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Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

20 April 2023 (\*)

(Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Prohibition of discrimination on grounds of age – Article 2(1) and (2)(a) – Article 6(1) – Retirement pension – National legislation providing for a gradual alignment of the pension scheme for civil servants with the general pension scheme – First adjustment of the amount of the pension being made more quickly for one category of civil servants than for another – Justification)

In Case C-52/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Austria), made by decision of 17 January 2022, received at the Court on 26 January 2022, in the proceedings

**BF**

v

**Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB),**

THE COURT (Seventh Chamber),

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

Advocate General: T. Čapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BF, by M. Riedl, Rechtsanwalt,

- the Austrian Government, by A. Posch, J. Schmoll and F. Werni, acting as Agents,
- the European Commission, by B.-R. Killmann and D. Martin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 2(1) and (2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and of the principles of legal certainty, maintenance of established rights and effectiveness of EU law.

2 The request has been made in proceedings between BF and the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB) (Insurance fund for civil servants and officials of the public authorities, the railways and the mining sector, Austria) concerning the amount of BF's retirement pension.

## **Legal context**

### *European Union law*

3 Article 1 of Directive 2000/78, headed 'Purpose', provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

4 Article 2 of that directive, headed 'Concept of discrimination', provides:

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 Article 3 of that directive, headed ‘Scope’, states, in paragraph 1(c):

‘Within the limits of the areas of competence conferred on the [European] 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;

...’

6 As provided in Article 6 of the directive, headed ‘Justification of differences of treatment on grounds of age’:

‘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.

...

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.’

7 Article 9 of Directive 2000/78, headed ‘Defence of rights’, provides, in paragraph 1:

‘Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.’

### *Austrian law*

8 The Pensionsharmonisierungsgesetz (Law on the harmonisation of pensions) of 15 December 2004 (BGBl. I, 142/2004) introduced the Allgemeines Pensionsgesetz (General Law on pensions; ‘the APG’), which entered into force on 1 January 2005, providing for a new uniform pension scheme for anyone born after 1 January 1955, including, in principle, federal civil servants.

9 Before the entry into force of the APG, federal civil servants were exclusively covered by the pension schemes of the Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965) (Federal Law on the pension rights of federal civil servants, their survivors and members of their families (Law on pensions 1965)) of 18 November 1965 (BGBl. 340/1965; ‘the PG 1965’).

10 Paragraph 41 of the PG 1965, as amended by the Law of 15 December 2020 (BGBl. I, 135/2020) ('the PG 2020'), was worded as follows:

- '1. Amendments to this Federal Law which do not alter the amount of the benefits under this Federal Law or the conditions for entitlement to such benefits shall also apply to persons who, on the date of its entry into force, are entitled to monthly cash payments under this Federal Law. Amendments to the rules of calculation or the conditions for entitlement to benefits shall not apply to persons who, on the date of its entry into force, are entitled to benefits under this Federal Law unless expressly provided for.
2. Retirement pensions and survivors' pensions payable under this Federal Law, with the exception of the supplementary premium under Paragraph 26, shall be adjusted at the same time and in the same proportion as pensions covered by the statutory pension insurance scheme, where
  - (1) the pension entitlement has already been established prior to 1 January of the year in question, or
  - (2) they are derived from retirement pensions to which an entitlement was established prior to 1 January of the year in question.

By way of derogation from the first sentence, the first adjustment of a retirement pension shall be made with effect only from 1 January of the second calendar year following the commencement of entitlement to the retirement pension.

...

7. The pension adjustment procedure provided for in Paragraph 744(1) and (2) of the [Allgemeines Sozialversicherungsgesetz (General Law on social security) of 9 September 1955 (BGBl. 189/1955; 'the ASVG')] for the 2021 calendar year shall apply by analogy, it being understood that a person's total pension income includes the sum of all retirement and survivors' pensions payable in December 2020

– under this Federal Law on the basis of a public-law employment relationship with the Federal State,

– ...

and subject to the adjustment of pensions on 1 January 2021. When adjusting the pensions of civil servants of the *Länder* to which this Federal Law applies, no total pension income shall be established. In the event of an increase pursuant to Paragraph 744(1)(4) of the ASVG, the total amount of the increase shall be applied in full to the retirement or survivor's pension. Where a person receives two or more retirement or survivors' pensions, Paragraph 744(3) of the ASVG shall apply *mutatis mutandis*.'

11 Paragraph 41 of the PG 1965, as amended by the Pensionsanpassungsgesetz 2022 (2022 Law on the adjustment of pensions) of 13 December 2021 (BGBl. I, 210/2021) ('the PG 2022'), provides:

'1. Amendments to this Federal Law which do not alter the amount of the benefits under this Federal Law or the conditions for entitlement to such benefits shall also apply to persons who, on the date of its entry into force, are entitled to monthly cash payments under this Federal Law.

Amendments to the rules of calculation or the conditions for entitlement to benefits shall not apply to persons who, on the date of its entry into force, are entitled to benefits under this Federal Law unless expressly provided for.

2. Retirement pensions and survivors' pensions payable under this Federal Law, with the exception of the supplementary premium under Paragraph 26, shall be adjusted at the same time and in the same proportion as pensions covered by the statutory pension insurance scheme, where

(1) the pension entitlement has already been established prior to 1 January of the year in question, or

(2) they are derived from retirement pensions to which an entitlement was established prior to 1 January of the year in question.

By way of derogation from the first sentence, the first adjustment of a retirement pension shall be made as follows:

As from 1 January, retirement pensions payable from the first of a month of the previous calendar year, as specified in the left-hand column, shall be multiplied by the adjustment factor percentage specified in the right-hand column

1 January	100%
...	...

In the case of retirement pensions payable from 1 November or 1 December of the previous calendar year, the first adjustment shall be made from 1 January of the second calendar year following the commencement of entitlement to the pension. These percentages shall also apply when the first adjustment is made to survivors' pensions derived from retirement pensions which have not yet been adjusted for the first time. When the first adjustment is made to survivors' pensions derived from civil servants who died while still in service, the percentage applicable shall be that which would have been applicable if the civil servant had retired on the first day of the month following the date of his or her death.

...

7. The pension adjustment procedure provided for in Paragraph 744(1) and (2) of the ASVG for the 2021 calendar year shall apply by analogy, it being understood that a person's total pension income includes the sum of all retirement and survivors' pensions payable in December 2020

– under this Federal Law on the basis of a public-law employment relationship with the Federal State,

– ...

and subject to the adjustment of pensions on 1 January 2021. When adjusting the pensions of civil servants of the *Länder* to which this Federal Law applies, no total pension income shall be established. In the event of an increase pursuant to Paragraph 744(1)(4) of the ASVG, the total amount of the increase shall be applied in full to the retirement or survivor's pension. Where a person receives two or more retirement or survivors' pensions, Paragraph 744(3) of the ASVG shall apply *mutatis mutandis*.'

12 Paragraph 99 of the PG 1965, as amended by the Law of 17 June 2015 (BGBl. I, 65/2015) ('the PG 2015'), provided:

1. Section XIII shall apply only to civil servants who were born after 31 December 1954 and before 1 January 1976, who entered into a public-law employment relationship with the Federal Government before 1 January 2005 and who were in service on 31 December 2004.
2. The civil servant is entitled to the retirement pension or pension paid on retirement from an academic post (*Emeritierungsbezug*) calculated in accordance with the provisions of this Federal Law only to an extent corresponding to the percentage under Paragraph 7 or Paragraph 90(1), which is derived from the total pensionable period of service acquired by the civil servant up to 31 December 2004.
3. In addition to the retirement pension or pension paid on retirement from an academic post, a pension shall be calculated for the civil servant by applying the APG and Paragraphs 6(3) and 15(2) of the APG in the version in force on 31 December 2013. Paragraph 15 and Paragraph 16(5) of the APG are not applicable in that respect. The pension under the APG shall be payable to the extent corresponding to the difference between the percentage under subparagraph 2 and 100%.
4. Periods included in accordance with Paragraph 9 shall not be taken into account when applying subparagraphs 2, 3 and 6. As regards periods to be taken into account, it is the actual time when the period taken into account is completed that is decisive.
5. The civil servant's total pension shall be composed of the pro rata retirement pension or pension paid on retirement from an academic post referred to in subparagraph 2 and the pro rata pension referred to in subparagraph 3.'

13 In accordance with Paragraph 109(90) of the PG 2022, Paragraph 41(2) and (3) and Paragraph 99(3), (5) and (6) of that law are to enter into force on 1 January 2022.

14 Paragraph 108h of the ASVG, as amended by the Law of 22 October 2019 (BGBl. I, 98/2019), provided in subparagraph 1:

'With effect from 1 January of each year,

- (a) all pensions covered by pension insurance for which the qualifying date (Paragraph 223(2)) is prior to 1 January of that year,

...

shall be multiplied by the adjustment factor. ...'

15 Paragraph 108h of the ASVG, as amended by the Law of 28 January 2021 (BGBl. I, 28/2021), states:

'1. With effect from 1 January of each year,

- (a) all pensions covered by pension insurance for which the qualifying date (Paragraph 223(2)) is prior to 1 January of that year,

...

shall be multiplied by the adjustment factor.

...

1a. By way of derogation from subparagraph 1, the first adjustment shall be made in such a way that pensions for which the qualifying date (Paragraph 223(2)) is in the calendar month of the calendar year preceding the adjustment, as specified in the left-hand column, shall be increased as from 1 January by the percentage of the amount of the increase which would result from the application of the adjustment factor, as specified in the right-hand column:

February	90%
...	...

If the qualifying date is in November or December of the calendar year preceding the adjustment, the first adjustment shall be made as from 1 January of the second calendar year following the qualifying date. ...'

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

16 BF, who was born in 1958, retired from the Austrian civil service on 1 July 2020.

17 By decision of 2 December 2020, the BVAEB fixed BF's retirement pension at a gross monthly amount of EUR 4 455.43. That amount was determined on the basis of a 'parallel' calculation performed in accordance with Paragraph 99 of the PG 2015, according to which part of the retirement pension – weighted according to the division of periods of service completed before or from 2005 – is covered by the PG 1965, while the other part is covered by the APG ('the parallel calculation').

18 By letter of 26 February 2021, BF requested that the BVAEB recalculate the gross monthly amount of his retirement pension with effect from 1 January 2021, on the ground that he considered himself to be disadvantaged by comparison with former federal civil servants in receipt of a pension fixed solely on the basis of the APG, the amount of which was adjusted without delay from the first new year of receipt, whereas BF's pension, fixed on the basis of the parallel calculation, would not be adjusted until 1 January of the second year following the commencement of entitlement to the retirement pension, in this case on 1 January 2022.

19 By decision of 19 March 2021, the BVAEB confirmed that BF's retirement pension was to be fixed at a gross monthly amount of EUR 4 455.43 and that the first adjustment of that pension would not be made until 1 January 2022, in accordance with Paragraph 41(2) of the PG 2020.

20 By letter of 6 April 2021, BF brought an action before the referring court, the Bundesverwaltungsgericht (Federal Administrative Court, Austria), against that decision of the BVAEB, requesting that the first adjustment of the amount of his retirement pension be made with effect from 1 January 2021.

21 BF argued before that court, first, that Paragraph 41(2) of the PG 2020, which provides that the first adjustment of the amount of the pension is to be made only as from the second calendar year following the commencement of entitlement to a pension, is unconstitutional, in so far as the retirement pensions fixed pursuant to Paragraph 108h(1a) of the ASVG, as amended by the Law of 28 January 2021, are adjusted without delay from the first new year of receipt. Secondly, Paragraph 41(2) of the PG 2020 gives rise to discrimination on grounds of age, contrary to EU law,

since the adjustment of the amount of the retirement pension on the basis of the parallel calculation mainly concerns federal civil servants born between 1955 and 1975.

22 BF also maintains that Paragraph 41(2) of the PG 2022 eliminated future discrimination. However, in so far as that paragraph does not provide for any retroactive effect, the discrimination allegedly suffered by former federal civil servants, such as BF, whose retirement pension is determined on the basis of the parallel calculation, as compared with former federal civil servants in receipt of a retirement pension fixed solely on the basis of the APG, will be maintained retroactively.

23 According to the referring court, so far as concerns, in the first place, the situation that adversely affects former federal civil servants whose retirement pension is determined on the basis of the parallel calculation, as compared with those who receive a pension exclusively under the APG, regard must be had to the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) concerning the comparability of retirement schemes under the PG 1965 and the APG, respectively. Furthermore, the referring court considers, in that context, that retirement pensions determined pursuant to Paragraph 99(5) of the PG 2015 should be treated as ‘pay’ within the meaning of Article 3(1)(c) of Directive 2000/78.

24 As regards, in the second place, BF’s argument that, in accordance with the parallel calculation, a proportion of the amount of his retirement pension is paid under the APG, the referring court states that that share is minimal, representing as it does only approximately 9.2% of that amount.

25 In the third place, the referring court notes that the national legislature has a relatively wide discretion as regards the rules governing the service, pay and pensions of public servants.

26 With regard, in the fourth place, to the legislative amendment consisting in the adoption of Paragraph 41(2) of the PG 2022, the referring court queries whether that amendment might not be contrary to the obligation of the Member States to eliminate immediately and fully any discrimination found to exist, as shown by paragraph 24 of the judgment of 7 October 2019, *Safeway* (C-171/18, EU:C:2019:839; ‘the judgment in *Safeway*’).

27 In the fifth and last place, according to the referring court, a legislative amendment having retroactive effect in the field of pensions could lead to adjustments to the amount of the retirement pension of federal civil servants previously discriminated against and thus entail significant costs to the Federal State budget. Therefore, such a retroactive effect could undermine the financial balance of the pension scheme concerned and thus constitute an overriding reason in the public interest, enabling the Austrian legislature to justify forgoing any such retroactive effect, in line with the Court’s finding in paragraph 43 of the judgment in *Safeway*.

28 The referring court notes that EU law does not preclude Member States from taking account of budgetary considerations alongside political, social or demographic considerations, provided that, in so doing, they respect, in particular, the general principle of non-discrimination on grounds of age. In that regard, while budgetary considerations may underlie a Member State’s social policy choices and influence the nature or extent of the measures it wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/78. The referring court finds however that there is no clear indication in this case of any justification of a similar significance to that of the risk of a retirement scheme being seriously undermined that might constitute such an overriding reason in the public interest.



29 In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Are Article 2(1) and 2(2)(a) and Article 6(1) of [Directive 2000/78] and the principles of legal certainty, maintenance of established rights and effectiveness of EU law to be interpreted as precluding national legislation – such as that at issue in the main proceedings – under which the first adjustment of the retirement pension of the group of civil servants who became entitled to a retirement pension [under the PG 2020] as from 1 December 2021 at the latest is to be made with effect only from 1 January of the second calendar year following the commencement of entitlement to the retirement pension, whereas the first adjustment of the retirement pension of the group of civil servants who became or will become entitled to a retirement pension [under the PG 2022] as from 1 January 2022 is to be made with effect already from 1 January of the first calendar year following the commencement of entitlement to the retirement pension?’

### **Consideration of the question referred**

#### ***Admissibility of the request for a preliminary ruling***

30 The Austrian Government challenges the admissibility of the request for a preliminary ruling on the ground that it does not meet the requirements of Article 94(c) of the Rules of Procedure of the Court of Justice, since the referring court has not explained how the Austrian legislation at issue in the main proceedings gives rise to direct discrimination on grounds of age, contrary to Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78.

31 It submits, first, that the referring court merely refers to the unfavourable situation of federal civil servants as compared with that of beneficiaries of the general pension insurance scheme, and to the question as to whether the national legislation at issue in the main proceedings is contrary to the obligation of the Member States to end discrimination. The request for a preliminary ruling contains just one reference to unequal treatment of ‘older civil servants’ in the part of the request in which the referring court sets out BF’s arguments in that regard.

32 Secondly, according to the Austrian Government, the referring court does not set out any of the reasons that prompted it to ask the Court whether or not the national legislation at issue in the main proceedings is compatible with the principles of legal certainty, maintenance of established rights and effectiveness of EU law.

33 In that regard, it should be recalled that, according to settled case-law, although questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court of Justice to determine, enjoy a presumption of relevance, the fact nonetheless remains that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they require in order to resolve the disputes before them. The justification for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. As is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be ‘necessary’ to enable the referring court to ‘give judgment’ in the case before it. Furthermore, under Article 94(c) of the Rules of Procedure, the referring court must set out precisely the reasons for its uncertainty as to the interpretation of EU law and the relationship between those provisions of EU law and the national legislation applicable to the main proceedings

(judgment of 24 March 2021, *NAMA and Others*, C-771/19, EU:C:2021:232, paragraph 23 and the case-law cited).

34 In the present case, by setting out its doubts as to whether Paragraph 41(2) of the PG 2022 is consistent with Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78, or with the principles of legal certainty, maintenance of established rights and effectiveness of EU law, the referring court sets out the reasons that prompted it to ask the Court about the interpretation of those provisions and principles of EU law.

35 It is true, as the Austrian Government correctly points out, that the referring court does not expressly define the relationship between the national provisions at issue in the main proceedings and the principles of legal certainty, maintenance of established rights and effectiveness of EU law which it seeks to have interpreted.

36 However, it is apparent from the order for reference that the referring court is asking the Court about the interpretation of those principles in the light of the judgment in *Safeway* and the lessons to be learned from that judgment as regards the obligation of the Member States to eliminate discrimination immediately and fully.

37 Having regard to all of those points, it must be held that the request for a preliminary ruling is admissible.

### ***Substance***

38 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may find it necessary to consider provisions of EU law to which the national court has not referred in its questions (see, to that effect, judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 31 and the case-law cited). The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (State liability for air pollution)*, C-61/21, EU:C:2022:1015, paragraph 34 and the case-law cited).

39 Since it is not clear from the request for a preliminary ruling that the referring court considers that only any possible direct discrimination, within the meaning of point (a) of Article 2(2) of Directive 2000/78, and not also indirect discrimination within the meaning of point (b) of that provision, may be relevant in the main proceedings, it must be held that, by its question, the referring court seeks to ascertain, in essence, whether Article 2(1) and (2)(a) and (b) and Article 6(1) of Directive 2000/78 must be interpreted as precluding national legislation which, with a view to gradually aligning the pension scheme for civil servants with the general pension scheme, provides that the first adjustment of the amount of the retirement pension of one category of civil servants is to be made as from the second calendar year following the commencement of entitlement to a pension, whereas, for another category of civil servants, that adjustment is to be made from the first calendar year following the commencement of that entitlement.

40 In order to answer that question, it is necessary to ascertain whether the legislation at issue in the main proceedings comes within the scope of Directive 2000/78 and, if so, whether it establishes a difference in treatment on grounds of age and, should that indeed be the case, whether such a difference may be justified in the light of Article 6(1) of Directive 2000/78.

41 In the first place, with regard to the question whether the legislation at issue in the main proceedings comes within the scope of Directive 2000/78, it is apparent both from its title and preamble and from its content and purpose that that directive 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 (judgment of 15 April 2021, *Olympiako Athlitiko Kentro Athinon*, C-511/19, EU:C:2021:274, paragraph 22 and the case-law cited).

42 In addition, it is apparent from Article 3(1)(c) of that directive that it is to apply, within the limits of the areas of competence conferred on the European Union, ‘to all persons, as regards both the public and private sectors, including public bodies’, in relation, in particular, to ‘employment and working conditions, including dismissals and pay’.

43 The Court has previously had occasion to point out, in the context of a reference for a preliminary ruling which also concerned the retirement pension of Austrian federal civil servants paid under the PG 1965, that such a retirement pension comes under the notion of ‘pay’ within the meaning of Article 157 TFEU in so far as, first, the amount depends on periods of service and equivalent periods and on the salary received by the federal civil servant concerned and, secondly, that pension constitutes a future cash payment, paid by the employer to its employees, as a direct consequence of their employment relationship. Under national law, that pension is regarded as pay which continues to be paid in the context of an employment relationship which continues after the civil servant becomes entitled to retirement benefits (judgment of 5 May 2022, *BVAEB*, C-405/20, EU:C:2022:347, paragraph 30 and the case-law cited).

44 That finding cannot be called into question on the ground that, in accordance with the parallel calculation, a proportion of BF’s retirement pension is paid to him under the APG, that share being minimal, as is apparent from paragraph 24 of the present judgment.

45 Consequently, the national legislation at issue in the main proceedings comes within the scope of Directive 2000/78.

46 As regards, in the second place, the question whether that legislation gives rise to a difference in treatment on grounds of age as regards employment and occupation, it must be noted that it is apparent from Article 2(1) of Directive 2000/78, read in conjunction with Article 1 thereof, that, for the purposes of that directive, the principle of equal treatment prohibits any direct or indirect discrimination on grounds of age. Article 2(2)(a) of that directive makes clear that, for the purposes of the application of paragraph 1 thereof, direct discrimination is to be taken to occur, inter alia, where one person is treated less favourably than another person who is in a comparable situation, on any of the grounds referred to in Article 1 of that directive. Under Article 2(2)(b) of Directive 2000/78, indirect discrimination is to be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular age at a particular disadvantage compared with other persons.

47 In the present case, it should be stated, first, that the national legislation at issue in the main proceedings, namely Paragraph 41(2) of the PG 2022, does not appear to give rise to direct discrimination, since it applies irrespective of the age of the federal civil servants concerned and

refers only to the date from which such a civil servant may enforce his or her right to a retirement pension.

48 It must, however, be noted, secondly, that it is apparent from the order for reference that, by virtue of the last sentence of Paragraph 41(2) of the PG 2020, the first adjustment of a retirement pension is to be made only with effect from 1 January of the second calendar year following the commencement of entitlement to the pension, whereas under Paragraph 41(2) of the PG 2022, the retirement pensions of federal civil servants who became or will become entitled to a pension only as from 1 January 2022 are first adjusted, on the basis of a proportional calculation, with effect from 1 January of the calendar year following the commencement of entitlement to a pension. Therefore, by referring to the date from which a federal civil servant may enforce his or her right to a retirement pension, that national legislation may be interpreted as being based indirectly on an age-related criterion, since the benefit of a retirement pension is generally subject to the completion of a certain number of years' work and to the condition of having reached a certain age.

49 In that regard, the Court has held that indirect discrimination on grounds of age can be established only if it is shown that, among all the persons covered by the national legislation from which that discrimination arises, that legislation has a negative effect, without justification, on a significantly higher proportion of persons of a certain age compared with other persons (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 71).

50 Moreover, the mere fact that a new legal framework has been applied in respect of persons under a certain age cannot give rise to indirect discrimination on grounds of age to the detriment of other persons to whom the former legal framework applies (judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 73 and the case-law cited).

51 Similarly, in so far as national legislation such as that at issue in the main proceedings treats the situation of a federal civil servant differently depending on whether he or she becomes entitled to a retirement pension before or after 1 January 2022, that legislation also appears not to be based indirectly on the age of the civil servants concerned, since it is based solely on the objective point in time at which that entitlement arose, which is, however, for the referring court to verify.

52 Furthermore, as is apparent from the written observations of the Austrian Government, while it is true that federal civil servants retire in principle at the age of 65, they may nevertheless, like BF, by way of derogation and under certain conditions retire earlier or later, which would seem to indicate that the distinction made by the national legislation at issue in the main proceedings cannot put persons having a particular age at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b) of Directive 2000/78.

53 Should the referring court, which alone has jurisdiction to interpret the national legislation applicable, nevertheless conclude that the distinction made by that legislation establishes, indirectly, a difference in treatment between the federal civil servants concerned, on the basis of an apparently neutral criterion, namely the date of the commencement of entitlement to the retirement pension, it would be necessary to examine, in the third place, whether such a difference in treatment based on age would be justified in the light of Article 6(1) of Directive 2000/78.

54 Under that provision, differences of treatment on grounds of age do 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.

55 In that regard, the Court has frequently held that Member States enjoy a broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (judgment of 15 April 2021, *Olympiako Athlitiko Kentro Athinon*, C-511/19, EU:C:2021:274, paragraph 30 and the case-law cited).

56 According to the order for reference, the aim of Paragraph 41(2) of the PG 2022 is to establish, like the ASVG, a monthly pro-rata calculation of the first adjustment of the pension as from 2022, while taking fair account of the time that has elapsed between the taking of retirement and the first adjustment, thereby aiming to treat the various retirement pension adjustment schemes similarly, to prevent too great a gap from opening up between the various pension schemes covered by the PG 1965 and the APG respectively.

57 Moreover, it is apparent from the documents available to the Court that Paragraph 41(2) of the PG 2022 aims to increase, in the face of the current rising depreciation of money and increase in the cost of living, the purchasing power of former federal civil servants from the beginning of the first calendar year following the commencement of entitlement to a pension, taking fair account of the period that has elapsed between such commencement and 1 January of the following year. On the other hand, maintaining a ‘waiting year’ for federal civil servants covered by Paragraph 41(2) of the PG 2020 would ensure the long-term funding of the national pension system.

58 While budgetary considerations cannot justify discrimination on grounds of age, the objectives of ensuring the long-term funding of retirement benefits and narrowing the gap between State-funded pension levels can be considered to constitute legitimate social policy objectives wholly unrelated to any discrimination based on age (see, by analogy, judgment of 5 May 2022, *BVAEB*, C-405/20, EU:C:2022:347, paragraph 57 and the case-law cited).

59 It follows that the national legislation at issue in the main proceedings is capable of pursuing legitimate social policy objectives wholly unrelated to any discrimination based on age.

60 As to whether that legislation meets the requirements set out in paragraph 54 of the present judgment, in particular whether it is appropriate and necessary, it is apparent from the information available to the Court that Paragraph 41(2) of the PG 2022 has the effect of compensating for the disadvantages which federal civil servants who retired after 1 January 2022 must bear as a result of the reforms of the pension scheme and the lower levels of pensions compared with those of federal civil servants who retired earlier, thereby reducing the gaps between those pension levels.

61 It must therefore be concluded that the alignment of retirement pension adjustment schemes, which Paragraph 41(2) of the PG 2022 is intended to achieve, is capable of constituting a legitimate employment policy and labour market objective that may justify, within the meaning of Article 6(1) of Directive 2000/78, for a transitional period, the difference in treatment based on age between federal civil servants who retired before or after 1 January 2022, as regards the annual adjustment of the amount of their retirement pension.

62 In the light of all of the foregoing considerations, the answer to the question raised is that Article 2(1) and (2)(a) and (b) and Article 6(1) of Directive 2000/78 must be interpreted as not precluding national legislation which, with a view to gradually aligning the pension scheme for civil servants with the general pension scheme, provides that the first adjustment of the amount of the retirement pension of one category of civil servants is to be made as from the second calendar year

following the commencement of entitlement to a pension, whereas, for another category of civil servants, that adjustment is to be made from the first calendar year following the commencement of that entitlement.

### **Costs**

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

**Article 2(1) and (2)(a) and (b) and Article 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 which, with a view to gradually aligning the pension scheme for civil servants with the general pension scheme, provides that the first adjustment of the amount of the retirement pension of one category of civil servants is to be made as from the second calendar year following the commencement of entitlement to a pension, whereas, for another category of civil servants, that adjustment is to be made from the first calendar year following the commencement of that entitlement.**

[Signatures]

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\* Language of the case: German.

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