ECLI:EU:C:2022:419

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

2 June 2022(*)

(Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Prohibition of discrimination on grounds of age – Directive 2000/78/EC – 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)

In Case C-587/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark), made by decision of 6 November 2020, received at the Court on 9 November 2020, in the proceedings

Ligebehandlingsnævnet, acting on behalf of A

v

HK/Danmark,

HK/Privat,

intervener:

Fagbevægelsens Hovedorganisation,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, J. Passer, F. Biltgen (Rapporteur), N. Wahl and M.L. Arastey Sahún, Judges,

Advocate General: J. Richard de la Tour,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 20 October 2021,

after considering the observations submitted on behalf of:

– the Ligebehandlingsnævnet, acting on behalf of A, by P. Ahlberg and R. Holdgaard, advokater,

– HK/Privat and HK/Danmark, by J. Goldschmidt, advokat,

– the Fagbevægelsens Hovedorganisation, by R. Asmussen, advokat,

– the Greek Government, by N. Dafniou, I. Kotsoni, O. Patsopoulou and E. Skandalou, acting as Agents,

– the European Commission, by L. Grønfeldt and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 January 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 2000 L 303, p. 16).

2 The request has been made in a dispute between the Ligebehandlingsnævnet (Equal Treatment Board, Denmark), acting on behalf of A, and HK/Danmark, and HK/Privat (together 'HK'), organisations of workers, concerning a provision of HK/Privat's statutes establishing an age-limit for election as its sector convenor.

Legal context

European Union law

3 Recitals 4, 5, 9 and 11 of Directive 2000/78 state:

'(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.

…

(9) 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.

…

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC 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.'

4 Article 1 of that directive, entitled 'Purpose', states:

'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 Article 3 of that directive, entitled 'Scope', provides, in paragraphs 1 and 4 thereof:

'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:

(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.

…

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.'

Danish law

6 Paragraph 1(1) of the lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. (forskelsbehandlingsloven) (Law on the prohibition of discrimination on the labour market (Anti-Discrimination Law)), as amended by lov nr. 253 (Law No 253) of 7 April 2004, and lov nr. 1417 (Law No 1417) of 22 December 2004, concerning the transposition of Directive 2000/78 ('the Anti-Discrimination Law'), states, the concept of 'discrimination', for the purpose of that law, shall be understood to mean any direct or indirect discrimination on the grounds of, inter alia, age.

7 Paragraph 2(1) of the of the Anti-Discrimination 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 the Anti-Discrimination 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.’

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

9 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 HK/Privat for standing for the election to be held that year. Paragraph 9 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 A lodged a complaint with the Equal Treatment Board, claiming that she had been discriminated against on grounds of age. By its decision of 22 June 2016, that board held that it was contrary to the Anti-Discrimination Law for A to be prohibited, by reason of her age, to stand for election as sector convenor of HK/Privat at the congress of 2011 and ordered HK to pay A compensation of Danish Kroner 25 000 (DKK) (approximately EUR 3 400) plus interest.

11 As that decision was not complied with, the Equal Treatment Board, acting on behalf of A, brought an action against HK 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, under Paragraph 9 of HK/Privat’s statutes, it is not disputed that she would be the victim of direct discrimination on the grounds of age contrary to that directive.

13 The referring court states that A, as elected sector convenor, was not employed within the meaning of the lov om retsforholdet mellem arbejdsgivere og funktionærer (funktionærloven) (Law on the legal relationship between employers and salaried employees), a role in which she was subject to management by a superior, but held a political office based on trust, responsible to the sector congress of HK/Privat, which had elected her. That role also implied that she had an obligation to maintain professional secrecy. However, her role as sector convenor included certain elements characteristic of ordinary workers.

14 The referring court notes 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 implemented the decisions adopted by the congress and the sector board and those of HK/Danmark’s management board, of which she was also a member.

15 As regards A's conditions 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 corresponding to a particular State pay grade. She was covered, not by collective agreement, but by HK's statutes. On the other hand, the Law on holidays applied to her.

16 The referring court takes the view that the Court has not defined in detail the concepts of 'employment', 'self-employment' and 'occupation' in Article 3(1)(a) of Directive 2000/78, nor has it 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 [falls within] the scope of the directive in the circumstances described in the request for a preliminary ruling?'

Consideration of the question referred

18 It should be noted, even if, formally, the referring court has limited its questions to the interpretation of certain provisions of EU law, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case before it, whether or not the referring court has referred to them in the wording of its questions. It is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (judgment of 12 March 2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, C-769/18, EU:C:2020:203, paragraph 40 and the case-law cited).

19 In the present case, the question referred for a preliminary ruling concerns the scope of Article 3(1)(a) of Directive 2000/78. However, since the dispute in the main proceedings concerns the conditions of governing eligibility to stand as sector convenor of an organisation of workers, it cannot be ruled out that Article 3(1)(d) of that directive, which concerns, inter alia, the involvement of persons in an organisation of workers, may also be applicable for the purposes of that dispute.

20 Therefore, it must be held that, by its question, the referring court asks, in essence, whether Article 3(1)(a) and (d) of Directive 2000/78 are to 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.

Article 3(1)(a) of Directive 2000/78

21 As provided in Article 3(1)(a) of Directive 2000/78, the directive is to apply, within the limits of the areas of competence conferred on the European Union, 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.

22 A provision of the statutes of HK/Privat – which stipulates that only members of that organisation of workers who are under the age of 60 on the date of the election, or in certain cases 61, are eligible for the post of sector convenor – is at issue in the main proceedings, as is apparent from paragraph 9 of this judgment.

23 It is not disputed that the setting of such an age limit constitutes a 'condition for access', within the meaning of Article 3(1)(a) of Directive 2000/78, to the post of sector convenor. In that regard, the Court has already held that national legislation setting a maximum age for recruitment to a job affects the recruitment conditions of those concerned and must, therefore, be regarded as laying down rules relating to access to employment within the meaning of Article 3(1)(a) of Directive 2000/78 (see, to that effect, judgment of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 25 and the case-law cited).

24 By contrast, HK and the Fagbevægelsens Hovedorganisation, a Danish Trade Union Confederation comprising 79 organisations of workers (FH) which intervened in the proceedings before the referring court, are of the opinion that the role of sector convenor does not fall within the concept of 'employment', 'self-employment' or 'occupation' also set out in Article 3(1)(a) of Directive 2000/78. In particular, they maintain that, apart from self-employment, which is not in any event concerned by the role of sector convenor in dispute, the scope of Directive 2000/78 is limited to posts occupied by 'workers', within the meaning of Article 45 TFEU, and that the holder of the post of sector convenor cannot be characterised as such.

25 In that regard, it should be noted that 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 (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).

26 In addition, in so far as that directive 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 are part (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).

27 As the Advocate General observed in point 32 of his Opinion, it follows from the use, together, of the terms 'employment', 'self-employment' and 'occupation' that Article 3(1)(a) of Directive 2000/78 covers conditions for access to any occupational activity, whatever the nature and characteristics of such activity. Those terms must be construed broadly, as is apparent from a comparison of the different language versions of that provision and the use of general expressions in those versions, such as '*erhvervsmæssig beskæftigelse*', '*ejercicio profesional*', '*Erwerbstätigkeit*', '*occupation*' and '*beroep*' in Danish, Spanish, German, English and Dutch respectively, in particular for the term 'occupation'.

28 Accordingly, apart from the fact that Directive 2000/78 expressly refers to self-employment, it also follows from the terms 'employment' and 'occupation', understood in their usual sense, that the EU legislature did not intend to limit the scope of Directive 2000/78 to posts occupied by a 'worker', within the meaning of Article 45 TFEU, who, according to settled case-law of the Court, is 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 (see, to that effect, judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 49 and the case-law cited).

29 It follows from other elements of the wording of Article 3(1)(a) of Directive 2000/78 that the scope of that directive is not limited solely to the conditions for accessing posts occupied by 'workers', within the meaning of Article 45 TFEU. Thus, in accordance with the wording of Article 3(1)(a) of Directive 2000/78, that directive applies to 'all persons, as regards both the public and private sectors, including public bodies … whatever the branch of activity and at all levels of the professional hierarchy'.

30 The textual interpretation of Article 3(1)(a) of Directive 2000/78 is confirmed by the objectives of that directive, from which it follows that the concept of 'conditions for access to employment … or to occupation', which defines the scope of that directive, cannot be interpreted restrictively (see, to that effect, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 39).

31 In accordance with Article 1 of Directive 2000/78, and as is clear from the title of, and preamble to, the directive, as well as from its content and purpose, the directive is intended to establish a general framework for combating discrimination on the grounds, inter alia, of age as regards 'employment and occupation', with a view to putting into effect in the Member States the principle of equal treatment, by providing everyone with effective protection against discrimination based, in particular, on that ground (judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 36 and the case-law cited).

32 In particular, recital 9 of that directive 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. In that respect also, 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.

33 In that regard, it must be recalled that Directive 2000/78 was adopted on the basis of Article 13 EC, now, following amendment, Article 19(1) TFEU, which confers on the Union the power to take appropriate action to combat discrimination based, inter alia, on age. That directive is thus a specific expression, within the field that it covers, of the general prohibition of non-discrimination laid down in Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter') (judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraphs 35 and 38 and the case-law cited).

34 Therefore, as the Advocate General observed in point 37 of his Opinion, Directive 2000/78 is not an act of EU secondary legislation such as those based, in particular, on Article 153(2) TFEU, which seek to protect only workers as the weaker party in an employment relationship, but seeks to eliminate, on grounds relating to social and public interest, 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.

35 Therefore, as is apparent from the order for reference as set out in paragraph 15 of the present judgment, in so far as the post of sector convenor of HK/Privat constitutes real and genuine professional activity, in particular in so far as it concerns a full-time occupational activity which is

remunerated by monthly salary, whether the conditions for access to such a post fall within the scope of Directive 2000/78 does not depend on whether or not the sector convenor is characterised as a worker, within the meaning of the case-law referred to in paragraph 28 of the present judgment.

36 In their observations submitted to the Court, HK and FH maintain, in addition, that those conditions for access are excluded from the scope of that directive since the sector convenor of an organisation of workers, such as HK/Privat, is a political post the holder of which is elected by the members of that organisation.

37 However, that line of argument cannot be accepted.

38 First, Directive 2000/78 does not exclude from its scope conditions for access to employment or occupation where the holder of the post concerned has been elected to that post. In that regard, the Court has held that the method of recruitment to a post has no bearing on the application of that directive (see, to that effect, judgment of 25 April 2013, *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 45).

39 Second, it does not follow from Directive 2000/78 that political posts are excluded from its scope. On the contrary, under Article 3(1)(a) thereof, that directive applies to both the private and the public sectors and 'whatever the branch of activity'. In addition, where that directive authorises the Member States not to apply the scheme which it lays down for certain professional activities, it specifies the activities in question. Accordingly, Article 3(4) of Directive 2000/78 provides that it may be provided that that directive is not to apply to the armed forces in so far as it relates to discrimination on the grounds of disability and age.

40 Moreover, as the Advocate General observed in point 48 of his Opinion, the objective pursued by Directive 2000/78, as recalled in paragraphs 31 to 34 of the present judgment, would not be achieved if the protection that it guarantees against discrimination in the field of employment and occupation were to depend on the nature of the functions performed in a particular employment.

41 The foregoing findings are not called into question by the argument put forward by FH at the hearing, according to which applying Article 3(1)(a) of Directive 2000/78 to the election to sector convenor of an organisation of workers would be contrary to 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, which provides that workers' organisations and employers' organisations have the right, inter alia, to freely elect their representatives.

42 Moreover, the right of organisations of workers to elect freely their representatives forms part of the freedom of association enshrined in Article 12 of the Charter, which, as is apparent from recital 5 of Directive 2000/78, the directive does not prejudice.

43 However, as the Advocate General observed in point 59 of his Opinion, the freedom of trade unions to elect their representatives must be reconciled with the prohibition of discrimination in employment and occupation, which is the purpose of that directive, as a specific expression of the general principle of non-discrimination enshrined in Article 21 of the Charter, and which is, moreover, referred to by ILO Convention No 111 of 25 June 1958 concerning Discrimination (Employment and Occupation), as mentioned in recital 4 of that directive.

44 It follows from Article 52(1) of the Charter that freedom of association is not absolute and that its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that freedom and the principle of proportionality, namely if they are

necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

45 That is so in the present case. In particular, the limitations to the exercise of the freedom of association that may flow from Directive 2000/78 are indeed provided for by law, since they result directly from that directive. Those limitations, moreover, respect the essence of the freedom of association, since they are applied only for the purpose of attaining the objectives of Directive 2000/78, 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 thus justified by those objectives (see, by analogy, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraphs 50 and 51).

46 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 material 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 the statutes of an organisation of workers that constitute discrimination in employment and occupation are prohibited (see, by analogy, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 52).

47 In addition, the limitations to the exercise of freedom of expression arising from Directive 2000/78 are necessary to guarantee the rights in matters of employment and occupation of persons who belong to groups of persons characterised by one of the grounds listed in Article 1 of that directive (see, by analogy, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 53).

48 It follows from the foregoing that the ‘conditions for access’ within the meaning of Article 3(1)(a) of Directive 2000/78 to the post of sector convenor of an organisation of workers fall within the scope of that directive.

Article 3(1)(d) of Directive 2000/78

49 Article 3(1)(d) of Directive 2000/78 provides that that directive applies to, inter alia, involvement in an organisation of workers.

50 As the Advocate General observed in point 52 of his Opinion, to stand for election as sector convenor of an organisation of workers, just as is the case in respect of holding the role of sector convenor once elected, constitutes a means of ‘involvement’, in the usual sense of that term, in such an organisation.

51 Such an interpretation reflects the objective of Directive 2000/78, which is to lay down a general framework to combat discrimination on the grounds, inter alia, of age in employment and occupation, so that concepts which, in Article 3 of that directive, define the scope of that directive cannot be interpreted restrictively.

52 In addition, it should be pointed out that, in the context of freedom of movement for workers guaranteed by Article 45 TFEU, the EU legislature took the view that that fundamental freedom includes the right of those workers to be elected as representatives of trade unions of their country of employment. Accordingly, as the Advocate General observed in point 53 of his Opinion, the area of application of Directive 2000/78 referred to in Article 3(1)(d) is taken from Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the

Community (OJ, English Special Edition 1968 (II), p. 475), which provided, in Article 8(1) that a worker is to enjoy the right of eligibility for workers' representative bodies in the undertaking concerned, whereas 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 Union (OJ 2011 L 141, p. 1), which replaced Regulation No 1612/68, provides that equality of treatment as is enjoyed by the worker as regards membership of trade unions and the exercise of rights attaching thereto includes eligibility for the administration or management posts of a trade union.

53 In those circumstances, it must be held that the pursuit of the activity of sector convenor of an organisation of workers, such as that at issue in the main proceedings, also falls within the scope of Article 3(1)(d) of Directive 2000/78.

54 In the light of all the foregoing considerations, the answer to the question referred is that Article 3(1)(a) and (d) of Directive 2000/78 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.

Costs

55 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 (Second Chamber) hereby rules:

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.

[Signatures]

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* Language of the case: Danish.