JUDGMENT OF THE COURT (First Chamber)

5 May 2022 (*)

(Reference for a preliminary ruling – Social policy – Article 157 TFEU – Protocol (No 33) – Equal treatment of men and women in matters of employment and occupation – Directive 2006/54/EC – Article 5(c) and Article 12 – Prohibition of indirect discrimination on grounds of sex – Occupational social security scheme applicable after the date referred to in that Protocol and Article 12 – Retirement pensions of civil servants – National legislation providing for an annual adjustment of retirement pensions – Adjustment on a reducing scale depending on the amount of the retirement pension, with no adjustment at all above a certain amount – Justifications)

In Case C-405/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Administrative Court, Austria), made by decision of 31 July 2020, received at the Court on 28 August 2020, in the proceedings

EB,

JS,

DP

v

Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB),

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, I. Ziemele, T. von Danwitz (Rapporteur) and P.G. Xuereb, Judges,

Advocate General: A. Rantos,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– JS and EB, by M. Riedl, Rechtsanwalt,

– DP, by M. Riedl, Rechtsanwalt, and by himself,

– the Austrian Government, by J. Schmoll and C. Leeb, acting as Agents,

– the European Commission, by B.-R. Killmann and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 January 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 157 TFEU, Protocol (No 33) concerning Article 157 TFEU, annexed to the FEU Treaty ('Protocol No 33'), and Articles 5 and 12 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The request has been made in three disputes between, respectively, EB, JS and DP, on the one hand, and the Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB) (Insurance fund for civil servants and officials of the public authorities, the railways and the mining sector, Austria), on the other hand, regarding the annual adjustment of their retirement pensions.

Legal context

European Union law

3 Protocol No 33 provides:

'For the purposes of Article 157 [TFEU], benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

4 Under Article 1 of Directive 2006/54:

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

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

…

(c) occupational social security schemes.

…'

5 Article 2(1) of that directive provides:

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

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

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

…

(f) "occupational social security schemes": schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [(OJ 1979 L 6, p. 24)] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.'

6 Under Article 3 of that directive, entitled 'Positive action':

‘Member States may maintain or adopt measures within the meaning of Article [157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.’

7 Chapter 2, entitled ‘Equal treatment in occupational social security schemes’, of Title II of the directive includes, in particular, Articles 5 and 12.

8 Article 5 of Directive 2006/54, entitled ‘Prohibition of discrimination’, states:

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

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(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.’

9 Article 12 of that directive, entitled ‘Retroactive effect’, provides:

‘1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the [Union] after 8 April 1976 and before 17 May 1990, that date shall be replaced by the date on which Article [157 TFEU] became applicable in their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by [Union] law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.

4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article [157 TFEU] became applicable in their territory.’

Austrian law

10 Paragraph 41 of the Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965) (Federal Law on the pension entitlements of federal civil servants, their survivors and members of their family (Law on pensions 1965)) of 18 November 1965, (BGB1. 340/1965), in the version thereof in force at the date of the facts in the main proceedings (‘the PG 1965’), provides:

‘…

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

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

…

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

11 Paragraph 108f of the General Law on social security, in the versionthereof in force at the date of the facts in the main proceedings ('the ASVG'), provides:

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

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

(3) The increase in consumer prices shall be determined according to the average increase over 12 calendar months up to July of the year preceding the year of adjustment, using the Consumer Price Index for 2000 or any other index that has replaced it. To that end, the arithmetic average of the annual inflation rates published by Statistik Austria shall be calculated for the calculation period.'

12 Paragraph 108h of the ASVG reads as follows:

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

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

…

shall be multiplied by the adjustment factor. …

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

13 Paragraph 711 of the ASVG provides:

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

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

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

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

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

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

…'

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

14 The appellants in the main proceedings, EB, JS and DP, are three men born before 1955 who worked as federal civil servants in Austria. They retired, respectively, in 2000, 2013 and 2006. In 2017, the

gross monthly amount of their retirement pension was EUR 6 872.43 in the case of the first appellant, EUR 4 676.48 in the case of the second appellant and EUR 5 713.22 in the case of the third appellant.

15 Each of the appellants in the main proceedings applied to the BVAEB for an increase in the amount of their retirement pension with effect from 1 January 2018. The BVAEB determined that the pensions of EB and DP were not eligible for an increase as they exceeded the upper limit of EUR 4 980 per month stated in Paragraph 711(1) of the ASVG. In the case of the retirement pension of JS, the adjustment was established by applying an increase of 0.2989%.

16 The appellants in the main proceedings each brought an action before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), claiming that Paragraph 41(4) of the PG 1965, read in conjunction with Paragraph 711(1)(4) and the last sentence of Paragraph 711(1) of the ASVG, which, given the amount of their pension, deprives them of an increase of that amount entirely, for two of them, or almost entirely, for the third, gave rise to indirect discrimination against them on grounds of sex, which is contrary to EU law.

17 In support of their actions, the appellants in the main proceedings submitted that the national legislation on the adjustment of pensions which was applicable to them had continuously adversely affected their situation since 1995 and that, between 2001 and 2017, higher levels of pension had been adjusted only to a lesser extent. In addition, they asserted that the legislation constituted indirect discrimination on grounds of sex, producing a statistical analysis which showed that recipients of retirement pensions under the PG 1965 of a monthly amount in excess of EUR 4 980 comprised 8 417 men and 1 040 women, whereas the number of recipients of a retirement pension from the federal civil service was 79 491 men and 22 470 women.

18 The Bundesverwaltungsgericht (Federal Administrative Court) dismissed the actions brought by the appellants in the main proceedings, holding that there were grounds of justification on the basis of which the argument of discrimination on grounds of sex could be rejected. As regards EB and DP only, that court also found that it was not contested that Paragraph 41(4) of the PG 1965, read in conjunction with the last sentence of Paragraph 711(1) of the ASVG, was of concern to far more men than women.

19 The appellants in the main proceedings lodged an appeal on a point of law against those decisions before the referring court, the Verwaltungsgerichtshof (Administrative Court, Austria).

20 The referring court states that the retirement pensions which are drawn by the appellants in the main proceedings under the PG 1965, in so far as they were born before 1955, fall within the scope of Article 157 TFEU, Protocol No 33 and Article 12 of Directive 2006/54. That court therefore raises the question of, first, the possible effect on their actions of the temporal limitation of the requirement of equal treatment of men and women laid down by that Protocol and by that article of Directive 2006/54, which applies to the period prior to 1 January 1994 in the case of the Republic of Austria. According to the referring court, although that limitation could be considered to be applicable to benefit components such as the adjustment of pensions contested by the appellants in the main proceedings, even partially, in proportion to the periods of employment which they completed prior to 1 January 1994, the Court's case-law following from, inter alia, the judgment of 6 October 1993, *Ten Oever* (C-109/91, EU:C:1993:833), militates in favour of the interpretation that that limitation is not applicable to such adjustment and cannot prevent the appellants in the main proceedings from relying on the requirement of equal treatment of men and women.

21 In that regard, the referring court explains, second, that, in the light of the national legislation at issue, retired federal civil servants in receipt of a gross monthly pension under the PG 1965 in excess of a certain amount are either entirely or almost entirely excluded from an increase of that pension for 2018, unlike beneficiaries of lower pensions. That disadvantage could give rise to discrimination on grounds of sex if it affects significantly more men than women. The referring court states that, since 1997, the annual adjustment of those pensions has no longer followed the trend of salaries of civil servants in active employment but, in principle, by virtue of a reference in Paragraph 41 of the PG 1965 to the ASVG, the rate of inflation, with the aim of preserving the purchasing power of recipients. Although this was intended to be a general, long-term scheme, the Austrian legislature has in some years regularly availed itself of the option of adopting legislation which derogates from the general indexation of pensions to inflation.

22 As regards the adjustment of pensions for 2018, the referring court states that the reason given by the Austrian Government for that derogation is the existence of a social component. The BVAEB also relied on that social aim as justification for any indirect discrimination, asserting that the application each year of a uniform percentage would quickly give rise to an 'unjustifiable divide' between levels of retirement pensions and that very high pensions could withstand a lesser adjustment without jeopardising their value or the standard of living of their recipients, with the result that such adjustment, in the interest of funding the overall adjustment volume available to the State, was tolerable and necessary for the sake of solidarity.

23 The referring court is uncertain, however, whether those reasons are capable of justifying any indirect discrimination and whether the requirements of the principle of proportionality are complied with. In particular, that court has doubts whether the national legislation on the adjustment of the pensions at issue is necessary, appropriate and consistent. The measure under that legislation is thus limited to recipients of retirement pensions and, moreover, to certain categories of recipients, when there are other appropriate social-policy instruments, such as progressive income tax rates, transfers and other tax-funded assistance. In addition, under domestic law, the retired federal civil servants affected by Paragraph 41 of the PG 1965 are in a special position, which sets them apart from persons in receipt of pensions paid by social security schemes such as the ASVG. According to the case-law of the Verfassungsgerichtshof (Constitutional Court, Austria), the retirement pensions of such civil servants should be considered as pay under public law in compensation for services rendered during the period of active service within the framework of a lifelong employment relationship. Whereas pensions paid under social security schemes are based on the principle of contributions-based funding and are payable by an insurer, the contributions made by civil servants in active employment are paid to the State budget and the idea underlying the PG 1965 is not the same as that underlying such schemes.

24 The referring court further notes that the national legislature refrained from adopting the same 'social balancing' measure for civil servants in active employment, who received, for the year 2018, a non-degressive pay rise above inflation in order to share in the benefits of economic growth. Similarly, the national legislature did not make retirement pensions provided under other occupational social security schemes, for example private schemes, subject to the same adjustment arrangements, except for the limited category of pensions paid by State-linked undertakings. The court is also uncertain whether it is necessary, when examining the proportionality and the consistency of the alleged discriminatory measure, to take into consideration the fact that the measure was not the only one of its kind, the appellants in the main proceedings invoking the cumulative effects of different measures adjusting the amount of their pensions which had been adopted since their retirement.

25 Lastly, the referring court points out that the Bundesverwaltungsgericht (Federal Administrative Court) has stated that the unfavourable treatment experienced by the mostly male recipients of higher pensions had to be examined in the light of the fact that, historically, women had been treated unfavourably, that is to say, under-represented in the best paid positions. The referring court also asks what consequences should be drawn from such a finding for the main proceedings.

26 In those circumstances, the Verwaltungsgerichtshof (Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the limitation of the scope *ratione temporis* of the requirement of equal treatment for men and women laid down in the judgment [of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209)], as well as in [Protocol No 33] and Article 12 of Directive [2006/54], be interpreted as meaning that an (Austrian) pensioner cannot lawfully rely on the requirement of equal treatment for men and women, or can do so only (in part) in respect of that part of his entitlement that relates to periods of employment after 1 January 1994, in order to claim that he has been discriminated against by rules on an adjustment of civil servants' pensions laid down for 2018 such as that which was applied in the main proceedings?

(2) Must the requirement of equal treatment for men and women (pursuant to Article 157 TFEU in conjunction with Article 5 of Directive 2006/54) be interpreted as meaning that indirect discrimination such as that which – in some cases – results from the rules, at issue in the main proceedings, concerning the 2018 pension adjustment, even in the light of similar measures

adopted previously and the considerable loss caused by the cumulative effect of those measures as compared with an adjustment of the actual value of pensions to take into account inflation (in this instance, a loss of 25%), is justified in particular

– in order to avoid a “divide” between higher and lower pensions (caused by periodic adjustment at a single rate), even though this would be purely nominal and would leave the differential between the two unchanged,

– in order to put in place a general “social component” in the form of steps to increase the purchasing power of those on lower pensions, even though (a) that objective could be attained even without limiting the adjustment of higher pensions and (b) the legislature does not also provide for the same type of measure to increase purchasing power when it comes to adjusting for inflation the salaries of lower-paid civil servants (to the detriment of the adjustment applied to the salaries of higher-paid civil servants), and has also not laid down rules for a comparable intervention in the adjustment applied to the value of pensions under other occupational social security schemes (in which the State does not participate) in order to increase the purchasing power of lower pensions (to the detriment of the adjustment of higher pensions),

– in order to maintain and finance “the scheme”, even though civil service pensions are payable not by an insurer-operated scheme organised in the form of insurance and financed from contributions, but by the Federal Government as employer of retired civil servants and in consideration for work performed, so that the maintenance or financing of a scheme is not decisive, the only relevant considerations, ultimately, being budgetary,

– because the fact that the statistically much higher representation of men among recipients of higher pensions is to be regarded as the consequence of the lack of equal opportunities for women in matters of employment and occupation that was typical in the past in particular, constitutes an independent ground of justification or (upstream of that) rules out from the outset any assumption of indirect discrimination on grounds of sex, within the meaning of Directive 2006/54, to the detriment of men, or

– because the scheme is permissible as positive action for the purposes of Article 157(4) TFEU?’

The questions referred for a preliminary ruling

The first question

27 By its first question, the referring court asks, in essence, whether Protocol No 33 and Article 12 of Directive 2006/54 must be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions applies to national legislation which provides for an annual adjustment of the retirement pensions paid under an occupational social security scheme applicable after the date referred to in those provisions.

28 From the outset, it should be recalled that Article 157 TFEU enshrines the principle of equal pay for male and female workers for equal work or work of equal value.

29 As regards Directive 2006/54, Article 1 states that the directive contains provisions to implement the principle of equal treatment in relation to, inter alia, occupational social security schemes.

30 As is apparent from the request for a preliminary ruling and as has already been held by the Court, a retirement pension like that paid to Austrian federal civil servants under the PG 1965 comes under the notion of ‘pay’ within the meaning of Article 157 TFEU in so far as its amount depends on periods of service and equivalent periods and on the salary received by the civil servant and that pension constitutes a future cash payment, paid by the employer to his employees, as a direct consequence of their employment relationship. Under national law, that pension is regarded as pay which continues to be paid in the context of an employment relationship which continues after the civil servant becomes

entitled to retirement benefits (see, to that effect, judgment of 21 January 2015, *Felber*, C-529/13, EU:C:2015:20, paragraph 23).

31 Furthermore, such a pension is paid under an ‘occupational social security scheme’ within the meaning of Article 2(1)(f) of Directive 2006/54, which provides workers of a given occupational sector with benefits designed to replace the benefits provided for by statutory social security schemes. In Austria, federal civil servants are excluded from the pension insurance scheme introduced by the ASVG because they are employed in the federal public administration, in so far as their employment relationship gives them a right to retirement benefits equal to those provided for by that retirement insurance scheme (see, to that effect, judgment of 16 June 2016, *Lesar*, C-159/15, EU:C:2016:451, paragraph 28).

32 First, it is important to recall that, according to the wording of Protocol No 33, for the purposes of Article 157 TFEU, benefits under occupational social security schemes are not to be considered as remuneration ‘if and in so far as’ they are attributable to periods of employment ‘prior’ to 17 May 1990. The same holds for the wording of Article 12(1) of Directive 2006/54, which provides that ‘all’ benefits under such schemes derived from periods of employment ‘subsequent’ to that date are covered by the measures implementing the provisions of Title II, Chapter 2, of that directive, on equal treatment in such schemes.

33 Since the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions constitutes a derogation from the general rule laid down by the FEU Treaty, it must be strictly interpreted.

34 Second, it should be noted that the wording of Protocol No 33 is identical to that of Protocol (No 17) on Article 141 EC, annexed to the EC Treaty; they have a clear link to the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), since they refer specifically to the date on which that judgment was delivered.

35 As the Court stated in the judgment of 6 October 1993, *Ten Oever* (C-109/91, EU:C:1993:833), by virtue of the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), the direct effect of Article 119 of the EEC Treaty (which became, after amendment, Article 141 EC, now Article 157 TFEU) may be relied on, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990 (the date of the judgment in that case), subject to the exception 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 (judgment of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 100 and the case-law cited).

36 Overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many pension schemes (see, to that effect, judgment of 23 October 2003, *Schönheit and Becker*, C-4/02 and C-5/02, EU:C:2003:583, paragraph 99).

37 This limitation is reproduced by Protocol No 33 and is also included in Article 12(1) of Directive 2006/54.

38 As far as the Republic of Austria is concerned, the reference date mentioned in the judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209), was replaced, under Article 12(3) of that directive, by 1 January 1994.

39 Third, it is to be observed that the principle of equal pay for male and female workers referred to in Article 157 TFEU forms part of the foundations of the European Union. Moreover, in accordance with the second subparagraph of Article 3(3) TEU, the European Union is to promote, inter alia, equality between men and women and, under Article 23 of the Charter of Fundamental Rights of the European Union, equality between women and men must be ensured in all areas, including employment, work and pay (see, to that effect, judgment of 3 June 2021, *Tesco Stores*, C-624/19, EU:C:2021:429, paragraphs 33 and 34 and the case-law cited).

40 In the present case, it is apparent from the request for a preliminary ruling that the annual adjustment of retirement pensions under the national legislation at issue in the main proceedings for the year 2018 is calculated on the basis of the amount of the retirement pension drawn by the recipient in the previous year, to which entitlement was already established, with that adjustment being made on a reducing scale such that it ceases to exist above a certain amount. In addition, the adjustment does not depend on the date of the periods of employment or of membership of the recipient in question.

41 Before the referring court, the appellants in the main proceedings claim an infringement of the principle of equal treatment of men and women only in respect of that national legislation, which does not have retroactive effect. Furthermore, they retired after 1 January 1994 and receive a pension for which they do not dispute either the date of entitlement or the initial amount. Nor do they contest the amount of their pension in connection with payments made in the past or with periods of employment prior to 1 January 1994.

42 Having regard to the considerations set out, in essence, in paragraphs 32 to 39 of this judgment, Protocol No 33 and Article 12 of Directive 2006/54 cannot be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions should apply to an annual adjustment of retirement pensions, in so far as such a mechanism does not have the effect of calling into question acquired rights or payments made before the reference date laid down in those provisions. It follows that, in the present case, that limitation cannot be applied to the appellants in the main proceedings in respect of an annual adjustment of retirement pensions like that provided for by the national legislation at issue in the main proceedings for the year 2018 alone.

43 In the light of the foregoing, the answer to the first question is that Protocol No 33 and Article 12 of Directive 2006/54 must be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions does not apply to national legislation which provides for an annual adjustment of the retirement pensions paid under an occupational social security scheme applicable after the date referred to in those provisions.

The second question

44 By its second question, the referring court asks, in essence, whether Article 157 TFEU and Article 5 of Directive 2006/54 must be interpreted as precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that amount, with no adjustment at all above a certain pension amount.

45 Article 5(c) of that directive prohibits direct or indirect discrimination on grounds of sex in occupational social security schemes in respect of the calculation of benefits.

46 It must be stated at the outset that national legislation such as that at issue in the main proceedings does not entail direct discrimination, since it applies indiscriminately to male and female workers.

47 As regards the question whether such legislation gives rise to indirect discrimination, as defined for the purposes of that directive in Article 2(1)(b) thereof, it is clear from the request for a preliminary ruling that, under Paragraph 41(4) of the PG 1965, read in conjunction with Paragraph 711(1) of the ASVG, Austrian federal civil servants who receive a monthly retirement pension above a certain amount are disadvantaged as compared with those whose retirement pension is lower because the amounts of the pensions of the former were not increased or were increased only to a lesser extent. Such legislation thus establishes a difference in treatment between Austrian federal civil servants on the basis of an apparently neutral criterion, namely the amount of their pension.

48 With regard to the question whether that difference in treatment puts persons of one sex at a particular disadvantage compared with persons of the other sex, the referring court states that, according to evidence produced by the appellants in the main proceedings and the findings made by the Bundesverwaltungsgericht (Federal Administrative Court), it cannot be ruled out that the conditions for indirect discrimination on grounds of sex are met from a statistical point of view. In particular, in the case of two of the appellants in the main proceedings, it is common ground that Paragraph 41(4) of the PG 1965, read in conjunction with the last sentence of Paragraph 711(1) of the ASVG, is of concern to

far more men than women in so far as more men are represented in the category of persons in receipt of pensions greater than the maximum amount laid down by that legislation.

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 (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 49 and the case-law cited).

50 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. Thus, it is for that court to assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant (judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraphs 50 and 51 and the case-law cited).

51 Should the statistics to which the referring court may have regard actually show that the percentage of workers of one gender is affected by the national legislation at issue to a considerably higher degree than workers of the other gender also coming within the scope of that legislation, 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, to that effect, judgments of 6 December 2007, *Voß*, C-300/06, EU:C:2007:757, paragraph 42 and the case-law cited, and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 54).

52 In such a case, 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.

53 This is particularly the case, in accordance with the Court's case-law, 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, judgments of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraphs 53 and 54 and the case-law cited, and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 56).

54 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 (judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 57 and the case-law cited).

55 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 in the case before it is justified by such an objective reason, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance in order to enable the national court to give judgment (see, to that effect, judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 58).

56 In the present case, it is apparent from the file before the Court that the aim of the national legislation at issue in the main proceedings is to preserve the purchasing power of recipients of retirement pensions by favouring, by means of 'social balancing', lower retirement pensions compared with higher pensions, to prevent an excessively large gap opening between those pensions and to ensure their long-term funding.

57 According to the Court's case-law, while budgetary considerations cannot justify discrimination against one of the sexes, the objectives of ensuring the long-term funding of retirement benefits and narrowing the gap between State-funded pension levels can be considered to constitute legitimate social-policy objectives wholly unrelated to any discrimination based on sex (see, to that effect, judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 61, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 38).

58 It follows that the national legislation at issue in the main proceedings pursues legitimate social-policy objectives wholly unrelated to any discrimination based on sex.

59 With regard to the question whether that legislation satisfies the proportionality requirements set out in paragraph 53 of this judgment, in particular whether it is appropriate, according to the information available to the Court, it makes it possible to increase only moderate or low retirement pensions, while inter alia ensuring that the lowest amounts are increased above inflation, and thus to contribute to the long-term funding of those pensions and to narrow the gaps between them.

60 It is true that, as the referring court stated, the indexation of retirement pensions to the rate of inflation does not per se alter the differences in the level of the various pensions and the gap between them remains unchanged from a mathematical perspective. However, price rises place a greater burden on the standard of living of people in receipt of low retirement pensions. In addition, since it affects only benefits exceeding a certain amount, the national legislation at issue in the main proceedings has the effect of bringing those benefits closer to the level of lower pensions.

61 With regard to the question whether that legislation is pursued in a consistent and systematic manner, as was stated in the request for a preliminary ruling and in the written observations of the Austrian Government, it applies to all retirement pensions of civil servants, but also to recipients of retirement pensions provided under both the occupational social security schemes of State-controlled undertakings and the statutory pension insurance scheme provided for by the ASVG. The annual adjustment of the pensions at issue in the main proceedings thus applies to all recipients of State pensions, which is, however, a matter for the referring court to verify.

62 In view of the broad margin of discretion enjoyed by the Member States in choosing the measures capable of achieving the aims of their social and employment policy, as recalled in paragraph 54 of this judgment, the consistency with which the adjustment measure is pursued cannot be called into question by the mere fact that other specific social-policy instruments seeking to achieve the aim of supporting low incomes are already in place.

63 The same is true of the fact that neither the pensions of private occupational social security schemes nor the salaries of civil servants in active employment have been subject to the same adjustment measure.

64 On the one hand, those private schemes are not, subject to verification by the referring court, dependent on the State. On the other hand, as regards civil servants in active employment, while under national law their appointment establishes a lifelong employment relationship and their retirement pension corresponds to pay owed by the State in compensation for services rendered during the period of active service, it is also clear from the request for a preliminary ruling and from the written observations of the Austrian Government that the civil servants pension scheme has undergone various changes over the last couple of decades, with a view to aligning it with the scheme under the ASVG. In particular, the adjustment of their pensions has no longer followed the trend of salaries of civil servants in active employment but in principle, the rate of inflation, as with pensions provided under the latter scheme. Furthermore, having regard to the aims pursued by the national legislation at issue in the main proceedings, retired civil servants and civil servants in active employment do not appear to be in a comparable situation, since, in particular, the aim of narrowing the gap between retirement pensions so as to avoid a divide between those pension levels being created over time requires a distinction to be made between the administration of pensions and the administration of salaries.

65 The fact that retirement pensions of civil servants are paid not by an insurer to which they have paid their contributions but directly by the State likewise does not seem to be crucial in view of the aim of the long-term funding of retirement pensions and the narrowing of the gap between them, as pursued by

the Austrian legislature in adopting the national legislation at issue in the main proceedings. Furthermore, an adjustment of pensions is not a benefit which represents consideration for the contributions paid (see, to that effect, judgment of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 79).

66 Consequently, that legislation appears to be implemented in a systematic and consistent manner, subject to verifications to be carried out by the referring court in this regard.

67 Nor does that legislation appear to go beyond what is necessary to attain the aims pursued. It is true that the appellants in the main proceedings claim a significant devaluation of their retirement pensions compared with a scenario whereby, under national law, they had received an adjustment equal to inflation each year since their retirement. It should be noted, however, that the national legislation at issue in the main proceedings takes account of the ability to contribute of the persons concerned. The limits on the increase of pensions laid down in Paragraph 711 of the ASVG, to which Paragraph 41(4) of the PG 1965 refers, are staggered according to the amounts of the benefits granted and it is only for the highest pensions that such an increase is precluded.

68 In those circumstances, there is no need to examine whether those limitations can be justified having regard to Article 157(4) TFEU or Article 3 of Directive 2006/54. In any event, in accordance with the Court's case-law, those provisions cannot be applied to national legislation which is limited to granting women a pension surplus, without providing a remedy for the problems which they may encounter in the course of their professional career, and which does not appear to compensate for the disadvantages to which women are exposed by helping them in that career and, thus, to ensure full equality in practice between men and women in working life (see, to that effect, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for women)*, C-450/18, EU:C:2019:1075, paragraph 65 and the case-law cited).

69 In the light of all those factors, the answer to the second question is that Article 157 TFEU and Article 5(c) of Directive 2006/54 must be interpreted as not precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that amount, with no adjustment at all above a certain pension amount, if that legislation is to the disadvantage of a significantly greater proportion of male beneficiaries than female beneficiaries, provided that the legislation pursues in a consistent and systematic manner the aims of ensuring the long-term funding of retirement pensions and of narrowing the gap between State-funded pension levels, without going beyond what is necessary to attain those aims.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending 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 (First Chamber) hereby rules:

1. **Protocol (No 33) concerning Article 157 TFEU, annexed to the FEU Treaty, and Article 12 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation must be interpreted as meaning that the temporal limitation of the effects of the principle of equal treatment of men and women laid down in those provisions does not apply to national legislation which provides for an annual adjustment of the retirement pensions paid under an occupational social security scheme applicable after the date referred to in those provisions.**

2. **Article 157 TFEU and Article 5(c) of Directive 2006/54 must be interpreted as not precluding national legislation which provides for an annual adjustment on a reducing scale of the amount of the retirement pensions of national civil servants depending on that**

amount, with no adjustment at all above a certain pension amount, if that legislation is to the disadvantage of a significantly greater proportion of male beneficiaries than female beneficiaries, provided that the legislation pursues in a consistent and systematic manner the aims of ensuring the long-term funding of retirement pensions and of narrowing the gap between State-funded pension levels, without going beyond what is necessary to attain those aims.

[Signatures]

---

* Language of the case: German.