OPINION OF ADVOCATE GENERAL CRUZ VILLALÓN
delivered on 19 May 2011 [1]

I — Introduction

1. By this reference for a preliminary ruling, the Bundesarbeitsgericht (Federal Labour Court), in essence, asks the Court of Justice whether a collective agreement which provides that, for the purposes of ensuring air safety, the employment relationship of airline pilots terminates at the age of 60 contravenes Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2] or the general principle prohibiting discrimination on grounds of age.

2. Thus, this case presents an opportunity for the Court of Justice to develop its case-law on the principle prohibiting discrimination on grounds of age in the context of employment relationship, [3] in connection, once again, with a clause in a collective agreement stipulating that the employment relationship is to be terminated once the worker reaches a certain age approaching that of retirement. [4] More specifically, the task at hand is to take the case-law forward from the point at which the Court of Justice left it in its recent judgment in *Rosenbladt*. There are essentially two

1 — Original language: Spanish.

2 — OJ 2000 L 303, p. 16.

3 — Suffice it to say that this case-law, starting with Case C-144/04 *Mangold* [2005] ECR I-9981 and restated in a substantial number of subsequent cases, has significantly reinforced this type of prohibition on discrimination, whilst emphasising its specific nature. For studies of discrimination on grounds of age in this area there is an extensive bibliography including: Sprenger, M., *Das arbeitsrechtliche Verbot der Alterdiskriminierung nach der Richtlinie 2000/78/EG,* Hartung-Gorre Verlag, Konstanz, 2006; Temming, F., *Alterdiskriminierung im Arbeitsleben,* Verlag C. H. Beck, Munich, 2008; ten Bokum, N., Flanagan, T., Sands, R. and von Steinau-Steinruck, R (Eds.), *Age Discrimination Law in Europe,* Wolters Kluwer, 2009; Sargeant, M. (Ed.), *The Law on Age Discrimination in the EU,* Kluwer Law International, 2008; Schiek, D., Waddington, L. and Bell, M. (Eds.), *Non discrimination Law,* Hart Publishing, 2007. See also Nogueira Gustavino, M., 'Extinción del contrato de trabajo y discriminación por razón de edad' in *Tratado de jubilación. Homenaje al Profesor Luis Enrique de la Villa Gil con motivo de su jubilación*, López Cumbre (Ed.), Iustel, 2007.

4 — The term 'retirement age' is used hereafter to refer to the age at which a worker normally stops working and is entitled to start receiving a pension. For cases concerning those approaching retirement, see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531; Case C-388/07 *Age Concern England* [2009] ECR I-1569, 'Age Concern'; Case C-341/08 *Petersen* [2010] ECR I-47; Case C-45/09 *Rosenbladt* [2010] ECR I-9391; and Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-11869.

factors which distinguish this case. First, that the employment relationship is not terminated at the age of 65 (the age which, without going into further detail at this stage, the Court of Justice has generally upheld), but at the significantly earlier age of 60; and second, that the situation before the Court of Justice on this occasion involves a profession, that of pilot, [5] which has, so to speak, a 'sell-by date' (of 65 years of age, according to the international rules). Taking as a starting point this peculiarity of the profession of pilot, I shall suggest to the Court of Justice that the protection of collective bargaining is a legitimate social policy objective, within the meaning of Article 6(1) of Directive 2000/78. Notwithstanding this, a review of the temporal scope of the actual provision at issue from a proportionality point of view will persuade me to suggest that it is incompatible with EU law.

II — Legal framework

A — *International regulation*

3. On 15 April 2003, the Joint Aviation Authorities [6] adopted the Joint Aviation Requirements – Flight Crew Licensing 1.060a ('JAR-FCL 1.060a'), which contain detailed provisions on the restrictions applicable to holders of pilot's licences aged over 60. In particular, these state that between the ages of 60 and 64, the holder of a pilot's licence cannot act as a pilot of aircraft engaged in commercial air transport operations except as a member of a multi-pilot crew where the other pilots have not yet reached the age of 60. Moreover, the holder of a pilot's licence aged over 65 cannot act as a pilot of an aircraft engaged in commercial air transport operations.

4. On 29 April 2003, those requirements were published by the Federal Ministry of Transport, Construction and Housing in the *Bundesanzeiger* No 80a.

5 — Commercial airline pilots, to be precise, although for the sake of brevity I shall refer to 'pilots'.

6 — An organ of the European Civil Aviation Conference representing the civil aviation regulatory authorities of a number of European States, including Germany.

B — *EU law*

1. The Charter of Fundamental Rights of the European Union

5. Article 21(1) of the Charter provides as follows: 'Any discrimination based on any ground such as … age … shall be prohibited.'

6. Article 28 of the Charter provides as follows:

'Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements …'

2. Directive 2000/78/EC

7. Article 1 of Directive 2000/78 states that the purpose of the 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.'

8. Article 2(5) provides that the directive 'shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

9. Article 4(1) provides that, notwithstanding Article 2(1) and (2) (which contain definitions of the principle of equal treatment and of direct and indirect discrimination), 'Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

10. Finally, Article 6, which deals specifically with justification for differences of treatment on grounds of age, provides as follows (Article 6(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.'

C — *German law*

1. Law on part-time working and fixed-term contracts

11. Paragraph 14 of the Law on part-time working and fixed-term contracts (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) of 21 December 2000 [7] provides that it is lawful to enter into a fixed-term employment contract if there are objective grounds for doing so.

2. General Law on equal treatment

12. Directive 2000/78 was incorporated into German law with the passing of the General Law on equal treatment of 14 August 2006 (Allgemeines Gleichbehandlungsgesetz; 'AGG'). [8] Paragraphs 8 and 10 of that law broadly replicate Articles 4(1) and 6(1) respectively of Directive 2000/78.

7 — BGBl. 2000 I, p. 1966.
8 — BGBl. 2006 I, p. 1897.

3. Provisions concerning time-related restrictions on pilot's licences

13. Paragraph 20(2) of the Rules on the authorisation of aviation operations (Luftverkehrs-Zulassungs-Ordnung), [9] cross-refers to the regulation on aviation staff (Verordnung über Luftfahrtpersonal) for matters concerning the regulation of all conditions relating to pilots' licences. At the same time it provides that JAR-FCL 1.060a is to apply to private pilots, professional pilots and airline pilots operating in multi-person crews.

14. Paragraph 4 of the First implementing regulation concerning the regulation on aviation staff (Durchführungsverordnung zur Verordnung über Luftfahrtpersonal; '1st DV LuftPersV'), of 15 April 2003, [10] provides that the holder of a commercial or airline pilot's licence issued in Germany or of a licence obtained pursuant to Paragraph 46(5) of the 1st DV LuftPers V who is over 60 may exercise the rights conferred by that licence, until he is over 65, in aircraft with a crew of at least one pilot engaged in the commercial transportation of passengers, mail and/or freight, within the limits of the territory of the Federal Republic of Germany.

4. The collective agreement

15. Finally, the national provision directly at issue in this case is Clause 19(1) of general collective agreement no 5a, which relates to members of Deutsche Lufthansa AG flight crews ('collective agreement no 5a'), by which the employment relationships of the parties in the main proceedings are governed. The version of Clause 19 dated 14 January 2005 stated as follows: 'The employment relationship shall cease, without notice of termination, at the end of the month in which the employee's 60th birthday falls'. Thereafter, pilots affected by this provision are entitled to a transitional allowance. [11]

16. The order for reference states that at other airlines within the Lufthansa Group, aircraft pilots are employed up to the age of 65.

III — The main proceedings and the question referred for a preliminary ruling

17. Messrs Prigge, Fromm and Lambach brought an action in the Arbeitsgericht

9 — BGBl. 2008 I, p. 1229.

10 — Bundesanzeiger No 82b of 3 May 2003.

11 — According to the information made available at the hearing, the employer would pay this compensatory allowance only until the employee reaches the age of 63, at which point pilots would be entitled to the relevant retirement pension.

(Labour Court), Frankfurt am Main against the airline Deutsche Lufthansa AG ('Deutsche Lufthansa'), for which they worked as pilots and captains, in respect of the decision of Deutsche Lufthansa to regard their employment relationships as terminated when they reached the maximum age of 60 laid down in general collective agreement no 5a, which applied in their case. The applicants consider that this decision constitutes discrimination on grounds of age, contrary to Directive 2000/78 and to the AGG.

18. The Arbeitsgericht dismissed the case and the Landesarbeitsgericht (Higher Labour Court) also dismissed it on appeal. The applicants have lodged an appeal on a point of law to the Bundesarbeitsgericht against the judgment on appeal.

19. In view of the fact that the outcome of the case depends on the interpretation of various articles of Directive 2000/78 and the general principle of non-discrimination on grounds of age, the Bundesarbeitsgericht has referred the following question to the Court of Justice for a preliminary ruling:

'Must Article 2(5), Article 4(1) and/or Article 6(1), first sentence, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and/or the general Community-law principle which prohibits discrimination on grounds of age be interpreted as precluding rules of national law which recognise an age-limit of 60 for pilots established by collective agreement for the purposes of air safety?'

IV — The procedure before the Court of Justice

20. The reference for a preliminary ruling was lodged at the Registry of the Court on 18 November 2009.

21. The Federal Republic of Germany, Ireland, the Commission and, in a joint statement, the three appellants in the main proceedings (Messrs Prigge, Fromm and Lambach) have submitted written observations.

22. At the hearing on 8 March 2011, the representatives of Messrs Prigge, Fromm and Lambach, the Commission, the Federal Republic of Germany and Ireland appeared and presented oral argument.

V — Preliminary observations

23. Before going on to reply to the question referred by the Bundesarbeitsgericht, it seems appropriate to introduce some thoughts concerning, first of all, the wording

of the question itself and then on the prohibition of discrimination which is at issue here and the impact of the right of collective bargaining on the case.

A — *The wording of the question*

24. First, it is worth commenting on the two points of EU law whose interpretation is sought in the light of the provision of national law: namely, and in this order, a piece of secondary legislation, Directive 2000/78, and a general principle of EU law, that of non-discrimination on grounds of age, which constitutes the basis of the directive and which the directive, for its part, 'embodies'.

25. To start with the higher-ranking point, it should first of all be stated that the prohibition of discrimination on grounds of age, especially in the area of employment, is indeed a general principle of EU law. This has been clear since at least 2005, when the Court so held in *Mangold*, and is not in any way in dispute here. Since then, the case-law has explicitly or implicitly given effect to this principle, almost always in the context of Directive 2000/78, which was relied on in each of the cases.

26. Although the Charter of Fundamental Rights of the European Union, which contains an express prohibition of discrimination on grounds of age (Article 21), had already been solemnly proclaimed at the time of the judgment in *Mangold*, it was not until the entry into force of the Treaty of Lisbon that it acquired full legal status as a primary source of law, and with it the ground of discrimination in question, being the penultimate explicit prohibition of discrimination set out in this article. This means, in my view, that, due to the fact that this prohibition has become part of a 'written constitution', the source par excellence in EU law of this principle of non-discrimination is Article 21 of the Charter. This statement is without prejudice to the provisions of subparagraphs 2 (scope of the competences of the Union) and three (Title VII and explanations) of Article 6(1) EU (which takes us back to, in particular, Article 13 EC, now Article 19 TFEU, on the one hand, and Article 52 of the Charter, on the other). In other words, although the statement made in *Mangold* (and confirmed in *Kücükdeveci*) [12] that the prohibition of discrimination on grounds of age is a general principle of EU law 'the source of [which is to be] found … in various international instruments and in the constitutional traditions

12 — Case C-555/07 *Seda Kücükdeveci* [2010] ECR I-365.

common to the Member States',[13] still holds absolutely true, the fact is that this principle has been enshrined in the 'Lisbon Charter' and it is therefore from this source that the possibilities and limitations of the principle's usefulness must flow.[14]

27. Regarding the secondary legislation, Directive 2000/78, there is little to be said at this stage. Suffice it to say, first, that the directive serves as the measure which 'gives effect to' the competence of the EU in the area and, in that sense, constitutes the foundation of such competence at the EU level. Second, as the Court has stated, the directive 'gives expression', in the relevant area, to the general prohibition of discrimination on grounds of age.[15]

28. The final noteworthy aspect of the way the question is worded is that it contains the statement that the disputed clause in the agreement is 'for the purposes of air safety'. It should be pointed out that the clause contains no statement to that effect. The statement in question can be explained by the fact that this is the justification which the Bundesarbeitsgericht has accepted as the objective reason for the provision concerned. The referring court is seeking to ascertain whether the case-law in question, which predates the entry into force of the AAG, is compatible with EU law.

29. If the Court were to give a reply which is limited to the strict terms of the question, as the Commission suggests, there is a risk that this will not achieve the objective of providing the Bundesarbeitsgericht with a useful answer. In reality, I believe that the issue of concern to the referring court is whether the clause providing for early termination of the employment relationship is compatible with EU law, irrespective of whether its purpose is the one that the national case-law has attributed to this type of provision.

30. Consequently, I believe that the question should be rephrased as follows:

'Must Article 2(5), Article 4(1) and the first sentence of Article 6(1) of Directive 2000/78, as construed in the light of Article 21 of the Charter, be interpreted as precluding an age-limit of 60 for pilots established by collective agreement?'

13 — *Mangold*, paragraph 74; and *Kücükdeveci*, paragraph 21.

14 — Paragraph 22 of the *Kücükdeveci* judgment already contains a brief reference to Article 21 of the Charter.

15 — Case C-13/94 *P.* v *S.* [1996] ECR I-2143; Case C-13/05 *Chacón Navas* [2007] ECR I-6467; and *Kücükdeveci*, paragraph 27. Furthermore, the applicability of the directive in this case is not at issue. The termination of the employment relationships of the three individuals in the present case occurred in November 2006 and in June and April 2007, after the entry into force of the national law transposing the directive (which occurred on 18 August 2006), so that the issue was already governed by EU law, irrespective of the fact that the time-limit for transposition did not expire until December 2006. On this point, see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 15; and, *a contrario*, Case C-427/06 *Bartsch* [2008] ECR I-7245, paragraph 24; and Case C-147/08 *Römer* [2011] ECR I-3591, paragraph 63.

B — *Age as a ground for discrimination, in particular in the area of employment relationship*

31. Explicit prohibitions of discrimination have long been a part of the constitutional traditions of the Member States. The members of the political community, and by extension human beings, are equal in dignity, in the sense of the dignity of the individual, and this human dignity has been translated into an, initially limited, range of specific prohibitions on discrimination, with their formulation being closely linked to the evolving state of our constitutional culture. [16] Today, Article 21 of the Charter, immediately following on from the general principle of equality laid down by Article 20, contains as many as fifteen unlawful grounds of discrimination, the penultimate of which is age.

32. The position of 'age' in the list set out in Article 21 is itself an indication that this is not exactly the oldest or most 'classical' of the prohibitions of discrimination. This does not, of itself, imply that it ranks below the others. But it does give grounds for arguing that its undisputed modernity makes it a type of non-discrimination the principles of which remain to be fully consolidated, and which, in some respects at least, continues to evolve through the construction of a political and social consensus.

33. In any event, there is no 'differential treatment' vis-à-vis the various grounds of discrimination within the provision itself: 'any' discrimination is prohibited in the same way for all of them. The differences originate elsewhere, from the greater or lesser role accorded to them under EU law, as it now stands. Over and above that, the important factor is that diversity is paramount when it comes to the different 'realities' reflected in the list enunciating the various prohibitions on discrimination.

34. Thus, in the case of age, its specific nature was highlighted in terms which speak for themselves by Advocate General Jacobs in his Opinion in *Lindorfer* v *Council*: 'the idea of equal treatment irrespective of age is subject to very numerous qualifications and exceptions, such as age-limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential'. [17] This is certainly true for an area as distinctive as employment. This therefore puts a different perspective on the matter.

16 — See Stern, K., 'Die Idee der Menschen- und Grundrechte', *Handbuch der Grundrechte in Deutschland und Europa, Band I, Entwicklung und Grundlagen,* C.F. Müller Verlag, Heidelberg, 2004, p. 3.

17 — See point 85 of the Opinion of Advocate General Jacobs in Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767.

35. In the sphere of employment, the 'horizontal dimension' of fundamental rights and general principles, meaning their operation in the context of relationships between private persons (as employers, in particular, generally are), is, like that of all such rights and principles, relatively recent. [18]

36. Prohibition of discrimination in the sphere of employment has a long history in both primary and secondary EU law. [19] Discrimination on grounds of 'age' has been developed and given specific expression by its inclusion in Directive 2000/78, alongside three other criteria for non-discrimination (religion or belief, disability and sexual orientation). [20]

37. That directive treats the four criteria in basically the same way. We shall see, however, that in the case of age it introduces a category of 'justifications' for particular types of difference in treatment (Article 6(1) of the directive), which does not appear in relation to the other criteria or in the other two directives.

38. This distinction allows us to divide into two groups the three provisions of Directive 2000/78 which are expressly mentioned by the referring court in its question. All of them in some way 'delimit', in a negative sense, the scope of application or the effectiveness of the principle of non-discrimination in the employment sphere and might accordingly be relied on to justify the disputed measure. However, they vary significantly in scope.

39. The first group of provisions, which would include Article 2(5) and Article 4(1) of the directive, covers all four types of non-discrimination in the area of occupation and employment, which is the specific subject-matter of that directive. They may thus serve to qualify the application not only of the prohibition of discrimination on grounds of age but also of that of discrimination on religious or ideological grounds, on the basis of disability or on that of sexual orientation. [21] There must therefore be strong grounds for allowing the first two provisions to be brought into play. That is why Article 2(5) uses language

18 — See Papier, H.-J., 'Drittwirkung der Grundrechte', *Handbuch der Grundrechte in Deutschland und Europa, Band II, Grundrechte in Deutschland, Allgemeine Lehren I*, C.F. Müller Verlag, Heidelberg, 2006, p. 1331.

19 — Worthy of mention are Articles 13 and 141 EC and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39 p. 40).

20 — Discrimination based on race is governed, generally, by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180 p. 22).

21 — Furthermore, Article 4(1) has its equivalent in Directives 76/207 and 2000/43, concerning discrimination on grounds of sex and ethnic origin, respectively.

which is reminiscent of the limitations on fundamental rights (Article 52 of the Charter) and Article 4(1) utilises the cumulative effect of two adjectives which can hardly be considered ambiguous: 'genuine and determining'.

40. Article 6(1), on the other hand, which forms the second of these groups, is a provision which is specifically directed towards 'justifications' for discrimination, even direct discrimination, on grounds of age. Thus, Article 6(1) broadens the scope for derogation, albeit specific, proportional and justified derogation, from the prohibition of discrimination where the ground is age. This article of the directive, in conjunction with recital 25 in the preamble, makes it possible to the use of terminology (differences of treatment which are 'justified') in connection with this ground which would perhaps be more difficult to accept in relation to discrimination on grounds of sexual orientation or ethnic origin, for example.

C — *The right of collective bargaining*

41. The fact that the provision at issue is in a collective agreement and is therefore the product of the social partners having exercised their right of collective bargaining (Article 28 of the Charter), has a certain bearing on the matter, as may also be inferred from the previous case-law. [22] This, when taken with other distinctive features of the present case, suggests that the full implications of these circumstances should be taken into account, in any event to a greater extent than was required by the circumstances surrounding other, earlier, cases decided by the Court. In that regard, it seems appropriate at this point to introduce some initial thoughts on the scope of the right of collective bargaining, while leaving its specific effect on the present case to be addressed at a later stage.

42. The right which is now contained in Article 28 of the Charter comes down to the concept of 'autonomy in collective bargaining'. This autonomy is an essential element in the understanding of the development of European employment law, around which the rules of democratic systems of representation are constructed and the boundaries between the law and trade union freedom are set. [23] Over and above the different aspects of the notion of a collective agreement in the Member States, [24] autonomy in collective

22 — See, as regards Article 28 of the Charter, Rixen, S., 'Artikel 28 GRCh (Artikel II 88 VVE) Recht auf Kollektivverhandlungen und Kollektivmaßnahmen', *Europäische Grundrechte-Charta,* Verlag C.H. Beck, Munich, 2006, p. 540.

23 — Sciarra, S., *La evolución de la negociación colectiva. Apuntes para un estudio comparado en los países de la Unión europea,* Revista de derecho Social No 38 (2007), p. 196.

24 — In this regard, see Wedderburn, 'Inderogability, Collective Agreements and Community Law', *The Industrial Law Journal,* Oxford University Press, 1992; and Valdés Dal-Ré, 'Negociación colectiva y sistemas de relaciones laborales: modelos teóricos y objetos y métodos de investigación', *Relaciones Laborales*, No 21, 1 to 15 Nov. 2000, p. 83.

bargaining enjoys a special respect in their legal traditions. [25]

43. The right of collective bargaining thus implies a recognition of the central role played by collective agreements in the regulation of employment relationships, which are their natural sphere of operation, ensuring that there is always a reasonable balance between such agreements and the law and, in particular, EU law. A reading of the case-law confirms that the Court has attempted to ensure that this delicate balance is maintained.

44. Thus, the Court has held that 'the Member States may leave the implementation of the social policy objectives pursued by a directive in this area … to management and labour', although not without clarifying that 'that possibility does not … discharge them from the obligation of ensuring that all workers in the Community are afforded the full protection provided for in the directive'. [26]

45. Similarly, the Court has had to consider many situations in which the right of collective bargaining, exercised 'in accordance with … national laws and practices', [27] has been invoked as a limitation on the application of EU law. Thus, in *Albany* [28] the Court held that the competition rules laid down by Article 101(1) TFEU are not applicable to collective agreements intended to improve working conditions. On the other hand, extensive case-law has held that collective agreements are not excluded from the scope of the provisions relating to the freedoms protected

25 — In addition to this, there is that fact that, as Advocate General Jacobs emphasised in point 181 of his Opinion in the *Albany*, *Brentjen's* and *Drijvende Bokken* cases, 'it is widely accepted that collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency. A measure of equilibrium between the bargaining power on both sides helps to ensure a balanced outcome for both sides and for society as a whole' (see Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-115/97 to C-117/97 *Brentjen's* [1999] ECR I-6025; and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121).

26 — Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 8, and Case 235/84 *Commission* v *Italy* [1986] ECR 2291, paragraph 20. To a certain extent, these decisions prioritise giving effect to a directive over promoting collective bargaining (on this point, see Davies, P., 'The European Court of Justice, National Courts, and the Member States', *European Community Labour Law. Principles And Perspectives. Liber Amicorum Lord Wedderburn,* Clarendon Press, Oxford, 1996, p. 121), but they also imply a clear recognition of the status of collective agreements within the Community legal framework.

27 — Article 28 of the Charter.

28 — See also *Brentjens*; *Drijvende Bokken*; and Case C-222/98 *Van der Woude* [1999] ECR I-7111. See also Case C-271/08 *Commission* v *Germany* [2010] ECR I-7091, paragraph 45.

under the Treaty [29] and, more specifically, that the principle of non-discrimination between male and female workers in terms of pay, as set out in the Treaties (Article 119 EC and then Article 141 EC, now Article 157 TFEU) and in secondary legislation, applies to collective agreements because it is mandatory. [30] Article 19 TFEU, unlike Article 157 TFEU, is not a provision which is addressed to Member States (it is a provision attributing competence to the Council), but both Directive 2000/78 and, of course, Article 21 of the Charter do have the 'mandatory nature' required by the case-law.

46. In the light of all of the above, it is reasonable to conclude that, although collective agreements do not constitute an area which is exempt from the application of EU law (just as they are not, from a domestic law perspective, an area completely exempted from compliance with the law), autonomy in collective bargaining deserves proper protection at EU level.

VI — Analysis of the question referred

47. The Bundesarbeitsgericht's wording of the question suggests that the question whether the provision at issue falls to be governed by Article 2(5), Article 4(1) and Article 6(1) of Directive 2000/78, interpreted in the light of Article 21 of the Charter, should be considered in turn.

A — *Article 2(5) of the directive: exclusion of measures taken under national law which are necessary for public security and the protection of health*

48. Pursuant to Article 2(5) of Directive 2000/78, the directive 'shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of

29 — Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47; Case C-35/97 *Commission* v *France* [1998] ECR I-5325; Case C-400/02 *Merida* [2004] ECR I-8471; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, '*Viking Line*', paragraph 54; Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 98; and *Commission* v *Germany*, paragraphs 42 to 47. The judgments in *Viking Line*, paragraph 44, and *Laval*, paragraph 91, expressly state that although the right to take collective action, which is also recognised by Article 28 of the Charter, must be 'recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions'.

30 — Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39; Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 12; Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 11; Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 26; Case C-284/02 *Sass* [2004] ECR I-11143, paragraph 25; and Case C-19/02 *Hlozek* [2004] ECR I-11491, paragraph 43. See also Case 165/82 *Commission* v *United Kingdom* [1983] ECR 3431, paragraph 11.

others'. In this provision, which is applicable to all the grounds of discrimination covered by the directive, the Community legislature recognises that there is a potential tension between protecting the general principle of equal treatment in the sphere of employment and the means of ensuring that other rights and fundamental values are protected and, by way of exception, gives priority to the latter.

49. In particular, the article covers three types of measure necessary in a democratic society: those necessary for public security (amongst which the maintenance of public order and the prevention of criminal offences are specifically mentioned), those for the protection of health and, finally, those intended to protect the rights and freedoms of others in general.

50. The referring court asks whether the protection of air safety can, under this provision, constitute grounds for the measure in dispute. It is difficult to deny that the protection of air safety can be regarded either in terms of public security or, as the German Government suggests, as a measure for the protection of the health of individuals (whether it be crew members, aircraft passengers or the residents of areas under the flight path). In principle, I think that Article 2(5) would be the natural home of a measure intended to protect the safety of air traffic.

51. However, the fact is that, in the first place, the provision requires that the measure be taken by 'national law', a term which is deliberately more restrictive than the more general 'Member States may provide', which, as we shall see, is used in Article 4(1) and Article 6(1) of Directive 2000/78. So, even allowing for the fact that the terminology is not entirely unambiguous, read in conjunction with the remainder of the sentence it can be assumed to mean that the measures which can result in a derogation from the directive must, in any event, at least originate from a public authority. [31] On that basis, the adoption of a measure of this nature by the social partners, acting independently, would not appear to correspond to the requirements of Article 2(5) of the directive in any way.

52. Furthermore, although it is true that in the course of collective bargaining the social

31 — Thus, in the *Petersen* case, the measure in question (an upper age limit for panel dentists) had been implemented by means of legislation having the rank of a law (see paragraph 11 of the judgment). From that point of view, and in so far as its purpose was stated to be the protection of health, the difference in treatment created would have fallen within Article 2(5). It did not, however, fall within that provision in so far as there was a lack of consistency because it did not apply to dentists who were not panel dentists.

partners can take into account objectives falling outside their sphere of operation, Article 2(5) expressly refers to measures which are 'necessary' in order to achieve the objectives in question. In my view, this adjective refers not only to the need to monitor the proportionality of the measure in question vis-à-vis the stated purpose, but also highlights the essential nature that the measure must have in achieving this purpose. The exceptionality of any derogation from the principle of non-discrimination (which, it should be recalled, is what this article is about) is the reason why the provision cannot be referring here to measures which are merely instrumental in contributing to public safety or health but must refer to provisions which are specifically introduced for such purposes, which are worthy of special protection.

53. Finally, it is my understanding that the power to take decisions concerning public order, public security or public health is, by its very nature, one which inherently belongs to public authorities and falls mainly outside the realm of collective bargaining, unless there happens to be some indirect impact, which will in any event be secondary. In short, these are not matters which can be left to the free choice of the parties and consequently they fall outside the legitimate field of intervention of the social partners. [32] The objectives of Article 2(5) demand action which is virtually uniform and consequently inconsistent with collective bargaining, which, by definition, results in uneven regulation. [33]

54. In the light of the foregoing, I am therefore of the view that Article 2(5) of Directive 2000/78 does not provide justification for a rule in a collective agreement providing that the employment relationship of pilots is to be terminated at the age of 60, for the purpose of ensuring air safety.

B — *Article 4(1) of the directive: the special rules concerning genuine and determining occupational requirements*

55. Article 4(1) permits Member States to 'provide that a difference of treatment which

32 — The judgment in *Laval un Partneri* concerned the relationship between collective agreements and public policy measures, albeit in a very different context, indicating that management and labour, 'not being bodies governed by public law', cannot, in the context of collective bargaining, avail themselves of Article 3(10) of Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services 'by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law' (paragraph 84). Along similar lines is the judgment in Case C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323.

33 — In this regard it should be recalled that the judgment in *Petersen* attributed importance to the consistency of the measure in the context of Article 2(5) of the directive (paragraphs 61 and 62 of the judgment).

is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

56. This provision (which is transposed into German law by Paragraph 8 of the AGG and, once again, is potentially applicable to all the grounds of discrimination covered by the directive) is subject to very strict requirements: first, the discriminatory measure must pursue a 'legitimate objective'; second, it must be based on a 'characteristic related to' the ground of discrimination; finally the discriminatory characteristic must be a 'genuine and determining' occupational requirement, in addition to being proportionate.

1. Legitimate objective

57. With regard, first of all, to the stated objective, in other words air safety, I need only point out that, aside from considerations relating to whether or not it can be relied on in the context of collective bargaining, this purpose could well constitute a legitimate objective within the meaning of this article.

2. Difference of treatment which is based on a 'characteristic related to' the ground of discrimination

58. Second, it must be recalled that under Article 4(1) a difference of treatment 'which is based on a characteristic related to any of the grounds referred to in Article 1' may be justified. This wording suggests that a distinction should be made between the ground of discrimination itself and the characteristic related to it. It is the latter which must constitute a 'genuine and determining occupational requirement' for the purposes of justifying the difference of treatment and not the ground of discrimination per se. [34]

59. In this case, the ground of discrimination would obviously be age, while the 'characteristic related to' it would be, here, certain physical or mental abilities whose loss is associated with old age, which for these purposes has translated into an age-limit set in advance, so to speak.

34 — Case C-229/08 *Wolf* [2010] ECR I-1, paragraph 35.

3. 'Genuine and determining' occupational requirement

60. As far as the condition relating to a 'genuine and determining' occupational requirement is concerned, Article 4(1) is unambiguous: the use of the two adjectives 'genuine and determining' clearly suggests a strict interpretation of the provision's potential, it 'being a derogation from an individual right laid down in the directive'.[35] This can also be inferred from recital 23 in the preamble to Directive 2000/78, according to which the Article 4(1) justification applies only 'in very limited circumstances' which, in any event, 'should be included in the information provided by the Member States to the Commission'.

61. The case-law has demonstrated a measured use of this exception and a desire to interpret it strictly, whilst also accepting that it covers instances in which, due to the special nature of the profession in question, the existence of a characteristic linked to age, or to another of the grounds of discrimination, appreciably (or, to paraphrase the provision, in a genuine and determining manner) reduces the ability of the person to carry on the profession in a proper and efficient way.

62. *Wolf* is the only case in which, up to now, the Court has found the exceptional circumstances of Article 4(1) of Directive 2000/78 to exist. Specifically, it involved a case of age discrimination in which it was thought that the provision could apply to justify national legislation which set the maximum age for recruitment to intermediate career posts in the fire service at 30 years. In the grounds set out in the *Wolf* judgment, express reference was made to recital 18 in the preamble to Directive 2000/78, which states that the directive does not require the police, prison or 'emergency' services to 'recruit persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services'.[36] In my opinion, it is likely that the fact that *Wolf* concerned ensuring public security, which is obviously the purpose behind this recital, had some bearing on the decision of the Court

35 — On this point, one might cite, by analogy, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 36, and Case C-273/97 *Sirdar* [1999] ECR I-7403, paragraph 23, which demand a strict interpretation of the former Article 2(2) of Directive 76/207 (in its orginal form), which is a provision similar to the one under consideration here, although applicable only in the area of discrimination on grounds of sex (following amendment by Directive 2002/73 of the European Parliament and of the Council of 23 September 2002, the provision became Article 2(6) of Directive 76/207, which is closer to the wording of Article 4(1) of Directive 2000/78).

36 — Paragraph 38.

in that case, which was to choose, of its own motion, to apply Article 4(1) rather than to go down the Article 6(1) route which the parties had relied on. [37]

63. In the light of this case-law, there should, at least in principle, be nothing to prevent a case involving age-limits on the pursuit of a profession falling within Article 4(1) of Directive 2000/78 where there is an objective such as air safety and the profession has characteristics as specific as that of a pilot. The problem, however, is that this is not precisely the meaning or the scope of the national measure in question here.

64. It is true that, it is difficult to dispute the importance of age in the exercise of this profession. [38] Furthermore, the fact that international regulations such as those set out in JAR-FCL 1.060a impose certain restrictions on pilots between 60 and 65 years of age (stating that they can fly only where there is another pilot under 60 years of age on the crew), may indicate not only that the profession of pilot requires a person to have particular physical and mental characteristics, but also that reaching the age of 60 may have certain implications in this area.

65. None the less, I am of the view that, in so far as both the national legislation and the international rules permit a pilot to fly – albeit with certain restrictions – up to the age of 65, a lower age-limit cannot fall within the exception set out in Article 4(1) of Directive 2000/78.

66. In my opinion, as the international regulation of the profession currently stands, a requirement to be below 65 years of age has every appearance of being a genuine and determining occupational requirement for carrying on the profession of pilot, for the

37 — The case-law on Article 2(2) of Directive 76/207 also mainly concerns public security. Thus, having denied 'that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security' (and, in particular, that 'the principle of equal treatment for men and women is … subject to any general reservation as regards measures for the organisation of the armed forces taken on grounds of the protection of public security'), the Court held that the exclusion of women from performing certain activities such as policing in the context of serious internal disturbances (*Johnston*, paragraphs 36 and 37), the work of prison warders (Case 318/86 *Commission* v *France* [1988] ECR 3559, paragraphs 11 to 18), or service in combat units such as the Royal Marines (*Sirdar*, paragraphs 29 to 31) could be justified under Article 2(2) of Directive 76/207. On the other hand, a provision barring women from all military posts involving the use of arms cannot be justified (Case C-285/98 *Kreil* [2000] ECR I-69, paragraphs 25 to 29).

38 — The Bundesarbeitsgericht itself, for example, in its judgment of 20 February 2002, mentioned the case of military pilots, for whom a legal age-limit of 41 was set, as an indication that the legislature considered that certain physical and mental abilities started to decline from that age (BAG v 20.02.2002 AP Nr. 18 BGB § 620 Altersgrenze, § 611 Luftfahrt). In many other cases decided by the Bundesarbeitsgericht in the past, that court worked on the basis of 'empirical medical evidence identifying aircraft cockpit staff as being subject to above-average levels of psychological and physical stress, as a result of which there is an increase in the risk of age-related deficiencies and unforeseen mistaken reactions'.

purposes of Article 4(1) of the directive. The fact that international regulations such as JAR-FCL 1.060a lay down that age-limit as an absolute and general rule is of itself sufficient evidence that the requirements of this provision of the directive will be satisfied.

67. The situation under consideration here, where it is laid down that the employment relationships of the pilots of a particular airline are automatically terminated upon reaching the age of 60, is a different matter entirely. In so far as international rules permit pilots over the age of 60 to fly, albeit subject to certain conditions, it seems illogical, from this point of view, to regard a requirement to be below 60 years of age as a 'genuine and determining' occupational requirement within the meaning of Article 4(1) of the directive. The conditions introduced for those over this age can have only the purpose which arises from the conditions themselves. Against the background of these conditions, it has not been claimed that continuing to pursue this profession contravenes any other requirement and the conclusion must therefore be that the provision at issue has no basis in Article 4(1) of the directive.

68. To sum up all of the above, it is my view that neither of the two provisions of the directive designed to reduce the scope of any of the prohibitions of discrimination which are the subject-matter of the directive, namely Article 2(5) and Article 4(1), constitutes a basis for finding the clause in the collective agreement in question compatible with EU law. That clause must now be analysed from the point of view of the provision specifically directed at relaxing the principle of non-discrimination on grounds of age: Article 6. The response that must be given in respect of this provision of the directive will be somewhat more complex.

C — Article 6(1) of the directive: justification for differences of treatment on grounds of age

69. Under Article 6(1) of Directive 2000/78, 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'. Article 6(1) therefore has two requirements for the justification of a difference in treatment of this kind: first, the existence of a legitimate objective or aim and, second, the 'appropriate and necessary' nature of

the measure, which is tantamount to saying its proportionality.

1. The legitimate objective or aim

70. The first of these requirements refers, more specifically, to reliance on a 'legitimate aim, including legitimate employment policy, labour market and vocational training objectives'.

71. The fact that air safety is cited as an objective of the disputed measure in this case means that, as preliminary step, it is necessary to determine whether an objective of this kind can fall within Article 6(1). I will then, however, go on to address the possibility of using the protection of autonomy in collective bargaining as a legitimate social policy objective in a context having features as specific as those in the present case.

(a) The objective of air safety

72. On a literal interpretation of Article 6(1) of Directive 2000/78, any kind of legitimate objective or aim might fall within it: the use in the provision of the term 'including' [39] would seem to indicate that the subsequent list is by way of example and not exhaustive or exclusive, just as the list of cases appearing later in the same provision is by way of example and indicates the type of differences of treatment which might be included under this limb of justification. [40] Nevertheless, the type of example that the directive gives makes it possible to limit the nature of these justifications to a certain extent.

73. This explains why the case-law has been advocating a stricter interpretation of the provision, which basically limits it to social policy objectives in general. Thus, the judgment in *Age Concern England* expressly states that 'it follows from the first sentence of Article 6(1) of Directive 2000/78 that the aims which may be considered "legitimate" within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social-policy objectives, such as those related

39 — 'Notamment', in the French version; 'incluidos' in the Spanish version, 'compresi', in the Italian version; 'erityisesti', in the Finnish version; 'insbesondere', in the German version, all of which bear the same meaning.

40 — Advocate General Sharpston made statements to this effect at point 110 of her Opinion in *Bartsch*.

to employment policy, the labour market or vocational training.' [41]

74. In my view, these statements reflect the idea that the Article 6(1) list is not of itself exhaustive, and should not therefore be limited to 'employment policy, labour market and vocational training' objectives (which are the only objectives expressly referred to). Nor, however, can its scope be extended beyond social policy objectives in a broad and general sense, of which these are just a manifestation or example.

75. This interpretation is perfectly consistent with the case-law allowing the involvement of the social partners in the specific context of Article 6(1). [42] To the extent that this provision is intended to cover measures based on considerations of social or employment policy, which is the natural sphere of collective bargaining, it is logical that its implementation can be entrusted to the social partners. [43]

76. In the light of the above, it is my view that, given the obvious lack of connection with the sphere of social policy and employment relationships, an objective such as air safety cannot be regarded as a 'legitimate objective or aim' for the purposes of Article 6(1) of Directive 2000/78, within the meaning given to this aspect of the provision in the case-law. As has already been mentioned, the natural home of an aim such as air safety would be Article 2(5).

77. At this point, given that the Bundesarbeitsgericht has expressly identified air safety as the objective of the disputed measure, the analysis of the case in relation to Article 6(1) could finish here. It is plain that it is ultimately for the national court, 'which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to seek out the reason for maintaining the measure in question and thus to identify the objective it pursues.' [44] However, without wishing to question the referring court's ultimate jurisdiction, as I have

41 — Paragraph 46. In the same vein, see the judgment in Case C-88/08 *Hütter* [2009] ECR I-5325, paragraph 41, and the Opinions of Advocate General Bot in *Küçükdeveci* (paragraph 37) and in *Petersen* (paragraph 55). Further and more indirect support for this view can be found in recital 25 in the preamble to the directive and in the judgments in *Mangold* (paragraph 63); *Palacios de la Villa* (paragraph 68); and *Petersen* (paragraphs 48 to 50).

42 — See *Palacios de la Villa*, paragraph 68, and Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 41.

43 — See recital 36 in the preamble to the directive, which expressly refers to this possibility 'as regards the provisions concerning collective agreements'.

44 — *Petersen*, paragraph 42.

already mentioned, I believe that in order to provide the referring court with a useful reply which will enable it to give judgment in the national proceedings, the analysis of the question referred should, at least where Article 6(1) is concerned, not be limited to the hypothesis that the objective pursued by the disputed measure is air safety, but should be open to other possibilities.

(b) The protection of autonomy in collective bargaining as a legitimate objective of social policy within the meaning of Article 6(1) of Directive 2000/78

78. The 'early' termination of the employment relationship which is under consideration here, as with other similar cases which have come before the Court, has not become part of the relevant national legal order through legislation of any kind, but, to be exact, by means of a collective agreement. In my view, this fact opens the way to exploring other ways of investigating what the legitimate objective pursued by the disputed measure might be. [45] This investigation might begin with some of the previous statements of the Court on the subject, by way of a 'natural development' of such statements.

45 — An option that was expressly mentioned at the hearing.

79. First of all, it should be recalled that collective agreements have an acknowledged central function as part of the legal order of the Member States in relation to attaining the objectives of the directive (recital 36 in the preamble and Article 18 of the directive). However, that is not the point at issue. The question is whether, over and above this undisputed function, the objective of preserving scope for collective bargaining in this area (namely, the determination of precisely when the employment relationship should terminate in the context of a person becoming entitled to a retirement pension) could assume the nature of a legitimate social policy objective within the meaning of the directive.

80. It should be noted that what is being proposed is not another version of the much-debated balance between, so to speak, 'fundamental rights' and 'fundamental freedoms'. The issue here is a more modest one, in the sense that it seeks only to present collective bargaining as 'legitimate objective' of social policy, capable on occasion of reducing the scope of the general principle of non-discrimination on grounds of age. I am of the view that both the most recent case-law and the very circumstances of the case suggest that this proposition should be accepted. First, as far as the case-law is concerned, since *Palacios de la Villa* and until *Rosenbladt* there seems to have been a tendency in the case-law of the Court whereby termination of employment clauses coinciding with entitlement to a retirement pension introduced by way of

a collective agreement are acceptable from the point of view of the directive as they respond implicitly to the legitimate objective of, in bald terms, making way for the next generation with respect to the right to work. [46] Alongside this are considerations relating to the role of collective bargaining, now protected under the Charter, and the 'flexibility' offered by collective agreements. [47]

81. In *Rosenbladt*, the Court of Justice effectively held that a collective agreement can provide for the automatic termination of employment contracts even at an age when there is ample evidence that the specific requirements for continuing to perform the work in question are still being met, provided that it is possible to start receiving a retirement pension. The Court took the view that such a clause responds to the legitimate objective of allowing younger generations to have access to work.

82. In my opinion, this case-law cannot be fully and precisely understood without taking into account the fact that it concerns a measure which is the result of collective bargaining, which helps to reinforce its legitimacy. [48] That is why, on the basis of this case-law, I am suggesting that the Court of Justice accepts as a potential legitimate social policy objective, in certain circumstances, the preservation of scope for collective bargaining. [49]

83. At this point, it is necessary, secondly, to take into account the circumstances of the case, that is, those of the profession of pilot. In effect, the claim of the applicants in the main proceedings, namely that they should be allowed to continue flying, even if this is subject to the conditions applicable to pilots over 60, until they are no longer authorised to fly under JAR-FCL 1.060a, is tantamount to removing any scope for legitimate bargaining by the social partners on this particular point. If there is one element which truly distinguishes

46 — *Rosenbladt*, paragraphs 43 and 48.

47 — Thus, paragraph 67 of the judgment in *Rosenbladt*, states that 'the fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement'.

48 — In connection with prohibited differential treatment in general, the Court has considered what importance should be accorded to the fact that the discrimination arises in a collective bargaining context. Particularly noteworthy is Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, where it was held that, although the principle of equal pay for men and women also applies where pay is set by a collective agreement, the national court may take this factor into account 'in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex' (paragraphs 45 and 46).

49 — Regarding its categorisation as 'social policy', it should be recalled that Article 151 TFEU, which is the opening article of Title X of the Treaty and which concerns precisely that topic of 'social policy', lists as one of the objectives of the policy 'dialogue between management and labour', and Article 155 TFEU, falling under the same title, also refers to dialogue between management and labour at Union level.

the present case from the previously decided cases, it is that the pursuit of the profession of pilot is subject to an overarching and internationally regulated age-limit beyond which it is not possible to continue working in that profession. Thus, if any of the arguments put forward in these proceedings were to be accepted, collective agreements in the case of pilots, unlike those of other professions or occupations, would be compelled to provide that the date of automatic termination of the employment relationship is the same as the date of expiry of the pilot's licence.

84. Without going into the question whether this might give rise to an element of unjustified discrimination between the profession of pilot and most other professions or occupations, and without seeing the issue in terms of weighing up two rights, it at least seems clear that, in principle, the preservation of scope for the operation of collective bargaining in this area can aspire to recognition as a legitimate social policy objective within the meaning of the first paragraph of Article 6(1) of the directive.

85. I therefore take the view, without going into further detail at present, that collective agreements have their own field of operation, a particular zone in which they can legitimately operate, and that rules relating to the termination of employment relationships naturally fall within this field or domain belonging to collective bargaining. The mere fact that collective bargaining occurs in that domain, in connection with such matters, is an important step towards making the decisions reached by collective bargaining legitimate. Even within that area, however, the social partners cannot operate with absolute freedom, since, once the legitimacy of the objective which opens the way for Article 6(1) to apply has been established, the measure is still subject to the test of proportionality imposed by this provision. This means that, in the case of the profession of pilot, the concept of an age-band below the age of 65 which can be the subject of collective bargaining is not, in principle, incompatible with Directive 2000/78, provided, of course, that it satisfies a proportionality test.

2. The proportionality of the measure

86. However, before looking at proportionality, we must dispense with the allegation that the measure is inconsistent by virtue of the fact that it does not apply to all Ger-

man pilots,[50] or even to all pilots working for Lufthansa group companies, but only to those working for Deutsche Lufthansa. In my view, in so far as autonomy goes hand in hand with collective bargaining, it is very difficult to require consistency between one collective agreement and another. It is no accident that this is the main reason for regarding collective agreements as unworkable as a way of addressing public security objectives. The issue, however, is that it is claimed that the parties to the collective bargaining resulting in the agreements in question would have been the same, and *Enderby* has already shown that, within the same undertaking and with the same trade union, autonomy in collective bargaining would not be sufficient grounds for circumventing the requirement for consistency between the two different agreements.[51] However, it seems that the parties were not absolutely identical in the present case: first because, although it has been said that the 'Cockpit' trade union participated in all the relevant Lufthansa group collective agreements, this does not exclude the possibility that different individuals conducted the negotiations, depending on the company to which each agreement related; second, in relation, more particularly, to the undertaking, I believe that the fact that Deutsche Lufthansa, together with other airlines, belongs to the Lufthansa group, does not mean that the group as such conducted the negotiations, but that each of the group companies did so.

87. Having dealt with the inconsistency argument, the proportionality of the measure must be considered. For these purposes various characteristic traits of proportionality must be taken into account.

88. First, it should be recalled that during the period from the 'early' termination of their employment relationship at the age of 60 until the date they become entitled to the relevant retirement pension, at the age of 63, the pilots in question receive from the airline a transitional allowance by way of compensation of approximately 60 % of pension contributions.[52]

89. Second, the five year duration of the measure must be considered, in that, in another airline, the pilot in question would be able to continue working (albeit with certain restrictions) until the age of 65. This, in my view, is the main objection to the disputed measure from the proportionality point of view, as not only does it involve an age-band below the maximum age beyond which flying

50 — The generally applicable rule in Germany is that a pilot over 60 and under 65 can fly a commercial transport aircraft, within the Federal Republic of Germany only, and retire upon reaching the age of 65 (Paragraph 4 of the Durchführungsverordnung zur Verordnung über Luftfahrtpersonal).

51 — Case C-127/92 [1993] ECR I-5535. As stated in paragraph 22, 'if the employer could rely on the absence of discrimination within each of the collective bargaining processes taken separately as sufficient justification for the difference in pay, he could … easily circumvent the principle of equal pay by using separate bargaining processes'.

52 — According to the information made available at the hearing.

is not permitted (65), but it brings forward the automatic termination of the contract to the age of 60.

90. Of course, it cannot be claimed that this is an arbitrary age. From the age of 60 a safeguard has been imposed (the presence of a co-pilot), which acts as a reminder, at least, of the human ageing process. But this type of safeguard, as has already been seen, should not be regarded as all-important.

91. The nub of the issue is whether, given that public security is not 'the' reason for the social partners deciding on this measure (although it may have been part of their reasoning or underlying logic), shortening a person's working life by a length of time as significant as five years is proportionate to the legitimate objective of preserving a degree of scope for collective bargaining.

92. On this point, it seems to me that we are dealing with a disproportionate measure, at least in the circumstances of the profession of pilot. The first thing to point out is that the loss of five years out of a professional career which must end at the age of 65 is very punitive. Furthermore, the principle of non-discrimination on grounds of age now occupies a sufficiently secure position in EU law for it to take priority over the collective bargaining point on this particular issue. By this, I mean only that the imperatives of the principle of non-discrimination on grounds of age need give ground only to the precise extent required by the circumstances of the case. Finally, although that aspect has not been addressed in this case, initiatives relating to the early termination of the employment relationship have an impact on the right to work, particularly in the age groups under consideration here.

93. All of this leads me to the view that, by shortening the duration of the employment contract so that it terminates at the age of 60, the collective agreement has gone beyond the operational margin which it in principle enjoys. Accordingly, this also means that the disputed measure cannot be justified on the basis of Article 6(1) of Directive 2000/78.

VII — Summary

94. A national provision such as that at issue in the present case, in so far as it allows the employment relationships of airline pilots to be automatically terminated upon reaching the age of 60 and to the extent that it is

established by a collective agreement, is not in the nature of a measure laid down by national law which, in a democratic society, is necessary for public security or for the protection of health, within the meaning of Article 2(5) of Directive 2000/78.

95. Nor is it possible, in the circumstances of the case, to find a legal basis for the automatic termination of the employment relationship of pilots upon reaching the age of 60 in Article 4(1) of Directive 2000/78, particularly as the conditions imposed on continuing in the profession beyond that age cannot be given a meaning which goes beyond what they actually say. On the contrary, restricting the pursuit of the profession of pilot to persons who have not yet reached the age of 65 should, as the international rules now stand, be regarded as an expression and a consequence of a genuine and determining occupational requirement within the meaning of that provision.

96. That being so, in the case of a profession such as that of a commercial pilot, where there is a requirement taking the form of an age-limit which expresses a genuine and determining occupational requirement, Directive 2000/78, and, specifically, Article 6(1), does not preclude a collective agreement which, in the interests of the social policy objective of preserving scope for collective bargaining, requires the automatic termination of the employment relationship on the worker reaching a lower age than that set by way of genuine and determining occupational requirement, as long as the principle of proportionality is respected. It is necessary in such cases that the worker should, at that time, have acquired an entitlement to a retirement pension or, alternatively, should be entitled to satisfactory transitional compensation for the period up until such entitlement to a pension takes effect. It is for the national court to determine whether the clause in the collective agreement in question is proportionate to that objective, both in relation to the amount of time by which the termination of the employment relationship is brought forward and, where applicable, to the amount of the transitional compensation.

97. In any event, and particularly in view of the fact that there is a limit on the length of a working life in the profession, Directive 2000/78 precludes as contrary to the principle of proportionality a provision such as that which is the subject of these proceedings which allows the termination of the employment relationship to be brought forward by five years as compared to the age set by way of a genuine and determining occupational requirement for airline pilots.

VIII — Conclusion

98. In conclusion, I propose that the Court of Justice give the following reply to the question referred by the Bundesarbeitsgericht:

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and, in particular, Article 2(5), Article 4(1) and Article 6(1) thereof, construed in the light of Article 21 of the Charter of Fundamental Rights of the European Union, precludes a provision in a collective agreement stipulating that the employment relationship of commercial airline pilots is automatically terminated upon reaching the age of 60.