OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 June 2016 (1)

Case C-443/15

Dr David L. Parris
v
Trinity College Dublin and Others

(Request for a preliminary ruling from the Labour Court, Ireland)

(Fundamental rights — Directive 2000/78/EC — Equal treatment in employment and occupation — Discrimination based on age and sexual orientation — Multiple discrimination — Same-sex civil partnership — Occupational pension — Survivor's pension — Eligibility of the surviving spouse or civil partner — Requirement to enter into a marriage or civil partnership before reaching the age of 60 — Preclusive obstacles in national law)

I – Introduction

1. Birthdays are usually a cause for joy and celebration. At the same time, however, they can be occasions for looking back over times gone by and may evoke not only positive memories but also painful reflections on things which have eluded one in life or which one has been denied as a result of circumstances in earlier years.
2. So it may have been for Dr David Parris when he celebrated his 70th birthday a few weeks ago. His joy at the fact that his long-standing partnership with another man had been recognised by the State in 2011 following a change in the law in Ireland may have been mixed with a good deal of bitterness. For the occupational pension scheme to which Dr Parris belongs as a former lecturer at Trinity College Dublin denies his partner the right to a survivor's pension. The reason given is that the couple formalised their relationship too late, that is to say not until after Dr Parris had turned 60. In response, Dr Parris argues that it had not been possible for him to

enter into a same-sex marriage or civil partnership before his 60th birthday because of the legal position in Ireland.

3. Prompted by Dr Parris's situation, these proceedings provide the Court with an opportunity to refine further its highly multifaceted case-law on the EU-law principle of equal treatment in matters relating to age and sexual orientation. Like the principle of equal treatment of men and women, the principle of equal treatment in matters relating to age and sexual orientation is a fundamental principle of EU law which is enshrined in primary legislation in Article 21 of the Charter of Fundamental Rights (2) and given specific expression in Council Directive 2000/78/EC. (3) (4)

4. In the present case, particular attention will have to be given to the fact that any discrimination perpetrated against the person concerned is attributable to a combination of two factors, age and sexual orientation. The Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation. In addition, it will be necessary to take into account the fact that the contested requirement to enter into a marriage or civil partnership before the age of 60 has proved to be an insurmountable obstacle for an entire community in Ireland.

II – Legal context

A – *EU law*

5. The EU-law framework applicable to this case is determined by Directive 2000/78, which, according to Article 20 thereof, entered into force on 2 December 2000, the date of its publication in the *Official Journal of the European Communities*.

6. Under Article 1 thereof, the purpose of that 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'.

7. Under the heading of 'concept of discrimination', Article 2 of Directive 2000/78 provides as follows:

'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, …

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

8. The scope of Directive 2000/78 is defined in Article 3 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:

…

(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.'

9. Article 6 of Directive 2000/78, concerning 'justification of differences of treatment on grounds of age', provides, inter alia, as follows:

'1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

…

2. 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.'

10. Finally, reference must be made to recital 22 of Directive 2000/78, in which the Council states that:

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

11. In accordance with Article 18(1) thereof, the Directive was to be transposed into national law by 2 December 2003.

B – *National law*

12. The Irish law relevant to this case is, principally, the Pensions Act 1990, (5) in the amended version of 2004. (6) Section 66 of the Pensions Act contains a general prohibition on discrimination in occupational pension schemes, in particular on the grounds of age, sexual orientation or marital status.

13. Section 72 of the Pensions Act sets out a number of exceptions to the prohibition on discrimination in occupational pension schemes and reads, in extract, as follows:

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

…

(c) fix age or qualifying service, or a combination of both, as a condition or criterion for entitlement to benefits under the scheme … provided that this does not result in a breach of the principle of equal pension treatment 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.

…’

14. Attention must also be drawn to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. (7) That act gave same-sex couples the right for the first time to enter into a civil partnership in Ireland from 2011. Moreover, a 2010 Ministerial Order relating to that act (8) enabled civil partnerships entered into abroad to be recognised in Ireland from 1 January 2011, but only prospectively.

15. Finally, a constitutional amendment adopted by referendum on 22 May 2015 gave same-sex couples in Ireland the right to marry. Following the entry into force of the necessary legislative adjustments, that right has been available since 16 November 2015.

III – Facts and main proceedings

16. The Irish Labour Court, (9) the referring court, has pending before it proceedings brought by Dr Parris with a view to obtaining an order granting his same-sex partner an occupational survivor’s pension in the event that he should outlive the applicant. Dr Parris’s action is directed, on the one hand, against Trinity College Dublin, his former employer, and, on the other hand, against the Higher Education Authority, the Department of Public Expenditure and Reform and the Department of Education and Skills (the

latter three bodies being collectively referred to hereinafter as 'the defendant authorities').

A – *Dr Parris and his marital status*

17. Dr Parris was born on 21 April 1946 and has dual Irish and British nationality. He has lived with his same-sex partner in a committed relationship for more than 30 years. The national court is satisfied that Dr Parris and his partner would have married or contracted a civil partnership many years ago had that been legally possible.

18. Since civil partnerships have been available in the United Kingdom since December 2005, (10) Dr Parris entered into a civil partnership with his partner there on 21 April 2009, his 63rd birthday. However, that civil partnership could not be recognised in Ireland at that time. Indeed, Dr Parris's civil partnership was not recognised until 12 January 2011, and even then only prospectively, in accordance with the Ministerial Order of 2010.

19. Four years after the recognition of the civil partnership, Dr Parris went on to marry his partner in the United Kingdom on 12 January 2015.

B – *Dr Parris's membership of the Trinity College occupational pension scheme*

20. Dr Parris was employed as a lecturer at Trinity College from 1972 to 2010. In that capacity he was also admitted as a non-contributory member to the Trinity College pension scheme.

21. Dr Parris has drawn an occupational pension under that scheme since his early retirement on 31 December 2010. Just over a year before then, on 3 December 2009, the pension fund, being in serious financial difficulties, (11) was transferred to a State agency, the National Treasury Management Agency. Since then, the scheme's benefits have been financed from State resources.

22. In accordance with Rule 5 of the terms of the pension scheme, a member's spouse or civil partner is to receive a pension for life equal to two thirds of the amount payable to the member before his death, where the member dies before that spouse or civil partner. However, that right exists only if the marriage or civil partnership was entered into before the member reached the age of 60, or before he retired, whichever is the earlier. In the case of a later marriage or civil partnership, the surviving spouse or civil partner is entitled only to a reduced survivor's pension for a period of five years, and even then only if the death occurs within five years from the date of the member's retirement.

C – *Dr Parris's application for a survivor's pension for his partner*

23. On 17 September 2010, Dr Parris made a formal application to Trinity College to have his partner's right to a survivor's pension recognised.

24. That application was rejected under Rule 5 of the pension scheme, Dr Parris's civil partnership not having been entered into before his 60th birthday. The Higher Education Authority confirmed the decision given by Trinity College.

25. Dr Parris lodged a complaint against the negative decisions with the Equality Tribunal, an anti-discrimination agency, arguing that he had been directly and/or indirectly discriminated against on grounds of his age and sexual orientation in breach of the Pensions Act 1990 as amended. Since that complaint was also unsuccessful, Dr Parris finally brought the pending action before the Labour Court.

IV – Request for a preliminary ruling and procedure before the Court

26. By order of 11 August 2015, received on 13 August 2015, the Labour Court referred the following questions to the Court for a preliminary ruling under Article 267 TFEU:

‘(1) Does it constitute discrimination on grounds of sexual orientation, contrary to Article 2 of Directive 2000/78/EC, 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/EC, 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/EC 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?’

27. In the proceedings before the Court, written observations were submitted by Dr Parris, Trinity College, the defendant authorities, the United Kingdom Government and the European Commission. With the exception of the United Kingdom Government, the same parties were also represented at the hearing of 28 April 2016.

V – Assessment

28. This is not the first time the Court has been asked the question whether the surviving same-sex civil partners of employees are entitled to survivor's pensions under occupational pension schemes. (12) Unlike in previous proceedings, however, the issue in the present case is no longer whether same-sex civil partners are, as a matter of principle, to be treated in the same way as widows and widowers of traditional marriages for these purposes. It is after all recognised in the dispute in the main proceedings that all surviving spouses or civil partners of employees –irrespective of whether they are from same-sex or opposite-sex couples — qualify for occupational survivor's pensions. The only point of contention in the present case is a provision in the terms of the scheme at issue to the effect that the employee concerned must have entered into a marriage or civil partnership before he reached the age of 60 (the '60-year age limit' or the 'contested age limit').

29. By its request for a preliminary ruling, the national court seeks to clarify whether that age limit constitutes discrimination prohibited by EU law under Directive 2000/78, given that, until a few years ago, same-sex couples in Ireland were not able either to marry or to contract a civil partnership. More specifically, it was for legal reasons impossible in Ireland for homosexual employees, such as Dr Parris, who were born before 1 January 1951 to meet the requirement to enter into a marriage or civil partnership before reaching the age of 60. While it is true that Dr Parris could have entered into a civil partnership before his 60th birthday abroad (that is to say, in the United Kingdom), this, as the referring court points out, would not have been recognised in Ireland before he reached the age limit of 60.

30. This case presents the Court with the issue of discrimination from three different perspectives which are each the subject of a separate question: first, from the point of view of the sexual orientation of the employee concerned (see section B below), secondly, with respect to his age (see section C below) and, thirdly, in terms of the combination of sexual orientation and age (see section D below).

A – *The scope of Directive 2000/78 (preliminary issue)*

31. Before I turn to the substantive analysis of the three questions, some brief preliminary remarks on the scope of Directive 2000/78 are called for.

1. Material scope

32. According to Article 3(1)(c), Directive 2000/78 applies 'within the limits of the areas of competence conferred on the Community … to all persons, as regards both the public and private sectors, including public bodies, in relation to … employment and working conditions, including dismissals and pay'.

33. It is settled case-law that the EU-law concept of pay within the meaning of Article 157 TFEU and the anti-discrimination directives (13) also includes occupational pensions inasmuch as these constitute a form of deferred pay. (14) Moreover, as specifically regards Article 3(1)(c) of Directive 2000/78, the Court has already held that benefits paid under an occupational survivor's pension scheme fall within the concept of pay. (15) Trinity College and the Commission, too, recognised at the hearing that the contested survivor's pension constitutes pay.

34. It is true that, in accordance with Article 3(3) of Directive 2000/78, payments from *State* social security schemes are excluded from the scope of that directive. (16) The survivor's pension at issue in the main proceedings, however, forms part of the *occupational* pension scheme operated by Trinity College, of which Dr Parris is a member by virtue of his employment contract.

35. In particular, the classification of the Trinity College pension fund as an occupational pension scheme is not precluded by the fact that that pension fund has since been transferred to a national authority and payments from it are now financed by the State. After all, the Court has already indicated on a number of occasions that the arrangements for funding and managing a pension scheme are not conclusive for the purpose of determining whether that scheme falls within the concept of pay. (17) The only decisive criterion is whether the survivor's pension is paid by reason of the previous employment relationship, 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 the last salary. (18) According to the information contained in the order for reference, those conditions are all met here.

36. Thus, a survivor's pension such as that for which Dr Parris seeks recognition for his partner in the present case falls within the substantive scope of Directive 2000/78.

2. Temporal scope

37. Directive 2000/78 entered into force on 2 December 2000 (Article 20 of the Directive). Member States were required to transpose that directive into national law by no later than 2 December 2003 (Article 18(1) of the Directive).

38. Dr Parris's application for recognition of his partner's entitlement to a survivor's pension dates back to 17 September 2010 and was therefore made more than six years after the time limit for transposing Directive 2000/78 expired. That application is thus covered by the Directive, as is also any survivor's pension that may be payable in future to Dr Parris's partner.

39. The United Kingdom raises the objection that Dr Parris's pension entitlements were based almost entirely on periods of service completed prior to the entry into force of Directive 2000/78 and cannot therefore be subject to the principle of equal treatment under that directive.

40. However, that objection is unfounded. For it is settled case-law that a new rule of law applies from the entry into force of the act introducing it, and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application. (19)

41. Those principles also apply to the temporal application of Directive 2000/78. A restriction of the temporal scope of that directive, in derogation from the aforementioned general principles, would have required an express

stipulation to that effect by the EU legislature. No such special provision has been made, however.

42. Consequently, the Court has already declared Directive 2000/78 to be applicable to cases concerning occupational and survivor's pension schemes the entitlements under which had arisen — much as they did here — long before the entry into force of that directive and any contributions or reference periods in respect of which also predated the entry into force of that directive. (20) Unlike in *Barber*, (21) for example, concerning Article 119 of the EEC Treaty (now Article 157 TFEU), the Court expressly did *not* apply a temporal restriction to the effects of its case-law relating to occupational pension schemes under Directive 2000/78. (22) I would add that there was, moreover, no longer any need for such a temporal restriction, since it had become sufficiently apparent to all the interested parties since the judgment in *Barber*that occupational pensions fall within the EU-law concept of pay and are subject to any prohibitions on discrimination.

43. It is true that the Court has held that the prohibition on discrimination contained in Directive 2000/78 cannot give rise to claims for *payments* in respect of periods in the *past* that predate the time limit for transposing that directive. (23) However, the recognition of the right to a *future* survivor's pension, at issue in the present case, is unaffected by that principle because such recognition is concerned only with future pension scheme payments, even though the calculation of those payments is based on periods of service completed or contributions made in the past. (24)

44. Consequently, the facts of the dispute in the main proceedings fall within the temporal scope of Directive 2000/78.

B – *Discrimination based on sexual orientation (first question)*

45. By its first question, the referring court wishes to ascertain, in essence, whether it constitutes discrimination based on sexual orientation as prohibited under Directive 2000/78 for an occupational retirement pension scheme to make the right of same-sex civil partners to a survivor's pension subject to the condition that the civil partnership was contracted prior to the 60th birthday of the employee affiliated to that scheme, in circumstances where it was legally impossible for the persons concerned to enter into such a civil partnership or marriage before the employee reached that age limit.

46. *Discrimination* is a difference in treatment which is not justified. (25) While a clear distinction between the concepts of 'difference of treatment' and 'discrimination' is almost entirely lacking in the wording of Directive 2000/78, it is apparent that the EU legislature also proceeds on the assumption that it is 'essential to distinguish between differences in treatment which are justified … and discrimination which must be prohibited'. (26)

1. The distinction between direct and indirect discrimination

47. As is apparent from Article 1 in conjunction with Article 2(1) of Directive 2000/78, that directive combats both direct and indirect discrimination based on sexual orientation in employment and occupation.

48. The distinction between direct and indirect discrimination is legally significant primarily because the possible justifications may vary depending on whether the underlying difference of treatment is directly or indirectly linked

to sexual orientation. In particular, the possible objectives which may be relied on in order to justify a direct difference of treatment based on sexual orientation are fewer than those capable of justifying an indirect difference of treatment. (27)

a) Direct discrimination based on sexual orientation

49. *Direct discrimination* within the meaning of Directive 2000/78 is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on account of sexual orientation (Article 2(2)(a) in conjunction with Article 1); the underlying difference of treatment is therefore directly linked to sexual orientation.

50. Contrary to Dr Parris's view, that is not the case here. After all, a pension scheme term such as that at issue in the main proceedings is specifically *not* directly related to the sexual orientation of the employee. On the contrary, it is neutrally formulated and, moreover, affects homosexual employees in the same way as heterosexual employees, whose partners, after all, are also excluded from eligibility for a survivor's pension if their marriage or civil partnership was not entered into before the employee's 60th birthday.

51. It is true that, in its previous case-law concerning various prohibitions on discrimination, the Court has generally adopted a broad understanding of the concept of direct discrimination, and has certainly always assumed such discrimination to be present where a measure was inseparably linked to the relevant reason for the difference of treatment. (28)

52. In the present case, however, there can be no question of an inseparable link with sexual orientation either. The mere fact that an employee has not married or entered into a civil partnership before his 60th birthday — whether on account of legal barriers or by choice — is not directly linked to his sexual orientation. There may be many reasons for not getting married or for not doing so until late in life. Had Dr Parris married a woman after his 60th birthday, for example, she would have been excluded from eligibility for the survivor's pension in exactly the same way as his current partner under the terms applicable to that pension.

53. Thus, this case is different, for example, from the well-known cases relating to pregnancy, which, according to case-law, is so inextricably linked to the sex of the employee that any reference to it can by definition relate only to women and therefore gives rise to direct discrimination. (29)

b) Indirect discrimination based on sexual orientation

54. It remains to be examined, however, whether a pension scheme term such as that at issue is capable of leading to*indirect discrimination* based on sexual orientation. Such indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular sexual orientation at a particular disadvantage compared with other persons (Article 2(2)(b) of Directive 2000/78).

55. There is no doubt that the requirement to enter into a marriage or civil partnership before the employee's 60th birthday constitutes an apparently neutral criterion which, as indicated above, bears no direct relation to the sexual orientation of the employee.

56. On a cursory examination, that criterion would also appear to affect all employees in the same manner. Thus, the occupational pension scheme entitles persons who enter into a marriage or civil partnership before the age of 60 to settle a survivor's pension on their surviving partner in the event of their death, but does not extend that entitlement to persons who do not marry until after that age.

57. On closer examination, however, it emerges that the 60-year age limit affects a large number of homosexual employees in Ireland more severely and more deleteriously than their heterosexual colleagues.

58. After all, while, for heterosexual employees, the question of whether to marry before or after their 60th birthday was and is simply a matter of individual life planning and personal choice, homosexual employees in Ireland did not for a long time have the option of entering into a State-recognised union with their respective partners. More specifically, all homosexual employees in Ireland who were born before 1951 were universally barred from entering into a civil partnership in good time before their 60th birthday because the institution of civil partnership did not exist in that Member State until 2011 and the best option previously available to same-sex couples was to live together as 'common-law' partners. It was therefore impossible for legal reasons for that group of people to secure a survivor's pension for their respective partners under the occupational pension scheme at issue and thus to provide the latter with a form of social protection that their heterosexual colleagues and their spouses were able to take for granted.

59. Where, therefore, a survivor's pension such as that at issue here is dependent on the contracting of a marriage or civil partnership before the employee reaches the age of 60, in Ireland, this operates to the particular detriment of homosexual employees born before 1951.

60. That finding is sufficient to support the assumption of indirect discrimination based on sexual orientation which, subject to any justification, is prohibited under Article 2(1) in conjunction with Article 2(2)(b) of Directive 2000/78.

61. After all, the assumption of indirect discrimination does not presuppose that all homosexual employees are at a disadvantage and is not subject to the condition that heterosexual employees are never at a disadvantage. (30) Rather, according to the definition of indirect discrimination in Article 2(2)(b) of Directive 2000/78, it is sufficient that the contested provisions, criteria or practices put 'persons having … a particular sexual orientation' (here: homosexual employees) 'at a particular disadvantage compared with other persons' (here: heterosexual employees).

62. That is the case here. For, even though there may be a few heterosexual employees who fall foul of the 60-year age limit and, conversely, some homosexual employees who, under the law applicable since 2010/2011, are fortunate enough to be able to marry or enter into a civil partnership before their 60th birthday, a rule such as that at issue here has a particularly adverse effect on homosexual employees as a group because a substantial proportion of them, through no fault of their own, were prevented from securing State recognition for their existing partnership before their 60th birthday and thus from fulfilling the fundamental condition of entitlement to a survivor's pension under the occupational pension scheme at issue.

63. The imposition of stricter conditions on the assumption of indirect discrimination would not only be contrary to the wording of Article 2(2)(b) of Directive 2000/78 ('would put … at a particular disadvantage') and the requirement that the anti-discrimination directives must be interpreted broadly, (31) but would also be difficult to reconcile with the Court's long-standing case-law in matters of discrimination — not least discrimination based on nationality (32) or sex. (33)

64. All things considered, therefore, a rule such as that at issue here falls within the category of indirect discrimination based on sexual orientation within the meaning of Article 2(2)(b) of Directive 2000/78.

2. Justification test

65. If, as I propose, a rule such as that at issue here is classified as indirect discrimination based on sexual orientation, it remains to be considered whether the underlying difference of treatment is justifiable under Directive 2000/78 or whether, in the absence of such a justification, it constitutes prohibited discrimination.

66. An indirect difference of treatment based on sexual orientation may be objectively justified by a legitimate aim, provided only that the measure at issue — in this instance, the exclusion of a survivor's pension in cases where *the employee*enters into a marriage or civil partnership *after* his 60th birthday — is appropriate and necessary for achieving that aim (Article 2(2)(b)(i) of Directive 2000/78).

a) Legitimate aim

67. The terms of the occupational pension scheme appear to provide no indication of the aims pursued by the rule at issue. It is not immediately apparent why the surviving partners of employees who did not enter into a marriage or civil partnership until after their 60th birthday are not entitled to a survivor's pension.

68. It is true that this in itself does not mean that such a rule is automatically excluded from justification under Article 2(2)(b)(i) of Directive 2000/78. In such a situation, however, it is important that other elements, taken from the general context of the rule concerned, enable the underlying aim of that rule to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary. (34)

69. The mere fact that an a 60-year age limit is said to have been 'common' at the time when the occupational pension scheme was set up in the early 1970s is not in any event a sufficient basis on which to assume that the aim pursued is legitimate. (35)

70. There may be cases where such an age limit for entering into a marriage or civil partnership is intended to ensure that eligibility for a survivor's pension is confined to surviving spouses or civil partners who have 'earned' such eligibility by lending private support to the employee during his active employment and, possibly, forgoing any meaningful paid employment of their own. Traditionally, this was the wife, who, in performing the conventional 'housewife' role within a marriage, often focused on taking care of the home and bringing up the children. A pension scheme

formulated along these lines would offer no prospect of benefit entitlement to a surviving spouse or civil partner with whom the employee did not enter into a relationship until he was older, towards the end of his own working life.

71. That is not the case here, however. On the basis of Trinity College's submissions, the referring court expressly informs us rather that the 60-year age limit is intended to safeguard against 'adverse selection on health grounds to the detriment of the Scheme Fund and other members'. As Trinity College has further submitted in the proceedings before the Court of Justice, the foregoing rests on the assumption that the health of pension scheme members will deteriorate as they grow older and they might then be tempted to enter into a marriage of convenience in order to secure pension scheme benefits for their respective unmarried partners.

72. To put it bluntly, therefore, the 60-year age limit at issue in the present case is intended to prevent employees affiliated to the occupational pension scheme from entering into a marriage — or, since 2011, a civil partnership — 'on their deathbed' simply in order to enable someone close to them to qualify for a survivor's pension at the expense of the employer and other scheme members. (36)

73. It can therefore be concluded, subject to verification by the national court, that the purpose of the rule at issue, put simply, is to prevent abusive behaviour detrimental to the financial stability of the pension scheme. The proportionality test which I shall now carry out is directed at *that* aim, which can certainly be regarded as legitimate. (37)

b) Proportionality test

74. It remains to be examined whether the contested rule was 'appropriate and necessary' for the purpose of preventing abuse. Those two adjectives that appear in Article 2(2)(b)(i) of Directive 2000/78 are there, ultimately, simply in order to recall the principle of proportionality.

75. According to settled case-law, the principle of proportionality is one of the general principles of EU law. It requires that measures implemented to achieve the legitimate objectives pursued by the rule in question must be appropriate and not go beyond what is necessary in order to achieve those objectives. (38) Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (39)

i) Whether appropriate

76. It must first be considered whether a rule such as that at issue here is *appropriate* (40) for achieving its legitimate aim, that is to say for preventing abuse.

77. There is no doubt that such a rule limits the occupational pension scheme's benefit liabilities and restricts opportunities for abuse.

78. It must be borne in mind, however, that, according to consistent case-law, a rule can be considered appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner. (41)

79. This might be the subject of some doubt in the present case, given that some employees may be in such poor health even before their 60th birthday that they are tempted to abuse the scheme by entering into marriages of pure convenience in order to provide social protection for their respective partners. On the other hand, given the general increase in people's life expectancy and the trend towards raising the retirement age, (42) it is open to question whether a general risk of abuse really is triggered immediately upon attainment of the age of 60, or whether it may be the case that such a risk does not materialise these days until persons reach the age of 65 or even 70.

80. It should be noted in this regard, however, on the one hand, that the appropriateness of a measure must always be assessed with reference to the objective which it pursues. Where, as here, a measure is intended to exclude potential abuse of pension benefits, it is difficult to make the appropriateness of that measure subject to the condition that no further instances of abuse will arise. (43)

81. On the other hand, an employer who introduces a voluntary occupational pension scheme and is therefore, in principle, fully entitled to attach additional conditions to the payment of benefits to survivors must be given a broad discretion in the choice of measures for achieving the objectives so pursued. Accordingly, an examination of the appropriateness of scheme terms such as those at issue here should be confined to the consideration of whether the rules contained in those terms are *manifestly inappropriate* or *unreasonable* for achieving the legitimate aim pursued by the employer. (44)

82. A rule such as that at issue is certainly not manifestly inappropriate for preventing abuse.

ii) Whether necessary

83. The second question must be whether a rule such as that at issue was *necessary* for achieving the objective pursued. A measure is necessary where the legitimate aim pursued could not have been attained by less restrictive but equally appropriate means. (45) It is therefore necessary to consider whether the improper claiming of survivor's pensions could have been prevented by less drastic means.

84. The measure least drastic from the point of view of the persons concerned would without any doubt be one whereby the occupational pension scheme does not attach a blanket age limit to the contracting of a marriage or civil partnership, but allows evidence to be submitted separately in each individual case to show that the marriage or civil partnership in question is not one of pure convenience and that there is thus no risk of the survivor's pension being claimed improperly. Given the huge administrative burden that such a procedure would generate, however, it is questionable whether it would be as appropriate for achieving the objective pursued as the contested age limit.

85. In order to ensure that the conditions for drawing a survivor's pension under an occupational pension scheme are predictable and practical, the employer must be able to adopt a standardising approach based on general criteria and to classify cases according to groups for that purpose. (46) This is particularly true given the fact, mentioned earlier, that the employer has a

broad discretion when it comes to formulating a voluntary occupational pension scheme. In principle, therefore, there can be no objection to an occupational pension scheme the terms of which are based on empirical values which make it seem likely that the objective pursued will be attained, at least in the vast majority of cases.

86. However, even if the employer is entitled to adopt a standardised approach based on general criteria, a strict 60-year age limit still seems to be an extremely drastic measure. In my view, a more lenient but equally appropriate measure would be to lay down a minimum *waiting period* between the contracting of the marriage or civil partnership and the onset of the right to a survivor's pension.

87. Thus, the objective of preventing the improper claiming of pension scheme benefits could be attained just as effectively, if not more so, if the scheme, instead of applying a strict age limit, provided that the surviving partner may claim a survivor's pension only on condition that a minimum number of years — a period of five years, for example — elapses between the time of his marriage to or civil partnership with the employee and the time of the employee's death. Moreover, such an approach would not only be simple and unbureaucratic to administer, but would also be consistent with the scheme itself, the terms of which already make provision elsewhere for just such account to be taken of the time interval between two events. (47)

88. In light of the foregoing, I consider that, even taking into account the broad discretion and practical necessities associated with the administration of the pension scheme, the contested 60-year age limit is a measure which goes beyond that which is necessary in order to attain the legitimate aim pursued by the employer.

iii) Undue prejudice to employees

89. However, even if it is assumed that the contested age limit is appropriate and necessary for achieving the aim it pursues, there is still the third question of whether it is proportionate *sensu stricto*.

90. According to that principle, measures may not, even if they are appropriate and necessary for achieving legitimate objectives, give rise to any disadvantages which are disproportionate to the objectives pursued. In other words, therefore, it must be ensured that a rule such as that at issue does not have the effect of unduly prejudicing the legitimate interests of employees. (48) Ultimately, this means that a fair balance must be struck between the conflicting interests of employees such as Dr Parris, on the one hand, and the occupational pension scheme, on the other.

91. In a case such as this, a fair balance must be sought between the employer's legitimate interest in preventing improper use of the occupational pension scheme and the employees' equally legitimate interest in securing adequate survivor's pensions for their partners.

92. With regard first of all to the purely financial impact of Dr Parris's claim for a survivor's pension for his partner, it must indeed be taken into account that every additional benefit payment puts further pressure on the occupational pension scheme, which is already in serious financial difficulty as it is. Even the finances of the Irish State, which has been responsible for the pension scheme's liabilities since late 2009, are unquestionably under severe strain in the wake of the 2008 global economic and financial crisis.

93. It must be borne in mind, however, that, according to the information available to the Court, the occupational pension scheme was from its inception designed in principle to confer on every employee who is a member of that scheme a right also to a survivor's pension for his surviving spouse — or, now, for his surviving civil partner too — and to do so without requiring the employee to pay any additional pension contributions.

94. Consequently, if an employee such as Dr Parris now seeks recognition for his partner's right to claim an occupational survivor's pension, the objection cannot be raised as against his claim that the necessary contributions were not previously paid into the occupational pension scheme on his partner's behalf. After all, even if Dr Parris had entered into a marriage or civil partnership long before his 60th birthday, no further contributions would have been made and the pension scheme would not therefore have been in a better financial position to pay any survivor's pension than it is now. (49)

95. Generally speaking, moreover, purely financial considerations may not be a pretext for discrimination. Accordingly, the failure to comply with the prohibition on discrimination under Article 2 of Directive 2000/78 cannot be justified solely by reference to financial burdens or possible administrative difficulties. (50)

96. Moreover, in a case such as this, the contested age limit would lead to the blanket exclusion of an entire category of employees from the right to claim benefits under the occupational pension scheme. (51) Thus, all homosexual employees born before 1951 are automatically prevented from providing their surviving partners with social protection in the form of a survivor's pension under the occupational pension scheme. The pension scheme imposes on them a condition, namely to enter into a marriage or civil partnership before their 60th birthday, which they cannot possibly satisfy — whether they want to or not and whatever their individual life plans may be.

97. Such serious adverse effects on the interests of an entire category of employees is completely disproportionate to the objective pursued by the contested age limit, which is simply to prevent abusive behaviour on the part of individual members.

98. This is certainly true of situations such as that in the present case, which, according to the findings in the order for reference, does *not* involve a marriage (or civil partnership) of convenience. After all, Dr Parris and his partner have been a couple for over 30 years and the national court is satisfied that they would have married many years ago had it been legally possible for them to do so.

99. All things considered, therefore, the contested age limit does not constitute a fair balance of interests and leads to excessive adverse effects on the legitimate interests of employees. It does not pass the proportionality test. The rule at issue thus constitutes indirect discrimination based on sexual orientation as prohibited under Article 2(1) in conjunction with Article 2(2)(b) of Directive 2000/78.

c) The autonomy of Member States to regulate marital status

100. Trinity College, the defendant authorities, the United Kingdom Government and the Commission raise the objection that a finding of discrimination based on sexual orientation in the present case could have the consequence of conferring de facto retroactive effect on the institution of

civil partnership, which was not introduced by the Irish legislature until 2010 — and became operational only as from 2011. In their submission, such a result is contrary to recital 22 of Directive 2000/78.

101. However, that objection is unfounded.

102. In the aforementioned recital 22, the EU legislature simply made it clear that Directive 2000/78 is without prejudice to national laws on marital status and the benefits dependent thereon.

103. The interpretation and application of Directive 2000/78 which I propose here does not in any way compel the Irish State to change the marital status of an employee such as Dr Parris retroactively. In particular, it does not mean that Dr Parris and his partner must be regarded as having been married or in a civil partnership during periods in the past. Nor does Directive 2000/78 oblige the national authorities to grant the persons concerned any benefits that do not correspond to their marital status.

104. Dr Parris and his partner are *today* recognised by the Irish State as living together as a couple, and they are *today* claiming — prospective — occupational pension scheme benefits corresponding to their marital status as it stands *today*. They are not in any way claiming a benefit to which their marital status does not entitle them. They are certainly not claiming such a benefit retroactively. Nor are they seeking a retroactive change to their marital status. Rather, they are simply defending themselves against a term contained in the occupational pension scheme at issue — the 60-year age limit — which was laid down in the past but discriminates against them today.

105. The situation here is therefore no different from that in *Maruko* and *Römer*, (52) where, as here, certain benefits were claimed only in respect of the period *after* the State had recognised same-sex civil partnerships, even though the origins of those benefits (contributions or relevant periods of service) lay in the distant past, that is to say *before* the institution of civil partnership was created.

106. There is nothing in Directive 2000/78 to indicate that its provisions confer protection exclusively in relation to legal relationships that were established after its entry into force or after the expiry of the time limit for its transposition. If the legal effects of a fundamental principle such as the EU-law principle of equal treatment were exclusively restricted to entirely new legal relationships, it would take years — not to say decades in a situation such as that in the present case — for all EU citizens to benefit from its protection.

107. As I have already said, (53) it is therefore a matter of general principle that a new legal provision such as the prohibition on discrimination under Article 2 of Directive 2000/78 is applicable not only to entirely new legal relationships but also to the current and future effects of legal relationships that came into being under the old law. This may very well mean that discriminatory provisions enacted in the past must henceforth be interpreted and applied in accordance with EU law or may have to be disapplied altogether. (54)

108. That is precisely the case here. In the same vein, the Court has already given a number of rulings to that effect when applying the provisions of the anti-discrimination directives to the present or future aspects of situations the origins of which sometimes extended into the distant past and certainly came into being before the entry into force of those directives. (55)

109. Also untenable from a legal point of view is the objection that, in a situation such as that here, the Irish State would be in a better position — at least financially — if it had never introduced the institution of civil partnership and had never extended marriage to same-sex couples. After all, it is true that EU law as it currently stands is without prejudice to the competence of Member States in matters of marital status and the benefits dependent thereon. In return, however, the Member States must, when exercising their competence, comply with EU law, in particular the principle of equal treatment and non-discrimination. (56) Consequently, in so far as a Member State grants recognition to same-sex partners and extends to the persons concerned rights and obligations comparable to those applicable to spouses, it may henceforth no longer discriminate against them by comparison with spouses. (57)

3. Intermediate conclusion

110. All things considered, the answer to the first question referred for a preliminary ruling must be that it constitutes indirect discrimination based on sexual orientation prohibited under Article 2(1) in conjunction with Article 2(2)(b) of Directive 2000/78 for an occupational pension scheme to make the right of same-sex partners to a survivor's pension subject to the condition that the civil partnership was contracted before the 60th birthday of the employee affiliated to that scheme, in circumstances where it was legally impossible for the persons concerned to enter into a civil partnership or marriage before the employee reached that age limit.

C – *Discrimination based on age (second question)*

111. By its second question, the referring court wishes to ascertain, in essence, whether it constitutes prohibited discrimination based on age under Directive 2000/78 for an occupational pension scheme to make the right of same-sex partners to a survivor's pension subject to the condition that the civil partnership was contracted before the 60th birthday of the employee affiliated to that scheme, in circumstances where it was legally impossible for the persons concerned to enter into such a civil partnership or marriage before the employee reached that age limit.

112. That question is raised only in the event that the first question is answered in the negative. Since, in the context of the first question, I have assumed the presence of discrimination prohibited by EU law, the second question, strictly speaking, no longer needs to be answered. I shall nevertheless examine it for the sake of completeness.

1. The distinction between direct and indirect discrimination

113. As is apparent from Article 1 in conjunction with Article 2(1) of Directive 2000/78, that directive combats both direct and indirect discrimination based on age in employment and occupation.

114. *Direct discrimination based on age* within the meaning of Directive 2000/78 is taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on account of age (Article 2(2)(a) in conjunction with Article 1); the underlying difference of treatment is therefore directly linked to age. On the other hand, there is

support only for an assumption of *indirect discrimination based on age* where an apparently neutral provision, criterion or practice would put persons of a particular age at a particular disadvantage compared with other persons (Article 2(2)(b)).

115. The age limit at issue is directly linked to age since it expressly provides that employees affiliated to the occupational pension scheme must have entered into a marriage or civil partnership before reaching their 60th birthday in order for their surviving partner to qualify for a survivor's pension.

116. There is therefore a direct difference of treatment on account of age within the meaning of Article 2(2)(a) of Directive 2000/78: employees who do not enter into a marriage or civil partnership until after they have reached their 60th birthday are treated less favourably than employees who do so at a younger age.

117. It is not possible to raise as against the assumption that direct discrimination based on age has been perpetrated against*the employee* — in the present case, therefore, Dr Parris — the objection that the actual financial disadvantage connected with the contested age limit will affect not him but his surviving partner, who is denied the survivor's pension. After all, from the point of view of EU law, the survivor's pension constitutes deferred pay owed to the employee, even though that pay is no longer being paid during his lifetime but is being disbursed to his surviving partner. (58) What is more, as is particularly apparent in the present case, the contested age limit also has the effect, from a very personal point of view, of depriving an employee such as Dr Parris of the ideal benefit of being able to provide his partner with social protection while he is still alive, and thus to 'leave his affairs in order'.

118. Even if the contested age limit were regarded as adversely affecting only *the survivor* of an employee such as Dr Parris (that is to say, his surviving spouse or civil partner), this would not detract from the assumption as to the presence of direct age discrimination here. It is, after all, settled case-law that direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78 always exists where a person suffers a disadvantage which is directly linked to one of the grounds for a difference of treatment set out in the Directive. (59) To put it simply, a person can be the victim of direct discrimination based on age even if that discrimination is directed not against *his* age but that of a close relative. After all, Directive 2000/78 not only protects a particular category of person but also imposes a general prohibition on discrimination based on age *per se*, without necessarily requiring the existence of a link to the age of the relevant person disadvantaged *himself*. (60)

2. Justification test

119. However, an age limit such as that at issue here can lead to age discrimination prohibited by Directive 2000/78 only in so far as the direct difference of treatment based on age which it contains is not justified. The EU-law requirements applicable to the justification of such a difference of treatment are set out in Article 2(5), Article 4(1) and Article 6 of Directive 2000/78. (61)

120. Only the latter provision is relevant in the present case. In the questions it has referred for a preliminary ruling, the national court mentions only Article 6(2)

of Directive 2000/78 (see section (a) immediately below). However, it is apparent from the general context of the order for reference and the explanatory comments of the Labour Court that an examination of Article 6(1) of the Directive will also be relevant (see, in that regard, section (b) below).

a) No justification under Article 6(2) of Directive 2000/78

121. Article 6(2) of Directive 2000/78 lays down the conditions under which age limits may be set and age criteria may be applied in occupational social security schemes without giving rise to age discrimination as prohibited under EU law.

122. That provision expressly applies only to occupational social security schemes which cover the risks of old age and invalidity. (62) The scheme at issue is such a scheme because the survivor's pension which Dr Parris seeks to secure for his partner is a form of retirement pension.

i) The three categories provided for in Article 6(2) of Directive 2000/78

123. From the point of view of its wording, Article 6(2) of the Directive permits precisely three types of derogation from the prohibition on age discrimination under Article 2(1) in conjunction with Article 2(2) of the Directive: first, the fixing of age limits as a condition of membership of an occupational social security scheme; secondly, the fixing of age limits for entitlement to retirement or invalidity benefits; and thirdly, the use of age limits in actuarial calculations. (63) Contrary to the view that the national court appears to take, these are three independent categories. The relevant rule can be justified under Article 6(2) even if an age limit falls within only one of those categories.

124. An age limit such as that at issue here, however, cannot be directly classified under any of those three categories.

125. First, the age limit at issue is not a condition of membership of the occupational pension scheme (first category). After all, the scheme *member* is Dr Parris, as Trinity College and the Commission also emphasised at the hearing. Dr Parris is affiliated to that scheme by virtue of the employment relationship he has maintained with Trinity College since 1972, and his affiliation to it has never depended on whether or when he entered into a marriage or civil partnership.

126. Nor does that age limit fix the age that a person must be in order to be entitled to benefits (second category). The contested 60-year age limit gives no indication as to whether Dr Parris's partner's age entitles him to receive a survivor's pension for the very reason that it is not linked to *his* age, but only to that of *Dr Parris* at the time when the couple entered into a civil partnership or marriage.

127. Finally, according to the express findings of the national court, the 60-year age limit also does not constitute a criterion which, in the context of the contested occupational pension scheme, is used in actuarial calculations (64) (third category).

ii) The question of the application by analogy of Article 6(2) of Directive 2000/78

128. It is true that a more generous reading of Article 6(2) of Directive 2000/78 could be adopted by treating the 60-year age limit as a condition of

membership (first category) or a condition of entitlement to a retirement pension (second category). After all, there is no doubt that the age limit at issue constitutes a condition that must be met in order for the pension scheme to be extended to an employee's surviving spouse or civil partner (in a similar way to a condition of membership for the purposes of the first category) and in order for the surviving spouse or civil partner to qualify for a survivor's pension (in a similar way to a condition of entitlement to retirement benefits for the purposes of the second category).

129. However, a careful analysis shows the proposition as to the analogous application of Article 6(2) of the Directive to an age limit such as that at issue here to be unconvincing.

130. For, on the one hand, Article 6(2) of Directive 2000/78 is an exception which must be interpreted strictly (65) and may not be extended by analogy to situations other than those specifically provided for by the EU legislature. (66) This is particularly true given that the measures permitted under Article 6(2) of the Directive, unlike those under Article 6(1), constitute an exhaustive list rather than defining examples. (67)

131. On the other hand, the age limit at issue in the present case does not serve the same purpose as the conventional age limits for admission or entitlement to retirement benefits which are taken into account by Article 6(2) of the Directive. Such conventional age limits ensure that a balance is struck between the probable life expectancy of the beneficiary (and thus the expected duration of the entitlement to benefits), on the one hand, and the contributions paid, on the other. An age limit such as that at issue here is by definition incapable of serving a comparable purpose. For it gives no indication of how long *the employee* (in this instance, Dr Parris) has or had been a member of the occupational pension scheme and says nothing about the age — and thus, indirectly, the life expectancy — of the beneficiary (in this instance, Dr Parris's partner).

132. Consequently, an age limit such as that at issue here cannot be justified under Article 6(2) of the Directive, and cannot be so justified even on an analogous application of that provision.

b) No justification under Article 6(1) of Directive 2000/78

133. It remains to be examined whether a 60-year age limit such as that at issue here can be justified by recourse to Article 6(1) of Directive 2000/78.

134. Essentially, Article 6(1) of the Directive permits differences of treatment based on age which pursue a legitimate aim and pass the proportionality test, for which purposes legitimate aims are to be understood as 'including legitimate employment policy, labour market and vocational training objectives'.

135. It is perfectly obvious that an age limit such as that at issue here, however, does not pursue employment policy, labour market or vocational training objectives. Nor, according to all of the information available to the Court, does it serve to confer 'social recognition' on a long-term partnership at the employee's side, in the manner of that of a 'housewife'. (68) Its only purpose is, rather, to prevent abuse of the occupational pension scheme, and Article 6(1) must accordingly be considered here in the light of that purpose alone.

136. It is true that it may not seem inconceivable at first sight that a measure to combat abuse might also be based on Article 6(1) of the Directive. After all, the use of the adverb 'including' in the wording of that provision could be understood as meaning that the EU legislature's express reference to 'legitimate employment policy, labour market and vocational training objectives' is merely a non-exhaustive list of examples that is without prejudice to the fixing of age limits in pursuit of other legitimate aims.

137. However, as the Court has already held on a number of occasions, (69) the feature common to all 'legitimate aims' within the meaning of Article 6(1) of the Directive is that they are *socio-political in nature*. The list contained in Article 6(1) is non-exhaustive only within the category of *social policy* objectives. By contrast, Article 6(1) provides no legal basis for differences of treatment based on age which pursue objectives other than social policy objectives.

138. Given the function and position of Article 6(1) in the overall scheme of Directive 2000/78, that case-law makes sense. Article 6(1) is a special provision the primary purpose of which is to justify *direct* differences of treatment based on age within the meaning of Article 2(2)(a) of that directive.

139. Even though there are without doubt many such differences of treatment which can be justified under Article 6(1) of the Directive, that provision nonetheless cannot be interpreted so extensively as to render it capable of supporting the pursuit of *any* legitimate aim. For, otherwise, the content of Article 6(1) of the Directive would be the same as that of Article 2(2)(b)(i) of the Directive, which justifies *indirect* differences of treatment. This would blur the distinction between direct and indirect age discrimination and make the possible grounds of justification the same for both. That would be inconsistent with the general scheme of the Directive.

140. In accordance with the scheme of the Directive (as in other areas of EU law too), only an *indirect* difference of treatment may be justified by reference to any legitimate aim, provided that the principle of proportionality is observed, the justification of a *direct* difference of treatment, on the other hand, being subject to stricter criteria, with the result that the only aims that may be pursued are those expressly provided for in EU law.

141. Accordingly, the scope of Article 6(1) of the Directive may not be extended beyond the social policy sphere expressly mentioned in that provision to other legitimate aims of any kind.

142. It follows that an age limit such as that at issue here, which, according to all the information available to the Court, serves no genuine social policy objectives, cannot be justified by recourse to Article 6(1) of the Directive.

c) Concluding remarks on the second question

143. I would make the point, in the event only that the Court does not concur with my view and adopts a more extensive reading of Article 6(1) or (2) of Directive 2000/78, that the principle of proportionality, as a general principle of EU law, must be observed in any event. (70)

144. It is my view that the outcome of the proportionality test in relation to age discrimination cannot be any different from that of the proportionality test which I carried out above (71) in relation to discrimination based on sexual orientation.

145. I can see no reason why the 60-year age limit should be assessed more favourably from the point of view of proportionality where the discrimination relates to age rather than to sexual orientation. If anything, the proportionality test for age discrimination should be stricter since the discrimination here arises from a *direct* difference of treatment within the meaning of Article 2(2)(a) of the Directive, whereas the discrimination on the basis of sexual orientation arises only from an indirect difference of treatment under Article 2(2)(b) of the Directive. A further argument for applying a strict criterion for the purposes of the proportionality test is the fact that the discrimination perpetrated against employees such as Dr Parris in the present case pertains not only to age but also to the sexual orientation of the persons concerned, and is therefore effectively aggravated by a second factor within the meaning of Article 1 of the Directive.

3. Intermediate conclusion

146. All things considered, therefore, it must be concluded with respect to the second question referred for a preliminary ruling that it constitutes direct discrimination based on age prohibited under Article 2(1) in conjunction with Article 2(2)(a) of Directive 2000/78 for an occupational pension scheme to make the right of same-sex partners to a survivor's pension subject to the condition that the civil partnership was contracted before the 60th birthday of the employee affiliated to that scheme, in circumstances where it was legally impossible for the persons concerned to enter into such a civil partnership or marriage before the employee reached that age limit.

D – *Discriminatory combination of several factors (third question)*

147. By its third question, the national court seeks, in essence, to ascertain whether, in the context of Directive 2000/78, prohibited discrimination can be assumed to exist even where a measure does not constitute discrimination on the basis of age *alone* or on the basis of sexual orientation *alone*, but does so on the basis of a combination of both grounds for a difference of treatment.

148. That question is raised only in the event that the first and second questions are answered in the negative. Since, in the context of each of the foregoing two questions, I have assumed the presence of discrimination prohibited under EU law, on the one hand based on sexual orientation (indirect discrimination), (72) and on the other hand based on age (direct discrimination), (73) the third question, strictly speaking, no longer needs to be answered. I shall nevertheless examine it for the sake of completeness.

149. By this question, the Court is essentially being asked to clarify how discrimination against individuals which is attributable to a *combination* of two or more grounds for a difference of treatment (74) is to be dealt with in the context of the EU-law prohibitions on discrimination. While there is no doubt that the Court has in the past already been presented with cases in which several such factors have featured in the background, (75) no case has yet — to my knowledge — required the Court to give a ruling on this issue.

150. This has been a well-known issue in legal literature both inside and outside the European Union for a long time. (76) For example, the question of how to

deal with cases in which certain measures are particularly detrimental to women of a certain skin colour was being discussed in the United States of America as long ago as the late 1980s. (77)

151. The issue has also been addressed incidentally in recent years by the European Parliament (78) and the Commission. (79) It is all the more surprising, then, that the Commission has not adopted a specific position on the subject in the present case.

152. It is true that the EU legislature has not adopted any express provisions on the issue of interest here. However, it should not be too rashly concluded from this that Directive 2000/78 offers no means of dealing with the combination of various grounds for a difference of treatment. It is apparent at several points in the Directive that its authors were acutely aware of this issue and assumed that it could be adequately resolved by recourse to the instruments provided by the Directive. (80)

153. The combination of two or more different grounds for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law. After all, it would be inconsistent with the meaning of the prohibition on discrimination enshrined in Article 1 in conjunction with Article 2 of Directive 2000/78 for a situation such as that at issue here to be split and assessed exclusively from the point of view of one or other of the grounds for a difference of treatment in isolation. Consequently, the fundamental rule of the Directive, to the effect that there must be *no* discrimination based on any of the grounds for a difference of treatment to which it refers (Article 2(1) in conjunction with Article 1 of the Directive) must also apply to cases involving possible discrimination based on a combination of more than one of those grounds.

154. If discrimination cannot be established *solely* on the basis of *one* of the grounds for a difference of treatment referred to in Article 1 of Directive 2000/78 (religion, belief, disability, age or sexual orientation), as the national court assumes as the premiss for its third question, the situation must, to my mind, be examined from the point of view of *indirect discrimination*. In such a case, it must therefore be examined, in the light of Article 2(2)(b) of the Directive, whether the measure in question puts the persons concerned at a particular disadvantage specifically on account of a combination of two or more grounds for a difference of treatment.

155. If a particular disadvantage on the basis of just *one* of the factors mentioned in Article 1 of Directive 2000/78 is sufficient to support the classification of a situation with the category of indirect discrimination within the meaning of Article 2(2)(b) of the Directive, (81) the same is true where the persons concerned are put at a particular disadvantage on the basis of not one factor but a combination of two or more. After all, the scope of the prohibition on discrimination in Directive 2000/78, being of a fundamental nature, must not be defined restrictively. (82)

156. Accordingly, in a situation such as that at issue here, employees such as Dr Parris would, in accordance with Article 2(2)(b) of Directive 2000/78, have to be regarded as being at a particular disadvantage by reason of a combination of their sexual orientation and their age because the terms of the pension scheme have the *effect* of systematically depriving their surviving partners in particular of a survivor's pension. (83) It is true that, for

all employees, the surviving partner's eligibility for a survivor's pension is subject to the (apparently neutral) condition that the couple must have entered into a marriage or civil partnership before the employee's 60th birthday. In truth, however, this systematically excludes homosexual employees born before 1951 in particular — unlike all other categories of employee — from a survivor's pension of this kind because those employees would never have been able to satisfy the aforementioned condition even if they had wanted to.

157. That is not all, however. The combination of two or more of the grounds for a difference of treatment referred to in Article 1 of Directive 2000/78 may also mean that, in the context of the reconciliation of conflicting interests for the purposes of the *proportionality test*, the interests of the disadvantaged employees carry greater weight, which increases the likelihood of *undue prejudice* to the persons concerned, thus infringing the requirements of proportionality *sensu stricto*.

158. That is precisely the case here. As I said earlier, (84) the contested 60-year age limit is disproportionate because it places an undue burden on the employees concerned such as Dr Parris, who are homosexual *and* were born before 1951.

159. All things considered, therefore, indirect discrimination as prohibited under Article 2(1) in conjunction with Article 2(2)(b) of Directive 2000/78 would have to be assumed to be present if it proved to be the case that the terms of the occupational pension scheme at issue do not pose a disadvantage on the basis of age alone or on the basis of sexual orientation alone, but do so on the basis of a combination of those two grounds for a difference of treatment.

E – *Temporal effects of the Court's judgment in the present case*

160. Further to the argument put forward by the defendant authorities, it should be recalled that the Court is in principle free, on a highly exceptional basis, to limit the temporal effects of its judgment, on compelling grounds of legal certainty, to future situations, in particular where the judgment affects a large number of legal relationships established in good faith and is likely to have serious financial consequences. (85)

161. In the present case, however, there is no specific information that would justify such an approach. After all, in the absence of any evidence to the contrary, it must be assumed that a rule such as that at issue here, which puts homosexual individuals born before 1951 at a particular disadvantage, affects significantly fewer employees and survivors than would be so in a case involving sex discrimination, for example, such as that at issue in the judgment in *Barber*. (86) It follows from this, moreover, that any additional burden on the occupational pension scheme and other similar pension schemes in the present case should remain within manageable limits. This is particularly true given that the financing of that system was from the outset organised in the expectation that employees would marry. Had Dr Parris married a woman, the financing of her survivor's pension would, so far as it is possible to tell, automatically have been included in the pension scheme calculation.

162. What is more, the Court regularly refuses to limit the temporal effects of judgments where it is not ruling on a particular point of law for the first time. (87) That is the case here. The applicability of Directive 2000/78 to

survivor's pensions provided for in occupational pension schemes has been established since the judgment in *Maruko*. Since the Court expressly refused to restrict the effects of the judgment in that case, (88) it would not be conceivable for it to do so in the present case either.

163. Should the Court nevertheless impose such a restriction, an exception would have to be made, in accordance with settled case-law, at least in relation to the claims of persons who have taken steps in good time to safeguard their rights, whether by way of legal proceedings or an equivalent legal remedy. (89) Dr Parris is such a person.

VI – Conclusion

164. In light of the foregoing, I propose that the Court's answer to the request for a preliminary ruling from the Irish Labour Court, on the basis of the first question, should be as follows:

It constitutes indirect discrimination based on sexual orientation prohibited under Article 2(1) in conjunction with Article 2(2)(b) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation for an occupational pension scheme to make the right of same-sex partners to a survivor's pension subject to the condition that the civil partnership was contracted before the 60th birthday of the employee affiliated to that scheme, in circumstances where it was legally impossible for the persons concerned to enter into such a civil partnership or marriage before the employee reached that age limit.

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1 – Original language: German.

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2 – See the judgment in *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 21), concerning age discrimination, and the judgment in*Léger* (C-528/13, EU:C:2015:288, paragraph 48), concerning sexual orientation.

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3 – Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16); 'Directive 2000/78' or simply 'the Directive'.

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4 – Judgments in *Kücükdeveci* (C-555/07, EU:C:2010:21, paragraph 21), *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 38) and *DI* (C-441/14, EU:C:2016:278, paragraph 22).

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5 – [German translation of the Irish legislation].

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6 – The amendments were introduced by the Social Welfare (Miscellaneous Provisions) Act 2004, which incorporated a new Part VII into the Pensions Act 1990 in order to transpose Directive 2000/78.

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7 – [German translation of the Irish legislation].

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8 – Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010, S.I. No. 649.

9 – Situated in Dublin.

10 – The relevant legislation in the United Kingdom is the Civil Partnership Act 2004.

11 – According to the national court, an actuarial review in 2008 found that the pension scheme was able to meet only 37% of its members' benefit entitlements.

12 – See, inter alia, the judgments in *Maruko* (C-267/06, EU:C:2008:179) and, similarly, *Römer* (C-147/08, EU:C:2011:286, paragraph 66).

13 – On the equivalence with the concept of pay in Article 157 TFEU (formerly Article 119 of the EEC Treaty or Article 141 EC), see recital 13 of Directive 2000/78.

14 – Judgments in *Bilka-Kaufhaus* (170/84, EU:C:1986:204, paragraphs 22 and 23), *Barber* (C-262/88, EU:C:1990:209, paragraphs 28 to 30) and *Maruko* (C-267/06, EU:C:2008:179, paragraph 45); see, to the same effect, the judgment in *Römer*(C-147/08, EU:C:2011:286, paragraph 30 to 33).

15 – Judgment in *Maruko* (C-267/06, EU:C:2008:179, paragraph 45); see to the same effect, in connection with the current Article 157 TFEU, the judgments in *Ten Oever* (C-109/91, EU:C:1993:833, paragraphs 12 and 13), *Coloroll Pension Trustees*(C-200/91, EU:C:1994:348, paragraph 18) and *Menauer* (C-379/99, EU:C:2001:527, paragraph 18).

16 – See also recital 13 of Directive 2000/78.

17 – See the judgments in *Beune* (C-7/93, EU:C:1994:350, paragraph 38), *Griesmar* (C-366/99, EU:C:2001:648, paragraph 37),*Niemi* (C-351/00, EU:C:2002:480, paragraph 43) and *Commission* v *Greece* (C-559/07, EU:C:2009:198, paragraph 46).

18 – See the judgments in *Beune* (C-7/93, EU:C:1994:350, paragraphs 43 and 45), *Griesmar* (C-366/99, EU:C:2001:648, paragraphs 28 and 30), *Maruko* (C-267/06, EU:C:2008:179, paragraphs 46 and 48) and *Commission* v *Greece* (C-559/07, EU:C:2009:198, paragraphs 47 and 50).

19 – Judgments in *Brock* (68/69, EU:C:1970:24, paragraph 6), *Licata* v *WSA* (270/84, EU:C:1986:304, paragraph 31),*Pokrzeptowicz-Meyer* (C-162/00, EU:C:2002:57, paragraph 50), *Monsanto Technology* (C-428/08, EU:C:2010:402, paragraph 66) and*Commission* v *Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 32).

20 – See the judgment in *Maruko* (C-267/06, EU:C:2008:179, in particular paragraphs 19, 20 and 79); similarly, see the judgment in *Römer* (C-147/08, EU:C:2011:286, in particular paragraphs 22 and 66).

21 – Judgment in *Barber* (C-262/88, EU:C:1990:209, paragraphs 40 to 45).

22 – Judgments in *Maruko* (C-267/06, EU:C:2008:179, paragraphs 77 to 79) and *Römer* (C-147/08, EU:C:2011:286, paragraph 66).

23 – Judgment in *Römer* (C-147/08, EU:C:2011:286, paragraphs 57 to 64).

24 – Judgment in *Römer* (C-147/08, EU:C:2011:286, paragraph 66).

25 – See my Opinion in *Andersen* (C-499/08, EU:C:2010:248, point 28).

26 – See in that regard, albeit in relation to age discrimination, the last sentence of recital 25 of Directive 2000/78. See also the wording of Article 4(1) and Article 6 of that directive, according to which the Member States may provide that, on the grounds of justification specified in each of those provisions, 'a difference of treatment … shall not constitute discrimination'. See, similarly, the — not always consistent — relevant case-law, such as, in relation to age discrimination, the judgment in *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 27).

27 – See to that effect, not least, my Opinion in *Andersen* (C-499/08, EU:C:2010:248, point 31) and — with regard to the related Directive 2000/43 — my Opinion in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:170, point 73); see also the judgment in *Hay*(C-267/12, EU:C:2013:823, paragraph 45).

28 – See, for example, the judgments in *Dekker* (C-177/88, EU:C:1990:383, paragraphs 12 and 17), *Handels- og Kontorfunktionærernes Forbund* (C-179/88, EU:C:1990:384, paragraph 13), *Busch* (C-320/01, EU:C:2003:114, paragraph 39), *Kiiski*(C-116/06, EU:C:2007:536, paragraph 55), *Kleist* (C-356/09, EU:C:2010:703, paragraph 31), *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraphs 23 and 24), *Maruko* (C-267/06, EU:C:2008:179, paragraph 72), *Römer* (C-147/08, EU:C:2011:286, paragraph 52) and *Hay* (C-267/12, EU:C:2013:823, paragraphs 41 and 44); see also, to that effect, the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 76, 91 and 95).

29 – On discrimination based on sex by virtue of a reference to pregnancy, see the judgments in *Dekker* (C-177/88, EU:C:1990:383, paragraphs 12 and 17), *Handels- og Kontorfunktionærernes Forbund* (C-179/88, EU:C:1990:384, paragraph 13) and*Busch* (C-320/01, EU:C:2003:114, paragraph 39).

30 – The objection raised by the defendant authorities to the effect that, in certain cases, heterosexual workers born before 1951 may also have been prevented from marrying their intended partner in good time before their 60th birthday because they did not meet the relevant legal conditions is therefore unconvincing. For such cases are either rare exceptions (such as where the person concerned is not of legal age or lacks legal capacity) or relate to circumstances in which, by the employee's own choice, an earlier — though possibly failed — marriage was still in place and a second marriage could not therefore be contracted. Such a situation is not at all comparable with that of homosexual employees born before 1951, since the latter were prevented from getting married before their 60th birthday not only in very exceptional cases but generally as a group.

31 – See, to that effect, the judgments in *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 43) and *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 42 and 66), both concerning the related Directive 2000/43.

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32 – See, inter alia, the judgment in *O'Flynn* (C-237/94, EU:C:1996:206, paragraph 18), relating to the free movement of workers. According to that judgment, conditions of national law are to be regarded as constituting indirect discrimination based on nationality not only where they affect essentially migrant workers or the great majority of those affected are migrant workers, but also where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers, and, finally, where there is a risk that they may operate to the particular detriment of migrant workers.

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33 – This can be aptly illustrated by the well-known example of discrimination against female part-time employees. Where a particular benefit — such as the continued payment of wages in the event of illness in the judgment in *Rinner-Kühn* (171/88, EU:C:1989:328) — is denied to part-time workers, it is sufficient for the purposes of the assumption of indirect discrimination based on sex for that provision to operate to the particular detriment of women. The fact that some men may also suffer the same disadvantage, namely if they work part-time, is, in my view, just as incapable of precluding the assumption of indirect discrimination based on sex as, conversely, the fact that some women may escape that disadvantage, namely by working full-time.

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34 – Judgments in *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraphs 56 and 57), *Age Concern England* (C-388/07, EU:C:2009:128, paragraphs 44 and 45) and *Rosenbladt* (C-45/09, EU:C:2010:601, paragraph 58).

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35 – See, to the same effect, the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraph 83 in conjunction with paragraph 80), in which the Court considers the fact that an undertaking is unable to provide specific information on the need for a measure, instead simply stating that the reasons are 'common knowledge', constitutes an indication that the objectives of the anti-discrimination directives have been impaired.

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36 – I would add that a 60-year age limit could in theory also serve to prevent pension over-provision, as most people have already made other provisions for their retirement by that age. In the present case, however, there is no evidence of such an objective, particularly since the 60-year age limit at issue here specifically does not apply to the age of the partner for whom the benefits are intended, but only to the age of the employee who is the pension scheme member.

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37 – On the financial balance of social security schemes, see, inter alia, the judgments in *Kohll* (C-158/96, EU:C:1998:171, paragraph 41) and *Maruko* (C-267/06, EU:C:2008:179, paragraph 77); on the prohibition on abusive behaviour, see the judgments in*Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68) and *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraph 42).

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38 – See the judgments in *Maizena and Others* (137/85, EU:C:1987:493, paragraph 15), *United Kingdom* v *Council* (C-84/94, EU:C:1996:431, paragraph 57), *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741, paragraph 122), *Digital Rights Ireland* (C-293/12 and C-594/12,

EU:C:2014:238, paragraph 46) and *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 67).

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39 – See the judgments in *Schräder HS Kraftfutter* (265/87, EU:C:1989:303, paragraph 21), *Jippes and Others* (C-189/01, EU:C:2001:420, paragraph 81) and *ERG and Others* (C-379/08 and C-380/08, EU:C:2010:127, paragraph 86); see also, to the same effect, the judgment in *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 91).

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40 – The use of the adjective ‘angemessen’ in the German-language version of Article 2(2)(a)(i) of Directive 2000/78 is unusual. A look at other language versions (English: ‘appropriate’, French: ‘appropriés’, Italian: ‘appropriati’, Spanish: ‘adecuados’, Dutch: ‘passend’) shows that the adjective ‘geeignet’ would have been more suitable in German.

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41 – See to that effect, with specific regard to Directive 2000/78, the judgments in *Petersen* (C-341/08, EU:C:2010:4, paragraph 53) and *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 67); see also, with respect to the requirement of consistency, the seminal judgments in *Hartlauer* (C-169/07, EU:C:2009:141, paragraph 55) and *Hiebler* (C-293/14, EU:C:2015:843, paragraph 65).

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42 – In Ireland, the minimum age for drawing a statutory retirement pension has risen to 66; see The 2015 Ageing Report, Underlying Assumptions and Projection Methodologies, Joint Report prepared by the European Commission (DG ECFIN) and the Economic Policy Committee (AWG), Part II, p. 199 (ISSN 0379-0991, available online at http://ec.europa.eu/economy_finance/publications/european_economy/2014/pdf/ee8_en.pdf, last consulted on 19 April 2016).

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43 – See, in that regard, my Opinions in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:170, point 123) and *Belov* (C-394/11, EU:C:2012:585, point 108).

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44 – See, to that effect, with respect to Article 6(1) of Directive 2000/78, the judgments in *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 66) and *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 58).

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45 – See, to that effect, for example, in relation to the proportionality test under Article 6(1) of Directive 2000/78, the judgment in*Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 69).

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46 – See, to that effect, the judgments in *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 70) and *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraphs 78 and 79); see also my Opinion in *Hlozek*(C-19/02, EU:C:2004:204, point 58).

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47 – In that case, the interval between the time of the employee’s retirement and that of his death (see, in that regard, the last part of point 22 of this Opinion, above).

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48 – See, to that effect, the judgments in *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 73) and *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600, paragraph 47), both relating to an age discrimination issue under

Directive 2000/78; see also the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:170, paragraph 123), as well as my Opinions in that case (EU:C:2015:170, point 131) and *Belov* (C-394/11, EU:C:2012:585, point 117), both relating to Directive 2000/43.

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49 – See, to the same effect, the judgment in *Römer* (C-147/08, EU:C:2011:286, paragraph 51).

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50 – Judgments in *Specht and Others* (C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005, paragraph 77) and*Schmitzer* (C-530/13, EU:C:2014:2359, paragraph 41); see, to the same effect, in connection with the equal treatment of men and women, the judgments in *Hill and Stapleton* (C-243/95, EU:C:1998:298, paragraph 40), *Jørgensen* (C-226/98, EU:C:2000:191, paragraph 39) and *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 85).

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51 – This would be particularly true if, as the order for reference indicates, the age limit at issue really was a fairly common provision in occupational pension schemes in Ireland in the 1970s.

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52 – See, in that regard, the judgments in *Maruko* (C-267/06, EU:C:2008:179) and *Römer* (C-147/08, EU:C:2011:286).

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53 – See, in that regard, point 40 of this Opinion, including footnote 19.

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54 – Settled case-law; see most recently the judgment in *DI* (C-441/14, EU:C:2016:278, paragraphs 29 to 37 and 43), concerning the prohibition on discrimination based on age contained in Directive 2000/78.

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55 – See, for example, the judgments in *Maruko* (C-267/06, EU:C:2008:179, in particular paragraphs 19, 20 and 79) and *Römer*(C-147/08, EU:C:2011:286, in particular paragraphs 22 and 66), concerning Directive 2000/78, and the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, in particular paragraph 22), concerning Directive 2000/43.

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56 – Judgments in *Maruko* (C-267/06, EU:C:2008:179, paragraphs 58 to 60) and *Römer* (C-147/08, EU:C:2011:286, paragraphs 34 to 36).

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57 – Judgments in *Maruko* (C-267/06, EU:C:2008:179, paragraph 73), *Römer* (C-147/08, EU:C:2011:286, paragraph 52) and *Hay*(C-267/12, EU:C:2013:823, paragraph 47).

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58 – See, to that effect, the judgments in *Ten Oever* (C-109/91, EU:C:1993:833, paragraph 13), *Coloroll Pension Trustees*(C-200/91, EU:C:1994:348, paragraph 18) and *Menauer* (C-379/99, EU:C:2001:527, paragraph 18), each relating to the same issue in the context of Article 119 of the EEC Treaty (now Article 157 TFEU).

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59 – See, to that effect, the judgment in *Coleman* (C-303/06, EU:C:2008:415, in particular paragraphs 38, 43, 48, 50 and 51), in which an employee was assumed to have been the subject of direct discrimination on account of a disability which was not her own disability but that of her child, who required care.

60 – In addition to the judgment in *Coleman* (C-303/06, EU:C:2008:415), referred to in footnote 59, that conclusion can also be drawn from the judgment in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, in particular paragraphs 56, 59 and 60), concerning the related Directive 2000/43, which recognised that a person may be the subject of discrimination based on ethnic origin even if he does not himself belong to the disadvantaged ethnic group but is simply 'discriminated against by association'.

61 – See, to that effect, for example, the judgment in *Prigge and Others* (C-447/09, EU:C:2011:573, paragraphs 52 to 83); see also my Opinion in *Andersen* (C-499/08, EU:C:2010:248, point 31).

62 – See the judgments in *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 48) and *Dansk Jurist- og Økonomforbund*(C-447/11, EU:C:2013:603, paragraph 43).

63 – See the judgment in *HK Danmark* (C-476/11, EU:C:2013:590, paragraph 49); see also my Opinion in that case (EU:C:2013:65, point 36).

64 – In any event, there is no evidence of any such actuarial component here, according to the Labour Court.

65 – See the judgments in *HK Danmark* (C-476/11, EU:C:2013:590, paragraphs 46 and 52) and *Dansk Jurist- og Økonomforbund*(C-447/11, EU:C:2013:603, paragraph 41).

66 – As the judgment in *HK Danmark* (C-476/11, EU:C:2013:590, paragraphs 51 and 52, first sentence) shows, the prohibition on the analogous extension of Article 6(2) of Directive 2000/78 applies even where such an extension serves to justify 'less severe forms of discrimination based on age'.

67 – Judgment in *Dansk Jurist- og Økonomforbund* (C-546/11, EU:C:2013:603, paragraph 39). It is not for no reason that the adverb 'in particular' is missing from the wording of Article 6(2) of Directive 2000/78, but is present in that of Article 6(1).

68 – See, in that regard, points 70 and 71 of this Opinion above.

69 – Judgments in *Age Concern England* (C-388/07, 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, paragraphs 80 to 82); see also my Opinion in *Andersen* (C-499/08, EU:C:2010:248, point 31 including footnote 29).

70 – Against this background, the defendant authorities' assertion that age limits under Article 6(2) require 'no justification' is untenable. These age limits too must of course pass the proportionality test.

71 – See, in that regard, points 74 to 99 of this Opinion, above.

72 – See point 110 of this Opinion, above.

73 – See point 146 of this Opinion, above.

74 – This is also sometimes referred to as ‘multiple discrimination’. However, that term may be misleading as it suggests the presence of two differences of treatment each of which would in its own right — completely independently of the other — have to be regarded as discrimination and would at most be aggravated by the existence of further grounds for a difference of treatment. The issue under consideration here, however, concerns the combination of two or more factors neither of which, in and of itself, gives rise to discrimination against the persons concerned.

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75 – I am thinking in particular of the judgments in *Kleist* (C-356/09, EU:C:2010:703, combination of age and sex), *Odar* (C-152/11, EU:C:2012:772, combination of age and disability) and *Z* (C-363/12, EU:C:2014:159, combination of sex and possible disability) and*Milkova* (C-406/15, combination of disability and civil servant status), pending.

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76 – Burri and Schiek, ‘Multiple Discrimination in EU Law — Opportunities for legal responses to intersectional gender discrimination?’, 2009, published by the European Commission, pp. 3 and 4; Baer, Bittner and Götsche, *Mehrdimensionale Diskriminierung — Begriffe, Theorien und juristische Analyse*, Berlin 2010, p. 10 et seq.; Bamforth, Malik and O’Cinneide, ‘Discrimination Law: Theory and Context’, London 2008, p. 541; see also the report, commissioned by the European Commission and published in September 2007, ‘Tackling Multiple Discrimination: Practices, policies and laws’.

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77 – Crenshaw, K., ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine’, in:*The University of Chicago Legal Forum*, 1989, pp. 139-167.

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78 – European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, P6_TA(2009) 0211, pp. 21 and 22.

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79 – Report from the Commission to the European Parliament and the Council — Joint Report on the application of Directive [2000/43] and of Directive [2000/78], submitted on 17 January 2014, COM(2014) 2 final, p. 11; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Non-discrimination and equal opportunities: A renewed commitment, submitted on 2 July 2008, COM(2008) 420 final, p. 10.

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80 – Thus, the EU legislature makes the special ground of justification for differences of treatment based on religion or belief, introduced specifically for the benefit of undertakings which pursue ideological aims, in Article 4(2) of Directive 2000/78 subject to the express condition that it ‘should not justify discrimination on another ground’. Similarly, in Article 6(2) of the Directive, the EU legislature permits the fixing of specific age limits and the use of certain age criteria, ‘provided this does not result in discrimination on the grounds of sex’. In addition, recital 3 of the Directive makes a point of saying that ‘women are often the victims of multiple discrimination’. Moreover, in its report of 17 January 2014, the Commission, too, expresses the view in passing that, to some extent, Directive 2000/78 already authorises ‘a combination of two or more grounds of discrimination to be tackled in the same situation’; see COM(2014) 2 final, p. 9.

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81 – See, in that regard, points 54 to 64 of this Opinion, above.

82 – See, to the same effect, with respect to the related Directive 2000/43, the judgments in *Runevič-Vardyn and Wardyn*(C-391/09, EU:C:2011:291, paragraph 43) and *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 42 and 66).

83 – Provided always that discrimination has not been assumed to be present on the basis of one of those two factors on its own, as I have assumed in the context of the first and second questions.

84 – See, in that regard, points 74 to 99 of this Opinion.

85 – Judgments in *Defrenne* (C-43/75, EU:C:1976:56, paragraphs 69 and 70) (‘*Defrenne II*’), *Barber* (C-262/88, EU:C:1990:209, paragraph 44) and *Bosman* (C-415/93, EU:C:1995:463, paragraph 144).

86 – Judgment in *Barber* (C-262/88, EU:C:1990:209).

87 – Judgments in *Barber* (C-262/88, EU:C:1990:209, paragraph 41), *Bosman* (C-415/93, EU:C:1995:463, paragraph 142),*Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 36) and *Maruko* (C-267/06, EU:C:2008:179, paragraph 77).

88 – Judgment in *Maruko* (C-267/06, EU:C:2008:179, paragraphs 77 to 79).

89 – Judgments in *Barber* (C-262/88, EU:C:1990:209, paragraph 44) and *Bosman* (C-415/93, EU:C:1995:463, paragraph 144); the judgment in *UNIS and Beaudout Père et Fils* is similar (C-25/14 and C-26/14, EU:C:2015:821, paragraph 53).