



Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS

delivered on 27 January 2022¹

Case C-405/20

**EB,
JS,
DP
v**

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)

(Request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria))

(Reference for a preliminary ruling – Social policy – Article 157 TFEU – Protocol (No 33) concerning Article 157 TFEU – Equal pay for male and female workers – Limitation of the temporal effects – Directive 2006/54/EC – Equal opportunity and equal treatment of men and women in matters of employment and occupation – Articles 5 and 12 – Prohibition of any indirect discrimination on grounds of sex – Occupational social security schemes – Retirement pensions of national civil servants – Proportion of men in the category receiving the highest pensions – Legislation providing for an annual adjustment of retirement pensions – Increase on a reducing scale that is precluded entirely above a certain pension amount – Justifications)

I. Introduction

1. As is clear from the judgment in *Defrenne III*,² the elimination of discrimination based on sex forms part of fundamental personal human rights, as general principles of European Union law, the observance of which the Court has a duty to ensure.
2. In that regard, since the judgment in *Defrenne II*,³ the Court has recognised the direct effect of Article 119 of the EEC Treaty (after amendment Article 141 EC, now Article 157 TFEU), which provides for the application of the principle of equal pay for male and female workers for equal work. Pursuant to the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209; ‘the judgment in *Barber*’), Article 119 of the EEC Treaty applies to occupational social security

¹ Original language: French.

² Judgment of 15 June 1978, *Defrenne* (149/77, EU:C:1978:130, paragraphs 26 and 27; ‘*Defrenne III*’).

³ Judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 40; ‘*Defrenne II*’).

schemes,⁴ but the direct effect of that article may not however be relied upon in order claim entitlement to a pension with effect from a date prior to that of that judgment.⁵ That case-law is now codified by Protocol (No 33) concerning Article 157 TFEU and Directive 2006/54/EC.⁶

3. In the present case, EB, JS and DP ('the appellants in the main proceedings') are retired male Austrian federal civil servants. The national legislation on the adjustment of retirement pensions for the year 2018, which applies to them, implemented an increase on a reducing scale that is entirely precluded above a certain pension amount, the result of which was that their pensions were not – or only very slightly – increased, unlike those of retirees in receipt of a lower pension amount.

4. In the context of their dispute with the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB) (Insurance fund for civil servants and officials of the public authorities, the railways and the mining sector, Austria; 'the BVAEB'), the appellants in the main proceedings argued before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the referring court, that that legislation entailed indirect discrimination on grounds of sex, as the great majority of federal civil servants receiving the highest retirement pensions are men.

5. That court asks the Court about the interpretation of Article 157 TFEU, Protocol (No 33) concerning Article 157 TFEU and Directive 2006/54 with a view to ascertaining whether the legislation is compatible with EU law.

6. In this Opinion, I will propose that the Court answer the questions submitted to the effect that, in the present case, the principle of equal pay applies without limitation of its temporal effects and that, subject to the verifications to be made by the referring court, EU law does not preclude legislation such as that in the main proceedings, provided that that legislation is justified by objective factors unrelated to discrimination on grounds of sex.

II. Legal context

A. *European Union law*

7. Article 1 of Directive 2006/54, which is entitled 'Purpose', states:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

...

(c) occupational social security schemes.

...'

⁴ Judgment in *Barber*, paragraph 30.

⁵ Judgment in *Barber*, paragraph 45. There is an exception for workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

⁶ Directive 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 (O) 2006 L 204, p. 23).

8. Article 2 of that directive, which is entitled ‘Definitions’, provides, in paragraph 1 thereof:

‘For the purposes of this Directive, the following definitions shall apply:

...

(b) “indirect discrimination”: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

...

(f) “occupational social security schemes”: schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [⁷ whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.]’

9. Article 5 of Directive 2006/54, which appears in Chapter 2, entitled ‘Equal treatment in occupational social security schemes’, of Title II of that directive, states:

‘Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

...

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.’

10. Article 7 of that directive, which is entitled ‘Material scope’, provides, in paragraph 1(a)(iii) thereof, that the provisions contained in Chapter 2 of the directive apply to occupational social security schemes which provide protection against the risk of ‘old age’, including early retirement.

11. Article 12 of the directive, which is entitled ‘Retroactive effect’, provides, in paragraph 1 thereof:

‘Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and

⁷ OJ 1979 L 6, p. 24.

before 17 May 1990, that date shall be replaced by the date on which Article 141 of the Treaty [now Article 157 TFEU] became applicable in their territory.’

B. Austrian law

12. Paragraph 41 of the Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965) (Federal Law on the pension entitlements of federal civil servants, their survivors and members of their family (Law on pensions 1965)) of 18 November 1965,⁸ in the version thereof in force at the date of the facts in the main proceedings⁹ (‘the PG 1965’), which is entitled ‘Effects of future amendments to this Federal Law and adjustment of the benefits paid periodically’, states:

‘ ...

(2) Retirement pensions and survivors’ pensions payable under this Law ... shall be adjusted at the same time and in the same proportion as pensions covered by the statutory pension insurance scheme,

1. where the pension entitlement has already been established prior to 1 January of the year in question

...

(4) The adjustment method for pensions which is laid down in Paragraph 711 of [the Allgemeines Sozialversicherungsgesetz (General Law on social security)]¹⁰ (‘the ASVG’) for the 2018 calendar year shall apply by analogy. ... In the event of an increase pursuant to Paragraph 711(1)(2) of the ASVG, the total amount of the increase shall be applied to the retirement or survivor’s pension.’

13. Paragraph 108f of the ASVG, in the version thereof in force at the date of the facts in the main proceedings,¹¹ provides:

‘(1) The Federal Minister for Social Security, Generations and Consumer Protection shall determine the adjustment factor for each calendar year, taking into account the reference value.

(2) The reference value shall be determined in such a way that the increase in pensions resulting from the adjustment, taking into account the reference value, is in line with the increase in consumer prices, in accordance with subparagraph 3. It shall be rounded to three decimal places.

(3) The increase in consumer prices shall be determined according to the average increase over twelve calendar months up to July of the year preceding the year of adjustment, using the Consumer Price Index for 2000 or any other index that has replaced it. To that end, the arithmetic average of the annual inflation rates published by Statistik Austria [(Austrian Institute of Statistics, Austria)] must be calculated for the calculation period.’

⁸ BGBl., 340/1965.

⁹ BGBl. I, 151/2017.

¹⁰ BGBl., 189/1955.

¹¹ BGBl. I, 29/2017.

14. Paragraph 108h of the ASVG, in the version thereof in force at the date of the facts in the main proceedings,¹² provides:

‘(1) With effect from 1 January of each year,

(a) all pensions provided under pension insurance for which the reference date (Paragraph 223(2)) is before 1 January of that year,

...

shall be multiplied by the adjustment factor. ...

(2) The adjustment referred to in subparagraph 1 shall be made on the basis of the pension to which entitlement was established under the provisions in force on 31 December of the previous year ...’

15. Paragraph 711(1) of the ASVG, in the version thereof in force at the date of the facts in the main proceedings,¹³ reads as follows:

‘By derogation from the first sentence of subparagraph 1 and subparagraph 2 of Paragraph 108h, the pensions increase for the 2018 calendar year shall not be made in line with the adjustment factor but [is made] as follows: the total amount of the pension (subparagraph 2) shall be increased by

1. 2.2%, where it does not exceed EUR 1 500 per month;

2. EUR 33, where it does not exceed EUR 2 000 per month;

3. 1.6%, where it is greater than EUR 2 000 but less than EUR 3 355 per month;

4. a percentage decreasing on a linear basis between the stated values of 1.6% and 0%, where it is greater than EUR 3 355 but less than EUR 4 980 per month.

An increase shall not be applied if the total amount of the pension is greater than EUR 4 980 per month.’

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

16. The appellants in the main proceedings, who are men born respectively in 1940, 1948 and 1941, worked as federal civil servants in Austria. Having retired respectively in 2000, 2013 and 2006, they receive retirement pensions under the PG 1965, the gross amount per month of which over the course of 2017 was EUR 6 872.43 in the case of the first appellant, EUR 4 676.48 in the case of the second appellant and EUR 5 713.22 in the case of the third appellant.

¹² BGBl. I, 111/2010.

¹³ BGBl. I, 151/2017.

17. Each of the appellants in the main proceedings requested that the BVAEB adopt a decision determining the amount of their retirement pensions with effect from 1 January 2018. The BVAEB decided that the amount of the retirement pensions of EB and DP was not to be increased as that amount exceeded the upper limit of EUR 4 980 per month stated in Paragraph 711(1) of the ASVG. As for JS' retirement pension, the adjustment was established by applying an increase of 0.2989%.

18. The appellants in the main proceedings challenged those decisions before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), claiming that Paragraph 41(4) of the PG 1965, read in conjunction with Paragraph 711(1)(4) and the last sentence of Paragraph 711(1) of the ASVG ('the legislation at issue'), which entirely – or almost entirely – deprives them of an increase for the year 2018 given the amount of their retirement pensions, unlike retirees in receipt of lower pensions, is contrary to EU law because it entails indirect discrimination on grounds of sex.

19. In support of their action, they submit that the legislation on pay and pensions applicable to them had continuously worsened since 1995 and that, since 31 December 1998, the amount of retirement pensions had ceased to be adjusted in line with the salaries of civil servants in employment, as was provided for in the legislation in force up until that date, and was now adjusted according to an adjustment factor which essentially reflected changes in purchasing power. They added that the adjustment of pensions needed in order to 'preserve the inherent monetary value', as provided for in principle by legislation on the adjustment of pensions, had not always been made in previous years.

20. The appellants in the main proceedings submitted a statistical analysis intended to show the breakdown by sex and by amount of the recipients of retirement and survivors' pensions under the PG 1965. In their view, it is apparent from that analysis that the category of recipients of retirement pensions greater than EUR 4 980 per month comprised a total of 8 417 men and 1 086 women. If account is taken of retirement pensions only, that category of pensioners includes 8 417 men and 1 040 women. By contrast, the total number of recipients of retirement pensions from the Austrian federal civil service consists of 79 491 men and 22 470 women. Those figures were not contested by the BVAEB or by the Bundesverwaltungsgericht (Federal Administrative Court) in the course of the procedure before the latter court.

21. In the judgments concerning EB and DP, judgments of 29 November and 10 December 2018 respectively, that court found that the part of the legislation at issue concerning the last sentence of Paragraph 711(1) of the ASVG is of concern to far more men than women because the category of persons in receipt of pensions greater than the maximum amount includes more men. However, the same court did not make any finding of that kind in the judgment concerning JS, which was given, taking into account the monthly amount of his retirement pension, on the basis of the part of that legislation concerning Paragraph 711(1)(4) of the ASVG.

22. By those judgments, the Bundesverwaltungsgericht (Federal Administrative Court) dismissed the actions brought by the appellants in the main proceedings. In that regard, that court took the view that the case-law of the Court established in the judgment of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675), did not apply here because the cases in the main proceedings concern not discrimination in relation to minimum pensions but rather unfavourable treatment on grounds of sex of recipients of higher pensions, which must be assessed in the light of a

different standard. The Bundesverwaltungsgericht (Federal Administrative Court) also held that discrimination could not arise where belonging to the category of recipients of higher pensions is linked to disadvantageous treatment in connection with the increase of the benefit concerned.

23. The appellants in the main proceedings lodged an appeal on a point of law against those judgments before the referring court, which joined the cases.

24. The referring court points out that the appellants in the main proceedings receive their retirement pensions pursuant not to the ASVG but to the PG 1965, the provisions of which, in so far as they are relevant in the present case, apply to the pensions of civil servants who were born before 1955, recruited into the civil service no later than 2005 and have subsequently retired.

25. According to that court, in the light of the Court's case-law, the retirement pensions received by the appellants in the main proceedings come under the concept of 'pay' within the meaning of Article 157 TFEU, and they are to be regarded as benefits paid under an 'occupational social security scheme' within the meaning of Protocol (No 33) concerning Article 157 TFEU and Chapter 2 of Title II of Directive 2006/54.

26. The same court observes that that protocol and Article 12 of Directive 2006/54 provide for a limitation of the temporal effects of the principle of equal pay for men and women as regards 'benefits under occupational social security schemes', which has its origin in the judgment in *Barber*. For Member States which, like the Republic of Austria, acceded to the Agreement on the European Economic Area¹⁴ on 1 January 1994, 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.

27. The referring court asks whether, and to what extent, that limitation affects the ability of the appellants in the main proceedings to rely on the principle of equal treatment for men and women in connection with the legislation at issue, which relates to the adjustment of retirement pensions for the year 2018. In that court's view, there are three conceivable interpretations.

28. Under the first interpretation proposed by that court, the adjustment of retirement pensions is a benefit component that can be linked to periods of employment prior to 1 January 1994, the reference date, which would prohibit the appellants in the main proceedings outright from relying on the principle of equal treatment, as laid down in Article 157 TFEU and in Directive 2006/54. However, the clarifications provided by the Court *inter alia* in the judgment of 6 October 1993, *Ten Oever* (C-109/91, EU:C:1993:833), and the wording of Protocol (No 33) concerning Article 157 TFEU run counter to that first interpretation.

29. Under the second interpretation, completed periods of employment prevent reliance on the application of the principle of equal treatment in so far as those periods predate the reference date. It is thus necessary, for each of the appellants in the main proceedings, to calculate the proportion of his periods of employment after 1 January 1994 as compared with his total periods of employment, and to ensure that his retirement pension is adjusted in a non-discriminatory manner in respect of that share alone.

¹⁴ Agreement signed on 2 May 1992 (OJ 1994 L 1, p. 3) and approved by Decision 94/1/EC, ECSC, of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (OJ 1994 L 1, p. 1).

30. The third interpretation consists in taking the view that the limitation of the temporal effects of the principle of equal treatment does not apply to benefit components such as an annual adjustment of retirement pensions. According to the referring court, the case-law of the Court argues against this interpretation.

31. Furthermore, that court points out that, pursuant to Paragraph 108h of the ASVG, the amount of retirement pensions has to be adjusted annually in line with the rate of inflation. However, as a result of the legislation at issue, civil servants in receipt of a retirement pension per month that is greater than a certain amount are disadvantaged as compared with those whose retirement pension is lower since, unlike the latter recipients, the former were denied any, or almost any, increase for the year 2018. Accordingly, the question whether indirect discrimination on grounds of sex resulting from that legislation can, where appropriate, be regarded as justified in the light of EU law is of crucial significance to the outcome of the cases in the main proceedings.

32. In that connection, the BVAEB argued before the referring court that, in addition to the traditional objective of preserving the purchasing power of pensioners, that legislation pursues an objective with a ‘social component’. If pensions were to be adjusted each year by a uniform percentage, without any distinction based on the level of those pensions, that adjustment would very quickly give rise to an ‘unjustifiable divide’. It is therefore reasonable, both from the perspective of maintaining purchasing power and in the light of that social component, that the national legislature should intervene by legislating to give a ‘helping hand’ to those in receipt of low pensions and that, as far as concerns recipients of pensions of a much greater amount than the average, an increase in purchasing power is not needed. The stepped, reducing scale of increases chosen by the legislature when adjusting the retirement pensions for the year 2018 is justified by the fact that small and medium-sized pensions have been affected by above-average rises in food prices and the cost of living (food, drinks, housing).

33. The referring court has doubts whether the legislation at issue is necessary, suitable and, in particular, consistent. That legislation is limited to the recipients of retirement pensions, even though there are appropriate social-policy instruments, the scope of which is objectively determined, such as progressive income tax rates, transfers and other tax-funded assistance. In addition, under domestic law, the persons concerned by Paragraph 41 of the PG 1965, that is to say retired civil servants, are in a special position which sets them fundamentally apart from persons in receipt of pensions paid by social security schemes, since a civil servant’s retirement pension constitutes pay under public law, which must be regarded as compensation for services rendered. According to the case-law of the Verfassungsgerichtshof (Constitutional Court, Austria), the essential characteristic of civil servants’ retirement pensions lies, *inter alia*, in the fact that the relationship between a civil servant and his or her employer is a lifelong legal relationship within the framework of which the retirement pension also constitutes a benefit paid exclusively by the employer. Thus, whereas pensions paid under social security schemes are based on the principle of contributions-based funding and payable by an insurer, the contributions made by civil servants in active employment are paid not to an institution under a pension insurance scheme but to the State budget.

34. In addition, while the national legislature made an important intervention in the adjustment of the pensions of civil servants for the year 2018, it refrained from adopting a ‘social balancing’ measure of that kind in respect of civil servants in active employment, in respect of whom a reducing scale was not applied when adjusting pay for the year 2018. Civil servants in active employment received a flat-rate pay rise of 2.33%, which is not limited to an adjustment for inflation but included an additional increase justified on the ground that civil servants should

enjoy their share of the benefits of economic growth. Similarly, the national legislature intervened solely within the context of the occupational social security scheme applicable to civil servants, whilst at the same time refraining from comparable interventions in other occupational social security schemes, for example private schemes, which appears inconsistent.

35. According to the referring court, the question is also raised whether, when examining the proportionality and the consistency of the legislation at issue, it is permissible to focus on just one year, considered in isolation, or whether account should be taken of the fact that that measure was not the only one of its kind, since the national legislature had already derogated, for a number of years, from the basic rule of adjustment introduced in the course of 2004. Thus, one of the appellants in the main proceedings has claimed, without this being challenged by the Bundesverwaltungsgericht (Federal Administrative Court), that, from his retirement up until 2017, the adjustment of his pension has led to a 22% overall reduction as compared with the correct adjustment for inflation and, following the entry into force of the legislation at issue, to a 25% overall reduction.

36. Finally, in the referring court's view, it is necessary to establish whether the existence of a category of persons defined by the fact that they receive higher retirement pensions, and which includes a greater proportion of men because – as women have historically been treated unfavourably in their working life – men have more commonly reached positions attracting higher retirement pensions, constitutes a ground of justification in itself or precludes the possibility of them claiming the discrimination of men in that context.

37. It is in those circumstances that the Verwaltungsgerichtshof (Supreme Administrative Court) has decided to stay the proceedings and to refer to the Court of Justice the following questions:

- '(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 *Barber*], as well as in Protocol (No 33) concerning Article 157 TFEU and Article 12 of Directive [2006/54], 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]) 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 into 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], to the detriment of men, or
- because the scheme is permissible as positive action for the purposes of Article 157(4) TFEU?’

38. Written observations were lodged by the appellants in the main proceedings, the Austrian Government and the European Commission. DP also lodged supplementary written observations.

IV. Analysis

A. The first question referred for a preliminary ruling

39. By its first question, the referring court asks, in essence, whether Protocol (No 33) concerning Article 157 TFEU and Article 12 of Directive 2006/54 are to be interpreted as meaning that the limitation of the temporal effects of the principle of equal pay for male and female workers provided for in those provisions applies to national legislation relating to benefits granted under an occupational social security scheme that provides for an annual adjustment of retirement pensions after 1 January 1994, where the periods of employment of the person concerned predate in part that date.

40. As a preliminary point, it is necessary to verify whether retirement pensions such as those of the appellants in the main proceedings fall within the scope of Article 157 TFEU and Directive 2006/54.

41. Pursuant to Article 157(2) TFEU, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his or her employment, from his or her employer. According to the case-law of the Court, the concept of ‘pay’, within the meaning of that provision, must be interpreted broadly and covers, in particular, any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of

his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis.¹⁵

42. With regard, in particular, to pensions granted to federal civil servants under the PG 1965, the Court has stated that the amount of the retirement pension depends on periods of service and equivalent periods and on the salary received by the civil servant. The retirement pension constitutes a future cash payment, paid by the employer to his or her employees, as a direct consequence of their employment relationship. That pension is, under national law, regarded as pay which continues to be paid in the context of an employment relationship which continues after the civil servant becomes entitled to retirement benefits. Consequently, the Court held that that pension constitutes, on that basis, ‘pay’ within the meaning of Article 157(2) TFEU.¹⁶

43. Furthermore, Article 1(c) of Directive 2006/54 states that it contains provisions to implement the principle of equal treatment in relation to ‘occupational social security schemes’. Article 2(1)(f) of that directive defines those schemes as ‘schemes not governed by [Directive 79/7] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional’.

44. It is apparent from the Court’s case-law that the retirement scheme for federal civil servants provided for under the PG 1965 is a scheme which provides workers of a given occupational sector with benefits designed to replace the benefits provided for by statutory social security schemes within the meaning of Article 2(1)(f) of Directive 2006/54. Federal civil servants are excluded from the pension insurance scheme introduced by the ASVG because they are employed in the federal public administration, in so far as their employment relationship gives them a right to retirement benefits equal to those provided for by that retirement insurance scheme.¹⁷

45. Accordingly, as the referring court has noted, retirement pensions such as those received by the appellants in the main proceedings must be regarded as ‘pay’ within the meaning of Article 157(2) TFEU, and as benefits paid under an ‘occupational social security scheme’ within the meaning of Article 2(1)(f) of Directive 2006/54, such that they fall within the scope of that directive.

46. As regards such benefits, EU law provided for a temporal limitation on the application of the principle of equal pay for male and female workers. In that regard, in the judgment in *Barber*, the Court held that overriding considerations of legal certainty preclude legal situations which have exhausted their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes. It is, however, appropriate to provide for an exception in favour of individuals who have taken action in good time in order to safeguard their rights. According to that judgment, no restriction on the effects of that interpretation can be permitted as regards the acquisition of entitlement to a pension as from the date of that judgment, with the result that the direct effect of Article 119 of the EEC Treaty (now, after amendment, Article 157 TFEU) may not be relied upon in order to claim

¹⁵ Judgment of 8 May 2019, *Praxair MRC* (C-486/18, EU:C:2019:379, paragraph 70 and the case-law cited).

¹⁶ Judgment of 21 January 2015, *Felber* (C-529/13, EU:C:2015:20, paragraph 23).

¹⁷ Judgment of 16 June 2016, *Lesar* (C-159/15, EU:C:2016:451, paragraph 28).

entitlement to a pension with effect from a date prior to that of that same judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.¹⁸

47. Accordingly, by virtue of the judgment in *Barber*, the direct effect of Article 119 of the EEC Treaty (now, after amendment, Article 157 TFEU) may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990 (the date of the judgment in that case), subject to the exception laid down.¹⁹ That limitation is reproduced in Protocol (No 33) concerning Article 157 TFEU, the wording of which is identical to Protocol (No 2) concerning Article 119 of the EC Treaty, which is *clearly linked* to the judgment in *Barber*, since it refers inter alia to the same date, 17 May 1990.²⁰ Such a limitation also appears in Article 12(1) of Directive 2006/54.

48. In the present case, pursuant to the case-law of the Court, since the facts in the main proceedings concern periods of work both before and after the accession of the Republic of Austria to the Agreement on the European Economic Area and to the European Union, 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*.²¹

49. It is apparent from the order for reference that the legislation at issue relating to the adjustment of pensions for the year 2018 under the PG 1965 provided for an increase on a reducing scale that is entirely precluded above a certain pension amount. It follows from that fact that the appellants in the main proceedings did not receive any (in the case of EB and DP) or scarcely any (in the case of JS) increase in their pensions, since they amounted to more than EUR 4 980 per month or close to that amount, unlike retirees in receipt of lower pension amounts. Before the referring court, they argued that the great majority of the category of recipients of pensions of an amount greater than EUR 4 980 per month are men, who are thus discriminated against on grounds of sex.

50. That court asks to what extent the appellants in the main proceedings may rely on the principle of equal pay for male and female workers in order to claim that the legislation at issue entails discrimination on grounds of sex prohibited by EU law. In that regard, the court mentions three possible interpretations²² and considers that several arguments militate in favour of the third interpretation, namely that the limitation of the temporal effects of the principle of equal pay provided for in Protocol (No 33) concerning Article 157 TFEU and Article 12 of Directive 2006/54 does not apply to an annual adjustment of retirement pensions such as that in the main proceedings.

51. I agree with the referring court's analysis. That protocol states that, for the purposes of Article 157 TFEU, benefits under occupational social security schemes are not to be considered as remuneration if and in so far as they are attributable to periods of employment prior

¹⁸ Judgment in *Barber*, paragraphs 44 and 45. See also judgment of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 99).

¹⁹ Judgment of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 100 and the case-law cited).

²⁰ See, to that effect, judgment of 23 October 2003, *Schönheit and Becker* (C-4/02 and C-5/02, EU:C:2003:583, paragraph 101 and the case-law cited).

²¹ See, by analogy, judgment of 12 September 2002, *Niemi* (C-351/00, EU:C:2002:480, paragraphs 54 and 55). In the same vein, Article 12(3) of Directive 2006/54 provides that, 'for Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 ... shall be replaced by 1 January 1994'.

²² See points 28 to 30 of this Opinion.

to 17 May 1990.²³ In addition, as is clear from the Court's case-law,²⁴ that protocol must be read in the light of the judgment in *Barber*. In that regard, the case which gave rise to that judgment concerned the fact that a female worker was entitled to an immediate retirement pension after being made compulsorily redundant, whereas a male worker of the same age was entitled in similar circumstances only to a deferred pension.²⁵ The Court found that the direct effect of Article 119 of the EEC Treaty (now, after amendment, Article 157 TFEU) could not be relied upon in order to *claim entitlement to a pension* with effect from a date prior to that of the judgment in *Barber*.²⁶

52. However, in the present case, the cases in the main proceedings do not concern a pension entitlement. The appellants in the main proceedings retired after 1 January 1994 and they do not contest the date of entitlement of the pension they receive or the amount of that pension initially determined. Nor do they call into question the amount of their pension in connection with payments made in the past or with periods of employment prior to 1 January 1994.

53. The appellants in the main proceedings rely on the principle of equal pay solely in relation to the legislation on the adjustment of retirement pensions for the year 2018. That adjustment applies to that year alone and does not have retroactive effect. In those circumstances, I consider that there is no need to limit the application of the principle of equal pay in respect of the share of their pension entitlements attributable to periods of employment after 1 January 1994. On the contrary, the appellants in the main proceedings may rely on the principle of equal pay fully, without any limitation of the temporal effects of that principle.

54. I therefore propose that the first question be answered to the effect that Protocol (No 33) concerning Article 157 TFEU and Article 12 of Directive 2006/54 are to be interpreted as meaning that the limitation of the temporal effects of the principle of equal pay for male and female workers laid down in those provisions does not apply to national legislation on benefits granted under occupational social security schemes which provides for an annual adjustment of retirement pensions after 1 January 1994, including where the periods of employment of the person concerned predate in part that date.

B. The second question referred for a preliminary ruling

55. By its second question, the referring court asks, in essence, whether Article 157 TFEU and Article 5 of Directive 2006/54 are to be interpreted as precluding national legislation, which provides for an annual adjustment of the retirement pensions of national civil servants in the form of an increase on a reducing scale that is entirely precluded above a certain pension amount, if that legislation adversely affects a significantly greater proportion of men than women.

²³ Article 12(1) of Directive 2006/54 is worded in almost identical terms to those of Protocol (No 33) concerning Article 157 TFEU and states that 'any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date ...'. Those two provisions are subject to an exception that does not apply in cases such as those in the main proceedings.

²⁴ See point 47 of this Opinion.

²⁵ Judgment in *Barber*, paragraph 38.

²⁶ Subject to an exception that does not apply in cases such as those in the main proceedings.

56. Pursuant to Article 5(c) of Directive 2006/54, all direct or indirect discrimination on grounds of sex is prohibited in respect of the calculation of benefits in occupational social security schemes which, in accordance with Article 7(1)(a)(iii) of that directive, provide protection against, *inter alia*, the risk of ‘old age’.²⁷

57. It must be stated, at the outset, that national legislation such as that at issue in the main proceedings does not directly entail discrimination on grounds of sex, since it applies indiscriminately to male and female workers.

58. As regards whether such legislation gives rise to indirect discrimination on grounds of sex, such discrimination is defined, for the purposes of Directive 2006/54, in Article 2(1)(b) of that directive, as where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

59. As the referring court has observed, under the legislation at issue, federal civil servants who receive a monthly retirement pension above a certain amount are disadvantaged as compared with those whose retirement pension is lower, since the pensions of the former were not increased.

60. In the light of Article 2(1)(b) of Directive 2006/54, the Court has held that the existence of a particular disadvantage can be established, for example, if it were proved that national legislation is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex.²⁸ The appreciation of the facts from which it may be presumed that there has been indirect discrimination is the task of the national court, in accordance with national law or practices which may provide, in particular, that indirect discrimination may be established by any means, including on the basis of statistical evidence.²⁹ Thus, it is for that court to assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant.³⁰

61. In that regard, the referring court states that, based on the findings made by the Bundesverwaltungsgericht (Federal Administrative Court) in relation to the cases concerning EB and DP, it cannot be ruled that the statistical conditions for indirect discrimination on grounds of sex are met. If the referring court were to come to the conclusion that the legislation at issue adversely affects a significantly greater proportion of men than women, it would thus be for that court to examine to what extent such a difference in treatment can, however, be justified by objective factors unrelated to any discrimination on grounds of sex, as is apparent from Article 2(1)(b) of Directive 2006/54.

62. In accordance with the Court’s case-law, this is particularly the case where the means chosen reflect a legitimate social-policy objective, are appropriate to achieve the aim pursued by the legislation at issue and are necessary in order to do so, it being understood that they can be

²⁷ Judgment of 24 September 2020, *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 41; the ‘judgment in *NK*’).

²⁸ Judgment in *NK*, paragraph 49 and the case-law cited.

²⁹ Judgment in *NK*, paragraph 50 and the case-law cited.

³⁰ Judgment in *NK*, paragraph 51 and the case-law cited. I would point out that such statistical evidence has only relative value and cannot be understood as an absolute benchmark with a view to establishing a particular disadvantage of individuals of one sex as compared with individuals of the other sex.

considered appropriate to achieve the stated aim only if they genuinely reflect a concern to attain that aim and are pursued in a consistent and systematic manner.³¹ It is for the Member State concerned, as the author of the allegedly discriminatory rule, to show that that rule reflects a legitimate social-policy aim, that that aim is unrelated to any discrimination based on sex, and that it could reasonably take the view that the means chosen were suitable for attaining that aim.³² The Court has also held that, in choosing measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion.³³

63. It also follows from the Court's case-law that, while it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent the legislative provision in question is justified by such an objective reason, the Court, which is called on to provide answers of use to the national court in the context of a reference for a preliminary ruling, may provide guidance based on documents in the file of the case in the main proceedings and on the observations which have been submitted to it, in order to enable the national court to give judgment.³⁴

64. In the present case, it is clear from the order for reference and from the written observations of the Austrian Government that, in addition to the objective of preserving the purchasing power of pensioners, the legislation at issue pursues an objective with a 'social component', since, as far as concerns the year 2018, the above-average rise in the costs of daily consumer goods (food and housing) quite specifically affected retired civil servants in receipt of low pensions. The purpose of the special pension adjustment established by that legislation was to offset the specific loss of purchasing power of those on lower and medium-sized incomes by means of a more significant adjustment than that provided for as standard in Paragraph 108h of the ASVG. In addition, according to the Austrian Government, the increase on a reducing scale that is entirely precluded above a certain pension amount allowed the pension scheme for civil servants, which is financed not by contributions but by public funds, to make savings.³⁵ The legislation at issue is thus guided by the long-term funding of benefits and generational fairness.

65. In that connection, the Court has held that, while budgetary considerations cannot justify discrimination against one of the sexes, the objectives of ensuring the *long-term funding of retirement benefits* and of *closing the gap between the levels of pensions funded by the State* may be considered, having regard to the broad discretion of the Member States, as constituting legitimate social-policy objectives unrelated to any discrimination based on sex.³⁶

66. In those circumstances, the legislation at issue must be regarded as being objectively justified by legitimate aims within the meaning of Article 2(1)(b) of Directive 2006/54.

³¹ Judgment in *NK*, paragraph 56 and the case-law cited.

³² Judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 55 and the case-law cited).

³³ Judgment in *NK*, paragraph 57 and the case-law cited.

³⁴ See, to that effect, judgment in *NK*, paragraph 58 and the case-law cited.

³⁵ I note that, in his written observations, DP contests that those objectives form the basis of the legislation at issue.

³⁶ Judgment in *NK*, paragraphs 60 and 61. See also judgment of 21 January 2021, *NSS* (C-843/19, EU:C:2021:55, paragraph 38).

67. In the present case, and subject to the verifications to be made by the referring court in this regard, the legislation at issue appears to strive towards such objectives. First, the savings made by not adjusting the highest retirement pensions have allowed increases to be applied to lower pensions, whilst ultimately cutting the cost to the State budget, the aim of which is to guarantee the long-term funding of civil servants' pensions.³⁷

68. Second, as the Commission has observed, the indexation of retirement pensions to the rate of inflation does not alter per se the differences in the level of the various pensions and the gap between them remains unchanged from a mathematical perspective. However, the intention of the national legislature to provide greater protection to lower retirement pensions from the effects of inflation is a permissible social-policy objective since price rises place a greater burden on the standard of living of people in receipt of low retirement pensions. In the present case, since the legislation at issue affects only benefits exceeding a certain amount, it has the effect of bringing those benefits closer to the level of small pensions.³⁸

69. That legislation does not appear to entail measures that go beyond what is necessary to attain the objectives pursued, inter alia in so far as the limits on the increase of pensions laid down in Paragraph 711 of the ASVG are staggered according to the amounts of the benefits granted.³⁹

70. In the light of the arguments raised by the referring court, it is necessary to examine whether legislation such as that in the main proceedings is implemented consistently and systematically.

71. First, that court states that the legislation at issue is limited to recipients of retirement pensions even though there are appropriate social-policy instruments, such as progressive income tax rates or other tax-funded assistance. However, in my view, the fact that there are other social-policy instruments cannot deprive a Member State of the possibility of varying the adjustment of the amount of retirement pensions. Within the broad discretion enjoyed by it, that Member State must have the option of using such alternative means, together or separately, with a view to pursuing a legitimate social-policy aim.

72. Second, the court observes that, whereas pensions paid under social security schemes are based on the principle of contributions-based funding and are payable by an insurer, the contributions of civil servants in active employment are paid not to an institution under a pension insurance scheme but to the State budget. In my view, that difference between the legal situation of civil servants and persons contributing to a social security scheme does not mean that the retirement pensions of civil servants must necessarily be raised uniformly in line with the rate of inflation. The long-term funding of retirement pensions and the closing of the gap between pension levels, which are legitimate social-policy aims unrelated to any discrimination on grounds of sex, can be applied just as well to a pension scheme financed by the State as to a scheme based on contributions paid to an insurer.

73. Third, the same court observes that, although the national legislature made an important intervention relating to the adjustment of civil servants' pensions for the year 2018, it refrained from adopting such a measure with a 'social component' in respect of civil servants in active employment, in respect of whom a reducing scale was not applied when pay was adjusted for the

³⁷ See, in that regard, Opinion of Advocate General Kokott in *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:356, point 79), according to which the national legislature appears to be pursuing the objective of reducing the burden on public funds in a comprehensive and systematic manner.

³⁸ See, to that effect, judgment in *NK*, paragraph 63.

³⁹ See, to that effect, judgment in *NK*, paragraph 65.

year 2018. Nevertheless, it appears to me that, in order to determine whether the means chosen to serve a legitimate social-policy aim are implemented consistently and systematically, reference must be made to the category of persons concerned, that is to say retired civil servants. In that regard, it is for the referring court to examine whether, as the Austrian Government claims, the legislation at issue applies in the same way to all recipients of a State pension. If it does not, that legislation appears to be inconsistent in that connection. If it does, the difference between civil servants' retirement pensions and the salaries of civil servants in active employment does not, in my opinion, fall within the scope of Article 5 of Directive 2006/54, which seeks merely to prohibit all direct or indirect discrimination on grounds of sex in occupational social security schemes.

74. Fourth, the referring court states that the national legislature intervened only in the context of the occupational social security scheme applicable to civil servants, whilst at the same time refraining from comparable interventions in other occupational social security schemes, for example private schemes. With regard to that argument, it seems to me, once again, that it does not come within the scope of Article 5 of Directive 2006/54. As far as concerns the occupational social security scheme at issue and those of the same type, it is necessary to examine whether the principle of equal pay for male and female workers is observed. The application of that principle does not mean that the national legislation is to apply in the same way to all the Member State's occupational social security schemes, including those not covered by Article 2(1)(f) of Directive 2006/54.

75. Fifth, the referring court states that, in the case of one of the appellants in the main proceedings, his retirement pension, following the entry into force of the legislation at issue, has seen a 25% reduction as compared with the correct adjustment for inflation since he is retired. In their written observations, the appellants in the main proceedings argue that, as civil servants whose relationship with their employer is an employment relationship governed by public law, the crucial factor is that they worked in return for pay which, today, has a posteriori been adjusted downwards. However, in my view, that situation is covered by domestic law and by the social policy which the Member State intends to pursue. EU law does not require that the amount of a retirement pension keeps pace with the rate of inflation and remains stable in real terms. With regard to Article 157 TFEU and Directive 2006/54, in particular, the interpretation of which is requested, those provisions concern merely the application of the principle of equal treatment for men and women, as part of which, as has been stated, closing the gap between the levels of retirement pensions funded by the State is a legitimate social-policy objective and in connection with which the Member States have a broad margin of discretion.

76. Broadly speaking, those first five arguments put forward by the referring court appear to be covered by the restrictions that could be imposed on a Member State's freedom of action within the field of social policy. They do not concern, as such, the principle of equal treatment in occupational social security schemes, within the meaning of Article 5 of Directive 2006/54, which requires that, within such a scheme, equality between men and women must be ensured.

77. Lastly, the referring court asks whether giving advantages to women vis-à-vis the increase in retirement pensions, on the ground that they have historically been treated unfavourably in their working, is a legitimate objective for the purposes of Article 157(4) TFEU. In that regard, it must be recalled that, according to the Court's case-law, that provision cannot be applied to national legislation where that legislation is limited to granting women a higher retirement pension, without providing a remedy for the problems which they may encounter in the course of their professional career, and that that increase does not appear to compensate for the disadvantages

to which women are exposed by helping them in that career and, thus, to ensure full equality in practice between men and women in working life.⁴⁰

78. It follows that, in my view, subject to verification by the referring court, legislation such as that at issue in the main proceedings is implemented consistently and systematically.

79. In conclusion, I would like to point out, as the referring court mentioned in its second question referred for a preliminary ruling, that the statistical overrepresentation of men in the category of persons receiving higher retirement pensions has its origin in the lack of equal opportunity for women as compared with men in relation to employment. The gap between the pension amounts of men and those of women is historically the result of differences in their career paths. In my view, the application of the principle of equal treatment in occupational social security schemes, as provided for in Article 157 TFEU and Directive 2006/54, is not intended to continue that unequal treatment by keeping men in a markedly more favourable position. It follows that the requirements regarding the justification of any indirect discrimination based on sex must be correspondingly lower.⁴¹

80. In the light of the foregoing considerations, I propose that the second question is answered to the effect that Article 157 TFEU and Article 5 of Directive 2006/54 are to be interpreted as not precluding national legislation, which provides for an annual adjustment of the retirement pensions of national civil servants in the form of an increase on a reducing scale that is entirely precluded above a certain pension amount, if that legislation adversely affects a significantly greater proportion of men than women, provided that the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

V. Conclusion

81. In the light of the following considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) as follows:

- (1) 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 are to be interpreted as meaning that the limitation of the temporal effects of the principle of equal pay for male and female workers laid down in those provisions does not apply to national legislation on benefits granted under occupational social security schemes which provides for an annual adjustment of retirement pensions after 1 January 1994, including where the periods of employment of the person concerned predate in part that date.

⁴⁰ See, to that effect, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075, paragraph 65 and the case-law cited).

⁴¹ See, to that effect, Opinion of Advocate General Kokott in *NK (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:356, point 76).

- (2) Article 157 TFEU and Article 5 of Directive 2006/54 are to be interpreted as not precluding legislation, which provides for an annual adjustment of the retirement pensions of national civil servants in the form of an increase on a reducing scale that is entirely precluded above a certain pension amount, if that legislation adversely affects a significantly greater proportion of men than women, provided that the legislation is justified by objective factors unrelated to any discrimination on grounds of sex.