Case C-405/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

28 August 2020

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

31 July 2020

Appellants on a point of law:

EB

JS

DP

Respondent authority:

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)

Subject matter of the main proceedings

Challenge to the determination of the retirement pension payable under an allegedly discriminatory pension adjustment scheme

Subject matter and legal basis of the reference for a preliminary ruling

Interpretation of EU law; Article 267 TFEU

Questions referred

1. Must the limitation of the scope *ratione temporis* of the requirement of equal treatment for men and women laid down in the judgment in Case C-262/88,

Barber, as well as in Protocol No 33 concerning Article 157 TFEU and Article 12 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ('Directive 2006/54/EC'), be interpreted as meaning that an (Austrian) pensioner cannot lawfully rely on the requirement of equal treatment for men and women, or can do so only (in part) in respect of that part of his entitlement that relates to periods of employment after 1 January 1994, in order to claim that he has been discriminated against by rules on an adjustment of civil servants' pensions laid down for 2018 such as that which was applied in the main proceedings?

2. Must the requirement of equal treatment for men and women (pursuant to Article 157 TFEU in conjunction with Article 5 of Directive 2006/54/EC) be interpreted as meaning that indirect discrimination such as that which – in some cases – results from the rules, at issue in the main proceedings, concerning the 2018 pension adjustment, even in the light of similar measures adopted previously and the considerable loss caused by the cumulative effect of those measures as compared with an adjustment of the actual value of pensions to take into account inflation (in this instance, a loss of 25%), is justified in particular

– in order to avoid a 'divide' between higher and lower pensions (caused by periodic adjustment at a single rate), even though this would be purely nominal and would leave the differential between the two unchanged,

– in order to put in place a general 'social component' in the form of steps to increase the purchasing power of those on lower pensions, even though (a) that objective could be attained even without limiting the adjustment of higher pensions and (b) the legislature does not also provide for the same type of measure to increase purchasing power when it comes to adjusting for inflation the salaries of lower-paid civil servants (to the detriment of the adjustment applied to the salaries of higher-paid civil servants), and has also not laid down rules for a comparable intervention in the adjustment applied to the value of pensions under other occupational social security schemes (in which the State does not participate) in order to increase the purchasing power of lower pensions (to the detriment of the adjustment of higher pensions),

– in order to maintain and finance 'the scheme', even though civil service pensions are payable not by an insurer-operated scheme organised in the form of insurance and financed from contributions, but by the Federal Government as employer of retired civil servants and in consideration for work performed, so that the maintenance or financing of a scheme is not decisive, the only relevant considerations, ultimately, being budgetary,

– because the fact that the statistically much higher representation of men among recipients of higher pensions is to be regarded as the consequence of the lack of equal opportunities for women in matters of employment and occupation that was typical in the past in particular, constitutes an independent ground of

justification or (upstream of that) rules out from the outset any assumption of indirect discrimination on grounds of sex, within the meaning of Directive 2006/54/EC, to the detriment of men, or

– because the scheme is permissible as positive action for the purposes of Article 157(4) TFEU.

Provisions of EU law cited

Article 157 TFEU

Protocol (No 33) concerning Article 157 of the Treaty on the Functioning of the European Union

Agreement on the European Economic Area, Articles 6 and 69

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, Articles 1, 2, 3, 4, 5, 6, 7 and 12; recitals 14, 17 and 18

Provisions of national law cited and parliamentary documents cited

Pensionsgesetz 1965 (Law on Pensions 1965), Paragraph 41

Allgemeines Sozialversicherungsgesetz (General Law on Social Insurance), Paragraphs 108f, 108h and 711

Pensionsharmonisierungsgesetz 2004 (2004 Law on the Harmonisation of Pensions) and parliamentary documents (RV 653 BlgNR 22. GP)

Pensionsanpassungsgesetz 2018 (2018 Law on the Adjustment of Pensions) and parliamentary documents (RV 1767 BlgNR 25. GP)

Brief summary of the facts and procedure

1 The appellants on a point of law each have a relationship with the Federal Government that is governed by public law and receive pensions under the Law on Pensions 1965 (‘PG 1965’).

2 The appellant on a point of law in the appeal proceedings registered under number Ro 2019/12/0005 was born on 5 February 1940 and retired on 31 August 2000. In 2017, he received a gross pension of EUR 6 872.43 per month. The appellant on a point of law in the appeal proceedings registered under number Ra 2019/12/0006 was born on 28 July 1948 and retired on 30 November 2013. In 2017, he received a gross pension of EUR 4 676.48 per month. The appellant on a point of law in the

appeal proceedings registered under number Ra 2019/12/0054 was born on 11 January 1941 and retired on 1 March 2006. In 2017, he received a gross pension of EUR 5 713.22 per month.

3 The appellants on a point of law each requested that the amount of their pension be determined by decision with effect from 1 January 2018. The decisions taken in respect of the appellants on a point of law in cases Ro 2019/12/0005 and Ra 2019/12/0054 found in this regard that there was no need to adjust the amount of their pensions for 2018, since their pensions exceeded the upper limit of EUR 4 980 per month that had been set for adjustments. The decision taken in respect of the appellant on a point of law in case Ra 2019/12/0006 increased his pension by 0.2989%.

4 The appellants on a point of law challenged those decisions on the ground that the 2018 pension adjustment rules applicable to them were contrary to EU law because they gave rise to indirect discrimination on grounds of sex. Appeals on a point of law against the judgments of the Bundesverwaltungsgericht (Federal Administrative Court, Austria) ('BVwG') in those three cases are now pending before the referring court.

5 The background to the case is the change of law which the referring court describes as follows. As part of the 2004 Law on the Harmonisation of Pension, Austrian social insurance law (and the law governing civil service pensions) was the subject of new rules on the arrangements applicable to the annual adjustment of pension values. In the general provision contained in Paragraph 108h of the Allgemeines Sozialversicherungsgesetz (General Law on Social Insurance) ('the ASVG'), the legislature stipulated that pensions must be annually adjusted to the rate of inflation. The aim of that rule was to peg pensions to changes in consumer prices and thus to ensure that pensioners retained their purchasing power throughout the reference period.

6 The appellants on a point of law draw their pensions not under the ASVG but under the PG 1965, which governs the pensions of civil servants who were born before 1955, had entered into an employment relationship governed by public law by 2005 at the latest and have subsequently retired.

7 Up until the entry into force of the first Budgetbegleitgesetz 1997 (Law accompanying the budget of 1997), the PG 1965 provided for (civil servants') pensions to be periodically adjusted by means of increases in pensions to bring them into line with increases in the salaries of working civil servants. Since the first Law accompanying the budget of 1997, the adjustment of civil servants' pensions has been provided for in the form of the reference in Paragraph 41 of the PG 1965 to provisions of the ASVG. In the current version of Paragraph 41(2) of the PG 1965, that reference to the ASVG is worded in such a way as to stipulate that pensions under the PG 1965 'shall be adjusted at the same time and in the same proportion as pensions covered by the statutory pension insurance scheme'.

Paragraph 41(4) of the PG 1965 states that the special provision concerning the 2018 pension adjustment is applicable.

8 It follows from the parliamentary documents relating to the rules in the 2004 Law on the Harmonisation of Pensions concerning periodic pension adjustment under the ASVG that the intention was to introduce a scheme based on the principle that the value adjustment provided for to take account of inflation would automatically be applied to all pensions every year in an amount in line with the increase in consumer prices. It is also apparent from those documents that, although this was intended to be a general, long-term scheme, the legislature nonetheless had the option of derogating from it by providing for limited exceptions in specific years. In the years since then, the legislature has repeatedly derogated from the aforementioned general scheme of rules governing pension adjustments laid down in the ASVG in 2004, and has created in respect of the general regime of pegging pension adjustments to the rate of inflation individual exceptions the effect of which has been: in some years, to lower the pension increase (by calibrating it according to the amount of the pension); in many years, to reduce it in percentage terms (without distinction as to the amount of the pension); and, in many years, to eliminate it altogether.

9 For 2018, the legislature created such an ad hoc derogation in the 2018 Law on the Adjustment of Pensions ('PAG 2018'), determined the level of pension adjustment according to a scale decreasing in proportion to the level of pension benefit, excluded from any adjustment at all pensions of EUR 4 980 per month or more and fixed the adjustment applicable to pensions corresponding to a level of benefit of between EUR 3 355 to EUR 4 989 according to a percentage decreasing on a linear basis from 1.6% to 0% (Paragraph 711 of the ASVG).

Main arguments of the parties to the main proceedings

10 In their appeals before the BVwG, the appellants on a point of law submitted that, from 1995, the salary and pension law applicable to them had continuously changed for the worse. Since 31 December 1998, the level of pension benefit is no longer adjusted in line with salary trends (as had been provided for in the version of Paragraph 41(2) of the PG 1965 applicable hitherto), but according to an adjustment factor which essentially reflects changes in purchasing power.

11 To illustrate the disadvantages they have experienced in recent years as a result of the periodic adjustment of the level of their pension benefit, the appellants on a point of law listed the adjustment schemes adopted each year between 2001 and 2017. According to that list, the pension adjustments applied each year between 2001 and 2012 were such that higher levels of pension benefit (as compared with lower levels of pension benefit) were adjusted to a lesser extent or by only a fixed amount, and, even in those years in which pensions were adjusted without distinction according to the level of pension benefit, the increase was well below the adjustment factor laid down in principle.

12 In 2018, the scheme at issue in the present case came into force. As a result of that scheme, two of the appellants on a point of law were excluded from the pension adjustment and the third received a substantially reduced pension adjustment.

13 According to the appellants on a point of law, the scheme adopted under the PAG 2018 gives rise to indirect discrimination on grounds of sex which is contrary to EU law. To demonstrate that the scheme has those effects, the appellants on a point of law submitted a statistical analysis which breaks down the recipients of retirement pensions and welfare benefits under the PG 1965 according to sex and level of benefit. This shows that those in receipt of a level of benefit in excess of EUR 4 980 comprise a total of 8 417 men and only 1 086 women (an overall ratio of 1:7.7). If account is taken only of retirement pensions (to the exclusion, that is to say, of welfare benefits), men account for 8 417 of the beneficiaries and women 1 040 (a ratio of 1:8).

14 On the claim of discrimination of grounds of sex that is contrary to EU law, the BVwG held that there were grounds of justification in all three cases, stating in this regard that the findings of the Court of Justice in the judgment of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675), could not be transposed to the situation in this instance, since this case concerned not with discrimination in relation to 'minimum pensions' but with a disadvantage based on sex suffered by recipients of 'higher pensions', in respect of which 'a different standard' had to be applied. It further held that the 'better position of a group' is not capable of constituting discrimination if it is linked to a disadvantage in connection with the increase of benefit.

15 The respondent authority contends that there is also a 'social component' to the objectives pursued by the scheme provided for in the PAG 2018.

16 This is demonstrated by the fact that, in recent decades, there have been hardly any linear pension adjustments which have increased pensions to the same extent in percentage terms. Since 2006, pensions have been increased by the same percentage in only 2013, 2014, 2015 and 2017. In all other years, pension adjustments have been socially calibrated in favour of lower pensions. If the principle of adjusting pensions by the same percentage without distinction as to the level of benefit were adopted every year, this would very quickly give rise to an unjustifiable divide.

17 It is therefore reasonable, from the point of view of both maintaining purchasing power and achieving a social balance, that the legislature should intervene by legislating to support those on low incomes while viewing those on higher incomes as not needing to have their purchasing power increased. It is clearly possible to apply a lesser adjustment to very high pensions than to small pensions without jeopardising the value of a (still well above average) pension or a standard of living already attained. The discretion to take into account social considerations is particularly extensive in this instance because very high pensions are still much less contributions-based than low pensions, with the result that, in the case of the

latter, regard is to be had ‘less to the principle of adequacy than to the principle of welfare’. However, a person in receipt of a pension may in any event be ‘regarded as enjoying an adequate level of benefit even if’ his pension, ‘which exceeds by 150% the maximum pension available under the ASVG’, is not adjusted to the same extent as small and medium-sized pensions.

18 In the case of high pensions, a smaller adjustment is not only reasonable, but also, as a social solidarity measure aimed at offsetting the receipt of a particularly high pension benefit, positively required. The choice made by the legislature to calibrate the 2018 pension adjustment to take into account social considerations is justified by the fact that small and medium-sized pensions are particularly affected by above-average rises in food prices and the cost of living.

Succinct presentation of the reasons for the request for a preliminary ruling

The first question

19 The fact that (for retired civil servants, at least) the pension adjustment at issue must be classified as ‘pay’ and constitutes a benefit under an ‘occupational social security scheme’ within the meaning ascribed to those terms under EU law is of relevance to the cases in the main proceedings, inasmuch as the application *ratione temporae* of the principle of equal treatment for men and women to benefits under occupational social security schemes was limited by the judgment of 7 May 1990, *Barber* (C-262/88, EU:C:1990:209). In that connection, it is important to clarify whether that limitation is applicable to the pension adjustment scheme at issue in the main proceedings (and, if so, what kind of impact this will have).

20 The Court of Justice has classified civil servants’ pensions as provided for in the legislation of individual Member States as ‘pay’ within the meaning of Article 157 TFEU and as ‘benefits under an occupational social security scheme’ within the meaning of Directive 2006/54/EC (or its predecessor, Directive 86/378/EEC).

21 The Court of Justice has already, in its judgment of 21 January 2015, *Felber* (C-529/13, EU:C:2015:20, paragraph 23), classified the pensions of Austrian federal civil servants as provided for in the PG 1965 as pay within the meaning of Article 157 TFEU. In its judgment of 16 June 2016, *Lesar* (C-159/15, EU:C:2016:451, paragraphs 27 to 29), the Court of Justice also held in that regard that those pensions were to be classified as benefits under an occupational social security scheme within the meaning of the definitions contained in Directive 2006/54/EC. It follows that the pensions drawn by the appellants on a point of law fall within the concept of pay as provided for in Article 157 TFEU and must be regarded as benefits under an occupational social security schemes within the meaning of Protocol No 33 concerning Article 157 TFEU and Chapter 2 of Directive 2006/54/EC.

22 In the case of benefits under occupational social security schemes, Protocol No 33 concerning Article 157 TFEU and Article 12 of Directive 2006/54/EC attach a time limitation to the requirement of equal treatment for men and women. That limitation can be traced back to the restriction laid down in the judgment in *Barber* (C-262/88, EU:C:1990:209) with respect to the temporal effects of that judgment.

23 In the case of those Member States which – like Austria – acceded to the European Economic Area on 1 January 1994, the Court of Justice has further held that, in accordance with Articles 6 and 69 of the EEA Agreement, that agreement, so far as its applicability *ratione temporae* to pensions under an occupational social security scheme is concerned, must be interpreted in the light of the judgment in *Barber* (C-262/88, EU:C:1990:209). The consequence of this is that the principle of equal pay for men and women 'cannot be invoked in respect of pension benefits relating to periods of work prior to 1 January 1994' (judgment of 12 September 2002, *Niemi*, C-351/00, EU:C:2002:480, paragraph 55). The same now follows from Article 12(3) of Directive 2006/54/EC too.

24 In the view of the referring court, there is therefore no doubt, at least so far as pension entitlement in principle and the initial level of that entitlement (also indirectly dependent on periods of employment) are concerned, that pension beneficiaries may in principle rely on the requirement of equal treatment for men and women only in so far as they claim benefits arising from periods of employment after 1 January 1994.

25 It falls to be clarified, however, whether and, if so, to what extent that temporal limitation also affects the ability of the appellants on a point of law to rely on the requirement of equal treatment for men and women in relation to the 2018 pension adjustment.

26 There are three possible answers to that question. First, the pension adjustment may be regarded as a benefit component attributable to periods of employment prior to 1 January 1994, in which case the appellants on a point of law are precluded outright from relying on the principle of equal treatment laid down in Article 157 TFEU and Directive 2006/54/EC. Militating against that interpretation, however, are not only the clarifications contained in the judgments in *Ten Oever* (C-109/91, EU:C:1993:833) and *Neath* (C-152/91, EU:C:1993:949) but also the formulation 'if and in so far as' contained in Protocol No 33, which appears to limit any effect of the temporal limitation to the extent to which the periods of employment predate the deadline.

27 This would support a second possible interpretation, to the effect that reliance on the requirement of equal treatment in connection with pension entitlement is excluded only in so far as the completed periods of employment predate the aforementioned deadline. The effect of this second possible interpretation might be to make it necessary, in the case of the pension adjustment applicable to the appellants on a point of law, to determine the periods of employment they each

completed after 1 January 1994 as a share of their entire employment history and to ensure that that pension adjustment is applied in a non-discriminatory manner in respect of that share alone.

28 A third possible interpretation could be that the temporal limitation of Protocol No 33 that flows from the judgment in *Barber* (C-262/88, EU:C:1990:209) (and Article 12 of Directive 2006/54/EC) is inapplicable from the outset to benefit components such as those forming part of an annual pension adjustment. In the view of the referring court, the following reasons militate in favour of this interpretation:

29 The appellants on a point of law do not rely on the principle of equal treatment in relation to the commencement of the payment of benefit – which is dictated by the periods of employment completed – or the calculation of the original level of the pension itself, but, rather, seek equal treatment in relation to an adjustment of their entitlement that is to be carried out (anew) every year. Domestic law does not determine the annual pension adjustment by reference to certain periods of employment; the adjustment must be made without distinction as to whether it concerns pension beneficiaries having completed periods of employment before or after 1994.

30 The referring court is uncertain not least as to whether, for the purposes of Protocol No 33, payment of the pension adjustment is to be regarded as a benefit that may be 'attributed' to certain periods of employment.

31 Also likely to militate against the applicability of the temporal limitation introduced by the judgment in *Barber* (C-262/88, EU:C:1990:209) and endorsed by Protocol No 33 (and Article 12 of Directive 2006/54/EC) is its purpose. That temporal limitation was imposed by the Court of Justice in the interests of the protection of legitimate expectations. The Court's previous case-law is also unlikely to support the inference that the temporal limitation of the requirement of equal treatment is applicable to the pension adjustment at issue in the main proceedings. The particular judgments in which the temporal limitation laid down in the judgment in *Barber* and in the Protocol concerning Article 157 TFEU was applicable concerned situations involving claims under national schemes the rules of which linked entitlement to the completion of periods of employment or qualifying periods, which is to say that they made receipt of a benefit conditional upon specified periods of service (see, inter alia, judgments of 6 October 1993, *Ten Oever*, C-109/91, EU:C:1993:833, paragraph 3, of 22 December 1993, *Neath*, C-152/91, EU:C:1993:949, paragraphs 3 to 5, of 12 September 2002, *Niemi*, C-351/00, EU:C:2002:480, paragraph 13; and of 23 October 2003, *Schönheit and Becker*, C-4/01 and C-5/02, EU:C:2003:583, paragraphs 17 and 20).

32 In the judgment of 28 September 1994, *Coloroll Pension Trustees* (C-200/91, EU:C:1994:348), the Court of Justice was called upon to rule on the extent to which the temporal limit laid down in the judgment in *Barber* (C-262/88, EU:C:1990:209) is applicable to benefits 'not linked to the length of actual

service'. In that regard, it held that, in the case of a benefit which 'is payable solely by reason of an employment relationship existing at the time of the event triggering payment of the benefit', and is payable 'irrespective of the length of previous periods of service', the limitation of the temporal effects of the judgment in *Barber* applies 'only where that operative event occurred before 17 May 1990' (see paragraphs 57 to 60 of that judgment).

33 The referring court takes the view, on the basis of that case-law, that there are indications to support the assumption that that temporal limitation is not applicable to the 2018 pension adjustment either.

The second question

34 According to the settled case-law of the Court of Justice, indirect discrimination on grounds of sex arises inter alia where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage than the other. Such a measure is compatible with the principle of equal treatment only if the difference in treatment between the two categories of persons to which it gives rise is justified by objective factors unrelated to any discrimination on grounds of sex (see judgments in *Brachner*, C-123/10, EU:C:2011:675, paragraph 56, and of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraph 41).

35 It follows from Paragraph 41(1) of the PG 1965 (in conjunction with Paragraphs 108h and 711 of the ASVG) that retired civil servants in receipt of a gross monthly pension in excess of a certain amount are, by comparison with those on a lower pension, placed at a disadvantage in relation to the annual adjustment of pensions for inflation, since, unlike beneficiaries of lower pensions, they are (either entirely or almost entirely) excluded from such an enhancement for 2018.

36 In the light of the case-law cited above, that disadvantage may give rise to discrimination on grounds of sex if it affects significantly more men than women. That is the position which the BVwG has taken in the judgments under appeal. The referring court is therefore faced with the question as to whether any indirect discrimination on grounds of sex to which the 2018 pension adjustment gives rise may be regarded as justified in the light of EU law.

37 The social component to which the respondent authority in particular has referred raises questions as to whether the objectives of Paragraph 41 of the PG 1965 are achieved not only proportionately but also in a sufficiently consistent and systematic fashion to meet the requirements applicable to the justification of discrimination under EU law.

38 It is true that the Member States enjoy a broad discretion in the area of social policy. However, that discretion must not have the effect of frustrating the implementation of a fundamental principle of EU law such as equal pay for men

and women. For, any reliance by way of justification for the adjustment scheme on the notion of social balance between recipients of higher benefits and recipients of lower benefits runs into uncertainties as to whether that measure is manifestly necessary, suitable and, in particular, coherent.

39 With regard to the aforementioned social considerations, those uncertainties stem from the fact that that measure is limited to pension beneficiaries (and, moreover, to only certain categories of pension beneficiary). Social policy measures thus exist in the form of appropriate instruments the scope of which is defined by the subject matter of the instrument in question (progressive income tax rates, transfers and other tax-funded assistance). In so far as social balance is relied on as a justification for the scheme at issue, there are therefore clear discrepancies with general social policy instruments, inasmuch as intervention in the adjustment of pension values warrants the adoption of measures aimed (only) at a certain section of the population (certain pension beneficiaries) and, for that group of persons, those measures come on top of the social policy instruments in place in any case, while other sections of the population remain excluded from any such additional measure.

40 The special nature of pensions under the PG 1965 is a further cause for uncertainty as to the coherence of that measure. Under national law, the persons affected by the scheme provided for in Paragraph 41 of the PG 1965 (retired civil servants), at issue here, are in a special position which sets them fundamentally apart from recipients of pensions under schemes governed by social insurance law: even though, for the purposes of the adjustment of pensions, the PG 1965 refers to specific provisions of the ASVG, the pension law laid down in the PG 1965 is, in terms of its purpose, financing and legal nature, based on a concept different from that which underpins pensions under schemes governed by social insurance law (such as the ASVG).

41 The special feature of the status of civil servant lies first in the fact that appointment as a civil servant creates an employment relationship for life. As a result of its lifelong nature, the employment relationship of civil servants is maintained even in retirement; the obligations by which civil servants are bound in employment continue to apply to them in retirement; and they remain subject to the service's disciplinary code. Entitlement to a pension is linked to the continuation of the employment relationship; it lapses if a civil servant comes out of retirement, is dismissed (on disciplinary grounds) or terminates his employment relationship *ex lege*. A civil servant's pension is pay disbursed by the employer for services rendered. According to the case-law of the Verfassungsgerichtshof (Constitutional Court, Austria) and the Verwaltungsgerichtshof (Upper Administrative Court, Austria), civil servants' pensions are not in the nature of an insurance benefit or a welfare benefit. The essential characteristic of civil servants' pensions lies, inter alia, in the fact that a civil servant's employment relationship is a lifelong legal relationship within the framework of which even the pension constitutes a benefit paid exclusively by the employer. As a payment made exclusively by the employer, that benefit is therefore different in nature

from the benefits which are paid to insured persons under the statutory pension insurance scheme.

42 Liability to pay pension benefits under the PG 1965 lies with the Federal Government; the contributions to be made by working civil servants are paid not to an institution under a pension insurance scheme but to the federal budget. By extension, therefore, the Federal Government does not pay an 'employer's contribution' for civil servants under the pension insurance scheme, as employers do for their employees. It follows by extension that the pensions which civil servants receive under the PG 1965 do not constitute benefits under a contributions-based system that groups civil servants together within a risk-sharing community.

43 That difference appears to be significant when it comes to examining whether the measure at issue is necessary, suitable and coherent. Whereas, in the context of a social insurance scheme (financed from contributions and based on the concept of covering social risks, such as age, for persons grouped together within a risk-sharing community), considerations of social balance within the community of risk sharing among recipients of higher pensions and recipients of lower pensions may already be built into the scheme, the same is not necessarily true of a scheme such as that provided for in the PG 1965 for retired civil servants, which is based on the concept of a lifelong employment relationship in which benefits are disbursed as 'pay' for work performed even in retirement.

44 The fact that civil servants' income constitutes pay both in active employment and in retirement raises a number of uncertainties with respect to the coherence of the measure at issue.

45 While the legislature made a significant intervention in the 2018 annual pension adjustment for retired civil servants (such as those at issue here), it refrained from adopting a 'social balancing' measure of this kind in respect of civil servants in active employment. The value adjustment applied to the pay of those in active employment was not calibrated; instead, active employees received a flat-rate pay rise of 2.33% which did not differentiate according to level of income and, moreover, included not only an adjustment for inflation but also an additional increase justified on the ground that civil servants should enjoy a share of the economic recovery.

46 An analysis of coherence which – in a manner at odds with the aforementioned domestic conception of the nature of pensions – looked at the scheme at issue from the point of view primarily of the welfare function of an 'occupational social security scheme' would bring to light inconsistencies with other such schemes that exist under national law. In the measure at issue, which does not include an adjustment for inflation for higher pensions but at the same time increases the adjustment for inflation for lower pensions, the legislature has intervened only in the occupational social security scheme for civil servants, but has refrained from similar interventions in any other occupational social security scheme.

47 Generally speaking, the fact that, while the 2018 pension adjustment carried out within the context of the PG 1965 took the form of an intervention with a 'social component' that operated to the detriment of those on higher incomes and in favour of those on lower incomes, the legislature generally refrained from adopting such a social balancing measure in respect of recipients of pensions paid directly by the employer under private law, does not appear to be manifestly coherent.

48 For the referring court, this raises the further question as to whether it is permissible for the examination of the proportionality and coherence of the disadvantages resulting from the 2018 pension adjustment to focus on 2018 in isolation, or whether, rather, account must also be taken of the fact that that measure is not the only one of its kind, the long-term adjustment scheme introduced in principle in 2004 having repeatedly been the subject of year-specific derogations whereby the adjustments applied to recipients of higher pensions have been lower or non-existent. In this connection, the appellants on a point of law submit that the effects of the foregoing on those concerned (particularly the longer-term retired) have been cumulative and have gone beyond what is acceptable.

49 In so far as the respondent authority notes that those on higher pensions are better able to cope with an intervention in connection with their pension adjustment because it has less of an adverse impact on their lifestyles, this view seems to the referring court to leave out of account – not only any cumulative effects but also – the fact that it must be assumed, in the case of recipients of civil service pensions in particular, that the State, when providing for a pension that is pegged to the level of the previous salary in active employment, creates legitimate expectations on the part of those civil servants to whom it awards correspondingly higher pay during active service (who may, in addition, be prompted, in the light in particular of those expectations, to enter into onerous financial arrangements even in retirement). If the legislature later adopts measures which attempt to eliminate at the stage of paying pension benefits differences that were – intentionally – brought about by the system of remuneration itself, this may create a tension with the coherence of that system.

50 The referring court has already stated that the law governing civil service pensions that falls to be assessed here is fundamentally different from the law governing pensions under social insurance schemes. It may be that, in the field of social insurance schemes which – unlike the PG 1965 – are based on the concept of a risk-sharing community and benefits financed from contributions, the legislature may pursue the regulatory objective of maintaining the functionality and ensuring the financial viability of the scheme (see, in this regard, Opinion of Advocate General Kokott in *NK*, C-223/19, EU:C:2020:356, point 77).

51 The decisions of the BVwG that are under appeal also state that the discriminatory treatment experienced by the – mostly male – recipients of higher pensions is a reflection of the 'previous discrimination against women'.

52 According to the case-law of the Court of Justice, 'the application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers' and the national courts are not required to 'make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women' (judgments in *Barber*, C-262/88, EU:C:1990:209, paragraphs 34 to 35, and of 30 March 2000, *JämO*, C-236/98, EU:C:2000:173, paragraph 43). It falls to be clarified whether the fact that what characterises the group of persons affected by the scheme at issue is that it receives higher pensions and is made up of a considerably greater proportion of men because – typically as a result of the discrimination previously suffered by women in professional life – men have more commonly reached positions attracting higher pensions, constitutes a ground of justification in itself or otherwise precludes from the outset the existence of any claim of discrimination.

53 The BVwG's comment could also be construed as a reference to the possibility, provided for in Article 157(4) TFEU and Article 3 of Directive 2006/54/EC, for Member States to take 'positive action'. That action must contribute to helping women to conduct their professional life on an equal footing with men. The Court of Justice has thus held, with regard to sex-specific retirement ages, that these are not capable of 'offset[ting] the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems which they may encounter in the course of their professional career' (see judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 64 et seq., and *Leone*, C-173/13, EU:C:2014:2090, paragraph 101, of 5 November 2019, *Commission* v *Poland* [independence of the ordinary courts], C-192/18, EU:C:2019:924, paragraph 80 et seq., of 12 December 2019, *Instituto Nacional de la Seguridad Social* [pension supplement for mothers], C-450/18, EU:C:2019:1075, paragraphs 64 to 65). The suitability of the scheme at issue for this purpose seems questionable.

54 Since the interpretation of EU law is not so obvious as to leave no scope for any reasonable doubt (see judgment of 6 October 1982, *Cilfit and Others*, EU:C:1982:335), the questions set out above are referred for a preliminary ruling.