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ECLI:EU:C:2016:897

JUDGMENT OF THE COURT (First Chamber)

24 November 2016 (*)

(Reference for a preliminary ruling — Equal treatment in employment and occupation — Directive 2000/78/EC — Article 2 — Prohibition of discrimination on grounds of sexual orientation and age — National pension scheme — Payment of a survivor’s benefit to the civil partner — Condition — Partnership contracted before the 60th birthday of the member of the scheme — Civil partnership — Not possible in the Member State concerned before 2010 — Existing stable relationship — Article 6(2) — Justification of differences of treatment on grounds of age)

In Case C-443/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Labour Court (Ireland), made by decision of 11 August 2015, received at the Court on 13 August 2015, in the proceedings

David L. Parris

v

Trinity College Dublin,

Higher Education Authority,

Department of Public Expenditure and Reform,

Department of Education and Skills,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, E. Regan, J.-C. Bonichot, A. Arabadjiev and S. Rodin, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 April 2016,

after considering the observations submitted on behalf of:

- Mr Parris, by M. Bolger SC, E. Barry BL, and J. Tomkin, Solicitor,
- Trinity College Dublin, by T. Mallon, Barrister, instructed by K. Langford, Solicitor,
- the Higher Education Authority, the Department of Public Expenditure and Reform and the Department of Education and Skills, by G. Hodge, E. Creedon and A. Joyce, acting as Agents, and A. Kerr, Barrister,
- the United Kingdom Government, by S. Simmons, acting as Agent, and J. Coppel QC,
- the European Commission, by A. Lewis and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 6(2) 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 proceedings between David L. Parris and Trinity College Dublin, the Higher Education Authority (Ireland), the Department of Public Expenditure and Reform (Ireland) and the Department of Education and Skills (Ireland) concerning the refusal by Trinity College Dublin to grant Mr Parris's civil partner, on Mr Parris's death, the survivor's pension provided for by the occupational benefit scheme of which Mr Parris was a member.

Legal context

EU law

3 Recital 22 of Directive 2000/78 states:

‘This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.’

4 Article 1 of the directive provides:

‘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.’

5 Under Article 2 of the directive:

‘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, ...

...’

6 Article 3 of the directive reads as follows:

‘1. 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, in relation to:

...

(c) employment and working conditions, including dismissals and pay;

...

3. This Directive does not apply to payments of any kind made by State schemes or similar, including State social security or social protection schemes.

...’

7 Under the heading ‘Justification of differences of treatment on grounds of age’, Article 6(2) of the directive provides:

‘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.’

8 Under the first paragraph of Article 18 of the directive, Member States were in principle to adopt the laws, regulations and administrative provisions necessary to comply with the directive by 2 December 2003 at the latest, or could entrust the social partners with the implementation of the directive as regards provisions concerning collective agreements, while ensuring that those agreements were implemented by the same date.

Irish law

9 The Pensions Act 1990 (‘the 1990 Act’) was amended by section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 (No 9 of 2004), which inserted a new Part VII in the 1990 Act, in order to give effect in national law to the provisions of Directive 2000/78 concerning the principle of equal treatment in occupational benefit schemes.

10 Section 66 of the 1990 Act lays down a general prohibition of less favourable treatment in relation to occupational benefit schemes on the grounds inter alia of age and sexual orientation. Unlike Directive 2000/78, the act also prohibits discrimination on the ground of marital status.

11 Section 72 of the 1990 Act, which was intended to transpose Article 6 of Directive 2000/78, lays down savings and exceptions to the general prohibition of discrimination in occupational benefit schemes, in the following terms:

‘(1) It shall not constitute a breach of the principle of equal pension treatment on the age ground for a scheme to —

- (a) fix age or qualifying service, or a combination of both, as a condition or criterion for admission to the scheme,
- (b) fix different ages or qualifying service, or a combination of both, as conditions or criteria for admission to the scheme for employees or groups or categories of employees,
- (c) fix age or qualifying service, or a combination of both, as a condition or criterion for entitlement to benefits under the scheme,

(d) fix different ages or qualifying service, or a combination of both, as conditions or criteria for entitlement to benefits under the scheme for employees or groups or categories of employees,

(e) (i) fix age or qualifying service, or a combination of both, as a condition or criterion in relation to the accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme, or

(ii) fix different ages or qualifying service, or a combination of both, as conditions or criteria in relation to the accrual of rights under a defined benefit scheme or in relation to the level of contributions to a defined contribution scheme for employees or groups or categories of employees,

where, in the context of the relevant employment, to do so is appropriate and necessary by reference to a legitimate objective of the employer, including legitimate employment policy, labour market and vocational training objectives,

(f) use criteria as to age in actuarial calculations:

Provided that this does not result in a breach of the principle of equal pension treatment on the gender ground.

(2) It shall not constitute a breach of the principle of equal pension treatment on the marital or family status ground for a scheme to provide more favourable occupational benefits where those more favourable benefits are in respect of any person in respect of whom, under the rules of the scheme, a benefit is payable on the death of the member, provided that this does not result in a breach of the said principle on the gender ground.

(3) It shall not constitute a breach of the principle of equal pension treatment on the marital status or sexual orientation ground to provide more favourable occupational benefits to a deceased member's widow or widower provided that it does not result in a breach of the said principle on the gender ground.

(4) In this section any reference to the fixing of age or ages for entitlement to benefits includes a reference to the fixing of retirement age or ages for entitlement to benefits.'

12 The Civil Partnership and Certain Rights and Obligations of Cohabitants Act ('the Civil Partnership Act') was adopted on 19 July 2010 and entered into force on 1 January 2011, after the necessary ministerial order was made by statutory instrument No 648/2010. That act excluded the retrospective recognition of civil partnerships registered in another country.

13 According to the documents before the Court, section 99 of the Civil Partnership Act provides that a 'benefit under a pension scheme that is provided for the spouse of a person is deemed to provide equally for the civil partner of a person'.

14 At the material time for the present case, marriage in Ireland was allowed only for persons of different sex. Recognition of same-sex marriage required a constitutional amendment following a national referendum. Such a referendum was held on 22 May 2015, and the proposal to allow marriage between two persons without distinction as to gender was carried. However, legislation had to be enacted to give effect to the amended provision of the constitution. According to the observations submitted by Trinity College Dublin, Irish law has recognised same-sex marriage since 16 November 2015.

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

15 Mr Parris, who was born on 21 April 1946, has dual Irish and United Kingdom nationality. He has been living for over 30 years in a stable relationship with his same-sex partner.

16 In 1972 Mr Parris was appointed by Trinity College Dublin as a lecturer. Pursuant to his contract of employment, he was admitted in October 1972 as a non-contributory member of a pension scheme operated by Trinity College Dublin. The scheme was closed to new entrants on 31 January 2005.

17 Rule 5 of the pension scheme provides for the payment of a survivor's pension to the spouse or, since 1 January 2011, the civil partner of a member, where the member predeceases the spouse or now the civil partner. In particular, under the terms of the scheme, on retirement a member is entitled to a pension equal to two-thirds of his or her final salary. Where a member dies after retirement, the surviving spouse, or now the civil partner, is entitled to a pension for life equal to two-thirds of the amount payable to the member before his or her death. However, that survivor's pension is payable only if the member married or entered into a civil partnership before reaching the age of 60.

18 On 21 December 2005 it became possible to enter into a civil partnership in the United Kingdom under the Civil Partnership Act 2004. On 21 April 2009, when he was aged 63, Mr Parris registered a civil partnership in the United Kingdom. At that time there was no provision in Irish law by which Mr Parris's civil partnership could be recognised in Ireland.

19 On 3 December 2009 the Trinity College Dublin pension fund was transferred to the National Treasury Management Agency (Ireland) (NTMA). The NTMA is a State agency with the function of providing the government with asset and liability management services. Since January 2010 all the pension scheme's liabilities have been met out of State resources.

20 On 25 January 2010 Mr Parris applied for and obtained an option allowing him to take cost-neutral early retirement from 31 December 2010, although he was contractually entitled to retain his pensionable employment until 30 September 2013.

21 On 19 July 2010 the Civil Partnership Act was enacted in Ireland.

22 On 17 September 2010 Mr Parris made a request to Trinity College Dublin that, on his death, his civil partner should receive a survivor's pension. The request was rejected by decision of 15 November 2010. On 20 December 2010 he appealed against that decision to the Higher Education Authority.

23 Mr Parris retired on 31 December 2010.

24 The Civil Partnership Act entered into force on 1 January 2011.

25 On 12 January 2011 Mr Parris's United Kingdom civil partnership was recognised in Irish law, following the making of the necessary ministerial order by statutory instrument No 649/2010.

26 By decision of 17 May 2011, the Higher Education Authority upheld the decision of Trinity College Dublin. The authority found in particular that Mr Parris had retired before the recognition of his civil partnership by Ireland, and furthermore that the rules to be applied by Trinity College Dublin excluded the payment of a survivor's benefit where the member married or entered into a civil partnership after the age of 60.

27 Mr Parris thereupon brought proceedings against Trinity College Dublin, the Higher Education Authority, the Department of Public Expenditure and Reform and the Department of Education and Skills before the Equality Tribunal (Ireland), arguing that he had been directly or indirectly discriminated against by them, contrary to the 1990 Act, by reason of his age and sexual orientation. When that action was dismissed by the Equality Tribunal, Mr Parris appealed to the Labour Court (Ireland).

28 That court is uncertain whether, in circumstances such as those at issue in the main proceedings, the application of a national rule specifying an age by which a member of an occupational benefit scheme must marry or enter into a civil partnership for his spouse or civil partner to be entitled to a survivor's pension amounts to discrimination on grounds of age and/or sexual orientation, contrary to Directive 2000/78.

29 In those circumstances, the Labour Court (Ireland) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does it constitute discrimination on grounds of sexual orientation, contrary to Article 2 of Directive 2000/78, to apply a rule in an occupational benefit scheme limiting the payment of a survivor's benefit to the surviving civil partner of a member of the scheme on their death, by a requirement that the member and his surviving civil partner entered their civil partnership prior to the member's 60th birthday in circumstances where they were not permitted by national law to enter a civil partnership until after the member's 60th birthday and where the member and his civil partner had formed a committed life partnership before that date?

2. If the answer to Question 1 is in the negative: Does it constitute discrimination on grounds of age, contrary to Article 2, in conjunction with Article 6(2) of Directive

2000/78, for a provider of benefits under an occupational benefit scheme to limit an entitlement to a survivor's pension to the surviving civil partner of a member of the scheme on the member's death, by a requirement that the member and his civil partner entered their civil partnership before the member's 60th birthday where:–

(a) The stipulation as to the age at which a member must have entered into a civil partnership is not a criterion used in actuarial calculations, and

(b) The member and his civil partner were not permitted by national law to enter a civil partnership until after the member's 60th birthday and where the member and his civil partner had formed a committed life partnership before that date?

3. If the answer to Question 2 is in the negative: Would it constitute discrimination contrary to Article 2 in conjunction with Article 6(2) of Directive 2000/78 if the limitations on entitlements under an occupational benefit scheme described in either Question 1 or Question 2 arose from the combined effect of the age and sexual orientation of a member of the scheme?'

Consideration of the questions referred

Question 1

30 By its first question, the referring court essentially asks whether Article 2 of Directive 2000/78 must be interpreted as meaning that a national rule which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age limit, constitutes discrimination on grounds of sexual orientation.

31 In order to answer that question, it must be examined, at a first stage, whether a national rule such as rule 5 of the pension scheme at issue in the main proceedings, which is alleged to be discriminatory, falls within the scope of Directive 2000/78.

32 It is apparent from Article 3(1)(c) of Directive 2000/78 that the directive applies, within the limits of the areas of competence conferred on the EU, 'to all persons, as regards both the public and private sectors, including public bodies', in relation inter alia to 'employment and working conditions, including dismissals and pay' (judgment of 26 September 2013, *Dansk Jurist- og Økonomforbund*, C-546/11, EU:C:2013:603, paragraph 24).

33 The Court has previously recognised that a survivor's pension provided for under an occupational pension scheme falls within the scope of Article 157 TFEU. The Court has stated that the fact that such a pension, by definition, is paid not to the worker but to his survivor cannot affect that interpretation, since, such a pension being a benefit deriving from the survivor's spouse's membership of the scheme, the pension accrues to

the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment (see judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraph 45 and the case-law cited).

34 Moreover, for the purposes of assessing whether a retirement pension, by reference to which the survivor's pension, should the case arise, is calculated, as in the main proceedings, falls within the scope of Article 157 TFEU, the Court has stated that, of the criteria for identifying a pension scheme which it has adopted on the basis of the situations brought before it, only the criterion of whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment, based on the wording of that article, may prove decisive (judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraph 46 and the case-law cited).

35 In this context, the Court added that, while that criterion admittedly cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot, however, prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to final salary (see judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraphs 47 and 48 and the case-law cited).

36 As regards the occupational benefit scheme at issue in the main proceedings, it should be observed, first, that that scheme does not apply to general categories of workers but concerns only workers employed by Trinity College Dublin or, at most, from 2005, workers employed by universities, according to the information provided at the hearing by the defendants in the main proceedings, so that membership of the scheme necessarily follows from the employment relationship between such workers and a particular employer.

37 Secondly, the scheme in question is not governed by statute but by its own rules.

38 Thirdly, it appears that, at least until 2005, the occupational benefit scheme at issue in the main proceedings was funded by Trinity College Dublin, so that it formed part of the advantages offered by the employer to the workers.

39 Finally, the amount of the survivor's benefit is calculated on the basis of the retirement pension, the amount of which is equal to two-thirds of the member's final salary.

40 In those circumstances, it must be concluded that the survivor's benefit at issue in the main proceedings derives from the employment relationship between Mr Parris and his employer, and must be categorised as 'pay' within the meaning of Article 157 TFEU.

41 That conclusion is not called in question by the fact that the Trinity College Dublin pension fund has in the meantime been transferred to a national authority and the benefits are now funded by the State, since, as the Advocate General observes in point 35 of her Opinion, the Court has stated on several occasions that, for determining whether a pension scheme falls within the concept of ‘pay’, the arrangements for its funding and management are not conclusive (see, to that effect, judgments of 28 September 1994, *Beune*, C-7/93, EU:C:1994:350, paragraph 38; of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 37; of 12 November 2002, *Niemi*, C-351/00, EU:C:2002:480, paragraph 43; and of 26 March 2009, *Commission v Greece*, C-559/07, EU:C:2009:198, paragraph 46).

42 The national rule at issue in the main proceedings therefore falls within the scope of Directive 2000/78.

43 At a second stage, it must be examined whether the application of such a rule produces discrimination on grounds of sexual orientation and is therefore prohibited by that directive.

44 It must be recalled that, in accordance with Article 2 of Directive 2000/78, the ‘principle of equal treatment’ means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive, which include sexual orientation.

45 First, as to whether there is direct discrimination, under Article 2(2)(a) of Directive 2000/78 direct discrimination occurs when a person is treated in a less favourable manner than another person in a comparable situation, on one of the grounds listed in Article 1 of the directive.

46 As regards, in particular, the receipt of the survivor’s benefit, it follows from the Court’s case-law that legislation of a Member State under which the surviving civil partner is not entitled to receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though under national law life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit, must be regarded as constituting direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78 (see, to that effect, judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraphs 72 and 73).

47 According to the order for reference, the Civil Partnership Act was enacted in Ireland on 19 July 2010 and, since the entry into force of that act on 1 January 2011, rule 5 of the pension scheme at issue in the main proceedings has provided for the survivor’s benefit to be available both to surviving spouses of members and to surviving civil partners of members.

48 Also according to that order, receipt of that benefit is subject, both for surviving spouses and for civil partners, to the condition that the marriage or civil partnership is entered into before the member reaches the age of 60.

49 As the Advocate General observes in point 50 of her Opinion, a condition of membership such as that at issue in the main proceedings does not refer directly to the worker's sexual orientation. On the contrary, it is worded neutrally and moreover refers both to homosexual employees and to heterosexual employees, and excludes their partners, without distinction, from receiving a survivor's pension where the marriage or civil partnership is not entered into before the employee reaches the age of 60.

50 It follows that surviving civil partners are not treated less favourably than surviving spouses as regards the survivor's benefit at issue in the main proceedings, and that the national rule relating to that benefit does not therefore give rise to direct discrimination on grounds of sexual orientation.

51 Secondly, as to whether there is indirect discrimination, Article 2(2)(b)(i) of Directive 2000/78 provides that indirect discrimination occurs 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 that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

52 The national rule at issue in the main proceedings makes the receipt of the survivor's benefit by surviving civil partners and surviving spouses of members of the occupational benefit scheme at issue in those proceedings subject to the condition that the civil partnership or marriage is entered into before the member's 60th birthday.

53 It appears from the documents before the Court that on 1 January 2011, the date on which the Civil Partnership Act entered into force, Mr Parris was 64 years old and had already retired, so that the pension rights he has acquired for himself and any spouse or civil partner relate to a period of occupational activity entirely completed before the entry into force of that act. It is also apparent from those documents that the civil partnership which Mr Parris had entered into in the United Kingdom on 21 April 2009, when he was aged 63, was recognised in Ireland with effect only from 12 January 2011.

54 It is thus not disputed that on the date on which Mr Parris retired, 31 December 2010, he did not satisfy the conditions laid down by the applicable national rule for his civil partner to be entitled to the survivor's benefit at issue in the main proceedings, since the civil partnership he had entered into in the United Kingdom was not yet recognised in Ireland, and in any event, even if it had been recognised, it could not have given an entitlement to such a benefit, as it had been entered into after the member's 60th birthday.

55 Mr Parris takes the view that the condition referred to in paragraph 52 above puts at a disadvantage homosexual workers who had already reached the age of 60 on the date

of entry into force of the Civil Partnership Act, in other words homosexual workers born before 1951 such as Mr Parris himself, and that that condition therefore causes indirect discrimination against homosexuals who are in such circumstances, because it is impossible for them to satisfy the condition.

56 It must be noted, however, that the fact that Mr Parris is unable to satisfy that condition is a consequence, first, of the state of the law existing in Ireland at the time of his 60th birthday, in particular the absence at that time of a law recognising any form of civil partnership of a same-sex couple, and, secondly, of the absence, in the rules governing the survivor's benefit at issue in the main proceedings, of transitional provisions for homosexual members born before 1951.

57 It should be recalled here that recital 22 of Directive 2000/78 expressly states that the directive is without prejudice to national laws on marital status and the benefits dependent thereon.

58 In this context, the Court has held that marital status and the benefits flowing therefrom are matters which fall within the competence of the Member States and that EU law does not detract from that competence. However, in the exercise of that competence the Member States must comply with EU law, in particular the provisions relating to the principle of non-discrimination (see judgment of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraph 59).

59 The Member States are thus free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect.

60 Consequently, EU law, in particular Directive 2000/78, did not require Ireland to provide before 1 January 2011 for marriage or a form of civil partnership for same-sex couples, nor to give retrospective effect to the Civil Partnership Act and the provisions adopted pursuant to that act, nor, as regards the survivor's benefit at issue in the main proceedings, to lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60 on the date of entry into force of the act.

61 In those circumstances, it must be concluded that the national rule at issue in the main proceedings does not produce indirect discrimination on grounds of sexual orientation as described in paragraph 55 above.

62 In the light of the foregoing considerations, the answer to Question 1 is that Article 2 of Directive 2000/78 must be interpreted as meaning that a national rule which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national

law did not allow the member to enter into a civil partnership before reaching that age limit, does not constitute discrimination on grounds of sexual orientation.

Question 2

63 By its second question, the referring court essentially asks whether Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age limit, constitutes discrimination on grounds of age.

64 In order to answer that question, it must be examined, at a first stage, whether the national rule at issue creates discrimination on grounds of age.

65 It must be recalled that, in accordance with Article 2 of Directive 2000/78, the 'principle of equal treatment' means that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive, which include age. Article 2(2)(a) of the directive provides that, for the purposes of applying Article 2(1), direct discrimination occurs when a person is treated in a less favourable manner than another is, has been or would be treated in a comparable situation, on one of the grounds listed in Article 1 of the directive.

66 In the present case, rule 5 of the pension scheme at issue in the main proceedings makes the survivor's benefit available only to surviving spouses and civil partners of members who entered into the marriage or civil partnership before reaching the age of 60.

67 Such a rule thus treats members who marry or enter into a civil partnership after their 60th birthday less favourably than those who marry or enter into a civil partnership before reaching the age of 60.

68 It follows that the national rules at issue in the main proceedings establish a difference in treatment based directly on the criterion of age.

69 At a second stage, it must be examined whether such a difference in treatment may, however, fall within the scope of Article 6(2) of Directive 2000/78.

70 In accordance with that provision, Member States may, notwithstanding Article 2(2) of the directive, 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'.

71 In this connection, the Court has held that Article 6(2) of Directive 2000/78 applies only to occupational social security schemes that cover the risks of old age and invalidity, and that not all aspects of an occupational social security scheme covering such risks come within the scope of that provision, but only those that are expressly referred to therein (see judgment of 16 June 2016, *Lesar*, C-159/15, EU:C:2016:451, paragraph 25 and the case-law cited).

72 In the present case, the survivor's benefit at issue in the main proceedings is a form of old age pension.

73 It must therefore be ascertained whether the national rule at issue in the main proceedings falls within one of the cases referred to in Article 6(2) of Directive 2000/78, namely 'the fixing ... of ages for admission or entitlement to retirement ... benefits' within the meaning of that provision.

74 In that respect, by making the acquisition of the right to receive a survivor's benefit subject to the condition that the member marries or enters into a civil partnership before the age of 60, that rule merely lays down an age limit for entitlement to that benefit. In other words, the national rule at issue in the main proceedings fixes an age for access to the survivor's benefit under the pension scheme concerned.

75 In those circumstances, it must be concluded that rule 5 of the pension scheme fixes an age for entitlement to an old age benefit, and that, consequently, the rule is covered by Article 6(2) of Directive 2000/78.

76 It follows that the difference in treatment on grounds of age created by a national rule such as that at issue in the main proceedings does not constitute discrimination on grounds of age.

77 The fact that it was legally impossible for the member of the scheme at issue in the main proceedings to enter into a civil partnership before reaching the age of 60 does not affect that conclusion at all, since, as noted in paragraph 56 above, that impossibility is a consequence of the fact that, on his 60th birthday, national law did not provide for any form of civil partnership for same-sex couples. As may be seen from paragraphs 57 to 60 above, EU law did not preclude that state of national law.

78 In the light of the foregoing considerations, the answer to Question 2 is that Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age limit, does not constitute discrimination on grounds of age.

Question 3

79 By its third question, the referring court essentially asks whether Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation.

80 In this respect, while discrimination may indeed be based on several of the grounds set out in Article 1 of Directive 2000/78, there is, however, no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established.

81 Consequently, where a national rule creates neither discrimination on the ground of sexual orientation nor discrimination on the ground of age, that rule cannot produce discrimination on the basis of the combination of those two factors.

82 In the light of the foregoing considerations, the answer to Question 3 is that Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation.

Costs

83 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. Article 2 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 a national rule which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, does not constitute discrimination on grounds of sexual orientation.**
- 2. Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil**

partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, does not constitute discrimination on grounds of age.

3. Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation.

Silva de Lapuerta

Regan

Bonichot

Arabadjiev

Rodin

Delivered in open court in Luxembourg on 24 November 2016.

A. Calot Escobar

R. Silva de Lapuerta

Registrar

President of the First
Chamber

* Language of the case: English.