Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

8 May 2019*

(Reference for a preliminary ruling — Social policy — Prohibition of all discrimination on grounds of age — Directive 2000/78/EC — Exclusion of professional experience obtained before the age of 18 — New system of remuneration and advancement — Maintenance of the difference in treatment — Freedom of movement for workers — Article 45 TFEU — Regulation (EU) No 492/2011 — Article 7(1) — National legislation providing for account to be taken of a proportion of previous periods of service)

In Case C-24/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 19 December 2016, received at the Court on 18 January 2017, in the proceedings

**Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst**

v

**Republik Österreich,**

THE COURT (First Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: K. Malacek, Administrator,

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

after considering the observations submitted on behalf of:

– the Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst, by M. Riedl and V. Treber-Müller, Rechtsanwälte,

– the Austrian Government, by G. Hesse and J. Schmoll, acting as Agents,

– the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

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

* Language of the case: German.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 45 TFEU, Articles 21 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) and of Articles 1, 2, 6 and 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in the context of proceedings between the Österreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst (Austrian Confederation of Trade Unions, Public Service Union) ('the Gewerkschaftsbund') and the Republik Österreich (the Republic of Austria) concerning the lawfulness of the federal system for the remuneration and advancement of contractual public servants adopted by the Austrian legislature in order to put an end to discrimination on the ground of age.

### Legal context

#### *European Union law*

*Regulation No 492/2011*

3 Chapter I of Regulation No 492/2011, entitled 'Employment, equal treatment and workers' families', includes Section 2 thereof, relating to employment and equality of treatment. That section contains Article 7 of that regulation, which provides, in paragraph 1 thereof:

'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.'

*Directive 2000/78*

4 In accordance with 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.'

5 Article 2 of that directive provides:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

…'

6 Article 6 of that directive provides:

'1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

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

7 Article 17 of that directive states:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.'

### *Austrian law*

8 The referring court states that the national legislation on the remuneration and advancement of State contractual public servants was amended on numerous occasions as a result of the incompatibility of some of its provisions with EU law. The new system of remuneration and advancement of those public servants, resulting from legislative amendments adopted during 2015 and 2016, sought in particular to put an end to discrimination on grounds of age caused by the previous system of remuneration and advancement in force.

*The Law on contractual public servants*

9 Paragraph 19(1) of the Vertragsbedienstetengesetz 1948 (Law on contractual public servants 1948), as amended by the Federal Law of 30 August 2010 (BGBl. I, 82/2010) ('the Law on contractual public servants'), provided:

'Advancement shall be determined on the basis of a reference date. Unless otherwise provided in this paragraph, the period required for advancement to the second incremental step for each job category shall be 5 years and 2 years for other incremental steps.'

10 Paragraph 26(1) of the Law on contractual public servants provided:

'Subject to the restrictions set out in subparagraphs 4 to 8, the reference date to be taken into account for purposes of advancement by an incremental step shall be calculated by counting backwards from the date of appointment for periods after 30 June of the year in which 9 school years were completed or ought to have been completed after admission to the first level of education:

(1) the periods specified in subparagraph 2 shall be taken into account in their entirety;

(2) other periods …'

*The amended Law on contractual public servants*

11 In order to address the discrimination on grounds of age found in the judgments of the Court of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381), and of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359), the Law on contractual public servants was amended with retroactive effect by the Bundesbesoldungsreform 2015 (Federal Law on Remuneration Reform, 2015) (BGBl. I, 32/2015) and by the Besoldungsrechtsanpassungsgesetz (Law adjusting remuneration legislation) of 6 December 2016 (BGB1 I, 104/2016) ('the amended Law on contractual public servants').

12 Under the heading 'Grading and advancement', Paragraph 19(1) of the amended Law on contractual public servants provides that:

'… Grading and further advancement shall be determined on the basis of remuneration seniority.'

13 Under Paragraph 26 of the amended Law on contractual public servants, entitled 'Remuneration seniority':

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

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

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

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

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

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

…

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

14 Paragraph 94a of the amended Law on contractual public servants provides that, during the transition of active contractual public servants in the new system of remuneration and advancement, it is necessary to apply Paragraphs 169c, 169d and 169e of the Gehaltsgesetz 1956 (Law on salaries 1956, BGBl. 54/1956), as amended by the Federal Law on Remuneration Reform of 2015 and by the Law on Remuneration Reform of 2016 ('the amended Law on remuneration'), which concern the regrading of public servants already in service in the new remuneration and advancement system.

15 In accordance with Paragraph 100(70)(3) of the amended Law on contractual public servants, Paragraphs 19 and 26 of that law, including their headings, enter into force in the version of the Federal Law on Remuneration Reform, 2015, published in the BGBl. I, 32/2015, 'on 1 July 1948; all the versions of those provisions published before 11 February 2015 shall cease to apply in current and future procedures'.

*The amended Law on remuneration*

16 Under Paragraph 169c of the amended Law on remuneration:

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

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

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

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

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

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

(1) the periods that, at the time that the transition month commences, have been definitively accredited as previous service periods, to the extent that such periods were completed before the age of 18 and have become effective for advancement, and

(2) the periods completed since the date of appointment, to the extent that they have become effective for advancement.

No other periods shall be counted backwards. For each 2 years that have elapsed since the effective date, the next higher salary grade shall be applicable in each case as the grading protected by statute. A salary grade shall be deemed as having been attained on 1 January or 1 July following completion of the two-year period, unless advancement was postponed or suspended on such date. The period of 2 years shall be deemed to have elapsed respectively on 1 January or 1 July where it is completed before the following 31 March or 30 September respectively.

2c. Subparagraphs 2a and 2b transpose into Austrian law, in the field of the Staff Regulations of federal employees and teaching personnel of the Länder, Articles 2 and 6 of [Directive 2000/78] as interpreted by the Court of Justice of the European Union in the judgment of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005). The procedures for the transition of civil servants appointed before the entry into force of the federal reform of remuneration in 2015 were therefore fixed in the new remuneration system and provide that the salary grade at which they are now placed is to be determined solely on the basis of the salary acquired under the old remuneration system, although that system was based on discrimination on the ground of the age of the civil servant and although that subsequent advancement to a higher salary grade is now calculated solely on the basis of professional experience since the entry into force of the reform of remunerations in 2015.

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

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

…

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

…

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

…'

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

17 The dispute in the main proceedings is between the Gewerkschaftsbund, the trade union representing, in particular, contractual public servants of the civil service of the Republic of Austria, in its capacity as employer.

18 The Gewerkschaftsbund brought an action before the Oberster Gerichtshof (Supreme Court, Austria), under Paragraph 54(2) of the Arbeits- und Sozialgerichtsgesetz (Law governing labour and social courts), for an order that the new system of remuneration and advancement of contractual public servants is contrary to EU law.

19 In support of its action, the Gewerkschaftsbund claims that the discrimination on the ground of age resulting from the old system of remuneration and advancement was maintained by the new system, on the ground that the remuneration payable for February 2015 is taken into account in the new system as a reference point for the regrading of the contractual public servants concerned for salary purposes. It added that the retroactive abolition of the 'advancement reference date', which had thus far been applicable to those public servants, deprived the latter of the possibility to check the legality of that remuneration.

20 The Oberster Gerichtshof (Supreme Court) questions, first, whether the modalities for the transition of contractual public servants from the old system of remuneration and advancement to the new system, in particular in so far as it does not provide for any financial compensation for contractual public servants who are treated unfavourably and the new system prevents regraded contractual public servants from obtaining a review of their reference date according to the rules of the old system of remuneration and advancement, are compatible with EU law.

21 Secondly, the referring court questions the compatibility with EU law of the rules of the new system of remuneration and advancement according to which previous professional experience is taken into account according to conditions that differ depending on the employer with whom that experience was acquired.

22 That court notes that the amended Law on remuneration seeks to prevent significant reductions in the level of remuneration of transitioned contractual public servants. That court adds that that reform responds also to an objective of neutrality in terms of costs. Furthermore, due to the great number of contractual public servants concerned, it would not have been possible, within a short period, to carry out an individual examination of the situation of each of those public servants prior to their regrading.

23 The Oberster Gerichtshof (Supreme Court) considers that there is a significant difference between the reform resulting from the amended Law on remuneration and the systems of remuneration that the Court examined in the cases giving rise to the judgments of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005), and of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561). In particular, according to that court, the system of remuneration and advancement at issue in those cases was discriminatory on grounds of age, since the age of employees was taken into account as a benchmark. No category of employees was thus favoured. As a result, all the active employees, or at least a large number of them, were affected by the old discriminatory system. By contrast, in the main proceedings, under the old system of remuneration and advancement, a category of contractual public servants was treated unfavourably, namely the category of contractual public servants who acquired experience before the age of 18.

24 In the context of the new system of remuneration and advancement, those contractual public servants could not obtain a review of the reference date resulting from the application of the rules of the old system of remuneration and advancement. However, that new system of remuneration and advancement does not deprive them of the right to bring an effective judicial appeal before the court in order to review the validity of a norm of that system in relation to EU law and Austrian constitutional law.

25 In those circumstances the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

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

(b) If the answer to Question [1(a)] is in the affirmative:

Is European Union law, in particular Article 17 of [Directive 2000/78], to be interpreted as meaning that existing public servants who were discriminated against in the old remuneration system in relation to the accreditation of previous service periods completed before the age of 18 must receive financial compensation if that age discrimination continues in terms of its financial effects even after transition to the new remuneration system?

(c) If the answer to Question [1(a)] is in the negative:

Is European Union law, in particular Article 47 of the Charter …, to be interpreted as meaning that the fundamental right to effective legal protection enshrined therein precludes national legislation under which the age-discriminatory remuneration system is no longer to apply in current and future procedures and the transition of the remuneration of existing public servants to the new remuneration system is to be based solely on the salary calculated or paid for the transition month?

(2) Is European Union law, in particular Article 45 TFEU, Article 7(1) of Regulation [No 492/2011], and Articles 20 and 21 of the Charter …, to be interpreted as precluding legislation under which previous service periods completed by a contractual public servant

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

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

## Consideration of the questions referred

### *Question 1(a)*

26 By Question 1(a), the referring court asks, in essence, whether Articles 1, 2 and 6 of Directive 2000/78, read in combination with Article 21 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, entering into force retroactively, that, for the purposes of putting an end to discrimination on grounds of age, provides for the transition of active contractual public servants to a new system of remuneration and advancement in the context of which the initial grading of those contractual public servants is calculated according to their last remuneration paid under the previous system.

27 It is necessary, as a first step, to determine whether the national legislation under examination involves a difference in treatment within the meaning of Article 2(1) of Directive 2000/78.

28 In that regard, it should be borne in mind that, under that provision, the 'principle of equal treatment' means that there is no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. Article 2(2)(a) of that directive states that, for the purposes of paragraph 1 of Article 2, direct discrimination occurs where one person is treated less favourably than another is, in a comparable situation, on any of the grounds referred to in Article 1 of that directive.

29 In the main proceedings, the categories of persons relevant for the purposes of that comparison are, first, contractual public servants active at the time of the transition whose professional experience was, even if partially, acquired before the age of 18 ('the contractual public servants treated unfavourably by the old system') and, secondly, those who obtained, after reaching that age, experience of the same nature and of a comparable duration ('the contractual public servants favoured by the old system').

30 It is apparent from the case file before the Court that, by the adoption of Paragraph 169c of the amended Law on remuneration, the Austrian legislature introduced a mechanism for regrading carried out on the basis of a 'transition amount' calculated in accordance with the rules of the old system. In particular, that 'transition amount', which under Paragraph 169c(2) of that law is the basis for the fixed determination of the remuneration seniority of transitioned contractual public servants, is calculated on the basis of the remuneration paid to those public servants the month preceding their transition to the new system.

31 It is apparent from the case file before the Court that the old system of remuneration and advancement has characteristics analogous to those of the system at issue in the case giving rise to the judgment of 11 November 2014, *Schmitzer* (C-530/13, EU:C:2014:2359).

32 In that regard, the Court ruled, in that judgment, that national legislation that, in order to put an end to discrimination on grounds of age in relation to civil servants, takes into account periods of study and service completed before the age of 18, but that, at the same time, introduces — with regard to civil servants who suffered from that discrimination — a three-year extension of the period required to progress from the first to the second incremental step in each job category and each salary group, maintains direct discrimination on grounds of age, for the purposes of Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78.

33 Moreover, it should be noted that it is apparent from the actual wording used in Paragraph 169c(2c) of the amended Law on remuneration that the old system of remuneration and advancement was based on discrimination on grounds of the age of the contractual public servants.

34 In those circumstances, a regrading mechanism, such as that created by the amended Law on remuneration, set out in paragraph 30 of the present judgment, is capable of maintaining the effects produced by the old system of remuneration and advancement, as a result of the link it establishes between the last salary received and the grading in the new system of remuneration and advancement.

35 It is necessary, therefore, to consider that Paragraph 169c of the amended Law on remuneration maintains a difference in treatment between the contractual public servant treated unfavourably by the old system and the contractual public servants treated favourably by that system, since the amount of remuneration that will be received by the former will be less than that that will be paid to the latter solely on the ground of the age they were at the time of their recruitment, although they are in comparable situations (see, to that effect, judgment of 9 September 2015, *Unland*, C-20/13, EU:C:2015:561, paragraph 40).

36 It is necessary, at a second stage, to examine whether that difference in treatment based on age is capable of being justified under Article 6(1) of Directive 2000/78.

37 The first subparagraph of Article 6(1) of Directive 2000/78 states that the Member States may provide that differences of treatment on grounds of age do 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.

38 The Court has held on numerous occasions that Member States enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 34 and the case-law cited).

39 In that context, the referring court notes that the legislation at issue in the main proceedings is, first and foremost, intended to establish a non-discriminatory system of remuneration and advancement. That court notes that that legislation pursues objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations.

40 As regards, first, the objective of financial neutrality pursued by the national legislation at issue in the main proceedings, it must be borne in mind that EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination. In that regard, while budgetary considerations may underpin the chosen social policy of a Member State and influence the nature or extent of the measures that that Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. This also applies to the considerations of an administrative nature mentioned by the referring court and by the Austrian Government (see, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 36).

41 As regards, secondly, respect for the acquired rights and the protection of the legitimate expectations of contractual public servants treated favourably by the old system with regard to their remuneration, it should be noted that these constitute legitimate employment-policy and labour-market objectives that can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of different treatment based on age (see, to that effect, judgment of 11 November 2014, *Schmitzer*, C-530/13, EU:C:2014:2359, paragraph 42).

42 Those objectives cannot, however, justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment that the reform, of which such a measure forms part, is designed to eliminate. Such a measure is not appropriate for the purpose of establishing a non-discriminatory system for persons who are treated unfavourably (see, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 39 and the case-law cited).

43 In this case, Paragraph 169c of the amended Law on remuneration provides for various mechanisms in order to prevent a significant reduction of the remuneration of regraded contractual public servants. Amongst those mechanisms is the payment of a maintenance premium equal to the difference between the amount of the new salary received by the transitioned contractual public servant and the transition amount. That maintenance premium is granted due to the fact that, following his transition, the contractual public servant is subject to a salary scale of the new system of remuneration and advancement to which is associated a salary level immediately below that which he received in the last place under the old system. Also amongst those mechanisms is the increase of between 6 and 18 months of the remuneration seniority of the transitioned contractual public servant.

44 As the Austrian Government pointed out at the hearing, all those mechanisms apply, without distinction, to all of the contractual public servants who were comprehensively transitioned to the new system of remuneration and advancement, whether or not those public servants were treated unfavourably by the old system of remuneration and advancement.

45 In those circumstances, it should be noted that, unlike the cases giving rise to the judgments of 19 June 2014, *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005), and of 9 September 2015, *Unland* (C-20/13, EU:C:2015:561), in which the gap in remuneration between the two categories of public servants at issue in those cases lessened, and, in some cases, progressively disappeared, it is not apparent from the case file before the Court in the present case that the mechanisms provided for by the legislation at issue allow a gradual convergence of the treatment of contractual public servants treated unfavourably by the old system with the treatment of contractual public servants treated favourably, so that in the medium or indeed the short term, the former will 'catch up' and enjoy the advantages granted to the latter. Those mechanisms, consequently, do not lessen, after a specific period, the gap in remuneration existing between the contractual public servants who are treated favourably and contractual public servants who are treated unfavourably.

46 Therefore, the legislation at issue in the main proceedings is not appropriate for the purpose of establishing a non-discriminatory system for contractual public servants treated unfavourably by the old system of remuneration and advancement. On the contrary, it maintains with respect to them the discrimination on grounds of age resulting from the previous system.

47 It follows from all the foregoing considerations that the answer to Question 1(a) is that Articles 1, 2 and 6 of Directive 2000/78, read in combination with Article 21 of the Charter, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, entering into force retroactively, that, for the purposes of putting an end to discrimination on grounds of age, provides for the transition of active contractual public servants to a new system of remuneration and advancement in the context of which the initial grading of those contractual public servants is calculated according to their last remuneration paid under the previous system.

***Question 1(b)***

48 Question 1(b) posed by the referring court refers to Article 17 of Directive 2000/78.

49 It should be noted that, under Article 17 of Directive 2000/78, Member States are to lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and to take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

50 It is apparent from the Court's case-law that that article requires the Member States to apply sanctions to any infringements of national provisions adopted in order to implement that directive (see, to that effect, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 61).

51 In the main proceedings, it is not apparent from the case file before the Court that infringements of national provisions adopted in order to transpose that directive are at issue.

52 The interpretation of Article 17 of Directive 2000/78 is therefore not necessary for the purposes of giving a ruling in the main proceedings.

53 In accordance with the power recognised by the Court's settled case-law, and in particular by the judgment of 21 September 2017, *Beshkov* (C-171/16, EU:C:2017:710, paragraph 33 and the case-law cited), it is necessary to reformulate Question 1(b) as seeking in essence to ascertain whether EU law must be interpreted as meaning that, where discrimination, contrary to EU law, has been established, as long as measures reinstating equal treatment have not been adopted, the restoration of equal treatment, in a case such as that at issue in the main proceedings, involves granting contractual public servants treated unfavourably by the old system of remuneration and advancement the same benefits as those enjoyed by the contractual public servants treated favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the salary scale and, consequently, granting financial compensation to contractual public servants discriminated against.

54 In that regard, it should be noted that, according to the Court's settled case-law, it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision can be interpreted in conformity with Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 74).

55 If it is not possible to construe and apply the national legislation in conformity with that directive, it should also be borne in mind that, by reason of the principle of primacy of EU law, which extends also to the principle of non-discrimination on grounds of age, conflicting national legislation that falls within the scope of EU law must be disapplied (judgment of 19 June 2014, *Specht and Others*, C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 89).

56 It is also apparent from the Court's settled case-law that, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Persons treated unfavourably must therefore be placed in the same position as persons enjoying the advantage concerned (see, to that effect, judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 79 and the case-law cited).

57 In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to persons within the disadvantaged category the same arrangements as those enjoyed by the persons in the other category. That obligation persists regardless of whether or not the national court has been granted competence under national law to do so (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 80 and the case-law cited).

58 Nevertheless, such an approach is intended to apply only if there is a valid point of reference (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 81 and the case-law cited).

59 In the present case, firstly, as is apparent from the answer to Question 1(a), and more particularly from paragraphs 32 and 33 of the present judgment, the rules of the old system of remuneration and advancement created direct discrimination on grounds of age, for the purposes of Directive 2000/78.

60 Secondly, the rules of the remuneration and advancement applicable to contractual public servants treated favourably are those that allow contractual public servants who are treated unfavourably to be promoted without discrimination.

61 Therefore, as long as measures reinstating equal treatment have not been adopted, the reinstating thereof, in a case such as that at issue in the main proceedings, involves granting contractual public servants treated unfavourably by the old remuneration and advancement system the same benefits as those enjoyed by the contractual public servants treated favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the salary scale (see, to that effect, judgment of 28 January 2015, *Starjakob*, C-417/13, EU:C:2015:38, paragraph 48).

62 It follows also that a contractual public servant who is treated unfavourably by the old system of remuneration and advancement is entitled to receive payment, from the employer, of compensation amounting to the difference between the remuneration that the contractual public servant concerned should have received if he had not been treated in a discriminatory way and the remuneration he actually received.

63 It should be noted that the considerations in paragraphs 61 and 62 of the present judgment are applicable only until measures reinstating equal treatment have been adopted by the national legislature (see, to that effect, judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 87).

64 It must be noted that, although the Member States are obliged, in accordance with Article 16 of Directive 2000/78, to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished, that article does not require them to adopt specific measures to be taken in the event of a breach of the prohibition of discrimination but leaves them free to choose, from among the different solutions suitable for achieving its intended purpose, the one that appears to them to be the most appropriate for that purpose, depending on the situations that may arise (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 88).

65 In the light of the above considerations, the answer to Question 1(b) is that, in the event that national provisions cannot be interpreted in conformity with Directive 2000/78, the national court is required to provide, within the limits of its jurisdiction, the legal protection that individuals derive from that directive and to ensure the full effectiveness of that directive, disapplying, if need be, any incompatible provision of national legislation. EU law must be interpreted as meaning that, where discrimination, contrary to EU law, has been established, as long as measures reinstating equal treatment have not been adopted, the restoration of equal treatment, in a case such as that at issue in the main proceedings, involves granting contractual public servants treated unfavourably by the old system of remuneration and advancement the same benefits as those enjoyed by the contractual public servants

treated favourably by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the salary scale and, consequently, granting compensation to contractual public servants discriminated against which is equal to the difference between the amount of remuneration the contractual public servant should have received if he had not been treated in a discriminatory manner and the amount of remuneration he actually received.

***Question 1(c)***

66 In light of the answer to Question 1(a), there is no need to answer Question 1(c).

***The second question***

67 By its second question, the referring court asks, in essence, whether Article 45 TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted as precluding national legislation, in accordance with which, in order to determine the remuneration seniority of a contractual public servant, previous service periods completed in an employment relationship with a local authority or municipal association of a Member State of the European Economic Area, the Republic of Turkey or the Swiss Confederation, or with an organisation of the European Union or an intergovernmental organisation of which Austria is a member, or with any similar body, must be accredited in their entirety, whereas all other previous service periods are taken into account only up to a maximum of 10 years and in so far as they are relevant.

68 In that regard, it should be noted that Article 45(2) TFEU provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

69 The Court has held that Article 7(1) of Regulation No 492/2011 constitutes merely the specific expression of the principle of non-discrimination laid down in Article 45(2) TFEU within the specific field of conditions of employment and work and must therefore be interpreted in the same way as the latter article (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 23).

70 In that context, it should be noted that the principle of equal treatment laid down in both Article 45 TFEU and in Article 7 of Regulation No 492/2011 prohibits not only direct discrimination on the ground of nationality but also all indirect forms of discrimination that, by the application of other criteria of differentiation, lead in fact to the same result (judgment of 2 March 2017, *Eschenbrenner*, C-496/15, EU:C:2017:152, paragraph 35).

71 Therefore, a provision of national law — even if it applies regardless of nationality — must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the migrant worker at a particular disadvantage, unless objectively justified and proportionate to the aim pursued (judgment of 2 March 2017, *Eschenbrenner*, C-496/15, EU:C:2017:152, paragraph 36).

72 In this case, first, it is clear that the legislation at issue in the main proceedings applies to contractual public servants without distinction on grounds of nationality.

73 Therefore, it does not appear that legislation such as that at issue in the main proceedings creates a difference in treatment directly based on nationality, for the purposes of Article 45 TFEU and Article 7 of Regulation No 492/2011.

74 Secondly, as the Advocate General stated in point 91 of his Opinion, the criterion on the basis of which the difference in treatment operates is whether the public servant concerned exercised the activities that he wishes to be taken into account, with employers listed in Paragraph 26(2) of the amended Law on contractual public servants or with those referred to in Paragraph 26(3) thereof, irrespective of the Member State in which he exercised them.

75 Such a criterion does not seem to be capable of affecting workers from other Member States more than Austrian workers.

76 However, it should be noted that, according to the Court's case-law, provisions of national legislation that preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute obstacles to that freedom even if they apply without regard to the nationality of the workers concerned (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 30).

77 It should be added in that regard that all the provisions of the TFEU relating to freedom of movement for persons are intended, as are those of Regulation No 492/2011, to facilitate the pursuit by nationals of the Member States of occupational activities of all kinds throughout the European Union, and preclude measures that might place nationals of Member States at a disadvantage if they wish to pursue an economic activity in the territory of another Member State (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 32).

78 In the main proceedings, the amount of relevant earlier periods of activity completed with employers other than those listed in Paragraph 26(2) of the amended Law on contractual public servants that can be taken into account is limited to 10 years.

79 Therefore, persons who have professional experience of more than 10 years with those other employers will be dissuaded from applying for a position as an Austrian contractual public servant due to the fact that they would obtain a lower grading in the salary scale, since the relevant periods of activity that they completed with such employers will not be taken entirely into account during the calculation of their seniority in the remuneration scale.

80 A migrant worker who acquired relevant professional experience of more than 10 years with an employer other than those listed in Paragraph 26(2) of the amended Law on contractual public servants will be graded in the same remuneration scale as that in which a worker who acquired the same type of experience, but of a duration of less than or equal to 10 years, will be graded.

81 Moreover, a migrant worker who has professional experience of 10 years that can be taken into account for the purposes of Paragraph 26(3) of the amended Law on contractual public servants can be required to seek employment with the employers listed in Paragraph 26(2) of that law in order to acquire relevant professional experience allowing him not to lose the possibility of starting work as an Austrian contractual public servant.

82 It follows that, by excluding taking into account all of the relevant periods of activity completed by a migrant worker with an employer other than those listed in Paragraph 26(2) of the amended Law on contractual public servants, the national legislation at issue in the main proceedings is likely to dissuade migrant workers who have acquired or who are in the process of acquiring relevant professional experience with other employers, from exercising their right to free movement.

83 National legislation such as that at issue in the main proceedings is, consequently, likely to make the free movement for workers less attractive, in breach of Article 45 TFEU and Article 7(1) of Regulation No 492/2011.

84 A measure of that kind cannot be accepted unless it pursues one of the legitimate aims listed in the TFEU or is justified by overriding reasons in the public interest. Even so, application of that measure still has to be such as to ensure achievement of the objective in question and must not go beyond what is necessary for that purpose (see, to that effect, inter alia, judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 36).

85 In that regard, the Austrian Government notes that, firstly, the Court has already accepted that rewarding experience acquired in a particular field, which enables the worker to better perform the duties conferred on him, constitutes a legitimate aim of pay policy, since the employers can, as a result, take account solely of that acquired experience when determining remuneration. Secondly, the legislation at issue in the main proceedings aims to reward the loyalty of contractual public servants.

86 As regards the first ground put forward as justification by the Austrian Government, it should be noted that, according to the Court's settled case-law, rewarding experience acquired in a particular field, which enables the worker to perform the tasks conferred on him, constitutes a legitimate objective of pay policy (judgment of 14 March 2018, *Stollwitzer*, C-482/16, EU:C:2018:180, paragraph 39).

87 Such experience must be taken into consideration for the grading and the calculation of the remuneration of a contractual public servant in its entirety.

88 Therefore, a national measure, such as that at issue in the main proceedings, which takes into account in a limited manner relevant experience, cannot be regarded as aiming to reward entirely that experience and, consequently, is not capable of guaranteeing the achievement of that objective.

89 As regards the second ground put forward as justification by the Austrian Government, it should be noted that, even assuming that the legislation at issue in the main proceedings indeed pursues the objective of rewarding workers' loyalty to their employers, if such an objective can constitute an overriding reason of public interest (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 38), it must be stated that, given the characteristics of that legislation, the obstacle that it entails is not such as to ensure achievement of that objective.

90 It should be noted that, given the large number of employers covered by Article 26(2) of the amended Law on contractual public servants, the new system of remuneration and advancement is intended to allow the greatest possible mobility within a group of legally distinct employers and not to reward the loyalty of an employee to a particular employer (see, by analogy, judgment of 30 November 2000, *Österreichischer Gewerkschaftsbund*, C-195/98, EU:C:2000:655, paragraph 49).

91 In those circumstances, it must be considered that that temporal limitation is not justified by overriding reasons in the general interest such as those referred to in paragraphs 86 and 89 of the present judgment.

92 In the light of those considerations, the answer to the second question is that Article 45 TFEU and Article 7(1) of Regulation No 492/2011 must be interpreted as precluding national legislation, in accordance with which, in order to determine the remuneration seniority of a contractual public servant, previous service periods completed in an employment relationship with a local authority or municipal association of a Member State of the European Economic Area, the Republic of Turkey or the Swiss Confederation, or with an organisation of the European Union or an intergovernmental organisation of which Austria is a member, or with any similar body, must be accredited in their entirety, whereas all other previous service periods are taken into account only up to a maximum of 10 years and in so far as they are relevant.

## Costs

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

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

1. **Articles 1, 2 and 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in combination with Article 21 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, entering into force retroactively, that, for the purposes of putting an end to discrimination on grounds of age, provides for the transition of active contractual public servants to a new system of remuneration and advancement in the context of which the initial grading of those contractual public servants is calculated according to their last remuneration paid under the previous system.**

2. **In the event that national provisions cannot be interpreted in conformity with Directive 2000/78, the national court is required to provide, within the limits of its jurisdiction, the legal protection that individuals derive from that directive and to ensure the full effectiveness of that directive, disapplying, if need be, any incompatible provision of national legislation. EU law must be interpreted as meaning that, where discrimination, contrary to EU law, has been established, as long as measures reinstating equal treatment have not been adopted, the restoration of equal treatment, in a case such as that at issue in the main proceedings, involves granting contractual public servants treated unfavourably by the old system of remuneration and advancement the same benefits as those enjoyed by the contractual public servants favoured by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the salary scale and, consequently, granting compensation to contractual public servants discriminated against that is equal to the difference between the amount of remuneration the contractual public servant should have received if he had not been treated in a discriminatory manner and the amount of remuneration he actually received.**

3. **Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union must be interpreted as precluding national legislation, in accordance with which, in order to determine the remuneration seniority of a contractual public servant, previous service periods completed in an employment relationship with a local authority or municipal association of a Member State of the European Economic Area, the Republic of Turkey or the Swiss Confederation, or with an organisation of the European Union or an intergovernmental organisation of which Austria is a member, or with any similar body, must be accredited in their entirety, whereas all other previous service periods are taken into account only up to a maximum of 10 years and in so far as they are relevant.**

[Signatures]