



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

8 May 2019*

(Reference for a preliminary ruling — Social policy — Prohibition of all discrimination on grounds of age — Directive 2000/78/EC — Exclusion of professional experience acquired before the age of 18 — New system of remuneration and advancement — Maintaining a difference in treatment — Right to an effective remedy — Article 47 of the Charter of Fundamental Rights of the European Union — Justifications)

In Case C-396/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Austria), made by decision of 30 June 2017, received at the Court on 3 July 2017, in the proceedings

Martin Leitner

v

Landespolizeidirektion Tirol,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev (Rapporteur), E. Regan, C.G. Fernlund and S. Rodin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2018,

after considering the observations submitted on behalf of

- Mr Leitner, by M. Riedl and V. Treber-Müller, Rechtsanwälte,
- the Austrian Government, by G. Hesse and J. Schmoll, acting as Agents,
- the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2018,

gives the following

* Language of the case: German.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 21 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 1, 2, 6, 9, 16 and 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
- 2 The request has been made in proceedings between Mr Martin Leitner and the Landespolizeidirektion Tirol (Regional Police Directorate, Tyrol, Austria) concerning the advancement and position on the salary scale of the applicant in the main proceedings.

Legal context

EU law

Directive 2000/78

- 3 Article 1 of Directive 2000/78 states: 'the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'
 - 4 Article 2 of Directive 2000/78 provides:
 - '1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
 2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
 - (b) indirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, ...
- ...'
- 5 Article 6 of that directive provides:
 - '1. 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 means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'

6 Article 9 of that directive is worded as follows:

'1. 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.

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.'

7 Article 16 of Directive 2000/78 is worded as follows:

'Member States shall take the necessary measures to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.'

8 Article 17 of that directive states:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions 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. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.’

Austrian law

- 9 The referring court explains that national legislation on the remuneration and advancement of civil servants has been amended on a number of occasions, on account of the incompatibility of certain provisions with EU law. The new system for the remuneration and advancement of civil servants arising from legislative amendments enacted over the course of 2015 and 2016 seeks, according to the referring court, to put a stop to, inter alia, discrimination on grounds of age resulting from the system for remuneration and advancement previously in force.

The Law on remuneration of civil servants

- 10 Paragraph 8(1) of the Gehaltsgesetz 1956 (Law on salaries 1956, BGBl. 54/1956), as amended by the Federal Law of 30 August 2010 (BGBl. I, 82/2010) (‘the Law on the remuneration of civil servants’), provided:

‘Advancement shall be determined on the basis of a reference date. 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.’

- 11 Paragraph 12 of the Law on the remuneration of civil servants provided:

‘Subject to the restrictions set out in subparagraphs 4 to 8, the reference date to be taken into account for 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:

1. the periods specified in subparagraph 2 shall be taken into account in their entirety;
2. other periods.’

The amended Law on the remuneration of civil servants

- 12 With the aim of remedying discrimination on the grounds of age established in the judgments of the Court of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), and of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359), the Law on the remuneration of civil servants was amended with retroactive effect by the Bundesbesoldungsreform 2015 (2015 Federal Law reforming remuneration, BGBl. I, 32/2015) and the Besoldungsrechtsanpassungsgesetz (2016 Law adjusting remuneration legislation, BGBl. I, 104/2016) (‘the amended Law on the remuneration of civil servants’).

- 13 Under the heading ‘Grading and advancement’, Paragraph 8 of the amended Law on the remuneration of civil servants provides, in subparagraph 1 thereof:

‘... Grading and further advancement shall be determined on the basis of remuneration seniority.’

14 Under Paragraph 12 of the amended Law on the remuneration of civil servants, headed ‘Remuneration seniority’:

‘(1) Remuneration seniority comprises the length of the periods effective for advancement that are 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 civil servant was entitled to a pension for injury on the basis of the Heeresversorgungsgesetz (Law on protection of the armed forces) and

4. for service in

(a) basic military service ...

(b) training service ...

(c) civilian service ...

(d) obligatory military service, a comparable military training service or an obligatory civilian substitute service in a Member State of the European Economic Area, the Turkish Republic or the Swiss Confederation.

...

(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. ...’

15 Paragraph 169c of the amended Law on the remuneration of civil servants, which relates to the reclassification of currently employed civil servants in the new remuneration and advancement system, provides:

‘(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 law in accordance with the following provisions solely on the basis of their previous salaries. Civil servants shall initially be ranked at 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 an overall determination of his or her remuneration seniority. The overall 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. the erroneous inputting clearly departs from the intended inputting as shown by the documents already existing at the time of the inputting.

(2b) If the actual grading according to the payslip is lower in terms of amount than the grading protected by statute, then upon application by the civil servant, the grading protected by statute shall be used for calculating the transition amount, unless a different approach is mandated because of the existence of a mere temporary grading in accordance with Paragraph 169d(5). The grading protected by statute is the salary grade that results when the effective date is applied. The effective date is the date that results when the following periods are counted backwards from the first day of the transition month. To be counted backwards are:

1. the periods that, at the time that the transition month commences, have been definitively accredited as previous service periods, to the extent that such periods were completed before the age of 18 and have become effective for advancement, and
2. the periods completed since the date of appointment, to the extent that they have become effective for advancement.

No other periods shall be counted backwards. For each two years that have elapsed since the reference date, the next higher salary grade shall be applicable in each case as the grading protected by statute. A salary grade shall be deemed as having been attained on 1 January or 1 July following completion of the two-year period, unless advancement was postponed or suspended on such date. The two-year period shall also be deemed as having been completed on 1 January or 1 July, respectively, even where it ends prior to the following 31 March or 30 September, respectively.

(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 by the Court of Justice of the European Union 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). 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 on 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 acquired 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.

(4) The remuneration seniority fixed in accordance with subparagraph 3 shall be extended by the period of time that elapsed between the time of the last advancement to a higher salary and the end of the transition month, provided that that period is relevant for the purpose of advancement.

...

(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 ...

...'

- 16 Pursuant to Paragraph 175(79)(3) of the amended Law on the remuneration of civil servants, Paragraphs 8 and 12 of that law, including their headings, enter into force in the version of the 2015 Federal Law reforming remuneration published in BGBl. I, 32/2015 'on 1 February 1956; all previous versions of these provisions published before 11 February 2015 shall cease to apply in current and future procedures...'.
...

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 17 Mr Martin Leitner, born in 1968, is subject, as a police officer, to the staff regulations applicable to civil servants of the Austrian authorities. Until February 2015, his remuneration was governed by the old remuneration and advancement system. He was then reclassified under the new remuneration and advancement system introduced by the amended Law on the remuneration of civil servants.
- 18 On 27 January 2015, Mr Leitner requested the Landespolizeidirektion Tirol (Regional Police Directorate, Tyrol, Austria) to recalculate his grading reference date, in order to take account of the experience that he had acquired before the age of 18. He also requested the payment of the remuneration he claimed was owing to him.
- 19 On 30 April 2015, Mr Leitner's request was rejected as inadmissible, on the ground that the provisions relating to the advancement reference date were no longer applicable.
- 20 Mr Leitner brought an action against that decision before the Bundesverwaltungsgericht (Federal Administrative Court, Austria). On 7 November 2016, that court annulled the decision of the Landespolizeidirektion Tirol (Regional Police Directorate, Tyrol) and requested that authority to make a determination on the merits of Mr Leitner's request.
- 21 On 9 January 2017, the Landespolizeidirektion Tirol (Regional Police Directorate, Tyrol) rejected that request on the ground that Mr Leitner could not derive rights from the old remuneration and advancement system, since that system was no longer applicable following the retroactive entry into force of the 2015 Federal Law reforming remuneration, brought about by the amended Law on the remuneration of civil servants
- 22 On 8 February 2017, Mr Leitner brought an action against that decision before the Bundesverwaltungsgericht (Federal Administrative Court).
- 23 The referring court is unclear as to whether a legislative amendment such as that established by the amended Law on the remuneration of civil servants has in fact put a stop to all discrimination on grounds of age which existed previously.

- 24 That court states that, inasmuch as the reclassification of currently employed civil servants is conducted on the basis of remuneration calculated in accordance with the rules of the old remuneration and advancement system, the category of civil servants whose periods of activity completed before reaching the age of 18 are not taken into account in the calculation of their seniority is in a less favourable position than that of civil servants with periods of activity of a comparable duration that were completed after reaching that age.
- 25 The referring court points out that periods of activity completed before the age of 18 cannot be taken into account in the calculation of the advancement of reclassified civil servants. The transfer of a civil servant to the new remuneration system and, correspondingly, the determination of his position in the new system are brought about by fixing his seniority on the salary scale. In order to establish that seniority, the transition amount — namely the last salary received by the civil servant under the old remuneration and advancement system — should be applied. Since there can be no assessment of whether the remuneration paid is correct, only the rectification of simple inputting errors in the data used for reclassification purposes, when reviewing the calculation of the transition amount, is possible. The transition amount cannot therefore be regarded as non-discriminatory remuneration due on the basis of the old remuneration and advancement system.
- 26 As to the justification of direct discrimination, the referring court points out that any argument alleging an increase in financial burdens and possible administrative difficulties cannot, in principle, justify a failure to comply with obligations arising from the prohibition of discrimination on grounds of age.
- 27 The referring court adds that the Province of Tyrol, in which there had previously been discriminatory legislation based on age similar to that at issue in the main proceedings, responded to the judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359) by recalculating the reference dates for all existing civil servants and thus put a stop to discrimination on grounds of age.
- 28 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- (1) 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 that, for the purpose of eliminating discrimination against currently employed civil servants, establishes a transitional rule under which, on the basis of a “transition amount”, which is indeed calculated in money, but nevertheless corresponds to a certain grading that can be specifically allocated, the reclassification is effected from the previous biennial system to a new biennial system (that in and of itself is non-discriminatory for newly hired civil servants), such that age discrimination against currently employed civil servants still continues?
- (2) Is EU law, in particular Article 17 of [Directive 2000/78] and Article 47 of the [Charter], to be interpreted as precluding national legislation that prevents currently employed civil servants from having — in accordance with the interpretation of Articles 9 and 16 of [that directive] in the judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359) — their remuneration status determined, in reliance on Article 2 of Directive 2000/78, as at the time prior to transition to the new system, in that it declares that the corresponding legal bases are no longer applicable retroactively to the date on which its historical original law entered into force and, in particular, that previous service periods completed before the age of 18 may not be accredited?
- (3) If Question 2 is answered in the affirmative:

Does the principle of primacy of EU law, affirmed, inter alia, in the judgment of the Court of Justice of 22 November 2005, *Mangold* (C-144/04, EU:C:2005:709) require that provisions applicable to currently employed civil servants at the time prior to transition, which have been

retroactively repealed, must continue to be applied so that those civil servants can be retroactively classified in the old system in a non-discriminatory manner and are thus reclassified in the new remuneration system in a non-discriminatory manner?

- (4) Is EU law, in particular Articles 1, 2 and 6 of Directive 2000/78, in conjunction with Articles 21 and 47 of the Charter, to be interpreted as precluding national legislation that eliminates existing age discrimination (with respect to the accreditation of previous service periods completed before the age of 18) in a merely declaratory manner by specifying that the periods actually completed under conditions of discrimination are retroactively to be considered no longer discriminatory even though discrimination in fact still continues?

Consideration of the questions referred

The first question

- 29 By its first question, the referring court is asking, in essence, whether Articles 1, 2 and 6 of Directive 2000/78, read in conjunction with Article 21 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which entered into force retroactively and which, for the purposes of putting a stop to discrimination on grounds of age, provides for the transfer of currently employed civil servants to a new remuneration and advancement system under which the initial classification of those civil servants is determined on the basis of the last salary they received under the previous system.
- 30 It is necessary, first, to determine whether the national legislation under examination introduces a difference in treatment for the purpose of Article 2(1) of Directive 2000/78.
- 31 In that regard, it should be borne in mind that, under that provision, the ‘principle of equal treatment’ means that there must be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(1), direct discrimination is taken to occur where one person is treated less favourably than another is, in a comparable situation, on any of the grounds referred to in Article 1 of that directive.
- 32 In the case in the main proceedings, the categories of persons relevant for the purposes of that comparison are (i) civil servants employed at the time of the transfer whose professional experience has, if only in part, been acquired before the age of 18 (‘civil servants disadvantaged by the previous system’) and (ii) those who have acquired experience of the same nature and of comparable length after attaining that age (‘civil servants treated more favourably by the previous system’).
- 33 It is apparent from the information before the Court that the Austrian legislature introduced, by the adoption of Paragraph 169c of the amended Law on the remuneration of civil servants, a system of reclassification on the basis of a ‘transition amount’ calculated under the rules of the previous system. More specifically, that ‘transition amount’ — which, under Paragraph 169c(2) of that Law, is decisive for the purpose of the overall determination of the seniority of civil servants transferred on the salary scale under the new system — is calculated on the basis of the remuneration paid to those civil servants in the month preceding their transfer to the new system.
- 34 In its judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359), the Court has previously held that the rules of the previous remuneration and advancement system gave rise to direct discrimination on grounds of age, for the purposes of Directive 2000/78.

- 35 In that connection, the Court ruled, in that judgment, that national legislation which, in order to put an end to discrimination on the grounds of age with regard to civil servants, takes into account periods of study and service completed before the age of 18 but which, at the same time, introduces, only for civil servants who suffer such discrimination, a three-year extension of the period required to progress from the first to the second incremental step in each job category and each salary group, maintains direct discrimination on the grounds of age, for the purposes of Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78.
- 36 It should also be observed that it is clear from the very words used in Paragraph 169c(2c) of the amended Law on the remuneration of civil servants that the previous remuneration and advancement system discriminated against civil servants on grounds of age.
- 37 In those circumstances, a reclassification system, such as that introduced by the amended Law on the remuneration of civil servants, as set out in paragraph 33 of the present judgment, is liable to maintain the effects produced by the previous remuneration and advancement system, on account of the link that it establishes between the last salary received under that system and classification in the new remuneration and advancement system.
- 38 It must, therefore, be concluded that Paragraph 169c of the amended Law on the remuneration of civil servants maintains a difference in treatment between civil servants disadvantaged by the previous system and those treated more favourably by that system, since the amount of the remuneration received by the former category will be less than that paid to the latter solely on account of their age at the time of recruitment, even though they are in comparable situations (see, to that effect, judgment of 9 September 2015, *Unland*, C-20/13, EU:C:2015:561, paragraph 40).
- 39 It is necessary, secondly, to examine whether that difference in treatment on grounds of age may be justified under Article 6(1) of Directive 2000/78.
- 40 The first subparagraph of Article 6(1) of Directive 2000/78 states that Member States may provide that differences in treatment on grounds of age are not to constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment-policy, labour-market and vocational-training objectives, and if the means of achieving that aim are appropriate and necessary.
- 41 The Court has frequently held that Member States enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 34 and the case-law cited).
- 42 In that context, the referring court points out that the main purpose of the legislation at issue in the main proceedings is to establish a non-discriminatory system of remuneration and advancement. That court states that that legislation pursues objectives of financial neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations.
- 43 As regards, first, the objective of financial neutrality pursued by the national legislation at issue in the main proceedings, it must be borne in mind that EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination. In that regard, while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. This also applies to the considerations of an administrative nature mentioned by the referring court and by the Austrian Government (see, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 36).

- 44 As regards, secondly, respect for the acquired rights and protection of the legitimate expectations of civil servants treated more favourably by the previous system with regard to their remuneration, it should be noted that these constitute legitimate employment-policy and labour-market objectives which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age (see, to that effect, judgment of 11 November 2014, *Schmitzer* C-530/13, EU:C:2014:2359, paragraph 42).
- 45 Those objectives cannot, however, justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the reform of which that measure forms part is designed to eliminate. Such a measure is not capable of establishing a non-discriminatory system in respect of the category of persons disadvantaged by the previous system (see, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 39 and the case-law cited).
- 46 In the present case, Paragraph 169c of the amended Law on the remuneration of civil servants provides for various mechanisms to prevent a significant reduction in the remuneration of reclassified civil servants. Those mechanisms include the payment of a maintenance premium equal to the difference between the amount of the new salary received by the civil servant transferred to the new system and the transition amount. That maintenance premium is granted on account of the fact that, following his transfer to the new system, the civil servant in question is placed in a salary grade in the new remuneration and advancement system corresponding to a salary grade immediately below that which he last received under the previous system. Those mechanisms also increase from 6 to 18 months the remuneration seniority of the transferred civil servant.
- 47 As the Austrian Government clarified at the hearing, all those mechanisms apply, without distinction, to all civil servants who have been transferred en masse to the new remuneration and advancement system, whether or not they were disadvantaged by the previous remuneration and advancement system.
- 48 In those circumstances, it must be held that, unlike the cases which gave 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), in which the pay gap between the two categories of officials at issue in those cases had been reduced or even, in certain cases, had gradually disappeared, it is not apparent from the file submitted to the Court in the present case that the mechanisms provided for by the legislation at issue in the main proceedings facilitate a gradual convergence of the treatment of civil servants who were disadvantaged by the previous system with that of civil servants who were treated more favourably, with the effect that the former category would, in the medium or indeed short term, ‘catch up’ and enjoy the advantages granted to the latter. Those mechanisms do not, consequently, have the effect of reducing, at the end of a given period, the pay gap which exists between civil servants treated more favourably and those disadvantaged by the previous system.
- 49 Therefore, even though the legislation at issue in the main proceedings is capable of protecting the acquired rights and legitimate expectations of civil servants treated more favourably by the previous system, it is not capable of establishing a non-discriminatory system for civil servants disadvantaged by the previous remuneration and advancement system, since it definitively maintains the discrimination based on age introduced by the previous system with regard to the latter category of civil servants.
- 50 It follows from all the foregoing that the answer to the first question is that Articles 1, 2 and 6 of Directive 2000/78, read in conjunction with Article 21 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which entered into force retroactively, and which, for the purpose of putting a stop to discrimination on grounds of age,

provides for the transfer of currently employed civil servants to a new remuneration and advancement system under which the initial classification of those civil servants is determined on the basis of the last salary they received under the previous system.

The second question

- 51 The second question referred concerns Article 17 of Directive 2000/78.
- 52 It should be recalled that, under Article 17 of Directive 2000/78, the Member States are to lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to that directive and take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, are to be effective, proportionate and dissuasive.
- 53 It is clear from the Court's case-law that the purpose of that article is to require Member States to provide for rules on sanctions in respect of all infringements of national provisions adopted for the purposes of transposing that directive (see, to that effect, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 61).
- 54 It is not apparent from the information before the Court that infringements of national provisions adopted for the purposes of transposing that directive are at issue in the case in the main proceedings.
- 55 The interpretation of Article 17 of Directive 2000/78 is therefore not necessary for the purposes of the outcome of the dispute in the main proceedings.
- 56 In accordance with the power, recognised by the Court's settled case-law and in particular by the judgment of 21 September 2017, *Beshkov* (C-171/16, EU:C:2017:710, paragraph 33 and the case-law cited), it is appropriate to reformulate the second question as seeking, in essence, to establish whether Article 47 of the Charter and Article 9 of Directive 2000/78 must be interpreted as precluding national legislation which, in a situation such as that at issue in the main proceedings, reduces the scope of the review which national courts are entitled to conduct, by excluding questions concerning the basis of the 'transition amount' calculated according to the rules of the previous remuneration and advancement system.
- 57 In that connection, it should be borne in mind that it is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law and that the applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter (see, to that effect, judgments of 30 April 2014, *Pfleger*, C-390/12, EU:C:2014:281, paragraph 33 and the case-law cited, and of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 49).
- 58 In the present case, it is apparent from Paragraph 169c(2c) of the amended Law on the remuneration of civil servants that it implements, in Austrian law, Directive 2000/78, for the purposes of Article 51 of the Charter, with the effect that the Austrian legislature was required to respect the fundamental rights guaranteed in Article 47 thereof, and more specifically the right of individuals to enjoy effective judicial protection of the prerogatives which EU law confers on them (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 49).
- 59 That said, it should be observed that, under the first paragraph of Article 47 of the Charter, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

- 60 In order to ensure observance of that fundamental right within the European Union, the second subparagraph of Article 19(1) TEU lays down that Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.
- 61 The right to an effective remedy is reaffirmed by Directive 2000/78 itself, Article 9 of which provides that Member States must ensure that all persons who consider themselves wronged by discrimination are able to assert their rights (see, to that effect, judgment of 11 November 2014, *Schmitzer*, C-530/13, EU:C:2014:2359, paragraph 49).
- 62 It follows that compliance with the principle of equality requires, so far as concerns persons who have been the subject of discrimination on grounds of age, that effective judicial protection of their right to equal treatment be guaranteed.
- 63 In the present case, as the Advocate General notes in point 74 of his Opinion, in the context of the new Austrian remuneration and advancement system, 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 civil servants concerned, is very narrow. That review may cover only inaccuracies resulting from the incorrect inputting of the relevant data, and not any irregularity in the calculation of the salary on which that amount is based, since the transition amount is thus determined on the basis of the salary as it was fixed, in principle and in amount, under the previous remuneration and advancement system.
- 64 In those circumstances, if a civil servant who was disadvantaged by the previous remuneration and advancement system cannot challenge the discriminatory effects of the ‘transition amount’, he will not be in a position to enforce all the rights that he derives from the principle of equal treatment, which is also guaranteed by Directive 2000/78, in breach of Article 47 of the Charter. The fact that he can bring proceedings in respect of the new remuneration and advancement system in its entirety does not invalidate that finding.
- 65 Thus, a civil servant who has suffered discrimination on grounds of age must be able to rely on Article 2 of Directive 2000/78 in order to challenge the discriminatory effects of the arrangements for his transfer to the new remuneration and advancement system.
- 66 In the light of the foregoing, the answer to the second question is that Article 47 of the Charter and Article 9 of Directive 2000/78 must be interpreted as precluding national legislation which, in a situation such as that at issue in the main proceedings, reduces the scope of the review which national courts are entitled to conduct, by excluding questions concerning the basis of the ‘transition amount’ calculated according to the rules of the previous remuneration and advancement system.

The third question

- 67 By its third question, the referring court is asking, in essence, whether the principle of the primacy of EU law must be interpreted as meaning that when national legislation, such as that at issue in the main proceedings, disregards the principle of non-discrimination on grounds of age and Article 47 of the Charter, it requires that the situation of currently employed civil servants who have been subjected to such discrimination on grounds of age be examined again, when the mechanism for the transfer to the new remuneration and advancement system is applied, and that those civil servants be transferred to that new system without discrimination.
- 68 In that connection, it should be noted that, according to the Court’s settled case-law, it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision can

be interpreted in conformity with Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 74).

- 69 If it is not possible to construe and apply the national legislation in conformity with the requirements of Directive 2000/78, it should also be borne in mind that, by reason of the principle of the primacy of EU law, which extends also to the principle of non-discrimination on grounds of age, conflicting national legislation which falls within the scope of EU law must be disapplied (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 89).
- 70 It is also the Court's settled case-law that, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned (see, to that effect, judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 79 and the case-law cited).
- 71 In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category. That obligation persists regardless of whether or not the national court has been granted competence under national law to do so (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 80 and the case-law cited).
- 72 Nevertheless, such an approach is intended to apply only if there is a valid point of reference (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 81 and the case-law cited).
- 73 In the present case, first, it should be recalled in the context of the answer to the first question that, in the judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359), the Court has previously held that the rules of the previous remuneration and advancement system and, more specifically, those which, in order to put an end to discrimination on the grounds of age with regard to civil servants, take into account periods of study and service completed before the age of 18 but which, at the same time, introduce, only to those civil servants who suffer such discrimination, a three-year extension of the period required to progress from the first to the second incremental step in each job category and each salary group, maintain direct discrimination on the grounds of age, for the purposes of Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78.
- 74 Second, the remuneration and advancement rules applicable to civil servants who are more favourably treated are those which would allow civil servants disadvantaged under the previous system to progress through the grades without any discrimination.
- 75 Accordingly, for as long as measures reinstating equal treatment have not been adopted, its reinstatement, in a case such as that at issue in the main proceedings, involves granting civil servants disadvantaged by the previous remuneration and advancement system the same benefits as those enjoyed by the civil servants treated more favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale. (See, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 48).

- 76 It also follows that a civil servant disadvantaged by the previous remuneration and advancement system is entitled to obtain payment, by his employer, of compensation in the sum of the difference between the amount of remuneration that the civil servant concerned ought to have received had he not been treated in a discriminatory manner and the amount of the remuneration which he in fact received.
- 77 It should be borne in mind that the considerations set out in paragraphs 75 and 76 of the present judgment are applicable only until measures reinstating equal treatment have been adopted by the national legislature (see, to that effect, judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 87).
- 78 Although Member States are obliged, in accordance with Article 16 of Directive 2000/78, to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished, that article does not require Member States to adopt specific measures to be taken in the event of a breach of the prohibition of discrimination but leaves them free to choose, from among the different solutions suitable for achieving its intended objective, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 88).
- 79 In the light of the foregoing, the answer to the third question is that in a situation where national provisions cannot be interpreted in a manner which is consistent with Directive 2000/78, the national court is obliged, within the scope of its powers, to guarantee the legal protection conferred on individuals by that directive and to guarantee that that protection is fully effective, by disapplying, if need be, any contrary provision of national law. EU law must be interpreted as meaning that where there has been a finding of discrimination which is contrary to EU law, and for as long as measures reinstating equal treatment have not been adopted, the reinstatement of equal treatment, in a case such as that at issue in the main proceedings, involves granting civil servants disadvantaged by the previous remuneration and advancement system the same benefits as those enjoyed by the civil servants treated more favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale and, accordingly, the award of financial compensation to those civil servants discriminated against in the sum of the difference between the amount of remuneration that the civil servant concerned ought to have received had he not been treated in a discriminatory manner and the remuneration which he in fact received.

The fourth question

- 80 In view of the answer to the first and second questions, there is no need to answer the fourth question.

Costs

- 81 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- Articles 1, 2 and 6 of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, read in conjunction with Article 21 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which entered into force retroactively, and which, for the purpose of putting a stop to discrimination on grounds of age, provides for the transfer of currently employed civil**

servants to a new remuneration and advancement system under which the initial classification of those civil servants is determined on the basis of the last salary they received under the previous system.

2. Article 47 of the Charter of Fundamental Rights of the European Union and Article 9 of Directive 2000/78 must be interpreted as precluding national legislation which, in a situation such as that at issue in the main proceedings, reduces the scope of the review which national courts are entitled to conduct, by excluding questions concerning the basis of the ‘transition amount’ calculated according to the rules of the previous remuneration and advancement system.
3. In a situation where national provisions cannot be interpreted in a manner which is consistent with Directive 2000/78, the national court is obliged, within the scope of its powers, to guarantee the legal protection conferred on individuals by that directive and to guarantee that that protection is fully effective, by disapplying, if need be, any contrary provision of national law. EU law must be interpreted as meaning that where there has been a finding of discrimination which is contrary to EU law, and for as long as measures reinstating equal treatment have not been adopted, the reinstatement of equal treatment, in a case such as that at issue in the main proceedings, involves granting civil servants disadvantaged by the previous remuneration and advancement system the same benefits as those enjoyed by the civil servants treated more favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale and, accordingly, the award of financial compensation to those civil servants discriminated against in the sum of the difference between the amount of remuneration that the civil servant concerned ought to have received had he not been treated in a discriminatory manner and the remuneration which he in fact received.

[Signatures]