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Provisional text

OPINION OF ADVOCATE GENERAL

SZPUNAR

delivered on 30 September 2021 (1)

Case C-389/20

CJ

v

Tesorería General de la Seguridad Social (TGSS)

(Request for a preliminary ruling from the Juzgado de lo Contencioso-Administrativo No 2 de Vigo (Administrative Court No 2, Vigo, Spain))

(Reference for a preliminary ruling – Equal treatment for men and women in matters of social security – Directive 79/7/EEC – Article 4(1) – Prohibition of any discrimination on grounds of sex – Domestic workers – Protection against unemployment – Exclusion – Particular disadvantage to female workers – Legitimate social policy objectives – Proportionality)

I. Introduction

1. As the Court has already held, 'the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure'. (2)

2. By this reference for a preliminary ruling, the Juzgado de lo Contencioso-Administrativo No 2 de Vigo (Administrative Court No 2, Vigo, Spain) has put questions to the Court concerning, inter alia, the interpretation of Article 4(1) of Directive 79/7/EEC, (3) in the context of a national provision under which the benefits granted by a statutory social security scheme for an entire category of workers excludes unemployment benefits. In the present case, it is the activity of domestic workers, a group overwhelmingly consisting of women, which is central to the referring court's questions.

3. Does this constitute indirect discrimination, which is prohibited by Directive 79/7? I will attempt to answer that question in this Opinion.

II. Legal context

A. EU law

1. *Directive 79/7*

4. The second recital of Directive 79/7 states:

'Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes'.

5. Article 1 of that directive provides:

'The purpose of this Directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment".'

6. Article 3(1) of that directive provides:

'This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

…

– unemployment;

…’.

7. Article 4(1) of the directive provides:

‘The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

– the scope of the schemes and the conditions of access thereto,

– the obligation to contribute and the calculation of contributions,

…’.

2. ***Directive 2006/54/EC***

8. Article 1 of Directive 2006/54/EC, (4) entitled ‘Purpose’, 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:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

…’.

9. Article 2 of that directive, entitled ‘Definitions’, provides in paragraph 1:

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

…

(f) “occupational social security schemes”: schemes not governed by [Directive 79/7] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.’

B. **Spanish law**

1. ***The LGSS***

10. Article 251 of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version approved by the Real Decreto Legislativo 8/2015 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (Royal Legislative Decree No 8/2015 approving the revised text of the General Law on Social Security) of 30 October 2015 (5) ('the LGSS'), entitled 'Protective function', provides:

'Workers covered by the special scheme for domestic workers shall be entitled to social security benefits under the terms and conditions laid down in respect of this general social security scheme but with the following specific features:

…

(d) the protection afforded by the special scheme for domestic workers shall not include protection in respect of unemployment.'

11. Article 264 of the LGSS, entitled 'Protected persons', provides in paragraph 1:

'The following persons are covered by protection in respect of unemployment provided they make provision to contribute for that benefit:

(a) employed persons covered by the general social security scheme;

(b) employed persons covered by special social security schemes which include that risk, with the specific features laid down by regulation;

…'.

2. ***Royal Decree No 625/1985***

12. Article 19 of the Real Decreto 625/1985 por el que se desarrolla la Ley 31/1984, de 2 de agosto, de Protección por Desempleo (Royal Decree No 625/1985 implementing Law No 31/1984 of 2 August 1984 on unemployment protection) of 2 April 1985 (6), entitled 'Contributions', provides as follows in paragraph 1:

'All undertakings and workers covered by the general social security scheme and special social security schemes offering protection against unemployment are obliged to contribute in respect of that risk. The basis of assessment for contributions in respect of unemployment will be the same as the basis of assessment for accidents at work and occupational diseases.'

III. **Factual background to the dispute in the main proceedings, the questions referred and the procedure before the Court**

13. CJ is a domestic worker and works for an employer who is a natural person. She has been registered with the special social security scheme for domestic workers ('the Special Scheme for Domestic Workers') since January 2011.

14. On 8 November 2019, CJ applied to the Tesorería General de la Seguridad Social (General Social Security Fund, 'the TGSS') to pay contributions in respect of unemployment protection in

order to acquire the right to those benefits. Her employer's written agreement to pay the requisite contribution was attached to the application.

15. By decision of 13 November 2019, the TGSS rejected that application on the grounds that because CJ was registered in the Special Scheme for Domestic Workers, Article 251(d) of the LGSS expressly prevented her from contributing to that scheme in order to obtain protection from unemployment. The TGSS confirmed that decision by decision of 19 December 2019, taken pursuant to an administrative appeal brought by CJ.

16. On 5 June 2020, CJ appealed against the TGSS's second decision to the Juzgado de lo Contencioso-Administrativo No 2 de Vigo (Administrative Court No 2, Vigo, Spain) claiming in essence that the national provision referred to ('the provision at issue in the main proceedings') places domestic workers in a situation of social distress when their employment ends for reasons which are not attributable to themselves. That social distress takes the form of those workers being unable to obtain not only unemployment benefit but also the other types of social assistance which are dependent on entitlement to unemployment benefit having come to an end.

17. In those circumstances, by a decision of 29 July 2020, received at the Registry of the Court on 14 August 2020, the Juzgado de lo Contencioso-Administrativo No 2 de Vigo (Administrative Court No 2, Vigo) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 4(1) of [Directive 79/7], governing equal treatment, which precludes any discrimination whatsoever on grounds of sex, either directly or indirectly, as regards the obligation to pay social security contributions, and Article 5(b) of [Directive 2006/54], which lays down the same prohibition of direct and indirect discrimination on grounds of sex as regards the scope of social security schemes and the conditions of access to those schemes and the obligation to contribute, and the calculation of contributions, be interpreted as precluding a national provision like Article 251(d) LGSS, which provides: "d) The protection afforded by the Special Scheme for Domestic Workers shall not include protection in respect of unemployment."?

(2) If the answer to that question is affirmative, must that statutory provision be regarded as an example of prohibited discrimination under Article 9(1)(e) and/or (k) of [Directive 2006/54], in so far as the addressees of the provision at issue, Article 251(d) LGSS, are almost exclusively women?'

18. The TGSS, the Spanish Government and the European Commission submitted written observations. Oral argument was presented on behalf of CJ, the TGSS, the Spanish Government and the Commission at the hearing held on 30 June 2021.

IV. **Analysis**

A. **Admissibility**

19. In their written observations, the TGSS and the Spanish Government question whether the request for a preliminary ruling and the questions it contains are admissible.

20. First, the TGSS submits that the dispute in the main proceedings is artificial in the sense that CJ brought proceedings before the referring court on spurious grounds. The dispute does not in fact concern an alleged entitlement to contribute but recognition of an entitlement to social security benefits for unemployment.

21. Next, the TGSS and the Spanish Government argue that such an entitlement is within the jurisdiction of the social courts and that the referring court, as an administrative court, therefore lacks jurisdiction to hear this dispute. According to the government, determination of the present request for a preliminary ruling is not in any way linked to determination of the dispute in the main proceedings.

22. The TGSS also maintains that, if the dispute in the main proceedings did in fact concern recognition of an entitlement to contribute, it would not be necessary to interpret Directive 79/7 in order for the referring court to rule on that application. The scope of the protective function of the Special Scheme for Domestic Workers is a different matter from how that scheme is financed.

23. Lastly, although it does not expressly plead inadmissibility, the Spanish Government contends that Directive 79/7 does not apply to the dispute in the main proceedings. It also argues that the questions referred should be found to be inadmissible in so far as they relate to Directive 2006/54. Although it has not formally submitted a plea of inadmissibility, the Commission likewise asserts that Directive 2006/54 does not apply in the present case.

24. I believe that with the exception of that relating to Directive 2006/54, those arguments should be rejected.

25. First, as regards the claim that the dispute in the main proceedings is artificial and the questions referred hypothetical, it should be recalled that questions referred for a preliminary ruling on EU law enjoy a presumption of relevance. (7)

26. The referring court states that the dispute concerns whether domestic workers are entitled to social security benefits for unemployment. Indeed, by her action, CJ has challenged the rejection by the TGSS of an application to contribute in order to cover the risk of unemployment, not as the exercise of an alleged right to contribute but *in order* to acquire entitlement to unemployment benefits. It is apparent from the order for reference that the application was rejected on the basis of a legislative policy decision to deny domestic workers the possibility to obtain social security benefits in respect of unemployment. (8) According to the referring court, since Article 251(d) of the LGSS, which implements that decision, applies to a group of workers covered by the Special Scheme for Domestic Workers which consists almost exclusively of women, that provision, as concerns the scope of a statutory social security scheme, may constitute indirect discrimination on grounds of sex, which is prohibited by Directive 79/7.

27. Given that the order for reference contains ample clarification of the relevance of the questions posed, the Court cannot, to my mind, dismiss the request for a preliminary ruling for the reason that it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose. (9)

28. In the second place, the claim that the referring court does not have jurisdiction to hear this dispute, under the rules of national law, because it concerns recognising entitlement to social security benefits in respect of unemployment and therefore falls within the jurisdiction of the social courts, does not suffice to lead to the inadmissibility of the request for a preliminary ruling, in so far as it is not for the Court of Justice to call into question the referring court's assessment of the rules of national law governing the organisation of the courts and their procedure. (10) It must abide by the decision from a court of a Member State requesting a preliminary ruling, in so far as that decision has not been overturned in any appeal procedures provided for by national law. (11) I note here that, as far as the interpretation of provisions of national law is concerned, the Court is in principle required to rely on the description given in the order for reference because, according to

settled case-law, the Court does not have jurisdiction to interpret the internal law of a Member State. (12)

29. Lastly, in the third place, in respect of the argument that the questions referred are inadmissible on the grounds that Directives 79/7 and 2006/54 purportedly do not apply to the dispute in the main proceedings, it should be found that since, as the referring court states, that dispute turns on whether or not there is indirect discrimination on grounds of sex, Directive 79/7 does apply to the dispute in the main proceedings. The discrimination in question concerns the scope of the Spanish statutory social security scheme providing protection from, in particular, the risk of unemployment.

30. On the other hand, Directive 2006/54 does not apply in the present case. It is clear from Article 1 of that directive that it seeks to ensure implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation and contains provisions intended to implement that principle in relation, inter alia, to working conditions, including pay. The concepts of 'working conditions' and 'pay' cannot be extended to encompass social security schemes or benefits – such as unemployment benefit – which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned and which are obligatorily applicable to general categories of employee. (13) In addition, it is apparent from subparagraph (c) of the second paragraph of Article 1 of that directive, read in conjunction with Article 2(1)(f) thereof, that it applies to occupational social security schemes rather than to statutory schemes.

31. In the light of those observations, the second question referred should in my view be rejected as inadmissible. I nevertheless propose that the Court should find this request for a preliminary ruling to be admissible.

B. **Substance**

1. ***Reformulation of the first question referred***

32. For the reasons given in point 30 of this Opinion, I propose that the Court should answer only the first question, which it should also reformulate.

33. The Court is in essence being asked whether Article 4(1) of Directive 79/7 must be interpreted as meaning that it precludes a national provision which excludes unemployment benefits from the benefits granted to domestic workers by a statutory social security scheme where it is found that those workers are almost exclusively women.

34. In order to offer a useful answer to that question, I will, in the first place, examine whether the provision at issue in the main proceedings falls within the scope of application of Directive 79/7 (Section 2). Since it seems that unemployment benefits are covered by that directive, I will examine, in the second place, whether, as the referring court suggests, the exclusion of unemployment benefits from those provided by the Special Scheme for Domestic Workers under Article 251(d) of the LGSS constitutes indirect discrimination on grounds of sex, prohibited by that directive (Section 3).

2. ***Does the provision at issue in the main proceedings fall within the scope of application of Directive 79/7?***

35. In the light of what I have already said when analysing the admissibility of the request for a preliminary ruling, I will be brief in dealing with this matter.

36. First, I would highlight that by her action CJ is challenging the fact that the TGSS rejected her application to contribute to cover the risk of unemployment *in order to acquire entitlement to unemployment benefits*. Second, I would underscore that unemployment benefits fall within the material scope of Directive 79/7 since they form part of a statutory scheme of protection against one of the risks set out in Article 3(1)(a) of that directive. (14)

37. I am therefore of the view that the provision at issue in the main proceedings does fall within the material scope of Directive 79/7.

3. ***Does the fact that by virtue of the provision at issue in the main proceedings the benefits under the special social security scheme for domestic workers exclude unemployment benefits constitute indirect discrimination on grounds of sex for the purposes of Directive 79/7?***

38. The referring court has doubts as to whether Article 251(d) of the LGSS is compatible with EU law. According to that court, the group of workers covered by the Special Scheme for Domestic Workers consists almost exclusively of women. That provision therefore constitutes indirect discrimination on grounds of sex since it denies women in that group the possibility to obtain welfare benefits for unemployment, by preventing them from contributing to cover that risk.

39. The parties in the main proceedings and the interested parties differ on whether such indirect discrimination exists in relation to domestic workers. The Spanish Government submits that the difference in treatment consisting of excluding protection against the risk of unemployment from the Special Scheme for Domestic Workers does not amount to indirect discrimination on grounds of sex. The TGSS does not deny that such discrimination exists but finds it to be justified and argues that the national provision at issue in the main proceedings is proportionate. (15) The Commission, for its part, submits that the provision at issue clearly amounts to indirect discrimination and entertains doubts about both a number of the reasons relied upon to justify it and whether it is proportionate.

40. In order to determine whether the provision at issue in the main proceedings constitutes indirect discrimination on grounds of sex for the purposes of Directive 79/7, I will address, first, whether that provision gives rise to de facto unequal treatment on grounds of sex. I will then examine whether any such inequality may be objectively justified in the light of the provisions of Directive 79/7 and, last, as appropriate, whether it is proportionate.

(a) ***Does the provision at issue in the main proceedings give rise to unequal treatment on grounds of sex?***

41. I note at the outset that the Court has repeatedly held that, when exercising their power to organise their social security systems and, failing any harmonisation at EU level, to determine the conditions for the grant of social security benefits, the Member States must comply with EU law. (16)

42. According to Article 1 of Directive 79/7, the purpose of that directive is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3 thereof, of the principle of equal treatment for men and women in matters of social security. (17) Article 4(1) of that directive specifies that ‘the principle of equal treatment means that

there shall be no discrimination whatsoever on ground of sex either directly, or indirectly …, in particular as concerns: … the scope of the schemes and the conditions of access thereto'.

43. It follows that when exercising their power in matters of social security, and unemployment benefits in particular, the Member States must comply with Article 4(1) of Directive 79/7, which implements the principle of non-discrimination on grounds of sex in matters of social security.

(1) *The Spanish Government's argument on the absence of comparable situations*

44. I would note at the outset that, according to settled case-law, discrimination arises through the application of different rules to comparable situations or the application of the same rule to different situations. (18) It should be noted in that respect that, for the purposes of the aims of EU social law, the concept of 'indirect discrimination' concerns primarily the different treatment of comparable situations. (19)

45. Relying on *MB (Change of gender and retirement pension)*, (20) the Spanish Government argues that the situation of domestic workers is not comparable to that of other workers under the general scheme and that there is therefore no indirect discrimination on grounds of sex.

46. I am not convinced by that argument. Not only should it be found that the two situations concerned are comparable in terms of entitlement to unemployment benefits, but the Spanish Government, in referring to that judgment, appears to be confusing the concepts of 'direct discrimination' and 'indirect discrimination'. (21)

47. I would note that it is clear from the order for reference that the provision at issue in the main proceedings is not alleged to constitute direct discrimination, but indirect discrimination on grounds of sex, for the purposes of Article 4(1) of Directive 79/7. Unlike the case which gave rise to *MB (Change of gender and retirement pension)*, (22) it is apparent from the present order for reference that the provision at issue in the main proceedings is worded neutrally. Indeed, the provision applies without distinction to domestic workers of either sex and therefore does not constitute direct discrimination on grounds of sex which could be disputed by alleging that the situation of domestic workers was not comparable to that of other workers. (23)

48. The Spanish Government's argument must therefore be rejected.

(2) *The existence of a particular disadvantage to persons of one sex as compared with persons of the other sex*

49. The Spanish Government argues that the difference in treatment to which the exclusion gives rise does not cause any harm to the workers concerned. (24)

50. Nevertheless, it should be recalled, as considered by one school of academic thought, that the existence of harm is not a prerequisite for there to be indirect discrimination. Accordingly, although harm may often be a sign of discrimination, the concept of 'discrimination' does not, as such, imply that harm must exist. (25) It is therefore necessary to determine whether a given national measure may have a 'disparate (or adverse) impact' on persons belonging to one group in comparison with the effect it has on persons belonging to another group. (26)

51. That being said, my view is that the Spanish Government intended to say that the provision at issue in the main proceedings does not create a particular *disadvantage* to domestic workers.

52. I do not concur with that argument. I believe on the contrary that the provision at issue in the main proceedings does create a particular disadvantage to domestic workers, as I will argue below.

53. In the first place, I would point out that Directive 79/7 does not define 'indirect discrimination'. (27) However, it is clear from the Court's case-law that in the context of that directive that concept must be understood in the same way as in the context of Directive 2006/54. That directive defines 'indirect discrimination based on sex' in Article 2(1)(b) 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'. (28) According to the Court, the existence of such a particular disadvantage might be established, for example, if it were proved that legislation such as that at issue in the main proceedings is to the disadvantage of a significantly greater proportion of persons of one sex compared with persons of the other sex. (29)

54. I note in that respect that whether the use of a formally neutral criterion leads to indirect discrimination depends on the factual circumstances of the case. (30) It is therefore for the referring court, in the light of those circumstances, to determine whether the provision at issue in the main proceedings can be regarded as an 'indirectly discriminatory measure' for the purposes of Article 4(1) of Directive 79/7.

55. Statistical data play a key role here in determining whether there is in fact a disadvantage to persons of one sex as compared with persons of the other sex. It is nevertheless for the national court to assess the reliability of those data and whether they should be taken into consideration. (31) If that court finds that the exclusion under the provision at issue in the main proceedings affects a higher percentage of women than men, that provision would constitute unequal treatment contrary to Article 4(1) of Directive 79/7.

56. In the second place, in the present case neither the order for reference nor the information submitted at the hearing suggests that there is a lack of statistical data. Although the national provision at issue in the main proceedings does not draw a distinction between individuals of the two sexes, the statistics provided by the referring court nevertheless indicate that within the group comprising domestic workers an overwhelming proportion of women are placed at a disadvantage. That court notes that the TGSS has not in any respect disputed the statistical data and that the provision at issue in the main proceedings does place domestic workers at a disadvantage. (32)

57. In order to assess those data, I would note that it is clear from the Court's settled case-law: (i) that it is for the national court to take into account all those workers subject to the national legislation in which the difference in treatment has its origin, here Article 251(d) of the LGSS, 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 women in the workforce who come within the scope of that legislation with the same proportion of men in the workforce coming within its scope. (33)

58. Applying that method to the present case, it is appropriate, first, to consider not only the persons enrolled in the Special Scheme for Domestic Workers, but also all the workers who are subject to the Spanish general social security scheme – including those covered by special schemes – within which the persons enrolled in the Special Scheme for Domestic Workers are included, since the legislation at issue in the main proceedings plays a part in defining the personal scope of the benefits applicable to all persons enrolled in the general scheme, that is to say, unemployment benefits. (34)

59. In that regard, it is apparent from Article 264(1) of the LGSS that all employed persons covered by the *general social security scheme* are in principle entitled to unemployment benefits. Indeed, replying to a question from the Court at the hearing, the TGSS stated that as at 31 May 2021, 15 872 720 employed workers in Spain were covered by that general scheme. Within that group, the proportion of men and women was roughly similar, that is to say, 51.04% and 48.96% respectively; (35) 14 259 814 workers contributed in respect of unemployment while 1 612 906 did not.

60. Second, the TGSS stated at the hearing that for the *Special Scheme for Domestic Workers*, which, on that date, encompassed 384 175 employed workers, the proportion of men and women differs greatly. Specifically, the referring court states that women represent almost 100% of the workers covered by that scheme. In that regard, the TGSS also stated at the hearing, in respect of data for the same date, that the cohort of domestic workers consisted of 17 171 men and 366 991 women. Those data show that on the date in question 95.53% of that group were women.

61. The statistics presented to the referring court and confirmed by the TGSS at the hearing show that the exclusion provision at issue in the main proceedings adversely affects a significantly greater proportion of female domestic workers than male domestic workers.

62. I am therefore of the view that if the referring court, on the basis of the statistical evidence examined above and, as the case may be, other relevant information, came to the conclusion that the provision at issue in the main proceedings places female domestic workers at a particular disadvantage, then that provision should be found to be contrary to Article 4(1) of Directive 79/7, unless it were justified by objective factors unrelated to any discrimination on grounds of sex. (36)

63. It is therefore necessary now to examine whether the unequal treatment to which the provision at issue in the main proceedings gives rise to the detriment of female domestic workers may be objectively justified in the light of Article 4(1) of Directive 79/7. (37)

(b) ***In the light of the provisions of Directive 79/7, can the unequal treatment to which the provision at issue in the main proceedings gives rise be objectively justified?***

64. In their written observations, the TGSS and the Spanish Government claim, inter alia, that the difference in treatment affecting domestic workers is justified by objectives relating to the specific characteristics of that category of employees and to the status of their employers, and by objectives concerning employee protection, safeguarding the level of employment in the sector and combating illegal work and fraud.

65. It is therefore necessary to determine whether those reasons are objective and unrelated to any discrimination on grounds of sex. According to the Court, that is particularly the case where the means chosen reflect a legitimate social policy objective of the legislation at issue, are appropriate to achieve that aim and are necessary in order to do so. (38) Moreover, such factors 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. (39)

(1) *Examination of whether the social policy objective pursued by the exclusion under the provision at issue in the main proceedings is legitimate*

66. First, I note that the Court has generally held social policy objectives to be legitimate general interest objectives. Protection against the risk of unemployment is an integral part of social policy, which falls within the competence of the Member States.

67. In particular, in the context of equal treatment in matters of employment and occupation, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy. (40) In relation specifically to Article 4(1) of Directive 79/7, the Court has held that, concerning access to a statutory unemployment scheme, combating an increase in unlawful employment and circumventing devices was an objective ground of justification. (41)

68. In that context, the Court has on a number of occasions accepted that the Member States enjoy 'a reasonable margin of discretion' as regards the nature of the protective measures in the social sphere and the detailed arrangements for their implementation, (42) whereas it has stated in more recent decisions that the Member States 'have a broad margin of discretion'. (43) In particular, in relation to indirect discrimination on grounds of sex for the purposes of Article 4(1) of Directive 79/7, 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. (44)

69. It should be noted that that case-law has been criticised by academic commentators, who take issue with that change of approach. (45) That said, I would underscore the fact that, irrespective of whether emphasis is placed on the Member States' margin of discretion in choosing the measures capable of achieving the aims of their social policy as being 'reasonable' or 'broad', the Court has nevertheless held that the margin of discretion cannot have the effect of frustrating the implementation of a fundamental principle of EU law such as that of equal treatment. (46)

70. Against that background, I would note that, if a difference in treatment is not to constitute indirect discrimination it must be justified by objective factors which are *also* unrelated to any discrimination on grounds of sex. (47) As stated above, (48) the Court finds that to be *particularly* the case where the means chosen reflect a legitimate social policy objective of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so. (49) Accordingly, first, it is for the Member State to prove that the legislation at issue reflects a legitimate objective and that *the objective is unrelated to any discrimination on grounds of sex* and, second, it is for the referring court to determine whether and to what extent the legislative provision concerned is justified by such an objective factor, while the Court has jurisdiction to 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. (50)

71. In terms of identifying the objectives pursued by the Special Scheme for Domestic Workers, the reasons advanced by the Spanish Government and the TGSS – relating to encouraging recruitment, safeguarding levels of employment, employee protection and combating social security fraud and illegal work – are indisputably legitimate social policy objectives. Nevertheless, it should be noted that in relation to indirect discrimination, the objective justification cannot consist solely of a list of social policy objectives which appear at first sight to be legitimate: those objectives must be unrelated to any discrimination on grounds of sex. (51) The Court has repeatedly held that mere generalisations are insufficient to show that the aim of a national rule is unrelated to any discrimination on grounds of sex. (52) Consequently, it remains necessary to determine whether the social policy reasons claimed by the Spanish Government and the TGSS are objectively unrelated to any discrimination on grounds of sex.

(2) *Determination of whether the reasons relied upon are objectively unrelated to any discrimination on grounds of sex*

72. As regards the objective adduced as justification and based on the characteristics of the branch of activity to which domestic workers belong and on safeguarding the level of employment,

the Spanish Government claims in its written observations, first, that the branch of activity of domestic worker has traditionally been sensitive to the burden that social security-related administrative obligations and employment costs might place on employers (householders) and employees and, second, that the sector has historically had a high level of employment. It argues that the foregoing justifies excluding cover for a risk such as the risk of unemployment, which has less of an impact for that group of workers.

73. As a potential justification for limiting the protective function of social security for domestic workers, the TGSS argued that their employers have a different status, since they are householders rather than business owners exploiting a traditional production unit. (53) The TGSS also states in its written observations that, because those employees' activity is low skilled and is therefore generally remunerated at the minimum wage, it might be 'more convenient' for those workers to access unemployment protection than to continue working, or to alternate between periods of actual work and periods of rest in receipt of unemployment benefit, which would incentivise fraud.

74. On the objective adduced as a justification and based on combating illegal work and fraud, the Spanish Government asserts in its written observations that the legitimate objective of preventing social security burdens and costs which would exacerbate the problem of illegal work and, in consequence, make those workers more vulnerable, justifies excluding protection against unemployment from the Special Scheme for Domestic Workers. Moreover, the specific characteristics of the employment relationship of domestic workers also pose additional difficulties as regards verifying certain preconditions for obtaining unemployment benefits, such as whether the employee stopped work involuntarily, and the difficulty of carrying out checks and inspections to verify any incompatibility or fraud, as a result of the inviolability of the employer's home, which for those employees is their workplace.

75. Against that background the Spanish Government and the TGSS state that including unemployment protection in the special system concerned would necessarily lead to an increase in contributions, which could cause an increase in illegal work – with the worker neither enrolled in a scheme nor paying contributions – and that employees in that scheme would therefore be less protected.

76. As I stated in point 67 of this Opinion, those social policy aims, which I will examine together, are, prima facie, legitimate objectives. (54) I nevertheless admit to harbouring doubts as to whether those objectives are non-discriminatory, for the following reasons.

77. In the first place, it merely needs noting that social security schemes are often based on a model of the family in which the man, who is automatically attributed the role as head of the family, is regarded as the person who works and bears all the costs relating to his household. (55) When examining any 'objective justification' it is therefore necessary to examine whether some social policy objectives relied upon to justify a difference in treatment of women have their roots in stereotyped roles or gender stereotypes capable of giving rise to indirect or systemic discrimination. (56) That model, in which stereotypes of the roles of men and women in society persist, (57) no longer reflects the reality of European society. Women today form part of the labour market at all levels, mothers and fathers tend to be in a comparable position in terms of parenting and bringing up children (58) or there are new forms of family structures, such as single-parent families, which no longer conform to the traditional family model.

78. In the second place, as academic writers have argued, a conception of gender equality which consolidates the traditional model of specialised male and female roles has the effect, on the one hand, of overlooking occupational gender segregation and women's unfavourable position in the

labour market, ‘authorising continued inequalities between typical and atypical workers in social security schemes’. (59) Second, ‘a person who does not follow the traditional model of occupational activity, in particular an “atypical” worker, is then seen as economically dependent on a “typical” worker. (60) That conception of equality legitimises the continued and increasing existence of multiple forms of the ‘familiarisation of rights’. (61)

79. Against that background, can the objectives under consideration be found to be unrelated to any discrimination on grounds of sex?

80. I think not.

81. First, the reasons based on the characteristics of domestic workers (as low-skilled and remunerated at the minimum wage) or on those of their employers (householders) appear in fact to be based on gender stereotypes and, therefore, not likely to be unrelated to discrimination on grounds of sex. (62) The TGSS states that if domestic workers were protected against unemployment, it would be ‘more convenient’ for those workers to ‘alternate between periods of actual work and periods of rest in receipt of unemployment benefit, which would incentivise fraud.’ Were those characteristics found to produce that effect, logic would then require that all low-skilled workers being paid the minimum wage in other sectors of the labour market should also be excluded from unemployment benefits. However, that is not the case. (63) In my view, therefore, there is no link between the grounds for justification on which the TGSS relies and the fact that the provision at issue in the main proceedings excludes domestic workers from unemployment benefits.

82. Second, as justification for that exclusion the Spanish Government adduces the objective of safeguarding the level of employment in the activity category of domestic worker, referring, on the one hand, to the supposedly lower impact of unemployment on that group of workers, which comprises mainly women, and, on the other, to the fact that, according to that government, including unemployment protection in the Special Scheme for Domestic Workers would necessarily lead to an increase in contributions and, therefore, to an increase in illegal work. However, to my mind that exclusion has the effect of reinforcing the traditional social view of gender roles, making it possible moreover not only to exploit the structurally weak position of the people who make up the domestic worker sector but also to undervalue the work done by employees in that sector, (64) which should, on the contrary, be recognised and appreciated by society.

83. In the light of the foregoing, I consider that the objectives invoked by the Spanish Government and the TGSS, relating to safeguarding the level of employment in the domestic worker sector and to the characteristics of that sector or to the need to combat illegal work, are not unrelated to any discrimination on grounds of sex and, therefore, cannot justify discrimination against women.

84. In case the Court should nevertheless find that the exclusion under the provision at issue in the main proceedings does reflect legitimate objectives which are *also* unrelated to any discrimination on grounds of sex, I will examine whether that provision is appropriate to achieving the objective pursued by the provision at issue in the main proceedings and is necessary in order to do so. (65)

(c) ***Is the provision at issue in the main proceedings proportionate?***

(1) *Appropriateness and necessity*

85. As the Court has stated, it does not appear unreasonable for the national authorities of a Member State to take the view that a specific measure may be appropriate and necessary in order to achieve the objectives claimed for the purpose of the social protection of workers. (66) However, can a measure such as that at issue in the main proceedings, which rules out unemployment benefits for a particular category of workers, in this case domestic workers, be regarded as appropriate and necessary?

86. I note that it is clear from the Court's settled case-law that mere generalisations concerning the capacity of a particular measure to safeguard employment and combat illegal work are not enough to show that the aim of the provision at issue in the main proceedings is unrelated to any discrimination on grounds of sex or to provide evidence on the basis of which it could reasonably be considered that the means chosen were appropriate for achieving that aim. (67)

87. The question therefore arises whether the exclusion clause at issue in the main proceedings may be regarded as an appropriate measure to achieve those social policy objectives. (68) To meet that criterion, that clause must genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner. (69)

88. First, I doubt whether the clause concerned is capable of pursuing the legitimate objectives relied upon, for the reasons set out in points 77 to 82 of this Opinion.

89. Second, I believe that the referring court could examine the following aspects relating to the requirement that that provision be pursued in a consistent and systematic manner.

90. In the first place, it should be noted that it is apparent from CJ's oral observations that domestic workers seem to be the only category of workers excluded from protection against unemployment.

91. In that regard, the TGSS stated at the hearing that individuals in other categories of activity, in which the proportion of persons of each sex is similar, such as participants in training programmes and Members of Parliament, are also excluded from protection against unemployment. The TGSS also stated that members of certain groups do not contribute in respect of unemployment, for example the managers and/or directors of business corporations, professionals and similar workers and ministers of religion, the majority of whom are men. For obvious reasons, those examples are irrelevant. (70)

92. In the second place, it is apparent from the observations of the Spanish Government that the Special Scheme for Domestic Workers covers occupational risks relating to accidents at work and occupational illness. It is therefore appropriate to determine whether the risk of fraud or the difficulty in carrying out checks are in actual fact greater in relation to unemployment benefits, from which domestic workers are excluded, than in relation to the other benefits to which those workers are entitled. (71)

93. In the third place, I concur with the Commission that it is necessary to examine the severity of the measure chosen to combat illegal work and fraud. In fact, I would observe that the total exclusion of a category of workers, such as domestic workers, from protection against unemployment, as a 'social protection' measure, does not seem to benefit those workers. I therefore find it difficult to see how an exclusion clause, such as that at issue in the main proceedings, which purports to combat illegal work but appears to exacerbate the social distress of that category of workers, could be regarded as consistent. That would not the case of a measure to combat illegal work that sought to control unemployment benefit fraud, which would be consistent with the

objective of providing domestic workers with social protection and would not penalise domestic employees. (72)

94. In the fourth place, as regards, in particular, the connection that the TGSS makes between an increase in contributions and illegal work, (73) it can be seen from its written observations that when the Special Scheme for Domestic Workers was created and integrated into the general regime in 2012 (74) it had the effect, on the contrary, of an appreciable increase in the enrolment of domestic workers, (75) thereby highlighting the illegal work that existed previously. (76) There is therefore no causal link to be found between an increase in contributions and illegal work.

95. In the fifth place, the question arises as to whether the fact that the workplace is the employer's home justifies choosing the exclusion measure at issue. It is therefore relevant to determine how important the influence of the workplace is on such a choice. How can the fact that the service is provided at the employer's home lead to unemployment benefits being excluded from the benefits granted to domestic workers while other social benefits to which those workers are entitled, such as accident at work or sickness benefits, are not?

96. In the same vein, as regards implementation in a systematic manner, the referring court could also ascertain whether, in relation to unemployment benefits, the workplace has the same influence on the situation of other workers whose workplace is likewise the employer's home (such as gardeners and chauffeurs) or is their own home (self-employed workers) as on the situation of domestic workers. (77) In that regard, it is also necessary to ascertain the requirements that exist as regards inspections of homes and inspections of companies. (78)

97. Last, in the sixth and final place, it may be relevant to determine whether there are any other social security benefits available to domestic workers that could make up for the absence of protection from unemployment. (79) CJ asserted in that respect at the hearing, in reply to a question from the Court, that not only are there no other benefits that could make up for the absence of protection from unemployment but the exclusion of unemployment protection also means that domestic workers are denied other benefits, such as permanent incapacity benefit. (80)

98. In that regard, the Spanish Government and the TGSS state that an exceptional allowance for loss of work has recently been created (81) for persons enrolled in the Special Scheme for Domestic Workers whose work has been reduced or terminated as a result of the health crisis caused by the COVID-19 pandemic. However, it should be noted that that exceptional allowance is temporary. In its written observations, the TGSS itself states that the allowance 'would remain in force for *one month* (from the date on which entitlement begins), which may be extended by one-month periods by the adoption of a royal decree-law'.

99. In the light of the foregoing, the provision at issue in the main proceedings does not in my view appear to be appropriate to securing the objectives of combating illegal work and fraud and of safeguarding employment, since that provision does not seem either genuinely to reflect a concern to attain those aims or to be pursued in a consistent and systematic manner. (82)

100. I am therefore of the view that the exclusion clause laid down by the provision at issue in the main proceedings, by totally prohibiting all domestic workers from obtaining unemployment benefits, goes beyond what is necessary to attain the objectives pursued.

(2) *Interim conclusion*

101. I am of the view that the provision at issue in the main proceedings gives rise to indirect discrimination for the purposes of Article 4(1) of Directive 79/7 because it is not justified by objective factors unrelated to any discrimination on grounds of sex.

4. ***Additional observations***

102. To conclude my analysis I would make the following two observations.

103. First, it can be seen from the Commission's written observations and CJ's oral observations that the second additional provision of Royal Decree No 1620/2011 of 14 November 2011 provides that the Ministry of Employment will set up a panel of experts to prepare a report, by 31 December 2012, on inter alia 'the feasibility of establishing an unemployment protection scheme tailored to the specific characteristics of domestic work such as to uphold the principles of contribution, solidarity and financial sustainability'. Both the Commission and CJ have observed that, to date, that provision does not appear to have been implemented.

104. Second, Article 14 of International Labour Organisation Convention No 189, the Domestic Workers Convention, approved on 16 June 2011, requires that 'each Member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection …'. The Commission points out that although the Kingdom of Spain has not yet ratified that convention, it is nevertheless a member of the International Labour Organisation. (83)

V. **Conclusion**

105. In the light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Juzgado de lo Contencioso-Administrativo No 2 de Vigo (Administrative Court No 2, Vigo, Spain) as follows:

Article 4(1) 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 must be interpreted as meaning that it precludes a national provision which excludes unemployment benefits from the benefits granted to domestic workers by a statutory social security scheme where it is found that those workers are almost exclusively women.

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1 Original language: French.

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2 Judgment of 30 April 1996, *P.* v *S.* (C-13/94, EU:C:1996:170, paragraph 19 and the case-law cited).

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

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4 Directive of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

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5 BOE No 261 of 31 October 2015, p. 103291, and corrigendum, BOE No 36 of 11 February 2016, p. 10898.

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6 BOE No 109 of 7 May 1985, p. 12699, and corrigendum, BOE No 134 of 5 June 1985, p. 16992.

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7 See, among others, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 27).

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8 The order for reference shows that the TGSS held, in its decision of 13 November 2019, that 'it is not currently possible for this group of workers to contribute to the social security system *in order to obtain unemployment protection*'. Emphasis added.

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9 See, to that effect, among others, judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400, paragraph 25), and of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 27).

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10 See judgment of 30 September 2020, *CPAS de Liège* (C-233/19, EU:C:2020:757, paragraph 36 and the case-law cited).

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11 See, to that effect, judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian Magistrates)* (C-658/18, EU:C:2020:572, paragraph 61 and the case-law cited).

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12 See, to that effect, judgments of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 13), and of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 29 and the case-law cited).

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13 See, to that effect, judgment of 22 November 2012, *Elbal Moreno* (C-385/11, EU:C:2012:746, paragraph 20 and the case-law cited).

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14 Under Article 2 of Directive 79/7 that directive is to apply to the working population and therefore a domestic worker such as CJ falls within the scope of persons covered by that directive.

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15 Since the Spanish Government maintains that there is no indirect discrimination, it advanced those arguments to the effect that the unequal treatment is justified and that the provision at issue in the main proceedings is proportionate purely in the alternative.

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16 In relation to Directive 79/7, see, among others, judgment of 9 November 2017, *Espadas Recio* (C-98/15, EU:C:2017:833, paragraph 37 and the case-law cited).

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17 It is clear from the case-law that Directive 79/7 is simply the expression, in the field concerned, of the principle of equality, which is one of the fundamental principles of law. See, by analogy, judgment of 30 April 1996, *P.* v *S.* (C-13/94, EU:C:1996:170, paragraph 18). See also, Lenaerts, K., 'L'égalité de traitement en droit communautaire. Un principe unique aux apparences multiples', *Cahiers de droit européen*, 1991, pp. 3 to 41.

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18 See, among others, judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 30); of 30 March 2004, *Alabaster* (C-147/02, EU:C:2004:192, paragraph 45); of 16 July 2009, *Gómez-Limón Sánchez-Camacho* (C-537/07, EU:C:2009:462, paragraph 56); and of 8 May 2019, *Praxair MRC* (C-486/18, EU:C:2019:379, paragraph 73).

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19 Tobler, C., *Limits and potential of the concept of indirect discrimination*, Directorate-General for Employment, Social Affairs and Inclusion (European Commission), 2009, pp. 1 to 85, especially p. 24.

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20 Judgment of 26 June 2018 (C-451/16, EU:C:2018:492, paragraph 42).

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21 Article 2(1)(a) of Directive 2006/54 defines the concept of 'direct discrimination' as 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'. In its case-law, the Court has stated that the concept should be understood in the same way in the context of Directive 79/7. It has clarified that where such less favourable treatment is based on sex and may constitute direct discrimination for the purposes of

Article 4(1) of Directive 79/7, it is further necessary to establish whether the two situations are comparable. See, among others, judgment of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraphs 34, 38 and 39). It follows that where the situations examined are not comparable, the difference in treatment does not constitute direct discrimination. Furthermore, 'direct discrimination' must be distinguished from 'indirect discrimination' in terms of the justification for the discrimination. Whereas direct discrimination can only be justified on the specific grounds expressly laid down by law, indirect discrimination can be justified on *objective grounds*. Accordingly, the question of whether discrimination may be *objectively justified* only arises when examining indirect discrimination.

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22 See judgment of 26 June 2018 (C-451/16, EU:C:2018:492, paragraph 48): 'Therefore, it must be held that the national legislation at issue in the main proceedings accords less favourable treatment, *directly based on sex*, to a person who changed gender after marrying, than that accorded to a person who has kept his or her birth gender and is married, even though those persons are in comparable situations.' Emphasis added.

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23 See, among others, in the context of equal pay for men and women, judgment of 11 May 1999, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* (C-309/97, EU:C:1999:241, paragraph 21).

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24 According to the Spanish Government, that approach follows from the judgments of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215, paragraphs 31 and 33), and of 9 November 2017, *Espadas Recio* (C-98/15, EU:C:2017:833, paragraph 41).

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25 Geulette, A., 'De la discrimination indirecte telle qu'appréhendée par la Cour de justice des Communautés européennes au regard du règlement 1408/71/CEE et de la directive 79/7/CEE', *Revue belge de sécurité sociale*, 2nd edition, 2003, pp. 541 to 582, especially p. 554 and the academic authorities cited. The Court of Justice has already held in that respect that 'the concept of discrimination does not imply, by definition, the fact that direct damage is caused [and] the meaning of this concept is primarily that unequal conditions are laid down for comparable cases.' Nevertheless 'the application of such unequal conditions may, it is true, bring about damage, which can then be considered as the consequence by which that discrimination may be detected.' See judgment of 10 May 1960, *Barbara and Others* v *High Authority* (3/58 to 18/58, 25/58 and 26/58, EU:C:1960:18, p. 404).

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26 On the influence of the US 'disparate impact' doctrine in relation to indirect discrimination in EU social law, see, among others, Tobler, C., *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Intersentia, Antwerpen-Oxford, 2005, pp. 91 to 96. See, in that respect, judgment of 31 March 1981, *Jenkins* (96/80, EU:C:1981:80, p. 925, paragraph 13), and Opinion of Advocate General Warner in *Jenkins* (96/80, not published, EU:C:1981:21, pp. 936 and 937).

27 The Court referred to indirect discrimination (by reason of nationality) for the first time in its judgment of 12 February 1974, *Sotgiu* (152/73, EU:C:1974:13, paragraph 11) in respect of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ 1968 L 257, p. 2): 'The rules regarding equality of treatment … forbid not only overt discrimination by reason of nationality but also *all covert forms of discrimination* which, by the application of other criteria of differentiation, lead in fact to the same result.' Emphasis added. For recent case-law on freedom of movement for workers in which the Court uses that concept, see, for example, judgment of 2 April 2020, *PF and Others* (C-830/18, EU:C:2020:275, paragraph 30 and the case-law cited).

28 Judgments of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 37 and the case-law cited), and of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 24). Emphasis added. I note that the latter judgment signals a change in the definition of this concept compared with the earlier case-law, according to which 'indirect discrimination for the purposes of [that article] arises where a national measure, albeit formulated in neutral terms, *works to the disadvantage* of far more women than men.' Emphasis added. See, among others, judgments of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675, paragraph 56); of 22 November 2012, *Elbal Moreno* (C-385/11, EU:C:2012:746, paragraph 29); of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215, paragraph 28); and of 9 November 2017, *Espadas Recio* (C-98/15, EU:C:2017:833, paragraph 38). As academic commentators emphasise, this involves a more qualitative examination of the potential unfavourable impact of a measure on persons satisfying a particular criterion compared with other persons. This new definition also makes it possible to address indirect discrimination based on criteria for which there are no quantitative data. See, on that point, Miné, M., 'Les concepts de discrimination directe et indirecte', *ERA Forum*, Vol. 4,2003, pp. 30 to 44, in particular pp. 38 and 39; Tridimas, T., *The General Principles of EU Law*, Oxford University Press, 2005, pp. 67 to 72; and Vielle, P. and Wuiame, N., *Évaluation de la mise en œuvre de la directive 79/7/CEE relative à l'égalité de traitement entre les hommes et les femmes en matière de sécurité sociale*,1999, pp. 1 to 49, in particular p. 21.

29 See judgments of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 38 and the case-law cited), and of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 25).

30 See among others, Tobler, C., *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, op. cit., p. 58.

31 See judgment of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 27 and the case-law cited). It is worth noting that indirect discrimination may be established by any means, and not only on the basis of statistical evidence. See, in that respect, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 46). See, also, judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 56).

32 The TGSS states in its written observations that ‘there is no doubt that the majority of workers who are members of the Special Scheme for Domestic Workers are women and that the fact that they are excluded from protection against unemployment may constitute indirect discrimination compared with male workers’.

33 See, among others, judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 52 and the case-law cited), and of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 26). See also, to that effect, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraphs 39 and 45).

34 See, to that effect, judgment of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 28).

35 For statistical data in respect of the first quarter of 2017, see judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 42).

36 See, to that effect, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 47).

37 See, to that effect, judgments of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 37 and the case-law cited), and of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 24).

38 See judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 53 and the case-law cited). See, also, judgments of 13 May 1986, *Bilka-Kaufhaus* (170/84, EU:C:1986:204, paragraph 36); of 13 July 1989, *Rinner-Kühn* (171/88, EU:C:1989:328, paragraph 14); of 24 February 1994, *Roks and Others* (C-343/92, EU:C:1994:71, paragraph 34); and of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 48).

39 See judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 54 and the case-law cited).

40 Judgments of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 65), and of 2 April 2020, *Comune di Gesturi* (C-670/18, EU:C:2020:272, paragraph 37). See, also, judgment of 11 September 2003, *Steinicke* (C-77/02, EU:C:2003:458, paragraph 62 and the case-law cited).

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41 See judgment of 14 December 1995, *Megner and Scheffel* (C-444/93, EU:C:1995:442, paragraphs 27, 28 and 32). In the context of access to compulsory old-age invalidity insurance, see judgment of 14 December 1995, *Nolte* (C-317/93, EU:C:1995:438, paragraphs 31, 32 and 36). In addition, in relation to the fundamental freedoms guaranteed by the Treaty, the Court has held that objectives such as the social protection of employees and the facilitation of the related administrative controls (judgment of 16 April 2013, *Las* (C-202/11, EU:C:2013:239, paragraph 28)) and combating fraud, particularly social security fraud, and preventing abuse are objectives that are among the 'overriding reasons in the public interest' capable of justifying a restriction on the exercise of the fundamental freedoms recognised in the Treaty (judgment of 13 November 2018, *Čepelnik* (C-33/17, EU:C:2018:896, paragraph 44)). Nevertheless, I would call to mind that 'overriding reasons in the public interest' in the context of fundamental freedoms and 'objective grounds of justification' in the context of indirect discrimination are not equivalent concepts.

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42 See, among others, judgments of 12 July 1984, *Hofmann* (184/83, EU:C:1984:273, paragraph 27) (on social measures to protect women as regards pregnancy and maternity); of 7 May 1991, *Commission* v *Belgium* (C-229/89, EU:C:1991:187, paragraph 22) (on the social policy objective of ensuring a minimum replacement income); and of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675, paragraph 91) (on the allocation of an income equal to the social minimum as forming an integral part of social policy).

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43 See, among others, judgments of 14 December 1995, *Nolte* (C-317/93, EU:C:1995:438, paragraph 33); of 14 December 1995, *Megner and Scheffel* (C-444/93, EU:C:1995:442, paragraph 29); of 1 February 1996, *Posthuma-van Damme and Oztürk*, (C-280/94, EU:C:1996:27, paragraph 26); of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 74); and of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675, paragraph 73).

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44 See judgment of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 33 and the case-law cited).

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45 Academic authorities have also lamented the relaxation of the three-step test of justification which, in order to be objective, requires that the means chosen, first, correspond to a real need (reality), second, are appropriate to achieving the objective in question (appropriateness) and, third, are necessary to that end (proportionality). According to those authorities, the Court applies that test more strictly and systematically in relation to indirect discrimination based on nationality than in relation to the matters subject, inter alia, to Directive 79/7. See, among others, Barnard, C. and Hepple, B., 'Indirect Discrimination: Interpreting *Seymour-Smith*', *Cambridge Law Journal*, 58(2),

1999, pp. 399 to 412, especially pp. 409 to 412: ‘The real problem is that while the Court of Justice is capable of pronouncing on questions of formal equality, it lacks access to the statistical and social science advice which is needed to assess arguments about disparate impact and objective justification’; Bell, M. and Waddington, L., ‘More Equal than Others: Distinguishing European Union Equality Directives’, *Common Market Law Review*, Vol. 38, 2001, pp. 587 to 611, especially p. 593; and Vielle, P. and Wuiame, N., op. cit., p. 22. On the importance of applying that test strictly in the context of discrimination on grounds of sex, see Mulder, J., *Indirect sex discrimination in employment. Theoretical analysis and reflections on the CJEU case-law and national application of the concept of indirect sex discrimination*, European network of legal experts in gender equality and non-discrimination, European Commission, Brussels, 2020, p. 130.

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46 Judgments of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 71); of 20 March 2003, *Kutz-Bauer* (C-187/00, EU:C:2003:168, paragraph 57); and of 11 September 2003, *Steinicke* (C-77/02, EU:C:2003:458, paragraph 63). See, also, judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2, paragraph 27).

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47 See, to that effect, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 47).

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48 See point 65 of this Opinion.

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49 See judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 54 and the case-law cited). See, also, judgments of 13 May 1986, *Bilka-Kaufhaus* (170/84, EU:C:1986:204, paragraph 36); of 13 July 1989, *Rinner-Kühn* (171/88, EU:C:1989:328, paragraph 14); of 24 February 1994, *Roks and Others* (C-343/92, EU:C:1994:71, paragraph 34); and of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 48).

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50 Judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraphs 55 and 56 and the case-law cited).

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51 It is in respect of this phase of determining whether there is indirect discrimination, that is to say, examination of the objective grounds of justification, that academic commentators have expressed reservations about the review exercised by the Court. According to those observers, that review appears to be permissive wherever it is argued that the benefit concerned is justified by legitimate social policy objectives. See, among others, Pennings, F., *European Social Security Law*, Intersentia, Antwerp, Oxford and Portland, 2010, pp. 322 to 327.

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52 Judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 59 and the case-law cited). Academic commentators stress that the fact that a legitimate objective has been invoked does not necessarily mean that the protection from indirect discrimination laid down by Directive 79/7 will be limited. See Tobler, C., *Limits and potential of the concept of indirect discrimination*, op. cit., p. 39: 'It is therefore unsurprising that the Court of Justice is criticised for accepting certain aims as legitimate.'

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53 The TGSS also appears to have asserted that domestic workers can receive unemployment benefit provided they have not ceased work voluntarily and have, in addition, contributed to the general social security scheme in the six years preceding their enrolment in the Special Scheme for Domestic Workers. However, that would seem to exclude unemployment benefit for workers who have always worked as domestic workers.

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54 I believe that is appropriate to examine those objectives together because they overlap and are closely linked.

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55 See, among others, Geulette, A., op. cit., p. 555.

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56 See, among others, Tobler, C., *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, op. cit., p. 61 et seq. and the academic authorities cited: 'The term "structural discrimination" refers to a type of discrimination with a much more complex nature. Structural discrimination arises from deeply rooted views, opinions and value judgments relied on in a given society or from societal, cultural, economic patterns and structures.' In relation to racial discrimination, see also the definition given by the Office of the United Nations High Commissioner for Human Rights: 'Discrimination can exist explicitly, through institutions, norms and values. … Structural discrimination primarily relates to the ways in which common behaviour and equal legislation and norms for everybody can affect, and obscure, discriminatory intent.' Available at: https://www.ohchr.org/Documents/Issues/Racism/IWG/Session8/MirjanaNajcevska.doc.

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57 In that respect, see, among others, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, EU Action Plan 2017-2019, Tackling the gender pay gap, COM(2017) 678 final.

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58 As Advocate General Bobek observed in his Opinions in *Syndicat CFTC* (C-463/19, EU:C:2020:550, paragraph 52 and the case-law cited), and in *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:696, paragraphs 37 and 38), referring in particular to the judgments of 25 October 1988, *Commission* v *France* (312/86, EU:C:1988:485, paragraph 14); of 29 November 2001, *Griesmar* (C-366/99, EU:C:2001:648,

paragraph 56); of 26 March 2009, *Commission* v *Greece* (C-559/07, EU:C:2009:198, paragraph 69); and of 16 July 2015, *Maïstrellis* (C-222/14, EU:C:2015:473, paragraph 47).

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59 Vielle, P. and Wuiame, N., op. cit., p. 24. See, in that regard, Vogel-Polsky, E., 'Genre et droit: les enjeux de la parité', *Cahiers du GEDISST (Groupe d'étude sur la division sociale et sexuelle du travail)*, No 17, 1996, *Principes et enjeux de la parité*, pp. 11 to 31: 'The occupational segregation … of women in the economy and the world of work has its origins in gendered social relationships as a whole [or] in pervasive stereotypes articulated by culture, education, the school system, family, the media …'.

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60 Vielle, P. and Wuiame, N., op. cit., p. 24.

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61 Vielle, P. and Wuiame, N., op. cit., p. 24. For an exhaustive analysis of how the EU legislature has progressively enhanced equality between male and female employed workers in their parental role, see the Opinion of Advocate General Bobek in *Syndicat CFTC* (C-463/19, EU:C:2020:550, paragraph 53 et seq.).

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62 It emerges from the Commission's observations that, in order to explain the existing differences in the protection of different kinds of workers and of domestic workers in particular, Spanish academic writers have referred in particular to the fact that the latter group comprises mainly women and that women traditionally enjoy social security cover by virtue of their family links. See, among others, Otxoa Crespo, I., *La Seguridad Social del empleo doméstico: evolución y perspectivas*, Universidad del País Vasco – Euskal Herriko Unibertsitatea, 2012, pp. 304 and 305. Available at: https://addi.ehu.es/bitstream/handle/10810/11601/9082-090-2-OtxoaTH.pdf?sequence= 6&isAllowed=y.

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63 Replying to a question from the Court at the hearing, the Spanish Government stated that chauffeurs are enrolled in the general social security scheme and contribute in respect of unemployment benefits.

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64 *Decent Work for Domestic Workers*, Report IV(1), International Labour Conference, Geneva, 99th Session, 2010, pp. 1 to 134. On occupational segregation, see Rodríguez Escanciano, S., 'Condiciones de trabajo y discriminación salarial por razón de sexo', *Derecho Social de la Unión Europea. Aplicación por el Tribunal de Justicia*, Casas Baamonde, M.E. and Gil Alburquerque, R. (eds), Francis Lefebvre, 2019, pp. 269 to 307, especially p. 280 et seq.

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65 Judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 53).

66 See, to that effect, among others, judgment of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 72).

67 See, to that effect, judgments of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 76); of 20 March 2003, *Kutz-Bauer* (C-187/00, EU:C:2003:168, paragraph 58); of 11 September 2003, *Steinicke* (C-77/02, EU:C:2003:458, paragraph 64); and of 5 March 2009, *Age Concern England* (C-388/07, EU:C:2009:128, paragraph 51).

68 See the case-law summarised in point 65 of this Opinion.

69 See, in particular, judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 54 and the case-law cited).

70 See, in that regard, point 81 of this Opinion.

71 It is apparent from the oral observations of the Spanish Government that the scheme also covers risks related to pregnancy and breastfeeding, maternity and paternity and death and survivorship.

72 The Commission gives the examples of the service employment vouchers that exist in France and Belgium, reductions or full or partial exemption from contributions for certain employers and tax credits and deductions.

73 See point 75 of this Opinion.

74 Real Decreto 1620/2011 por el que se regula la relación laboral de carácter especial del servicio del hogar familiar (Royal Decree No 1620/2011 governing the special employment relationship of domestic workers) of 14 November 2011 (BOE No 277 of 17 November 2011, p. 119046).

75 In that respect, CJ stated at the hearing that social security enrolments of domestic workers had increased from 296 949 to 414 453 in 2012.

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76 However, the TGSS stated in its written observations that the number of persons enrolled then fell between 2012 and 2019.

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77 As I stated in footnote 63 of this Opinion, the Spanish Government, replying to a question from the Court at the hearing, indicated that chauffeurs contribute in respect of unemployment benefits.

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78 In its written observations, the Commission refers to a Parliamentary question put to the Commission (P-128/2020) by a number of Spanish MEPs in which it was stated, in respect of the ability to inspect homes to detect fraud, that 'according to the Supreme Court, the same requirements (signs of fraud, the principles of necessity and proportionality) need to be met in order to inspect a company or a home.' Available at: https://www.europarl.europa.eu/doceo/document/P-9-2020-000128_EN.html.

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79 In that regard, the TGSS asserted at the hearing that the temporary incapacity allowance is more advantageous because it is paid from the 9th day rather than from the 15th day.

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80 The referring court states that where domestic workers' employment ends through reasons not attributable to themselves, the fact that they are not entitled to unemployment benefit also means they are not entitled to other types of social assistance dependent on the cessation of entitlement to unemployment benefit. See, in that regard, point 16 of this Opinion.

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81 Article 30 of Real Decreto-ley 11/2020 por el que se adoptan medidas urgentes complementarias en el ámbito social y económico para hacer frente al COVID-19 (Royal Decree-Law No 11/2020 adopting urgent additional social and economic measures in response to COVID-19) of 31 March 2020 (BOE No 91 of 1 April 2020).

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82 See, among others, judgment of 17 July 2014, *Leone* (C-173/13, EU:C:2014:2090, paragraph 54 and the case-law cited).

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83 The Spanish Government stated at the hearing that the steps needed to ratify that convention had been initiated and could lead to domestic workers being granted unemployment protection.