

Case C-52/22

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:

26 January 2022

Referring court:

Bundesverwaltungsgericht (Austria)

Date of the decision to refer:

17 January 2022

Appellant:

BF

Respondent authority:

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau

Subject matter of the main proceedings

Determination of the amount of a federal civil servant's total pension (composed of the civil service pension and the pension under the Allgemeines Pensionsgesetz (General Law on pensions; 'the APG')) – Different points in time at which pensions under the APG and total pensions of federal civil servants are adjusted for inflation for the first time – Elimination of unequal treatment, but without retroactive effect – Principles of legal certainty, maintenance of established rights and effectiveness

Subject matter and legal basis of the request

Interpretation, under Article 267 TFEU, of Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78/EC

Question referred for a preliminary ruling

Are Article 2(1) and 2(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 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 ('total pension' under the Pensionsgesetz 1965 ('the 1965 Law on pensions')) 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 ('total pension' under the 1965 Law on pensions) 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?

Provisions of European Union law relied on

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation: Article 1, Article 2(1) and 2(2)(a), Article 3, Article 6(1), Article 9(1)

Provisions of national law relied on

Paragraph 41(2) of the Pensionsgesetz 1965 (1965 Law on pensions; 'the 1965 PG') in the version published in Federal Law Gazette (BGBl.) I No 135/2020:

'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 ...

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 pension ...'

BGBl. I No 210/2021 introduced a new version of the latter sentence of Paragraph 41(2) of the 1965 PG, which has been in force since 1 January 2022:

'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%

...

1 July 40%

...

1 October 10%

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. ...'

Paragraph 99 of the 1965 PG, BGBl. I No 65/2015 reads as follows:

‘SECTION XIII

Special provisions for civil servants born after 31 December 1954 –

Parallel calculation (*Parallelrechnung*)

Paragraph 99. (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%.

...

(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 under subparagraph 2 and the pro rata pension under subparagraph 3.'

Paragraph 108h(1) of the Allgemeines Sozialversicherungsgesetz (General Law on social security; 'the ASVG'):

'With effect from 1 January 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. ...'

BGBI. I No 28/2021 added the following subparagraph to Paragraph 108h of the ASVG:

'(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%
March	80%
April	70%
May	60%
June	50%
July	40%
August	30%
September	20%
October	10%

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 ...'

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant retired at the end of the month in which he reached the age of 62, that is to say, with effect from 1 July 2020. By final administrative decision of the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (Insurance fund for civil servants and officials of the public authorities, the railways and the mining sector; ‘the BVAEB’) of 2 December 2020, it was determined that the appellant was entitled to a total pension of EUR 4 455.43 gross per month as of 1 July 2020 under the Pensionsgesetz (Law on pensions; ‘the PG’). That total pension results, inter alia, from a retirement pension of EUR 3 716.82, an increase of EUR 327.53 under Paragraph 90a of the PG and a pro rata pension of EUR 411.08 under the APG.
- 2 By letter of 26 February 2021, the appellant requested a new decision on his pension entitlement as of 1 January 2021. By administrative decision of the BVAEB of 19 March 2021, it was determined that the amount of the total pension to which the appellant was entitled was unchanged with effect from 1 January 2021, since, in accordance with Paragraph 41(2) of the PG, a first adjustment for inflation was to be made with effect only from 1 January of the second calendar year following the commencement of entitlement, that is to say, as of 1 January 2022. On 6 April 2021, the appellant brought an appeal against that decision before the Bundesverwaltungsgericht (Federal Administrative Court) within the prescribed period.

The essential arguments of the parties in the main proceedings

- 3 The appellant submits that he started to draw a pension under the voluntary early retirement scheme (*Korridorpension*) as a federal civil servant on 1 July 2020, at the age of 62. He asserts that, according to the parallel calculation under Paragraph 99 of the PG, the amount of his civil servant pension is calculated only partly according to the provisions of the PG, and partly according to the rules laid down in the ASVG. He considers that the last sentence of Paragraph 41(2) of the PG is contrary to the principle of equality and is therefore unconstitutional, because it means that a component of the APG is also not adjusted for inflation, although APG pensions in general (that is to say, all those for which there is not a combination and parallel calculation within the meaning of Paragraph 99 of the PG) are to be adjusted already in the first new pension year in accordance with Paragraph 108h(1a) of the ASVG. In addition, the appellant also asserts an infringement of EU law. He claims that the described breach of the principle of equality affects only older civil servants, namely those born between 1955 and 1975, but is not the consequence of an adjustment of the pension system to a demographic development. By virtue of the new version of Paragraph 41(2) of the PG, which has been in force since 1 January 2022, such a pension adjustment without the delay is now also made in respect of civil servants who are subject to the ASVG. He submits that, by virtue of that provision, the discrimination suffered by civil servants in comparison with ASVG pensioners is eliminated for

the future, which was also the justification expressly given in the interests of fairness towards civil servants in the explanatory notes to the government bill. According to the legislation provided for, however, there is to be no retroactive effect, with the result that the discrimination suffered in comparison with ASVG pensioners continues to exist in the case of the appellant.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 4 The pension to which a federal civil servant is entitled under the PG is to be treated as civil servants' pay within the meaning of Article 3(1)(c) of Directive 2000/78/EC. This also applies in the case of a total pension payable under Paragraph 99(5) of the PG (see CJEU, judgment of 21 January 2015, *Felber*, C-529/13, paragraph 24). The amount in each case must therefore be determined by reference to Articles 2 and 6 of that directive.
- 5 On the one hand, in its case-law on the comparability of retirement pensions under the PG and the pension system under the ASVG, the Austrian Verwaltungsgerichtshof (Supreme Administrative Court) proceeds on the assumption that the public-law employment relationship (including the employer-retiree relationship) and the field of social security are profoundly different areas of law, with the result that constitutional concerns derived from a (mere) 'cross-comparison' are of no consequence. In addition, according to settled case-law of the Austrian Verfassungsgerichtshof (Constitutional Court), the legislature has a relatively wide margin of discretion when establishing the law governing the service, remuneration and pensions of public servants.
- 6 However, account must be taken of the appellant's argument that, with effect from 1 January 2022, the Austrian legislature amended the provision of Paragraph 41(2) of the PG in such a way that the amount of the total pension of civil servants who are entitled to a retirement pension (total pension) under the PG with effect (only) from 1 January 2022 is already adjusted with effect from 1 January of the calendar year following the commencement of entitlement to the pension, whereas, in the case of the appellant, a 'waiting year' continues to apply and his total pension is to be adjusted with effect only from the second calendar year following the commencement of entitlement to the pension. That legislative amendment was not adopted with retroactive effect, which may be contrary to the obligation, established by the case-law of the Court, to eliminate discrimination in full (see judgment of 7 October 2019, C-171/18, EU:C:2019:839, *Safeway*, paragraph 24). Although, in accordance with the case-law of the Court, the risk of seriously undermining the financial balance of the pension scheme concerned may constitute an overriding reason in the public interest to forgo any retroactive effect (see *Safeway*, paragraph 43), the retirement pensions of civil servants in Austria are not paid from a pension scheme but from the State budget. While budgetary considerations may underlie a Member State's choice of social policy, they cannot constitute in themselves a legitimate aim under Article 6(1) of Directive 2000/78/EC.