

Case C-356/24**Request for a preliminary ruling****Date lodged:**

16 May 2024

Referring court:

Landesverwaltungsgericht Kärnten (Austria)

Date of the decision to refer:

16 May 2024

Appellant:

A.B.

Respondent authority:

Kärntner Landesregierung

[...]

Case number: KLVwG-2548/10/2023**ORDER**

In the appeal brought by A.B., [...], Klagenfurt am Wörthersee, against the decision of the Kärntner Landesregierung (Government of the Province of Carinthia) of 20 September 2023, [...], rejecting the application for the accreditation of previous periods of equivalent service of 14 November 2022, the Landesverwaltungsgericht Kärnten (Regional Administrative Court, Carinthia, Austria) refers [...] the following questions to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1.

Is EU law, in particular Article 45 TFEU and Article 7(1) of Regulation No 492/2011, to be interpreted as precluding national legislation under which previous periods of relevant service completed in other EU Member States are no longer taken into account when setting the advancement reference date where a civil servant's existing remuneration status has been attained by a discretionary

act (promotion) on the part of the employer rather than by periodic advancement, and such national legislation provides that the advancement reference date is recalculated only where the existing remuneration status is determined on the basis of the advancement reference date?

2.

Is EU law, in particular Articles 1, 2 and 6 of Directive 2000/78 in conjunction with Article 21 of the Charter, to be interpreted as precluding national legislation under which previous periods of relevant service completed in other EU Member States are no longer taken into account when setting the advancement reference date where a civil servant's existing remuneration status has been attained by a discretionary act (promotion) on the part of the employer rather than by periodic advancement and such national legislation provides that the advancement reference date is recalculated only where the existing remuneration status is determined on the basis of the advancement reference date, but under the employer's corresponding guidelines such promotion is usually only available after 19 and 25 years of service (calculated from the advancement reference date), and therefore concerns older civil servants?

3.

Do the principles of freedom of movement for workers laid down in Article 45 TFEU and Article 20 of the Charter preclude national legislation according to which periods of equivalent professional activity are taken into account in their entirety when setting the advancement reference date where that professional activity was carried out outside Austria (in the territory of a Contracting Party to the EEA or of an EU Member State, in a State the nationals of which enjoy the same rights of access to a profession as Austrian nationals, or at an institution of the European Union or another intergovernmental organisation to which Austria belongs), whereas equivalent professional activities in the private sector that were carried out in Austria are not taken into account?

A. Subject matter and facts of the case in the main proceedings

The appellant, an Austrian national, born on xx.xx.1968, started working for the local authority (Province of Carinthia) in 'Specialist Technical Services', Road and Bridge Construction Department, as a contractual public servant (a private-law employment relationship with the Province) on 3 October 2005. His advancement reference date was set at 8 September 2001.

Prior to starting work for the Province of Carinthia the appellant completed previous periods of service with private employers in Austria and in other EU Members States (Germany, Poland, Hungary and Croatia) from 1 October 1987 up to and including 4 April 2003. From 13 October 2003 to 2 October 2005, he was employed by the Province of Carinthia on the basis of a service slip.

At the start of his employment relationship with the Province of Carinthia on 3 October 2005, the appellant was credited with periods between the date on which he reached the age of 18 and the date on which he started his employment relationship, amounting to 4 years 0 months and 25 days, for the purpose of determining his advancement reference date pursuant to Paragraph 41 of the Kärntner Landesvertragsbedienstetengesetz of 1994 (Law of the Province of Carinthia on contractual public servants 1994; 'the K-LVBG'). Those periods include periods spent in military service, periods working for the Province of Carinthia on the basis of the service slip, as well as the accreditation of one year and six months. The accreditation of that one year and six months as a maximum credit period is provided for by law where periods of private service are not particularly important for employment in the civil service of the Province of Carinthia and where accreditation is not justified as being in the public interest. That provision was applied and one year and six months were taken into account when determining his advancement reference date.

With effect from 1 January 2010, the appellant was appointed as a civil servant (a public-law employment relationship with the Province) and was appointed to a post in job category B, service class III, salary grade 7, in the 'Road Maintenance' Department. Since then, the Kärntner Dienstrechtsgesetz of 1994 (Law of the Province of Carinthia on the conditions of service of civil servants 1994; 'the K-DRG') has been decisive for determining his remuneration status. Pursuant to Paragraph 143 of the K-DRG, advancement is determined on the basis of a reference date, in accordance with Paragraph 145 of the K-DRG.

The advancement reference date determined at the start of his employment relationship with the Province of Carinthia (8 September 2001) was also carried over to his public-law employment relationship.

Advancement to the next incremental step was approved on 1 July 2011 and advancements were implemented in the following years based thereon.

On 1 January 2016, the appellant was promoted to the next service class (B/V/02) and to the one above that, service class VI (specifically, B/VI/01), in the 'Road Maintenance' Department on 1 January 2022.

On the basis of current national law (Paragraph 145(11) of the K-DRG), previous periods of service completed abroad which, at the time of entry into service, involved equivalent activities, are to be taken into account in their entirety when setting the advancement reference date.

By application of 14 November 2022, the appellant requested that previous periods of equivalent service in Austria and in other EU Member States be taken into account and also sought the payment in arrears of differences in salary resulting from such accreditation.

By decision of the Government of the Province of Carinthia ('the respondent authority') of 20 September 2023 that application was rejected pursuant to

Paragraph VI(7) of the law in the version published in LGBL (Provincial Law Gazette) No 82/2011. The rejection was based on the fact that the appellant had been appointed to service class VI by a discretionary promotion (as opposed to periodic advancement) with effect from 1 January 2022. His remuneration status is therefore no longer determined on the basis of the advancement reference date, since the act of the promotion of a civil servant, which creates rights and is at the discretion of the authority, is governed by the provision on advancement set out in Paragraph 181 of the K-DRG, which derogates from Paragraph 143 of the K-DRG, rather than the advancement reference date.

The first sentence of Paragraph VI(7) assumes, for the purposes of the recalculation of the advancement reference date, a case in which ‘the existing remuneration status is determined on the basis of the advancement reference date’. That transitional provision entered into force on 1 January 2012. Paragraph 305b(2) of the K-DRG, which entered into force on 21 December 2019, contains the (largely identical) current legal provision.

The appellant lodged an appeal against that decision with the Regional Administrative Court, Carinthia. He claims that previous periods of relevant service in Austria and in other EU Member States from 1 October 1987 to 4 April 2003 should be taken into account when calculating his advancement reference date and that his advancement reference date should be determined as 5 July 1988.

On 5 December 2023, the respondent authority submitted the appeal to the Regional Administrative Court, Carinthia for a decision, adding that, on the basis of a decision by the Verfassungsgerichtshof (Constitutional Court, Austria) of 4 October 2023, case number G192/2023, the constitutionality of Paragraph 145(11) and(12) of the K-DRG had been confirmed.

B. The state of national law

Kärntner Dienstrechtsgesetz of 1994 (Law of the Province of Carinthia on the conditions of service of civil servants 1994), LGBL. No 71/1994, as last amended by LGBL. No 60/2019

Paragraph 143

Advancement

1. Advancement shall be determined on the basis of a reference date. Unless otherwise provided in this paragraph, the period required for advancement to the second incremental step in respect of service class III shall be five years and two years for other incremental steps.

2. Advancement shall take place on 1 January or 1 July following completion of the period of two or five years (advancement date), unless it is postponed or suspended on such date. The period of two or five years shall be deemed to have

elapsed on the advancement date where it is completed before 31 March or 30 September following the advancement date.

[...]

Kärntner Dienstrechtsgesetz of 1994 (Law of the Province of Carinthia on the conditions of service of civil servants 1994), LGBI. No 71/1994, as last amended by LGBI. No 81/2021

Paragraph 145

Reference date

1. Subject to the restrictions set out in subparagraphs 4 to 8, the reference date to be taken into account for the purposes of advancement by an incremental step shall be calculated by counting backwards from the date of recruitment in respect of periods after 30 June of the year in which nine school years were completed or ought to have been completed after admission to the first level of education:

- (1) the periods specified in subparagraph 2 shall be taken into account in their entirety;*
- (2) other periods*
 - (a) which fulfil the criteria set out in subparagraph 3 shall be taken into account in their entirety,*
 - (b) which do not fulfil the criteria set out in subparagraph 3*
 - (aa) shall be taken into account in their entirety for three years and*
 - (bb) shall be taken into account to the extent of one half for three additional years.*

[...]

11. Periods referred to in subparagraph 2 and subparagraph 1(2) in which professional activities were carried out which, with regard to the activities carried out at the time of entry into service, involved equivalent activities providing equivalent professional experience, are to be taken into account in their entirety where those periods were completed outside Austria

- (1) in the territory of a Contracting Party to the Agreement on the European Economic Area or of a Member State of the European Union, or*
- (2) in a State whose nationals enjoy the same rights of access to a profession as Austrian nationals, or*

(3) *at an institution of the European Union or another intergovernmental organisation to which Austria belongs.*

[...]

Kärntner Dienstrechtsgesetz of 1994 (Law of the Province of Carinthia on the conditions of service of civil servants 1994), LGBI. No 71/1994, as last amended by LGBI. No 60/2019

Paragraph 181

Promotion

1. *Promotion is the appointment of a civil servant in the general administration to the next higher service class in his or her job category.*

[...]

4. *After a promotion civil servants shall advance at the time at which in their previous service class they would, under subparagraph 3, have fulfilled the condition for attaining the next higher salary grade for their new service class, but at the latest after two years. Any period spent at the highest salary grade for a service class shall be credited up to a maximum of four years. By way of derogation from the above, in cases where promotion to a higher service class is subject to the completion of two years at the highest salary grade for the lowest service class, the time spent at the highest salary grade for that service class shall be credited up to a maximum of four years in so far as it exceeds the time completed at that salary grade. Paragraphs 143 and 144 shall apply mutatis mutandis.*

[...]

Kärntner Dienstrechtsgesetz of 1994 (Law of the Province of Carinthia on the conditions of service of civil servants 1994), LGBI. No 71/1994, as last amended by LGBI. No 81/2021

[...]

Paragraph 305b

Scope of individual provisions

[...]

2. *The reference date to be taken into account for purposes of advancement by an incremental step and the resulting remuneration status are to be recalculated ex officio in accordance with Paragraphs 143 and 145 of this Law, in the version*

published in LGBl. No 60/2019, without unnecessary delay and only in cases where the existing remuneration status is determined on the basis of the advancement reference date. [...]

[...]

4. *For persons for whom the advancement reference date does not have to be recalculated in accordance with subparagraph 2,*

(1) Paragraphs 143 and 145 of this Law shall continue to apply in the version in force on 31 December 2003; where their advancement reference date has been set under Paragraph 145 of this Law in the version in force on 30 September 1995 they shall continue to apply in the version in force on 30 September 1995.

[...]

20. Kärntner Dienstrechtsgesetz-Novelle (20th Amendment of the Law of the Province of Carinthia on the conditions of service of civil servants), 17. Kärntner Landesvertragsbedienstetengesetz-Novelle (17th Amendment of the Law of the Province of Carinthia on contractual public servants); Kärntner Gemeindebedienstetengesetz (Law of the Province of Carinthia on local authority employees), Kärntner Stadtbeamtenengesetz (Law of the Province of Carinthia on city officials) of 1993 and Kärntner Gemeindevertragsbedienstetengesetz (Law of the Province of Carinthia on contractual local authority employees); each as amended in LGBl. No 82/2011

Paragraph VI (7)

1. *The following provisions shall enter into force:*

[...]

7. *The reference date to be taken into account for purposes of advancement by an incremental step and the resulting remuneration status may be recalculated in accordance with Paragraphs 143 and 145 of the K-DRG, in the version laid down by Paragraph I, or Paragraphs 41 and 42 of the K-LVBG, in the version laid down by Paragraph II, only on request and only in cases where the existing remuneration status is determined on the basis of the advancement reference date.*
[...]

Guidelines on the Advancement, Periodic Advancement and Promotion of Civil Servants of the Province of Carinthia, decision of the Government of the Province of Carinthia of 20 October 1998, number LAD-PW-22/1-98

[...]

PROMOTION

The promotion of civil servants of the province is at the discretion of the Provincial Government.

Only civil servants who fulfil the following conditions and whose performance and skills as well as their on-duty and off-duty conduct warrant promotion shall be eligible for promotion, whereby the respective list of posts and the job organisation chart shall be taken into account.

(a) Temporal conditions:

<i>Job category</i>	<i>Service class V</i>	<i>Service class VI</i>	<i>Service class VII</i>	<i>Service class VIII</i>
<i>A</i>	<i>9 years</i>	<i>13 years</i>	<i>19 years</i>	<i>30 years</i>
<i>B</i>	<i>19 years</i>	<i>25 years</i>	<i>31 years</i>	
<i>C</i>	<i>29 years</i>			

Those years shall be calculated starting from the advancement reference date.

[...]

C. Provisions of EU law

Article 7(1) of Regulation No 492/2011

‘A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his [or her] nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.’

Article 1 of Directive 2000/78

‘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.’

Article 2 of Directive 2000/78

‘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 ...'

Article 6 of Directive 2000/78

'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.'

National case-law on questions 1 and 2

According to the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the discretionary promotion of a civil servant means that his or her remuneration status no longer depends on the advancement reference date, but on the free exercise of discretion by the administrative authority. The fact that, when discretion is exercised in the context of a discretionary promotion, the advancement reference date, as a significant factor in the discretionary decision on his or her classification, may play a certain role does not alter this result in the case of a promotion at the authority's free discretion. Furthermore, it is not possible to infer from the right to freedom of movement for workers provided for in Article 45 TFEU and the prohibition of discrimination laid down in Articles 1 and 2 of Directive 2000/78 and of Article 7 of Regulation (EEC) No 1612/68 an effective principle according to which acts of appointment

at the discretion of the administrative authority should be deemed to have been carried out with effect at other times (which are optimal for the civil servant) (Supreme Administrative Court, 13.04.2021, case number Ro 2020/12/0001).

In addition, the Supreme Administrative Court states that the decision on a promotion is at the – in principle – unverifiable discretion of the administrative authority, which is also not bound by the “Promotion Guidelines”, which by their very nature are only a guide for promotion practices (Supreme Administrative Court 21.02.2017, case number Ro 2016/12/0019).

National case-law on question 3

Due to concerns as to the objective justification of a provision in the K-LVBG (Paragraph 41(12) thereof) that is almost identical to Paragraph 145(11) of the K-DRG, the Oberster Gerichtshof (Supreme Court, Austria) in employment and welfare law matters, in a case pending before it, submitted an application to the Constitutional Court by decision of 29 March 2023, case number 8 ObA 82/22z, to repeal parts of the provision or the provision in Paragraph 41 of the K-LVBG as being unconstitutional. That decision was based on doubts as to the objectivity required by constitutional law with regard to the different treatment of domestic and foreign previous periods of service. The connecting factor of previous periods of service ‘outside Austria’ and thus the exclusion of the application of that favourable provision to previous periods of service in Austria upon its ‘adaptation’ to the requirements of EU law arising from the case-law on the right to freedom of movement and from the perspective of EU law was also regarded as questionable. Moreover, the Supreme Court stated that the objectivity requirement of the principle of equality laid down in Article 20 of the Charter also applies to such transposition.

In its ruling of 4 October 2023, case number G 192/2023, the Constitutional Court states that it has no reservations about this distinction with regard to the requirements of the right to equality in accordance with the principle of equal treatment under Paragraph 7 of the Bundes-Verfassungsgesetz (Austrian Federal Constitutional Law; ‘the B-VG’) and Paragraph 2 of the Staatsgrundgesetz (Austrian Basic Law; ‘the StGG’). In relation to Article 20 of the Charter, it notes that Paragraph 41(12) of the K-LVBG was enacted within the competence of the national legislature and the Constitutional Court must therefore assess those provisions itself against the yardstick of the principle of equality pursuant to Paragraph 2 of the StGG and Paragraph 7 of the B-VG. The applications filed with the Supreme Court were rejected and dismissed.

D. Reasons for doubts about the national provisions

The Regional Administrative Court, Carinthia is a court within the meaning of Article 267 TFEU. The decision of the Regional Administrative Court depends on the answers to the questions of interpretation of EU law set out in the present

request for a preliminary ruling and discussed in greater detail below. The correct application of EU law does not appear to be so obvious that there is no room for reasonable doubt, which is why the request for a preliminary ruling had to be made.

Questions 1 and 2 (Paragraph VI(7) of the law in the version published in LGBI. No 82/2011 / Paragraph 305b of the K-DRG)

The Court of Justice has held that previous periods of equivalent service must always be taken into account in their entirety in the existing employment relationship where such taking account of previous periods of service is provided for (Case C-703/17, ECLI:EU:C:2019:850).

In the present case, taking previous periods of equivalent service completed abroad into account when determining the advancement reference date is provided for by law (Paragraph 145(11) of the K-DRG). Previous periods of equivalent service completed abroad must therefore be taken into account when setting the advancement reference date.

Paragraph 305b(2) of the K-DRG (as well as Paragraph VI(7) of the law in the version published in LGBI. No 82/2011), on the other hand, stipulates that the reference date to be taken into account for purposes of advancement by an incremental step and the resulting remuneration status are to be recalculated ex officio in accordance with Paragraphs 143 and 145 of that Law, in the version published in LGBI. No 60/2019, without unnecessary delay and only in cases where the existing remuneration status is determined on the basis of the advancement reference date.

Paragraph 305b(4)(1) of the K-DRG provides that for persons for whom the advancement reference date does not have to be recalculated in accordance with subparagraph 2, Paragraphs 143 and 145 of that Law are to continue to apply in the version in force on 31 December 2003.

It therefore follows from the provision laid down in Paragraph 305b(2) of the K-DRG (as well as Paragraph VI(7) of the law in the version published in LGBI. No 82/2011) that civil servants are excluded from applying to have their advancement reference date recalculated if they have been promoted during their professional career.

It is objectively questionable whether the provision laid down in Paragraph 305b(2) of the K-DRG precludes the accreditation of previous periods of relevant service. That is because failing to take previous periods of relevant service into account has the effect of limiting the extent of the accreditable previous periods of service at the current employer. That statutory provision enshrines the limitation of the accreditation of previous periods of relevant service or their non-accreditation, and no longer allows the advancement reference date to be recalculated.

Since the appellant is being transferred to a new remuneration and advancement system as a result of his promotion, the provision in question prevents him from being able to recalculate his advancement reference date by accrediting previous periods of relevant service completed abroad. The provision laid down in Paragraph 305b(2) of the K-DRG does not allow him to do this from the outset. He is completely excluded from the system for recalculating and improving the advancement reference date.

In the view of the court, a provision is contrary to Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 if previous periods of relevant service completed abroad that have not yet been accredited can no longer be accredited for the purposes of determining remuneration seniority and as a result remuneration seniority can no longer be (re)calculated although, in principle, the accreditation of such periods has been provided for by law.

Since the discretionary act of promotion must be subject to the fulfilment of temporal conditions or the attainment of a certain number of years of service (in the case at hand, 19 or 25 years according to the Guidelines on the Advancement, Periodic Advancement and Promotion of Civil Servants of the Province of Carinthia), which, moreover, are calculated starting from the advancement reference date, the statutory provision, according to which the advancement reference date can no longer be recalculated on the basis of a promotion, concerns older employees. The transfer to the new service class takes into account the advancement reference date.

The court is therefore also uncertain whether a new determination of the remuneration status, under which previous periods of relevant service are not accredited and recalculation is not possible, constitutes discrimination and must, against that background, be regarded as contrary to EU law. Since promotion depends on the attainment of a certain number of years of service and consequently concerns older civil servants in a system with no possibility of accrediting previous periods of relevant service and improving their advancement reference date, this might constitute indirect discrimination on the grounds of age.

Question 3 (Paragraph 145(11) of the K-DRG)

By judgment of 8 May 2019, Case C-24/17, (ECLI:EU:C:2019:373), the Court of Justice held that a temporal limitation on the accreditation of previous periods of relevant service in the private sector is not compatible with the freedom of movement for workers provided for in Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers. By judgments of 10 October 2019, Case C-703/17 (ECLI:EU:C:2019:850), and 23 April 2020, Case C-710/18 (ECLI:EU:C:2020:299), the Court of Justice clarified its case-law to the effect that identical or equivalent previous experience must be taken into account under EU law in order to ensure the freedom of movement of workers, whereas that is not the case for previous experience which is merely beneficial.

That case-law on the restriction of freedom of movement for workers prompted the legislature of the Province of Carinthia to amend the provisions on the determination of the advancement reference date in Paragraph 145 of the K-DRG by means of LGBl. No 81/2021 (cf. the explanatory memorandum to the draft law, number 01-VD-LG-370/2020-320). That statutory provision entered into force on 1 December 2021.

Now periods of equivalent professional activity are taken into account in their entirety where such professional activity was carried out outside Austria (in the territory of a Contracting Party to the EEA or of an EU Member State, in a State the nationals of which enjoy the same rights of access to a profession as Austrian nationals, or at an institution of the European Union or another intergovernmental organisation to which Austria belongs), whereas equivalent professional activities in the private sector that were carried out in Austria are not taken into account. The rationale for not taking into account a professional activity carried out in Austria is that it is not covered by the provisions of EU law on freedom of movement.

The present legal situation falls within the scope of EU law since the national provision in question (Paragraph 145(11) of the K-DRG) was transposed by the provincial legislature in order to comply with the freedom of movement for workers provided for in Article 45 TFEU and Article 7(1) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 and on the basis of the aforementioned case-law of the Court of Justice.

The question concerns the interpretation of EU law since the applicable national provisions are measures transposing EU acts. Therefore, the present case concerns the implementation of EU law pursuant to Article 51(1) of the Charter and, through the transposition of EU law and the adjustment to EU law carried out by the legislature by means of Paragraph 145(11) of the K-DRG, concerns Article 20 of the Charter. Member States are bound by the Charter when transposing EU secondary law.

The connecting factor of previous periods of service ‘outside Austria’ and thus the exclusion of the application of that favourable provision to previous periods of service in Austria in order to comply with the requirements of EU law arising from the case-law on the right to freedom of movement cannot, in the view of the court, be justified by the obligation to transpose EU law (cf. CJEU C-290/94 paragraph 29 [ECLI:EU:C:1996:265]). The objectivity requirement of the principle of equality laid down in Article 20 of the Charter also applies in particular to transposition and, in the view of the court, Article 20 of the Charter precludes such a transposition.

[...]