ECLI:EU:C:2019:1075

Provisional text

JUDGMENT OF THE COURT (First Chamber)

12 December 2019 (*)

(Reference for a preliminary ruling — Social policy — Directive 79/7/EEC — Equal treatment for men and women in matters of social security — Article 4(1) and (2) — Article 7(1) — Calculation of benefits — Directive 2006/54/EC — Equal treatment of men and women in matters of employment and occupation — National legislation granting a right to a pension supplement for women who have had at least two biological or adopted children, and who are in receipt of a contributory permanent incapacity pension — Same right not granted to men in an identical situation — Comparable situation — Direct discrimination on grounds of sex — No exceptions)

In Case C-450/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 3 de Gerona (Social Court No 3, Gerona, Spain), made by decision of 21 June 2018, received at the Court on 9 July 2018, in the proceedings

WA

v

Instituto Nacional de la Seguridad Social (INSS),

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta, Vice-President of the Court, M. Safjan (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: M. Bobek,

Registrar: L. Carrasco Marco, administrator,

having regard to the written procedure and further to the hearing on 13 June 2019,

after considering the observations submitted on behalf of

– WA, by F. Casas Corominas, abogado,

– the Instituto Nacional de la Seguridad Social (INSS), initially by A.R. Trillo García, L. Martínez-Sicluna Sepúlveda and P. García Perea, and subsequently by L. Martínez-Sicluna Sepúlveda and P. García Perea, letrados,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the European Commission, initially by N. Ruiz García, C. Valero and I. Galindo Martín, and subsequently by N. Ruiz García and C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2019,

gives the following

Judgment

1 This request for preliminary ruling concerns the interpretation of Article 157 TFEU and 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 proceedings between WA, a father of two children, and the Instituto Nacional de la Seguridad Social (INSS) (National Institute for Social Security, Spain) concerning the refusal to grant him a pension supplement which is available to women who have had at least two biological or adopted children.

Legal context

EU law

Directive 79/7/EEC

3 The second and third recitals of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) state:

‘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;

Whereas the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity; whereas, in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment’.

4 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”.’

5 Article 2 of that directive provides:

‘This Directive shall apply to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons.’

6 Article 3(1) of that directive provides:

‘This Directive applies to:

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

– sickness,

– invalidity,

– old age,

– accidents at work and occupational diseases,

– unemployment;

…’

7 Article 4 of Directive 79/7 is worded as follows:

‘1. 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 such schemes and the conditions of access to them;

– the obligation to contribute and the calculation of contributions;

– the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.’

8 Article 7 of that directive states:

‘1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

…

(b) advantages in respect of old-age pension schemes granted to persons who have raised children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;

…

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.’

Directive 2006/54

9 Directive 2006/54 repealed Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p.15).

10 Recital 13 of Directive 2006/54 states:

‘In its judgment of 17 May 1990 in [Barber (C-262/88, EU:C:1990:209)], the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 [EC].’

11 Article 1 of that directive provides:

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

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

…

(b) working conditions, including pay;

(c) occupational social security schemes.

…’

12 Article 2(1) of that directive provides:

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

…

(f) “Occupational social security schemes” means 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.’

The relevant provisions of Spanish law

13 Under Article 7(1) of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291) (‘the LGSS’):

‘Regardless of their sex, civil status or profession, Spanish citizens residing in Spain and foreign nationals who reside or are legally present in Spanish territory come under the social security system for the purposes of contributory benefits, provided that, in both situations, they work in the national territory and they come under one of the following subparagraphs:

(a) employees who provide their services on behalf of others under the conditions set out in Article 1(1) of the consolidated text of the Estatuto de los Trabajadores (Workers’ Statute), in the various branches of the economy, or similar employees, whether they are temporary, seasonal, permanent or even “*fijos discontinuos*” employees, including teleworkers, and in all cases, regardless of the professional category of the employee, or the form or the amount of the remuneration which (s)he receives or the general nature of the employment relationship;

(b) self-employed persons, whether or not they are the owners of individual or family undertakings, over the age of 18 years, who satisfy all the conditions expressly laid down by this law or by legislation adopted for its implementation;

(c) employee-members of workers’ cooperatives;

(d) students;

(e) civil or military servants.’

14 Article 60(1) of the LGSS provides:

‘Women who have had biological or adopted children and are recipients of a contributory retirement, widow’s or permanent incapacity pension under any scheme within the social security system shall be granted a pension supplement on account of their demographic contribution to social security.

That supplement, which shall have the legal nature of a contributory State pension for all purposes, shall consist of an amount equivalent to the result of applying to the initial amount of the pensions referred to a specified percentage which shall be based on the number of children in accordance with the following scale:

(a) in the case of two children: 5 per cent.

(b) in the case of three children: 10 per cent.

(c) in the case of four or more children: 15 per cent.

For the purpose of establishing entitlement to the supplement and the amount thereof, only children born or adopted before the operative event for the pension concerned shall be taken into account.'

15 Article 196(3) of the LGSS provides:

'The financial benefit for permanent absolute incapacity shall consist of a lifelong pension.'

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

16 By a decision of 25 January 2017, the INSS granted WA a permanent absolute incapacity pension of 100% of the basic amount ('the decision of 25 January 2017'). That pension came to EUR 1 603.43 per month plus revaluations.

17 WA brought a prior administrative complaint against that decision, claiming that, as the father of two daughters, he should, on the basis of Article 60(1) of the LGSS, be entitled to receive the pension supplement provided for in that provision ('the pension supplement at issue'), representing 5% of the initial amount of his pension under the same conditions as women who are the mothers of two children and are in receipt of contributory permanent incapacity pensions under a scheme within the Spanish social security system.

18 By decision of 9 June 2017, the INSS dismissed WA's prior administrative complaint and confirmed the decision of 25 January 2017. In that regard, the INSS stated that the pension supplement at issue is granted exclusively to women in receipt of a contributory pension from the Spanish social security and who are mothers of at least two children, because of their demographic contribution to social security.

19 In the meantime, on 23 May 2017, WA challenged the decision of 25 January 2017 before the Juzgado de lo Social No 3 de Gerona (Social Court No 3, Gerona, Spain), claiming that his right to receive the pension complement at issue should be recognised.

20 On 18 May 2018, the Juzgado de lo Social No 3 de Gerona (Social Court No 3, Gerona) was informed that WA died on 9 September 2017. His wife, DC, succeeded WA on his death as the applicant in the main proceedings. The referring court states that any payment of the pension supplement at issue would therefore run up to the date of WA's death.

21 The referring court states that Article 60(1) of the LGSS entitles women who have had at least two biological or adopted children to receive the pension supplement at issue, on account of their demographic contribution to social security, whereas men in an identical situation do not have that entitlement. That court expresses doubts about whether such a provision is compatible with EU law.

22 The notion of 'demographic contribution to social security', referred to in Article 60(1) of the LGSS, is equally valid as regards both women and men, since reproduction and responsibility for looking after, feeding and bringing up the children lies with anyone who has the status of a mother or father. Consequently, a career break as a result of the birth or adoption of children or in order to bring up those children can be equally detrimental to women and men, regardless of their demographic contribution to social security. In that context, Article 60(1) of the LGSS creates an unjustified difference in treatment in favour of women, to the detriment of men in an identical situation.

23 Reproduction, however, involves a greater sacrifice for women in personal and professional terms. They have to deal with a period of pregnancy and with the birth, which involves clear biological and physiological sacrifices, together with the disadvantages which that involves in physical terms and in the area of employment and their legitimate expectations of promotion in their profession. In biological terms, the provisions of Article 60(1) of the LGSS may therefore be justified inasmuch as they are intended to protect women from the consequences of pregnancy and motherhood.

24 In those circumstances, the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona) stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Does a national legislative provision (specifically Article 60(1) of the [LGSS]) which grants the right to receive a pension supplement — in view of their demographic contribution to social security — to women who have had biological or adopted children and are in receipt of a contributory retirement, widow's or permanent incapacity pension under any scheme within the social security system, but, on the other hand, does not grant that right to men in an identical situation, infringe the principle of equal treatment which prohibits all discrimination on grounds of sex, enshrined in Article 157 of the [TFUE] and in Directive [76/207], as amended by Directive [2002/73] and recast by Directive [2006/54]?'

Consideration of the question referred

Preliminary observations

25 In the context of the procedure established by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (judgments of 26 June 2008, *Wiedemann and Funk*, C-329/06 and C-343/06, EU:C:2008:366, paragraph 45, and of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 42).

26 In the present case, even if formally the referring court has limited its question to the interpretation only of the provisions of Article 157 TFEU and of Directive 2006/54, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its question. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation in view of the subject matter of the dispute (see, to that effect, judgments of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 32, and of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 43).

27 In the present case, WA, a father of two children, applied, on the basis of Article 60(1) of the LGSS, for the pension supplement at issue, which would be added to his contributory pension for permanent absolute incapacity.

28 In that regard, it should be noted that the term 'pay' within the meaning of Article 157(2) TFEU covers pensions which depend on the employment relationship between worker and employer, excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the

employment relationship than by considerations of social policy. Accordingly, that concept cannot be extended to encompass social security schemes or benefits — such as retirement pensions — 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 (see judgment of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 20 and the case-law cited).

29 A contributory permanent incapacity pension, such as the one which WA received, on the basis of which the pension supplement at issue is calculated, appears to be determined less by an employment relationship between worker and employer than by considerations of social policy, in accordance with the case-law cited in the preceding paragraph.

30 In addition, Article 60(1) of the LGSS stipulates that the pension supplement at issue has, for all purposes, the legal nature of a contributory State pension.

31 It is true that considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the last salary (judgments of 28 September 1994, *Beune*, C-7/93, EU:C:1994:350, paragraph 45, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 23).

32 In that regard, as the INSS submits, the first of those three conditions does not appear to be satisfied in so far as the documents before the Court disclose no evidence that a contributory permanent incapacity pension such as that at issue in the main proceedings applies only to a specific category of worker.

33 Therefore, such a contributory permanent incapacity pension does not come under the notion of ‘pay’ within the meaning of Article 157(1) and (2) TFEU or of Directive 2006/54 (see, to that effect, judgments 13 February 1996, *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 14; of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 25; and of 14 July 2016, *Ornano*, C-335/15, EU:C:2016:564, paragraph 38).

34 In addition, it is apparent from subparagraph (c) of the second paragraph of Article 1 of Directive 2006/54, read in conjunction with Article 2(1)(f) thereof, that that directive does not apply to statutory schemes governed by Directive 79/7.

35 On the other hand, the pension supplement at issue falls within the scope of the latter directive, since it forms part of a statutory scheme providing protection against one of the risks listed in Article 3(1) of Directive 79/7 — namely, invalidity — and it is directly and effectively linked to protection against that risk (see, to that effect, judgments of 16 December 1999, *Taylor*, C-382/98, EU:C:1999:623, paragraph 14, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 26).

36 That pension supplement is intended to protect women who have had at least two biological or adopted children and who are in receipt of an invalidity pension, by ensuring that they have the necessary means, in particular in terms of their needs.

37 In those circumstances, it is appropriate to understand the question asked as seeking, in essence, to ascertain whether Directive 79/7 must be interpreted as meaning that it precludes national legislation which, on account of the women’s demographic contribution to social security,

makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement.

Substance

38 As a result of the third indent of Article 4(1) of Directive 79/7, the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference, in particular, to marital or family status as regards the calculation of benefits.

39 The main proceedings concern the calculation of the total amount of the permanent incapacity benefit of a man who has had two children, and he is applying for the pension supplement at issue.

40 According to Article 60(1) of the LGSS, in view of the demographic contribution of women to the social security system, the pension supplement at issue is awarded to women where they have had at least two biological or adopted children and they are in receipt, in particular, of contributory permanent incapacity pensions under a scheme within the social security system. By contrast, men in an identical situation are not entitled to that pension supplement.

41 Thus, it appears that that national legislation treats men who have had at least two biological or adopted children less favourably. Such less favourable treatment based on sex may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7.

42 According to the Court's settled case-law, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (judgments of 13 February 1996 *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 16, and of 8 May 2019, *Praxair MRC*, C-486/18, EU:C:2019:379, paragraph 73).

43 Thus, it is appropriate to ascertain whether the difference in treatment between men and women created by the national legislation at issue in the main proceedings concerns categories of persons who are in comparable situations.

44 In that regard, the requirement relating to the comparability of situations does not require those situations to be identical, but only similar (judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 41 and the case-law cited).

45 The comparability of situations must be assessed not in a global and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, and, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates (judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 41 and the case-law cited).

46 With regard to the aim pursued by Article 60(1) of the LGSS, namely to reward the demographic contribution of women to social security, it should be pointed out that the contribution of men to demography is just as necessary as that of women.

47 Therefore, the ground of demographic contribution to social security cannot justify men and women not being in a comparable situation with regard to the award of the pension supplement at issue.

48 However, in response to a written question from the Court, the Spanish Government stated that the objective pursued by that pension supplement is not just to reward women who have had at least two children for their demographic contribution to social security. That supplement was also conceived as a measure to reduce the gap between the pension payments of men and those of women arising from differences in career paths. The aim pursued is to ensure the award of adequate pensions to women whose contribution capacity and therefore the amount of the pension have been reduced where their professional careers have been interrupted or shortened due to the fact that they have had at least two children.

49 In addition, the INSS claims in its observations that the pension supplement at issue is justified on grounds of social policy. To that end, the INSS provides numerous statistical data which reveal a difference between the pension payments of men and those of women, and, on the one hand, between the pension payments of childless women or those who have had one child and, on the other, the payments of women who have had at least two children.

50 In that respect, as regards the objective of reducing the gap between the pension payments of men and those of women by awarding the pension supplement at issue, it must be stated that Article 60(1) of the LGSS is intended, at least in part, to protect women in their capacity as parents.

51 First, this is a quality which both men and women may have and, secondly, the situation of a father and that of a mother may be comparable as regards the bringing-up of children (see, to that effect, judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 56, and of 26 March 2009, *Commission* v *Greece*, C-559/07, not published, EU:C:2009:198, paragraph 69).

52 In particular, the fact that women are more affected by the occupational disadvantages entailed in bringing up children, because it is they who generally carry out that task, does not prevent their situation from being comparable to that of a man who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages (see, to that effect, judgment of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 56).

53 In those circumstances, as the Advocate General stated in point 66 of his Opinion, the existence of statistical data highlighting structural differences between the pension payments of women and those of men is not sufficient to make it possible to reach the conclusion that, as regards the pension supplement at issue, women and men are not in a comparable situation as parents.

54 According to the case-law of the Court, a derogation from the prohibition, set out in Article 4(1) of Directive 79/7, of all direct discrimination on grounds of sex is possible only in the situations exhaustively set out in the provisions of that directive (see, to that effect, judgments of 3 September 2014, *X*, C-318/13, EU:C:2014:2133, paragraphs 34 and 35, and of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 50).

55 With regard to those grounds for derogation, it must be stated in the first place that, by virtue of Article 4(2) of Directive 79/7, the principle of equal treatment is without prejudice to the provisions relating to the protection of women on the ground of maternity.

56 In that regard, it is clear from the case-law of the Court that, by reserving to the Member States the right to retain or introduce provisions which are intended to ensure that protection, Article 4(2) of Directive 79/7 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth (see, to that effect regarding Directive 76/207, judgments of 12 July 1984, *Hofmann*, 184/83, EU:C:1984:273, paragraph 25, and of 19 September 2013, *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 62).

57 In the present case, there is nothing in Article 60(1) of the LGSS that establishes a link between the award of the pension supplement at issue and taking maternity leave or the disadvantages suffered by a woman in her career as a result of being absent from work during the period following the birth of a child.

58 In particular, that supplement is granted to women who have adopted children, which means that the national legislature did not intend to limit the application of Article 60(1) of the LGSS to protecting the biological condition of women who have given birth.

59 In addition, as the Advocate General stated in point 54 of his Opinion, that provision does not require women to have actually stopped working at the time they had their children, and thus the condition relating to maternity leave is absent. That is particularly the case where a woman has given birth before entering the job market.

60 Therefore, it must be held that a pension supplement such as that at issue in the main proceedings does not fall within the scope of the derogation from the prohibition of discrimination laid down in Article 4(2) of Directive 79/7.

61 In the second place, according to Article 7(1)(b) of Directive 79/7, that directive is without prejudice to the right of Member States to exclude from its scope advantages in respect of old-age pension schemes granted to persons who have brought up children and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing-up of children.

62 In that regard it must be stated that, in any event, Article 60(1) of the LGSS makes the award of the pension supplement at issue subject, not to the bringing-up of children or the existence of periods of interruption of employment due to the bringing-up of children, but only to the fact that women recipients have had at least two biological or adopted children and receive a contributory retirement, widow's or permanent incapacity pension under a scheme within the social security system.

63 Consequently, Article 7(1)(b) of Directive 79/7 does not apply to a benefit such as the pension supplement at issue.

64 Finally, it must be added that, under Article 157(4) TFEU, in order to ensure full equality in practice between men and women in working life, the principle of equal treatment must not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

65 However, that provision cannot be applied to national legislation such as Article 60(1) of the LGSS, given that the pension supplement at issue is limited to granting women a surplus at the time when a pension is awarded, in particular in the case of permanent invalidity, without providing a

remedy for the problems which they may encounter in the course of their professional career, and that supplement 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, judgments of 29 November 2001, *Griesmar*, C-366/99, EU:C:2001:648, paragraph 65, and of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraph 101).

66 Consequently, it must be stated that national legislation such as that at issue in the main proceedings constitutes direct discrimination on grounds of sex and is, therefore, prohibited by Directive 79/7.

67 In the light of the foregoing considerations, the answer to the question asked is that Directive 79/7 must be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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:

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 national legislation, such as that at issue in the main proceedings, which makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, while men in an identical situation do not have a right to such a pension supplement.

[Signatures]

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* Language of the case: Spanish.