

**Opinion of Advocate General Bot delivered on 3 September 2009**

**Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe**

**Reference for a preliminary ruling: Sozialgericht Dortmund - Germany**

**Directive 2000/78/EC - Articles 2(5) and 6(1) - Prohibition of discrimination on grounds of age - Provision of national law setting a maximum age of 68 for practice as a panel dentist - Aim pursued - Measure necessary for the protection of health - Consistency - Appropriateness of the measure**

**Case C-341/08**

*European Court reports 2010 Page 00000*

1. By this reference for a preliminary ruling, the Sozialgericht Dortmund (Social Court, Dortmund) (Germany) seeks to ascertain whether Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (2) must be interpreted as precluding national legislation under which admission to practise as a panel dentist expires at the end of the calendar quarter in which the panel dentist reaches the age of 68.

2. The specific feature of this case is that, in its questions, the national court contemplates only that that legislation might be justified in the light of the aim of protecting the health of patients covered by the statutory health insurance scheme, from the standpoint of maintaining a quality medical service on account of the presumption that there is a decline in the performance of panel dentists who have reached the age of 68.

3. In this Opinion, I shall explain why, in my view, the examination of that legislation must not be limited solely to the aim of protecting public health. I shall show that, having regard to the general context of the national legislation at issue in the main proceedings, its justification must be assessed primarily in the light of the two main aims which it pursues, namely the aim of maintaining the financial balance of the statutory health insurance scheme and the aim of seeking to ensure that new generations have the opportunity to practise as panel dentists.

4. It is on the basis of those two aims that I take the view that Article 2(2)(a), Article 5 and Article 6(1) of Directive 2000/78 must be interpreted as not precluding such national legislation.

**I – The legal context**

**A – Directive 2000/78**

5. Article 1 of Directive 2000/78 provides that the purpose of the 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’.

6. Article 2 of that directive states:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...

5. 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.’

7. Article 3 of that directive, entitled ‘Scope’, states in paragraph 1:

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

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

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

...’

8. Article 4 of Directive 2000/78, entitled ‘Occupational requirements’, provides in paragraph 1:

‘Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

9. Article 6 of that directive, entitled ‘Justification of differences of treatment on grounds of age’, provides in paragraph 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:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

## **B – National law**

**10.** The Law on the safeguarding and structural improvement of the statutory health insurance scheme (Gesetz zur Sicherung und Strukturverbesserung der gesetzlichen Krankenversicherung) of 21 December 1992 (3) introduced a maximum age limit for panel doctors which, since 14 November 2003, appears in the third sentence of Paragraph 95(7) of Book V of the Social Security Code (Sozialgesetzbuch). (4)

**11.** That paragraph provides that, from 1 January 1999, admission to practise as a panel doctor expires at the end of the calendar quarter in which the panel doctor reaches the age of 68. Under the second sentence of Paragraph 72(1) of the SGB V, that provision applies by analogy to dentists.

**12.** The explanatory statement of the GSG 1993 is worded as follows:

'The growth in the number of panel doctors represents a significant cause of excessive rises in expenditure in the statutory health insurance scheme. In view of the constantly increasing number of panel doctors, there is a need to limit the number of panel doctors. The surplus supply cannot be curbed only by restrictions on admission, at the expense of the young generation of doctors. To that end, the introduction of a mandatory age limit for panel doctors is also necessary.'

**13.** The German legislature subsequently repealed the provision of the SGB V which restricted admissions on the basis of need, with effect from 1 January 2007.

**14.** Furthermore, by the Law strengthening competition in the statutory health insurance scheme (Gesetz zur Stärkung des Wettbewerbs in der gesetzlichen Krankenversicherung) of 26 March 2007, the German legislature removed all restrictions on admission for panel dentists on 1 April 2007, on the ground, inter alia, that the problem of surplus supply does not occur in the same way in the panel dental care sector as in the panel medical care sector. However, the age limit of 68 years was retained.

**15.** Directive 2000/78 was transposed by the Law transposing European directives on the principle of equal treatment (Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung) of 14 August 2006, which entered into force on 18 August 2006. Paragraph 1 of that law contains the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz). (5) That law neither removed nor amended the age limit laid down in the third sentence of Paragraph 95(7) of the SGB V.

## **II – The main proceedings and the questions referred**

**16.** Ms Petersen, who was born on 24 April 1939, reached the age of 68 in April 2007. She has been admitted to provide panel dental care since 1 April 1974.

**17.** By decision of 25 April 2007, the Admissions Board for Dentists for the district of Westphalia and Lippe found that that admission to practise ended on 30 June 2007.

**18.** Ms Petersen lodged an administrative appeal against that decision, claiming, in particular, that it was contrary to Directive 2000/78 and the German legislation transposing that directive. At the same time, she requested by way of interlocutory proceedings the application of interim measures admitting her to practise as a panel dentist for a period of at least two further years. However, that application was unsuccessful both at first instance and on appeal.

**19.** Her administrative appeal having been examined and dismissed by the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Ms Petersen appealed against that decision before the Sozialgericht Dortmund.

**20.** That court states that the dismissal of the administrative appeal brought by Ms Petersen is lawful under national law, since the German legislation transposing Directive 2000/78 does not have primacy over the law laying down the age limit and therefore does not render the latter invalid. The constitutionality of the age limit has also been examined by the Bundesverfassungsgericht (Federal Constitutional Court).

**21.** By judgment of 7 August 2007, the Bundesverfassungsgericht ruled that the age limit in question was not contrary to the German Constitution. It based that decision on the need to protect insured persons against the risks presented by older panel dentists whose performance is no longer the best. According to the Bundesverfassungsgericht, it is a matter of general experience that the risk of a reduction in performance increases with age. It took the view that the German legislature was not limited, within the scope of the discretion available to it, to prescribing an examination in each individual case to ensure a panel doctor's physical and mental performance after the age of 68. Rather, the legislature could adopt general rules on the basis of empirical evidence. The Bundesverfassungsgericht also regarded as irrelevant the absence of any reference to the protection of the health of insured persons in the explanatory statement of the law. In its view, the constitutionality of a legal provision must be examined having regard to all factors, even if they are not referred to in the explanatory statement of the law.

**22.** However, the national court is uncertain whether that analysis also applies as regards Directive 2000/78. It takes the view that there are serious doubts as to the compatibility of the third sentence of Paragraph 95(7) of the SGB V with that directive.

**23.** Having shown, in its view, that Directive 2000/78 is applicable and that the age limit of 68 constitutes direct discrimination on grounds of age within the meaning of Article 2(2)(a) of that directive, the national court considers that it is not possible to justify that age limit under either Article 2(5) or Article 4(1) of that directive.

**24.** According to Article 2(5) of Directive 2000/78, the directive is to be without prejudice to legislative measures necessary for the protection of health. Since the legislature did not adopt the age limit with that in mind, that provision is not relevant.

**25.** Under Article 4(1) of that directive, a difference of treatment on grounds of age need not constitute discrimination contrary to that directive if it constitutes a genuine and determining requirement of the professional activity concerned. However, the age limit in question is subject to four exceptions which, according to the national court, render the application of that provision impossible, namely:

- if the person concerned has practised for a period of less than 20 years as a panel doctor (dentist) when he reaches the age of 68 and if he was already admitted to practise as a panel doctor (dentist) before 1 January 1993, the competent board extends the admission until at the latest the expiry of that period of 20 years;
- if inadequate medical provision exists or is impending in certain areas of the region of admission, the age limit does not apply;
- in the event of illness, leave or participation in training events, cover may be provided for a panel doctor (dentist) by a doctor (dentist) who is himself no longer admitted to practise as a panel doctor (dentist) because he has reached the age limit, and
- dentists may, in any event, continue to pursue their activities beyond the age of 68 outside the panel scheme.

**26.** The national court also expresses uncertainties with regard to whether or not the age limit provided for in the third sentence of Paragraph 95(7) of the SGB V is covered by Article 6(1) of Directive 2000/78. In its view, the answer to that question depends on the interpretation of the concept of 'legitimate aim' and the terms 'appropriate' and 'necessary' in Article 6(1).

**27.** The national court takes the view that the aims pursued by the German legislature with the introduction of the third sentence of Paragraph 95(7) of the SGB V, namely to safeguard the financing of the statutory health insurance scheme and to guarantee a balanced sharing of burdens between generations, are 'legitimate aims' within the meaning of Article 6(1) of Directive 2000/78. With regard to panel dentists, however, the age limit is not or is no longer necessary as a means of achieving those aims. The national court points out, in that regard, that the Law strengthening competition in the statutory health insurance scheme of 26 March 2007 removed all the restrictions on admission for panel dentists, with effect from 1 April 2007, since the German legislature considered that the problem of surplus supply did not occur in the same way in the panel dental care sector as in the panel medical care sector.

**28.** Moreover, according to that court, the protection of the health of insured persons is in principle a 'legitimate aim' within the meaning of Article 6(1) of Directive 2000/78. Nevertheless, it points out that that aim was actually entirely irrelevant to the German legislature when it introduced the third sentence of Paragraph 95(7) of the SGB V. Clearly, in the absence of a financial deficit in the statutory health insurance scheme and therefore of the need for restrictions on admission, the expiry of admission on grounds of age would not have been introduced. Nor is there any evidence to suggest that the German legislature subsequently took into account the protection of the health of insured persons in connection with the age limit in question as a factor in its policy. Accordingly, the national court doubts that it is possible for the protection of the health of insured persons to constitute a legitimate aim in this case.

**29.** It also doubts that the age limit introduced by the third sentence of Paragraph 95(7) of the SGB V is appropriate and necessary to protect the health of insured persons. It asks whether it is not possible to envisage less onerous means, in particular allowing a temporary extension of admission on request, following an individual examination of performance. The impact of the age limit is actually very punitive for panel dentists wishing to pursue their activity beyond that limit, since 90% of the population is insured under the statutory health insurance scheme.

**30.** It is in the light of those considerations that the Sozialgericht Dortmund decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) May the statutory regulation of a maximum age limit for admission to practise a profession (in this case, to work as a panel dentist) be an objective and reasonable measure to protect a legitimate aim (in this case, the health of patients insured under the statutory health insurance scheme) and an appropriate and necessary means of achieving that aim within the meaning of Article 6 of Directive 2000/78/EC if it is derived solely from an assumption, based on "general experience", that a general drop in performance occurs from a certain age, without any account being taken of the individual capacity of the specific person concerned?
- (2) If Question 1 is to be answered in the affirmative, may a legitimate (legislative) aim within the meaning of Article 6 of Directive 2000/78 (in this case, the protection of the health of patients insured under the statutory health insurance scheme) be taken to exist even where that aim was entirely irrelevant to the national legislature in the exercise of its legislative discretion?
- (3) If Question 1 or 2 is to be answered in the negative, may a law enacted prior to the adoption of Directive 2000/78 which is incompatible with that directive be disapplied by virtue of the primacy of European law, even where the national law transposing the directive (in this case, the Allgemeines Gleichbehandlungsgesetz – General Law on equal treatment) makes no provision for such a legal consequence in the event of a breach of the prohibition of discrimination?

### III – Analysis

#### A – The admissibility of the reference for a preliminary ruling

31. The German Government takes the view that the reference for a preliminary ruling is inadmissible. In its written observations, that Government argues that the contested provision was to be repealed by Paragraph 1(1)(i) of the Law developing the organisational structures of the statutory health insurance scheme (Gesetz zur Weiterentwicklung der Organisationsstrukturen in der gesetzlichen Krankenversicherung), with retroactive effect from 1 October 2008. According to that Government, the forthcoming enactment of that law would give Ms Petersen the opportunity, irrespective of the Court's decision, to obtain admission to practise. Consequently, the judgment of the Court is not necessary for the resolution of the dispute in the main proceedings.

32. That line of argument is irrelevant in my view. Regardless of any subsequent amendments to national law, the Court's answer to the questions referred by the national court is decisive for the outcome of the dispute in the main proceedings, in particular for enabling that court to determine whether the Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe was correct to dismiss the applicant's administrative appeal and whether the applicant was deprived of the opportunity to practise as a panel dentist after 30 June 2007.

#### B – The first and second questions

33. I shall examine the first and second questions together. By those questions, the national court essentially seeks to ascertain whether Directive 2000/78 must be interpreted as precluding national legislation under which admission to practise as a panel dentist expires at the end of the calendar quarter in which the panel dentist reaches the age of 68. It also raises the question of the method for identifying the aim in the light of which the justification for a difference of treatment on grounds of age must be assessed.

34. I will begin by assessing whether the national legislation at issue actually falls within the scope of Directive 2000/78.

35. As is apparent both from its title and preamble and from its content and purpose, Directive 2000/78 seeks to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which include age. More particularly, it follows from Article 3(1)(a) and (c) of Directive 2000/78 that the directive 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', first, in relation to 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy' and, second, in relation to 'employment and working conditions, including dismissals and pay'.

36. Panel dentists provide care under the statutory health insurance scheme. The third sentence of Paragraph 95(7) of the SGB V requires those dentists to stop providing panel care when they reach the age of 68, thereby adversely affecting the exercise of their professional activity. Moreover, the introduction of such an age limit may have the consequence of ending their professional activity, due to unprofitability, since, as the national court points out, around 90% of the population is insured under the statutory health insurance scheme. After the age of 68, dentists are consequently no longer able to work as panel dentists and, more generally, the exercise of their professional activity as dentists is adversely affected. That national legislation therefore relates, in my view, to 'conditions for access to employment, to self-employment or to occupation' within the meaning of Article 3(1)(a) of Directive 2000/78 and to 'employment and working conditions' within the meaning of Article 3(1)(c) of the same directive. National legislation of that nature must therefore be regarded as falling within the scope of that directive.

37. Article 2(1) of Directive 2000/78 defines the 'principle of equal treatment' that it seeks to implement as being 'no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 [of the directive]'. Article 2(2)(a) of the directive states that, for the purposes of paragraph 1, direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 of the same directive.

38. However, national legislation such as that at issue in the main proceedings imposes less favourable treatment on panel dentists who have reached the age of 68 as compared with those who have not yet reached that age. Such legislation thus establishes a difference of treatment directly based on age which is, in principle, prohibited by Article 2(2)(a) of Directive 2000/78.

39. It is also necessary to ascertain whether such a difference of treatment may be justified. It is important, in that regard, to determine the standpoint from which that justification should be examined.

40. In its first two questions, the national court emphasises only the aim of protecting the health of patients covered by the statutory health insurance scheme, from the point of view of maintaining a high-quality medical service, on account of the presumption that there is a decline in the performance of panel dentists who have reached the age of 68. However, the actual wording of those two questions and the information provided by that court in its order for reference show that it entertains doubts as to the relevance of that aim in justifying the age limit laid down in the third sentence of Paragraph 95(7) of the SGB V. (6)

41. At the hearing, the German Government sought to justify that provision primarily in the light of two aims, namely, first, the aim of maintaining the financial balance of the statutory health insurance scheme and, second, that of ensuring that new generations have the opportunity to practise as panel dentists. The Government expressly stated that it would examine only as a marginal issue the aim of protecting the health of patients covered by the statutory health insurance scheme.

42. That position further persuades me that the latter aim is secondary to the two main aims pursued by the third sentence of Paragraph 95(7) of the SGB V.

**43.** An examination of the general context of that paragraph confirms that view. I would note, in that regard, that in its judgments in *Palacios de la Villa* (7) and *Age Concern England* (8) the Court set out the procedure to be followed for identifying the aim or aims which could be taken into account with a view to justifying a difference of treatment on grounds of age. It is clear from those judgments that, if the national legislation does not specify the aims which it pursues, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary. (9)

**44.** In the light of those considerations, it is clear that an examination of the third sentence of Paragraph 95(7) of the SGB V and of the national legislation containing that paragraph does not show explicitly that the age limit in question was introduced and then maintained on the basis of the presumption that from the age of 68 the quality of care provided by panel dentists diminishes. That factor was therefore not the one put forward to justify the introduction of the age limit of 68.

**45.** I also take the view that it is not possible, in the light of the general context of that national legislation, to consider that the presumption of a reduction in the performance of panel dentists who have reached the age of 68 is the decisive factor in explaining the maintenance of such an age limit. Indeed, it must be recalled that the German law which originally introduced that age limit had the purpose of safeguarding and improving the structure of the statutory health insurance scheme in order to ensure the funding of that scheme, and that that limit now appears in the social security code. It is therefore apparent from an examination of the general context of that legislation that the maintenance of the financial balance of the statutory health insurance scheme is the decisive factor, rather than the diminution in the quality of dental care where it is provided by panel dentists over the age of 68. Moreover, it is expressly stated in the reasons for the GSG 1993 that the introduction of an age limit for practising as a panel dentist was designed by the German legislature as a measure to curb rising expenditure on health connected with the surplus supply of medical care in the context of the statutory health insurance scheme.

**46.** At the hearing, the German Government explained why the aim of maintaining the financial balance of the statutory health insurance scheme was still valid, even following the removal, from 1 April 2007, of restrictions on the granting of admission to practise as a panel dentist. It stated that, with a view to limiting health expenditure in the context of the statutory health insurance scheme, the German legislature had considered it necessary to reduce the number of panel doctors, based on the assumption of supply-induced demand. In those circumstances, restrictions on admission to practise as a panel doctor had been introduced, though they were not the only measures intended to combat rising healthcare expenditure. The age limit of 68 was also one such measure. (10) When the German legislature considered, in 2007, that the problem of surplus supply did not arise in the panel dentist sector in the same way as in the panel doctor sector, it decided to remove the restrictions on admission for panel dentists and to initiate an observation stage with a view to the possible removal of all regulatory measures previously introduced in respect of them. Nevertheless, the German legislature did not wish to abandon at the same time all instruments for containing rising healthcare expenditure. It wished to maintain, on a transitional basis, one of those instruments, namely the age limit of 68, while retaining the possibility of subsequently abolishing it in the light of developments in healthcare expenditure relating to dental care provided under the statutory health insurance scheme.

**47.** That evidence shows, in my view, that the aim of ensuring the financial balance of the statutory health insurance scheme is one of the aims pursued by the age limit of 68 laid down by the third sentence of Paragraph 95(7) of the SGB V.

**48.** Moreover, it is clear from the reasons for the GSG 1993 that the introduction of the age limit of 68 also constitutes a measure to ensure equity between the generations, seeking to prevent solely the younger generation of dentists from bearing the burden of the implementation of a policy of reducing healthcare expenditure under the statutory health insurance scheme. Accordingly, the third sentence of Paragraph 95(7) of the SGB V also pursues the aim of ensuring that new generations have the opportunity to practise as panel dentists.

**49.** I take the view that the foregoing factors do not mean that an examination of the justification for a difference of treatment on grounds of age must always be limited to the aims initially pursued by the national legislature. A measure may be maintained even if it pursues new aims, in the light of developments in social, economic, demographic and budgetary conditions. Nevertheless, it must be possible to identify such aims from the general context of the measure. In my view, that does not appear to be the case as regards the aim of protecting the health of patients covered by the statutory health insurance scheme because there is a decline in the performance of panel dentists who have reached the age of 68.

**50.** I would none the less point out that if the Court should consider that that aspect of the aim of protecting public health is actually one of those pursued by the third sentence of Paragraph 95(7) of the SGB V, I take the view that it would be difficult to regard the age limit laid down in that paragraph as necessary for that purpose, in the light of the exceptions to its application provided for under German law. Those exceptions raise questions concerning the internal consistency of that paragraph in that respect. Indeed, if the German legislature truly considers that, on account of the presumption that there is a decline in the performance of panel dentists who have reached the age of 68, the pursuit by the latter of that activity after that age may adversely affect the health of patients covered by the statutory health insurance scheme, it is difficult to find cogent reasons to explain why those dentists may none the less continue to work where there is inadequate medical provision in a region, to provide cover, or where they have worked for a period of less than 20 years as panel dentists. At the hearing, the German Government also acknowledged that, considered from that standpoint, the third sentence of Paragraph 95(7) of the SGB V is not without a number of inconsistencies. It is hardly surprising that such inconsistencies should be found to exist, since the intention of the German legislature, as is apparent from the general context of the measure at issue, was manifestly not to protect patients covered by the statutory health insurance scheme on account of the presumption that there is a decline in the performance of panel dentists who have reached the age of 68.

51. For all those reasons, it is therefore solely in the light of the two main aims pursued by the third sentence of Paragraph 95(7) of the SGB V, namely the aim of maintaining the financial balance of the statutory health insurance scheme and the aim of ensuring that new generations have the opportunity to practise as panel dentists, that I will examine whether the age limit of 68 may be regarded as justified under the provisions of Directive 2000/78. I will examine those two aims in turn.

#### 1. The aim of maintaining the financial balance of the statutory health insurance scheme

52. It follows from the Court's case-law that the aim of preventing the risk of serious harm to the financial balance of the social security system is one facet of the aim of protecting public health. (11) In *Hartlauer*, cited above, the Court held, in connection with outpatient care, that the planning of medical services is intended to control costs and to prevent, as far as possible, any wastage of financial, technical and human resources, since the medical care sector generates considerable costs and must satisfy increasing needs, while the financial resources which may be made available for healthcare are not unlimited, whatever the mode of funding applied. (12)

53. As an instrument forming part of a policy of planning dental-care provision aimed at curbing the rise in healthcare expenditure under the statutory health insurance scheme, the age limit of 68 laid down in the third sentence of Paragraph 95(7) of the SGB V pursues the aim of protection of public health, from the point of view of maintaining the financial balance of the statutory health insurance scheme.

54. It is now necessary for me to determine which provision of Directive 2000/78 is most appropriate for the purpose of examining such a justification.

55. I am not convinced, in that regard, that Article 6(1) of that directive, as it has been interpreted by the Court, is the suitable provision. Indeed, I would recall that the Court clearly stated in *Age Concern England* that it is apparent from that article that the aims that may be considered 'legitimate' within the meaning of that article and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age are *social policy objectives*, such as those related to employment policy, the labour market or vocational training. (13) Since, in my view, the aim of protecting public health can scarcely be treated as a social policy objective, unless the latter concept is applied very broadly, I take the view that it must be examined in the context of Article 2(5) of Directive 2000/78 which, for its part, expressly refers to the protection of health.

56. I would point out that pursuant to that article, Directive 2000/78 'shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary ... for the protection of health'. That article therefore refers to the protection of health as a reason capable of justifying a difference of treatment on one of the grounds prohibited by that directive. It is therefore necessary to determine whether the third sentence of Paragraph 95(7) of the SGB V constitutes a measure which may be regarded as being necessary for the protection of health.

57. That examination of whether the measure is necessary from the point of view of the protection of health must take into account that it is clear, both from the case-law of the Court and from Article 152(5) EC, that Community law does not detract from the power of the Member States to organise their social security systems and to adopt, in particular, provisions intended to govern the organisation and delivery of health services and medical care. (14) In exercising that power, however, the Member States must comply with Community law and, in particular, in so far as the present case is concerned, the provisions of Directive 2000/78. When assessing whether that obligation has been complied with, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the EC Treaty and that it is for the Member States to determine the level of protection which they wish to afford to public health and the way in which that level is to be achieved. Since the level may vary from one Member State to another, Member States must be allowed discretion. (15)

58. In the light of that case-law, I consider that a Member State may, in the context of its power to organise the provision of dental care and with a view to attaining a high level of protection of public health, adopt a regulatory measure setting an age limit of 68 for practising as a panel dentist.

59. I consider that such a measure is appropriate for securing the aim of protecting public health. In particular, if a Member State takes the view that the situation as regards the supply of dental care presents a risk to the financial balance of its statutory health insurance scheme, it must, as a preventive measure, be able to adopt regulatory provisions to reduce that risk. (16)

60. It must also be pointed out that, according to the Court, national legislation is appropriate for securing attainment of the objective relied on only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner. (17) I take the view, in that regard, that the existence of exceptions to the application of the age limit of 68 does not undermine the internal consistency of the third sentence of Paragraph 95(7) of the SGB V in the light of the aim of protecting public health. In other words, those derogations are not, in my view, inconsistent with the finding that the age limit of 68 laid down by that paragraph is appropriate for attaining the aim of maintaining the financial balance of the statutory health insurance scheme.

61. I would recall, in that regard, that the age limit in question is subject to the following four exceptions:

- if the person concerned has practised for a period of less than 20 years as a panel doctor (dentist) when he reaches the age of 68 and if he was already admitted to practise as a panel doctor (dentist) before 1 January 1993, the competent board extends the admission until at the latest the expiry of that period of 20 years;
- if inadequate medical provision exists or is impending in certain areas of the region of admission, the age limit does not apply;
- in the event of illness, leave or participation in training events, cover may be provided for a panel doctor (dentist) by a doctor (dentist) who is himself no longer admitted to practise as a panel doctor (dentist) because he has reached the age limit, and
- dentists may, in any event, continue to pursue their activities beyond the age of 68 outside the panel scheme.

62. Those four exceptions are intended to correct possible abuses arising from an overly strict application of the age limit of 68 and are the result of a compromise between various interests deserving of protection.

**63.** Thus, the reason for the first exception is the German legislature's wish not to prejudice unduly the conditions under which panel dentists pursue their activities. More specifically, by guaranteeing them a minimum period of activity of 20 years as a panel dentist, the German legislature sought to ensure that those dentists are, at the end of their working life, entitled to a retirement pension. The Court, in *Palacios de la Villa*, emphasised the importance of the possibility of such financial compensation at the end of the working life of workers affected by an age limit. (18) Furthermore, in so far as, pursuant to that derogation, admission to practise as a panel dentist may be extended only for the benefit of those who were already admitted before 1 January 1993, such an exception is provisional in nature and affects a limited number of panel dentists. Accordingly, I take the view that it does not undermine the consistency of the third sentence of Paragraph 95(7) of the SGB V in the light of the aim of maintaining the financial balance of the statutory health insurance scheme.

**64.** As regards the second and third exceptions, their purpose is to prevent the age limit of 68 from leading to a shortage or absence of dentists in particular circumstances or areas. The German legislature therefore took into account the fact that an overly strict application of the age limit could, in certain cases, have negative consequences on the protection of public health. In so far as the second and third exceptions help to ensure the continuity and availability of panel dental care, they seek to maintain a high-quality medical service open to all, which constitutes another facet of the aim of protecting public health. (19) Pursuit of that aspect of the aim of protecting public health is in no way inconsistent, in my view, with that of maintaining the financial balance of the statutory health insurance scheme.

**65.** The fourth exception seeks, for its part, to protect the professional freedom of dentists. In so far as that exception allows them to continue to pursue their activity after the age of 68 outside the panel system, it too does not call into question the consistency of the third sentence of Paragraph 95(7) of the SGB V in the light of the aim of maintaining the financial balance of the statutory health insurance scheme.

**66.** Furthermore, I consider that that paragraph does not go beyond what is necessary to secure such an aim. In the context of its competence in matters relating to the organisation of health services and its discretion, a Member State may, in my view, regard the age of 68 as sufficiently advanced to serve as the limit for admission to practise as a panel dentist. I also take the view that, in the light of the average ages which are generally adopted in the Member States for eligibility to a retirement pension, setting an age limit of 68 for pursuing the activity of a panel dentist is not disproportionate.

**67.** For all those reasons, I take the view that the age limit of 68 laid down in the third sentence of Paragraph 95(7) of the SGB V may be regarded as necessary for the protection of health, within the meaning of Article 2(5) of Directive 2000/78, and accordingly that that age limit is not contrary to that article.

**68.** Such an age limit is, in my view, also justified by the aim of ensuring that new generations have the opportunity to practise as panel dentists.

## **2. The aim of ensuring that new generations have the opportunity to work as panel dentists**

**69.** The national court takes the view that that aim can no longer be relied on to justify the age limit of 68. It points out that that age limit was initially intended by the German legislature as a measure to accompany restrictions on granting admission to practise as a panel dentist, in order to prevent the disadvantages connected with such restrictions from being suffered solely by young dentists. The age limit was therefore introduced in order to distribute the burdens fairly between the dentists who are already admitted and the younger generation of dentists wishing to obtain admission. Since the German legislature subsequently considered that the restrictive scheme of admission on the basis of need ought to be abolished, the age limit of 68 lost its original function, so that it could no longer be justified by the aim of ensuring that new generations have the opportunity to work as panel dentists.

**70.** Contrary to the national court's comments and having regard to the information provided by the German Government at the hearing, I do not think that it is possible so categorically to dismiss such a justification. Even after the removal of the restrictions on the granting of admission to practise as a panel dentist, the age limit of 68 continued, in my view, to serve its original function, namely to ensure that new generations have the opportunity to practise as panel dentists, in particular in the most attractive areas. The removal of those restrictions therefore did not change the German legislature's desire to encourage the generational renewal of dentists in regions in which the amount of panel dental care supply hindered the establishment of young panel dentists.

**71.** That justification based on the aim of ensuring that new generations have the opportunity to practise as panel dentists must, in my view, be examined in the context of Article 6(1) of Directive 2000/78. According to that article, 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'.

**72.** Moreover, it should be observed that aims that may be considered 'legitimate' within the meaning of Article 6(1) of Directive 2000/78 and, consequently, capable of justifying derogation from the principle prohibiting discrimination on grounds of age are social policy objectives, such as those related to employment policy, the labour market or vocational training. (20)

**73.** I take the view that the aim of ensuring that new generations have the opportunity to practise as panel dentists and, more generally, of encouraging the generational renewal of panel dentists falls within that category of legitimate aims. It is clear from the Court's case-law that the encouragement of recruitment constitutes a legitimate aim of the social or employment policy of the Member States and that that assessment applies to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers. (21)

**74.** Consequently, such an aim must be considered to justify 'objectively and reasonably', 'within the context of national law', as provided in the first subparagraph of Article 6(1) of Directive 2000/78, a difference of treatment on the ground of age such as that in the third sentence of Paragraph 95(7) of the SGB V.

**75.** It is also necessary to ascertain, according to the actual wording of the first subparagraph of Article 6(1) of that directive, whether the means used to achieve that aim are ‘appropriate and necessary’.

**76.** In this respect, the Member States unarguably enjoy a broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. (22)

**77.** Moreover, that broad discretion must be taken into account all the more as regards a measure which, as we have seen, also falls within the competence of the Member States to organise their health and medical-care services.

**78.** In those circumstances, I consider that the age limit of 68 laid down in the third sentence of Paragraph 95(7) of the SGB V constitutes an appropriate means of achieving the aim of ensuring that new generations have the opportunity to practise as panel dentists.

**79.** The exceptions to the application of such an age limit do not call into question that assessment in so far as they do not undermine the internal consistency of that national provision in the light of the above-mentioned aim. Referring to what I have already stated with regard to those exceptions, I would point out that the first exception concerns a limited number of panel dentists, that the second relates to the most disadvantaged areas from the medical standpoint in which no access problems are faced by young panel doctors, that the third concerns the temporary cover of dentists and, finally, that the fourth relates to leaving the panel scheme, and therefore cannot have a negative impact on the aim of ensuring that new generations have the opportunity to practise as panel dentists.

**80.** Moreover, I take the view that the age limit of 68 laid down in the third sentence of Paragraph 95(7) of the SGB V does not go beyond what is appropriate and necessary for achieving the aim of ensuring that new generations have the opportunity to practise as panel dentists. As I pointed out above, I consider that, having regard to the average ages which are generally adopted in the Member States for entitlement to a retirement pension, the setting of an age limit of 68 for practising as a panel dentist is not disproportionate. Moreover, the German legislature adopted a balanced approach by excluding the application of such an age limit in regions in which there is inadequate medical provision, where access to practise as a panel dentist presents no difficulties.

**81.** I take the view that it follows from the above that the difference of treatment on grounds of age set out in the third sentence of Paragraph 95(7) of the SGB V may be regarded as objectively and reasonably justified by the aim of ensuring that new generations have the opportunity to practise as panel dentists, and that it does not go beyond what is appropriate and necessary to achieve that aim.

#### **C – The third question**

**82.** In view of my proposed answer to the first and second questions, it is not necessary to propose an answer to the third question.

#### **IV – Conclusion**

**83.** Having regard to all those considerations, I propose that the Court should rule that: Articles 2(2)(a) and (5) and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which admission to practise as a panel dentist expires at the end of the calendar quarter in which the panel dentist reaches the age of 68.

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**1** – Original language: French.

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**2** – OJ 2000 L 303, p. 16.

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**3** – BGBl. I, p. 2266, ‘the GSG 1993’.

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**4** – ‘The SGB V’.

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**5** – BGBl. I, p. 1897, ‘the AGG’.

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**6** – See point 28 of this Opinion.

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**7** – Case C-411/05 [2007] ECR I-8531.

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**8** – Case C-388/07 [2009] ECR I-0000.

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**9** – *Palacios de la Villa*, paragraph 57, and *Age Concern England*, paragraph 45.

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**10** – Another regulatory measure which may be referred to is the reform of medical studies in order to attain a 20% reduction in the number of medical students (see report No 1675 of the Institut de recherche et documentation en économie de la santé (IRDES), November 2007, p. 49).

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**11** – See, in particular, Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 47 and case-law cited.

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**12** – *Ibid.*, paragraph 49 and case-law cited.

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**13** – Paragraph 46. See also Case C-88/08 *Hütter* [2009] ECR I-0000, paragraph 41 and case-law cited.

[14](#) – See, in particular, *Hartlauer*, paragraph 29, and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-0000, paragraph 18.

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[15](#) – See, in particular, *Apothekerkammer des Saarlandes and Others*, paragraph 19.

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[16](#) – See, by analogy, in connection with a risk to the reliability and quality of the provision of medicinal products to the public, *Apothekerkammer des Saarlandes and Others*, paragraph 30.

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[17](#) – See *Apothekerkammer des Saarlandes and Others*, paragraph 42 and case-law cited.

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[18](#) – Paragraph 73.

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[19](#) – See *Hartlauer*, paragraph 47 and case-law cited.

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[20](#) – See *Hütter*, paragraph 41 and case-law cited.

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[21](#) – *Palacios de la Villa*, paragraph 65 and case-law cited.

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[22](#) – *Hütter*, paragraph 45 and case-law cited.

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