**Case C-681/21**

**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:**

11 November 2021

**Referring court:**

Verwaltungsgerichtshof (Austria)

**Date of the decision to refer:**

11 October 2021

**Authority bringing the appeal on a point of law:**

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau

**Interested party:**

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**Subject matter of the main proceedings**

Retirement pensions – Pension adjustment – Discrimination on grounds of age

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

**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 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?

**Provisions of EU law cited**

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

**Provisions of national law cited**

Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965 – PG 1965) (Federal Law on the pension rights of federal civil servants, their survivors and the members of their families (1965 Law on pensions – 'the 1965 PG') of 18 November 1965, Paragraph 41(1) to (3)

Paragraph 41 of the 1965 PG in the version of the Federal Law as published in BGBl. I No 111/2010 provides/provided as follows:

'Effects of future amendments to this Federal Law and adjustment of recurring benefits

…

(3) The pension adjustment method laid down in Paragraph 634(12) of the ASVG [Allgemeines Sozialversicherungsgesetz – General Law on social security] 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'.

Paragraph 41(3) of the 1965 PG, in the version of the 2. Dienstrechts-Novelle 2018 (2nd Law amending the rules relating to public servants 2018; 'the 2018 Amending Law'), BGBl. I No 102/2018, now reads as follows:

'(3) 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.' (Change made by the 2018 Amending Law underlined by the Verwaltungsgerichtshof (Supreme Administrative Court))

In the *travaux préparatoires* relating to the 2018 Amending Law, the following was stated in relation to Paragraph 41(3) of the 1965 PG:

'In Case No Ro 2016/12/0027 of 25 October 2017, the Verwaltungsgerichtshof (VwGH) stated that, with regard to the application of Paragraph 41(3), the age group of civil servants born before 1955 would be discriminated against in relation to civil servants born after 1954, to whom Paragraph 99(6) was applicable. In order to eliminate that discrimination, those civil servants to whom Paragraph 99(6) was applicable are retroactively brought within the scope of Paragraph 41(3).'

Paragraph 99 of the 1965 PG, in the version of the Federal Law as published in BGBl. I No 210/2013, provided as follows:

'SECTION XIII

Special provisions for civil servants born after 31 December 1954 – Parallel calculation ('*Parallelrechnung*')

Paragraph 99. (6) A parallel calculation is not to 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 is to be calculated in accordance with the provisions of this Federal Law, with the exception of the present Section.'

Bundesgesetz über die Allgemeine Sozialversicherung (Federal Law on social security – 'the ASVG') of 9 September 1955

**Succinct presentation of the facts and procedure in the main proceedings**

1 The interested party was born on 10 November 1946 and retired on 31 December 2011.

2 By administrative decision of 9 May 2012, the authority bringing the appeal on a point of law ('the appellant authority') determined that the interested party was entitled to a monthly retirement pension of EUR 2 438.87 gross and a net emolument supplement of EUR 595.70 as of 1 January 2012.

3 With effect from 1 January 2015, the interested party's retirement pension benefits were adjusted. By letter of 20 May 2015, she submitted that the application of

Paragraph 41(3) of the 1965 PG constitutes an infringement of Council Directive 2000/78/EC in that connection. According to the interested party, Paragraph 41(3) of the 1965 PG discriminates against older civil servants (those born before 1 January 1955) in comparison with younger civil servants. The interested party therefore requested that the civil service pension to which she had been entitled as from 1 January 2015 be fixed by administrative decision and that she be retroactively paid the difference in benefits.

4 By administrative decision of the appellant authority of 24 June 2015, the interested party's monthly retirement pension was fixed at EUR 3 176.27 in application of Paragraph 41(3) of the 1965 PG.

5 An appeal on the merits brought against that administrative decision was dismissed as unfounded by the Bundesverwaltungsgericht (Federal Administrative Court) by judgment of 19 August 2016. It stated that the direct discrimination on grounds of age at issue (capping of the pension adjustment under Paragraph 41(3) of the 1965 PG for civil servants born before 1 January 1955) did not run counter to the directive. The unequal treatment, it found, was justified by the fact that, for civil servants born on or after 1 January 1955, a parallel calculation, which was less favourable to them, was applied when determining the pension.

6 By judgment of 25 October 2017, the Supreme Administrative Court set aside the judgment of the Federal Administrative Court on appeal on a point of law by the interested party on the ground of illegality of its content. The Supreme Administrative Court held that the justifying circumstance cited by the Federal Administrative Court did not apply, as the parallel calculation was not applicable to all younger civil servants, and the application of Paragraph 41(3) of the 1965 PG therefore discriminated against the interested party in relation to a specific category of younger civil servants.

7 By (replacement) judgment of 9 October 2018, the Federal Administrative Court fixed the interested party's monthly pension at EUR 3 182.03 gross (retirement pension plus emolument supplement), and ruled that she was entitled to retroactive payment of the corresponding difference. It stated that Article 2 of Directive 2000/78/EC precluded the application of Paragraph 41(3) of the 1965 PG on account of primacy of application.

8 The appellant authority brought an appeal on a point of law against that (replacement) judgment, which the Supreme Administrative Court dismissed as inadmissible by decision of 30 April 2019. It stated that there was in fact a (small) category of persons who were treated favourably in relation to the interested party on account of their age, and that the cap provided for in Paragraph 41(3) of the 1965 PG had in fact had a detrimental effect on the adjustment of the interested party's retirement pension.

9 By administrative decision of 25 July 2019, the appellant authority fixed the amount of the interested party's pension benefits as from 1 January of the years

2015, 2016, 2017, 2018 and 2019 in response to her request of 17 July 2019 (made on a precautionary basis). It was also found that there had been an overpayment of EUR 84.24 gross for the period from January to August 2019, which had to be reimbursed to the Federal Government.

10 In issuing that administrative decision, the appellant authority proceeded on the assumption that the discrimination on grounds of age had been retroactively eliminated by amending legislation in 2018, to the effect that Paragraph 41(3) of the 1965 PG was now also applicable to the small category of persons in relation to whom the interested party had previously been the subject of discrimination. The decision of the Federal Administrative Court of 9 October 2018 therefore did not preclude the appellant authority from issuing a new decision.

11 The appellant authority calculated the interested party's retirement pension for 2015 in the same way as it had done in its administrative decision of 24 June 2015. The benefits which had been paid for the period from January 2015 to December 2018 in the amount fixed by the Federal Administrative Court in its judgment of 9 October [2018] had been received in good faith and were therefore not being recovered. However, due to the entry into force of the abovementioned amending law, receipt in good faith could no longer be assumed as of 1 January 2019, with the result that the overpaid benefits had to be withheld from the interested party's retirement pension benefits.

12 The Federal Administrative Court, which had once again been seised of the matter, held that the request to fix the amount of the retirement pension for 2015 was precluded on the ground of *res judicata* and had therefore to be refused. It also fixed the amount of the pension benefits for the years 2016 to 2020 and held that there had been no overpayment.

13 In its reasoning, the Federal Administrative Court stated that, although the age-related discrimination at issue had been removed from the legislative text by the amending law, it does not follow from that alone that the interested party was no longer discriminated against. The calculation method had not been changed in the slightest; the amounts that had been declared inapplicable had simply been reapplied retroactively. Therefore, the amending law did not bring about a significant change in the legal situation, and Paragraph 41(3) of the 1965 PG still could not be applied, due to an infringement of EU law.

14 In the appeal on a point of law brought against that judgment, the appellant authority stated that, as a result of the retroactive change in the legal situation, the principle of *res judicata* does not apply. According to the appellant authority, there are no express higher-ranking provisions that would prohibit the legislature from interfering with existing legal positions. There are no fundamental social rights in Austria, and the European Social Charter does not have constitutional status and is also subject to the requirement of enactment of primary legislation by parliament, with the result that the ordinary legislature may in principle change legal positions under social law to the detriment of those concerned. Although

legitimate expectations in acquired rights must be taken into account, and retirement pensioners are particularly worthy of protection, what is at issue is merely a retroactive extension of the scope of an existing rule, and the intensity of the interference is relatively minor. In addition, the legislature intended to eliminate the established discrimination by means of the abovementioned amending law.

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

15 In accordance with settled case-law of the Court of Justice of the European Union ('the Court'), if there has been discrimination contrary to EU law, 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. In the present case, the discriminatory provision must be disregarded by the national court, and the difference in benefits must be paid to the civil servant who was the subject of discrimination. That continues to be the case until the discrimination has been effectively eliminated.

16 According to the legal situation prior to the 2018 Amending Law, there were three categories of civil servants in respect of whom the annual pension adjustment was made in different ways. For the first category, a capped pension adjustment was to be made in the first three years; for the second category, the parallel calculation was to be applied; and, for the third category, neither one nor the other of those approaches was taken. By judgment of 25 October 2017, the Supreme Administrative Court held that the interested party, as a member of the first category, had suffered discrimination on the basis of her age in comparison with members of the third category.

17 By means of the 2018 Amending Law, the third (favoured) category was retroactively removed by virtue of the fact that the application of Paragraph 41(3) of the 1965 PG was extended to cover that category, and the discrimination was eliminated as a result of the fact that the third category and the (previously disadvantaged) first category are now retroactively treated equally badly.

18 Following that amending law, the appellant authority established the interested party's entitlements in the same way as it had done in its administrative decision of 24 June 2015, even though entitlements which had already been established by a final judicial decision – disapplying the national law which is contrary to EU law – existed for that period. Therefore, the 2018 Amending Law might run counter to the principle of legal certainty.

19 In addition, under EU law, there is an obligation to eliminate discrimination immediately and in full, and a prohibition on removing, with retroactive effect, the advantages of the previously favoured category. However, the 2018 Amending Law removes, with retroactive effect, the advantages to which the previously favoured category was entitled. It is also unclear whether that case-law, which is based on discrimination on grounds of gender, which is prohibited under primary

and secondary law, is also applicable to discrimination on grounds of age, which is prohibited only under secondary law.

20 According to the case-law of the Court, it is possible that measures seeking to end discrimination contrary to EU law may, exceptionally, be adopted with retroactive effect provided that, in addition to respecting the legitimate expectations of the persons concerned, those measures are in fact warranted by an overriding reason in the public interest. Although a significant threat to the financial equilibrium of the pension scheme in question may constitute an overriding reason in the public interest, in Austria the retirement pensions of civil servants are paid from the State budget, not from a pension scheme.

21 In relation to discrimination on grounds of age, the Court has hitherto ruled, in principle, that the established rights of the favoured category must be maintained. That is precisely not the case in the main proceedings. In accordance with the case-law, financial compensation (of the difference in relation to the amount that would be due without discrimination) is not obligatory in cases of discrimination on grounds of age, but on the presumption that the established rights of the favoured category are maintained. There has hitherto not been a ruling establishing the cases in which, the circumstances under which, and the extent to which it is permissible to fall short of that difference. In any event, it has never yet been held – so far as can be seen – that it would be in conformity with EU law to place the previously favoured category on an equal footing with the previously disadvantaged category with regard to their entitlements by means of a new statutory regime which enters into force with retroactive effect, with the result that a person who has previously suffered discrimination on the basis of age has no financial entitlements whatsoever.

22 Under the 2018 Amending Law, the interested party would also suffer a not insignificant loss of pension income in comparison with a non-application of the discriminatory provisions.

23 Moreover, according to settled case-law of the Court, Member States are obliged to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. However, the effectiveness of the remedies would appear to be undermined by the retroactive worsening of the legal position of the previously favoured category if a statutory regime which can retroactively eliminate judicially established discrimination without guaranteeing the resulting difference in benefits for those discriminated against were to be regarded as being EU-law compliant.

24 Moreover, if the 2018 Amending Law were regarded as being EU-law compliant, the civil servants who had asserted discrimination claims would have to bear financial expenses as a result of the dispute without having ultimately received any advantage from the successful discrimination claims.

25 Moreover, within the category of civil servants who have availed themselves of remedies to enforce their claims under EU law, there is, on the one hand, a sub-category who have already received payments on the basis of a non-discriminatory calculation of their pensions and are allowed to keep that additional amount, and, on the other hand, a sub-category to whom no such payments have been made thus far, with the result that they have not received any financial advantage. The sub-category to which a civil servant belongs depends, in essence, on circumstances over which he or she could not have any influence, namely whether and how the competent authorities and administrative courts ruled or took action in the individual case, with the result that both the effectiveness of the remedies of which the civil servants concerned availed themselves in order to enforce their claims under EU law and the general principle of equal treatment appear to be called into question.