



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

24 September 2020*

(Reference for a preliminary ruling – Equal treatment in employment and occupation – Directives 2000/78/EC and 2006/54/EC – Scope – Prohibition of indirect discrimination on grounds of age or sex – Justifications – National legislation providing for an amount to be withheld from pensions paid directly to their recipients by undertakings in which the State has a majority participation and for the cancellation of the indexation of the amount of those pensions – Articles 16, 17, 20 and 21 of the Charter of Fundamental Rights of the European Union – Applicability – Discrimination on grounds of property – Infringement of the freedom of contract – Infringement of the right to property – Article 47 of the Charter of Fundamental Rights – Right to an effective remedy)

In Case C-223/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court, Austria), made by decision of 11 March 2019, received at the Court on 13 March 2019, in the proceedings

YS

v

NK AG,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, L.S. Rossi, J. Malenovský, F. Biltgen (Rapporteur) and N. Wahl, Judges,

Advocate General: J. Kokott,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 22 January 2020,

after considering the observations submitted on behalf of:

- YS, by M. Breunig, Rechtsanwalt, and M.J. Hanreich, Prozessbevollmächtigter,
- NK, by C. Egermann, Rechtsanwalt,
- the Austrian Government, by J. Schmoll, acting as Agent,
- the European Commission, by C. Valero, B.-R. Killmann and B. Bertelmann, acting as Agents,

* Language of the case: German.

after hearing the Opinion of the Advocate General at the sitting on 7 May 2020,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), 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 (OJ 2006 L 204, p. 23) and of Articles 16, 17, 20, 21 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between YS and NK AG concerning (i) the withholding of an amount from the occupational pension paid directly by NK to YS and (ii) the cancellation of the contractually agreed indexation in respect of that pension for 2018.

Legal context

European Union law

Directive 79/7/EEC

- 3 Article 3(1)(a) of 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 (OJ 1979 L 6, p. 24) provides that the directive is to apply to statutory schemes that provide protection against, inter alia, the risk of 'old age'.

Directive 2000/78

- 4 According to Article 1 of Directive 2000/78, the purpose of the directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
- 5 Article 2(1) and (2) of that directive provides:
 - '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:

...

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ...

...'

6 Article 3, entitled 'Scope', of the directive provides, in paragraph 1 thereof:

'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;

...'

Directive 2006/54

7 Recital 30 of Directive 2006/54 states:

'The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is, however, necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.'

8 Article 1 of the directive provides:

'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:

...

(b) working conditions, including pay;

(c) occupational social security schemes.

...'

9 Article 2(1)(b) of the directive defines 'indirect discrimination' as a situation 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.

10 The first paragraph of Article 4 of that directive reads as follows:

‘For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.’

11 Article 5 of Directive 2006/54, in Chapter 2, entitled ‘Equal treatment in occupational social security schemes’, of Title II thereof, is worded as follows:

‘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.’

12 Article 7(1)(a)(iii) of the directive provides that the provisions of Chapter II apply to occupational social security schemes which provide protection against the risk of ‘old age’, including early retirement.

Austrian law

13 Paragraph 1 of the Sonderpensionenbegrenzungsgesetz (Law on the limitation of special pension arrangements, BGBl. I, 46/2014, ‘the SpBegrG’) is composed of constitutional provisions making various changes to the Bundesverfassungsgesetz über die Begrenzung von Bezügen öffentlicher Funktionäre (Federal constitutional law on the limitation of remuneration of holders of public office, BGBl. I, 64/1997, ‘the BezBegrBVG’). That paragraph, inter alia, broadened the personal scope of the BezBegrBVG to the employees and former employees of legal entities subject to review by the Rechnungshof (Court of Auditors, Austria). The latter includes private-law undertakings in which the Austrian federal government or the various provinces have a controlling shareholding.

14 Although the SpBegrG, as a federal law, cannot affect directly the contracts of the employees of undertakings subject to review by the Rechnungshof (Court of Auditors), due to the effective control that the provinces have over those undertakings, Paragraph 10(6) of the BezBegrBVG authorises the legislatures of the provinces to adopt rules comparable to those provided for at federal level for employees and former employees of legal entities in which that province has a controlling shareholding.

15 The niederösterreichisches Landes- und Gemeindebezügegesetz (Lower Austrian Law on provincial and municipal remuneration, ‘the NÖ Landes- und GemeindebezügeG’), adopted pursuant to the SpBegrG, provides, in Paragraph 24a thereof, entitled ‘Limitation of pension arrangements’:

‘(1) Beneficiaries of retirement and pension benefits from defined benefit pensions

...

b. from legal entities which, on account of a majority participation or effective control on the basis of financial, economic or organisational measures of Niederösterreich [(province of Lower Austria)] ... are subject to review by the Rechnungshof [(Court of Auditors)]

have to make a pension security contribution for the proportion which exceeds the amount of the monthly maximum contribution basis pursuant to Paragraph 45 [Allgemeines Sozialversicherungsgesetz (General Law on social security), BGBl., 189/1955, last amended by BGBl. I, 139/1997] and Paragraph 108(1) and (3) of [that law], last amended by BGBl. I, 35/2012]. This shall also apply to special payments.

(2) The pension security contribution is to be withheld by the paying body and paid to the legal entity established under provincial law or the undertaking from which the retirement or pension benefits are received.

(3) The pension security contribution amounts to ...'

- 16 Paragraph 711 of the General Law on social security ('the ASVG') inserted by the Pensionsanpassungsgesetz 2018 (Law on pension adjustment 2018, BGBl. I, 151/2017) and entitled 'Adjustment of pensions for 2018' is worded as follows:

'(1) By way of derogation from the first sentence of Paragraph 108h(1) and Paragraph 108h(2), the pension increase for the 2018 calendar year is to be applied not by means of the adjustment factor, but [is to be applied] as follows: the total pension income (subparagraph 2) is to be increased

1. by 2.2%, if it does not exceed EUR 1 500 per month;
2. by EUR 33, if it is above EUR 1 500 and up to EUR 2 000 per month;
3. by 1.6%, if it is above EUR 2 000 and up to EUR 3 355 per month;
4. by a percentage which decreases linearly between the values mentioned from 1.6% to 0%, if it is above EUR 3 355 and up to EUR 4 980 per month.

If the total pension income exceeds EUR 4 980 per month, no increase shall be applied.

(2) The total pension income of a person is the sum of all his/her pensions under the statutory pension insurance scheme ... The total pension income also includes all benefits covered by the [SpBegrG], if the person in receipt of the pension is entitled thereto on 31 December 2017.

...

(6) (Constitutional provision) The adjustment for the 2018 calendar year of benefits which are covered by the [SpBegrG] may not exceed the increase under subparagraph 1 on the basis of the total pension income (subparagraph 2).'

- 17 Paragraph 2 of the Betriebspensionsgesetz (Law on occupational pensions, BGBl., 282/1990) is worded as follows:

'Defined benefit pensions within the meaning of Paragraph 1(1) are obligations on the part of the employer resulting from unilateral declarations, individual agreements or collectively agreed norms

1. to pay contributions to a pension fund ... on behalf of the employee and his/her survivors; to pay contributions to a collective occupational insurance scheme ... on behalf of the employee and his/her survivors; ...
2. to provide benefits directly to the employee and his/her survivors (direct defined benefit pension);

3. to pay premiums for a life insurance policy taken out on behalf of the employee and his/her survivors.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 18 The applicant in the main proceedings is a former employee of NK, a limited liability public company in which the province of Lower Austria holds a participation of approximately 51%.
- 19 On 2 March 1992, the applicant in the main proceedings concluded an occupational pension contract with NK. That agreement contained a 'direct defined benefit pension' due by NK, that is, an occupational pension, financed from the employer's reserves and that the latter has committed to paying to the employee after the employment relationship comes to an end. In addition, an index-linking clause was agreed on, under which the pension benefits payable would increase by the same percentage as that of the increase, during the period in which that occupational pension is drawn, in the salaries of the highest category of employment as provided for in the collective agreement applicable to the employees of the Austrian undertakings in the relevant industry.
- 20 The applicant in the main proceedings retired on 1 April 2010. Since that date, he has been in receipt of various pension benefits on that basis. Inter alia, since 17 December 2010, NK has paid him the 'direct defined benefit pension' provided for under the occupational pension contract of 2 March 1992.
- 21 Since 1 January 2015, NK has withheld, in accordance with Paragraph 24a of the NÖ Landes- und GemeindebezügeG, a pension security contribution.
- 22 Pursuant to Paragraph 711 of the ASVG, NK has not increased the amount of the occupational pension of the applicant in the main proceedings for 2018, even though the part of the pension which is paid directly should have increased by 3%, in accordance with the salary indexation planned for that year by the collective agreement for the employees of the Austrian undertakings in the relevant industry.
- 23 The applicant in the main proceedings brought an action against NK before the referring court, the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court, Austria) (i) disputing the withholding of those amounts and the fact that his occupational pension had not increased and (ii) seeking a declaration of his future rights.
- 24 Regarding the scope of EU law, Directives 79/7, 2000/78 and 2006/54 in particular, the referring court considers that Paragraph 24a of the NÖ Landes- und GemeindebezügeG and Paragraph 711 of the ASVG (together, 'the national legislation at issue') directly govern the procedure and the conditions for determining the amount of the occupational pension to which the applicant in the main proceedings is entitled under the occupational pension contract of 2 March 1992.
- 25 The referring court emphasises that the persons affected by the national legislation at issue are the recipients of an occupational pension in the form of a 'direct defined benefit pension', the amount of which is relatively large, to be paid by a legal entity subject to review by the Rechnungshof (Court of Auditors), on account, inter alia, of the fact that the majority shareholder is a province which has adopted rules in that respect comparable to those provided for at federal level.
- 26 That court states that persons who have not reached a certain age are not affected by the national legislation at issue, since agreements relating to 'direct defined benefit pensions' were no longer concluded in Austria from 2000, approximately. By contrast, as that type of agreement was generally concluded with persons who had acquired a significant amount of seniority and a certain level of responsibility within the undertaking employing them, those persons have now reached a certain age.

- 27 The referring court further notes that, according to official Austrian statistics, the national legislation at issue affects in large part the occupational pensions of men.
- 28 As for the objectives of that legislation, the referring court mentions two objectives set out in the SpBegrG, consisting of (i) reducing the imbalance created by ‘special’ pensions and (ii) ensuring the long-term funding of retirement benefits.
- 29 Moreover, according to the referring court, the national legislation at issue was adopted as constitutional provisions, primarily to restrict the ability to dispute their validity before the Verfassungsgerichtshof (Constitutional Court, Austria).
- 30 In those circumstances the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘1. Does the scope of [Directive 79/7/EEC] and/or of [Directive 2006/54] include legislation of a Member State if the effect of that legislation is that the former employer is to withhold sums of money from a considerably higher proportion of men entitled to an occupational pension than from women entitled to an occupational pension when those occupational pensions are paid out and those sums may be freely used by the former employer, and are such provisions discriminatory within the meaning of those directives?
 2. Does the scope of [Directive 2000/78] include legislation of a Member State that discriminates on the ground of age because the financial burden is borne exclusively by older people who are entitled under private law to the benefits of an occupational pension that was agreed as a ‘direct defined benefit pension’, whereas young and relatively young people who have entered into occupational pension contracts are not financially burdened?
 3. Are the provisions of the [Charter], in particular the prohibitions of discrimination laid down in Articles 20 and 21 of the Charter, to be applied to occupational pensions even if the Member State’s legislation does not cover forms of discrimination as prohibited pursuant to [Directives 79/7, 2000/78 and 2006/54]?
 4. Are Article 20 et seq. [of the Charter] to be interpreted as precluding legislation of a Member State that implements Union law within the meaning of Article 51 [of the Charter] and that discriminates, on grounds of sex, age, property or on other grounds, such as, for example, on the basis of the former employer’s current ownership, against persons entitled under private law to an occupational pension as compared with other persons entitled to an occupational pension, and does the [Charter] prohibit such forms of discrimination?
 5. Are national rules that place only a small group of people who are contractually entitled to an occupational pension in the form of a direct defined benefit pension under an obligation to make financial payments to their former employer also discriminatory on the basis of property within the meaning of Article 21 [of the Charter] if they cover only people with relatively large occupational pensions?
 6. Is Article 17 [of the Charter] to be interpreted as precluding legislation of a Member State that provides for expropriatory intervention, directly by law and without compensation, in an agreement relating to an occupational pension in the form of a ‘direct defined benefit pension’ entered into between two private parties to the detriment of a former employee of a company that has made provision for the payment of the occupational pension and is not experiencing financial difficulties?

7. Does a statutory obligation on the part of the former employer of a person entitled to an occupational pension not to pay out parts of the agreed remuneration (of the agreed occupational pension) represent, as an infringement of freedom of contract, an interference with the employer's right to property?
8. Is Article 47 [of the Charter] to be interpreted as precluding legislation of a Member State that expropriates directly by law and makes no provision for any challenge to the expropriation other than by way of a claim against the beneficiary of the expropriation (the former employer and the debtor under the pension contract) for damages and reimbursement of the expropriated sum of money?

Consideration of the questions referred

The first and second part of the first and second questions

- 31 By the first part of its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directives 79/7, 2000/78 and 2006/54 must be interpreted as meaning that the scope of those directives includes provisions of the law of a Member State pursuant to which (i) part of the amount of the occupational pension which the employer is contractually bound to pay directly to its former worker must be withheld at source by that employer and (ii) the contractually agreed indexation of the amount of that benefit is ineffective.
- 32 In that regard, it must first of all be borne in mind that, in accordance with Article 3(1)(a) of Directive 79/7, the directive applies only to statutory schemes that provide protection against, inter alia, the risk of 'old age' (see, to that effect, judgment of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 26 and the case-law cited).
- 33 By contrast, benefits granted under a pension scheme which essentially relates to the employment of the interested party concerned form part of the pay received by that person and come within the scope of Article 157 TFEU (see, to that effect, judgment of 5 November 2019, *Commission v Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924, paragraph 59 and the case-law cited). Therefore, they constitute 'pay', within the meaning of Article 3(1)(c) of Directive 2000/78 (see, to that effect, judgment of 15 January 2019, *E. B.*, C-258/17, EU:C:2019:17, paragraphs 44 and 48).
- 34 Moreover, it is apparent from Articles 1(c) and 5(c) of Directive 2006/54 that the directive relates to occupational social security schemes. The Court has previously held that schemes of pensions paid to a worker by reason of his/her employment relationship with the public employer also fall within the material scope of Article 5 of Directive 2006/54 (see, to that effect, judgment of 5 November 2019, *Commission v Poland (Independence of the ordinary courts)*, C-192/18, EU:C:2019:924, paragraphs 72 and 73).
- 35 It follows that a pension such as the 'direct defined benefit pension' that the applicant in the main proceedings receives from his former employer by reason of his employment relationship with the latter falls within the scope of Directives 2000/78 and 2006/54, not of Directive 79/7.
- 36 Next, it must be stated that the national legislation at issue, pursuant to which (i) part of the amount of the occupational pension which the employer is contractually bound to pay directly to its former worker must be withheld at source by that employer and (ii) the contractually agreed indexation of the amount of that benefit is ineffective, result in a reduction of the amount of the pension that that undertaking is bound to pay to that former worker. Accordingly, that legislation affects the latter's conditions of pay within the meaning of Article 3(1)(c) of Directive 2000/78, and the occupational

social security scheme within the meaning of Article 5(c) of Directive 2006/54. Therefore, those directives apply to a situation such as that in the main proceedings (see, by analogy, judgment of 16 June 2016, *Lesar*, C-159/15, EU:C:2016:451, paragraph 18 and the case-law cited).

- 37 That finding is not called into question by the case-law established by the judgment of 2 June 2016, C (C-122/15, EU:C:2016:391), referred to by the Austrian Government in its written observations, in paragraph 30 of which the Court held that national legislation relating to a supplementary tax on pension income does not fall within the substantive scope of Directive 2000/78.
- 38 In paragraphs 25 and 26 of that judgment, the Court based its reasoning on the fact that the dispute giving rise to that judgment did not concern the procedure or the conditions for determining the amount of the benefits paid to the worker by reason of the employment relationship between him and his former employer, but concerned the rate of tax on retirement pension income – which derives directly and exclusively from national tax legislation, as it is external to the employment relationship – and, therefore, the determination of ‘pay’ within the meaning of that directive and Article 157(2) TFEU.
- 39 Consequently, the answer to the first part of the first and second questions is that Directives 2000/78 and 2006/54 must be interpreted as meaning that the scope of those directives includes provisions of the law of a Member State pursuant to which (i) part of the amount of the occupational pension which the employer is contractually bound to pay directly to its former employee must be withheld at source by that employer and (ii) the contractually agreed indexation of the amount of that benefit is ineffective.

The second part of the first question

- 40 By the second part of its first question, the referring court asks, in essence, whether Directive 2006/54 must be interpreted as precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension, where far more male than female recipients are affected by that legislation.
- 41 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’.
- 42 It must be noted from the outset that national legislation such as that at issue in the main proceedings is not directly discriminatory, since it applies without distinction to male and female workers.
- 43 Regarding whether such national legislation is indirectly discriminatory, indirect discrimination is defined for the purposes of Directive 2006/54 in Article 2(1)(b) thereof 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’.
- 44 In that regard, in the first place, it is apparent from the request for a preliminary ruling that the persons that are put at a disadvantage by the national legislation at issue are former employees of State-controlled undertakings who receive a ‘direct defined benefit pension’, the amount of which exceeds certain thresholds. First, Paragraph 24a of the NÖ Landes- und GemeindebezügeG provides for a pension security contribution for the part of such benefit exceeding the amount of the monthly maximum contribution basis, pursuant to the ASVG. At the hearing before the Court, the Austrian

Government stated that that monthly amount was EUR 5 370 gross for 2020. Second, pursuant to Paragraph 711(6) of the ASVG, no increase in a benefit covered by the SpBegrG, such as the ‘direct defined benefit pension’ in question in the main proceedings, could be applied for 2018 if the total pension income of the interested party exceeded EUR 4 980 per month.

- 45 For the purposes of Article 2(1)(b) of Directive 2006/54, the situation of the persons concerned by the national legislation at issue cannot be compared to that of former employees of undertakings not controlled by the State or that of persons receiving an occupational pension other than a ‘direct defined benefit pension’, such as pension fund or life insurance policy payments. In contrast to the pensions paid to the two categories of persons referred to above, the Federal State or province concerned controls the employers of workers receiving a ‘direct defined benefit pension’ and the funds designated for the pensions of those workers.
- 46 As observed by the Advocate General in point 55 of her Opinion, the situations to be compared are, among the persons receiving a pension in the form of a ‘direct defined benefit pension’ from a State-controlled undertaking, that of persons affected by the national legislation at issue on account of the amount of that benefit and that of persons who are not affected.
- 47 It follows that the apparently neutral criterion within the meaning of Article 2(1)(b) of Directive 2006/54 resulting in a difference in treatment due to the application of the national legislation at issue must be regarded as the amount of the benefit defined by the latter, as only the recipients of pensions the amount of which exceeds certain thresholds are put at a disadvantage by that legislation.
- 48 Regarding, in the second place, whether that difference in treatment puts persons of one sex at a particular disadvantage compared with persons of the other sex, the referring court restricts itself to noting that, according to official Austrian statistics, the national legislation at issue affects men in large part.
- 49 In that regard, the Court has held that the existence of such 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 (judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 45 and the case-law cited).
- 50 As is also apparent from recital 30 of Directive 2006/54, 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 national practices which may provide, in particular, that indirect discrimination may be established by any means, including on the basis of statistical evidence (judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 46 and the case-law cited).
- 51 Thus, it is for the national 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 (see, to that effect, judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 48 and the case-law cited).
- 52 As regards statistical evidence, the Court has also held (i) that the referring court must take into account all those workers subject to the national legislation in which the difference in treatment has its origin and (ii) that the best approach to the comparison is to compare the respective proportion of workers that are and are not affected by the alleged difference in treatment among the men in the workforce who come within the scope of that legislation with the same proportion of women in the

workforce coming within its scope (see, to that effect, judgments of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraphs 40 and 41, and of 3 October 2019, *Schuch-Ghannadan*, C-274/18, EU:C:2019:828, paragraph 47).

- 53 In the present case, it is apparent from the request for a preliminary ruling that it is the former workers of an entity subject to review by the Rechnungshof (Court of Auditors) receiving an occupational pension in the form of a ‘direct defined benefit pension’ who come within the scope of the national legislation at issue.
- 54 Consequently, as stated by the Advocate General in points 65 to 67 of her Opinion, should the available statistics actually show that the percentage of former workers whose amount of such occupational pension has been affected by the national legislation at issue is considerably higher among male former workers coming within the scope of that legislation than among female former workers coming within its scope, it would be necessary to hold that that situation is evidence of indirect sex discrimination, contrary to Article 5(c) of Directive 2006/54, unless that legislation is justified by objective factors wholly unrelated to any discrimination based on sex (see, by analogy, judgment of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 42).
- 55 In the third place, should the referring court hold, having regard to the considerations set out in paragraphs 52 and 53 of the present judgment, that the national legislation at issue gives rise to a difference in treatment capable of constituting indirect discrimination on grounds of sex, that court must then assess to what extent such difference in treatment can nonetheless be justified by objective factors wholly unrelated to any discrimination based on sex, as follows from Article 2(1)(b) of Directive 2006/54.
- 56 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 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 (see, to that effect, judgment of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraphs 53 and 54 and the case-law cited).
- 57 In addition, the Court has held that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion (judgments of 6 April 2000, *Jørgensen*, C-226/98, EU:C:2000:191, paragraph 41, and of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 73 and the case-law cited).
- 58 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 of Justice, 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 the documents in the file of the case in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (judgment of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraph 56 and the case-law cited).
- 59 In the present case, it is apparent from the request for a preliminary ruling that the SpBegrG, to which the national legislation at issue is closely connected, pursues two objectives, that is, first, reducing the imbalance created by ‘special’ pensions – which, as indicated by the Austrian Government in its written observations, are ‘supplementary pensions outside ordinary pension schemes’ – and, second, ensuring the long-term funding of retirement benefits. The Austrian Government confirmed those objectives in its written observations, specifying that the national legislation at issue aims, more specifically, to offset the imbalances in respect of the granting of pension benefits funded ultimately

by the State. That government stated, in addition, that such pensions are heavy financial burdens on the undertakings concerned, which potentially have indirect repercussions on the State budget, particularly on account of reduced profit distribution.

- 60 In that regard, the Court has previously held that budgetary considerations cannot justify discrimination against one of the sexes (judgment of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 85 and the case-law cited).
- 61 However, the objectives of ensuring the long-term funding of retirement benefits and narrowing the gap between State-funded pension levels can be considered, having regard to the broad discretion of the Member States, to constitute legitimate social-policy objectives wholly unrelated to any discrimination based on sex.
- 62 In the present case, subject to the verifications which it is for the referring court to carry out in that regard, it is apparent from the case file submitted to the Court that the national legislation appears to pursue such objectives. First, both the withholding of part of the benefit to be paid and the fact that the amount thereof is not increased are such as to allow reserves to accrue for future payment obligations. In that regard, although it is the case that, as emphasised by the applicant in the main proceedings and NK at the hearing before the Court, the amounts thus saved can, in principle, be used for any purpose by the undertakings concerned, the fact remains that, subject to the same verifications, the State, where it holds a majority participation, has sufficient control over that undertaking to ensure that it can adequately fund the retirement benefits in question.
- 63 Second, as that legislation affects only the benefits exceeding a certain amount, it has the effect of bringing those benefits closer to the level of smaller pensions.
- 64 Moreover, subject to verification by the referring court, that legislation is implemented in a consistent and systematic manner, in that it applies to all pensions granted in the form of a ‘direct defined benefit pension’ by directly or indirectly State-controlled institutions and undertakings, for which the reserves constituted from the amounts withheld or not awarded are therefore available to fund future pension obligations.
- 65 The national legislation at issue does not appear to entail measures that go beyond what is necessary to attain the objectives pursued, inter alia in so far as they take account of the ability to contribute of the persons concerned, since both the amounts withheld pursuant to Article 24a of the NÖ Landes- und GemeindebezügeG and 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.
- 66 In addition, as regards more specifically the objective of ensuring the long-term funding of retirement pensions, the fact that a specific undertaking such as NK was able to constitute sufficient reserves for that purpose cannot in itself call into question the necessary nature of the national legislation at issue since, as is noted by the European Commission in its written observations, that legislation applies to all undertakings in which the Federal State and the province of Lower Austria have a majority shareholding.
- 67 Having regard to the foregoing considerations, the answer to the second part of the first question is that Article 5(c) and Article 7(1)(a)(iii) of Directive 2006/54 must be interpreted as not precluding legislation of a Member State pursuant to which the recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension, even though the percentage of former workers the amount of whose occupational pension has been affected by that legislation is considerably higher among male former workers coming within the scope of that

legislation than among female former workers coming within its scope, provided that those consequences are justified by objective factors wholly unrelated to any discrimination based on sex, which it is for the referring court to verify.

The second part of the second question

- 68 By the second part of its second question, the referring court asks, in essence, whether Directive 2000/78 must be interpreted as precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension, where that legislation affects only recipients above a certain age.
- 69 Pursuant to Article 1 and Article 2(1) and (2)(b) of Directive 2000/78, any indirect discrimination on grounds of, inter alia, age is prohibited. Indirect discrimination is to be taken to occur where an apparently neutral provision, criterion or practice would put persons of a certain age at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (judgment of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106, paragraphs 41 and 42).
- 70 According to the referring court, the potential existence of indirect discrimination on grounds of age is based on the fact that no pension contract in the form of a ‘direct defined benefit pension’ has been concluded in Austria since 2000, so that only persons above a certain age are affected by the national legislation at issue, as occupational pension contracts for the other persons have been concluded as pension funds or insurance policies.
- 71 Like indirect discrimination on grounds of sex, as is apparent from paragraphs 45, 49 and 52 of the present judgment, indirect discrimination on grounds of age can be established only if it is shown that national legislation has a negative effect, without justification, on a significantly higher proportion of persons of a certain age compared with other persons. To that end, it is necessary to take into consideration all those workers subject to the national legislation in which the difference in treatment has its origin.
- 72 It follows that, in order to establish indirect discrimination on grounds of age, the persons put at a disadvantage by the national legislation at issue cannot be compared with persons that do not come within its scope, such as persons who have concluded a pension contract as a pension fund or insurance policy.
- 73 Moreover, as the Advocate General recalled in point 89 of her Opinion, the mere fact that a new legal framework has been applied in respect of persons under a certain age cannot give rise to indirect discrimination on grounds of age to the detriment of other persons to whom the former legal framework applies (see, to that effect, judgment of 14 February 2019, *Horgan and Keegan*, C-154/18, EU:C:2019:113, paragraph 28).
- 74 It must, in addition, be stated that the referring court did not indicate whether, among the persons falling within the scope of the national legislation at issue, that is, the recipients of a pension paid by a State-controlled undertaking in the form of a ‘direct defined benefit pension’, a significantly higher proportion of persons above a certain age is put at a disadvantage by that legislation.
- 75 Consequently, the answer to the second part of the second question is that Article 2(1) and (2)(b) of Directive 2000/78 must be interpreted as not precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount

withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension, on the sole ground that that legislation affects only recipients above a certain age.

The third, fourth, fifth, sixth and seventh questions

- 76 By its third to seventh questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 16, 17, 20 and 21 of the Charter must be interpreted as precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension.
- 77 In that regard, it must be borne in mind that the scope of the Charter is defined in Article 51(1) thereof, providing that, with regard to action by the Member States, the provisions of the Charter are addressed to those States only when they are implementing EU law.
- 78 It should also be borne in mind that the fundamental rights guaranteed by the Charter are applicable in all situations governed by EU law and that they must, therefore, be complied with *inter alia* where national legislation falls within the scope of EU law (judgment of 21 May 2019, *Commission v Hungary (Rights of usufruct over agricultural land)*, C-235/17, EU:C:2019:432, paragraph 63 and the case-law cited).
- 79 It is nevertheless necessary that, in the area concerned, EU law imposes specific obligations on Member States with regard to the situation at issue in the main proceedings (see, to that effect, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 35).
- 80 In the present case, as is apparent from paragraphs 40 to 67 of the present judgment, the national legislation at issue is capable of giving rise to a difference in treatment on grounds of sex that, if it is not justified, would constitute indirect discrimination prohibited by Directive 2006/54. As was noted by the Advocate General in point 98 of her Opinion, that legislation is therefore subject to specific requirements of EU law in so far as the allocation and calculation of benefits in occupational social security schemes must be free from discrimination contrary to that directive and Directive 2000/78.
- 81 It follows that the national legislation at issue constitutes implementation of EU law within the meaning of Article 51(1) of the Charter, so that it must respect the fundamental rights guaranteed by the latter.
- 82 In that regard, in the first place, Article 20 of the Charter enshrines the principle that everyone is equal before the law. Under Article 21(1) of the Charter, any discrimination based on grounds of, *inter alia*, sex, age or property is prohibited.
- 83 Regarding, more specifically, discrimination on grounds of age, it is apparent from the case-law of the Court that, where they adopt measures which fall within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, Member States must respect the directive (judgment of 21 January 2015, *Felber*, C-529/13, EU:C:2015:20, paragraph 16 and the case-law cited). Likewise, Member States must, when they adopt measures which fall within the scope of Directive 2006/54, which gives specific expression, in that domain, to the principle of non-discrimination on grounds of sex, respect that directive.

- 84 In those circumstances, the questions of the referring court relating to whether there is discrimination on grounds of age and sex must be examined, as they are in the context of the answers to the first and second questions, in the light of Directives 2000/78 and 2006/54 alone, respectively (see, to that effect, judgment of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 25).
- 85 So far as concerns discrimination on grounds of property, assuming that it can be shown that the difference in treatment identified in paragraph 46 of the present judgment – namely that the national legislation at issue affects only pensions the amount of which exceeds a certain threshold – puts persons with a certain amount of property at a particular disadvantage, such a situation is capable of being justified in the present case for the reasons set out in paragraphs 61 to 66 of the present judgment, subject to the verifications to be carried out by the referring court. To that extent, such legislation does not involve infringement of Articles 20 and 21(1) of the Charter in that respect.
- 86 As regards, in the second place, Article 16 of the Charter, it should be borne in mind that the freedom to conduct a business enshrined in that article includes the freedom of contract, which is the subject of the seventh question referred for a preliminary ruling (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 42). As was noted by the Advocate General in point 110 of her Opinion, that freedom includes the freedom to fix or agree the price for a service.
- 87 It follows that legislation, such as the national legislation at issue, constitutes a limitation on the freedom of contract in so far as it requires the undertakings concerned to pay to their former employees a pension in the form of a ‘direct defined benefit pension’ the amount of which is lower than the contractually agreed amount.
- 88 However, the freedom to conduct a business does not constitute an unfettered prerogative, but must be examined in the light of its function in society, and may thus be subject to interventions on the part of public authorities which may limit the exercise of economic activity in the public interest. In addition, in accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the latter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (see, to that effect, judgment of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraphs 157 to 160).
- 89 In that regard, it must be stated that the limitation on the freedom of contract referred to in paragraph 87 of the present judgment has been provided for by law and respects the essence of that freedom, as it leads to only a very small part of the occupational pensions negotiated and agreed between the undertaking concerned and its workers being withheld. Moreover, subject to verification by the referring court, such withholding reflects the objectives of general interest of ensuring the long-term funding of State-funded retirement pensions and narrowing the gap between the levels of those pensions. Lastly, as is apparent from paragraphs 61 to 66 of the present judgment, it must be held that that limitation complies with the principle of proportionality, so that it is not contrary to Article 16 of the Charter.
- 90 Regarding, in the third place, Article 17(1) of the Charter, enshrining the right to property, it should be borne in mind that the protection granted by that provision applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his or her benefit (see, to that effect, judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 34).
- 91 It must be held that the conclusion of a contract relating to an occupational pension generates a proprietary interest with respect to the recipient of that pension. In addition, the withholding by the undertaking concerned of part of the contractually agreed amount and the non-application of the contractually agreed indexation affect that proprietary interest. Nevertheless, the right guaranteed by

Article 17(1) of the Charter is not absolute, so that it cannot be interpreted as entitling a person to a pension of a particular amount (see, to that effect, judgment of 13 June 2017, *Florescu and Others*, C-258/14, EU:C:2017:448, paragraphs 50 and 51).

- 92 However, as is apparent from paragraph 88 of the present judgment, any limitation on that right to property must be provided for by law and respect the essence thereof and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union. The limitations on the pension rights at issue in the main proceedings are indeed provided for by law. In addition, they limit only part of the total amount of the pensions in the form of ‘direct defined benefit pensions’ concerned, so that they cannot be considered to affect the essence of those rights. Moreover, subject to verification by the referring court, those restrictions appear to be necessary and to actually meet the objectives of general interest of ensuring the long-term funding of State-funded retirement pensions and narrowing the gap between the levels of those pensions.
- 93 Having regard to the foregoing, the answer to the third to seventh questions is that Articles 16, 17, 20 and 21 of the Charter must be interpreted as not precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension.

The eighth question

- 94 By its eighth question, the referring court asks, in essence, whether Article 47 of the Charter must be interpreted as precluding a Member State’s failure to provide, in its legal system, for a free-standing legal remedy for, primarily, an examination of whether national provisions implementing that right are compatible with EU law.
- 95 It is apparent from the order for reference that the national legislation at issue is closely connected to Paragraph 1 of the SpBegrG or was adopted as a direct continuation of that law. As the SpBegrG is made up of constitutional provisions, the possibility of disputing the national legislation at issue before the Verfassungsgerichtshof (Constitutional Court) is reduced, so that that national legislation can be called into question only indirectly by bringing private-law proceedings against the contractual partner of the occupational pension.
- 96 However, the Court has held that the principle of effective judicial protection guaranteed by Article 47 of the Charter does not require it to be possible, as such, to bring a free-standing action which seeks primarily to dispute the compatibility of national provisions with EU law, provided one or more legal remedies exist, which make it possible to ensure, indirectly, respect for an individual’s rights under EU law (judgment of 21 November 2019, *Deutsche Lufthansa*, C-379/18, EU:C:2019:1000, paragraph 61 and the case-law cited).
- 97 Since the referring court indicates that the national legislation at issue can be called into question indirectly, it cannot be held that the principle of effective judicial protection has been infringed on account of the lack of a free-standing legal remedy.
- 98 Consequently, the answer to the eighth question is that Article 47 of the Charter must be interpreted as not precluding a Member State’s failure to provide, in its legal system, for a free-standing legal remedy for, primarily, an examination of whether national provisions implementing that right are compatible with EU law, provided that it is possible for such examination to take place indirectly.

Costs

- ⁹⁹ Since these proceedings are, for the parties to the main proceedings, a step in the action before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and 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 must be interpreted as meaning that the scope of those directives includes provisions of the law of a Member State pursuant to which (i) part of the amount of the occupational pension which the employer is contractually bound to pay directly to its former employee must be withheld at source by that employer and (ii) the contractually agreed indexation of the amount of that benefit is ineffective.
2. Article 5(c) and Article 7(1)(a)(iii) of Directive 2006/54 must be interpreted as not precluding legislation of a Member State pursuant to which the recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension, even though the percentage of former workers the amount of whose occupational pension has been affected by that legislation is considerably higher among male former workers coming within the scope of that legislation than among female former workers coming within its scope, provided that those consequences are justified by objective factors wholly unrelated to any discrimination based on sex, which it is for the referring court to verify.
3. Article 2(1) and (2)(b) of Directive 2000/78 must be interpreted as not precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension, on the sole ground that that legislation affects only recipients above a certain age.
4. Articles 16, 17, 20 and 21 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding legislation of a Member State pursuant to which recipients of a pension that a State-controlled undertaking is contractually bound to pay them directly and that exceeds certain thresholds set in that legislation are deprived of (i) an amount withheld from the part of that pension exceeding one of those thresholds and (ii) the benefit of a contractually agreed indexation of that pension.
5. Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding a Member State's failure to provide, in its legal system, for a free-standing legal remedy for, primarily, an examination of whether national provisions implementing that right are compatible with EU law, provided that it is possible for such examination to take place indirectly.

[Signatures]