a supplementary manner and on a restricted basis.

3. This request for a preliminary ruling has been made in an appeal on a point of law in proceedings between Gemeinsamer Betriebsrat EurothermenResort Bad Schallerbach GmbH ('the works council') and EurothermenResort Bad Schallerbach GmbH concerning the conditions for the grant of that sixth week of paid annual leave. According to the works council, EU law requires past periods of service with other employers in a Member State other than the Republic of Austria to be credited in the same way as periods of service completed with the current employer.

1 Original language: French.

2 Law of 7 July 1976 (BGBl. 1976/390) as published in BGBl. I, 2013/3.

3 Regulation of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

4. In this Opinion, I will set out the reasons why I take the view that national legislation such as the UrlG which, for the purpose of granting entitlement to paid annual leave, treats periods of service completed with past employers less favourably than periods of service with the current employer does not constitute either discrimination on the grounds of nationality or an obstacle to the freedom of movement for workers. I will explain, in the alternative, why, in my opinion, if the Court were to find that that legislation does constitute discrimination or an obstacle in that regard, it may be justified.

II. Legal context

A. Regulation No 492/2011

5. Article 7(1) of Regulation No 492/2011 provides:

'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

6. Paragraph 2(1) of the UrlG states:

'The employee shall be entitled to uninterrupted paid holiday for each year of employment. The holiday allowance shall be 30 working days where the length of service is less than 25 years and shall increase to 36 working days after completion of the 25th year.'

7. Pursuant to Paragraph 3 of the UrlG:

'(1) For the purpose of calculating the holiday allowance, periods of service with the same employer, in which there are no interruptions longer than three months in each case, shall be aggregated.

…

(2) The following shall be credited for the purpose of calculating the holiday allowance:

1. A period of service spent in another employment relationship … in Austria, provided that it lasted at least six months in each case;

…

(3) Periods pursuant to subparagraph (2) item 1 … shall be credited only up to a maximum of five years in total. …

…'

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

8. EurothermenResort Bad Schallerbach is an Austrian company active in the tourism sector. It employs, in particular, a number of workers who have completed past periods of service with previous employers in Member States of the European Union other than the Republic of Austria.

9. The works council brought an action against EurothermenResort Bad Schallerbach before the Landesgericht Wels (Regional Court, Wels, Austria) concerning the entitlement of the workers in question to paid annual leave. In that context, the works council claimed that, by limiting the possibility of taking into account, in terms of the period of service required by Paragraph 2(1) of the UrlG for the grant of a sixth week of paid annual leave, previous periods of service completed in Member States other than Austria — only up to a maximum of five years — migrant workers are particularly disadvantaged by Paragraph 3(2)(1) and (3) of the UrlG and the exercise of the freedom of movement by Austrian workers is rendered less attractive. The works council claimed that, in accordance with EU law, previous periods of service should be credited in their entirety, so that all workers with 25 years of professional experience have a right to a sixth week of holiday under Paragraph 2(1) of the UrlG.

10. By judgment of 25 January 2017, the Landesgericht Wels (Regional Court, Wels) dismissed that action. The Landesgericht held, in particular, that the provisions of the UrlG at issue do not discriminate on grounds of nationality, in so far as all past periods of service completed with previous employers are treated equally. In that regard, although Paragraph 3(2)(1) of the UrlG refers only to periods of service carried out in Austria, the case-law of the Oberster Gerichtshof (Supreme Court) requires equal account to be taken of periods of service carried out in other Member States. In any case, it is permissible for Member States to provide benefits for workers with a certain period of service with the same employer.

11. By judgment of 3 May 2017, the Oberlandesgericht Linz (Higher Regional Court, Linz, Austria) upheld the judgment delivered at first instance. In that regard, the appellate court held that, while it is not inconceivable that the loss of the sixth week of paid annual leave may discourage Austrian workers from exercising their freedom of movement, the obstacle thus created is justified by the objective of rewarding workers' loyalty to their employer.

12. The works council then appealed on a point of law to the Oberster Gerichtshof (Supreme Court) against that decision. In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are Article 45 TFEU and Article 7(1) of [Regulation No 492/2011] to be interpreted as precluding a national provision such as that in the main proceedings (Paragraph 3(2)(1) in conjunction with Paragraph 3(3) and Paragraph 2(1) of the UrlG)), under which a worker who has a total of 25 years of service, but has not completed these with the same Austrian employer, is entitled to only 5 weeks of [paid] annual holiday, whereas a worker who has completed 25 years of service with the same Austrian employer is entitled to 6 weeks of holiday per year.'

13. The request for a preliminary ruling was registered at the registry of the Court on 19 July 2017. Written observations were submitted to the Court by the works council, EurothermenResort Bad Schallerbach, the Austrian Government and the European Commission. At the hearing, held on 3 May 2018, those same parties presented oral argument.

IV. Analysis

A. Preliminary observations

14. As an important social benefit, the entitlement of workers to paid annual leave is regulated by EU law. In that regard, Article 7(1) of the Directive 2003/88/EC ('the Working Time Directive')[4] guarantees that every EU worker is entitled to paid annual leave of at least four weeks. Since that directive sets only minimum requirements, Member States are free to grant more extensive rights to workers governed by their national laws. Nevertheless, any conditions to which Member States subject those additional rights must comply with the general provisions of EU law, including the rules on freedom of movement for workers provided for in Article 45 TFEU and Regulation No 492/2011.

15. Indeed, the Austrian Law on holidays (the UrlG) goes beyond the four weeks guaranteed by EU law. Paragraph 2(1) of the UrlG grants workers five or six weeks of paid annual leave for each year of employment, *depending on whether the length of service of the worker in question is more or less than 25 years*.

16. The period of service required is thus calculated in accordance with the rules laid down in Paragraph 3 of the UrlG. Pursuant to Paragraph 3(1), periods of service with the same employer — the current employer — are aggregated, provided that there are no interruptions longer than three months in each case.[5] Paragraph 3(2)(1) provides that account should also be taken of previous periods of service completed with one or more previous employers, provided that they lasted at least six months in each case.[6] Nevertheless, under Paragraph 3(3), those past periods of service are credited *only up to a maximum of five years* in total.

17. In order to have a complete view and understanding of those provisions, let us consider the case of a worker, Mr Mahler, who spent 5 years working with undertaking X, then 8 years with undertaking Y, before finally joining undertaking Z where he worked for 15 years without interruption. In accordance with Paragraph 2(1) and Paragraph 3(1) to (3) of the UrlG, Mr Mahler's entitlement to paid annual leave is calculated by taking account of the period of service completed with undertaking Z, that is to say 15 years, to which is added, in addition, the periods of service with his two previous employers, that is to say 13 years which, nevertheless, count only for 5 years — that is to say 20 years in total. Consequently, although Mr Mahler's working career spans 28 years, he does not have the required length of service of 25 years to qualify for a sixth week of paid annual leave in accordance with Paragraph 2(1) of the UrlG.

18. The appeal on a point of law brought by the works council before the Oberster Gerichtshof (Supreme Court) is based on the premiss that the provisions of the UrlG at issue are contrary to EU law. Those rules are claimed to infringe the principle of non-discrimination enshrined in Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011 and restrict freedom of movement for workers, especially Austrians. Those two aspects must therefore be examined in turn, first by examining the reasons why, in my opinion, legislation such as the UrlG does not discriminate on grounds of nationality (B) and then the reasons why I believe that the same conclusion should be drawn with regard to the existence of an obstacle to the freedom of movement for workers (C).

4 Directive of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

5 EurothermenResort Bad Schallerbach and the Austrian Government state that, according to the second sentence of Paragraph 3(1) of the UrlG, not mentioned in the order for reference, seniority is also lost where there is an interruption resulting from the resignation of the worker, his departure before the end of the contract without urgent cause or in the case of dismissal for misconduct.

6 As stated in point 10 of this Opinion, although the wording of Paragraph 3(2)(1) of the UrlG refers only to periods of service carried out in Austria, the case-law of the Oberster Gerichtshof (Supreme Court) 'corrects' that provision by requiring equal account to be taken of periods of service carried out in other Member States.

B. Absence of discrimination on grounds of the nationality of workers

19. Article 45(2) TFEU prohibits any discrimination based on nationality between workers of the Member States as regards employment, remuneration or other conditions of work and employment. Article 7(1) of Regulation No 492/2011 constitutes the specific expression of that prohibition within the specific field of conditions of employment and work. Those two provisions must therefore be interpreted in the same way.[7]

20. Rules such as those laid down by the UrlG fall within the scope of those provisions, in so far as the entitlement to paid annual leave of workers is unquestionably part of conditions of employment and work.

21. With regard to the existence of any prohibited discrimination, Paragraph 2(1) and Paragraph 3(1) to (3) of the UrlG create, for the purposes of establishing the extent of the entitlement to paid annual leave of workers, a distinction based on the criterion of their *periods of service*. Those provisions apply in the same way to all workers, irrespective of nationality. They do not therefore discriminate *directly* on the basis of that criterion.

22. However, according to the Court's settled case-law, Article 45(2) TFEU and Article 7(1) of Regulation No 492/2011 prohibit not only discrimination based directly on the nationality of workers, but also all forms of discrimination based *indirectly* on that criterion, that is to say 'all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result'.[8]

23. The test to be applied in that regard was laid down for the first time in the judgment of 23 May 1996 in *O'Flynn*.[9] According to the Court, 'unless objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory 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 former at a particular disadvantage'.[10]

24. It follows that any measure which is *likely*, in the light of generally accepted facts[11] or other data, to have the *potential* to produce *different effects* on nationals and nationals of other Member States, which are particularly unfavourable to the latter, must be regarded as indirectly discriminatory on the grounds of nationality, except where objectively justified. That must be clear *from the very nature of the measure*, that is to say from the chosen *criterion for distinction*, which much have, despite its apparent neutrality, effects of the same type as those produced by the criterion of nationality. The

7 Judgments of 26 October 2006, *Commission* v *Italy* (C-371/04, EU:C:2006:668, paragraph 17), and of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken* (C-514/12, 'the judgment in *SALK*', EU:C:2013:799, paragraph 23). I will therefore refer to one or other of those provisions interchangeably or even to both of those provisions together throughout the rest of this Opinion.

8 That case-law originates from the judgment of 12 February 1974, *Sotgiu* (152/73, EU:C:1974:13, paragraph 11). See, for recent references, judgments of 10 September 2009, *Commission* v *Germany* (C-269/07, EU:C:2009:527, paragraph 53); of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 39); and of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 41).

9 C-237/94, EU:C:1996:206.

10 Judgment of 23 May 1996, *O'Flynn* (C-237/94, EU:C:1996:206, paragraph 20) (the emphasis is mine). That judgment unified the various formulations previously employed by the Court, which has held in turn that conditions must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, '*they affect essentially migrant workers … or the great majority of those affected are migrant workers*' or where 'th*ey can more easily be satisfied by national workers than by migrant workers*' or where '*there is a risk that they may operate to the particular detriment of migrant workers*' (see paragraph 18 of that judgment, the emphasis is mine). The wording contained in that judgment has been consistently employed in the Court's case-law (see, in particular, judgments of 27 November 1997, *Meints* (C-57/96, EU:C:1997:564, paragraph 45); of 10 September 2009, *Commission* v *Germany* (C-269/07, EU:C:2009:527, paragraph 54); and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 26)).

11 In the judgment of 23 May 1996, *O'Flynn* (C-237/94, EU:C:1996:206, paragraph 22), the Court accordingly held that legislation which makes the grant of a payment to cover burial or cremation expenses incurred by a worker in respect of a deceased family member conditional on them taking place within the national territory may be indirectly discriminatory on grounds of nationality, in view of the fact that 'it is above all the migrant worker who may, on the death of a member of the family, have to arrange for burial in another Member State, *in view of the links which the members of such a family generally maintain with their State of origin*' (the emphasis is mine).

discriminatory potential of such a criterion is confirmed by separating — hypothetically — nationals and non-nationals into two different groups, then assuming the proportion of people from each group likely to be affected negatively by the criterion in question and, lastly, by comparing those two proportions. [12]

25. The Court's case-law thus provides numerous illustrations of criteria which may, in practice, particularly disadvantage non-nationals: residence, [13] place of origin, [14] language, [15] the place where the linguistic knowledge was acquired, [16] the place where the diploma was awarded, [17] or even the national education system of the trainee. [18]

26. Such criteria reveal a connection to a given Member State, focusing on characteristics of that State, such as its territory or language and, therefore, are close to the criterion of nationality. The gloss of neutrality cracks easily. [19] Admittedly, criteria totally unrelated to nationality are nevertheless indirectly discriminatory on that basis. The Court's case-law contains some historical examples. [20] However, further information is then needed to establish the existence of unequal treatment indirectly based on nationality. [21]

27. In the present case, the works council and the Commission claim that the criterion of periods of service, on which Paragraph 2(1) and Paragraph 3(1) to (3) of the UrlG are based, is, in practice, more favourable to Austrian workers than workers who are nationals of other Member States. Indeed, they argue, the vast majority of Austrian workers reside in Austria, start their professional career there and could remain in the service of the same employer for an uninterrupted period of 25 years as required, under Paragraph 2(1) of the UrlG, for the grant of a sixth week of paid annual leave. By contrast, workers who are nationals of other Member States generally start their career in their Member State of origin and will only take up employment with an Austrian employer later in their career. In those circumstances, it is argued that it is more difficult for workers from other Member States to have the required period of service, in so far as past periods of service are taken into account only up to a maximum of five years as provided in Paragraph 3(3) of the UrlG. [22]

12 See, to that effect, judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 73); and my Opinion in Joined Cases *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2017:410, points 79 and 80). The question of determining the effects of a measure on different groups of people is the subject of much more precise case-law in the field of equal treatment of male and female workers (for a summary of that case-law and an explanation of the numerous difficulties raised by that question, see Barnard, C., *EU Employment Law*, Oxford University Press, Oxford, 2012, 4th edition, pp. 282 to 286). For the purposes of the principle of non-discrimination on grounds of nationality, this level of precision is not, however, necessary given the general nature of the test applied in that regard.

13 See, in particular, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 28), and of 7 May 1998, *Clean Car Autoservice* (C-350/96, EU:C:1998:205, paragraph 29).

14 Judgment of 12 February 1974, *Sotgiu* (152/73, EU:C:1974:13, paragraph 11).

15 Judgment of 28 November 1989, *Groener* (C-379/87, EU:C:1989:599, paragraph 12).

16 Judgments of 28 November 1989, *Groener* (C-379/87, EU:C:1989:599, paragraph 23), and of 6 June 2000, *Angonese* (C-281/98, EU:C:2000:296, paragraphs 39 to 42).

17 Judgment of 7 July 2005, *Commission* v *Austria* (C-147/03, EU:C:2005:427, paragraphs 43, 46 and 47).

18 Judgment of 21 November 1991, *Le Manoir* (C-27/91, EU:C:1991:441, paragraph 11).

19 See, to that effect, Opinion of Advocate General Lenz in *O'Flynn* (C-237/94, EU:C:1996:123, point 27). Geographic or linguistic conditions are, in matters of discrimination on grounds of nationality, equivalent to conditions for access to employment such as the requirement of a minimum size (see judgment of 18 October 2017, *Kalliri*, C-409/16, EU:C:2017:767) or certain physical strength (see judgment of 1 July 1986, *Rummler*, 237/85, EU:C:1986:277) in matters of discrimination on grounds of sex.

20 In particular, in the case giving rise to the judgment of 16 February 1978, *Commission* v *Ireland* (61/77, EU:C:1978:29), the Court was faced with Irish legislation excluding boats of a certain size or power from a fishing zone. However, although they were genuinely neutral with regard to nationality, those conditions of size and power led, in practice, to the exclusion from the waters in question of a big part of the French and Dutch fishing fleets, whereas the Irish and British fishing fleets, made up of smaller boats, were largely spared.

21 Such as, in the case referred to in the previous footnote, information relating to the specific characteristics of Member States' fishing fleets.

22 The works council claims that the provisions of the UrlG *always* place workers who are nationals of Member States other than Austria at a disadvantage. The Commission had adopted the same approach in its written observations before returning to its position at the hearing and claiming that those workers are at a disadvantage *in most cases*.

28. EurothermenResort Bad Schallerbach and the Austrian Government have the opposite opinion. In their view, it is not possible to conclude, in the present case, that there is indirect discrimination on the grounds of nationality, in so far as the provisions of the UrlG treat both Austrian workers and workers from other Member States in the same way. Adopting the same approach, the referring court states that it is not axiomatic that Austrian workers tend to stay in the service of the same employer for 25 years and that, therefore, they qualify for the sixth week of paid annual leave provided for in Paragraph 2(1) of the UrlG to a greater extent than workers from other Member States. On the contrary, Austrian workers frequently change their employer.

29. As I mentioned earlier, I share the view of the EurothermenResort Bad Schallerbach and the Austrian Government.

30. Indeed, the criterion of *25 years of service*, used in Paragraph 2(1) of the UrlG, favours workers who do not change their employer during the period required. Similarly, that criterion *disadvantages all workers who change their employer during their career* and who see their professional experience acquired with past employers credited only up to a maximum of five years as provided in Paragraph 3(3) of the UrlG. In that regard, the nationality of the employer or past employers and the place in which the employment relationship in question is performed are irrelevant. The provisions of that law make no distinction between the *internal mobility* — within Austria — and *external mobility* — to or from another Member State — of a worker. Account is taken of the periods of service carried out by that worker with one or more past employers in the same way, irrespective of whether they have been carried out in Austria or in another Member State.[23]

31. Consequently, all workers who are nationals of Member States other than the Republic of Austria with more than five years of professional experience with one or more employers other than their current employer are, admittedly, negatively affected by the provisions of the UrlG. However, the same is true similarly of all Austrian workers who change their employer. Accordingly, the criterion of the periods of service affects national workers and workers from other Member States in a similar way.[24] It would be different if further information revealed or, at least, permitted the inference that national workers change their job significantly less often than workers from other Member States. However, as stated by the referring court, there is nothing to indicate that.[25]

32. The Commission nevertheless claims that the fact that a significant proportion of Austrian workers are negatively affected by the provisions of the UrlG does not preclude the finding of indirect discrimination on the grounds of nationality. It would suffice to state that the majority of workers satisfying the criterion of 25 years of service provided for in Paragraph 2(1) of the UrlG are Austrian and/or that the majority of those affected by the taking into account of periods of service with past employers only on a restricted basis, provided for in Paragraph 3(3) of the UrlG, are nationals of other Member States.

23 I would point out that the wording of Paragraph 3(2)(1) of the UrlG, which covers only periods of service carried out in Austria — a condition which unquestionably constitutes unequal treatment indirectly based on nationality — has been 'corrected' by the case-law of the Oberster Gerichtshof (Supreme Court), which requires equal account to be taken of periods of service carried out in other Member States (see point 10 and footnote 6 of this Opinion). That 'correction' in the case-law does not dispense with the need for the Austrian legislature to amend that provision. According to the Court's settled case-law, if a provision of national law that is contrary to EU law is retained unchanged, 'this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on EU law' (see judgments of 24 March 1988, *Commission* v *Italy* (104/86, EU:C:1988:171, paragraph 12), and of 13 July 2000, *Commission* v *France* (C-160/99, EU:C:2000:410, paragraph 22)).

24 The works council submits that, according to a survey, only 13% of workers in the average of EU Member States have never changed job, whereas 60 to 66% of those workers have changed job up to five times, which affects, in particular, seasonal workers — such as those employed, in the present case, in the tourism sector — and confirms the negative effect of the provisions of the UrlG at issue on those workers. However, I understand that argument as meaning that those provisions actually disadvantage *the majority of workers*, in particular seasonal workers, *irrespective of their nationality*.

25 In that regard, unequal treatment on the grounds of nationality resulting from the provisions of the UrlG could be established on the basis of national statistics if they cover enough individuals, do not illustrate purely fortuitous or short-term phenomena, and appear, in general, to be significant (see, by analogy, so far as concerns discrimination on grounds of sex, judgment of 6 April 2000, *Jørgensen* (C-226/98, EU:C:2000:191, paragraph 33). However, the statistics presented by the Austrian Government in its written observations and at the hearing tend, on the contrary, to establish the dynamism of the Austrian labour market.

33. In that regard, I would point out that, in order to establish that national legislation leads, in practice, to unequal treatment on the grounds of nationality, it is not necessary or sufficient that the majority of people benefiting from that legislation are nationals or that the majority of those disadvantaged by it are non-nationals. There are serious defects in such reasoning.[26] As explained in point 24 of this Opinion, consideration should be given to the possible existence of a difference between the proportion of non-nationals likely to be negatively affected by the UrlG in comparison with the proportion of nationals disadvantaged by it. However, such a difference is, in my opinion, unlikely in the present case.[27]

34. Contrary to what the Commission claims, a different conclusion cannot be drawn from the Court's case-law according to which, for a national measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question.[28]

35. Indeed, that case-law does not help in a case such as that in the main proceedings. That case-law merely indicates that, *in so far as national legislation is liable to affect non-nationals more than nationals*, the fact that a certain proportion of nationals are also affected does not preclude a finding of indirect discrimination on the grounds of nationality. By contrast, that case-law does not give rise to the conclusion that there is such discrimination with regard to legislation which, as in the present case, has *similar effects on both nationals and non-nationals*.[29]

36. Admittedly, there is case-law of the Court relating to the calculation of seniority in the civil service in the Member States, for the purposes of promotion and the benefits of remuneration generally associated with promotion. In accordance with that case-law, national legislation which does not allow, in that field, periods of employment completed by a worker in the public service of another Member State to be taken into account or which makes the determination of those periods subject to conditions which are stricter than those applicable to periods of service spent in in the public service of the Member State concerned, is indirectly discriminatory on grounds of nationality.[30]

37. Nevertheless, although the legislation at issue in those earlier cases is based on a distinction — seniority in the national public sector — which appears to be similar to the criterion on which the UrlG is based, that legislation differs, in practice, on account of its application.

26 Such reasoning is fundamentally biased by the unequal ratio between nationals and non-nationals falling, in the present case, within the scope of the legislation at issue. Taking account of the fact that there are fundamentally more Austrian workers covered by Austrian social legislation — in so far as logically the labour market of that Member State relies above all on Austrians — there are of course more Austrians than foreign nationals who qualify for the sixth week of paid annual leave provided for by the UrlG. See, by analogy, so far as concerns discrimination on grounds of sex, judgment of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 59). In that judgment, the Court stated that the discriminatory effects of a measure are assessed by comparing 'on the one hand, the respective proportions of men in the workforce able to satisfy the requirement of two years' employment under the disputed rule and of those unable to do so, and, on the other, … those proportions as regards women in the workforce. *It is not sufficient to consider the number of persons affected, since that depends on the number of working people in the Member State as a whole as well as the percentages of men and women employed in that State*' (the emphasis is mine).

27 In any event, although I can accept that, in absolute terms, the majority of workers who qualify for the sixth week of annual paid leave provided for in Paragraph 2(1) of the UrlG are Austrian, I sincerely doubt that the majority of those negatively affected by that law are nationals of other Member States, for the reasons set out in point 31 of this Opinion.

28 Judgments of 28 June 2012, *Erny* (C-172/11, EU:C:2012:399, paragraph 41); of 20 June 2013, *Giersch and Others* (C-20/12, EU:C:2013:411, paragraph 45); and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 27).

29 In that context, it cannot be argued, as the works council does, that *all* non-national workers are put at a disadvantage whereas only *some* national workers are, however many they may be. The excessiveness of that claim is clear from the outset. It is likely that a number of nationals from other Member States, for example Germans, start their professional career in Austria. Moreover, workers who have started their career in another Member State and have joined the service of their current employer with less than five years of experience are not disadvantaged by the limit provided for in Paragraph 3(3) of the UrlG.

30 See, in particular, judgments of 15 January 1998, *Schöning-Kougebetopoulou* (C-15/96, EU:C:1998:3, paragraph 22); of 12 March 1998, *Commission* v *Greece* (C-187/96, EU:C:1998:101, paragraphs 20 and 21); of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraphs 41 to 44); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 70, 71 and 73); of 12 May 2005, *Commission* v *Italy* (C-278/03, EU:C:2005:281, paragraph 18); of 26 October 2006, *Commission* v *Italy* (C-371/04, EU:C:2006:668, paragraph 18); and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 28).

38. In that regard, the judgment of 30 September 2003 in *Köbler*[31] provides a good example. That case concerned a length-of-service increment granted by the Austrian State *qua* employer to university professors if they have, inter alia, carried on that profession for at least 15 years with *any Austrian public university*. As the Court ruled, that increment had the effect of rewarding the professors of *Austrian universities* who continue to exercise their profession *on Austrian territory* to the detriment of those exercising their profession on the territory of other Member States.

39. Such legislation allowed a high degree of mobility within a group of different national employers.[32] By contrast, the UrlG *considers favourably only periods of service with the same employer* — the current employer. As explained in point 30 above, that law treats *internal mobility* within Austria as stringently as *external mobility*: any change of employer results in unfavourable treatment.

40. Moreover, as EurothermenResort Bad Schallerbach argued at the hearing, without being challenged in that regard, the current employer does not necessarily have to be *an Austrian employer*. Paragraph 2(1) and Paragraph 3(1) of the UrlG does not even require periods of service with the current employer *to have been carried out in Austria*. In that regard, the defendant in the main proceedings claims, again without being challenged, that all periods of service completed by a worker with the same employer are treated in the same way, regardless of the place where they were carried out.[33] The only condition, implicit but obvious, in addition to that of remaining within the service of the same employer would be to *come under Austrian law at the time of the grant of the sixth week of paid annual leave*.

41. Let us take, for example, the case of a German worker joining an establishment of a given undertaking, situated in Germany, and who, after several years of work, joins an establishment of that same undertaking situated in Austria — thus falling, in principle, within the scope of Austrian law.[34] For the purposes of granting a sixth week of paid annual leave in accordance with the provisions of the UrlG at issue, those periods of work completed in Germany are treated just as favourably as those completed in Austria, *since the criterion relating to the identity of the employer is satisfied*.[35]

42. The works council and the Commission nevertheless rely on the judgment in *SALK*,[36] which must, they claim, be applied by analogy in the present case. I would point out that that judgment concerned a Law of the Province of Salzburg — that is to say, in essence, *regional* legislation — which, in determining the reference date for the purposes of the advancement of an employee of a holding company of three hospitals and of several other establishments situated in Land Salzburg, drew a distinction depending on whether the employee has always worked for Land Salzburg or for other national or foreign employers. For the first group, the periods of employment were taken into account in their entirety, whereas for the second group, the periods of employment before their recruitment by Land Salzburg were taken into account only in a lesser proportion.

31 C-224/01, EU:C:2003:513, paragraphs 73 and 85.

32 See judgment of 30 September 2003, Köbler (C-224/01, EU:C:2003:513, paragraph 84. See also on that point judgments of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraph 49), and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 40). The Court considers that the various public bodies and administrations of a Member State constitute distinct employers.

33 See, *a contrario*, the case giving rise to the judgment of 10 March 2011, *Casteels* (C-379/09, EU:C:2011:131). That case concerned a collective agreement which, for the purposes of granting supplementary pension benefits, takes account of periods of work completed by a worker with the same employer differently, depending on whether those periods were completed in an establishment abroad or in an establishment situated in the Member State in question.

34 In that regard, I would point out that to the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract is to be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. See Article 8(2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

35 It is for the referring court alone to interpret the provisions of the UrlG and to verify the claims made by EurothermenResort Bad Schallerbach. That said, even if those claims were not established, the mere fact that the UrlG treats any change of employer strictly in the same way is sufficient, in my opinion, to conclude that there is no indirect discrimination.

36 Judgment of 5 December 2013 (C-514/12, EU:C:2013:799).

43. In that case, it could be reasonably claimed, as in the present case, that internal mobility was treated in the same way as external mobility. That did not prevent the Court from finding there to be indirect discrimination on the basis of nationality, applying its precedents on seniority in the civil service of the Member States, and recalling the case-law set out in point 34 of this Opinion. [37]

44. I have some reservations with the regard to the judgment in *SALK*. [38] In that case, in the same way as workers from other Member States, all Austrian workers with public or private employers other than Land Salzburg were placed at a disadvantage. I doubt that, in that case, there was, in practice, indirect discrimination on the basis of nationality. I take the view that the application of case-law relating to measures applicable at national level — such as those relating to seniority in the national civil service — to similar measures adopted by local or regional authorities must be done with caution. By way of example, while it is likely that a residence condition, imposed at national level, is particularly disadvantageous to nationals from other Member States, it is not certain when such a condition is imposed by a local authority. [39]

45. Nevertheless, if the Court does not wish to call that judgment into question, it is still possible to distinguish it from the present case. Indeed, the legislation at issue in that judgment still favoured a certain degree of internal mobility since a worker from that province could change job and continue to benefit from the favourable rules on the calculation of seniority, provided he chose to join another public undertaking in that province. The provisions of the UrlG can therefore be clearly distinguished from the legislation at issue in that same judgment.

46. In the light of all the foregoing, I take the view that legislation such as the UrlG does not lead to any unequal treatment — whether direct or indirect — on grounds of the nationality of workers. It would be otherwise only if it were likely that Austrian workers change their job materially less often than workers from other Member States. There is nothing in the documents before the Court to suggest this.

C. Absence of an obstacle to the freedom of movement for workers contrary to Article 45 TFEU

47. In accordance with the Court's settled case-law, Article 45 TFEU prohibits not only all discrimination, direct or indirect, based on nationality but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement. [40]

48. Article 45 TFEU protects workers of one Member State wishing to enter the labour market of another Member State, both vis-à-vis their Member State of origin and the host Member State. It is therefore necessary, in the present case, to determine whether provisions such as those of the UrlG are such as to constitute a barrier 'to the entry' of workers who are nationals of other Member States into the Austrian market (1) or a barrier 'to the exit' of Austrian workers from the national market to the market of other Member States (2).

37 Judgment of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 31).

38 Judgment of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799).

39 See, on this point, Opinion of Advocate General Jacobs in *Bickel and Franz* (C-274/96, EU:C:1998:115, point 38): 'Let us suppose, for example, that under the relevant regulations the ruins of Pompeii were open free of charge out of season to residents of Naples and the surrounding area. *It would be difficult to argue that such a rule worked to the particular disadvantage of nationals of other Member States since the vast majority of Italian residents would also be affected*' (the emphasis is mine). It is therefore regrettable that the Court adopted the opposite interpretation in its judgment of 16 January 2003, *Commission* v *Italy* (C-388/01, EU:C:2003:30), by finding different legislation, adopted by local authorities, granting free admission to local museums to persons residing in the surrounding area to be indirectly discriminatory. In paragraph 14 of that judgment, the Court rejected the argument that the majority of Italians risked being put at a disadvantage in the same way as foreigners by merely referring, yet again, to the case-law set out in point 34 of this Opinion.

40 See, in particular, judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 96), and of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49, paragraph 18).

1. No barrier 'to entry'

49. According to the Court's case-law, Article 45 TFEU precludes any measure which, even though applicable without discrimination on grounds of nationality, is *capable of hindering or rendering less attractive* the exercise by European Union nationals of the fundamental freedoms guaranteed by the Treaty. [41]

50. Since Directive 2003/88 provides only for minimum requirements relating to the entitlement to paid annual leave of workers, disparities continue to exist between Member States in that regard. In the present case, the provisions of the UrlG could, in absolute terms, make it less attractive for a worker to pursue his career in Austria if the right to work in his Member State of origin grants him more leave than under that legislation.

51. Nevertheless, Article 45 TFEU cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in social terms, since, given the disparities referred to in the previous paragraph, such a move may be more or less advantageous for the person concerned in that regard. That article thus does not grant to that worker the right to claim, in the host Member State, the conditions of employment which he enjoyed in the Member State of origin under the national legislation of the latter State. [42] He may solely, in principle, benefit from the working conditions applicable to national workers, in accordance with the principle of equal treatment. [43] Otherwise, any legislation of the host Member State of the worker which is less favourable than that of his Member State of origin would constitute an obstacle to the freedom of movement for that worker. Such reasoning would have profound implications on the social legislation of Member States.

52. Consequently, I am of the opinion that provisions such as those of the UrlG cannot constitute a barrier to the entry of workers who are nationals of other Member States into the Austrian labour market.

2. No barrier 'to exit'

53. It is apparent from the case-law of the Court that all the provisions of the FEU Treaty on freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the Union, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. In that context, nationals of the Member States have in particular the right, which they derive directly from the Treaty, to leave their State of origin to enter the territory of another Member State and to reside there in order to pursue an economic activity there. [44]

54. Consequently, provisions which *preclude or deter* a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute restrictions on the freedom of movement for workers. [45]

41 See, in particular, judgments of 1 April 2008, *Government of the French Community and Walloon Government* (C-212/06, EU:C:2008:178, paragraph 45); of 10 March 2011, *Casteels* (C-379/09, EU:C:2011:131, paragraph 22); and of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraph 33).

42 Judgment of 18 July 2017, *Erzberger* (C-566/15, EU:C:2017:562, paragraphs 34 and 35).

43 See, to that effect, Opinion of Advocate General Fennelly in *Graf* (C-190/98, EU:C:1999:423, point 32): 'In the normal case, the migrant worker must take the national employment market as he finds it'. See also my Opinion in *Erzberger* (C-566/15, EU:C:2017:347, points 74 to 78).

44 Judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraphs 94 and 95), and of 1 April 2008, *Government of the French Community and Walloon Government* (C-212/06, EU:C:2008:178, paragraph 44).

45 Judgments of 15 December 1995, *Bosman* (C-415/93, EU:C:1995:463, paragraph 96); of 16 March 2010, *Olympique Lyonnais* (C-325/08, EU:C:2010:143, paragraph 34); and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 30).

55. In the present case, it is clear that the provisions of the UrlG do not *preclude* Austrian workers from pursuing an activity as an employed person in other Member States. It is therefore, at most, a question of determining whether those provisions are likely to *deter* Austrian workers from doing so.

56. In so far as the provisions of the UrlG make the grant of a sixth week of paid annual leave subject to remaining in the service of the same employer, they inevitably discourage workers from leaving their current employer for a certain number of years. Nonetheless, I do not consider that those provisions deter Austrian workers from exercising their right to freedom of movement.

57. In that regard, the fact that a worker changes employer does not entail the loss of an *acquired right*.[46] By leaving his employer for the purpose of taking up employment with another, even in another Member State, a worker merely *breaks the continuity of seniority required* to qualify for the grant of that sixth week and, thereby, *decreases his chances of benefiting from that advantage*.

58. Even if a worker would rather remain in the service of his current employer in order to acquire the seniority required, in accordance with the UrlG, to qualify for the additional sixth week of paid annual leave,[47] rather than leaving to pursue an activity as an employed person in another Member State, where the legislation on entitlement to annual leave is less generous, this would not constitute a restriction contrary to Article 45 TFEU, for the reasons set out in point 51 of this Opinion: that article cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in social terms. There is no obstacle to the freedom of movement for workers each time a person chooses to continue working in a given Member State, in order to benefit from social advantages, rather than leaving to pursue an activity in a Member State where the legislation is less favourable to him. The opposite reasoning would, here too, have profound implications for the social legislation of Member States.

59. The works council and the Commission claim, however, that the provisions of the UrlG are such as to deter *Austrian workers who wish to leave their current employer and take up employment in another Member State, while wishing to subsequently return to the service of their initial employer* from exercising their freedom of movement. In that regard, it should be borne in mind that, pursuant to Paragraphs 1 to 3 of the UrlG, the periods of service completed by a worker for the same employer are taken into account in their entirety *only where there are no interruptions longer than three months*. Accordingly, in the event that a worker resigns from his initial employment, goes to offer his services to another employer — foreign or national — and subsequently re-enters his initial employment, the periods of service completed before his resignation, like the periods of service completed with the second employer, would be taken into account only up to a maximum of five years as provided for in Paragraph 3(3) of the UrlG.

46 The present case is thus distinguishable from the case-law of the Court on social security, in particular judgments of 21 January 2016, *Commission* v *Cyprus* (C-515/14, EU:C:2016:30), and of 13 July 2016, *Pöpperl* (C-187/15, EU:C:2016:550). In the cases giving rise to those judgments, a civil servant who resigned from his employment in the national civil service and took up employment in another Member State, lost the opportunity to benefit from an advantage to which he had already contributed and which could, therefore, be considered to have been acquired. That is not the case here. Furthermore, whereas social security rights are potentially *exportable*, the same is not true of the right to paid annual leave.

47 It is likely that the importance that a worker gives to that consideration, weighing up the pros and cons of resigning and moving abroad, is, in general, particularly low. Admittedly, this will depend on the age of the worker in question and the years of activity already spent working for his current employer, depending on whether the worker is more or less close to the 25 years of service required by Paragraph 2(1) of the UrlG. Nevertheless, the risk of losing such an advantage pales in insignificance in comparison to the existential doubts of a worker who is planning on leaving his Member State of origin to try his luck abroad.

60. Nonetheless so, as the referring court rightly points out, such logic is based on a set of circumstances which is too uncertain and indirect a possibility for the UrlG to constitute an obstacle to the freedom of movement for workers contrary to Article 45 TFEU. [48]

61. In that regard, it is true that in its judgment in *Köbler*, [49] the Court held that national legislation which does not take into account, for the purposes of granting a length-of-service increment in the civil service, periods of service completed in another Member State is such as to deter the workers from the Member State in question from exercising their freedom of movement, in so far as, *on their return to the civil service of that Member State*, relevant professional experience in the civil service of another Member State is not given any value. The Court adopted a similar interpretation in the judgment in *SALK*, so far as concerns workers employed in the public services of Land Salzburg *wishing to re-enter the employ of those services after having exercised their freedom of movement*.

62. However, I am still not sure whether the logic behind that case-law relating to the civil service is applicable to the present case. In that regard, the Austrian Government maintains that the reinstatement of a public sector worker in his original employment, after a period of secondment to the administrative authorities of another Member State or a leave of absence to gain professional experience with a public or private employer, is common. By contrast, it would be much less common that a private sector employee who has changed employer would re-enter the employment of his initial employer to pursue his career. Such reinstatement would, for a worker unsure whether to stay in the employment of his employer or to resign, be too *uncertain and indirect*. Indeed, that hypothetical reintegration would be subject to satisfaction of a number of conditions beyond the control of the worker concerned, such as the availability of a vacant post on his return, and the employer's decision to re-employ him rather than somebody else. That argument is, in my view, perfectly reasonable.

63. Furthermore, I would point out that the existing case-law of the Court concerns the taking into account of the duration of service *for the purposes of calculating the remuneration* of civil service workers. In that regard, the effects of seniority are felt immediately or in the short term. By contrast, in the present case, even if a worker were to re-enter the employment of his initial employer after having exercised his freedom of movement, the entitlement to a sixth week of paid annual leave would, in any event, constitute *a mediated event occurring, in general, in the distant future*, in the light of the 25 years of service required in that regard. It would be necessary for the worker in question to remain with his employer for the time required, which would also depend on relatively *uncertain* circumstances, relating both to the personal life of the worker — who could, for different reasons, decide to leave again — and to the employer — who may have to terminate the employment relationship for various reasons.

64. In the light of all the foregoing, I consider that the provisions of the UrlG do not constitute a barrier 'to the exit' of Austrian workers to the labour market of other Member States.

48 See, to that effect, judgment of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49, paragraph 25). See also, by analogy, judgments of 4 October 1991, *Society for the Protection of Unborn Children Ireland* (C-159/90, EU:C:1991:378, paragraph 24); of 15 June 2010, *Commission* v *Spain* (C-211/08, EU:C:2010:340, paragraph 72); and of 12 July 2012, *SC Volksbank România* (C-602/10, EU:C:2012:443, paragraph 81). The question of a future event being too uncertain and indirect a possibility for national legislation to constitute an obstacle to the freedom of movement for workers must not be confused with that of the significance of such a barrier, with regard to which the Court considers that even minor restriction is prohibited by Article 45 TFEU (see, to that effect, judgments of 13 December 1989, *Corsica Ferries (France)* (C-49/89, EU:C:1989:649, paragraph 8), and of 1 April 2008, *Government of the French Community and Walloon Government* (C-212/06, EU:C:2008:178, paragraph 52)). Indeed, the first question concerns the impact — likely or, on the contrary, purely hypothetical and therefore inexistent — that the legislation is likely to have on the choice of the worker to exercise his freedom of movement, whereas the second question relates to the consequences of that legislation on workers exercising that freedom.

49 Judgment of 30 September 2003 (C-224/01, EU:C:2003:513, paragraph 74).

D. In the alternative, the existence of an objective justification

65. For the sake of completeness and if the Court finds that Paragraph 2(1) and Paragraph 3(1) to (3) of the UrlG entails unequal treatment indirectly based on nationality or that those provisions constitute an obstacle to the freedom of movement for workers, I will set out the reasons why I believe that those provisions are, in any event, justified.

66. In that regard, I would point out that, in accordance with the Court's settled case-law, unequal treatment indirectly based on nationality does not constitute prohibited discrimination where it is objectively justified and is proportionate to the objective pursued. National legislation which forms an obstacle to the freedom of movement for workers is also consistent with EU law, to the extent that it satisfies the same conditions.

67. So far as concerns the existence, in the present case, of an objective justification, the Austrian Government submits that the provisions of the UrlG at issue seek to reward workers' loyalty to their employer.

68. The Court has never formally acknowledged that a loyalty incentive justifies unequal treatment indirectly based on nationality or an obstacle to the freedom of movement for workers. It has merely held, on several occasions but always with some reserve, that 'it cannot be excluded'[50] that an objective of rewarding loyalty may constitute such justification, while rejecting the idea that such a justification could be relied on in the specific case.[51]

69. In my opinion, a loyalty incentive can indeed justify unequal treatment on grounds of nationality or an obstacle contrary to Article 45 TFEU. The legitimate objectives of social and employment policy put forward by the Member States must, in my view, be regarded as permissible justifications in that regard. As EU law currently stands, those same Member States have *a broad discretion*, in particular, *in choosing the objectives that they pursue in the course of that policy*.[52] I thus see no reason why a loyalty incentive cannot be considered to be such a legitimate objective. As EurothermenResort Bad Schallerbach submits, the long-term nature of the employment relationship provides the worker with a degree of security. The Commission has also claimed, not without reason, that rewarding workers' loyalty is a good thing for the employer, which can plan its operations more easily, since stability in staffing levels is guaranteed.

70. So far as concerns, next, the proportionality test, it should be borne in mind that it requires the legislation at issue to be such as to ensure achievement of the objective in question and not to go beyond what is necessary for that purpose.[53]

71. I consider, on the one hand, that the provisions of the UrlG are suitable for achieving the objective of rewarding loyalty. In that regard, I would point out that, in the cases relating to the seniority of workers in the civil service ruled on by the Court, the legislation at issue rewarded professional experience acquired with not just one but a number of employers.[54] In view of this, the Court held

50 Judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 83), and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 38); see also order of 10 March 2005, *Marhold* (C-178/04, not published, EU:C:2005:164, paragraph 34).

51 Judgments of 15 January 1998, *Schöning-Kougebetopoulou* (C-15/96, EU:C:1998:3, paragraphs 26 and 27); of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraph 49); of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 83 and 84); and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 38).

52 See, with regard to Article 45 TFEU, judgment of 13 December 2012, *Caves Krier Frères* (C-379/11, EU:C:2012:798, paragraph 51). See, also, so far as concerns other areas of EU law, judgments of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709, paragraph 63); of 11 January 2007, *ITC* (C-208/05, EU:C:2007:16, paragraph 39); and of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 68).

53 See, in particular, judgment of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 36 and the case-law cited).

54 The Court considers that the various public bodies and authorities of a Member State constitute separate employers. See footnote 32 above and the case-law cited.

that the legislation at issue *did nothing* to achieve that objective.[55] They were, in fact, 'false' loyalty rewards. By contrast, as has been stated throughout this Opinion, the provisions of the UrlG reward, essentially, only seniority acquired with *the same employer*. The sixth week of paid annual leave provided for in Paragraph 2(1) of the UrlG thus constitutes a 'true' loyalty reward.[56]

72. The works council claims, however, that the provisions of the UrlG do not effectively achieve that objective of rewarding loyalty, in so far as, in practice, only a few workers qualify for the sixth week of paid annual leave provided for by Paragraph 2(1) of the UrlG. In addition, the provisions of the UrlG do not protect workers from the possibility of dismissal before acquiring the required qualifying period. Furthermore, better loyalty incentive measures are conceivable.

73. Nonetheless, the broad discretion enjoyed by Member States, in accordance with the case-law set out in point 69 of this Opinion, also extends *to the definition of measures likely to achieve the objectives of social and employment policy pursued*. Therefore, in assessing the appropriateness of legislation such as the UrlG, it is not for the Court to verify whether it con*stitutes the best means of rewarding workers' loyalty*. It is sufficient that it *contributes to rewarding loyalty*. I believe that this is the case.

74. On the other hand, so far as concerns the necessity of the provisions of the UrlG with regard to the objective pursued of rewarding loyalty, I consider that the broad discretion enjoyed by Member States must also play a role in that regard. In particular, it is not for the Court to determine what constitutes meritorious seniority, otherwise it would be acting as a substitute for the national legislature. Here too, the mere fact that other measures exist to reward loyalty, no doubt implemented in other Member States, is not sufficient to consider the provisions of the UrlG to be disproportionate.[57]

75. It should also be borne in mind, for the purposes of assessing the necessity of the provisions of the UrlG, that they provide a *benefit* to workers, beyond that provided under Directive 2003/88. Workers who do not benefit from the sixth week of paid annual leave provided for in Paragraph 2(1) of the UrlG may still be entitled to one more week of paid annual leave than the standard minimum of four weeks guaranteed under that directive.

76. Moreover, contrary to what the Commission claims, the provisions at issue in no way prevent employers from rewarding workers' loyalty in other ways. EurothermenResort Bad Schallerbach stated, without being contradicted on that point, that many other measures exist to that effect under Austrian law. In addition, EurothermenResort Bad Schallerbach and the Austrian Government have submitted that social partners and employers may individually, at company level, go beyond the provisions of the UrlG by making the grant of a sixth week of paid annual leave conditional on a shorter period of service, which the Commission itself admitted at the hearing.

55 Judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraph 84), and of 5 December 2013, *SALK* (C-514/12, EU:C:2013:799, paragraph 38). In some older cases, the Court even considered that the measures at issue were *not really intended to achieve the objective of promoting loyalty relied on* (see judgments of 15 January 1998, *Schöning-Kougebetopoulou* (C-15/96, EU:C:1998:3, paragraph 26), and of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraph 49)).

56 It is therefore quite logical that the UrlG provides only for marginal account to be taken of periods of service completed with previous employers, since those periods are not comparable to those completed with the current employer in the light of the loyalty incentive objective pursued. On the whole, the periods of service completed with previous employers should not be taken into account at all. Nevertheless, in my opinion, taking account of the periods up to a maximum of five years in total, as provided for by Paragraph 3(2) and (3) of the UrlG, serves merely to mitigate the rigidity of the 25 years of seniority requirement and thus contributes to its proportionality.

57 See, by analogy with regard to the free movement of goods, judgment of 10 May 1995, *Alpine Investments* (C-384/93, EU:C:1995:126, paragraph 51), and Opinion of Advocate General Jacobs in *Alpine Investments* (C-384/93, EU:C:1995:15, point 88).

77. Lastly, that measure does not have the effect of partitioning the national employment market which was criticised in *Köbler*.[58] In that regard, I would point out that, in that judgment, the Court held that by rewarding professional experience obtained only at Austrian public universities the seniority payment at issue was likely to have an effect on a university professor's choice between an Austrian university and a university in another Member State, thus leading to a partitioning of the national labour market contrary to the very principle of freedom of movement for workers — which gave an unjustifiable character to that legislation.[59] By contrast, in the present case, since a worker interrupts the continuity of seniority required for the grant of a sixth week of paid annual leave by entering the employment of a national employer or an employer from another Member State, the rules of the UrlG do not influence his choice between a job with an Austrian undertaking or a job with an undertaking from another Member State.[60]

78. In the light of all the foregoing, I am of the opinion that provisions such as Paragraph 2(1) and Paragraph 3(1) of the UrlG are justified and proportionate.

V. Conclusion

79. In the light of all the foregoing considerations, I propose that the Court answers the question referred for a preliminary ruling by Oberster Gerichtshof (Supreme Court, Austria) as follows:

Article 45(1) and (2) 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, such as that at issue in the main proceedings, under which a worker who has a total of 25 years of service but has not completed these with the same Austrian employer is entitled to only 5 weeks of paid annual holiday, whereas a worker who has completed 25 years of service with the same Austrian employer is entitled to 6 weeks of holiday per year.

58 See, to that effect, judgment of 30 September 2003, C-224/01, EU:C:2003:513.

59 Judgment of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513, paragraphs 85 and 86).

60 Admittedly, rewarding loyalty will always, to some extent, be contrary to the logic of freedom of movement guaranteed by the FEU Treaty. A loyalty bonus rewards immobility precisely where the provisions of the FEU Treaty facilitate mobility. This does not mean that it is contrary to EU law. EU law does not preclude stable and long-term relationships, whether professional or personal.