



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 25 November 2015¹

Case C-441/14

Dansk Industri (DI), acting on behalf of Ajos A/S

v

Estate of Karsten Eigil Rasmussen

(Request for a preliminary ruling

from the Højesteret (Supreme Court, Denmark))

(Request for a preliminary ruling — Social policy — Directive 2000/78/EC — Principle of non-discrimination on grounds of age — Principles of legal certainty and of the protection of legitimate expectations — Dispute between individuals — Role of the national courts — Obligation to interpret national law in conformity with EU law — Interpretation contra legem)

1. This request for a preliminary ruling concerns the interpretation of the principles of non-discrimination on grounds of age, legal certainty and the protection of legitimate expectations.
2. It has arisen after the Court delivered its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), in which it held that Articles 2 and 6(1) of Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation² must be interpreted as precluding national legislation pursuant to which workers eligible for an old-age pension from their employer under a pension scheme they have joined before attaining the age of 50 years may not, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment.
3. The dispute which gave rise to that judgment was between an employee and a public-sector employer. In the present case the dispute is between two private persons, who disagree on the matter of the payment of a severance allowance. Consequently, the Court is once again asked to address the issue of how EU law is to be applied by national courts in the context of disputes between private persons.
4. The dispute in the present case is between Dansk Industri (DI), acting on behalf of Ajos A/S,³ and the legal heirs of Mr Rasmussen and it concerns Ajos's refusal to pay Mr Rasmussen a severance allowance.
5. In this Opinion I shall set out the reasons for which, in the context of the present case, it is for the national court before which a dispute between individuals falling within the scope of Directive 2000/78 has been brought, when applying provisions of national law, to interpret those provisions in such a way that they can be applied in a manner which is consistent with the wording and objective of that

¹ — Original language: French.

² — OJ 2000 L 303, p. 16.

³ — Hereafter 'Ajos'.

directive. I shall also explain why I believe that the existence of national case-law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's fulfilment of its obligation to interpret national law in conformity with EU law. I shall also suggest that, in circumstances such as those of the case in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.

I – Legal framework

A – Directive 2000/78

6. According to Article 1 thereof, the purpose of Directive 2000/78 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.

7. Article 2 of the directive states:

'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;

...'

8. Article 6 of the directive is worded as follows:

'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;

...'

B – *Danish law*

9. Paragraph 2a of the Law on salaried employees (Lov om retsforholdet mellem arbejdsgivere og funktionærer (funktionærloven)) contains the following provisions on severance allowances:

‘1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months’ salary.

2. The provisions of subparagraph (1) shall not apply if the employee will receive a State retirement pension on termination of the employment relationship.^[4]

3. No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching 50 years of age.

...’

10. The Højesteret (Supreme Court) states that the Kingdom of Denmark transposed Directive 2000/78 by adopting Law No 1417 amending the Law on the principle of non-discrimination on the labour market (Lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.) of 22 December 2004.⁵

11. The national court also indicates that, since the introduction in 1971 of Article 2a of the Law on salaried employees, it has given a number of rulings on the interpretation of Article 2a(3), in particular, following the amendment of the anti-discrimination law in 2004. In a judgment handed down on 17 January 2014,⁶ in which it expressed its position on the consequences of the Court’s judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) for the application by public-sector employers of Article 2a(3), the national court made the following statement with regard to the case-law on that provision and the consequences of the Court of Justice’s ruling:

‘In the case-law (most recently, the judgment of the Supreme Court published in UfR 2008.1892), Article 2a(3) of the Law on salaried employees has consistently been interpreted as meaning that an employee is not entitled to a severance allowance if he is entitled to an old-age pension ... regardless of whether or not he has temporarily waived his right to that pension in order to continue with his career. The legislative provision in question was not amended following the judgment in *Ingeniørforeningen i Danmark* ((C-499/08, EU:C:2010:600)). However, following that judgment, it can no longer be applied by public-sector employers where the employee demonstrates an intention temporarily to waive his right to an old-age pension in order to continue with his career.’

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

12. Mr Rasmussen was dismissed from Ajos and his employment relationship terminated at the end of June 2009. Having been with the company since 1 June 1984, he was, in principle, entitled to a severance allowance equal to three months’ salary, pursuant to Article 2a(1) of the Law on salaried employees. However, since he had reached 60 years of age on the date of his departure and was

4 — For an interpretation by the Court of Directive 2000/78 in relation to Article 2a(2) of the Law on salaried employees, see the judgment in *Ingeniørforeningen i Danmark* (C-515/13, EU:C:2015:115).

5 — Hereafter ‘the anti-discrimination law’.

6 — Case 96/2013 e.a. (UfR 2014.1119).

entitled to an old-age pension payable by the employer under a scheme which he had joined before reaching 50 years of age, Article 2a(3) of the said law, as interpreted in consistent national case-law, barred his entitlement to the severance allowance, even though he remained on the employment market after his departure.

13. In March 2012, the Dansk Formands Forening brought an action on Mr Rasmussen's behalf against Ajos claiming the payment of a severance allowance equal to three months' salary as provided for in Article 2a(1) of the Law on salaried employees. The Dansk Formands Forening relied in this connection on the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600).

14. On 14 January 2014, the Sø- og Handelsretten (Maritime and Commercial Court) upheld the claim brought by the legal heirs of Mr Rasmussen, since deceased, for payment of the severance allowance. That court held that it was clear from the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) that Article 2a(3) of the Law on salaried employees was contrary to Directive 2000/78 and that the previous national interpretation of that provision was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.

15. Ajos brought an appeal against that judgment before the Højesteret (Supreme Court). In support of its appeal, it argues that any interpretation of Article 2a(3) of the Law on salaried employees that was consistent with the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) would be *contra legem*. It also argues that the application of a rule as clear and unambiguous as Article 2a(3) of the Law on salaried employees could not be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age without jeopardising the principles of legal certainty and the protection of legitimate expectations.

16. The legal heirs of Mr Rasmussen maintain their claim for the payment of a severance allowance pursuant to Article 2a(1) of the Law on salaried employees and claim compensation pursuant to Article 7 of the anti-discrimination law.

17. In its order for reference, the Højesteret points out that it is apparent from the judgment in *Dominguez* (C-282/10, EU:C:2012:33) that, in relationships between private persons, it is not possible to give direct effect to the provisions of a directive. In the context of a dispute between private persons, any conflict between a provision of domestic law and a directive must be resolved by interpreting the provision of domestic law in conformity with EU law. However, there are certain limits on the principle of consistent interpretation, and it cannot serve as the basis for an interpretation of domestic law *contra legem*. In the present case, in accordance with consistent national case-law, interpreting Article 2a(3) of the Law on salaried employees in a manner consistent with EU law would be *contra legem*.

18. According to the Højesteret, it thus becomes necessary to examine whether a general principle of EU law, such as the principle prohibiting discrimination on grounds of age, may be invoked against a private-sector employer in order to compel that employer to pay a severance allowance provided for under Danish law even when, under Danish law, the employer is relieved of any such obligation. The present case thus also raises the question of the extent to which an unwritten principle of EU law can prevent a private party from relying on a provision of national law.

19. In order to address these questions, the national court regards it as necessary to know whether the principle prohibiting discrimination on grounds of age has the same content and scope in this regard as Directive 2000/78 or whether the directive affords broader protection against discrimination on grounds of age than the aforementioned principle.

20. The national court also queries whether the principle prohibiting discrimination on grounds of age may, as appears from the judgments in *Mangold* (C-144/04, EU:C:2005:709) and *Kücükdeveci* (C-555/07, EU:C:2010:21), be directly applied in relationships between private persons and how the direct application of that principle is to be weighed against the principle of legal certainty and its corollary, the principle of the protection of legitimate interests.

21. The national court also questions whether, in a situation such as that in the case in the main proceedings, EU law permits a national court to weigh the principle prohibiting discrimination on grounds of age against the principles of legal certainty and the protection of legitimate interests and to conclude that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age, such that an employer would, in accordance with national law, be relieved of its obligation to pay a severance allowance.

22. In this connection, the national court also questions whether the fact that employees can, in appropriate cases, claim compensation from the Danish State on account of the incompatibility of Danish law with EU law may be taken into account when that balancing exercise is carried out.

23. It was in those circumstances that the Højesteret decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Does the general principle of EU law prohibiting discrimination on grounds of age preclude legislation, such as the Danish legislation, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching 50 years of age, regardless of whether the employee chooses to remain on the employment market or take his retirement?
- 2) Is it consistent with EU law for a Danish court hearing an action in which an employee seeks from a private-sector employer the payment of a severance allowance which, under the Danish law described in question 1, the employer is not bound to pay, even though that is contrary to the principle prohibiting discrimination on grounds of old age, to weigh that principle and the issue of its direct effect against the principle of legal certainty and the related principle of the protection of legitimate expectations and to conclude that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age, such that the employer would, in accordance with national law, be relieved of its obligation to pay the severance allowance and, in order to determine whether such a balancing exercise may be carried out, is it necessary to take into consideration the fact that the employee may, in appropriate cases, claim compensation from the Danish State on account of the incompatibility of Danish law with EU law?’

III – My analysis

24. Before proceeding to analyse the questions referred by the national court, it is appropriate that I set out the Court’s findings in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600).

25. In that case, the Court was called upon to determine whether Articles 2 and 6(1) of Directive 2000/78 were to be interpreted as precluding national legislation pursuant to which employees who are eligible for an old-age pension from their employer under a pension scheme which they joined before reaching 50 years of age cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment.

26. I would reiterate that, under Article 2a(1) of the Law on salaried employees, an employee that has been with the same company for an uninterrupted period of 12, 15 or 18 years is entitled to a severance allowance. By way of exception, Article 2a(3) of that law provides that, if the employee will, on termination of the employment relationship, receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching 50 years of age, the severance allowance is not payable.

27. I would note that, in its presentation of the Danish legislation, the Court mentioned a clarification offered by the Vestre Landsret (Western Regional Court): ‘according to settled national case-law, there is no entitlement to a severance allowance where a private pension scheme to which the employer has contributed allows payment of an old-age pension on termination of the employment relationship, even if the employee does not wish to exercise his right to retirement’.⁷

28. The Court of Justice found that the national legislation at issue provided for a difference in treatment based directly on grounds of age for the purposes of Article 1 of Directive 2000/78 in conjunction with Article 2(2)(a) thereof.⁸ It considered that the aim of the severance allowance of protecting employees with many years of service in an undertaking and helping them to find new employment could, in principle be regarded as justifying a difference in treatment on grounds of age.⁹

29. The Court also held that ‘[r]estricting the severance allowance to only those workers who, on termination of the employment relationship, are not entitled to an old-age pension to which their employer has contributed [did] not appear unreasonable in the light of the objective pursued by the legislature of providing increased protection for workers for whom it is very difficult to find new employment as a result of their length of service for an undertaking’.¹⁰ It added that ‘Article 2a(3) of the Law on salaried employees also [made] it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment’.¹¹ The Court concluded from that that the provision ‘[did] not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the legislature’.¹²

30. The Court then went on to ascertain whether the measure at issue went beyond what was necessary to attain the objective pursued by the legislature and drew the following distinction.

31. First, strictly on the basis of the wording of Article 2a(3) of the Law on salaried employees, the Court concluded that that provision, ‘in so far as it [excluded] from entitlement to the severance allowance workers who [would] receive, on termination of the employment relationship, an old-age pension from their employer, [did] not go beyond what [was] necessary to attain the objectives which it [pursued]’.¹³

32. Secondly, the Court took account of the clarification provided by the Vestre Landsret concerning the scope of Article 2a(3) of the Law on salaried employees as established in consistent national case-law, which treated those who would actually receive an old-age pension from their employer in the same way as those who were merely eligible for such a pension. It found, in that regard, that, ‘by not permitting payment of the severance allowance to workers who, although eligible for an old-age pension from their employer, none the less [wished] to waive their right to such a pension temporarily in order to continue with their career, Article 2a(3) of the Law on salaried employees

7 — Judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraph 9).

8 — Ibidem (paragraph 24).

9 — Ibidem (paragraph 31).

10 — Ibidem (paragraph 34).

11 — Idem.

12 — Judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraph 35).

13 — Ibidem (point 40).

unduly [prejudiced] the legitimate interests of workers in such a situation and thus [went] beyond what [was] necessary to attain the social policy aims pursued by that provision'.¹⁴ Therefore, the difference in treatment resulting from that provision could not, according to the Court, be justified under Article 6(1) of Directive 2000/78.¹⁵

33. In its observations, the Danish Government points out that the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) concerned an employment relationship between an employee and a public-sector employer, that is to say, a 'vertical' relationship. It infers from that that the Court gave no ruling in its judgment on the question whether, in the light of EU law, Article 2a(3) of the Law on salaried employees could, despite the fact that it could not apply to relationships between employees and public-sector employers, nevertheless continue to apply to purely 'horizontal' relationships between employees and private-sector employers.

34. In my view, it may be inferred in a general fashion from the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) that Article 2a(3) of the Law on salaried employees, as interpreted by the national courts, is incompatible with Articles 2 and 6(1) of Directive 2000/78. While the dispute which gave rise to that judgment was between an employee and a public-sector employer, it nevertheless follows from that judgment that the provision of national law in question quite simply cannot be applied to relationships between employees and employers, whether the relationship is governed by public law or by private law. The contrary view would result in restricting the scope of the Court's judgment to a single category of legal relationship, that is to say, relationships governed by public law.

35. Indeed, the interpretation of Directive 2000/78 which the Court gave in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) highlighted the reasons for which Article 2a(3) of the Law on salaried employees, as interpreted by the national courts, must be regarded as incompatible with that directive. Those reasons hold true regardless of the nature of the legal relationship at issue, whether it is governed by public law or by private law.

36. However, in the view of the referring court, giving effect to the solution identified by the Court in that judgment in disputes between private persons raises certain difficulties, and these difficulties led it to make the present request for a preliminary ruling.

37. According to the referring court, giving effect to that solution poses no problem where the employer is a public-sector body. In such a case, the inconsistency of Article 2a(3) of the Law on salaried employees with Directive 2000/78 may, in its view, be resolved by the employee's invoking the directive and relying on its provisions, provided that they appear to be unconditional and sufficiently precise, with the result that the application of Article 2a(3) of the Law on salaried employees may be precluded in specific cases.

38. The national court points out that, in relationships between private persons, on the other hand, the provisions of a directive may not be given direct effect. It states that, in such a situation, any inconsistency between a provision of national law and a directive may be resolved, in so far as is possible, by interpreting the provision of national law at issue in a manner consistent with the directive concerned, in such a way as to attenuate the apparent contradiction between the two. The national court states, however, that the principle of consistent interpretation is subject to certain limits and, in particular, that it cannot serve as the basis for a *contra legem* interpretation of national law.

¹⁴ — Ibidem (paragraph 47).

¹⁵ — Ibidem (paragraph 48).

39. According to the Højesteret, a limitation of that kind does present itself in this case and it is necessary, in accordance with the case-law in *Mangold* (C-144/04, EU:C:2005:709) and *Küçükdeveci* (C-555/07, EU:C:2010:21), to have recourse to the principle prohibiting discrimination on grounds of age in order to resolve the dispute between the two private parties to the main proceedings. Having recourse to that principle would then present the referring court with the problem of weighing the principle of non-discrimination against the principles of legal certainty and the protection of legitimate expectations.

40. The reasoning followed by the national court in formulating its questions appears to me to accord, at least in part, with the latest developments in the Court's case-law on the application of the principle prohibiting discrimination on grounds of age in disputes between private parties. Indeed, it is consistent with that case-law for recourse to be had to a general principle of law, given the Court's consistent refusal to extend the direct effect of directives 'horizontally'. I would recall in this connection that, in disputes between individuals, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual.¹⁶

41. Be that as it may, it is also clear from the case-law of the Court that directives are not entirely devoid of any effect in the context of disputes between individuals. The obligation upon national courts to interpret national law in conformity with the content and objectives of directives means that directives may have an indirect effect in such disputes.

42. With regard to the role of the national court when called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, the Court has held that 'it is for the national courts to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective'.¹⁷ Moreover, 'the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member State, including, for matters within their jurisdiction, the courts'.¹⁸

43. It follows that, 'when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them.'¹⁹

44. The obligation of consistent interpretation relates to the whole body of rules of national law,²⁰ including national case-law.²¹

16 — See, in particular, the judgment in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 37 and the case-law cited). See also, to that effect, the judgment in *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 36 and the case-law cited).

17 — See, in particular, the judgment in *Küçükdeveci* (C-555/07, EU:C:2010:21, paragraph 45 and the case-law cited).

18 — Ibid. (paragraph 47 and the case-law cited).

19 — See, in particular, the judgment in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 24 and the case-law cited).

20 — See, in particular, the judgment in *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 38 and the case-law cited).

21 — Judgment in *Centroteel* (C-456/98, EU:C:2000:402, paragraph 17).

45. The Court has also made clear that, ‘if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive at issue’.²²

46. The requirement to interpret national law in conformity with EU law thus requires ‘national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it’.²³

47. It is only when it proves impossible for the national courts to give effect to an interpretation of domestic law in conformity with Directive 2000/78 that the principle prohibiting discrimination on grounds of age becomes the rule of reference enabling the court to resolve disputes between individuals by neutralising the application of the domestic law that is inconsistent with EU law. This principle then acts as a palliative for the lack of horizontal direct effect of Directive 2000/78 and for the inability of national courts to interpret national law in conformity with that directive. I would also note that, in the most recent case-law, the Court has clearly emphasised the primary role which it intends to ascribe to the obligation to interpret national provisions in a manner consistent with EU law.²⁴

48. Before resorting to the principle prohibiting discrimination on grounds of age as the ultimate solution for resolving inconsistencies between national law and EU law, national courts must, therefore, duly ascertain that their national law is incapable of being interpreted in conformity with Directive 2000/78.

49. The Court has stated in this connection that the requirement to interpret national law in conformity with EU law is subject to certain limits. Thus, the obligation on a national court to refer to the content and purpose of a directive when interpreting and applying the relevant rules of domestic law ‘is limited by the general principles of law, particularly [that] of legal certainty ... and that obligation cannot serve as the basis for an interpretation of national law *contra legem*’.²⁵

50. Consequently, it is only where the Court recognises, on the basis of the observations submitted to it, that the national court has actually encountered such a limitation that it will proceed, as it did in its judgment in *Küçükdeveci* (C-555/07, EU:C:2010:21), to interpret the general principle of law which the provision of secondary law is intended to put into specific terms. In the event of a conflict between the principle and the national law, the Court will then indicate to the national court that the principle can be invoked in a dispute between individuals in order to preclude the application of the national provision which is contrary to EU law.

51. In the present case, the national court states that it cannot give an interpretation of national law in conformity with Directive 2000/78 other than one which is *contra legem*.

22 — See, in particular, the judgment in *Mono Car Styling* (C-12/08, EU:C:2009:466, paragraph 63 and the case-law cited).

23 — See, in particular, the judgment in *Dominguez* (C-282/10, EU:C:2012:33, paragraph 27 and the case-law cited).

24 — Ibidem (paragraph 23, in which the Court began by pointing out that ‘the question whether a national provision must be disapplied inasmuch as it conflicts with EU law arises only if no compatible interpretation of that provision proves possible’). See, on this subject, Simon, D., ‘La panacée de l’interprétation conforme: injection homéopathique ou thérapie palliative?’ in *De Rome à Lisbonne: les juridictions de l’Union européenne à la croisée des chemins — Mélanges en l’honneur de Paolo Mengozzi*, Bruylant, Brussels, p. 279. According to this author, ‘the Court is ever more clearly ascribing to this method of consistent interpretation a sort of technical priority over other implications of precedence’ (p. 298).

25 — See, in particular, the judgment in *Mono Car Styling* (C-12/08, EU:C:2009:466, paragraph 61 and the case-law cited). See also, to that effect, the judgment in *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 39 and the case-law cited).

52. Of course, in accordance with consistent case-law, the interpretation of domestic law is a task that falls exclusively to national courts.²⁶ It is therefore for that court to decide, ultimately, whether their domestic law can be interpreted in conformity with EU law.

53. Having said that, I take the view that, if it is apparent from the information provided to the Court with a request for a preliminary ruling that the only reason for which it is impossible to interpret a national provision in conformity with EU law is that national case-law exists which conflicts with EU law, it then falls to the Court of Justice to inform the national court whether or not it may take that factor into account. In other words, it falls squarely within the jurisdiction of the Court of Justice, in my opinion, for it to clarify the precise parameters of a limit on the obligation of consistent interpretation which it has itself identified, in this case the limit being the interpretation of national law *contra legem*. The spirit of cooperation between the Court of Justice and national courts which governs the preliminary ruling mechanism under Article 267 TFEU, the effectiveness of that procedure and the effective application of EU law thus demand that the Court of Justice indicate to the national court how it should proceed, in order to avoid improper reliance on the limit on the obligation of consistent interpretation represented by the *contra legem* interpretation of national law.

54. It is for that reason that I recommend that the Court should consider very carefully the reasons for which the referring court considers that it cannot give an interpretation of national law in conformity with Directive 2000/78.

55. I would recall in this connection that, as the referring court has expressly stated, it is clear from consistent national case-law, the most recent illustration of which is a judgment delivered on 17 January 2014,²⁷ that Article 2a(3) of the Law on salaried employees is interpreted as meaning that an employee is not entitled to a severance allowance if he is entitled to an old-age pension paid by the employer under a pension scheme which the employee joined before reaching 50 years of age, regardless of whether or not the employee has chosen to waive his right to that pension in order to continue with his career. The referring court considers that, in that context, any interpretation of Article 2a(3) of the Law on salaried employees that might render the provision consistent with Directive 2000/78, as interpreted by the Court of Justice in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), would be *contra legem*.

56. It is on the basis of that premiss that the national court then proceeded to focus its attention, in the formulation of its questions, on the effect of the principle prohibiting discrimination on grounds of age in disputes between individuals.

57. It is therefore necessary to ascertain whether the premiss thus adopted by the national court is valid.

58. In their observations, the legal heirs of Mr Rasmussen argue, primarily, that it is actually possible, in keeping with consistent interpretation, for Article 2a(3) of the Law on salaried employees to co-exist with the prohibition of discrimination on grounds of age laid down in Directive 2000/78.

59. The legal heirs of Mr Rasmussen state in this connection that, in the national case-law, Article 2a(3) of the Law on salaried employees has been interpreted in the sense that the words 'will receive' (*vil oppebære*) in fact mean 'can receive' (*kan oppebære*). Underlying that interpretation is the idea that it cannot depend solely on the decision of the dismissed employee either to activate, if he so wishes, his retirement pension and thus lose his entitlement to a severance allowance or to defer his retirement pension and thus preserve his entitlement to the severance allowance. The courts

26 — See, *inter alia*, the judgments in *Adeneler and Others* (C-212/04, EU:C:2006:443, paragraph 103) and *Wilson* (C-506/04, EU:C:2006:587, paragraph 34).

27 — See footnote 6 to this Opinion.

have therefore taken into consideration the presumed intention of the national legislature to take as an objective criterion the moment when liability to pay the severance allowance falls away as a result of the employee's entitlement to receive a retirement pension on termination of the employment relationship.

60. The legal heirs of Mr Rasmussen dispute the national court's conclusion that an interpretation of Article 2a(3) of the Law on salaried employees according to which that provision might be consistent with Directive 2000/78, as interpreted by the Court in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), would be *contra legem*, inasmuch as, in their view, such an interpretation in conformity with EU law could only be given in the context of the wording of Article 2a(3).

61. The legal heirs of Mr Rasmussen refer in this connection to the Opinion of Advocate General Kokott in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:248). In point 84 of that Opinion, after mentioning the rule that the national court alone has jurisdiction to interpret national law, Advocate General Kokott stated that 'it [seemed] to [her] to be perfectly possible to interpret [Article 2a(3)] in conformity with [Directive 2000/78]'. In support of that view, she pointed out that 'the current strict application of the derogatory provision contained in [Article 2a(3) was] based only on its interpretation by the Danish courts. Its wording ... could also be interpreted as meaning that it covers only persons who *will actually receive* their old-age pension, without necessarily also including persons who merely *may receive* an old-age pension'.

62. To precisely the same effect, the European Commission stated in its observations, albeit without discussing the solution in detail, that the interpretation which emerged from the national case-law did not necessarily follow from the wording of Article 2a(3) of the Law on salaried employees, inasmuch as the words 'will receive' could, it seemed, equally well be understood as meaning that the employee lost his entitlement to a severance allowance only if he actually exercised his right to receive an old-age pension.

63. Lastly, I would point out that, in the observations which it lodged in the case which gave rise to the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), the Danish Government itself appeared to take the view that it was not impossible to interpret Article 2a(3) of the Law on salaried employees in a way that was consistent with Directive 2000/78. It stated that, in the event that the Court should not agree with its view that its national law was compatible with the directive, 'the national court would then have to see whether, in the context of interpreting Article 2a(3) of the Law on salaried employees in conformity with [Directive 2000/78], it was able to achieve an outcome that fitted within the framework of the directive and avoid the necessity of declaring [that provision] inapplicable to relationships between public-sector employers and their employees'.²⁸

64. That suggestion appears to me to be particularly appropriate, since the technique of consistent interpretation makes it possible in the context of this case, as it did in the context of the case which gave rise to the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), to restrict the scope of Article 2a(3) of the Law on salaried employees to what is absolutely clear from the wording of that provision. The alternative solution of disapplying that provision entirely would not be appropriate, inasmuch as, in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), the Court merely pointed up the incompatibility with Directive 2000/78 of the interpretation which the national courts had given to Article 2a(3) of the Law on salaried employees.

65. As we have seen, it does not follow from the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) that the very wording of Article 2a(3) of the Law on salaried employees is inconsistent with Directive 2000/78. On the contrary, in that judgment, the Court acknowledged that the provision, read literally, could be justified by the objective of protecting employment. It was the extension of that

²⁸ — Paragraph 42.

rule in the case-law to employees who were merely entitled to receive an old-age pension, without ascertaining whether they actually did, that the Court regarded as being contrary to Directive 2000/78. By implication, the Court's reasoning also called into question the logical coherence of the provision of national law as interpreted by the national courts: why indeed should employees who defer their old-age pension in order to continue their careers be deprived of the benefit of a measure whose very purpose is to help them find employment?

66. Against that background, the implementation by the referring court of an interpretation of its national law that is in conformity with Directive 2000/78 is the most appropriate means of resolving the conflict between its national law and EU law, since it makes it possible to neutralise the meaning given in the national case-law to Article 2a(3) of the Law on salaried employees, which has proved to be inconsistent with the directive, and to give that provision of national law a meaning which not only accords with its wording but is also in conformity with the directive.

67. In this connection, it is important to circumscribe the situations in which a consistent interpretation is impossible and, more specifically, to define what *contra legem* interpretation actually means.

68. The Latin expression '*contra legem*' literally means 'against the law'. A *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the national provision at issue. In other words, a national court is confronted by the obstacle of *contra legem* interpretation when the clear, unequivocal wording of a provision of national law appears to be irreconcilable with the wording of a directive. The Court has acknowledged that *contra legem* interpretation represents a limit on the obligation of consistent interpretation, since it cannot require national courts to exercise their interpretative competence to such a point that they substitute for the legislative authority.

69. As we have seen, the referring court is very clearly not in that sort of situation. Indeed, were it to interpret Article 2a(3) of the Law on salaried employees in conformity with Directive 2000/78, that would in no way compel it to re-write that provision of national law. The national court would not, therefore, be making any incursion into the sphere of competence of the national legislature.

70. The implementation by the national court of an interpretation in conformity with EU law would merely require it to change its case-law so that the interpretation which the Court gave of Directive 2000/78 in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) is given full effect in the national legal system, not only in relationships between employers and employees that are governed by public law, but also in such relationships governed by private law.

71. By calling on the referring court to effect a change in its case-law the Court is in no way obliging it to overstep the bounds of its jurisdiction. It is, instead, reminding that court of the essential role it plays in '[providing] the legal protection which individuals derive from the rules of EU law and [ensuring] that those rules are fully effective'.²⁹ The Court will also be reminding the national court that 'the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, are binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts.'³⁰

29 — See, in particular, the judgment in *Küçükdeveci* (C-555/07, EU:C:2010:21, paragraph 45 and the case-law cited).

30 — Ibid. (paragraph 47 and the case-law cited).

72. An obstacle that is presented by the case-law is thus not comparable to an obstacle consisting in the existence of a provision of national law whose very wording is irreconcilable with a rule of EU law. In the latter case, the obstacle cannot be overcome by the national courts without their substituting themselves for the legislative authority and re-writing the provision in question.

73. I would add that to recognise the existence of national case-law that is contrary to EU law as an obstacle to the interpretation by national courts of a provision of national law in conformity with EU law would greatly diminish the potential of the technique of consistent interpretation in resolving conflicts between EU law and national law.

74. I also believe that, in a situation such as that in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate interests militates against the national court's giving effect to an interpretation of Article 2a(3) of the Law on salaried employees that is consistent with Directive 2000/78.

75. More specifically, the fact that a consistent interpretation of national law given by the referring court would result in an obligation upon the employer to pay the severance allowance which was the source of the dispute in the main proceedings does not alter my analysis.

76. Admittedly, it is clear from the case-law that the 'obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions'.³¹ However, that case-law concerns, first and foremost, the limits on the obligation of consistent interpretation in criminal matters³² and it should not, it seems to me, be understood as precluding an interpretation of national law in conformity with a directive which would result in imposing on an employer an obligation to pay a severance allowance such as that at issue in the main proceedings.

77. If it were to be construed strictly, the formulation that the 'obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed' would impose drastic limitations on the principle of interpretation of national law in accordance with EU directives.³³ I do not think, therefore, that that limitation on the obligation of consistent interpretation can apply outside the context of criminal proceedings, which indeed was the context in which the Court made that statement.³⁴

78. Moreover, in a situation such as that in the main proceedings, an obligation on the employer to pay a severance allowance would flow not from Directive 2000/78 but from the national law itself, which, as a result of consistent interpretation, would be given a scope of application commensurate with its wording. In other words, the situation is not one where consistent interpretation would result in imposing on an individual an obligation that is laid down by a directive but for which there is no basis in existing national law. It is the provision of national law, expunged of its meaning contrary to EU law, that would place an obligation on the employer to pay a severance allowance.

31 — See, in particular, the judgment in *Arcaro* (C-168/95, EU:C:1996:363, paragraph 42 and the case-law cited).

32 — See, in particular, the judgment in *Caronna* (C-7/11, EU:C:2012:396, paragraphs 51 and 52 and the case-law cited).

33 — See the Opinion of Advocate General Jacobs in *Centrosteeel* (C-456/98, EU:C:2000:137, point 34).

34 — *Idem.* See, in particular, on this point, Lenaerts, K., and Corthaut, T., 'Of birds and hedges: the role of primacy in invoking norms of EU law' in *European Law Review*, 2006, vol. 31, no 3, p. 287, especially pp. 295 and 296, and the commentary on the judgment in *Pfeiffer and Others* (C-397/01 to C-403/01, EU:C:2004:584) by Prechal, S. in *Common Market Law Review*, 2005, vol. 42, p. 1445, especially paragraph 6.4.

79. Lastly, it should be borne in mind that, in accordance with settled case-law, '[t]he interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines, where required, the meaning and scope of that rule as it must be, or ought to have been understood and applied from the time of its entry into force. In other words, a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force.'³⁵ According to the Court, '[i]t follows that the rule as thus interpreted may, and must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the competent courts are satisfied'.³⁶

80. Moreover, the Court has consistently held that 'it is only exceptionally that, in application of a general principle of legal certainty which is inherent in the ... legal order [of the European Union], [it] may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith'.³⁷ In addition, 'as the Court has consistently held, such a restriction may be allowed only in the actual judgment ruling upon the interpretation sought'.³⁸ Indeed, according to the Court, 'there must necessarily be a single occasion when a decision is made on the temporal effects of the requested interpretation which the Court gives of a provision of [European Union] law. In that regard, the principle that a restriction may be allowed only in the actual judgment ruling upon that interpretation guarantees the equal treatment of the Member States and of other persons subject to [European Union] law under that law, fulfilling, at the same time, the requirements arising from the principle of legal certainty'.³⁹

81. However, in its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), the Court did not restrict the temporal effects of the interpretation which it gave of Directive 2000/78 in relation to Article 2a(3) of the Law on salaried employees. In the context of the present request for a preliminary ruling, the Court is not called upon to give a fresh ruling on that provision's consistency with Directive 2000/78; it is simply asked to clarify how an inconsistency between EU law and national law is to be resolved in a dispute between individuals. The Court could not therefore, in the context of this request for a preliminary ruling, restrict the temporal effects of its judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) even if it had been asked to do so, which it has not.

82. If the referring court were authorised, in the circumstances of the present case, to limit its obligation of consistent interpretation on the ground of the principle of legal certainty, that would amount to limiting the temporal effects of the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600), even though the Court had not taken the view that that principle justified such a limitation. However, as may be seen from the abovementioned case-law on the effects *ratione temporis* of judgments given on references for a preliminary ruling, it is for the Court of Justice alone to decide upon any temporal restrictions to be imposed on the interpretation which it provides.⁴⁰

83. It follows from the foregoing reasoning that it is for the national court before which a dispute between individuals falling within the scope of Directive 2000/78 has been brought, when applying provisions of national law, to interpret those provisions in such a way that they can be applied in a manner which is consistent with the wording and objective of that directive. The existence of national case-law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's

35 — See, in particular, the judgment in *Pohl* (C-429/12, EU:C:2014:12, paragraph 30 and the case-law cited).

36 — See, in particular, the judgment in *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 34 and the case-law cited).

37 — Ibidem (paragraph 35 and the case-law cited).

38 — Ibidem (paragraph 36 and the case-law cited).

39 — Ibidem (paragraph 37).

40 — See the judgment in *Barra and Others* (309/85, EU:C:1988:42, paragraph 13).

fulfilment of its obligation to interpret national law in conformity with EU law. Moreover, in circumstances such as those of the case in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.

IV – Conclusion

84. In the light of the foregoing considerations, I propose that the Court should answer the questions raised by the Højesteret (Supreme Court) as follows:

It is for the national court before which a dispute between individuals falling within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation has been brought, when applying provisions of national law, to interpret those provisions in such a way that they can be applied in a manner which is consistent with the wording and objective of that directive. The existence of national case-law which is inconsistent with Directive 2000/78 presents no obstacle to the national court's fulfilment of its obligation to interpret national law in conformity with EU law. Moreover, in circumstances such as those of the case in the main proceedings, neither the principle of legal certainty nor the principle of the protection of legitimate expectations militates against the fulfilment of that obligation.