Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 13 January 2022 [1]

Case C-587/20

Ligebehandlingsnævnet, acting on behalf of A
v
HK/Danmark,
HK/Privat,
Intervener:
Fagbevægelsens Hovedorganisation

(Request for a preliminary ruling from the Østre Landsret (High Court of Eastern Denmark))

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Principle of equal treatment in employment and occupation – Prohibition of discrimination on grounds of age – Article 3(1)(a) and (d) – Scope – Post of elected sector convenor of an organisation of workers – Statutes of that organisation under which only members under the age of 60 or 61 on the date of the election are eligible to stand as sector convenor)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 3(1)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. [2]

2. The request has been made in a dispute between, on the one hand, the Ligebehandlingsnævnet (Equal Treatment Board, Denmark), acting on behalf of A, and, on the other, HK/Danmark, a workers' trade union, and the HK/Privat federation, concerning a provision of HK/Privat's statutes under which A could not stand for election as its sector convenor by reason of her age on the date of the election.

3. The referring court asks the Court whether Directive 2000/78 is applicable to such a situation. In the present Opinion, I will argue that Article 3(1)(a) and (d) of that directive must be interpreted as meaning that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that directive.

[1] Original language: French.
[2] OJ 2000 L 303, p. 16.

II. Legal context

A. Directive 2000/78

4. Article 3 of Directive 2000/78, entitled 'Scope', provides, in paragraph 1 thereof:

'Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.'

B. Danish law

5. Lov nr. 459 om forbud mod forskelsbehandling på arbejdsmarkedet m.v. (Law No 459 on the prohibition of discrimination on the labour market) of 12 June 1996 was amended by Law No 253 of 7 April 2004 and Law No 1417 of 22 December 2004, which transposed Directive 2000/78.

6. Paragraph 1(1) of that Law, in the version applicable to the dispute in the main proceedings, states:

'Discrimination for the purposes of this Law shall be understood to mean any direct or indirect discrimination on grounds of … age …'

7. Paragraph 2(1) of that Law provides:

'An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.'

8. Under Paragraph 3(3) and (4) of that Law:

'3. The prohibition of discrimination shall also apply to any person who introduces provisions and takes decisions concerning access to independent professions.

4. The prohibition of discrimination shall also apply to any person who takes decisions on conditions for membership of, and involvement in, an organisation of workers or employers, including the benefits provided for by such organisations.'

III. The dispute in the main proceedings and the question referred for a preliminary ruling

9. According to the order for reference, A, who was born in 1948, was recruited in 1978 as a union representative in a local branch of the HK organisation of workers. In 1980, she was transferred to the national confederation. The congress of HK/Service (now HK/Privat) elected her as deputy convenor in 1992, then convenor in 1993. She was subsequently re-elected every four years and held the post of sector convenor of that body until 8 November 2011, when she reached the age of 63 and had exceeded the age limit laid down in Paragraph 9 of the statutes of that body for standing for the election to be held that year. Paragraph 9(1) provides that only members who are under the age of 60 on the date of the election may be elected as sector convenor, with that age limit being deferred to 61 for members re-elected after the 2005 congress.

10. After a complaint had been lodged by A, the Equal Treatment Board held, by its decision of 22 June 2016, that it was contrary to the Law relating to the prohibition of discrimination in the labour market for A to be prohibited, by reason of her age, to stand for election as sector convenor of HK/Privat at the congress in 2011 and ordered HK/Danmark and HK/Privat to pay A compensation of Danish Kroner 25 000 (DKK) (approximately EUR 3 460) [3] plus interest.

11. As that decision was not complied with, the applicant in the main proceedings [4] brought an action against HK/Danmark and HK/Privat before the Københavns Byret (District Court, Copenhagen, Denmark). In so far as that action raised questions of principle, it was remitted to the Østre Landsret (High Court of Eastern Denmark, Denmark).

12. The referring court considers that the outcome of the dispute before it depends on whether, as a politically elected sector convenor of HK/Privat, A falls within the scope of Directive 2000/78 since, if that is the case, it is not disputed that Paragraph 9 of HK/Privat's statutes would entail direct discrimination on grounds of age against her pursuant to that directive.

13. That court notes in this regard that the duties performed by A as sector convenor of HK/Privat consisted in having responsibility for its overall management, laying down policy in its professional field, concluding and renewing collective agreements and ensuring that these were respected. In addition, she had to implement decisions adopted by the congress and the sector board and those of HK/Danmark's management board, of which she was also a member.

14. As regards A'sconditions of employment, the referring court states that, under the 'contract for an elected person' of 27 October 2009 signed by A, she was employed full-time in HK/Privat and had no outside occupation. She received a monthly salary of DKK 69 548.93 (approximately EUR 9 350), [5] corresponding to a particular State pay grade. She was not covered by the lov om retsforholdet mellem arbejdsgivere og funktionærer (Law on the legal relationship between employers and salaried employees), [6] since a political office was involved. She was not covered by a collective agreement, but by HK's statutes. However, the lov om ferie (Law on holidays) [7] applied to A and she had an obligation to maintain professional secrecy.

[3] At the exchange rate of 22 June 2016.

[4] The Equal Treatment Board, in its capacity as A's representative in the dispute in the main proceedings.

[5] At the exchange rate of 27 October 2009.

[6] In the version resulting from Consolidating Decree No 81 of 3 February 2009, as amended.

[7] In the version resulting from Consolidating Decree No 1177 of 9 October 2015, as amended.

15. In addition, the referring court states that, as elected sector convenor, A was not employed but held an office based on trust, responsible to the sector congress of HK/Privat, which had elected her. However, her role as sector convenor included certain elements characteristic of ordinary workers.

16. The referring court takes the view that the Court of Justice has not defined in detail the concepts of 'employment', 'self-employment' and 'occupation' mentioned in Article 3(1)(a) of Directive 2000/78 and that it has not given a ruling on whether politically elected representatives in an organisation of workers fall within the scope of that directive.

17. In those circumstances, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 3(1)(a) of [Directive 2000/78] be interpreted as meaning that a politically elected sector convenor of a trade union [falls within] the scope of the directive in the circumstances described [in the request for a preliminary ruling]?'

18. The applicant in the main proceedings, HK/Danmark and HK/Privat, Fagbevægelsens Hovedorganisation (Trade Union Confederation, Denmark, 'FH'), the Greek Government and the European Commission lodged written observations. Those parties presented oral argument at the hearing on 20 October 2021.

IV. Analysis

19. It should be noted as a preliminary point that, by its question, the referring court asks the Court solely whether the age condition governing eligibility to stand for the post of sector convenor of an organisation of workers falls within the substantive scope of Directive 2000/78. However, the referring court does not ask the Court about whether there is a difference in treatment on grounds of age or any justification for it. I will not therefore examine those issues in the present Opinion.

20. The referring court asks the Court to clarify the scope of Directive 2000/78 in respect of a provision of the statutes of an organisation of workers under which eligibility to stand as sector convener of that organisation is subject to the condition that the candidate for the post is under the age of 60 or 61.

21. By its question, the referring court must be considered to be asking, in essence, whether the concept of 'conditions for access to employment, to self-employment or to occupation' in Article 3(1)(a) of Directive 2000/78 is to be interpreted as meaning that that concept covers an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convener of that organisation.

22. I concur with the Greek Government that in order to provide a helpful and comprehensive answer to the referring court, its question should be understood as also referring to Article 3(1)(d) of that directive.

23. I will therefore examine the question asked by that court in turn from the perspective of Article 3(1)(a) of Directive 2000/78 and then from the perspective of Article 3(1)(d) of that directive. I will conclude by making some remarks on the compatibility of the proposed interpretation with freedom of association.

A. The scope of Directive 2000/78, as referred to in Article 3(1)(a) thereof

24. According to the very wording of the title of Directive 2000/78, the directive concerns employment and occupation. Where they adopt measures which fall within the scope of that directive – which gives specific expression, in the area of employment and occupation, to the principle of non-discrimination on grounds of age, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union [8] – the Member States and the social partners must respect that directive. [9]

25. It is apparent from Article 3(1)(a) of Directive 2000/78 that the directive applies 'to all persons, as regards both the public and private sectors, including public bodies, in relation to … conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'.

26. As the Court has already held, Directive 2000/78 does not refer to the law of the Member States for the purpose of defining 'conditions for access to employment, to self-employment or to occupation', but it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. [10]

27. In addition, in so far as Directive 2000/78 does not define the terms 'conditions for access to employment, to self-employment or to occupation', they must be interpreted by reference to their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they form part. [11]

28. In that regard, the Court has noted that the phrase 'conditions for access to employment … or to occupation', in everyday language, covers circumstances or facts the existence of which must be established in order for a person to be able to secure particular employment or a particular occupation. [12]

8 'The Charter'.

9 See, inter alia, judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 17 and the case-law cited).

10 See judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 31 and the case-law cited).

11 See judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 32 and the case-law cited).

12 See judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 33).

29. The Court has also stated that it follows from Article 3(1)(a) of Directive 2000/78 that that directive applies 'to a person seeking employment, and also in regard to the selection criteria and recruitment conditions of that employment'.[13] However, it is also necessary, in order for a person to be able to rely on the protection offered by that directive, that that person is genuinely seeking to obtain the post for which he formally applies.[14]

30. For example, legislation limiting recruitment to posts in the fire service to persons of not more than 30 years of age[15] and legislation setting a maximum age for practising as a panel dentist within the statutory health insurance scheme fall within the scope of Directive 2000/78, under Article 3(1)(a) thereof.[16]

31. In the light of that line of case-law of the Court, I take the view that, in so far as the age limit laid down by the statutes of HK/Privat must be respected in order for a person to obtain the post of sector convener of that organisation of workers, such a rule forms part of 'conditions for access to employment, to self-employment or to occupation' within the meaning of Article 3(1)(a) of Directive 2000/78.

32. In support of that view, I note that the very wording of that provision attests to the EU legislature's intention to give a particularly broad definition to the scope of that directive. By juxtaposing the terms 'employment', 'self-employment' and 'occupation',[17] I consider that the Union legislature wished to cover all rules laying down conditions for access to any occupational activity, whatever the nature and characteristics of that activity. The directive thus applies to employment relationships in the public or private sectors,[18] irrespective of the nature and forms of those relationships. I note in that regard that, according to the explanation concerning Article 3 in the Explanatory Memorandum for the Proposal for a Council directive establishing a general framework for equal treatment in employment and occupation,[19] 'equality of treatment in respect of access to employed or self-employed activities (point a) involves the elimination of any discrimination arising from any provision which prevents access of individuals to *all forms of employment and occupation*'.[20]

33. Clearly, election to the post of sector convener of an organisation of workers such as HK/Privat results in the exercise of an occupational activity. There is no doubt, in my view, that if regard is had to the meaning of the term 'employment' in everyday language, by standing for

[13] See, inter alia, judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 34 and the case-law cited).

[14] See judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraphs 29 and 35). Accordingly, Article 3(1)(a) of Directive 2000/78 must be interpreted as meaning that a situation in which a person who, in making an application for a post, does not seek to obtain that post but seeks only the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of 'access to employment, to self-employment or to occupation' within the meaning of that provision and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights (paragraph 44 and operative part of that judgment).

[15] See judgment of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3).

[16] See judgment of 12 January 2010, *Petersen* (C-341/08, EU:C:2010:4). In that judgment, the Court held that the legislation at issue also concerned 'employment and working conditions' within the meaning of Article 3(1)(c) of Directive 2000/78 (paragraph 33).

[17] The terms for 'employment', 'self-employment' and 'occupation' used in Spanish, for example, are 'empleo', 'actividad por cuenta propia' and 'ejercicio profesional' and, in French, 'emploi', 'activités non salariées' and 'travail'.

[18] See, with regard to Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), judgment of 16 July 2015, *Maïstrellis* (C-222/14, EU:C:2015:473, paragraph 42).

[19] COM(1999) 565 final.

[20] Italics added.

election, A wished to access employment within the organisation of workers, which is characterised in the present case by the full-time performance of management duties for HK/Privat, giving rise to payment of monthly remuneration. [21]

34. In my view, it is clear that the use, together, in Article 3(1)(a) of Directive 2000/78 of the concepts of 'employment', 'self-employment' and 'occupation' demonstrates that the EU legislature did not have any intention to limit the scope of that directive to positions which grant their holders the status of 'worker' within the meaning of Article 45 TFEU and the many rules of EU secondary law which seek to protect workers as the weaker party in an employment relationship. In that context, the concept of 'worker' usually refers to a person who for a certain period of time performs services for and under the direction of another person in return for which he or she receives remuneration. [22]

35. That is not to say that the definition of 'worker' under EU law is irrelevant in the context of Directive 2000/78. The Court's case-law includes several examples where that definition is used in combating discrimination. [23] That is because, whatever the area to which they relate, the Court's judgments clarify the concept of 'worker' in the light of the principle of equal treatment, [24] which, by extension, entails using the definition of that concept in all areas where that principle is at issue. In other words, the definition of the concept of 'worker' within the meaning of Article 45 TFEU naturally is intended to spread to all cases involving the principle of equal treatment in employment and occupation.

36. That being the case, if workers thus defined undoubtedly fall within the scope of Directive 2000/78, that scope is, in my view, broader and covers all situations where a condition founded in one of the grounds for discrimination specified by the directive is applied to access to occupational activities of all kinds, whether what is concerned are, in particular, employed or self-employed activities. [25] In short, any barrier to employment is capable of being captured by Article 3(1)(a) of the directive.

37. As the Greek Government correctly observed at the hearing, and as its legal basis [26] indicates, Directive 2000/78 does not constitute legislation for the protection of workers as the weaker party in an employment relationship. The directive seeks to eliminate, on grounds relating to social and public interests, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided.

38. Accordingly, the scope of that directive is not limited to activities the characteristics of which would allow the person wishing to access them to satisfy all the criteria of the concept of 'worker' within the meaning of Article 45 TFEU.

[21] See points 13 and 14 of the present Opinion.

[22] See, inter alia, judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian Magistrates)* (C-658/18, EU:C:2020:572, paragraph 94 and the case-law cited).

[23] See, inter alia, judgments of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraphs 22 to 27), and of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraphs 19 to 23). See also Opinion of Advocate General Rantos in *HR Rail* (C-485/20, EU:C:2021:916, point 48), who notes, with reference to the latter judgment, that the concept of 'worker' within the meaning of Directive 2000/78 is the same as within the meaning of Article 45 TFEU.

[24] See judgment of 14 December 1995, *Megner and Scheffel* (C-444/93, EU:C:1995:442, paragraph 20).

[25] It is of interest, in that regard, to draw a parallel with the Court's settled case-law that 'all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by EU nationals of *occupational activities of all kinds* throughout the European Union': see, inter alia, judgment of 11 November 2021, *MH and ILA (Pension rights in case of bankruptcy)* (C-168/20, EU:C:2021:907, paragraph 86 and the case-law cited). Italics added.

[26] Namely Article 13 EC, now Article 19(1) TFEU.

39. In particular, I would observe that the criterion relating to there being a relationship of subordination to an employer, which seems to be the focus for the doubts expressed by the referring court, is not apparent from the wording of Article 3(1)(a) of Directive 2000/78. On the contrary, the reference in that provision to access to 'self-employment' shows that a relationship of subordination to an employer need not necessarily be demonstrated for a situation to fall within the scope of the directive. Furthermore, it is apparent from the wording of that provision that it concerns 'conditions for access to employment, to self-employment or to occupation … *at all levels of the professional hierarchy*',[27] including, therefore, the highest level.

40. I note, in addition, that Article 3(1)(a) of Directive 2000/78 refers to 'selection criteria and recruitment conditions', which can, in my view, include access to an occupational activity organised by means of an election. The fact that access to the post of sector convener of an organisation of workers occurs through a vote in which affiliated members can take part cannot preclude the application of that directive. Aside from the fact that that directive makes no distinction regarding the manner in which access to employment occurs, the Court has already held that the method of recruitment to a post has no bearing on the application of that directive.[28]

41. Furthermore, I consider the fact, relied upon by the referring court that the post of sector convener of an organisation of workers entails the performance of political functions, to be irrelevant for the purposes of determining whether Directive 2000/78 is applicable, in accordance with the provisions of Article 3(1)(a) of the directive. Even though the performance of such functions may have importance in national law,[29] it should be pointed out that under that provision the directive applies 'whatever the branch of activity'. In addition, it appears that where Member States are able to make provision that the directive does not apply to a certain branch of activity, the directive is to make express mention thereof. That is the case in relation to the armed forces, which, under Article 3(4) of the directive, may be excluded from its scope as regards discrimination on the grounds of disability and age.

42. In my view, it therefore follows from the clear wording of Article 3(1)(a) of Directive 2000/78 that the scope of that directive encompasses a rule establishing an age limit, such as the rule at issue in the main proceedings, where that rule lays down a condition for access to the post of sector convener of an organisation of workers.

43. I consider that the interpretation which can be inferred from the wording of that provision is supported by the objectives pursued by that directive.

44. It should be noted in that regard that Directive 2000/78 was adopted on the basis of Article 13 EC, now Article 19(1) TFEU, which confers on the European Union competence to take appropriate action to combat discrimination based on, inter alia, age. That directive accordingly seeks to establish a general framework for ensuring that all persons benefit from equal treatment 'in employment and occupation' by providing effective protection against discrimination based on any of the grounds referred to in Article 1 thereof,[30] which include age.

27 Italics added.

28 See, to that effect, judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 45).

29 There would appear to be a distinction in Danish law between staff who perform political functions and other members of staff of a trade union, the former not being subject to the Law on salaried employees.

30 See, with regard to disability, judgment of 15 July 2021, *Tartu Vangla* (C-795/19, EU:C:2021:606, paragraph 26 and the case-law cited).

45. In particular, recital 9 of Directive 2000/78 states that 'employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential'. Similarly, recital 11 of the directive states that 'discrimination based [inter alia on age] may undermine the achievement of the objectives of the [FEU] Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons'.

46. Directive 2000/78 is thus a specific expression, within the area it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter. [31]

47. The Court has ruled that, in the light of that objective and having regard to the nature of the rights which that directive seeks to safeguard and to the fundamental values that underpin it, the concept of 'conditions for access to employment … or to occupation' within the meaning of Article 3(1)(a) of the directive, which defines its scope, cannot be interpreted restrictively. [32]

48. The objective pursued by Directive 2000/78 could not be achieved if the protection against discrimination in the area of employment and occupation were to depend on a formal categorisation of an employment relationship under national law or on the choice made at the time of a person's appointment between one type of contract and another. [33] Similarly, that objective would be frustrated if such protection were to depend on the nature of the functions performed in a particular job.

49. In my view, all these factors militate in favour of the view that an age limit laid down by the statutes of an organisation of workers for eligibility to stand as sector convener of that organisation falls within the scope of Directive 2000/78, in accordance with Article 3(1)(a) of that directive.

B. The scope of Directive 2000/78, as referred to in Article 3(1)(d) thereof

50. I consider that the situation at issue in the main proceedings is also covered by Article 3(1)(d) of Directive 2000/78.

[31] See, inter alia, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 38 and the case-law cited).

[32] See, inter alia, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 39 and the case-law cited). In paragraph 58 of that judgment, the Court ruled that 'the concept of "conditions for access to employment … or to occupation" in Article 3(1)(a) of Directive 2000/78 must be interpreted as covering statements made by a person during an audiovisual programme according to which that person would never recruit persons of a certain sexual orientation to his or her undertaking or wish to use the services of such persons, even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical'.

[33] See, by analogy, judgment of 11 November 2010, *Danosa* (C-232/09, EU:C:2010:674, paragraph 69), which illustrates the fact that the protection conferred by the anti-discrimination directives in the area of employment and occupation is directed at individuals and goes beyond their sole status as a 'worker' within the meaning of EU law. It is clear from paragraph 64 et seq. of that judgment that the situation of a member of the board of directors of a capital company who was dismissed when she was pregnant ought to be examined from the perspective of non-discrimination on grounds of sex where that person could not, given the nature of the activity pursued and the context within which it is accomplished, rely on the status of 'pregnant worker' within the meaning of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

51. That provision refers to 'membership of, and *involvement* in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations'. [34]

52. In my view, where a person such as A wishes to stand for election as sector convenor of an organisation of workers, that is a form of 'involvement' [35] or, to put it differently, participation, by that person in such an organisation for the purposes of Article 3(1)(d) of Directive 2000/78.

53. That area of application of Directive 2000/78 comes from Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [36]

54. Under Article 8(1) of that regulation, 'a worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote … *Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking*'. [37]

55. Within the framework of that regulation, the right of membership and involvement includes the right to vote and to stand as candidates. [38]

56. The first paragraph of Article 8 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 European Union [39] now expressly refers to eligibility for 'the administration or management posts of a trade union'.

57. With these factors in mind, I consider that the concept of 'involvement' ought to be understood as including eligibility for the administration or management posts of a trade union. I do not see why the principle of equal treatment should apply to such eligibility in freedom of movement for workers and not in combatting discrimination on grounds of age.

[34] Italics added.

[35] Respectively 'participación', 'Mitwirkung' and 'engagement' in Spanish, German and French.

[36] OJ, English Special Edition 1968 (II), p. 475. See, to that effect, Martin, D., 'Article 3 – Champ d'application', *Directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail: Commentaire article par article*, Bruylant, Brussels, 2020, p. 85 to 106, in particular p. 98.

[37] Italics added.

[38] See, with regard to legislation of a Member State which denies workers who are nationals of other Member States and are employed in that Member State the right to vote and to stand as candidates in elections organised in occupational guilds, judgment of 18 May 1994, *Commission* v *Luxembourg* (C-118/92, EU:C:1994:198). See also, with regard to national legislation refusing foreign workers the right to vote in elections of members of an occupational guild to which they are compulsorily affiliated, to which they must contribute, which is responsible for defending the interests of affiliated workers and which has a consultative function in the legislative field, judgment of 4 July 1991, *ASTI* (C-213/90, EU:C:1991:291). On the basis of those judgments, when it was required to interpret Article 10(1) of Decision No 1/80 of 19 September 1980 on the development of the Association, adopted by the Association Council established by the Association Agreement between the European Economic Community and Turkey, the Court understood eligibility for election to the general assembly of a body representing and defending the interests of workers as relating to 'conditions of work' of Turkish workers: see judgment of 8 May 2003, *Wählergruppe Gemeinsam* (C-171/01, EU:C:2003:260), and Opinion of Advocate General Jacobs in *Wählergruppe Gemeinsam* (C-171/01, EU:C:2002:758, points 42 to 46). See also judgment of 16 September 2004, *Commission* v *Austria* (C-465/01, EU:C:2004:530). In so far as Directive 2000/78 establishes in Article 3(1)(d) a specific provision for involvement in an organisation of workers, I do not think it is helpful also to examine the situation in the main proceedings from the perspective of Article 3(1)(c) of the directive, under which the directive is applicable to 'employment and working conditions'.

[39] OJ 2011 L 141, p. 1.

58. At the hearing the Commission stated that, in its view, Article 3(1)(d) of Directive 2000/78 covers a situation where an employer sets limits on workers' participation in an organisation of workers. I believe that the Commission's restrictive interpretation of that provision is in no way required by its wording. I consider that the wording of that provision does not preclude that a measure imposing such limits may stem from that organisation itself, including its statutes.

C. Final remarks on the compatibility of the proposed interpretation with freedom of association

59. In support of its position that Directive 2000/78 does not apply to election to the post of sector convener of an organisation of workers, FH stated at the hearing that that directive ought to be interpreted in accordance with Article 3(1) of Convention No 87 of the International Labour Organisation (ILO) of 9 July 1948 concerning Freedom of Association and Protection of the Right to Organise, under which trade unions are free to choose their representatives. [40] In making that argument, however, FH ignores the fact that that directive constitutes the expression in EU law of a general principle of non-discrimination in employment and occupation, which is protected by another ILO convention, namely Convention No 111 of 20 June 1951 concerning Discrimination (Employment and Occupation), as mentioned in recital 4 of that directive. The existence of those two conventions reflects the fact that trade unions' freedom to elect their representatives must be reconciled with the prohibition of discrimination in employment and occupation.

60. The argument relied on by FH is, in fact, tantamount to maintaining that that freedom ought to prevail over the prohibition of discrimination in employment and occupation. To put it another way, the position that election to the post of sector convener of an organisation of workers falls within the scope of Directive 2000/78 is incompatible with the freedom of trade unions to elect their representatives, which constitutes an component of freedom of association in trade union matters, as enshrined in Article 12(1) of the Charter. [41]

61. In my view, that line of argument cannot succeed. The freedom of trade unions to elect their representatives cannot give them carte blanche to adopt in their statutes measures liable to result in discrimination in employment and occupation.

62. In that regard, I believe that the Court ought to apply, by analogy, the reasoning it adopted with regard to freedom of expression in its judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*. [42]

63. Accordingly, the interpretation that election to the post of sector convener of an organisation of workers falls within the scope of Directive 2000/78 is not affected by any limitation of the exercise of freedom of association, raised by FH at the hearing, that such an interpretation might entail.

[40] Under that provision, 'workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes'.

[41] The right of collective bargaining and action is enshrined in Article 28 of the Charter.

[42] C-507/18, EU:C:2020:289.

64. As is apparent from Article 52(1) of the Charter, freedom of association is not an absolute right and its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality, namely if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

65. That is so in the present case, as the limitations to the exercise of freedom of association which may follow from Directive 2000/78 are indeed provided for by law, since they result directly from that directive.

66. Those limitations, moreover, respect the essence of freedom of association, since they apply solely for the purpose of attaining the objectives of that directive, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection. They are, accordingly, justified by those objectives.

67. Such limitations also respect the principle of proportionality in so far as the prohibited grounds of discrimination are listed in Article 1 of Directive 2000/78, the substantive and personal scope of which is defined in Article 3 of that directive, and the interference with the exercise of freedom of association does not go beyond what is necessary to attain the objectives of the directive, in that only provisions of statutes of an organisation of workers which constitute discrimination in employment and occupation are prohibited.

68. In addition, the limitations of the exercise of freedom of association arising from Directive 2000/78 are necessary to guarantee the rights in matters of employment and occupation of persons belonging to groups characterised by one of the grounds listed in Article 1 of that directive.

69. In particular, if, contrary to my proposed interpretation of Article 3(1)(a) and (d) of Directive 2000/78, provisions preventing certain categories of people from standing for election as sector convener of an organisation of workers were to fall outside the substantive scope of that directive on the grounds, inter alia, that that post includes political functions, limitations of access to such a post of sector convener would be possible on any ground protected by the directive. That would exclude a whole range of occupations carried out in organisations of workers from the protection granted by that directive in matters of employment and occupation.

70. I would add that, if that view were adopted, it would mean that it would be possible in the statutes of a trade union to use a person's religion or sexual orientation, among other things, to prohibit him or her from being eligible for the position of sector convener of that organisation. The excesses which could result from a restrictive interpretation of the scope of Directive 2000/78 are therefore apparent.

71. To conclude, it seems paradoxical to say the least, that an organisation whose mission is to protect workers' rights is advocating a restrictive interpretation of the scope of a rule intended to combat discrimination in employment and occupation.

72. In the light of the foregoing, it is my view that a provision of the statutes of an organisation of workers which limits eligibility to stand as sector convener of that organisation to persons under a certain age cannot fall outside the ambit of the regime for combatting discrimination in employment and occupation established by Directive 2000/78. Such a provision is therefore covered by the substantive scope of that directive, as defined in Article 3(1)(a) and (d) thereof.

V. Conclusion

73. In the light of all the above considerations, I propose that the question referred for a preliminary ruling by the Østre Landsret (High Court of Eastern Denmark, Denmark) be answered as follows:

Article 3(1)(a) and (d) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that an age limit laid down in the statutes of an organisation of workers for eligibility to stand as sector convenor of that organisation falls within the scope of that directive.