ECLI:EU:C:2023:349

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

27 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 – Retirement pension – National legislation providing, with retroactive effect, for a category of civil servants previously advantaged by the national legislation relating to retirement pension rights to be treated in the same way as a category of civil servants previously disadvantaged by that legislation)

In Case C-681/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 11 October 2021, received at the Court on 11 November 2021, in the proceedings

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)

v

BB,

THE COURT (Seventh Chamber),

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

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BB, 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).

2 The request has been made in proceedings between 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) and BB concerning the fixing of the amount of BB'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 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.’

8 Article 16 of that directive, headed ‘Compliance’, provides:

‘Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers’ and employers’ organisations are, or may be, declared null and void or are amended.’

Austrian law

9 The Allgemeines Pensionsgesetz (General Law on pensions) of 15 December 2004 (BGBl. I, 142/2004), in the version applicable to the dispute in the main proceedings ('the APG'), applies to civil servants born on or after 1 January 1955.

10 Paragraph 39 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'), in the version resulting from the Law of 30 December 2010 (BGBl. I, 111/2010) ('the PG 2010'), headed 'Repayment of wrongly received benefits', provided, in subparagraph 1:

'Benefits wrongly received (overpayments) must, in so far as they have not been received in good faith, be repaid to the Federal State.'

11 Paragraph 41 of the PG 2010 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.

3. The pension adjustment method laid down in Paragraph 634(12) of the [Allgemeines Sozialversicherungsgesetz (General Law on social security) of 9 September 1955 (BGBl. 189/1955), in the version applicable to the dispute in the main proceedings ("the ASVG")] for the 2010 calendar year shall, in the case of civil servants who were born before 1 January 1955 and were in service on 31 December 2006, be applied in the first three adjustments of their retirement pensions or of reversionary pensions derived from them, unless, for the calendar year concerned, a provision derogating from Paragraph 108h(1) of the ASVG applies.'

12 Paragraph 41(3) of the PG 1965, as amended by the 2. Dienstrechts-Novelle 2018 (2nd Law amending the rules relating to public servants 2018) of 22 December 2018 (BGBl. I, 102/2018) ('the PG 2018'), provides:

'The pension adjustment method laid down in Paragraph 634(12) of the ASVG for the 2010 calendar year shall, in the case of civil servants who were born before 1 January 1955 and were in

service on 31 December 2006 and in the case of those to whom Paragraph 99(6) is applicable, be applied in the first three adjustments of their retirement pensions or of reversionary pensions derived from them, unless, for the calendar year concerned, a provision derogating from Paragraph 108h(1) of the ASVG applies.'

13 Paragraph 99 of the PG 1965, in the version resulting from the Law of 27 December 2013 (BGBl. I, 210/2013) ('the PG 2013'), headed 'Parallel calculation', was worded as follows:

'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 pension referred to in subparagraph 2 and the pro rata pension referred to in subparagraph 3.

6. A parallel calculation shall not be carried out if the ratio of the total pensionable period of service completed as at 1 January 2005 to the total pensionable period of service is less than 5% or if the first-mentioned period of service is less than 36 months. In that case, the pension shall be calculated in accordance with the provisions of this Federal Law, with the exception of the present section.'

14 Paragraph 634(12) of the ASVG, in the version resulting from the Law of 23 May 2013 (BGBl. I, 81/2013), provides:

'By way of derogation from the first sentence of Paragraph 108h(1), the Federal Minister for Social Affairs and Consumer Protection shall, in the regulation referred to in Paragraph 108(5), adjust pensions for the 2009 and 2010 calendar years in such a way that:

(1) pensions which do not exceed 60% of the maximum contribution basis referred to in Paragraph 45 are multiplied by a factor of 1.034 for the 2009 calendar year and by the adjustment factor for the 2010 calendar year, and

(2) all other pensions are increased by a fixed amount corresponding to the increase resulting from the application, to 60% of the maximum contribution basis referred to in Paragraph 45, of a factor of 1.034 for the 2009 calendar year and of the adjustment factor for the 2010 calendar year.'

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

15 BB, who was born in 1946, retired from the civil service on 31 December 2011.

16 By decision of 9 May 2012, the BVAEB fixed her retirement pension at a gross monthly amount of EUR 3 079.57.

17 With effect from 1 January 2014, BB's retirement pension was adjusted and increased to a gross monthly amount of EUR 3 128.84, in accordance with Paragraph 41(2) of the PG 2010.

18 By letter of 20 May 2015, BB challenged, before the BVAEB, the application of Paragraph 41(3) of the PG 2010 in connection with the increase in the amount of her retirement pension for 2015 and requested that the gross monthly amount of the retirement pension to which she was entitled as from 1 January 2015 be determined by decision and that the pension arrears be paid to her. In that regard, BB claimed, inter alia, that the application of that provision was contrary to Article 2 of Directive 2000/78, in so far as it put older civil servants (born before 1 January 1955) at a disadvantage compared with younger civil servants (born on or after 1 January 1955) as regards the increase in the amount of the retirement pensions.

19 By decision of 24 June 2015, the BVAEB fixed BB's retirement pension, pursuant to Paragraph 41(1), (2) and (3) of the PG 2010, at a gross monthly amount of EUR 3 176.27 with effect from 1 January 2015. In that regard, it found that there was no discrimination on grounds of age, within the meaning of Article 2 of Directive 2000/78, because civil servants born on or after 1 January 1955 would be subject to the less favourable system of the 'parallel calculation' provided for in Paragraph 99 of the PG 2013, under which the amount of their retirement pensions is to be fixed in accordance with the PG 1965 for periods of insurance acquired before 2005, and on the basis of the APG for periods of insurance acquired as from 2005, with completed periods of service being taken into account in order for that amount to be adjusted accordingly.

20 By judgment of 19 August 2016, the Bundesverwaltungsgericht (Federal Administrative Court, Austria) dismissed the appeal brought by BB against the decision of the BVAEB of 24 June 2015, on the ground that the capping of the pension adjustment as provided for in Paragraph 41(3) of the PG 2010, which applies only to civil servants born before 1 January 1955, was compatible with Directive 2000/78. The difference in treatment was justified by the fact that, for civil servants born on or after 1 January 1955, a parallel calculation, which is less favourable to them, is applied when determining their retirement pensions.

21 By judgment of 25 October 2017, following the appeal on a point of law brought by BB, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) set aside that judgment and decided to refer the case back to the Bundesverwaltungsgericht (Federal Administrative Court), on the ground that Paragraph 41(3) of the PG 2010 constituted unjustified direct discrimination on grounds of age for civil servants born before 1 January 1955, since the 'parallel calculation' did not apply to all civil servants born after 31 December 1954, including those whose total length of pensionable service completed on or after 1 January 2005 is equal to less than 5% of the length of service taken into account for the purposes of retirement or is less than 36 months, in accordance with Paragraph 99(6) of the PG 2013.

22 The Verwaltungsgerichtshof (Supreme Administrative Court) observed that, under Paragraph 41(3) of the PG 2010 and Paragraph 99(1) and (6) of the PG 2013, there were three categories of retired civil servants, each subject to a different scheme for adjustment of retirement pensions: the first category, comprising civil servants born before 1 January 1955 whose pension

adjustment was to be capped during the first three years of receipt, in accordance with Paragraph 41(3) of the PG 2010; the second category, comprising civil servants born on or after 1 January 1955, in respect of whom a parallel calculation was to be made in accordance with Paragraph 99(1) of the PG 2013; and the third category, comprising civil servants who were also born on or after 1 January 1955, but in respect of whom there was no need to make either a capped pension adjustment or a parallel calculation, under Paragraph 99(6) of the PG 2013 ('the third category').

23 By replacement judgment (*Ersatzerkenntnis*) of 9 October 2018, the Bundesverwaltungsgericht (Federal Administrative Court) upheld the appeal brought by BB referred to in paragraph 20 of the present judgment, finding that she was entitled, with effect from 1 January 2015, to a gross monthly retirement pension of EUR 3 182.03 and to payment of the corresponding pension arrears, given that Article 2 of Directive 2000/78 precluded the application of Paragraph 41(3) of the PG 2010 to the retirement pension at issue in the main proceedings.

24 The PG 2018 amended Paragraph 41(3) of the PG 2010 with retroactive effect from 1 January 2011. By including civil servants to whom Paragraph 99(6) of the PG 2013 applies retroactively within the scope of Paragraph 41(3) of the PG 2018, that new version of the PG 1965 sought to eliminate the third category by including it in the first category mentioned in paragraph 22 of the present judgment, which is subject to a temporarily capped adjustment of retirement pensions.

25 By decision of 30 April 2019, the Verwaltungsgerichtshof (Supreme Administrative Court) dismissed as inadmissible the appeal on a point of law brought by the BVAEB against the replacement judgment (*Ersatzerkenntnis*) of the Bundesverwaltungsgericht (Federal Administrative Court) of 9 October 2018.

26 By decision of 25 July 2019, the BVAEB found, following a fresh application made by BB on 17 July 2019, that BB was entitled to a retirement pension of a gross monthly amount of EUR 3 176.27 from 1 January 2015, EUR 3 211.26 from 1 January 2016, EUR 3 236.95 from 1 January 2017, EUR 3 288.74 from 1 January 2018 and EUR 3 354.52 from 1 January 2019, since Paragraph 41(3) of the PG 2018 had ended, with retroactive effect, the discriminatory situation identified by the Verwaltungsgerichtshof (Supreme Administrative Court) in its judgment of 25 October 2017 referred to in paragraph 21 above. In accordance with that provision, the capped adjustment of the retirement pension also applied to civil servants covered by Paragraph 99(6) of the PG 2013, who had previously been exempted from that adjustment. In addition, the BVAEB concluded that BB was required to refund to the State an overpayment of the retirement pension in the amount of EUR 84.24 for the period from January to August 2019; the overpayments received by BB during the period before December 2018, on the other hand, had been received in good faith.

27 By judgment of 23 June 2020, the Bundesverwaltungsgericht (Federal Administrative Court), before which the matter had again been brought by BB, upheld BB's appeal against the decision referred to in the preceding paragraph, on the ground that Paragraph 41(3) of the PG 2018 still contravened Article 2 of Directive 2000/78. The legislative amendment adopted on the basis of the PG 2018 had not altered the situation of civil servants born before 1 January 1955, who continued to be disadvantaged, meaning that the discrimination on grounds of age was ongoing. Having regard to the force of *res judicata*, that court nevertheless dismissed that appeal in respect of 2015. It therefore ruled that BB was entitled to a retirement pension in the gross monthly amount of EUR 3 217.02 from 1 January 2016, EUR 3 242.76 from 1 January 2017, EUR 3 294.64 from 1 January 2018, EUR 3 360.53 from 1 January 2019 and EUR 3 421.02 from 1 January 2020, and that those amounts did not constitute overpayments.

28 Subsequently, the BVAEB lodged an appeal on a point of law against that judgment before the referring court, the Verwaltungsgerichtshof (Supreme Administrative Court).

29 In that context, the referring court is uncertain as to the compatibility with the principle of legal certainty of Paragraph 41(3) of the PG 2018, by means of which the category of civil servants who were previously advantaged by the national legislation, as regards their retirement pension rights ('the previously advantaged category'), was treated in the same way as the category of civil servants previously disadvantaged by that legislation ('the previously disadvantaged category').

30 Furthermore, the referring court queries, first, whether that provision is consistent with the obligation, arising from the case-law of the Court, in particular the judgment of 7 October 2019, *Safeway* (C-171/18, EU:C:2019:839, paragraphs 34 and 41 and the case-law cited), to eliminate discrimination immediately and in full once it has been identified, and to prohibit the removal, with retroactive effect, of the advantages enjoyed by the previously advantaged category. Secondly, it queries whether it is possible to apply that case-law to the situation at issue in the main proceedings.

31 The need to ensure that the acquired rights and legitimate expectations of the previously advantaged category are protected follows from the Court's case-law on discrimination on grounds of age, in particular the judgment of 8 May 2019, *Leitner* (C-396/17, EU:C:2019:375, paragraph 49). In the present case, it is precisely the acquired rights of the previously advantaged category that are not protected by Paragraph 41(3) of the PG 2018.

32 It is true that the Court held, in its judgment of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraph 49), that it is not mandatory, in all cases of discrimination on grounds of age, to award financial compensation corresponding to the difference in the amounts of benefits according to whether or not there is discrimination. The referring court is uncertain, however, whether that case-law can be applied to circumstances such as those at issue in the main proceedings, in so far as, in the case which gave rise to that judgment, the acquired rights of civil servants within the previously advantaged category had been preserved, unlike the situation in the main proceedings.

33 In any event, the Court had not yet ruled on the question as to whether it is compatible with EU law for an amendment of a national provision, with retroactive effects, ultimately to place the previously advantaged category on an equal footing with the previously disadvantaged category by removing the element which gave rise to the difference in treatment so that persons previously discriminated against on grounds of age have no financial right.

34 Furthermore, the referring court observes that the right to an effective remedy is guaranteed not only by the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union but also by Directive 2000/78, Article 9 of which provides that Member States are to ensure that all persons who consider themselves wronged by discrimination are able to enforce their rights. Yet the right to an effective remedy would be rendered wholly ineffective if it were to be considered compatible with EU law to amend national legislation so as to enable discrimination on grounds of age to be eliminated retroactively without those who have suffered discrimination being guaranteed the possibility of receiving financial compensation corresponding to payment of the pecuniary rights which they would have obtained had the discrimination in question not taken place.

35 In those circumstances, the Verwaltungsgerichtshof (Supreme 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 a previously advantaged category of civil servants is retroactively no longer entitled to pension benefits accruing on the basis of a pension adjustment, and which, in that way (retroactive removal of the previously advantaged category by now placing it on an equal footing with the previously disadvantaged category), has the effect that the previously disadvantaged category of civil servants is also not/no longer entitled to pension benefits accruing on the basis of the pension adjustment to which the latter category would have been entitled because of discrimination on grounds of age which has already been (on several occasions) judicially established – as a result of the non-application of a national provision which is contrary to EU law for the purpose of establishing equal treatment with the previously advantaged category?’

Procedure before the Court

36 By decision of the President of the Court of 5 July 2022, a request for information was sent to the referring court, inviting it to clarify, in the light of the content of the request for a preliminary ruling, how precisely the Court’s answer to the question raised, based as that question is on the premiss of the retroactive application of the national legislation at issue, would be useful for the resolution of the dispute in the main proceedings.

37 By letter of 2 September 2022, received by the Court Registry on 8 September 2022, the referring court replied to that request for information, reiterating, first of all, the statement of reasons demonstrating the relevance of the request for a preliminary ruling to the outcome of the dispute in the main proceedings. It went on to state, first, that it is required, in the context of the dispute in the main proceedings, to determine whether the amount of the retirement pensions fixed by the Bundesverwaltungsgericht (Federal Administrative Court) as being payable to BB for the years 2015 to 2018, on the one hand, and from 1 January 2019, on the other, is consistent with the applicable national legislation, taking EU law into account. The referring court emphasised, secondly, that the dispute in the main proceedings thus concerns, above all, the determination of the amount of retirement pension payable, and not whether or not it would have been necessary to recover any benefits that may have been wrongly received in the past. It thus made it clear, thirdly, that, should the Court find that EU law does not preclude a national provision such as Paragraph 41(3) of the PG 2018, the amount of the retirement pension payable to BB would be too high and consequently unlawful, thus entailing an adjustment of that pension. In that regard, the referring court noted, fourthly, that such an adjustment would be made irrespective of whether BB might have been required to repay benefits wrongly received in the past or whether she could keep them in reliance on her good faith. Fifthly, the referring court stated that the question of the possible recovery of benefits wrongly received would arise only if it were established that Paragraph 41(3) of the PG 2018 was applicable. It concluded, sixthly, that, even if the retroactive effect of the legislation at issue materialised with respect to the period from 1 January 2019, the compatibility of that legislation with EU law would still be decisive in terms of ascertaining the applicable legal basis for fixing the amount and the annual adjustment of BB’s retirement pension both retroactively and for the future, irrespective of any recovery of benefits wrongly received.

Consideration of the question referred

38 By its question, the referring court asks, in essence, whether Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as precluding national legislation which, in order to end discrimination on grounds of age, provides for the retirement pension scheme for civil servants within the previously advantaged category to be treated, with retroactive effect, in the same

way as the retirement pension scheme for civil servants within the previously disadvantaged category.

39 As a preliminary point, it must be noted that it is apparent from the request for a preliminary ruling that the question raised by the referring court is based on the premiss that, first, Paragraph 41(3) of the PG 2010 constituted direct discrimination on grounds of age for civil servants born before 1 January 1955 and, secondly, the national legislature's adoption of Paragraph 41(3) of the PG 2018 was intended to eliminate that discrimination on grounds of age. It is solely in the light of that premiss that the Court will examine the question raised.

40 In order to answer that question, it should be recalled at the outset that it follows both from the title and preamble and from the content and purpose of Directive 2000/78 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 3 June 2021, *Ministero della Giustizia (Notaries)*, C-914/19, EU:C:2021:430, paragraph 21 and the case-law cited).

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

42 It must also be pointed out, as 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 requires, inter alia, that there be no direct or indirect discrimination on grounds of age. Article 2(2)(a) of the directive states that, for the purposes of applying Article 2(1), direct discrimination is to be taken to occur, inter alia, 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 that directive.

43 Notwithstanding Article 2(2) of Directive 2000/78, Member States may, in accordance with Article 6(1) thereof, provide that differences of treatment on grounds of age are not to 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.

44 In that regard, it should be noted that, according to settled case-law of the Court, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned (judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 79 and the case-law cited).

45 Consequently, it would be contrary to the objective of the harmonisation of working conditions and to the principle of legal certainty to allow the authorities with responsibility for the pension scheme concerned to eliminate discrimination by adopting a measure equalising, with retroactive effect, the scheme for previously favoured persons to the level of the scheme for previously disadvantaged persons. To accept such an approach would relieve those authorities of the obligation, after the finding of discrimination, to eliminate it immediately and in full (see, to that

effect, judgment of 7 October 2019, *Safeway*, C-171/18, EU:C:2019:839, paragraphs 34 and 41 and the case-law cited).

46 The considerations set out in the preceding paragraph are applicable only if measures reinstating equal treatment have not been adopted by the national legislature (see, to that effect, judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 77 and the case-law cited).

47 However, as regards the period after the adoption of measures reinstating equal treatment by the competent legislature, the Court held that Article 119 EC (now Article 157 TFEU) does not preclude such measures from providing for the advantages of the persons previously favoured to be reduced to the level of the scheme applicable to previously disadvantaged persons (see, to that effect, judgment of 7 October 2019, *Safeway*, C-171/18, EU:C:2019:839, paragraph 18 and the case-law cited).

48 Contrary to what the European Commission maintains in its written observations, the conclusions to be drawn from that judgment are intended also to apply in the context of Directive 2000/78, in a situation such as that in the main proceedings, in so far as that situation was characterised, as regards the period prior to the entry into force of the PG 2018, by the existence of a valid point of reference, namely the third category (see, by analogy, judgment of 22 January 2019, *Cresco Investigation*, C-193/17, EU:C:2019:43, paragraph 81 and the case-law cited).

49 It follows that the national legislature was entitled, in the light of EU law, once compliant legislation was introduced – in this case by the adoption of the PG 2018 – to treat the retirement pension scheme for civil servants within the previously advantaged category in the same way as that of civil servants within the previously disadvantaged category.

50 It must be held that although Member States are obliged, in accordance with Article 16 of Directive 2000/78, to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished, that article does not require Member States to adopt specific measures to be taken in the event of a breach of the prohibition of discrimination but leaves them free to choose, from among the different solutions suitable for achieving its intended objective, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise (judgment of 8 May 2019, *Leitner*, C-396/17, EU:C:2019:375, paragraph 78 and the case-law cited).

51 However, it follows from the Court's case-law that, as a general rule, the principle of legal certainty precludes a measure implementing EU law from having retroactive effect. In that regard, it must be recalled that that principle of legal certainty, which is one of the general principles of EU law, requires, particularly, that rules of law be clear, precise and predictable in their effects (judgment of 13 February 2019, *Human Operator*, C-434/17, EU:C:2019:112, paragraph 34 and the case-law cited). Accordingly, a measure implementing EU law may only exceptionally be given retroactive effect, where an overriding reason in the public interest so demands and where the legitimate expectations of those concerned are duly respected (see, to that effect, judgment of 7 October 2019, *Safeway*, C-171/18, EU:C:2019:839, paragraph 38 and the case-law cited).

52 As regards, in the first place, the requirement of an overriding reason in the public interest, it should be noted that the risk of seriously undermining the financial balance of the pension scheme concerned may constitute such an overriding reason (see, to that effect, judgment of 7 October 2019, *Safeway*, C-171/18, EU:C:2019:839, paragraph 43 and the case-law cited). It does not appear from the file before the Court, however, that any such overriding reason was put forward to justify the retroactive effect of the national legislation at issue in the main proceedings. While the Austrian

Government admittedly states in its written observations that Paragraph 41(3) of the PG 2018 is intended to ensure a fair balance between older and younger civil servants in the sharing of the burdens which are supposed to ensure the long-term funding of the retirement pension scheme, it nevertheless appears that such a consideration cannot be sufficient to establish that treating the retirement scheme for civil servants within the previously advantaged category retroactively in the same way as that of civil servants within the previously disadvantaged category was necessary in order to avoid seriously undermining the financial balance of the pension scheme concerned. The Austrian Government's observation that it is apparent from the case-law of the Court that the objectives of ensuring the long-term funding of retirement pensions and reducing the gap between State-funded pension levels could be regarded, in view of the wide discretion enjoyed by the Member States, as constituting legitimate social policy objectives, is not capable, in the absence of other relevant information from which it might be concluded that such objectives do exist, of establishing that the measure in question did indeed address such an overriding reason in the public interest. It follows that there appears to be no objective justification for the retroactive application of that measure, which it is nevertheless for the referring court to ascertain.

53 As regards, in the second place, the protection of the legitimate expectations of the persons concerned, it must be recalled that it is apparent from the order for reference and from the reply given by the referring court to the Court's request for information that, under Paragraph 39 of the PG 2010, only 'benefits wrongly received (overpayments) must, in so far as they have not been received in good faith, be repaid to the Federal State'. It follows that, subject to the checks which it is for the referring court to make in the light of all of the relevant circumstances of the dispute before it, the national legislation at issue in the main proceedings is capable of protecting the legitimate expectations of the persons concerned through the possible application of Paragraph 39 of the PG 2010.

54 In the light of the foregoing considerations, the answer to the question raised is that Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as precluding, in the absence of an overriding reason in the public interest, national legislation which, in order to end discrimination on grounds of age, provides for the retirement pension scheme for a category of civil servants previously advantaged by the national legislation relating to retirement pension rights to be treated, with retroactive effect, in the same way as the retirement pension scheme for the category of civil servants previously disadvantaged by that legislation.

Costs

55 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 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 precluding, in the absence of an overriding reason in the public interest, national legislation which, in order to end discrimination on grounds of age, provides for the retirement pension scheme for a category of civil servants previously advantaged by the national legislation relating to retirement pension rights to be treated, with retroactive effect, in the same way as the retirement pension scheme for the category of civil servants previously disadvantaged by that legislation.

[Signatures]

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* Language of the case: German.