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Provisional text

JUDGMENT OF THE COURT (Tenth Chamber)

15 May 2025 (*)

(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) – National legislation providing for a pension supplement awarded to women who are in receipt of contributory retirement pensions and have had one or more biological or adopted children – Possibility of awarding such a supplement to men subject to additional requirements – Direct discrimination on grounds of sex – Article 23 of the Charter of Fundamental Rights of the European Union – Positive action measures)

In Joined Cases C623/23 [Melbán] and C626/23 [Sergamo], (i)

REQUESTS for a preliminary ruling under Article 267 TFEU from, first, the Juzgado de lo Social No 3 de Pamplona (Social Court No 3, Pamplona, Spain) and, second, the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid, Spain), by decisions of 21 September and 13 September 2023, received at the Court on 6 October 2023 and 12 October 2023, respectively, in the proceedings

UV (C623/23),

XXX (C626/23)

v

Instituto Nacional de la Seguridad Social (INSS),

intervening parties:

OP (C623/23),

Ministerio Fiscal (C623/23),

THE COURT (Tenth Chamber),

composed of D. Gratsias, President of the Chamber, E. Regan and B. Smulders (Rapporteur), Judges,

Advocate General: R. Norkus,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Instituto Nacional de la Seguridad Social (INSS), by A. Álvarez Moreno and A.R. Trillo García, letrados,
- the Spanish Government, by M. Morales Puerta, acting as Agent,
- the European Commission, by I. Galindo Martín and E. Schmidt, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation 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), and of Articles 20, 21, 23 and Article 34(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The requests have been made in the context of two sets of proceedings between, on the one hand, UV (C623/23), the father of two children, and XXX (C626/23), the father of three children, and, on the other hand, the Instituto Nacional de la Seguridad Social (INSS) (National Institute for Social Security, Spain), concerning the refusal, by the latter, to grant them a pension supplement ('the pension supplement at issue') provided for by national law for the benefit of women and men who have had one or more children, the award of which to men is, however, subject to additional requirements.

European Union law

3 Article 1 of Directive 79/7 states:

'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".'

4 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.'

5 Article 3(1) of that directive provides:

'This Directive shall apply to:

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

- sickness,
- invalidity,
- old age,
- accidents at work and occupational diseases,
- unemployment;

...'

6 Article 4 of that directive 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 the schemes and the conditions of access thereto,
- 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.'

7 Under Article 7 of Directive 79/7:

'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 brought up 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.'

Spanish law

8 Headed 'Maternity supplement for contributory pensions under the social security system', Article 60 of the Ley General de la Seguridad Social (General Law on Social Security), as 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 former LGSS'), provided in paragraph 1 thereof:

'Women who have had biological or adopted children and are recipients of a contributory retirement, widow's or permanent invalidity 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 in 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

...'

9 Following the adoption of Real Decreto-Ley 3/2021, por el que se adoptan medidas para la reducción de la brecha de género y otras materias en los ámbitos de la Seguridad Social y económico (Royal Decree-Law 3/2021, adopting measures intended to reduce the gender gap and relating to other matters in the fields of social security and the economy) of 2 February 2021 (BOE No 29, 3 February 2021, p. 12268) ('Royal Decree-Law 3/2021'), the former LGSS was amended ('the LGSS, as amended'). Article 60 of the LGSS, as amended, headed 'Supplement to contributory pensions to reduce the gender gap', provides:

'1. Women who have had one or more children and who are recipients of a contributory retirement, permanent incapacity or widow's pension shall be entitled to a supplement for each child, on account of the impact which, in general, the gender gap has on the amount of the contributory pensions received by women from the social security system. The right to the supplement for each child shall be granted to, or maintained for, the woman provided that the supplement is not claimed by and granted to the other parent and, where that other parent is also a woman, it shall be granted to the parent in receipt of public pensions the total amount of which is less.

In order for men to be entitled to receive the supplement, one of the following requirements must be satisfied:

(a) Being granted a widower's pension on account of the death of the other parent of the children in common, provided that one of those children is entitled to receive an orphan's pension;

(b) Being entitled to a contributory retirement or permanent incapacity pension and having interrupted their professional career, or had it affected, on account of the birth or adoption, in accordance with the following conditions:

(1) In the case of children born or adopted up to 31 December 1994, having more than 120 days without making contributions in the 9 months prior to the birth and the 3 years following that date or, in the case of adoption, from the date of the court order establishing it and in the 3 subsequent years, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled;

(2) In the case of children born or adopted since 1 January 1995, that the total of the income on the basis of which contributions are calculated for the 24 months following the birth or the court order establishing the adoption is less, by more than 15 per cent, than that for the immediately preceding 24 months, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled.

...

(3) Where the two parents are men and they each meet the aforementioned conditions, the supplement shall be granted to the parent in receipt of public pensions the total amount of which is less.

...

2. The granting of the supplement to the second parent shall cause the withdrawal of the supplement already granted to the first parent and produce material effects on the first day of the month following that in which the decision was made ...

Before giving the decision granting the right to the second parent, the parent in receipt of the supplement shall be heard.

3. This supplement shall, for all relevant purposes, have the legal status of a contributory public pension.

The amount of the supplement per child shall be determined in the relevant

Ley de Presupuestos Generales del Estado (Law on the General State Budget). The amount to be received shall be limited to four times the fixed monthly amount per child and increased at the beginning of each year by the same percentage as that laid down by the relevant Law on the General State Budget in respect of contributory pensions.'

10 Under the 37th supplementary provision of the LGSS, as amended, headed 'Temporal scope of the supplement to contributory pensions to reduce the gender gap', provides:

'1. The right to receive the supplement to contributory pensions to reduce the gender gap, provided for in Article 60, shall remain for as long as gender gap in retirement pensions becoming claimable in the previous year is greater than five (5) per cent.

2. For the purposes of this law, the gender gap in retirement pensions means the percentage difference between the average amount of the contributory retirement pensions becoming claimable in a given year by men and by women.

3. In order to ensure that the correction measure introduced for the purposes of closing the gap between the pensions received by men and women is appropriate, the Spanish Government must, in the context of social dialogue, carry out a periodic review of the effects of that measure every five years.

4. Where the gender gap over the course of a one-year period is under 5%, the Government shall submit to the [Cortes Generales (Spanish Parliament)] a draft law intended to repeal Article 60, further to consultations with social partners.'

11 The 33rd transitional provision of the LGSS, as amended, headed 'Provisional retention of the maternity supplement in contributory pensions under the social security system', states:

'Persons who, as at the date of entry into force of the amendment laid down in Article 60, were in receipt of the maternity supplement on the basis of the demographic contribution shall continue to receive the same.

Receipt of that maternity supplement shall be incompatible with the supplement to contributory pensions to reduce the gender gap which may be payable, on account of the granting of a new public pension; the persons concerned may choose between one or the other.

Where the other parent of one of the children giving rise to the right to the maternity supplement on the basis of the demographic contribution applies for the supplement to contributory pensions to reduce the gender gap and is entitled to receive that supplement, pursuant to Article 60 of the present Law ..., the monthly sum awarded to that parent is to be deducted from the maternity supplement received ...'

12 Article 3 of the Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 on effective equality between women and men) of 22 March 2007 (BOE No 71 of 23 March 2007, p. 12611) is worded as follows:

'The principle of equal treatment of women and men means that there must be no discrimination whatsoever, be it direct or indirect, based on sex, in particular that on grounds of motherhood, shouldering family responsibilities, or marital status.'

13 Paragraph 11(1) of that law provides:

'In order render effective the constitutionally guaranteed right to equality, public authorities shall adopt specific measures in favour of women, intended to remedy manifest situations of de facto inequality by comparison with men. Such measures, which shall be applicable for as long as such situations persist, shall in each case be reasonable and proportionate in the light of the objective pursued.'

The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice

Case C623/23

14 UV, the father of two children, was allocated, by the INSS, a retirement pension in the monthly amount of EUR 1 637.08 gross as from 1 July 2021.

15 On 16 July 2022, UV asked the INSS to grant him, as of 1 July 2021, the pension supplement to reduce the gender gap, which is provided for in Article 60 of the LGSS, as amended.

16 By decision of 14 November 2022, the INSS rejected that request, taking the view that UV did not satisfy the conditions laid down in Article 60.

17 Furthermore, by decision of 22 December 2022, with effect from 10 December 2022, the INSS granted the mother of the two children concerned an early retirement pension in the monthly amount of EUR 2 790.99 gross, increased by the pension supplement at issue in the amount of EUR 56 per month.

18 UV brought an action against the decision of 14 November before the Juzgado de lo Social No 3 de Pamplona (Social Court No 3, Pamplona, Spain), which is the referring court in Case C623/23, claiming that Article 60 of the LGSS, as amended, is contrary to Directive 79/7 in that it discriminates on grounds of sex.

19 The INSS recalls that, by its judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075), the Court ruled that Article 60 of the former LGSS was discriminatory; the INSS takes the view that Article 60, which was amended in order to take that judgment into account, now complies with the requirements of Directive 79/7.

20 The referring court observes, as a preliminary point, that the pension supplement at issue is added to the amount of the retirement pension, calculated on the basis of the contributions paid throughout a person's working life, and falls within the scope of Directive 79/7 inasmuch as it forms part of a statutory scheme of protection against one of the risks set out in Article 3(1)(a) of that directive.

21 It recalls, moreover, that, although UV did indeed devote himself to bringing up his two children, the INSS rejected the request that the pension supplement at issue be awarded, on the ground that the period during which UV did not contribute to the social security system did not meet the minimum threshold laid down, for men, in Article 60 of the LGSS, as amended, since UV did not in fact cease to contribute for more than 120 days between the 9-month period preceding the birth of his children and a period of 3 years thereafter.

22 Taking the view, therefore, that it is required to rule on the question whether Article 60 introduces discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7, the referring court states that there is no doubt that, having regard to Article 4(1) of that directive, Article 60 accords less favourable treatment to men than to women, in so far as women who receive a retirement pension and have had one or more children are automatically recognised as being entitled to the pension supplement at issue, whereas men in a comparable situation must satisfy additional requirements relating, inter alia, to an effective interruption in their careers and in their contributions to the social security system.

23 However, the referring court wishes to ascertain, in the first place, whether such a difference in treatment on grounds of sex may be justified by the well-known fact that, in Spain, the bringing-up of children mostly falls to women, which stems from historical and structural discrimination against them and entails detriment to women's professional careers and, consequently, to their contributions to the social

security system. The pension supplement at issue, provided for in Article 60 of the LGSS, as amended, is therefore intended to repair damage suffered by women throughout their career, as is apparent, according to the referring court, in the preamble to Royal Decree-Law 3/2021.

24 That being so, that supplement is granted without distinction to all women who have had children, irrespective of whether they were indeed occupied with bringing up their children and whatever the amount of their pension, which may be higher than the amount of the average pension, or match the maximum acceptable amount of pensions in Spain. According to the referring court, it would therefore not appear that that measure is actually of such a nature as to achieve the aim of reducing the gender gap in connection with retirement pensions.

25 In those circumstances, the referring court asks, in particular, whether, given the existence of such a gap, the award of the pension supplement at issue may be regarded as a positive action measure in favour of women.

26 In that connection, it refers to the possibility that the measure laid down in Article 60 of the LGSS, as amended, forms part of the measures allowed under Article 157(4) TFEU in the light, in particular, of the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075), which appears to preclude that possibility.

27 However, the referring court does not exclude the possibility that it might be considered that, having regard to the purpose pursued by Article 60 of the LGSS, as amended, which consists in compensating for the financial consequences brought about by the situation of women in the job market, which is the result of the fact that they have historically taken a leading role in child-rearing, men are not, in fact, in the same position as women; this accordingly precludes the existence of discrimination between them.

28 It considers, moreover, that the pension supplement at issue laid down in Article 60 is unconnected to the specific protection of women on grounds of pregnancy, giving birth, or maternity, so that it does not appear to fall within the scope of the derogation provided for in Article 4(2) of Directive 79/7. The same applies, according to the referring court, to the derogation provided for in Article 7(1)(b) of that directive, in so far as the award of that supplement to women is not specifically subject to their having brought up children.

29 In the second place, should Article 60 of the LGSS, as amended, not be in compliance with the principle of equal treatment, the referring court wishes to ascertain the consequences of a finding of such non-compliance in the light of that Article 60, which provides that the pension supplement at issue may be granted to one parent only, namely the parent for whom the amount of the contributory retirement pension is less.

30 In the present case, the mother of the two children concerned has already been awarded the supplement concerned. The INSS therefore maintained that, should there be a finding of discrimination on grounds of sex pursuant to Directive 79/7, the award of the pension supplement to the father would entail the cessation of payment of that supplement paid to date to the mother, on the ground that the amount of the latter's contributory retirement pension is higher than that of the father's pension.

31 The referring court, which states that the mother was summoned to appear as an intervener despite not appearing at the trial, is nonetheless of the view that awarding that supplement solely to the pensioner who is in receipt of the pension the amount of which is less is such as to render redundant any finding of the existence of discrimination in the case where the retirement pension the amount of which is higher is that received by the father. Furthermore, the referring court considers that Article 60 of the LGSS, as amended, expressly provides that that supplement may be paid to one of the parents only in the event that both parents satisfy the statutory requirements for obtaining it, with the result that that provision under

Article 60 ought not to apply where the pension supplement at issue is granted to the father who does not satisfy the requirements laid down by a national rule that introduces discrimination on grounds of sex.

32 In those circumstances, the Juzgado de lo Social No 3 de Pamplona (Social Court No 3, Pamplona) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must [Directive 79/7] be interpreted as meaning that a national rule such as that contained in Article 60 of [the LGSS, as amended] does not comply with the principle of equal treatment preventing any discrimination on grounds of sex, recognised in Articles 1 and 4 of that directive, where that rule, under the heading ‘Supplement to contributory pensions to reduce the gender gap’, in the case of women who have had biological or adopted children and are recipients of such pensions, recognises the right to a supplement to contributory retirement and permanent incapacity pensions, without any other requirement and irrespective of the amount of their pensions, which is not recognised on the same terms in the case of men in an identical situation, in that, in order to access the supplement to their retirement or permanent incapacity pension, certain periods without making contributions, or making lower contributions, following the birth of the children or the adoption, are required, and, in particular, in the case of children born or adopted up to 31 December 1994, having more than one hundred and twenty days without making contributions in the nine months prior to the birth and the three years following that date or, in the case of adoption, from the date of the court order establishing it and in the three subsequent years, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled and, in the case of children born or adopted since 1 January 1995, that the total of the income on the basis of which contributions are calculated for the twenty-four months following the birth or the court order establishing the adoption is less, by more than 15 per cent, than that for the immediately preceding twenty-four months, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled?’

(2) Does [Directive 79/7] require, as a consequence of the discrimination resulting from the exclusion of the male pensioner, that he should be awarded the supplement to the retirement pension, even though Article 60 of the LGSS provides that the supplement may only be granted to one of the parents, and, at the same time, is it necessary that the granting of the supplement to the male pensioner does not bring about, as an effect of the judgment of the Court of Justice and of the lack of alignment between the national rule and [Directive 79/7], the withdrawal of the supplement granted to the female recipient of the retirement pension, where she satisfies the legal requirements of being the mother of one or more children?’

Case C626/23

33 By decision of the INSS, of which XXX was notified on 6 April 2022, the latter, who is the father of three children, was granted a retirement pension with effect from 11 January 2022.

34 Taking the view that the amount of that pension had been calculated incorrectly and that that amount ought also to include the pension supplement at issue, XXX lodged a complaint with the INSS against that decision.

35 Since the complaint remained unanswered, on 16 September 2022, XXX brought an action before the Juzgado de lo Social nº 4 de Madrid (Social Court No 4, Madrid, Spain) which, by decision of 15 February 2023, dismissed it in its entirety.

36 XXX brought an appeal against that decision before the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid, Spain), which is the referring court in Case C626/23, submitting that the difference in treatment between men and women stemming from Article 60 of the former LGSS persisted in Article 60 of the LGSS, as amended, in so far as concerns the granting of the pension supplement at issue, inasmuch as the requirement of a ‘career break’ applies solely to men, thereby infringing Directive 79/7.

37 The referring court therefore deems it necessary to determine whether Article 60 of the LGSS, as amended, is compatible with that directive and with Articles 20, 21 and 23 and Article 34(1) of the Charter.

38 In that connection, the referring court observes that Article 60 of the former LGSS was amended in order to take account of the guidance provided in the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075). The award of the pension supplement, which is provided for in Article 60 of the LGSS, as amended, and is no longer described as a ‘maternity supplement in contributory pensions under the social security system’ but rather as a ‘supplement to contributory pensions to reduce the gender gap’, is subject to the existence of one or more children, and the amount of that supplement varies according to the number of children.

39 Furthermore, in the LGSS, as amended, it is provided that that supplement will no longer be granted where the percentage representing the difference between the average amount of contributory retirement pensions becoming claimable over the course of one year by men and women ceases to be greater than 5%.

40 That said, unlike women who are in receipt of a retirement pension and have had one or more children, and who are automatically entitled to the pension supplement provided for in Article 60 of the LGSS, as amended, men can claim that supplement only where certain additional requirements are satisfied, be it either that they must be in receipt of a widower’s pension on account of the death of the other parent, with one of the children being in receipt of an orphan’s pension, or they have had their professional career – and, accordingly, their social security contribution period – interrupted or harmed.

41 According to the referring court, as regards those measures, which introduce a difference in treatment on grounds of sex, it is not sufficient, in order to justify the measures, to state that they are intended to restore material equality between women and men, but rather it ought also to be established that the interference that they represent in the formal right to equal treatment is proportionate to the objective pursued.

42 In the present case, it is apparent from the preamble to Royal Decree-Law 3/2021 that the justification for the difference in treatment put into effect by Article 60 of the LGSS, as amended, lays in the objective of reducing the gender gap in social security matters, which reflects the situation of women on the labour market, having historically assumed a principal role in the work of looking after children. Article 60 therefore introduces a positive action measure in favour of women, to which men nevertheless have access provided that they are in a comparable situation.

43 However, the referring court harbours doubts as to whether that justification is sufficient. Not only do the requirements governing the award of the pension supplement at issue in fact prevent most men from accessing that supplement, but those requirements do not prevent that supplement also being granted to women who have not had their professional career affected by their having to bring up children. Furthermore, given that the amount of the pension supplement at issue is a percentage of the amount of the retirement pension, that supplement is of greater benefit to persons whose retirement pensions are high whereas, according to the referring court, such persons are probably less likely to suffer harm to their professional career on account of having to look after their children, since they have, inter alia, the financial means to employ third parties for that purpose.

44 Lastly, the referring court points out that the LGSS, as amended, now provides that, where both parents are entitled to the pension supplement concerned, only the lower retirement pension of the two parents is to be supplemented thereby. In that connection, although, in the present case, only the father’s right to that supplement is at issue, the question nonetheless arises as to whether, in order to attain the objective of closing the gender gap in connection with retirement pensions, as pursued by the LGSS, as amended, and in order to ensure that Article 60 of that law is compatible with Article 23 of the Charter or,

where appropriate, with Article 7(1)(b) of Directive 79/7, it would have been sufficient to grant the pension supplement solely to the parent whose retirement pension was the lower, irrespective of the sex of the parent.

45 In those circumstances, the Tribunal Superior de Justicia de Madrid (High Court of Justice, Madrid) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must [Directive 79/7] and Articles 20, 21 and 23 and Article 34(1) of the [Charter] be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which establishes the right to a pension supplement for recipients of contributory retirement pensions who have had biological or adopted children, which is granted automatically to women, while, in the case of men, they are required either to be in receipt of a widower’s pension on account of the death of the other parent, with one of the children being in receipt of an orphan’s pension, or to have had their professional career interrupted or harmed (as provided for by law and described previously) on account of the birth or adoption of the child?’

46 By decision of the President of the Court of 13 December 2023, Cases C623/23 and C626/23 were joined for the purposes of the written and oral parts of the proceedings and of the judgment.

Consideration of the questions referred

The first question in Case C623/23 and the single question in Case C626/23

47 As a preliminary point, it should be observed that, in C626/23, the referring court seeks, by way of its question, the interpretation not only of Directive 79/7, but also of Articles 20, 21, 23 and Article 34(1) of the Charter.

48 As regards Articles 20 and 21 of the Charter, the first of these enshrines the principle of equality before the law, the second the prohibition of discrimination, inter alia on grounds of sex. Furthermore, Article 34(1) of the Charter relates, inter alia, to the recognition and respect, by the European Union, of the right of access to social security benefits.

49 In that context, it should be recalled that Directive 79/7 gives specific expression to the principle of equal treatment for men and women in matters of social security, with the result that the Member States are required to act in compliance with that directive where they adopt measures that fall within the scope of that directive. It follows that the question put by the referring court in Case C626/23 must be examined in the light of that directive and not of those provisions of the Charter (see, to that effect, judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C223/19, EU:C:2020:753, paragraphs 83 and 84, and of 2 September 2021, *INPS (Childbirth and maternity allowances for holders of single permits)*, C350/20, EU:C:2021:659, paragraphs 46 and 47).

50 Under those circumstances, it must be held that, by the first question in Case C623/23 and by the single question in Case C626/23, which it is appropriate to examine together, the referring courts are asking, in essence, whether Directive 79/7, in particular Article 4 and Article 7(1)(b) thereof, read in the light of Article 23 of the Charter, must be interpreted as precluding national legislation pursuant to which, with a view to reducing the gender gap in connection with social security benefits which is attributable to the bringing-up of children, a pension supplement is awarded to women who are in receipt of a contributory retirement pension and who have had one or more children, whereas the award of that

supplement to men placed in an identical situation is subject to additional requirements relating to whether their professional career was interrupted or affected by the birth or adoption of their children.

51 Directive 79/7 applies, according to Article 3(1)(a) thereof, to statutory schemes which provide protection against, inter alia, old age. Furthermore, in accordance with the third indent of Article 4(1) of that directive, 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.

52 As the referring courts observe, the Court has already held, in essence, in paragraphs 39, 41, 66 and 67 of its judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075), that Directive 79/7 must be interpreted as precluding national legislation which provides 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 pensions, inter alia in the case of permanent invalidity, under a scheme within the national social security system, while men in an identical situation do not have the right to such a pension supplement, as such legislation constitutes direct discrimination on grounds of sex within the meaning of the third indent of Article 4(1) of that directive.

53 In the present cases, it is apparent from the explanations provided by those referring courts that the national legislation that gave rise to that judgment, namely that contained in Article 60(1) of the former LGSS, was amended to the effect, in particular, that henceforth, men, and no longer only women, are also entitled to such a pension supplement, provided that they satisfy additional requirements in relation to whether their professional career was interrupted or affected by the birth or adoption of their children, and in particular, in so far as concerns the disputes in the main proceedings, that of not having contributed for more than 120 days between the 9 months preceding the birth of their children and the 3 years following that birth.

54 As the INSS and the Spanish Government submit, the LGSS, as amended, is founded, as is apparent from the preamble to that law, on the presumption that the bringing up of children is, in principle, a task taken on by women, to the detriment of their professional careers; that presumption is based on empirical evidence that child-rearing predominantly affects the professional career of mothers. Such a presumption may only be rebutted where it is established that the conditions applicable to men, laid down in Article 60(1) of the LGSS, as amended, are met; meeting those requirements accordingly allow it to be considered that it is in fact the man who devoted himself to raising his children.

55 In that connection, in the first place, it must be stated, first, as the referring courts and the European Commission have done, that the amendments to the former LGSS did not put an end to the existence of less favourable treatment of men compared to that of women.

56 Men alone have to satisfy the additional requirements, referred to in paragraph 53 of the present judgment, in order to be entitled to the pension supplement at issue. Thus, for men are in receipt of a retirement pension the fact of being a parent is not sufficient to be granted such a supplement, whereas it is for women with an identical status.

57 Second, it is necessary to ascertain whether the difference in treatment between men and women introduced by the national legislation at issue in the main proceedings concerns categories of persons in comparable situations, in accordance with the considerations recalled in paragraphs 42 to 45 of the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075).

58 In particular, 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 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075, paragraph 45 and the case-law cited)).

59 In the present cases, it is apparent from the information before the Court and from the very wording of that national legislation that the aim of the latter is to reduce the gender gap in matters of social security by compensating for the financial harm suffered by mothers in their professional career on account of their prominent role in raising their children, which harm results, inter alia, in the payments of lower contributions to the social security system and, therefore, by the award of reduced social security benefits.

60 However, the Court has already ruled that, in the light of such an aim, it cannot be excluded that male and female workers who have taken on the responsibility of raising their children are in comparable situations, inasmuch as each category can, on account of their involvement in raising their children, suffer the same career-related disadvantages, which assessment is not called into question by the fact, raised by the INSS and the Spanish Government, that the tasks associated with the bringing-up of children are, in practice, mostly performed by women (see, to that effect, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*, C450/18, EU:C:2019:1075, paragraphs 50 to 52).

61 It follows that national legislation such as article 60(1) of the LGSS, as amended, introduces less favourable treatment for men by comparison with women, whereas they may find themselves in comparable situations.

62 Such legislation therefore constitutes direct discrimination on grounds of sex within the meaning of Article 4(1) of Directive 79/7.

63 It should be recalled, in the second place, that 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, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*, C450/18, EU:C:2019:1075, paragraph 54 and the case-law cited).

64 In that connection, as regards, first, Article 4(2) of Directive 79/7, under which the principle of equal treatment is without prejudice to the provisions relating to the protection of women on the grounds of maternity, it is clear, as the referring court also observes in Case C623/23, that Article 60(1) of the LGSS, as amended, contains nothing 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 (see, to that effect, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*, C450/18, EU:C:2019:1075, paragraph 57).

65 Moreover, as the Commission observes, the mere fact that the pension supplement at issue can now, subject to the additional requirements referred to in paragraph 53 of the present judgment, also be granted to men confirms such a finding.

66 Therefore, 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.

67 Second, 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.

68 In that regard, it is sufficient to note, however, that while it is true that Article 60(1)(b)(1) and (2) of the LGSS, as amended, imposes requirements on men which seek to limit the award of the pension supplement at issue solely to male workers who have had their professional career interrupted or affected by the birth or the adoption of their children, it is apparent from the information provided by the referring courts that, in so far as women are concerned, that provision continues not to make that award subject to the bringing-up of children or the existence of periods of interruption of employment due to the bringing-up of children (see, to that effect, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*, C450/18, EU:C:2019:1075, paragraph 62).

69 Consequently, Article 7(1)(b) of Directive 79/7 cannot apply to such a pension supplement.

70 In the third place, it is necessary to examine whether the discrimination referred to in paragraph 62 of the present judgment, which stems from article 60(1) of the LGSS, as amended, may be justified by virtue of Article 23 of the Charter.

71 Article 23 provides, in the second paragraph thereof, that the principle of equality does not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. In the regard, it should be stated that that provision takes over, ‘in shorter form’, Article 157(4) TFEU, but ‘does not amend [it]’, as is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

72 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.

73 In that context, the INSS claims that Article 60(1) of the LGSS, as amended, falls within the scope of that provision inasmuch as it must be regarded as constituting a positive action measure forming part of the framework for pursuing the objective – the importance of which is recognised at EU level – of closing the gender gap in retirement pension matters, which is the result of the fact that women have historically assumed a principal role in bringing up children. The INSS adds that the pension supplement at issue is one of a series of measures taken by the Kingdom of Spain in relation, inter alia, to mechanisms intended to promote shared responsibility between parents in reconciling professional and family life and, accordingly, to attain the objectives set out in Article 157(4) TFEU. This Article 60(1) of the LGSS, as amended, serves to supplement those other measures by compensating for the disadvantages that women have suffered in their professional career on account of their bringing up their children, which disadvantages impact their retirement pensions at the end of their career.

74 In that connection, it should be recalled that the Court ruled, in essence, in paragraph 65 of the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C450/18, EU:C:2019:1075), that Article 157(4) TFEU cannot be applied to national legislation such as Article 60(1) of the former LGSS, which is limited to granting women a pension supplement 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 such a pension 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.

75 The considerations set out in the preceding paragraph also apply in so far as concerns Article 60(1) of the LGSS, as amended. In that regard, the fact that that provision supplements, in so far as that is established, other provisions which, in turn, are intended to attain the objectives set out in Article 157(4) TFEU is not, in itself, of such a nature as to affect that finding.

76 Accordingly, it must be found that national legislation such as that at issue in the main proceedings cannot be justified by virtue of Article 23 of the Charter.

77 In the light of the foregoing considerations, the answer to the first question in Case C623/23 and the single question in Case C626/23 is that Directive 79/7, in particular Article 4 and Article 7(1)(b) thereof, read in the light of Article 23 of the Charter, must be interpreted as precluding national legislation pursuant to which, with a view to reducing the gender gap in connection with social security benefits which is attributable to the bringing-up of children, a pension supplement is awarded to women who are in receipt of a contributory retirement pension and who have had one or more children, whereas the award of that supplement to men placed in an identical situation is subject to additional requirements relating to whether their professional career was interrupted or affected by the birth or adoption of their children.

The second question in Case C623/23

Admissibility

78 The INSS and the Spanish Government argue that the second question in Case C623/23, which relates to the effect that the award of the pension supplement at issue to the father might have on the maintenance of the supplement already granted to the mother, is inadmissible in so far as the possible withdrawal of that supplement from the mother of the children concerned is not at issue in the main proceedings.

79 In that regard, it should be noted that, in accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts, provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C389/20, EU:C:2022:120, paragraph 23 and the case-law cited).

80 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where 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, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C389/20, EU:C:2022:120, paragraph 24 and the case-law cited).

81 In the present case, it is true that the question of withdrawing the pension supplement granted to the mother does not appear, as such, to be the subject matter of the dispute in the main proceedings. That said, under Article 60(2) of the LGSS, as amended, 'the award of the supplement to the second parent shall imply the termination of the supplement already granted to the first parent'; that parent must then be heard 'before the decision awarding the right to the second parent [is given]'. Moreover, it is apparent from the information provided by the referring court that the mother was summoned to appear as an intervening party in [the dispute] in the main proceedings.

82 Under those circumstances, it cannot be excluded that the referring court may have to take the eventuality of such a withdrawal into account in order to settle the dispute in the main proceedings, in line

with the procedural rules applicable. Consequently, it is not obvious that the compatibility of such a withdrawal with EU law is unrelated to the subject matter of the dispute in the main proceedings.

83 Moreover, the Spanish Government takes the view that Directive 79/7 is completely unrelated to the subject matter of the second question in Case C623/23, since the referring court has failed to specify which of the provisions of that directive would be infringed if the finding that the national legislation at issue in the main proceedings is discriminatory were to lead to the withdrawal of the pension supplement at issue from the mother.

84 In that connection, suffice it to state that the doubts harboured by the referring court relate to the fact that it takes the view that such a withdrawal could strip the finding that that national legislation is discriminatory, made in the light of Directive 79/7, of any effectiveness. The link which that court makes between the withdrawal of the pension supplement at issue granted to the mother and the requirements stemming from that directive can therefore be understood.

85 It follows that the second question in Case C623/23 is admissible.

Substance

86 By its second question in Case C623/23, the referring court is asking, in essence, whether Directive 79/7 must be interpreted as precluding that, in the event that a request for a pension supplement, made by a father pursuant to national legislation found to constitute direct discrimination on grounds of sex within the meaning of that directive, is rejected, and where the father must, accordingly, be awarded that supplement under the conditions applicable to mothers, such an award gives rise to the withdrawal of the pension supplement already granted to the mother, where, under the terms of that legislation, that supplement may only be awarded to the parent who is in receipt of a pension the amount of which is less, and that parent is the father.

87 In that regard, it should be recalled that, according to the settled case-law of the Court, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category (judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)*, C113/22, EU:C:2023:665, paragraph 41 and the case-law cited).

88 In the present case, as regards the pension supplement at issue, the application, to the father, of the same rules as those applicable to the mother gives rise to the award of that supplement to that father and, at the same time, the withdrawal of the supplement already granted to that mother, inasmuch as, on the one hand, the national legislation provides that that supplement may only be awarded to one parent, namely the parent who is in receipt of the pension the amount of which is the lower, and, on the other hand, the mother received the higher pension, that withdrawal cannot be regarded as rendering ineffective the finding that the national legislation under which fathers were not entitled to that supplement is discriminatory.

89 Such a withdrawal is in fact merely the consequence of the application, to the father, of the same conditions as those applicable to mothers in so far as concerns the award of the pension supplement at issue.

90 The same may be said as regards the situation, evoked by the referring court, in which the father is in receipt of the higher pension and where that supplement is, on those grounds, awarded solely to the mother.

91 It is for that court to interpret its national law and to determine whether or not that law permits the maintenance of the pension supplement already granted to the mother where the father may claim the pension supplement at issue under the same conditions as those applicable to mothers, given that that court appears to consider that the condition that that supplement is to be granted solely to the parent who is in receipt of the lower pension is not applicable 'where [that] supplement is granted to the father who does not satisfy the requirements laid down by a national rule that introduces discrimination on grounds of sex'.

92 If the referring court finds that its national law does permit such maintenance, there is nothing in EU law that requires that the category of persons already benefitting from a pension supplement should be deprived of that supplement, as the Commission rightly observes (see, to that effect, judgment of 22 June 2011, *Landtová*, C399/09, EU:C:2011:415, paragraph 53).

93 In the light of the foregoing, the answer to the second question referred in Case C623/23 is that Directive 79/7 must be interpreted as not precluding that, in the event that a request for a pension supplement, made by a father pursuant to national legislation found to constitute direct discrimination on grounds of sex within the meaning of that directive, is rejected, and where the father must, accordingly, be awarded that supplement under the conditions applicable to mothers, such an award gives rise to the withdrawal of the pension supplement already granted to the mother, where, under the terms of that legislation, that supplement may only be awarded to the parent who is in receipt of a pension the amount of which is the lower, and that parent is the father.

Costs

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

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

1. 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, in particular Article 4 and Article 7(1)(b) thereof, read in the light of Article 23 of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding national legislation pursuant to which, with a view to reducing the gender gap in connection with social security benefits which is attributable to the bringing-up of children, a pension supplement is awarded to women who are in receipt of a contributory retirement pension and who have had one or more children, whereas the award of that supplement to men placed in an identical situation is subject to additional requirements relating to whether their professional career was interrupted or affected by the birth or adoption of their children.

2. Directive 79/7

must be interpreted as not precluding that, in the event that a request for a pension supplement, made by a father pursuant to national legislation found to constitute direct discrimination on grounds of sex within the meaning of that directive, is rejected, and where the father must, accordingly, be awarded that supplement under the conditions applicable to mothers, such an award gives rise to the withdrawal of the pension supplement already granted to the mother, where, under the terms of that legislation,

that supplement may only be awarded to the parent who is in receipt of a pension the amount of which is the lower, and that parent is the father.

[Signatures]

* Language of the case: Spanish.

i The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.