

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 17 July 2014 ([1](#))

Case C-416/13

Mario Vital Pérez
v
Ayuntamiento de Oviedo

(Request for a preliminary ruling from the Juzgado Contencioso-Administrativo No 4 de Oviedo (Spain))

(Equal treatment in employment and occupation — Prohibition of discrimination on grounds of age — Directive 2000/78 — Age limit of 30 years for participation in a selection procedure for recruitment to a local police service — Justification)

I – Introduction

1. Directive 2000/78 ([2](#)) ('the Directive') is aimed at establishing a general framework to combat, with regard to employment and working conditions, discrimination based on one of the grounds listed in Article 1 thereof. The purpose of the Directive is to put the principle of equal treatment into effect in the Member States.

2. In line with Article 13 EC, age was included among the grounds of discrimination listed in Article 1 of the Directive ([3](#)) and is the one that has given rise to the largest number of rulings by the Court in disputes regarding the application of the Directive. Enshrined as a general principle of Community law in *Mangold*, ([4](#)) the prohibition of discrimination on grounds of age is codified in Article 21(1) of the Charter of Fundamental Rights of the European Union, which is therefore the benchmark for interpreting the provisions of the Directive.

3. Although the Directive prohibits any form of discrimination in employment based directly or indirectly on age, it provides for a number of exceptions, some of which also apply to the other grounds of discrimination defined in Article 1. This is true, in particular, of Article 4(1) — to which the first part of the question submitted for a preliminary ruling in the present case relates — under which Member States may provide, subject to certain conditions, that a difference of treatment which is based on a characteristic related to one of the grounds to which the Directive refers shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement. Other exceptions, however, are specific to age as a ground of discrimination. Article 3(4) lays down that Member States may provide that the Directive shall not apply to the armed forces in so far as it relates to discrimination on the grounds of disability and age, while Article 6 — to which the second part of the

question in the present case relates — establishes a system of derogations which, in certain circumstances, justifies differences of treatment on grounds of age stemming from Member States' actions in the field of social policy.

4. Hence the Directive lays down a specific regime for differences of treatment based directly or indirectly on the criterion of age. That regime is explained partly by the fact that age is not, as a rule, considered to be a 'suspect' ground on a par with race or gender, not sharing their long history of discrimination, (5) and partly by the fact that it is a risk factor whose scope and bounds are not easy to define. (6)

5. The specific nature of age as a ground for discrimination in the system created by the Directive is one of the reasons for the many requests for interpretation the Court has received from national courts, aimed for the most part at obtaining clarification of the scope of the exceptions to the prohibition of discrimination on the basis of that criterion. The request for a preliminary ruling from the Juzgado Contencioso-Administrativo No 4 de Oviedo (Spain) that gave rise to the present case falls in that category.

II – The dispute in the main proceedings and the question referred

6. The dispute that gave rise to the question referred is between Mr Vital Pérez and the municipality of Oviedo regarding the action brought by Mr Vital Pérez against the decision of 7 March 2013 of the municipal council of Oviedo approving the specific requirements and conditions laid down in a notice of competition to fill 15 posts as local police officers. The action relates more specifically to requirement 3.2 of the notice, under which candidates may not be older than 30 years of age.

7. Mr Vital Pérez claims that this requirement, which unjustifiably excludes him from the competition, infringes his fundamental right of access on equal terms to public office, as laid down both in the Spanish Constitution and in the Directive. In defending the action, the municipality of Oviedo maintains first that the notice of competition is consistent with Law 2/2007 of the Autonomous Community of the Principality of Asturias ('Law 2/2007'), Article 32 of which makes it a requirement that applicants for a post in any rank of the local police services be no more than 30 years of age, and secondly that in *Wolf* (7) the Court has already ruled in favour of such an age limit in a similar case.

8. As it had doubts about the lawfulness of the contested age limit and considered an interpretation of the relevant provisions of the Directive to be necessary in order to settle the dispute, the Juzgado Contencioso-Administrativo No 4 de Oviedo put the following question to the Court:

'Do Articles 2(2), 4(1) and 6(1)(c) of [the] Directive ... and Article 21(1) of the Charter of Fundamental Rights of the European Union, inasmuch as they prohibit all discrimination on grounds of age, preclude the fixing, in a notice of competition issued by a municipality expressly applying a regional law of a Member State, of a maximum age of 30 for access to the post of local police officer?'

III – Analysis

9. The case that is the subject of the main proceedings undeniably falls within the scope of the Directive, which applies, in accordance with Article 3(1)(a), within the limits of the areas of competence conferred on the 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'. In providing that applicants for a post in any rank of the local police services may not be more than 30 years of age, Article 32 of Law 2/2007 lays down rules on access to a public post within the meaning of the abovementioned provision of the Directive. (8)

10. There is also no doubt that the law in question provides for a difference of treatment on the basis of age. I note in this regard that under Article 2(1) of the Directive 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. Article 2(2)(a) of the Directive specifies that for the purposes of applying Article 2(1) direct discrimination shall be taken to occur where one person is treated less favourably than another in a comparable situation, on any of the grounds referred to in Article 1 of the Directive. (9) The application of Article 32 of Law 2/2007 has the consequence that some persons are treated less favourably than others in comparable situations solely on the ground that they have passed the age of 30 years. That provision therefore introduces a difference of treatment based directly on age, within the meaning of Article 2(2)(a) of the Directive. (10)

11. The only question that arises in the main proceedings, on which the court of reference seeks an interpretation by the Court, is therefore whether the difference of treatment constitutes direct discrimination within the meaning of Article 2(2)(a) of the Directive or whether it falls under one of the exceptions laid down in Articles 4(1) and 6(1).

A – *The interpretation of Article 4(1) of the Directive*

12. Under Article 4(1) of the Directive, entitled ‘Occupational requirements’, Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a *genuine and determining occupational requirement*, provided that the *objective is legitimate* and the *requirement is proportionate*. (11)

13. The Spanish, Italian, German and French Governments maintain that the age limit at issue in the main proceedings is justified pursuant to the abovementioned provision because some of the duties assigned to local police officers impose physical requirements that are particularly high, and in any case above the norm, and such requirements are met only by younger officers. They argue that the purpose of such a limit is to safeguard the operational capacity and proper functioning of the local police service, by ensuring that newly recruited officers are able to perform the more physically demanding tasks for a relatively long period of their career. By contrast, the court of reference, the applicant in the main proceedings and the Commission doubt the lawfulness of the contested age limit.

14. As clarified by the Court in *Wolf* — to which both the court of reference and, relying on contrary lines of argument, all the interveners refer — Article 4(1) of the Directive authorises Member States to derogate from the principle of equal treatment if a characteristic linked to the ground on which the difference of treatment is based, and not the ground itself, constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. (12)

15. In that judgment, in which the issue was the maximum age of 30 set by a German *Land* for recruitment to an intermediate career post in the fire service, the Court stated first that the objective of safeguarding the operational capacity and proper functioning of services such as those listed in recital 18 of the Directive, (13) which include the police services, must be considered a ‘legitimate objective’ under Article 4(1) of that Directive. (14)

16. In the present case, the legislation at issue in the main proceedings — on the supposition that, as assumed by the Spanish Government, in particular, it genuinely pursues such an objective, which it is for the court of reference to determine definitively (15) — could therefore be justified on the basis of the abovementioned provision of the Directive if the other conditions were satisfied.

17. Secondly, in *Wolf* the Court held, on the basis of clarification provided by the German Government, that the possession of ‘especially high physical capacities’ was a genuine and determining occupational requirement within the meaning of Article 4(1) of the Directive for carrying on the occupation in question. It remarked in this regard that, in contrast to the management duties of persons in the higher careers of the fire service, the activities of persons in the intermediate career were characterised by their physical nature,

as those persons took part, in particular, in fighting fires, rescuing persons and animals, environment protection tasks and dealing with dangerous animals, as well as supporting tasks. (16)

18. I am not convinced that the same conclusion can be reached in the present case with regard to local police officers in Asturias. It is apparent from the order for reference that the activities of such officials cover several areas and include both operations ‘in the field’, such as the arrest of offenders, which may require the use of physical force, and tasks that are less demanding from the psychophysical point of view, such as traffic control. (17) The operations of the local police services in Spain therefore cover a far wider and more varied range of activities than the intermediate career of the fire service examined by the Court in the abovementioned *Wolf* judgment, the members of which, as became clear in that judgment, are required mainly, if not exclusively, to perform activities in the field that entail a high physical capacity.

19. Thirdly, the Court held that the requirement to possess high physical capacities to perform the tasks of persons in the intermediate career of the fire service was related to age. To that end, based on data produced by the German Government deriving from studies in the field of industrial and sports medicine which showed that respiratory capacity, musculature and endurance diminish with age, the Court concluded that some of the tasks of persons in that service, such as fighting fires or rescuing persons, required exceptionally high physical capacities and could be performed only by young officials, that is to say those under 45 years of age in the first case and under 50 in the second.

20. In my opinion, there are no factors that permit the same conclusions to be reached in the present case. First, the assertion in the observations of the Spanish Government that the physical fitness that local police officers must have is comparable to that required by firemen engaged in fighting fires and rescuing persons, (18) as ascertained by the Court in the abovementioned *Wolf* judgment, is based on mere allegations not supported by facts or data that would make it possible to analyse the specific situation of such police forces. Secondly, as I observed above, on the basis of the information contained in the order for reference and the observations of the Spanish Government, a large part of the tasks of Spanish local police officers does not appear to require exceptional physical characteristics, whereas it is clear from *Wolf* that all of the activities performed by persons in the intermediate career of the fire service, or at least those most characteristic of the functions of that service, required such attributes.

21. In more general terms, it is clear from the above that in the present case the conditions that led the Court to rule in favour of the age limit in question in *Wolf* do not apply. I do not consider it possible to conclude, contrary to the conclusion drawn by the Court in that judgment, that the possession of ‘exceptionally high physical capacities’ are a genuine and determining requirement for performing the function of local police officer, as described in the order for reference, even if account is taken of the fact, emphasised in particular by the Spanish and French Governments, that the performance of that function may involve the use of firearms. Moreover, although it may be legitimate to consider that local police officers need certain physical capacities to perform some of their tasks, in my opinion it is not possible to conclude, on the basis of the information provided to the Court, that those capacities are inevitably related to a particular age range, and that they are not found in persons above a specific age limit, as the Court concluded in *Wolf*.

22. It follows, from the point of view of the necessary and hence proportionate nature of the contested age limit, that it cannot be concluded either, as the Court did in *Wolf*, that the objective of ensuring the operational capacity and proper functioning of the local police service makes it necessary to maintain a particular age structure, which in turn requires the recruitment exclusively of officials of less than 30 years of age. (19)

23. With regard to proportionality, I also observe that it is not evident from the order for reference that officers above a certain age are automatically assigned to less physically demanding activities or those that do not involve the use of firearms, whereas the order mentions that there is provision for public officials in the national police service or in some local communities who are in active service to transfer, at their request, to other activities upon reaching the age of 58 (the so-called ‘segunda actividad’ regime), in other words only 7 years from retirement age, set at 65 years.

24. In these circumstances, it may be held that possession of the necessary physical capacities for carrying on the activity of a local police officer may be adequately assessed on the basis of the physical tests, which are in any case particularly rigorous, and from the medical exclusions laid down in the contested notice of competition, and that the age limit in question is therefore not necessary.

25. I note that, in so far as it authorises a derogation from a fundamental principle of Union law, Article 4(1) must be interpreted strictly and that, as expressly indicated in recital 23 of the Directive, a derogation is possible only in ‘very limited circumstances’. (20) In my opinion, the present case does not fall into that category.

26. On the basis of the foregoing considerations, I hold that Article 4(1) of the Directive must be interpreted as precluding national legislation such as that at issue in the main proceedings which fixes the maximum age for participation in a selection procedure for recruitment to the local police service at 30 years.

B – *The interpretation of Article 6(1) of the Directive*

27. I note that under Article 6(1) of the Directive ‘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*’. (21)

28. That provision establishes a system of derogations in consideration of the recognition of the ‘specific nature’ of age among the grounds of discrimination addressed by the Directive. (22) In particular, it allows Member States to introduce into their national law measures providing for differences in treatment on grounds of age which otherwise fall within the category of *direct discrimination* as defined in Article 2(2)(a) of the Directive. (23) That option, ‘in that it constitutes an exception to the principle prohibiting discrimination, (24) is however strictly limited by the conditions laid down in Article 6(1) itself’. (25)

29. It is therefore necessary to enquire whether, under Spanish law, the setting of the age limit in dispute in the main proceedings serves a legitimate aim within the meaning of the provision cited above that can objectively and reasonably justify the difference of treatment to which it gives rise and whether that limit is an appropriate and necessary means of achieving that aim.

a) Identification of the aims pursued

30. I note first of all that it is not evident either from the order for reference or from the file submitted to the Court that the legislation on which the notice of competition at issue in the main proceedings is based makes explicit reference to objectives such as those specified in Article 6(1) of the Directive to justify the setting of the contested age limit. That circumstance is not, however, sufficient in itself to preclude the possibility that the limit is justified under Article 6(1) of the Directive. (26) The Court has recognised that, in the absence of precision in the national legislation, the aims pursued can be deduced from ‘elements taken from the general context of the measure concerned’. (27)

31. Although the Court acknowledges, in what is now settled case-law, that analysis of the ‘contextual elements’ may compensate for the lack of an explicit reference in the national legislation at issue, the limits of reliance on such analysis are still not clear. In some cases the Court has carefully reconstructed the objectives of the legislation in question from information provided by the court of reference or contained in the file, (28) but in other cases it has merely made reference to the observations of the Member State concerned, even where there was little evidence to support the reliance on objectives covered by the derogation under Article 6(1) of the Directive. (29) Moreover, it has granted Member States the option of adducing and proving aims other than those identified by the court of reference or expressly stated in the national legislation. (30) Lastly, it has not excluded the possibility of taking account, in its

assessment, of aims mentioned not by the Member State concerned but by intervening Member States. (31)

32. In this regard, I consider it appropriate to note that Article 6(1) of the Directive provides for a limited form of derogation from the fundamental principle of non-discrimination on grounds of age, justified by specific considerations of social policy *particular to an individual Member State*.

33. The application of such a derogation *requires the adoption of a specific national measure* that pursues well defined aims. Such aims, if not mentioned explicitly, must at least be clearly deducible from the context of the measure itself. Although, as the Court stated in *Age Concern England*, the Directive does not oblige Member States to draw up a precise list of the differences of treatment that may be justified by a legitimate aim within the meaning of Article 6(1), (32) the need both for legal certainty and for the exercise of judicial review require that the aims of national legislation introducing a derogation from the prohibition of discrimination on grounds of age be clearly identified by the Member State and that their lawfulness under the provision in question be adequately demonstrated.

34. On the other hand, the Court has clarified that ‘mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying’ a derogation based on Article 6(1) of the Directive and that such a provision imposes on Member States ‘the burden of establishing to a high standard of proof the legitimacy of the aim pursued’. (33)

35. On the basis of the above, aims other than those mentioned in the measure at issue or indicated by the court of reference, which alone is competent to interpret the applicable national legislation, and/or deducible from the context of the measure, possibly in the light of information provided by the Member State in question, cannot be taken into account.

36. In the present case, as I indicated above, the law introducing the contested age limit does not specify the reasons for that decision. The order for reference contains only an implicit reference to the need to ensure a reasonable period of employment before retirement or transfer to so-called ‘segunda actividad’, and the national file does not contain additional information. For its part, the Spanish Government, citing the Opinion of Advocate General Bot in the *Wolf* case, (34) refers to employment policy objectives linked to management of the local police service, such as, in particular, the attainment of a balanced age structure within the service that makes it possible to ensure that the various tasks assigned to it can be performed. It also points out that the recruitment of officers able to perform all of the tasks for a sufficiently long time before retirement or transfer to ‘segunda actividad’ also meets the objective of reducing public expenditure, since it makes it possible to recruit personnel less frequently. According to the Spanish Government, that objective, which accords with the policy pursued at national level of reducing government expenditure, contributes to the set of measures adopted to restore the health of the Spanish economy.

37. In the light of the above, and it being understood that it is ultimately for the national court to identify the objective genuinely pursued by the legislation at issue, (35) the aims that may be ascribed to the measure contested in the main proceedings on the basis of the information available to the Court are: (i) the need to ensure a reasonable period of employment before retirement; (ii) the attainment of a balanced age structure in the local police service in order to ensure its proper functioning; and (iii) a recruitment policy geared towards reducing costs.

38. In my opinion, however, the aims mentioned by the German, Italian and French Governments or that can be deduced from their observations — relating in particular to requirements connected with vocational training, promotion of the employment of young people and public safety — should not be taken into consideration because they do not appear relevant to the measures at issue in the main proceedings. In the remainder of my assessment I shall nevertheless also take account of those aims in the event that the Court does not share my opinion that they are irrelevant in the present case.

b) Lawfulness of the aims and objectives pursued

39. There can be no doubt that training requirements for the work in question or the need for a reasonable period of employment before retirement are legitimate aims such as to justify the fixing of a maximum age for recruitment (and hence for participation in a selection procedure with a view to recruitment). Such aims are expressly mentioned in Article 6(1)(c) of the Directive.

40. In my opinion, however, there is not the same degree of agreement that the objective of establishing a balanced age structure that would safeguard the operational capacity and proper functioning of the local police service is a legitimate aim within the meaning of the provision in question.

41. I note that, according to the Court, the aims which may be considered ‘legitimate’ within the meaning of Article 6(1), and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, meet ‘social policy objectives, such as those related to employment policy, the labour market or vocational training’. (36)

42. Although it cannot be denied that the proper functioning of a police service, whether national or local, is an objective of public interest, it is not one of the objectives which, on the basis of the case-law of the Court, permit Member States to derogate from the principle of non-discrimination on grounds of age within the meaning of Article 6(1) of the Directive.

43. The fact that not all public interest objectives pursued by Member States qualify for the purposes of applying Article 6(1) is nevertheless clear from the judgment delivered by the Grand Chamber of the Court in the case of *Prigge and Others*, in which the Court, after reiterating that ‘the legitimate aims set out in that provision are related to employment policy, labour market and vocational training’, ruled that the aim of safeguarding air traffic safety did not fall within those aims. (37) It is true that in *Fuchs and Köhler*, which came shortly before the judgment in *Prigge and Others*, the Court appears to acknowledge that the objective of ensuring a high-quality public service, in the case in point the administration of justice, is likely to qualify for the purposes of applying the derogation provided for in Article 6(1) of the Directive. However, it is clear from paragraphs 50 and 53 of that judgment that the objective in question was held to be relevant only in so far as it coincided, in the context of considerations relating to employment and labour market policy in the Member State concerned, with other objectives, such as, in particular, the aim of encouraging the recruitment and promotion of young people. (38)

44. On the other hand, as we have seen above, in *Wolf* the aim of safeguarding the operational capacity and proper functioning of the intermediate career of the fire service, which was invoked by the German Government and is similar to the objective mentioned in the present case by the Spanish Government, was examined by the Court solely in relation to the derogation under Article 4(1) of the Directive, despite the fact that the questions submitted by the court of reference related only to Article 6(1). After recalling recital 18 of the Directive, according to which the Directive ‘does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services’, the Court stated in paragraph 39 of the judgment that ‘the concern to ensure the operational capacity and proper functioning of the professional fire service constitutes a legitimate objective within the meaning of Article 4(1) of the Directive’. Similarly, in *Petersen* (39) objectives associated with the protection of health were examined only in the light of Article 2(5) of the Directive, despite the fact that, here too, the court of reference had based its assessment on Article 6(1).

45. Similarly, the public safety objectives mentioned in general terms by some of the intervening governments cannot, in my opinion, be classified as legitimate aims under Article 6(1) of the Directive, at least where they are not accompanied by social policy objectives such as those typified by that provision.

46. Similar considerations can, in my opinion, also be made concerning the objective of favouring a recruitment policy that saves costs and consequently reduces government expenditure, which is also relied

on by the Spanish Government in its observations.

47. I note in this regard that the Court has stated that the legitimate aims which justify a difference of treatment on grounds of age within the meaning of Article 6(1) of the Directive are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. (40)

48. It is clear that where the employer is a public administration the aim of reducing costs as a rule meets a public interest objective in the same way as those mentioned in Article 6(1) of the Directive. However, this consideration alone is not sufficient, in my opinion, to hold that such an objective is one of the legitimate aims permitted by that provision. If that logic were followed, any difference in treatment on grounds of age that made a reduction in public expenditure possible could, for that reason alone, be justified on the basis of Article 6(1) of the Directive. (41) This would lead to an unacceptable broadening of an exception to the fundamental principle prohibiting discrimination, which, as such, was contained by the Community legislature within well defined limits and must be interpreted strictly by the courts of the Union.

49. Moreover, the Court ruled clearly to that effect in *Fuchs and Köhler*. It stated that although EU law does not preclude the Member States from taking account of budgetary considerations *at the same time as* political, social or demographic considerations', this may occur only subject to observance of the general principle of the prohibition of age discrimination (42) and that 'while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations *cannot in themselves constitute a legitimate aim*' within the meaning of Article 6(1) of the Directive. (43)

50. As regards more specifically the aim of establishing a balanced age structure in a particular field of activity, I note that the Court has recognised that aim to be legitimate for the purposes of applying the exception under Article 6(1) of the Directive only in so far as it is directed at furthering employment objectives such as, in particular, encouraging recruitment, especially of young people, (44) in the interests of sharing work among the generations. (45) Moreover, the judgments in which the Court held that aim to be legitimate concerned national measures providing for the automatic retirement of employees upon reaching retirement age (46) or their compulsory retirement. (47)

51. The present case is distinctly different from those situations, both because it relates to a maximum age limit for entry to the profession in question, and therefore involves a wider circle of persons and not only those at the end of their working life, and because the distribution among age groups adduced as a legitimate aim by the Spanish Government does not serve the objective of encouraging new recruitment, and hence employment, but on the contrary that of limiting it, principally for the purpose of reducing the associated expenditure.

52. It is clear from all of the above considerations that the only aims among those considered that can be regarded as 'legitimate' within the meaning of Article 6(1) of the Directive are those relating on the one hand to training requirements and on the other to the need to ensure a reasonable period of employment before retirement or transfer to 'segunda actividad'.

c) The necessity and adequacy of the measures

53. The age limit at issue may be held to be objectively and reasonably justified by the aims mentioned in the preceding paragraph provided that the measures laid down for that purpose do not go beyond what is necessary to achieve those aims and reflect them in a consistent and systematic manner. (48)

54. Examination of the proportionality of the measure at issue is the cornerstone of the verification of the lawfulness of recourse to the derogation under Article 6(1). It must therefore be precise and cannot be held to be met where the Member State involved relies on mere generalisations concerning the capacity of the measure in question to achieve the social policy objectives of that measure. (49) As the Court stated in

Mangold, observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued. (50)

55. It must be remembered in this regard that although according to settled case-law Member States enjoy broad discretion in defining the measures capable of attaining the objectives they intend to pursue in the fields of social and employment policy, (51) the Court has stated clearly that that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. (52)

56. As a matter of principle, it is for the national court to ascertain, in the light of all the relevant evidence and taking account of the possibility of achieving by other means such legitimate social policy objective as may be identified, whether the measure at issue, as a means intended to achieve that aim, is, according to the actual wording of Article 6(1) of the Directive, ‘appropriate and necessary’. (53) I note, however, that when the Court is requested to give a preliminary ruling it does not hesitate, in order to give guidance to the court of reference, to carry out its own examination of the proportionality of the measure in question, sometimes in considerable detail, on the basis of the information available.

57. In the present case I maintain that the contested age limit goes far beyond what can be considered necessary for the training requirements for local police officers and in order to ensure that new recruits serve for a reasonable period before retirement or transfer to ‘segunda actividad’.

58. With regard to vocational training — a justification mentioned by the French Government in its observations but not one of the aims pursued by the legislature of Asturias — it is evident from the notice of competition at issue, which is contained in the file, that before entering service the applicants who have passed the competition must follow a period of ‘selective training’, the length of which is set by the regional academy of local police services and by the municipality of Oviedo. (54) Such a period of training, even if it lasted for more than one or two years, (55) would not, in my opinion, justify refusing entry to the employment in question to a large category of workers that includes individuals in age groups who, while not at the beginning of their working life, are certainly not advanced in years. For workers like the applicant in the main proceedings who are in age groups closest to the contested limit the loss of opportunity as a result of exclusion from participation in the competition may, moreover, be even more harmful in that they are still far from an age at which they are eligible for pension and are more exposed to family burdens. (56)

59. Similar considerations also apply to the objective of ensuring that newly appointed police officers serve for a reasonable period before retirement or transfer to ‘segunda actividad’, to which the court of reference implicitly refers. Since on the basis of the information provided by that court the retirement age for local police officers is fixed at 65 years and that for transfer to ‘segunda actividad’ at 58 years, a person joining the profession in question after the age of 30, in particular if he is in one of the age groups closest to the contested limit — as is the case of the applicant in the main proceedings — will have a normal professional career ahead of him and will be able to serve for a reasonable period, even in the most demanding duties, before becoming eligible to join the ‘segunda actividad’ regime on grounds of age or reaching retirement age. Moreover, I note that the notice of competition in question requires that persons seeking admission to the specific competition in the framework of internal mobility must be no less than 15 years from pensionable age, which raises the maximum age limit from 30 to 50 years, thus introducing an inconsistency into the eligibility requirements directly or indirectly linked to age. (57)

60. In those circumstances, the contested age limit is not proportionate to the objectives under consideration and cannot therefore be considered objectively and reasonably justified by those objectives.

61. For the sake of completeness I would add that neither the requirements associated with public safety nor the aim of safeguarding the operational capacity of the local police service, which are raised by the intervening governments, are, in my opinion, appropriate to justify the contested age limit under

Article 6(1), even supposing that they were among those pursued by the legislature of Asturias and could be considered legitimate aims within the meaning of that provision.

62. In this regard I merely observe that the difference of treatment stemming from the setting of such an age limit does not appear strictly necessary to ensure attainment of the abovementioned objectives, as shown, *inter alia*, by the fact that no limit of this kind is imposed for recruitment to the Spanish national police service (58) or for local police services in autonomous communities other than Asturias, that a higher maximum age is laid down in the legislation of other autonomous communities, that the similar age limit laid down for admission to the competition to recruit trainee inspectors in the national police service has been declared illegal by the Spanish Tribunal Supremo (59) and lastly that the lawfulness of the limit underlying the main proceedings is the subject of debate within the legislative bodies of Asturias.

63. The disparity in the solutions adopted at national and regional level not only casts doubt on the need for the measure at issue but is also a legislative inconsistency within the Member State concerned. According to settled case-law, legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. (60)

64. It is true that in *Fuchs and Köhler* the Court stated that, in the context of the distribution of powers between central and regional authorities in a Member State, in the case in point the Federal Republic of Germany, the ‘fact that a certain period of time may elapse between changes made to the law of one ... *Land* and those made in another ... *Land* ... does not, by itself, mean that the legislation at issue lacks coherence’, as the pace of change can vary from one local authority to another to take account of particular regional features. (61) In the present case, however, it does not appear that the age limit at issue was maintained in view of the socio-economic situation in Asturias. On the contrary, the court of reference appears to exclude the possibility that the specific features of that region may justify a solution other than the one prevalent in Spain at both central and local levels.

d) Outcome of the assessment on the basis of Article 6(1) of the Directive

65. On the basis of the considerations set out above and in the light of the information available to the Court, I consider that the difference of treatment on grounds of age inherent in the maximum age limit set in the contested notice of competition cannot be justified under Article 6(1) of the Directive.

IV – Conclusion

66. In the light of all the foregoing considerations, I suggest that the Court give the following answer to the question submitted to it by the Juzgado Contencioso-Administrativo No 4 de Oviedo:

Articles 4(1) and 6(1) 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 precluding national legislation such as that in the case in the main proceedings that set at 30 years the maximum age for participation in a selection procedure for recruitment to the local police service.

¹ – Original language: Italian.

² – Council Directive 2007/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

³ – Protection against discrimination on grounds of age stems from the US Employment Age Discrimination Act of 1965 and was originally aimed at protecting older workers (aged over 40). Age is not one of the grounds listed in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), but the Court in Strasbourg has stated that it is covered by the expression ‘other status’ in that article (judgment of 10 June 2010 in *Schwizgebel v. Switzerland*, No 25762/07).

[4](#) – *Mangold* (C-144/04, EU:C:2005:709, paragraph 75).

[5](#) – In the celebrated judgment of 1967 in *Massachusetts Board of Retirement v Murgia* (427 U.S. 307), the US Supreme Court ruled that differentiation on the basis of age did not constitute a ‘suspect class’, defining that concept in the following terms: ‘a suspect class is one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process’.

[6](#) – Comparing the nature of discrimination based on sex with that based on age, in his Opinion in *Lindorfer v Council* (C-227/04 P, EU:C:2005:656) Advocate General Jacobs observed that ‘sex is essentially a binary criterion, whereas age is a point on a scale. Sex discrimination based on actuarial tables is thus an extremely crude form of discrimination, involving very sweeping generalisations, whereas age discrimination may be graduated and may rely on more subtle generalisations’ (point 84).

[7](#) – C-229/08, EU:C:2010:3.

[8](#) – See to that effect *Wolf* (EU:C:2010:3, paragraph 27).

[9](#) – See *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 50); *Age Concern England* (C-388/07, EU:C:2009:128, paragraph 33); and *Wolf* (EU:C:2010:3, paragraph 28).

[10](#) – See, by analogy, *Wolf* (EU:C:2010:3, paragraph 29).

[11](#) – Emphasis added.

[12](#) – EU:C:2010:3, paragraphs 35 and 36.

[13](#) – Recital 18 of the Directive states that the Directive ‘does not require, in particular, the armed forces and the police, prison or emergency services to recruit ... persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services’.

[14](#) – EU:C:2010:3, paragraph 38.

[15](#) – With regard to the identification of the objectives likely to justify a difference of treatment under the Directive, see below for application of the derogation referred to in Article 6(1).

[16](#) – *Wolf*, EU:C:2010:3, paragraph 40).

[17](#) – According to the order for reference, Article 18(6) of Law 2/2007 defines the duties of police officers as follows: ‘providing assistance to citizens, protecting persons and property, the arrest and custody of offenders,

conducting crime prevention patrols, traffic control and such other duties as may be assigned to them by superior officers'. In its observations the Spanish Government also mentions Article 53(1) of Ley Orgánica 2/86 de 13 de marzo de Fuerzas y Cuerpos de Seguridad, under which local police forces perform the following functions: (a) protecting the local authorities and guarding their premises and installations; (b) ensuring the order, signalling and control of traffic in the city centre in accordance with road traffic regulations; (c) writing reports on traffic accidents in the city centre; (d) performing administrative police duties regarding orders, notices and other acts adopted by the municipalities within their powers; (e) participating in the functions of the investigative police; (f) providing assistance in the event of accidents, disasters or public emergencies, participating in the implementation of civil protection plans; (g) carrying out inquiries and adopting any crime prevention measures; (h) monitoring public spaces and cooperating with the law enforcement agencies of the State and with the police of the autonomous communities to protect demonstrations and maintain order at large gatherings when their assistance is requested; and (i) assisting in the resolution of private disputes when their assistance is requested.

[18](#) – Similar assertions are made in the observations of the German, Italian and French Governments, albeit in more nuanced form in the case of the last.

[19](#) – In *Wolf* the Court held that the age limit laid down in the legislation at issue was appropriate to the objective of ensuring the operational capacity and proper functioning of the service in question and did not go beyond what was necessary to achieve that objective. According to the Court, as the fire-fighting and rescue duties which are part of the intermediate career in the fire service could only be performed by younger officials, it could be considered necessary for the majority of officials in that career to be able to perform such tasks, and hence for them to be younger than 45 or 50. Recruitment at an older age would have had the consequence that too large a number of officials could not be assigned to the most physically demanding duties, and in any case not for a sufficiently long period.

[20](#) – See to that effect *Age Concern England* (EU:C:2009:128, paragraph 62). Technically, Articles 4(1) and 6 of the Directive do not provide for a derogation or exception from the prohibition of discrimination but allow a difference of treatment to be justified by excluding its classification as discrimination under Article 2 of the Directive. From the substantive point of view, however, the Court treats those provisions as exceptions to the general prohibition of discrimination.

[21](#) – Emphasis added.

[22](#) – That specific nature is reflected in recital 25 of the Directive, which states that although the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines, agreed by the European Council at Helsinki on 10 and 11 December 1999, and encouraging diversity in the workforce, 'differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States'. See *Age Concern England* (EU:C:2009:128, paragraph 60).

[23](#) – *Age Concern England* (EU:C:2009:128, paragraph 62).

[24](#) – On the basis of Article 6(1) of the Directive, that option is exercised '[n]otwithstanding Article 2(2)'.

[25](#) – *Age Concern England* (EU:C:2009:128, paragraph 62).

[26](#) – *Palacios de la Villa* (EU:C:2007:604, paragraph 56).

[27](#) – *Palacios de la Villa* (EU:C:2007:604, paragraph 56); *Age Concern England* (EU:C:2009:128, paragraph 45); *Petersen* (C-341/08, EU:C:2010:4, paragraph 40); *Georgiev* (C-250/09 and C-268/09, EU:C:2010:699, paragraph 40); *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 58); *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508, paragraph 39); and *Commission v Hungary* (C-286/12, EU:C:2012:687, paragraph 56).

[28](#) – As in *Georgiev* (EU:C:2010:699).

[29](#) – Ibid.

[30](#) – *Fuchs and Köhler* (EU:C:2011:508, paragraphs 39 to 46).

[31](#) – *Georgiev* (EU:C:2010:699, paragraphs 43 and 44).

[32](#) – EU:C:2009:128. I note incidentally that as a matter of principle such an obligation exists with regard to Article 4(1), as recital 23 of the Directive lays down that the ‘very limited circumstances’ in which a difference of treatment on grounds of age may be justified under that provision should be ‘included in the information provided by the Member States to the Commission’.

[33](#) – *Age Concern England* (EU:C:2009:128, paragraphs 51 and 65).

[34](#) – EU:C:2010:3.

[35](#) – *Age Concern England* (EU:C:2009:128, paragraph 47) and *Georgiev* (EU:C:2010:699, paragraphs 47 and 48).

[36](#) – *Age Concern England* (EU:C:2009:128, paragraph 46); *Hütter* (C-88/08, EU:C:2009:381, paragraph 41); and *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 81).

[37](#) – EU:C:2011:573, paragraph 82; that aim was, however, considered legitimate under Article 4(1) of the Directive (paragraphs 68 and 69 of the judgment).

[38](#) – EU:C:2011:508. The same can be said of *Georgiev* (EU:C:2010:699) as regards the objective of improving the quality of teaching and research at universities; see also *Commission v Hungary* (EU:C:2012:687, paragraph 62).

[39](#) – EU:C:2010:4.

[40](#) – See *Age Concern England* (EU:C:2009:128, paragraph 46).

[41](#) – I note that in *Petersen* (EU:C:2010:4) the aim of controlling public health expenditure, which the court of reference had assessed from the point of view of Article 6(1) of the Directive, was examined in the light of Article 2(5) of the Directive (see paragraph 45).

[42](#) – *Fuchs and Köhler* (EU:C:2011:508, paragraph 73); emphasis added.

[43](#) – *Fuchs and Köhler* (EU:C:2011:508, paragraph 74); emphasis added.

[44](#) – Together with, where applicable, pursuit of the aims of improving personnel management and preventing possible disputes concerning employees' fitness to work beyond a certain age; see *Fuchs and Köhler* (EU:C:2011:508, paragraph 68) and *Commission v Hungary* (EU:C:2012:687, paragraph 62).

[45](#) – See, inter alia, *Palacios de la Villa* (EU:C:2007:604, paragraph 53).

[46](#) – See, for example, *Palacios de la Villa* (EU:C:2007:604).

[47](#) – See, for example, *Fuchs and Köhler* (EU:C:2011:508).

[48](#) – See, inter alia, *Georgiev* (EU:C:2010:699, paragraph 55).

[49](#) – To that effect, see *Age Concern England* (EU:C:2009:128, paragraph 51).

[50](#) – EU:C:2005:709, paragraph 65.

[51](#) – See, inter alia, *Mangold* (EU:C:2005:709, paragraph 63).

[52](#) – *Age Concern England* (EU:C:2009:128, paragraph 51).

[53](#) – *Age Concern England* (EU:C:2009:128, paragraph 50).

[54](#) – Paragraph 7 of the notice of competition.

[55](#) – In its observations France mentions such a minimum training period for French police officers.

[56](#) – Although the situation of a compulsorily retired worker is objectively different from that of an applicant for a post, I note that in assessing the proportionality of national measures setting age limits for termination of the employment relationship the Court has held that the fact that the persons concerned receive economic compensation in the form of an old-age pension is relevant and indeed decisive.

[57](#) – That inconsistency may, in my opinion, be justified only in part by the consideration that persons admitted to the competition in the framework of internal mobility are already members of the local police services.

[58](#) – As confirmed by the Spanish Government in reply to a written question from the Court.

[59](#) – By a judgment of 21 March 2011, mentioned in the order for reference.

[60](#) – See *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55) and *Petersen* (EU:C:2010:4, paragraph 53).

[61](#) – *Fuchs and Köhler* (EU:C:2011:508, paragraphs 95 and 96). With regard to the importance of consistency, see in particular *Hartlauer* (EU:C:2009:141, paragraph 55).