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Provisional text

JUDGMENT OF THE COURT (Second Chamber)

17 October 2024 (\*)

( Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 2(2)(a) – Prohibition of discrimination on grounds of age – Mandatory retirement age – National legislation precluding any postponement of the retirement of federal judges – Possibility for federal civil servants and Land judges to request the postponement of retirement – Difference in treatment on grounds of membership of a socio-professional category or place of work )

In Case C-349/23 [Zetschek], (i)

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe, Germany), made by decision of 24 April 2023, received at the Court on 6 June 2023, in the proceedings

**HB**

v

**Bundesrepublik Deutschland,**

THE COURT (Second Chamber),

composed of F. Biltgen (Rapporteur), President of the First Chamber, acting as President of the Second Chamber, M.L. Arastey Sahún, President of the Fifth Chamber, and J. Passer, Judge,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by J. Möller, W. Ewer and M. Hellmann, acting as Agents,

– the European Commission, by T.S. Bohr, F. Clotuche-Duvieusart and E.E. Schmidt, acting as Agents, having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(a) and Article 6(1) 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 a dispute between HB, who is a judge at the Bundesgerichtshof (Federal Court of Justice, Germany), and the Bundesrepublik Deutschland (Federal Republic of Germany), represented by the Bundesministerium der Justiz (Federal Ministry of Justice, Germany) ('the BMJ'), concerning the refusal, by the President of that court, of the request to postpone retirement made by HB.

## **Legal context**

### ***European Union law***

3 Article 1 of Directive 2000/78 is worded as follows:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

4 Article 2 of 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; ...'

5 Article 3 of that directive, under the heading 'Scope', provides, in paragraph 1 thereof:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, ...'

6 Article 6(1) of that directive provides:

'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.'

**German law**

*The Basic Law of the Federal Republic of Germany*

7 Under Paragraph 95(1) and (2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1):

'(1) The Federation shall establish, as supreme courts of ordinary, administrative, financial, labour and social jurisdiction, [the Bundesgerichtshof (Federal Court of Justice), the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the Bundesfinanzhof (Federal Fiscal Court, Germany), the Bundesarbeitsgericht (Federal Labour Court, Germany) and the Bundessozialgericht (Federal Social Court, Germany)].

(2) The judges of these courts shall be appointed jointly by the competent Federal Minister and a committee for the election of judges consisting of the competent *Land* Ministers and an equal number of members elected by the Bundestag [(Federal Parliament, Germany)].'

*The Law on the election of judges*

8 Paragraph 1(1) of the Richterwahlgesetz (Law on the election of judges) provides:

'Judges of these supreme federal courts shall be chosen by the competent Federal Minister in collaboration with the Judges Election Committee and shall be appointed by the Federal President.'

*The DRiG*

9 Paragraph 48 of the Deutsches Richtergesetz (German Law on Judges; 'the DRiG') provides:

'(1) Judges appointed for an indefinite term shall retire at the end of the month in which they reach the retirement age applicable to them. They generally reach retirement age at the age of 67 (statutory retirement age).

(2) Retirement cannot be postponed.

(3) Judges appointed for an indefinite term who were born before 1 January 1947 shall reach the statutory retirement age at the age of 65. For judges appointed for an indefinite term who were born after 31 December 1946, the statutory retirement age shall be as follows:

Year of birth	Increase in months	Retirement age
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Year	Month
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...

1960	16	66	4
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...'

*The BBG*

10 Paragraph 51 of the Bundesbeamtengesetz (Federal Civil Service Law; 'the BBG') reads as follows:

'(1) Civil servants appointed for life shall retire at the end of the month in which they reach the age limit applicable to them. The age limit is generally reached at the age of 67 (statutory retirement age) unless another age limit (special age limit) is stipulated by law.

(2) Civil servants appointed for life who were born before 1 January 1947 shall reach the statutory retirement age at the age of 65. For civil servants appointed for life who were born after 31 December 1946, the statutory retirement age shall be as follows:

Year of birth    Increase in months    Retirement age

Year            Month

...

1960            16            66            4

...'

11 Under Paragraph 53(1) and the first sentence of Paragraph 53(1a) of the BBG:

'(1) At the request of the civil servant, retirement may be postponed for up to three years if

1. it is in the interest of the service and
2. the working time is at least half of the regular weekly working time.

The request must be made no later than six months before the start of retirement. Retirement may, in the same circumstances, if a special age limit applies, be postponed for up to three years.

(1a) The request must be granted where

1. the civil servant, for family reasons
  - (a) was employed on a part-time basis or was non-active pursuant to Paragraph 92,
  - (b) has taken leave for family care pursuant to Paragraph 92a or
  - (c) has taken leave for care pursuant to Paragraph 92b,
2. the retirement pension paid to the civil servant in the case of retirement as a result of reaching the age limit does not exceed the ceiling set,
3. the working time is at least half of the regular weekly working time, and
4. the needs of the service do not preclude a postponement.

...'

*The Law of Land Baden-Württemberg on judges and prosecutors*

12 Paragraph 6(1) and (2) of the Landesrichter- und Staatsanwaltgesetz des Landes Baden-Württemberg (Law of Land Baden-Württemberg on judges and prosecutors) states:

'(1) Judges appointed for an indefinite or fixed term shall retire at the end of the month in which they reach the age of 67.

(2) Retirement as a result of reaching the age limit shall be postponed for up to one year upon request, but not beyond the month in which the judge reaches the age of 68. The request must be made no later than six months before reaching the age limit.'

### *Preparatory works concerning the BBG and the DRiG*

13 The document of the Federal Parliament, bearing the reference BT-Drs. 16/7076, reproduces the preparatory works relating to the BBG and the DRiG, and sets out the intentions of the German legislature as regards the adaptation of the BBG and the introduction of Article 48 into the DRiG. It is clear from that document that the law which amended both the BBG and the DRiG is intended 'to create, for the Federal State, a modern and transparent law regarding civil servants, pay and pensions, which:

- strengthens the principle of performance,
- strengthens the competitiveness and efficiency of the public service,
- allows for a more flexible use of manpower and improves job mobility,
- opens up opportunities and perspectives in order to bolster the responsibility, motivation and availability of employees,
- guarantees civil service pensions in the long term and transfers the measures taken within the framework of the statutory old-age insurance scheme over to the field of pensions law, taking the diversity of those schemes into account,
- avoids bureaucracy and excessive regulation'.

14 As regards the adaptation of the BBG, that document includes the following statement:

#### '4. Actions linked to demographic developments

As in the context of a statutory old-age insurance scheme, the retirement age of civil servants has gradually increased to 67 years of age. Progressive retirement, particularly the 'block model', which leads to early retirement, shall be restricted.'

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

15 HB, born on 20 September 1960, is a judge at the Bundesgerichtshof (Federal Court of Justice) and is, as a federal judge, subject to a strict age limit regarding retirement, which is fixed at 67. The DRiG does not offer HB any possibility of obtaining an increase in the retirement age, and provides that, for persons born in 1960, the statutory retirement age is 66 years and 4 months.

16 On 30 September 2021, HB requested that the President of the Bundesgerichtshof (Federal Court of Justice) inform him, by means of a decision against which an appeal may be brought, of the date on which he had to retire. By letter of 7 October 2021, she informed him that he would have to retire at the end of 31 January 2027, that is to say, once he had reached the statutory retirement age, set at 66 years and 4 months. Wishing to remain in judicial office at the Bundesgerichtshof (Federal Court of Justice) beyond the statutory retirement age, HB lodged a complaint against that letter with the BMJ.

17 Since that complaint was rejected, HB brought an action before the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe, Germany), the referring court. In support of his action, HB claims that he has been discriminated against directly on grounds of age since, first, federal civil servants, for whom the statutory retirement age is the same as his own, may, in accordance with Paragraph 53 of the BBG, postpone their retirement for a period of up to three years and, second, judges in the service of Land Baden-Württemberg (Germany), for whom the retirement age is, in principle, also fixed at 67, may, pursuant to the first sentence of Paragraph 6(2) of the Law of Land Baden-Württemberg on judges and prosecutors, request the postponement of their retirement for a period of up to one year, without, however, going beyond the end of the month in which they reach the age of 68.

18 In the present case, the BMJ, for its part, disputes the existence of direct discrimination on grounds of age, within the meaning of Article 2(1)(a) of Directive 2000/78. In that regard, it contends, inter alia, that, in order to determine whether or not such discrimination exists, no comparison may be made between, on the one hand, a federal judge and, on the other hand, federal civil servants or *Land* judges, in so far as the appointment of federal judges is fundamentally different from the appointment of federal civil servants and *Land* judges. Furthermore, even assuming that there is such unequal treatment, it is justified since Paragraph 48(1) and (2) of the DRiG is intended to achieve a balanced age pyramid within the judiciary given that the retirement of older employees specifically allows those starting out in the profession to access the civil service. In addition, the legislation has advantages in terms of the predictability of the renewal of staff having regard to the specificities of the election of judges. Finally, the predictable and continual opening of higher-grade positions has the effect of fostering higher levels of commitment amongst judges.

19 In its request for a preliminary ruling, the referring court observes that, according to the settled case-law of the Court, stemming from the judgments of 21 July 2011, *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508, paragraph 34); of 6 November 2012, *Commission v Hungary* (C-286/12, EU:C:2012:687, paragraph 51); and of 3 June 2021, *Ministero della Giustizia (Notaries)* (C-914/19, EU:C:2021:430, paragraph 26), a national provision, such as Paragraph 48(1) of the DRiG, which provides that people automatically cease to exercise their functions upon reaching a certain age whereas younger people, carrying out the same functions, can continue to carry them out, introduces a difference in treatment directly based on age, within the meaning of Article 2(2)(a) of Directive 2000/78.

20 However, that court asks whether, in the present case, there is not also a difference in treatment directly based on age on the ground that the national legislation at issue in the main proceedings does not allow HB to postpone his retirement whereas federal civil servants and – as an example – judges in the service of Land Baden-Württemberg have that option. In view of the broad scope of Directive 2000/78, set out in Article 3(1) thereof, which refers to ‘all persons, as regards both the public and private sectors, including public bodies’, the referring court considers that a comparison between federal judges and *Land* judges is relevant for the purposes of resolving the dispute in the main proceedings. The differences existing in so far as concerns the appointment of, on the one hand, federal judges and, on the other hand, federal civil servants and *Land* judges should only be taken into account at the stage of examining the justification for the difference in treatment. However, in order to resolve the dispute in the main proceedings, it is necessary to ascertain whether or not the difference in treatment thus circumscribed comes under one of the grounds of discrimination set out in Article 1 of Directive 2000/78.

21 In those circumstances, the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does it constitute direct discrimination on grounds of age within the meaning of Article 2(2)(a) of Directive [2000/78], when, under Paragraph 48(2) of [the DRiG], federal judges cannot postpone the start of their retirement, even though federal civil servants and, for example, judges in the service of Land Baden-Württemberg are allowed to do so?

(2) In the context of the first subparagraph of Article 6(1) of Directive [2000/78], do elements derived from the general context of the measure at issue also include aspects that are not mentioned at all in the legislative material or in the course of the entire parliamentary legislative process, but are presented only during the judicial proceedings?

(3) How are the terms “objectively” and “reasonably” in the first subparagraph of Article 6(1) of Directive 2000/78/EC to be interpreted and what is their point of reference? Does the first subparagraph of Article 6(1) of [that] directive require a twofold examination of reasonableness?

(4) Is the first subparagraph of Article 6(1) of Directive [2000/78] to be interpreted as precluding, from the point of view of coherence, national legislation which precludes federal judges from postponing their retirement whereas federal public servants and, for example, judges in the service of Land Baden-Württemberg are allowed to do so?’

### **Consideration of the questions referred**

#### ***The first question***

22 By its first question, the referring court asks, in essence, whether Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that national legislation, under which federal judges cannot postpone their retirement whereas federal civil servants and *Land* judges are allowed to do so, establishes a direct difference in treatment on grounds of age, within the meaning of that provision.

23 In that regard, it should be recalled that Article 2(2)(a) of Directive 2000/78 states that direct discrimination is 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 of that directive.

24 In accordance with Article 1 of Directive 2000/78, its ‘purpose ... 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’.

25 Accordingly, as the Court has already held, the grounds listed in Article 1 of Directive 2000/78 are exhaustive and that directive is not concerned with discrimination on the basis of professional category or place of work (judgment of 21 May 2015, *SCMD*, C-262/14, EU:C:2015:336, paragraph 29 and the case-law cited).

26 In the present case, the difference in treatment referred to in Question 1 is unrelated to that between federal judges who cannot continue to work beyond the age set out in Paragraph 48(1) of the DRiG and federal judges who have not reached that age who can continue to work, but concerns that between, on the one hand, federal judges and, on the other hand, federal civil servants and *Land* judges, in particular those in the service of Land Baden-Württemberg.

27 As is apparent from the national legal framework, the provisions governing the exercise of the functions of those various judges and those civil servants are laid down in clearly distinct legislative acts. Persons belonging to those groups of persons do not exercise the same functions and the conditions for the exercise of those functions are specific to each of those groups.

28 Accordingly, the difference in treatment between, on the one hand, federal judges and, on the other hand, federal civil servants and *Land* judges, in particular those in the service of Land Baden-Württemberg, is based on the function occupied respectively by those various groups of persons.

29 It follows that a difference in treatment, such as that referred to in Question 1, is based on the professional category to which the persons concerned belong at the federal level as well as the regional level, and not on age.

30 That ground of discrimination does not appear among the grounds listed in Article 1 of Directive 2000/78, thus it must be concluded that a situation such as that referred to in Question 1 does not come under the general framework established by Article 2(1)(a) of Directive 2000/78.

31 In the light of the foregoing considerations, the answer to the first question is that Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that national legislation, under which federal judges

cannot postpone their retirement, whereas federal civil servants and *Land* judges are allowed to do so, does not establish a difference in treatment directly based on age, within the meaning of that provision.

***The second, third and fourth questions***

32 In view of the answer given to the first question, there is no need to answer the second, third and fourth questions. The latter questions appear to have been asked only on the assumption that it is considered that the difference in treatment between, on the one hand, federal judges and, on the other hand, other federal civil servants and *Land* judges, in particular those in the service of Land Baden-Württemberg, is directly based on age, within the meaning of Article 2(2)(a) of Directive 2000/78.

**Costs**

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

**Article 2(2)(a) 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 national legislation, under which federal judges cannot postpone their retirement, whereas federal civil servants and *Land* judges are allowed to do so, does not establish a difference in treatment directly based on age, within the meaning of that provision.**

[Signatures]

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\* Language of the case: German.

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i The name of the present case is a fictitious name. It does not correspond to the real name of any of the parties to the proceedings.