Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 5 September 2018 [1]

Case C-258/17

E.B.
v
Versicherungsanstalt öffentlich Bediensteter BVA

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

(Reference for a preliminary ruling — Social policy — Equal treatment — Prohibition on discrimination on grounds of sexual orientation — Homosexual relations with minors — Disciplinary sanctions taken against civil servant employed by the police following criminal conviction — Maintenance of the effects of the disciplinary decision)

I. Introduction

1. E.B. ('the Appellant') was born in 1942. In 1974, while employed in the Austrian police force, he was criminally convicted for attempted homosexual acts with persons who were 14 and 15 years old. In 1975, the Appellant received a disciplinary sanction in relation to the same acts, consisting in compulsory early retirement from the police force with a 25% reduction to his pension entitlement.

2. At that time, Austrian law provided for two separate criminal offences: 'defilement' (sexual acts with persons *under the age of 14*); and 'indecency' (*male* homosexual acts with persons *under the age of 18*). In 2002, the latter offence was held to amount to unjustified discrimination on the grounds of sexual orientation. It was repealed.

3. In the main action, the Appellant essentially challenges the fact that he continues to receive a reduced pension, on the basis that the criminal offence and disciplinary sanction imposed on him were discriminatory, on the grounds of sexual orientation.

4. It is against such legal and factual background that the Verwaltungsgerichtshof (Higher Administrative Court, Austria) asks whether the reduction to the Appellant's pension entitlement is compatible with the prohibition on discrimination on the grounds of sexual orientation, under Article 2 of Directive 2000/78/EC,[2] even if the original disciplinary decision became final before that directive entered into force. The referring court also asks a series of questions on how and from what point in time the discrimination would potentially have to be remedied.

1 Original language: English.

2 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

II. Legal framework

A. EU law

5. Article 1 of Directive 2000/78 mentions, inter alia, sexual orientation as an unacceptable ground for discrimination.

6. Article 2(1) and (2)(a), Article 3(1)(c) and Article 17 of Directive 2000/78 read as follows:

'Article 2

Concept of discrimination

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;

…

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay;

…

Article 17

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.'

7. The first sentence of Article 18 requires that the directive, in principle, be transposed by 2 December 2003.

B. National law

1. Criminal law

8. As at 25 February 1974, Paragraphs 128 and 129 of the Strafgesetz (Criminal Law) ('the StG') were applicable in the version brought into force by the Bundesgesetz published in BGBl. No 273/1971 ('1971 Federal Law'). They provided as follows:

'Defilement

Paragraph 128

Any person who, … for the purposes of sexual gratification, sexually abuses a boy or girl under the age of 14 in a manner other than that referred to in Paragraph 127 commits the offence of defilement, which shall be punishable by a custodial sentence of 1 to 5 years, of up to 10 years in the event of serious aggravating circumstances, and of up to 20 years in the event of any of the consequences mentioned in Paragraph 126.

Offence of indecency

…

Paragraph 129

The following forms of indecency shall also be punishable as a criminal offence:

I. Same-sex indecency perpetrated by any person of the male sex who has reached the age of eighteen with a person who has not yet reached the age of eighteen.'

9. The aforementioned provisions thus provided for different ages of consent for male homosexual relations (18 years) and for heterosexual or lesbian relations (14 years) respectively.

10. The same was true of the legal position under Paragraphs 207 and 209 of the Strafgesetzbuch (Criminal Code) ('the StGB'), which entered into force on 1 January 1975.

11. By judgment of 21 June 2002,[3] the Verfassungsgerichtshof (Constitutional Court, Austria), declared Paragraph 209 of the StGB (corresponding to Paragraph 129 I of the StG) to be unconstitutional. It was repealed, with effect from 28 February 2003.

12. By the version of the StGB brought into force by the Bundesgesetz published in BGBl I No 134/2002 ('Federal Law No 134/2002'), effective from 13 August 2002, the Austrian legislature repealed Paragraph 209 of the StGB before the repeal ordered by the Verfassungsgerichtshof (Constitutional Court) became effective.

3 Judgment of the VfGH of 21 June 2002, G 6/02 ECLI:AT:VFGH:2002:G6.2002.

13. Austria was the subject of adverse judgments of the European Court of Human Rights (ECtHR) relating to the application of Paragraph 209 of the StGB. In *L. and V. v. Austria*, the ECtHR took the view, in essence, that Paragraph 209 of the StGB violated Articles 8 and 14 of the European Convention on Human Rights ('ECHR') because the legislature had failed to provide adequate justification for the different ages of consent applicable to male homosexual relations with adults, on the one hand, and heterosexual or lesbian relations with adults, on the other. [4]

2. Civil servant law

14. Under Paragraph 13(1) of the Beamten-Dienstrechtsgesetz 1979 (1979 Law on the conditions of service of civil servants) ('BDG 1979'), in the version of those paragraphs brought into force by the Bundesgesetz published in BGBl. I No 119/2002 ('Federal Law No 119/2002'), it was the case until 30 December 2016 that civil servants were to take retirement at the end of their 65th year.

15. For the Appellant, who was born in 1942, this — had it not been for the disciplinary decision taken against him — would have been 1 January 2008. At that time, the main provisions applicable to the assessment of pensions were contained in the Pensionsgesetz (PG) 1965 (1965 Law on pensions) in the version brought into force by the Bundesgesetz published in BGBl. I No 53/2007 ('2007 Federal Law'). Those provisions laid down rules on how pensions should be calculated including the taking into account of the date of entry into service and length of service.

3. Police Service Regulation

16. The disciplinary decision against the Appellant of 10 June 1975 was taken on the basis of the then applicable Dienstpragmatik (Police Service Regulations, RGBl. No 15/1914) ('the DP'). Article 24 and Article 87 of the DP stated as follows:

'Behaviour

Article 24

(1) A civil servant must, within and outside of his service, maintain the reputation of the profession, behave at all times in accordance with the rules of conduct requirements and avoid anything likely to undermine the esteem and confidence that his position requires.

…

Disciplinary sanctions

Article 87

Civil servants who fail to comply with their professional and official obligations shall be subject, without prejudice to their criminal responsibility, to administrative or disciplinary sanctions, depending on whether the breach of duty constitutes a mere breach of the administrative rules or that, in view of the prejudice or infringement of the interests of the State, the nature or seriousness of the breach, recidivism or other aggravating circumstances, this breach is considered a breach of service obligations.'

4 Judgment of the ECtHR of 9 January 2003, *L. and V. v. Austria* (CE:ECHR:2003:0109JUD003939298); see also judgments of 9 January 2003, *S.L. v. Austria* (CE:ECHR:2003:0109JUD004533099), and of 21 October 2004, *Woditschka and Wilfling v. Austria* (CE:ECHR:2004:1021JUD006975601).

III. Facts, procedure and questions referred

17. The Appellant, who was born on 1 January 1942, is retired.

18. By judgment of 10 September 1974, the Appellant, at that time a serving police officer, was convicted of an attempted offence of same-sex indecency under Paragraph 129 I of the StG. He was sentenced to three months' custodial sentence suspended for three years. An appeal brought by the Appellant against that first-instance decision was unsuccessful.

19. By decision of 10 June 1975 of the Disciplinary Committee of the Bundespolizeidirektion Wien (Federal Police Headquarters, Vienna, Austria) ('BPD-Wien'), the Appellant was found guilty of:

'having acted in breach of his professional duties (Paragraph 24(1)) of the Dienstpragmatik (Police Service Regulations, "DP") inasmuch as, on the evening of 25 February 1974, while off-duty, he did, in Vienna's Prater park, ask the 15-year-old W and the 14-year-old H to perform on him an act of manual sexual release, for which he was convicted of an attempted act of same-sex indecency with young persons within the meaning of Paragraphs 8 and 129 I of the StG.

He thereby committed a disciplinary offence (Paragraph 87 of the DP). This Committee therefore imposes on him the disciplinary penalty of compulsory permanent retirement on a reduced pension, the deduction from the standard pension entitlement being set at 25% (Paragraph 93(1)(d) in conjunction with Paragraph 97(1) of the DP).'

20. An appeal by the Appellant was dismissed by decision of 24 March 1976. Accordingly, the Appellant was forced to retire with effect from 1 April 1976.

21. By decision of 17 May 1976, the pension to which the Appellant was entitled was calculated on the basis of his retirement taking effect from 1 April 1976, and taking into account the 25% deduction imposed by the disciplinary authority.

22. It was confirmed at the oral hearing that the Appellant began to receive a reduced pension from that date.

23. As outlined above in points 11 and 12, by decision of the Verfassungsgerichtshof (Constitutional Court) of 21 June 2002, Paragraph 209 of the StGB (corresponding to Paragraph 129 I of the StG) was held to be unconstitutional and was repealed by the Austrian legislature later that year.

24. By letter of 2 June 2008, the Appellant submitted to the disciplinary authority, inter alia, applications for the disciplinary decision of 10 June 1975 to be annulled, the disciplinary proceedings against him to be discontinued and, in the alternative, the legal effects of that disciplinary decision to be declared to be extinguished as from 21 June 2002. He also sought the payment of salary for specified periods of service and, in the alternative, claimed that the reduction in his pension should not have occurred from 21 June 2002 onwards.

25. Those applications were dismissed.

26. On 11 February 2009, the Appellant submitted to the civil service and pensions authority an application for the assessment and back payment of salary and higher pension benefits. He expressed the view, primarily, that, in order to avoid (ongoing) discrimination, he should be treated, from the point of view of pay and pension entitlement, as if he had been in active employment until reaching statutory retirement age. In the alternative, he argued that he was entitled, at least, to his pension without the 25% reduction.

27. Those applications were dismissed. A challenge against that dismissal before the Bundesverwaltungsgericht (Federal Administrative Court, Austria) was rejected. An extraordinary appeal on a point of law against that judgment was brought before the Verwaltungsgerichtshof (Higher Administrative Court), the referring court in this case.

28. In its request for a preliminary ruling, the referring court assumes that, after Directive 2000/78 became effective in Austrian law, an adverse disciplinary decision such as that made in relation to the Appellant would no longer have been allowed. In the absence of any (new) grounds of justification for different ages of consent for male homosexual relations with adults, on the one hand, and for heterosexual and lesbian relations with adults, on the other, it would be impermissible to differentiate, even for the purposes of disciplinary action, between the incitement of a minor by an adult to perform male homosexual acts, on the one hand, and the incitement by an adult to perform heterosexual or lesbian acts, on the other.

29. According to the referring court, there is 'absolutely no doubt' that the disciplinary decision at issue was made on the basis of such a differentiation, its central foundation having been that the conduct with which the Appellant was charged was (at that time) a criminal offence punishable by law. Even though it is not inconceivable that such an incitement to perform heterosexual or lesbian acts would have been interpreted as a dereliction of duty, any disciplinary adjudication made in the absence of the constituent elements of the offence provided for in Paragraph 129 I of the StG would have been 'incomparably milder'.

30. In the light of those considerations, the referring court wonders what the effects of the entry into force of Directive 2000/78 and the prohibition of discrimination on grounds of sexual orientation are for the ongoing pension payments to the Appellant. The Verwaltungsgerichtshof (Higher Administrative Court,) decided to stay proceedings and refer the following questions to the Court:

'(1) Does Article 2 of [Directive 2000/78 ("the Directive") preclude the maintenance in being of the new legal position created by an administrative decision that has become final under national law, in the area of law governing disciplinary action in the civil service (disciplinary decision), compulsorily retiring and reducing the pension benefits of a civil servant, where

that administrative decision was not yet subject to provisions of EU law, in particular the Directive, at the time when it was adopted, but

a (notional) decision to the same effect would infringe the Directive if it were adopted within the temporal scope of the Directive?

(2) If the first question is answered in the affirmative, is it, for the purposes of creating a non-discriminatory situation,

(a) necessary under EU law, for the purposes of determining the civil servant's pension, to treat him as if, in the period between the entry into force of the administrative decision and his reaching statutory pensionable age, he had not been retired but working, or is it

(b) sufficient for these purposes to recognise as due the unreduced pension accruing in consequence of compulsory retirement at the time specified in the administrative decision?

(3) Does the answer to Question 2 depend on whether the civil servant did in fact proactively seek active employment in the federal civil service before reaching retirement age?

(4) If it is considered sufficient to annul the percentage reduction of pension entitlement (and depending also, if necessary, on the circumstances referred to in Question 3):

Can the principle of non-discrimination contained in the Directive support a primacy of application over conflicting national law which a national court must observe, when calculating pension entitlement, even in respect of periods before the Directive became directly applicable in national law?

(5) If Question 4 is answered in the affirmative, to which point in time does such "retroactive effect" extend?'

31. Written submissions were lodged by the Appellant, the Italian and Austrian Governments and the European Commission. With the exception of the Italian Government, those interested parties also presented oral argument at the hearing held on 29 May 2018.

IV. Assessment

32. Can a new rule of law be invoked to challenge the ongoing repercussions of an administrative decision that was adopted and became final before that new rule became applicable? That is the fundamental question raised by the referring court's first question.

33. In circumstances such as those in the main case, I consider that the answer is no.

34. Given my proposed answer to that first question (Section A below), the remaining questions do not require an answer. Nevertheless, in the event that the Court should come to a different conclusion, I will also briefly discuss the issues that those questions raise (Sections B and C), as well as the relevance of Article 157 TFEU (ex Article 141 EC) for the present case. The latter provision does not figure in the referring court's questions, but has been raised by the Appellant (Section D).

A. Question 1

35. Where an administrative decision, involving discrimination on the grounds of sexual orientation and leading to a reduction in pension rights, became final before such discrimination was prohibited under Directive 2000/78, is the maintenance of that reduction in pension rights precluded now that the directive is in force? That is the crux of the referring court's first question.

36. According to the order for reference, the first question does not relate to the validity of the decision to impose compulsory retirement and reduce the Appellant's pension rights. That was challenged in the 1970s and the Appellant sought again to challenge it (unsuccessfully) after the offending provision of the criminal law was repealed.

37. Rather, to the extent that the administrative decision involved discrimination, the referring court's first question asks whether it is contrary to Directive 2000/78 to *maintain the effects* of that decision in terms of *ongoing reduced pension rights*.

38. In addressing that question, I will begin by recalling the Court's general approach to the temporal application of new rules to ongoing effects of pre-existing situations (Section 1). I will then turn to the Court's approach specifically in cases involving pensions (Section 2). Next, I will outline the case-law on ongoing relations (Section 3) and the extent of the duty to reopen past decisions (Section 4). Finally, I will apply those findings to the present case (Section 5).

39. However, before turning to those issues, two preliminary remarks are called for.

40. First, there seems to be an agreement on the fact that the difference in *criminal* treatment of sexual relations with minors depending on the homosexual or heterosexual nature of those relations, which applied under Austrian law in 1974, would not be acceptable *today*. Logically the same would then also be true of the references to the Appellant's sexuality in the reasoning contained in the *disciplinary* decision. None of those statements were in fact disputed by the Austrian Government. Nonetheless, and without being contradicted on that point, the Austrian Government stated that both the criminal and disciplinary sanctions were entirely legal under Austrian law in 1974 and 1975. That government also suggested that they were compliant with the then prevailing European standards, which have evolved since then.

41. Second, what is much less clear in the context of the present case is the exact relationship between the criminal and disciplinary sanctions in the main proceedings. In particular, there have been rather extensive discussions, both in the written submissions and at the oral hearing, as to whether or not a disciplinary sanction (of certain severity) was a necessary consequence of the criminal conviction. On the one hand, unlike the criminal code, the (rather generally framed [5]) disciplinary rules applicable to civil servants made no formal distinction between behaviour depending on its homosexual or heterosexual nature. On the other hand, in its order for reference, the referring court stated that, if there had been no criminal conviction, the disciplinary measures imposed would have been 'incomparably milder'.

42. In response to questions about the exact relationship between the criminal and disciplinary sanctions, the Austrian Government stated that in 1974 the existence of a definitive criminal sanction against a police officer was not necessarily *sufficient* for automatic dismissal. [6] Nor, however, was such a conviction *necessary* to impose disciplinary sanctions. Austrian police officers were required in 1974 to behave in line with the highest standards both on and off duty. Thus, the fact that certain behaviour was not the subject of a criminal conviction (or criminalised at all) did not mean that it posed no problems under the disciplinary rules. In that regard, the Austrian Government, without being challenged on the point, posited that, completely *irrespective of* sexual orientation, the solicitation by a 32-year-old police officer of 14- and 15-year-olds in a public park was unlikely to be viewed as upstanding behaviour. It is indeed confirmed by the referring court that the equivalent heterosexual soliciting of minors in public parks could have been interpreted as a dereliction of duty, punishable at that time by disciplinary action.

43. I draw a twofold conclusion from those statements. First, I understand that *the mere existence* of a final criminal conviction against a police officer had by definition to be seen as a failure in terms of his professional obligations. It is rather clear that the standards of behaviour for police officers are set at a higher level than merely 'not committing criminal offences'. In this sense, it is therefore quite logical that the existence of a criminal conviction had by definition direct repercussions on the range of conceivable sanctions, making them '(in)comparably harder' than in cases in which no criminal conviction were issued. [7] Second, I also understand that beyond this one-sided implication (from the existence of the criminal conviction to the disciplinary sanction) in terms of severity of the disciplinary sanction, a criminal conviction *was not a necessary precondition* for the adoption of that disciplinary sanction.

5 Article 24 of the DP, quoted above in point 16 of this Opinion.

6 Adding that under current national rules, a final criminal conviction entered against a civil servant has as its automatic consequence the termination of the employment relationship *ex lege*, without the need for a disciplinary decision in that regard being taken.

7 As in fact already implied by the wording of the then applicable Article 87 of the DP (above, point 16).

1. Temporal applicability of new rules

(a) The general approach

44. According to settled case-law of the Court, new rules apply as a matter of principle immediately to the 'future effects of a situation which arose under the old rule' and the principle of legitimate expectations cannot be extended to the point of 'generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule'. [8]

45. However, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to 'situations existing before their entry into force' only in so far as it 'clearly follows from their terms, their objectives or their general scheme that such effect must be given to them'. [9]

46. According to another formula used by the Court, a new rule of law 'does not apply to legal situations that have arisen and become definitive under the old law [but] it does apply to their future effects, and to new legal situations. It is otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application'. [10]

47. The general rules emerging from those cases could thus be described as follows: (i) non-application of new rules to 'definitive situations', which arose and were adjudicated upon under the old rules, and (ii) application of new rules to future effects of 'existing situations', which produce ongoing effects. The taking into account of older facts for a fresh legal assessment under the new rules will, furthermore, be carried out only if such an assessment is provided for or necessary by the nature or structure of the new rules.

48. The same approach is also reflected in the context of an accession of a new Member State to the European Union, [11] both with regard to the national application of (new) EU rules as well as the jurisdiction of the Court on preliminary rulings to answer questions relating to such situations. Past facts (that is, facts pre-dating accession) may be taken into account if they are relevant and need to be (freshly) assessed in the process of the application of the new law(s) post-accession. [12] Thus, for example, it was not for the Court to essentially start substantively re-assessing, post-accession, whether or not some terms in a consumer contract concluded prior to accession were unfair, even if that contract is effectively being enforced after accession. [13] By contrast, the Court was competent to assess whether or not national legislation capping interest for late payments that related to a legal transaction concluded well before accession, but with ongoing effects (and their ultimate calculation) after accession, was compatible with EU law. [14]

8 See, for example, judgments of 16 May 1979, *Tomadini* (84/78, EU:C:1979:129, paragraph 21), and of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 49).

9 Judgment of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 50).

10 Judgment of 26 March 2015, *Commission* v *Moravia Gas Storage* (C-596/13 P, EU:C:2015:203, paragraph 32).

11 Which, in a way, differs not in principle, but just in scale (the entire legal order if effectively 'amended').

12 See, for example, judgments of 14 June 2007, *Telefónica O2 Czech Republic* (C-64/06, EU:C:2007:348) (procedure before authority ongoing at the date of accession, decision post-accession); of 22 December 2010, *Bezpečnostní softwarová asociace* (C-393/09, EU:C:2010:816, paragraphs 22 to 27) (request for authorisation pre-accession, fresh decision adopted post-accession); of 24 November 2011, *Circul Globus Bucureşti* (C-283/10, EU:C:2011:772, paragraph 29) (licensing contract pre-accession, alleged breach of intellectual property rights post-accession); of 12 September 2013, *Kuso* (C-614/11, EU:C:2013:544, paragraph 30) (work contract pre-accession, retirement post accession); and of 3 September 2014, *X* (C-318/13, EU:C:2014:2133, paragraphs 21 to 24) (accident at work pre-accession, related legal act being challenged post-accession).

13 Judgment of 10 January 2006, *Ynos* (C-302/04, EU:C:2006:9).

14 Judgment of 15 December 2016, *Nemec* (C-256/15, EU:C:2016:954).

(b) Ciola

49. In their written as well as oral submissions, both the Appellant and the Commission relied extensively on the decision of this Court in *Ciola*.[15] That decision should indeed be looked at in detail, because it demonstrates how the general guidance outlined in the previous section is applied in the context of a specific case.

50. The magic date in *Ciola* was 1 January 1995, when Austria acceded to the European Communities. At that date, of course besides any explicit derogations, EC law, including free movement rules, entered into force in full and became applicable immediately in that new Member State.

51. Mr Ciola's company owned and rented 200 moorings for pleasure boats, situated in the Austrian part of Lake Constance. An administrative decision from 1990 stated that a maximum of 60 moorings could be rented to foreign residents.[16] A list of the moorings granted to foreign residents was to be provided on an annual basis.[17]

52. On 10 July 1996 (18 months after accession), a new individual administrative decision was adopted, finding the company guilty of renting two moorings to foreign residents in January and May 1995, in excess of the quota of 60. Mr Ciola was fined for each of these infringements of the administrative decision of 1990.[18] Mr Ciola appealed against the decision of 1996 to impose a penalty. The case was referred to this Court, with the second question raised by the referring court explicitly asking about the temporal scope of application of that preclusion, given that the original administrative decision became final prior to accession.

53. The Court began its reasoning by confirming that the foreign resident mooring quota was precluded by the rules on free movement of services. However, the Court added that 'the dispute concerns not the fate of the administrative act itself, in this case the decision of 9 August 1990, but the question of whether such an act must be disregarded *when assessing the validity of a penalty imposed* [after the date of accession] for failure to comply with an obligation thereunder, because of its incompatibility with the principle of freedom to provide services'.[19] The Court concluded that such an act must be disregarded.

54. In the present case, the Appellant cites *Ciola* as holding effectively that a person suffering the negative effects of an administrative decision has a right to have those effects neutralised if, hypothetically, the administrative decision *would have been* incompatible with new legal rules if it had been adopted after the entry into force of those new rules.

55. Yet such a conclusion does not follow from the *Ciola* judgment. In *Ciola* the applicant was challenging the *validity of a fine* that was imposed by a decision *post-dating the entry into force* of the free movement rules in Austria. Moreover, the fine was imposed *for actions* carried out by Mr Ciola's company — the rental of moorings in January and May 1995 — which *themselves* post-dated accession.

56. Thus, it is therefore rather clear that in *Ciola*, there was a new application of the new law post-dating accession, which was logically necessary in order to assess a new situation. Post-accession facts (rental of moorings) were to be evaluated and matched with new post-accession law (national law prospectively adapted to be compliant with newly applicable EU rules). Moreover, there was

15 Judgment of 29 April 1999 (C-224/97, EU:C:1999:212).

16 Judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraphs 3 and 4).

17 Opinion of Advocate General Mischo in *Ciola* (C-224/97, EU:C:1998:598, point 5).

18 Judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraph 8); Opinion of Advocate General Mischo in *Ciola* (C-224/97, EU:C:1998:598, point 6).

19 Judgment of 29 April 1999, *Ciola* (C-224/97, EU:C:1999:212, paragraphs 25 and 34), emphasis added. See also Opinion of Advocate General Mischo in *Ciola* (C-224/97, EU:C:1998:598, points 40 to 43).

clearly no 'neutralisation' of (past) effects of the 1990 decision in the sense suggested by the Appellant. The Court did not state that that decision had to be revisited or that any compensation for its previous existence had to be paid. Instead, what was required was simply that that old decision, which became incompatible with the new laws post-1995, could no longer be applied in a new, fresh application of the law in the context of imposing administrative penalties post-accession.

2. Specific case-law on pensions

57. The general approach outlined in the previous section also applies in the context of Directive 2000/78 and pension schemes.[20] However, precisely *how* those rules apply in individual cases is not necessarily self-evident. The particularities of pension schemes cannot be ignored. Rights are accrued and pensions are paid out for decades, during which laws can change significantly. The fact that pension-related disputes can involve such significant sums of money for the individual and, in aggregate, the state and private pension funds, makes it more sensitive.

58. That is indeed a significant feature that can be seen running through the judgments that will be discussed in this section in relation to pensions. The large majority of those cases involve decisions on pensions that have been adopted *after* the new rules have come into force.

(a) Old facts, new law and the need for a new decision

59. There are many judgments relating specifically to pensions where the Court has confirmed that, in establishing the right to a pension, facts predating the entry into force of new rules prohibiting discrimination (in particular, periods of service) must be considered.

60. Thus, for example, the *Bruno* and *O'Brien* cases[21] concerned equal treatment of part-time and full-time workers, which is provided for in Directive 97/81/EC.[22] The Court held in those cases that, in establishing whether an individual qualifies for a pension, periods of part-time service predating the entry into force of that directive needed to be considered.[23] In both *Bruno* and *O'Brien* the entitlement to a pension was to be determined *after* the entry into force of the directive.[24]

61. That was also true of the *Barber*[25] and *Ten Oever*[26] cases, where alleged sex discrimination in breach of Article 119 EC was at issue. In those cases, the entitlement to a pension was determined *after* the entry into force of Article 119 EEC.[27]

20 Judgments of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179), and of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286). Certain pension schemes are, however, excluded from the scope of Directive 2000/78 by Article 3(3) thereof.

21 Judgments of 10 June 2010, *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329), and of 1 March 2012, *O'Brien* (C-393/10, EU:C:2012:110).

22 Council Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC — Annex: Framework agreement on part-time work (OJ 1998 L 14, p. 9).

23 Judgment of 10 June 2010, *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:329, paragraph 55), and of 1 March 2012, *O'Brien* (C-393/10, EU:C:2012:110, paragraphs 24 and 25).

24 In the case of *O'Brien*, in 2005. As regards *Bruno*, the Court does not confirm that explicitly, but the fact that none of the applicants had retired is implicit in paragraph 12 of the judgment. In her Opinion in *Bruno*, Advocate General Sharpston stated that 'Directive 97/81 therefore governs the calculation of qualifying weeks for access to the pension at issue in the main proceedings, *to the extent that none of the claimants had retired definitively before the entry into force of the Directive*. It is for the national court to establish whether that is the case'. Opinion of Advocate General Sharpston in Joined Cases *Bruno and Others* (C-395/08 and C-396/08, EU:C:2010:28, point 40). Emphasis added.

25 Judgment of 17 May 1990 (C-262/88, EU:C:1990:209).

26 Judgment of 6 October 1993 (C-109/91, EU:C:1993:833).

27 In *Ten Oever*, the alleged right to a survivor's pension arose following the death of the spouse in 1988. Mr Barber was made redundant in 1980.

62. In *Maruko*[28] the issue was refusal of a right to a survivor's pension resulting from alleged discrimination on grounds of sexual orientation in breach of Directive 2000/78. As in *Ten Oever*,[29] the relevant event occurred, and new decision was made (death of a partner and decision to refuse a survivor's pension) *after* the deadline for transposition had expired.[30]

63. The *Kauer* and *Duchon* cases effectively involved discrimination on grounds of nationality.[31] In those cases the applicants applied for a pension in Austria *after* accession and requested that certain facts occurring in other Member States and before accession be taken into account (in the case of *Kauer*, child-rearing periods in Belgium and in the case of *Duchon*, a work-related accident in Germany leading to incapacity).

64. To summarise, the above cases on pensions all involve situations where facts pre-dating new law are taken into account when adopting a decision *post-dating* the new law. That fits the pattern of the general case-law cited above perfectly: there is an ongoing factual situation in relation to which a fresh legal assessment has to be carried out following the entry into force of a new law. In such situations, it is entirely logical, in particular in the social security context, that all the relevant factual elements pre-dating the new law are to be taken into account.

65. For that reason, that case-law is in my view not transposable to the present case, where the facts, the applicable law, as well as the administrative decision itself pre-date the new law. The only facts post-dating the new law are the pension payments made to the Appellant.

66. That is all the more so since the alleged discriminatory decision in the present case involves the assessment and application of law to facts that in themselves are not *directly* related to pension entitlement or calculation. The alleged discrimination relates to a disciplinary decision which, having confirmed the guilt of the Appellant, has imposed a twofold disciplinary sanction on him.[32] There is of course no denying that that decision has had repercussions on the Appellant's pension.[33] However, unlike the cases discussed in this section, the present case does not involve, for example, objective conditions of entitlement pertaining to personal situations or periods of service. Instead, it concerns an underlying and separate disciplinary decision relating to a specific set of facts.

(b) Existing pensions, new law and current situations

67. The judgment in *Römer*,[34] which has been cited by all parties, does not fit the above pattern quite so well. It therefore deserves to be considered in more detail.

68. In that case, the applicant was in fact already retired and drawing his pension when in 2001 (so prior to the expiry of the deadline for transposing Directive 2000/78) he entered into a life partnership with his male companion. Mr Römer was denied the tax classification which would normally have been applied in case of a (heterosexual) marriage,[35] and would have given him higher pension payments.

28 Judgment of 1 April 2008 (C-267/06, EU:C:2008:179).

29 Judgment of 6 October 1993 (C-109/91, EU:C:1993:833).

30 See judgment of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 21).

31 Judgments of 7 February 2002, *Kauer* (C-28/00, EU:C:2002:82), and of 18 April 2002, *Duchon* (C-290/00, EU:C:2002:234).

32 The operative part of that decision is reproduced above in point 19.

33 See points 21 and 22 above.

34 Judgment of 10 May 2011 (C-147/08, EU:C:2011:286).

35 More specifically, tax classification of notional net income used to calculate the pension.

69. The Court in substance held that, to the extent there was discrimination, Mr Römer could claim equal tax treatment *as from the expiry of the deadline for transposition* of Directive 2000/78. Unlike the other cases cited above, however, in *Römer* the applicant's entitlement to a pension was decided before the new rules entered into force. The issue was about *ongoing discrimination* in relation to subsequent payments and the applicant's tax position.

70. However, that case is different from the present one, for two reasons in particular.

71. First, it is true that Mr Römer's tax position had been determined prior to the expiry of the transposition period of Directive 2000/78, so in that sense it was a 'final' decision. However, it is also the case that relevant national law provided *for a review* of tax treatment in case of a *change in personal circumstances*. Thus, as confirmed by the Court, under the applicable national law 'if the conditions [for more favourable tax classification] are not satisfied until after payment of the retirement pension has commenced, the latter provision has to be applied from that date if the party concerned so requests'. [36]

72. In *Römer* there was therefore a mechanism for adopting fresh decisions, taking new, and for the purposes of social security calculations, relevant changes in personal circumstances into account.

73. Secondly, and more fundamentally, leaving aside the aforementioned review clause, the judgment in *Römer* concerns the way in which new rules (Directive 2000/78) might apply to the *current personal situation* of an individual, in order to review a *decision on their pension rights*.

74. That is, in my opinion, completely different from the type of temporal application argued for by the Appellant in the present case. In the present case, what is proposed is not the (legally provided for) taking into account of personal circumstances for a future adjustment, but a review in the light of new rules of law of *a closed set of facts* taking place many years ago and a *disciplinary decision* adopted in relation to them, with the purpose of altering knock-on effects for pension rights.

(c) Exceptions to the rule?

75. It is true that there are isolated judgments of the Court where the decision on granting a pension and all relevant facts appear to predate the new rules. In other words, a decision has been taken to grant (or not) a pension and concerning the level of entitlement, but new rules are apparently invoked to reopen that decision, without there being any new facts or any change to personal circumstances.

76. However, such judgments are in practice rare and, on a closer inspection, they can easily be distinguished. In *P.* [37] the applicant was the divorcee of a Commission official. At the time the official died, P. had no right to a survivor's pension because 'fault' for the divorce had not been placed solely on the deceased husband. Only a few months after the death, new rules entered into force, under which *P. would have had* a right to a survivor's pension. [38] The Court effectively applied the new rules, which created a right for P. to a pension from the date of entry into force of those new rules.

36 Judgment of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 19).

37 Judgment of 5 February 1981, *P.* v *Commission* (40/79, EU:C:1981:32).

38 Essentially, the condition that the deceased was solely to blame was removed and a new condition, that the survivor was *not* solely to blame, took its place.

77. In the *P.* case, there were nonetheless some peculiar features. The Commission in fact argued strongly in favour of application of the new rules (it contested the payment of a pension on other grounds). Other institutions applied the rules with immediate effect, and failure to do so would, according to the Commission, result in discrimination between officials. Moreover, the original decision refusing the pension to P. was in practice taken some days *after* the new rules entered into force (even though the death of the ex-husband's death was prior to this).

78. In the case of *Brock*, the applicant had been granted an invalidity pension in 1958. In 1961 that was transformed into an old age pension.[39] The question was essentially whether new rules requiring the taking into account of contributions in other Member States and entering into force on 1 January 1964 applied. The Court held that they did.

79. It is in my view significant that in that case the relevant legislation included a provision that *explicitly provided for review of pensions that were calculated before entry into force* of that legislation.

80. However, the most important element distinguishing *P.* and *Brock* from the present case is that the relevant decisions in those cases concerned the assessment of the *conditions for granting the pension under new rules of law*.

81. That is obviously different from the *assessment of past behaviour under new rules of law*, for the purposes of determining how different a (disciplinary) decision would have been, and its knock-on effects on subsequent pension rights.

82. Thus, for example, in *P.* the divorcee did not request the reassessment of her divorce, to determine whether her ex-husband was solely responsible. In *Brock*, the incapacitated party did not request a reassessment of the circumstances of his accident to determine whether it could be classed as an accident at work. Any decisions on responsibility for the divorce or the accident were final, just as the disciplinary decision in the present case is also final.

83. In sum, judgments such as *P.* and *Brock* do have a 'more strongly retroactive flavour' to them at first sight than other cases, such as those discussed above. However, apart from the fact that they are relatively old and isolated cases, they can clearly be distinguished from the present case. In any event, it is, in my view, clear that such judgments cannot be read as meaning that the adoption of any new rules gives rise to an absolute right to have any underlying and previous administrative decisions, which have otherwise become definitive, reviewed in the light of those new rules and for corresponding adjustments to be made to pension payments.

(d) Transitional provisions

84. Finally, another line of case-law in the pension context worth addressing relates to Directive 79/7/EEC.[40] That directive required Member States to implement the principle of equal treatment of men and women in matters of social security. As part of that process, Member States changed national rules on benefits to remove discrimination on grounds of sex.

85. Those legislative changes led to a number of references to this Court. To the extent relevant here, the cases concerned female claimants who, on the basis of discriminatory national rules, had been refused social security benefits by a decision adopted *prior to the deadline for transposition* of the directive. They sought, in effect, to obtain those benefits *after the transposition deadline* by application of the new non-discriminatory rules.

39 Judgment of 14 April 1970 (68/69, EU:C:1970:24).

40 Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

86. The judgments adopted by the Court repeatedly confirmed that the effects of the discrimination had to be removed after expiry of the transposition deadline. However, on closer inspection, those cases are again very different from the present one.

87. For example, in the *Borrie Clarke* case,[41] national law imposed an additional condition on women applying for an invalidity pension, as compared with men (the inability to do housework). The claimant did not meet that additional condition and her request for a pension was rejected in 1983. To comply with the directive, national law was subsequently changed. The invalidity pension was replaced with disability allowance and new conditions were imposed, which were the same for both sexes. However, as part of the transition, people who had been granted invalidity pensions prior to the new law automatically received disability allowance without needing to meet the new conditions. The transitional provisions thus effectively reaffirmed and perpetuated the discrimination.

88. The Court held that 'if, as from [the transposition deadline], a man in the same position as a woman was automatically entitled to the new severe disability allowance under the aforesaid transitional provisions without having to re-establish his rights, a woman was also entitled to that allowance without having to satisfy an additional condition applicable before that date exclusively to married women'.[42]

89. In my view, the situation in *Borrie Clarke* is similar to the other pensions cases already discussed above in Section (a). The transitional provisions effectively constituted a new application (or at the least a renewal of the past decision under the new law) of the discriminatory rules for the future. As a result, that line of case-law can again clearly be distinguished from the present case.

90. The same type of situation can be seen in other judgments, albeit relating to different kinds of benefits.[43]

3. Ongoing relations

91. In its written submissions, the Commission also referred to the *Österreichischer Gewerkschaftsbund* case,[44] drawing a parallel with ongoing discrimination regarding the payment of monthly salaries. That chimes with the Appellant's arguments, which repeatedly refer to the ongoing discrimination in the form of reduced pension payments, which are made on a regular basis.

92. To the extent that the reference to this line of case-law could be seen as supporting an argument different to the one explored in the previous section, I do not see how it could help the claims made by the Appellant. In my view, that case-law is again simply different.

93. In *Österreichischer Gewerkschaftsbund*,[45] for the purposes of calculating pay for contracted teachers, Austrian law fully took into account previous teaching experience gained in Austria. Teaching experience in other Member States was only taken into account to a limited extent. The Court held that limitation to be contrary to the free movement of workers. It also held that, to remedy the discrimination, teaching experience in other Member States had to be taken into account fully, even if it was acquired *before Austrian accession*.

41 Judgment of 24 June 1987 (384/85, EU:C:1987:309).

42 Judgment of 24 June 1987, *Borrie Clarke* (384/85, EU:C:1987:309, paragraph 12).

43 See, for example, judgment of 8 March 1988, *Dik and Others* (80/87, EU:C:1988:133).

44 Judgment of 30 November 2000 (C-195/98, EU:C:2000:655).

45 Judgment of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655).

94. *Österreichischer Gewerkschaftsbund* is in fact one of a number of judgments where the Court has essentially held that, in employment relationships, facts predating the entry into force of new rules may need to be taken into account in determining pay for employees if they are relevant for that assessment under the new legal regime.[46] Thus, for example, in a series of cases beginning with *Hütter*, the Court held that Austrian rules taking into account professional experience obtained before the age of 18 in fixing civil servants' pay grades were contrary to the prohibition on discrimination on grounds of age under Directive 2000/78.[47] Pay grades had to be adjusted to remove the discrimination, including where the relevant experience was acquired before expiry of the deadline for transposing that directive.

95. In my view it is not possible to draw direct parallels between such cases, involving adjustments of salaries to remedy discrimination and, cases like the present one for a simple reason: the employment relationship in cases such as *Österreichischer Gewerkschaftsbund* was an *ongoing* one, with current reciprocal rights and obligations. The employee has a grade or rank and a specific number of years of relevant experience, which is used each month as a basis to calculate his salary. Thus, there is a 'renewal' each month, a renewed application of the extant laws for the purposes of the appropriate salary calculations, necessitating ongoing adjustments in the light of new law and changes to personal situation.[48] That is indeed similar in some ways to the scenario in *Römer*, where specific legislative provisions relating to a change in the personal situation of the claimant allowed for a similar 'renewal'.[49]

96. By contrast, in cases such as the present one, the employment relationship had come to an end[50], all pension rights were accumulated well before that time and a disciplinary decision on the 25% reduction had been taken in 1975 on the basis of past events and become definitive. The practical effects of that decision continue to be felt, as may be the situation with any and every past event, but there is no longer any ongoing relationship that would require a fresh (re)assessment under the new law. There are no continuously relevant past facts. In this sense, legal effects of the past facts have indeed been exhausted.

4. Reopening past decisions

97. Finally, to provide a complete overview, it ought to be added that there also exists, under EU law, in addition to the rules concerning temporal applicability of new rules to past facts and/or ongoing legal relationships, the limited duty to reopen past decisions if they are incompatible with EU law.

98. The Court's case-law underlines the importance of the principle of *res judicata* for reasons of stability of the law and legal relations, as well as the sound administration of justice. Decisions which have become final after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard can no longer be called into question.[51] That is so even if to do so would enable a national court to remedy an infringement of EU law by the decision at issue.[52]

46 See, for example, judgments of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513); of 26 October 2006, *Commission* v *Italy* (C-371/04, EU:C:2006:668); and of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381).

47 Judgments of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381); of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38); and of 14 March 2018, *Stollwitzer* (C-482/16, EU:C:2018:180).

48 Following again the general rules that the specific content of the mutual rights and obligations in ongoing legal relationships, such as, for instance, contracts concluded under the previous legal regime, will have to be *prospectively* modified to be in compliance with the new law — see further, for example, my Opinion in *Nemec* (C-256/15, EU:C:2016:619, point 41).

49 Above, points 67 to 74.

50 It is explained in the order for reference that technically the 'serving employment relationship' has transformed into a 'retirement employment relationship'. The point here is that the civil servant is no longer serving.

51 See, for example, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 38 and the case-law cited).

52 Judgments of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraphs 46 and 47), and of 16 March 2006, *Kapferer* (C-234/04, EU:C:2006:178, paragraph 21).

99. It is true that final decisions may be reopened, but that is only the case if there are truly exceptional circumstances. Those circumstances include the fact that EU law was misinterpreted, without a question being referred to the Court for a preliminary ruling, and that the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court. [53]

100. However, leaving aside the question of where exactly the 'exceptionality' threshold would lie, the common denominator to those few cases where such an obligation was imposed was naturally that the incompatibility *already existed* at the moment when the decision was taken at national level. Thus, the original decision was already in breach of EU law.

101. By contrast, in the present case, at the time the relevant decisions were adopted (both the disciplinary decision and the decision granting a pension to the Appellant) Austria was not a Member State, and Directive 2000/78 had not yet been adopted. Moreover, according to the Austrian Government, a view which the Appellant does not contradict, the disciplinary decision was compatible with national law when it was adopted in 1974.

102. There are therefore no exceptional circumstances that would justify the reopening of final administrative decisions in this case, let alone anything that would justify a more general and far-reaching rule on temporal application of EU law aimed at achieving the same result.

5. Application to the present case

103. The main conclusions that can be drawn from the different lines of case-law outlined above are the following.

104. First, the Court's case-law on temporal effects of new law and pension rights is very much focused on situations where the pension entitlement was decided *after* the new law came into force.

105. Second, the case-law on ongoing (employment) relationships and adjustment of pay grades and monthly salaries cannot be transposed to the payment of pensions, calculated and already paid out (long) before the new law came into force.

106. Third, there is no solid basis in the Court's case-law for the far-reaching proposal that the ongoing effects on pension payments of administrative decisions, which have become definitive *before* entry into force of the new law, must be revisited, taking into account the way that the new law would have been applied. Moreover, such a proposal conflicts with the Court's well established case-law on *res judicata*.

107. I already sought to distinguish the present case and to explain why it falls outside of any of those categories in each of the relevant sections above. In a nutshell, I consider that in the present case the compulsory retirement and fixing of the reduced pension rights had already become a 'definitive situation' within the meaning of the case-law cited above in point 46 before the transition period of Directive 2000/78 expired. The ongoing payment of a pension to the Appellant cannot be considered as the 'future effects' of a situation that arose prior to that directive, within the meaning of the Court's case-law, such that those effects would have to be precluded or modified.

53 Such exceptional circumstances are considered in the judgments of 13 January 2004, *Kühne & Heitz* (C-453/00, EU:C:2004:17, paragraph 28), and of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 63).

108. The disciplinary decision was already unsuccessfully challenged in the 1970s. The legal question of the Appellant's status as a retired police officer and the reduction of his pension were settled by that time. The Appellant has been drawing his pension since 1976. There is no new decision that was taken or that would have to be taken after expiry of the transposition deadline for Directive 2000/78.

109. Moreover, all the relevant facts in the present case, which formed the basis of the disciplinary decision, occurred in the 1970s. Thus, unlike the *Römer* case, there are no current facts relating to the Appellant's ongoing personal situation that are subject to reassessment under Directive 2000/78.

110. I do not consider that cases such as *Brock* and *P.* can serve as a basis for the general proposition that there is a right to review of pension payments, consisting in a retroactive application of new rules to a previously existing decision affecting the entitlement to and level of those payments. Also, *Brock* and *P.* are in my view very different from the present case. In both those cases the pre-existing administrative decision was taken applying a number of rather specific and objective conditions in relation to the entitlement to and level of the pension. Subsequent changes to the law modified those conditions. That contrasts with the present case, where what is being proposed is in fact a rerun of a disciplinary procedure from 40 years ago in the light of new rules on discrimination and a qualitative assessment of whether that decision would have changed and if so, how.

111. In his submissions, the Appellant insisted on the 'ongoing' nature of the discrimination in the form of reduced monthly payments. However, it is clear from the discussion of the cases on actual ongoing legal relationships and the need for their gradual adaptation in the light of the new rules, such as *Österreichischer Gewerkschaftsbund* or *Römer*, that the mere receipt of monthly payments based on final decisions from 1975 and 1976 requires no fresh assessment of any relevant facts.

112. What is in fact requested in the present case is a fresh assessment of a final, underlying disciplinary decision, applying new standards of non-discrimination to determine the knock-on effects on monthly pension payments. The true nature of what is being requested is perhaps best captured by the German wording of the final sentence of the first preliminary question submitted by the referring court, which refers to the adopting of a new type of 'gedachte' decision that, if it were adopted at the time when Directive 2000/78 was in force, would breach that directive. 'Gedachte' can indeed be translated as 'notional', but its true meaning in the present context is rather (entirely) 'imaginary'.

113. In my view, in a case such as the present one, EU law clearly does not grant individuals a right to request the review, in the light of any new law, of any administrative decision taken in their regard during their lifetime and which has or might have had a negative impact on their pension (or other benefits). There is simply no basis in EU law for such a far-reaching proposition.

114. Finally, to give full credit to the arguments advanced by the Appellant, there is, partially intertwined but also partially independent from the 'technical' argument relating to the temporal application of new rules, a much deeper *moral* argument present in the submissions made by the Appellant. If looked at separately, as indeed suggested by the Appellant at the hearing, that moral argument becomes largely independent of any revisiting of a disciplinary decision from 1975. What Austria would then be reproached for is not the failure to revisit the past, but the failure to actively and prospectively compensate for past wrongdoings, after 2003, when Directive 2000/78 was already in force and judgments by the ECtHR were issued against Austria. [54]

115. In this regard, I would simply restate that I fail to see any such obligation arising *as a matter of EU law*. Article 17 of Directive 2000/78, which requires the Member States to adopt effective, proportionate and dissuasive sanctions, is itself logically tied to the temporal applicability of the same directive.

54 Cited above in footnote 4.

116. In addition, administrative decisions are adopted in contexts specific to their time. The criminal, disciplinary and moral frameworks in Austria, as well as elsewhere in Europe, have shifted considerably since 1975. Thus, for example, in Austria, disciplinary sanctions will now only be imposed on police officers whose acts undermine public confidence in the police. However, criminal convictions will lead to automatic dismissal, I understand without pension rights at all. The age of consent in Austria is now 14 for homosexuals and heterosexuals alike. However, there are also explicit exceptions for children under the age of 16 who are considered to be insufficiently mature.

117. In sum, morality is a moving target. In addition, moral arguments are often a double-edged sword. In factually complex cases, requiring the passing multiple moral judgments, such as in the present one, they may cut both ways. Thus, apart from extreme situations of obvious and blatant disregard for basic values of humanity, which could be said to trigger the moral duty to remedy past wrongs irrespective of time,[55] societies and their laws ought to be allowed to gradually evolve, with the past remaining the past.

6. Conclusion on Question 1

118. In the light of the foregoing, I propose to answer the referring court's first question as follows:

Article 2 of Directive 2000/78 does not preclude the maintenance in effect of the legal position created by an administrative decision that has become final under national law, in the area of law governing disciplinary action in the civil service (disciplinary decision), compulsorily retiring and reducing the pension benefits of a civil servant, where

– that administrative decision was not yet subject to provisions of EU law, in particular the directive, at the time when it was adopted, but

– a (notional) decision to the same effect would infringe the directive if it were adopted within the temporal scope of the directive.

B. Questions 2 and 3

119. In the light of the reply proposed to the referring court's first question, there is no need to reply to the second and third questions. Nonetheless, in the event that the Court should come to a different conclusion, I will briefly consider those questions below.

120. Were the Court to hold that the effects of the discriminatory disciplinary decision cannot be maintained, the question then becomes precisely what 'not maintaining those effects' entails in a case such as the present one.

121. Unless the answer to that question were to be detached from the decisions taken in 1970s, stating, similarly to what has just been discussed in relation to the active, prospective duty to compensate (presumably with lump-sum payments), the national court would need to consider the content of the disciplinary decision to see whether it had been adopted in a way that was compatible with Directive 2000/78, and the date from which that new imaginary decision would be applicable. I refer to this below as the 'what if?' approach.

55 Reaching such an unbearable degree of tension between justice and legal certainty that the latter must give way to the former and the (erroneous) posited law in question declared *ex post* non-existent — Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung*, 1946, Volume 1, issue 5, pp. 105 to 108.

122. In my view, the reconstruction of a 40-year old decision and its effects is highly problematic. However, the referring court is rather specific in questions 2 and 3 about particular 'plot lines' in such a work of legal fiction. As a result, unless the Court simply states that 'effects cannot be maintained' and leaves it to the national court to decide how to identify and 'neutralise' those effects, the Court will inevitably become its co-author. I set out below some considerations about how the story might play out.

1. Question 2

123. The disciplinary decision put the Appellant into early retirement and reduced his pension rights by 25%. By its second question the national court asks whether, to remedy the discrimination inherent in the administrative decision, it is sufficient to set aside the 25% reduction in the pension or whether the pension should be calculated as if the Appellant had worked in the period since his compulsory retirement. Is it sufficient to neutralise the future effects of *the 25% reduction* or is it also necessary to neutralise the future effects of the *early compulsory retirement*?

124. In his submissions, the Appellant argues that the 25% reduction should be set aside in full and his pension rights calculated as if he had worked during the interim period in the police force. In other words, to create the situation that would have existed if the disciplinary decision had not been adopted at all (or no sanction had been imposed).

125. The Commission argues for a 'what if?' approach only in relation to the 25% reduction, acknowledging that even without any homophobic bias, there may have been a reduction in the Appellant's pension to sanction his behaviour. By contrast, the Commission considers it inappropriate to take a 'what if?' approach to the retirement itself. The reduction in pension resulting from the early retirement is not in fact a 'future effect' of a situation that arose in the past and to which new rules must apply. The legal effects of the retirement were, in the Commission's view, exhausted when the employment relationship came to an end. For that reason, the effects consisting of an absence of increase in pension rights, which resulted from early retirement, can be maintained.

126. I note the following observations.

127. If the disciplinary decision had, in 1975, been adopted in a way that *was* compatible with the prohibition on discrimination on the grounds of sexual orientation introduced in 2000, it is not clear whether the Appellant would have been forced into retirement at all. Indeed, the 'incomparably milder'[56] nature of the sanction referred to by the referring court could also be understood as suggesting that the Appellant would not have been forced into retirement.

128. If that is so, then in accordance with the answer to the first question, the 'future effects of early compulsory retirement' could not be maintained. Those effects surely include the fact that the Appellant no longer worked for the police force, no longer accrued pension benefits and did not have those 'lost years' taken into account in calculating his pension. In this sense, the effects of that sanction are indeed still 'ongoing'. Neutralising the future effects of early compulsory retirement must therefore take those lost years into account (somehow).

129. The Commission argues against that conclusion. It considers that the effects which lead to no increase in pension rights, which resulted from the early retirement, can be maintained.

56 Discussed above in point 41.

130. I admit that I find the Commission's reasoning on that point impossible to reconcile with its position that the 25% reduction imposed by the disciplinary decision *does* constitute 'future effects' in the above sense. Both sanctions — forced retirement and the 25% reduction — were imposed based on the same set of facts and by the same disciplinary decision. In both cases the question of principle is what would have been the effects of the disciplinary decision had it been adopted in a way that is compatible with Directive 2000/78.

131. Indeed, if the distinction drawn by the Commission between different effects were to be adopted, it would imply that the Appellant could, in fact, have been dismissed from his job and would have had no recourse to any potential challenge. Unlike retirement, outright dismissal would in principle have brought an end to the legal relationship with no ongoing effects in the form of pension payments.

132. In the light of the above, if the Court were to conclude that the effects of the discriminatory disciplinary decision cannot be maintained and the 'what if?' approach is adopted, that approach should contemplate an alternative history in which the Appellant does not retire as well as one where the 25% reduction in the Appellant's pension is not (fully) applied.

133. I note that such a conclusion would obviously raise a series of further tricky questions. In order to neutralise the 'future effects' of compulsory retirement in 1976, should it be assumed that the Appellant worked throughout the interim years since 1976, or during all the years since expiry of the deadline for transposition of Directive 2000/78? Should any corresponding increase in pension be offset by pension income from other sources of work by the Appellant in those years?[57] Should any corresponding increase in pension be offset by pension income from the police service which has already been received by the Appellant from the date of his compulsory retirement (which he would obviously not have received if he had continued to work)?[58]

134. Finally, regarding the 25% reduction specifically, the referring court's second question impliedly takes as a premiss that that reduction is entirely a consequence of the discriminatory nature of the decision.

135. However, 'what if?' should really mean 'what if?'. Thus, the possibility must be envisaged that, even in the absence of a criminal conviction, the Appellant would still be sanctioned in the disciplinary context based on the same set of facts,[59] and the Appellant's pension would still have been reduced, but by less than 25%. That is indeed the approach taken by the Commission in its written pleadings. Thus, if in the absence of discrimination the Appellant would still have had his pension reduced but by, for example 5% or 10%, then the effects of that 5% or 10% reduction should remain.

136. Thus, were the 'what if?' approach to be embraced in relation to the 25% reduction, I agree with the Commission that the fiction must be taken to its logical conclusion. Once again, precisely how different the disciplinary decision would have been if it had been adopted in a non-discriminatory manner would be a (indeed rather difficult) question for the national court to deal with.

2. Question 3

137. By its third question, the referring court asks if the answer to the second question depends on whether the person actively sought employment in the federal civil service before reaching retirement age.

57 It was confirmed in the written submissions and at the hearing that after leaving the police force, the Appellant was employed in the private sector, for which he receives a pension.

58 As was confirmed at the hearing, the Appellant has been receiving a pension from the police force since his forced retirement in 1976.

59 See above, point 42, and the submissions of the Austrian Government in the sense that a police officer soliciting sexual encounters with minors would be punishable in disciplinary proceedings *irrespective of the sexual orientation* of the actors involved.

138. I must admit that I am puzzled by the relevance of such a question in view of the facts in the main proceedings. But since we are already engaging in 'what if?' scenarios, it is rather difficult to state that such a question is hypothetical.

139. The facts of the case are silent on the issue of whether or not the Appellant ever sought (re)employment in the federal civil service. It is perhaps reasonable to assume that if a person had been dismissed from that service in circumstances such as those in the main proceedings, trying to rejoin the same service would be rather futile (if legally possible to begin with). If that is indeed the case and the Appellant would not have later sought reemployment in the federal civil service, what conclusions can be drawn from that fact? Could the Appellant be reproached for not having done so? Could he then be put at a potential disadvantage as a result?

140. However, for what it is worth, as noted above in point 133, to the extent the effects of early compulsory retirement are to be neutralised, that raises a series of questions about how to deal with the interim period. In constructing its alternative history, it should in my view be left to the national court to determine which specific details to take into account, in order to find a balance between, on the one hand, completely ignoring those interim years and, on the other, fully taking them into account as if the Appellant had worked in the public sector in that time.

C. Questions 4 and 5

141. In the light of the proposed response to the referring court's first question, again there is no need to reply to the fourth and fifth questions. Nonetheless, in the event that the Court should come to a different conclusion, I add some suggestions.

142. By its fourth and fifth questions, the referring court asks from what moment in time an eventual (partial) setting aside of the 25% reduction should take effect. Those questions are limited to the moment in time from which the effects of the 25% reduction must be neutralised. They do not cover the effects of the early compulsory retirement. However, as stated above in point 133, I consider that a different approach to the future effects of the 25% reduction and the future effects of the compulsory retirement raises problems of inconsistency.

143. In my view, the answer to that question follows from the case-law summarised above in point 44 et seq. It is hoped that the application of Directive 2000/78 would still be — notwithstanding the potentially far-reaching approach to the elimination of future effects discussed above — subject to the principle of non-retroactivity. Therefore, whatever the answer to the referring court's first question, it can in any case be used as a basis for arguing that the effects of the 25% reduction must be neutralised from the expiry of the directive's transposition deadline, and not any earlier.

D. Discrimination on the grounds of sex

1. Scope of the referring court's questions

144. Finally, in its written submissions, the Appellant argued that the sanction imposed by the disciplinary decision (also) amounted to discrimination on the grounds of sex, contrary to Article 157 TFEU (previously Article 119 EEC, and then Article 141 EC). According to the Appellant, that provision, which first came into force in 1979, can therefore be used to preclude the future effects of the disciplinary decision in a way similar to that envisaged in the national court's first question in relation to Directive 2000/78. However, it would do so from a much earlier date.

145. I would make the following observations in that regard.

146. The national court does not refer to Article 157 TFEU (or its predecessors). Indeed, the Appellant is the only party to raise the issue in written submissions. It might be argued that addressing the possible application of Article 157 TFEU would prove useful for the national court. However, in my view the Court should not do so, in particular for the following reasons.

147. First, there is a complete lack of reference to that provision in either the referring court's questions or the order for reference more generally. Had the national court considered it to be relevant, it would in my view at least have mentioned it. There may be multiple reasons for such an omission and it would be wrong to assume that the lack of reference is an 'oversight'. The question here is not whether the Court should point out the details and relevance of an obscure piece of technical legislation that might have been overlooked. Article 157 TFEU is an important Treaty provision. Rather, since arguments on Article 157 TFEU are in fact central to the Appellant's written submissions, it is equally plausible that the Appellant proposed to the national court that questions should be put to this Court on that provision, but that that proposal was rejected.

148. Second, Article 94 of the Rules of Procedure of the Court of Justice requires the preliminary reference to include, inter alia, relevant facts and national law and the reasons that led the national court to put the specific questions to the Court. In the present case, the national court has drafted the order for reference without mentioning Article 157 TFEU (or its predecessors), nor indicating the potentially relevant facts or national law relating to that provision. In such circumstances, it would, in my view, be inconsistent with the case-law[60] on Article 94 of the Rules of Procedure for the Court to ignore those omissions and, at the behest of one of the parties, proactively provide guidance on a question that has not been asked.

149. Nonetheless, should the Court choose to address the arguments raised by the Appellant in relation to Article 157 TFEU, I set out some brief observations in the following section.

2. Article 157 TFEU

150. I explained in my proposed reply to Question 1 why Directive 2000/78 does not preclude the maintenance of the effects of the disciplinary decision. That decision was outside the temporal scope of the directive. The directive cannot be used to reopen that decision to neutralise some of its effects. Those arguments apply *mutatis mutandis* to Article 157 TFEU.

151. To the extent the Court comes to a different conclusion, it would be for the national court to determine the potential existence of such discrimination. However, I understand the basic argument is that male homosexuals were treated less favourably than female homosexuals.[61] It was suggested by the Appellant that a female police officer engaging in homosexual acts with a minor over the age of 14 would receive no (or in any event a milder) disciplinary sanction in comparison to a male homosexual police officer engaging in comparable acts.

152. To the extent that such a proposition were to be factually accurate (in view of the disciplinary practice in the Austrian police force in the 1970s), which would be for the national court to ascertain, Article 157 TFEU prohibits sex discrimination in relation to 'pay'. According to established case-law, 'pay' in that sense *does not include* payments made in application of statutory pension schemes, which are rather classed as social security benefits.[62] At the hearing, the Austrian Government stated that the pension scheme in this case is statutory. Whether that is indeed the case (within the meaning given to

60 Most recently, see for example, orders of 31 May 2018, *Bán* (C-24/18, not published, EU:C:2018:376, paragraph 18 et seq.); of 7 June 2018, *easyJet Airline* (C-241/18, not published, EU:C:2018:421, paragraph 12 et seq.); and of 7 June 2018, *Filippi and Others* (C-589/16, EU:C:2018:417, paragraph 25 et seq.).

61 See, *a contrario*, judgment of 17 February 1998, *Grant* (C-249/96, EU:C:1998:63).

62 See judgment of 28 September 1994, *Beune* (C-7/93, EU:C:1994:350, paragraphs 20 to 24 and the case-law cited).

the Court's case-law [63]) would again be subject to verification by the national court. However, on the basis of the statement provided by the Austrian Government on that point, those types of payments would in principle fall outside Article 157 TFEU, rendering that provision inapplicable to the present case.

153. If, however, that were not the case, temporal application of Article 157 TFEU (and its predecessors) would have to be considered. I refer in that regard to my observations under Questions 4 and 5 which apply *mutatis mutandis*. In addition, in accordance with the *Barber* [64] and *Ten Oever* [65] judgments, 'the direct effect of Article 119 of the EEC Treaty may be relied upon, 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* [date of the *Barber* judgment], subject to the exception in favour 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'. [66]

154. However, it follows from the facts as set out in the referring court's request that none of the relevant periods of employment are subsequent to 17 May 1990.

V. Conclusion

155. I propose that the Court answer the first question referred by the Vervaltungsgerichtshof (Higher Administrative Court, Austria), as follows:

Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not preclude the maintenance in effect of the legal position created by an administrative decision that has become final under national law, in the area of law governing disciplinary action in the civil service (disciplinary decision), compulsorily retiring and reducing the pension benefits of a civil servant, where

– that administrative decision was not yet subject to provisions of EU law, in particular Directive 2000/78, at the time when it was adopted, but

– a (notional) decision to the same effect would infringe Directive 2000/78 if it were adopted within the temporal scope of the directive.

63 See, for example, judgments of 28 September 1994, *Beune* (C-7/93, EU:C:1994:350, paragraphs 20 to 24 and the case-law cited), and of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraphs 34 and 35).

64 Judgment of 17 May 1990 (C-262/88, EU:C:1990:209).

65 Judgment of 6 October 1993 (C-109/91, EU:C:1993:833).

66 See the operative part of the judgment of 6 October 1993, *Ten Oever* (C-109/91, EU:C:1993:833). Emphasis added.