

JUDGMENT OF THE COURT (Fourth Chamber)

20 October 2011\*

In Case C-123/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 9 February 2010, received at the Court on 8 March 2010, in the proceedings

**Waltraud Brachner**

v

**Pensionsversicherungsanstalt,**

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal (Rapporteur), K. Schiemann, L. Bay Larsen, and E. Jarašiūnas, Judges,

Advocate General: V. Trstenjak,  
Registrar: K. Malacek, Administrator,

\* Language of the case: German.

having regard to the written procedure and further to the hearing on 13 April 2011,

after considering the observations submitted on behalf of:

- the Austrian Government, by G. Hesse, acting as Agent,
- Ireland, by D. O'Hagan and N. Travers, acting as Agents,
- the European Commission, by V. Kreuzschitz and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2011,

gives the following:

### **Judgment**

- <sup>1</sup> The present reference from a preliminary ruling concerns the interpretation of 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 (OJ 1979 L 6, p. 24).

- 2 The reference has been made in proceedings between Ms Brachner and the Pensionsversicherungsanstalt (Pension Insurance Office) concerning the increase in the amount of the retirement pension granted to her under the pension adjustment scheme for the year 2008.

## **Legal context**

### *European Union law*

- 3 Article 1 of Directive 79/7 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”.

- 4 Article 3(1) of the directive provides:

“This Directive shall apply to:

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

...

— old age,

...

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).'

5 Pursuant to Article 4(1) of Directive 79/7:

‘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 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.’

### *National law*

6 Paragraph 108(5) of the General Law on social security (Allgemeines Sozialversicherungsgesetz) of 9 September 1955 (BGBl. 189/1955), in the version applicable to the dispute in the main proceedings (‘the ASVG’), provides:

‘Adjustment factor: the Federal Minister for Social Security, the Generations and Consumer Protection shall lay down every year by order, for the following calendar

year, the adjustment factor (Paragraph 108f), before 30 November every year at the latest. The order shall be laid before the Federal Government for approval. In so far as not otherwise provided, the adjustment factor must be used for increases in annuities and pensions and in the fixed amounts of social security benefits.’

7 Paragraph 108f of the ASVG provides:

‘1. The Federal Minister for Social Security, the Generations and Consumer Protection shall lay down the adjustment factor for each calendar year, taking into account the reference value referred to in the first sentence of Paragraph 108e(9).

2. The reference value shall be fixed in such a way that the increase in pensions resulting from the adjustment in accordance with the reference value corresponds to the increase in consumer prices, as provided for in subparagraph 3. It shall be rounded up to three decimal places.

3. The increase in consumer prices shall be determined on the basis of the average increase over a period of twelve calendar months until the month of July in the year preceding the year of adjustment, by reference to the consumer price index for 2000 or to any other index which may have replaced it...’

8 Pursuant to Paragraph 108h(1) of the ASVG:

‘With effect from 1 January each year:

- (a) all pensions covered by pension insurance for which the qualifying date is prior to 1 January of that year

...

shall be multiplied by the adjustment factor...'

- 9 For 2008, the adjustment factor for pensions covered by the ASVG was set at 1.017 by decision of the Federal Minister for Social Affairs and Consumer Protection (BGBl. II, 337/2007).
- 10 Paragraph 634(10) of the ASVG, in the version resulting from the Federal law on adjustment of legal provisions to the agreement concluded in accordance with Paragraph 15a of the BV-G concerning the organisation and financing of the health system for the period from 2008 to 2013 (Bundesgesetz zur Anpassung von Rechtsvorschriften an die Vereinbarung gemäß Art. 15a B-VG über die Organisation und Finanzierung des Gesundheitswesens für die Jahre 2008 bis 2013, BGBl. I, 101/2007; 'the amending Law of 2007'), provides for an exceptional increase in pensions for 2008 following an agreement with the Österreichischer Seniorenrat (Austrian pensioners council).
- 11 Paragraph 634(10) is worded as follows:

'By way of derogation from the first sentence of Paragraph 108h(1), pensions in excess of EUR 746.99 per month may not be multiplied by the adjustment factor during the calendar year 2008, but shall be increased in the manner set out as follows: if the monthly pension amounts to:

1. between EUR 746.99 and EUR 1 050, it shall be increased by EUR 21;
2. between EUR 1 050 and EUR 1 700, it shall be multiplied by the factor 1.020;
3. between EUR 1 700 and EUR 2 161,50, it shall be increased by a rate of between 2 % and 1.7 % (decreasing in a linear manner between those amounts);
4. greater than EUR 2 161,50, it shall be increased by EUR 36.57<sup>1</sup>.

<sup>12</sup> Persons resident in Austrian territory and in receipt of a retirement or survivor's pension the amount of which is so small that it does not cover the minimum for subsistence, on the ground that they have not completed a sufficient number of insurance periods or because the basis of assessment for their pension is too low, are entitled in principle to a compensatory supplement in so far as their income to be taken into account does not exceed the standard amount laid down for the grant of that supplement.

<sup>13</sup> Paragraph 292(2) of the ASVG provides in that regard that the total net income of the spouse living in the common household with the pensioner is to be taken into account in order to determine whether, in the light of that standard amount, the pensioner is entitled to the compensatory supplement.

<sup>14</sup> Where the gross pension amount and the further net income of a person and his or her spouse living in a common household fall below the compensatory supplement standard rate, that person is entitled to a compensatory supplement equivalent to the difference between his or her total income and that standard amount.

- 15 Paragraph 293 of the ASVG, in the version of the amending Law of 2007, provides for an exceptional increase in the compensatory supplement standard amount, for pensioners living alone, from EUR 726 to EUR 747 and, for pensioners living with spouses in a common household, from EUR 1 091,14 to EUR 1 120.

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

- 16 Ms Brachner, who was born on 8 June 1947, receives an old-age pension under the ASVG from the Pensionsversicherungsanstalt which amounted, for the year 2007, to EUR 368.16 gross per month. She is not entitled to receive the compensatory supplement because her spouse receives a monthly pension of EUR 1 340,33 net, which, when added to her own income, comes to an amount which exceeds that provided for by the standard amount for that supplement.
- 17 By decision of 8 May 2008, the Pensionsversicherungsanstalt decided that Ms Brachner's gross monthly pension was to be EUR 374.42, from 1 January 2008, by application of the adjustment factor of 1.017 for the year 2008, that is to say, a 1.7 % increase in her pension.
- 18 Ms Brachner brought an action before the Landesgericht Linz (Regional Court, Linz) against that decision, claiming payment of a gross monthly pension of EUR 389.16 from 1 January 2008, that is to say, the increase of EUR 21 provided for under Paragraph 634(10) of the ASVG in the version of the amending Law of 2007, for pensions the monthly amount of which is between EUR 746.99 and EUR 1 050.



- 19 In support of her action, she submitted that the adjustment effected by the Austrian legislature for 2008 was incompatible with the principle of equal treatment, infringed the constitutional guarantee of the right of property and amounted to indirect discrimination against women, contrary to Article 4 of Directive 79/7.
- 20 By decision of 8 July 2008, the Landesgericht Linz upheld Ms Brachner's action, ruling that the adjustment of pensions for 2008 involved unlawful indirect discrimination against women.
- 21 That decision was varied by a judgment of the Oberlandesgericht Linz (Higher Regional Court, Linz) of 13 August 2008, ruling as a court of appeal in labour and social law matters. Ms Brachner thereupon appealed on a point of law ('Revision') to the Oberster Gerichtshof (Austrian Supreme Court).
- 22 By judgment of 24 September 2009, the Verfassungsgerichtshof (Constitutional Court) dismissed the applications, including that brought by the Oberster Gerichtshof in the case concerning Ms Brachner, which sought annulment of the provisions of the ASVG concerning the adjustment of pensions for 2008, in so far as the amending Law of 2007 reserved the exceptional increase in pensions for that year exclusively to pensions which were in excess of EUR 746.99 per month. Those applications were made on the basis of constitutional-law pleas alleging infringement of the principle of equal treatment and of the right to property.
- 23 Following the dismissal of those applications by the Verfassungsgerichtshof, the Oberster Gerichtshof continued of its own motion the 'Revision' proceedings at issue in the main proceedings.

- 24 The Oberster Gerichtshof states that the purpose of the proceedings pending before it is now to address the question, which remains in dispute between the parties, as to whether the adjustment of pensions effected by the Austrian legislature for the year 2008 breaches Article 4 of Directive 79/7 on the ground that it discriminates indirectly against women.
- 25 In that regard, the Oberster Gerichtshof notes, in the first place, that the parties disagree on the question whether the annual pension adjustment scheme at issue in the main proceedings comes within the scope of Article 4(1) of Directive 79/7 and, in particular, within the concept of 'calculation of benefits' which appears therein.
- 26 That court takes the view, in the second place, with regard to the indirect discrimination which Ms Brachner claims to have suffered, that the pensions adjustment carried out for 2008 gives rise to unequal treatment for the pensioners concerned in so far as pensions of an amount lower than the compensatory supplement standard amount were increased by only 1.7 %, whereas pensions of between EUR 747 and EUR 2 160 were increased by a greater amount.
- 27 It is, the Oberster Gerichtshof argues, necessary therefore to examine whether such unequal treatment constitutes a disadvantage affecting a significantly higher number of women than men.
- 28 The Oberster Gerichtshof refers in that regard to the following findings derived from statistical data concerning persons coming within the scope of the ASVG for the month of December 2007:
- 1 325 762 persons, of whom 614 293 are men and 711 469 women, are in receipt of a retirement pension on the basis of their own professional activity;

— 562 463 persons, of whom 408 910 are women and 153 553 men, have received a pension equal to or lower than EUR 750 per month ('the minimum pension'), that is to say, 57 % of female pensioners and 25 % of male pensioners.

29 It follows, according to that court, that the percentage of women disadvantaged by the adjustment of pensions for 2008 is approximately 2.3 times higher than the percentage of men.

30 The Oberster Gerichtshof states, in the third place, that the Pensionsversicherungsanstalt has claimed that such unequal treatment may be objectively justified for the following reasons: first, because women contribute for a shorter period of time than men since they retire earlier; second, because women receive their pension for longer than men because of their life expectancy, which is, on average, higher than that of men; and, finally, because of the increase in the compensatory supplement standard rate for 2008 of EUR 21 per month for pensioners living alone and approximately EUR 29 per month for pensioners living with another person.

31 In that regard, the referring court takes the view, first, that the justification relating to the shorter period of contributions by women must be rejected since the annual adjustment in question seeks to maintain the purchasing power of pension holders by indexing the pensions to consumer price developments, and that that adjustment is not therefore an element of the benefit, the amount of which is linked to the amount of the contributions or to the duration thereof.

32 Second, the Oberster Gerichtshof takes the view that the fact that, on average, women receive their pension for a longer period because of their longer life expectancy also cannot justify the difference in treatment in question, since that is a factor directly

based on sex which, in the light of the case-law of the Court of Justice, cannot, by its nature, be taken into account (Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 28).

- 33 Finally, with regard to the justification derived from the increase in the compensatory supplement standard amount, the referring court states that it is apparent from the statistical data that 136 771 persons, of whom 64 166 are men and 72 605 women, have received the compensatory supplement in addition to their retirement pension.
- 34 Since, with regard to persons coming within the scope of the ASVG, 57% of female pensioners receive a minimum pension, whereas that is the case for only 25% of male pensioners, the Oberster Gerichtshof takes the view that a significantly larger number of women than men does not receive any compensatory supplement and cannot therefore benefit from the increase in the standard amount applicable to that supplement provided for in the context of the 2008 pensions adjustment.
- 35 The Oberster Gerichtshof also takes the view that, while the taking into account of the spouse's income in determining entitlement to the supplementary amount may, admittedly, appear to be justified since that benefit is designed to ensure a minimum subsistence (Case C-226/91 *Molenbroek* [1992] ECR I-5943), it does not follow that such a process of taking into account is also justified in the context of an annual pension adjustment measure.
- 36 According to the Oberster Gerichtshof, the essential purpose of the annual pensions adjustment is to maintain the purchasing power of the pension and it therefore pursues a goal which is completely different from that of the compensatory supplement.

37 The Oberster Gerichtshof takes the view that, in the light of those factors, the question arises as to whether the increase in the compensatory supplement standard amount may justify the lower increase provided for under the 2008 adjustment for minimum pensions and the fact that a significantly larger number of women than men are disadvantaged when, in accordance with the rules relating to that compensatory supplement, the other income of the pension holder and that of his or her spouse living in the common household are taken into consideration only in the case of minimum pensions, whereas holders of higher pensions receive a higher increase, without their other income or that of their spouse being taken into consideration.

38 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 4 of Directive [79/7] to be interpreted as meaning that the annual pension adjustment scheme (indexation) provided for in the law on the statutory pension insurance scheme comes within the scope of the prohibition of discrimination in Article 4(1) of that directive?

(2) If the answer to the first question is in the affirmative: Is Article 4 of Directive [79/7] to be interpreted as precluding a national provision concerning an annual pension adjustment whereby a potentially smaller increase is provided for a particular category of pensioners receiving a minimum pension than for other pensioners, in so far as the provision in question adversely affects 25 % of male pensioners, but 57 % of female pensioners, and there are no objective grounds for discrimination?

- (3) If the answer to the second question is in the affirmative: May a disadvantage for female pensioners arising from the annual increase in their pensions be justified by the earlier age at which they become entitled to a pension and/or the longer period during which they receive a pension and/or by the fact that the standard amount for a minimum income, provided for under social law (compensatory supplement standard amount), was disproportionately increased, where the provisions concerning the payment of the minimum income provided for under social law (compensatory supplement) require account to be taken of the pensioner's other income and the income of a spouse living in the common household, whereas in the case of other pensioners the pension increase takes place without account being taken of the pensioner's other income or the income of the pensioner's spouse?

## Consideration of the questions referred

### *The first question*

- <sup>39</sup> By its first question, the referring court asks in essence whether Article 3(1) of Directive 79/7 must be interpreted as meaning that an annual pension adjustment scheme such as that at issue in the main proceedings comes within the scope of that directive, with the result that the provisions relating to that scheme are subject to the prohibition of discrimination laid down in Article 4(1) of that directive.
- <sup>40</sup> It is settled case-law that, in order to come within the scope of the Directive 79/7, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks listed in Article 3(1) of that directive, or a form of social assistance having the same objective, and be directly and effectively linked to protection

against one of those risks (see, inter alia, Case C-382/98 *Taylor* [1999] ECR I-8955, paragraph 14 and the case-law cited).

- 41 Since it is common ground that the benefit at issue in the main proceedings is part of a statutory scheme to the extent to which it is provided for by legislation, that is, the provisions of the ASVG covering the 2008 pension adjustment scheme, it remains to be examined whether that benefit is directly and effectively linked to protection against any of the risks listed in Article 3(1) of Directive 79/7.
- 42 In this regard, it must be pointed out that a pension paid pursuant to the ASVG, such as that received by Ms Brachner, constitutes a benefit which, clearly, is directly and effectively linked to one of those risks, that is to say, the risk relating to old age.
- 43 That also applies with regard to an annual adjustment scheme for a pension such as that at issue in the main proceedings.
- 44 Like the pension itself, its subsequent adjustment is designed to protect persons who have obtained the statutory retirement age against the risk of old age, by ensuring that they can have the necessary means in the light of, inter alia, their needs as retired persons.
- 45 As stated by the referring court, the adjustment scheme at issue in the main proceedings seeks to maintain the purchasing power of the pension by indexing its amount to consumer price developments.

- 46 In addition, in the light of the objective of the adjustment scheme at issue in the main proceedings, as stated by the referring court, which is to preserve the purchasing power of the pension in the light of consumer price developments, the view cannot be taken that the scheme at issue is one which, under certain conditions, provides persons with means below a legally defined limit with a special benefit designed to enable them to meet their needs and which the Court has held not to be covered by Article 3(1)(a) of Directive 79/7 (Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraph 17).
- 47 The exceptional increase provided for by the adjustment scheme at issue in the main proceedings is granted even to pensioners who do not encounter financial or material hardship. In addition, only those persons who have reached the statutory retirement age may benefit from that adjustment scheme, meaning that the grant of an increase under that scheme is in any case subject to the materialisation of the risk of old age (see, by analogy, *Taylor*, paragraphs 23 to 25).
- 48 The abovementioned adjustment scheme therefore also differs from other schemes on which the Court has ruled, which concerned adjustments granted by reason of the materialisation of one of the risks listed in Article 3(1) of Directive 79/7 and in relation to which the Court held that that fact alone was not sufficient to bring the basic benefit to which those adjustments related, and which did not cover such a risk, within the scope of Directive 79/7 (see, to that effect, *Jackson and Cresswell*, paragraph 19).
- 49 In the present case, what is at issue is also not a scheme characterised by the fact that the law sets the amount of the theoretical needs of the persons concerned, used to determine the benefit in question, independently of any consideration relating to the materialisation of any of the risks listed in Article 3(1) of Directive 79/7, a scheme



which the Court has regarded as not coming in any circumstances within the scope of that directive (*Jackson and Cresswell*, paragraph 20).

- 50 In addition, taking into account the purpose of the adjustment scheme at issue in the main proceedings, the subsequent alteration of the amount of the pensions for which it provides may be considered as coming within the ‘calculation of benefits’ within the meaning of Article 4(1) of Directive 79/7.
- 51 The contrary interpretation, according to which only the initial calculation of a benefit which comes within the scope of Directive 79/7, provided that it covers one of the risks listed in Article 3(1) of the directive, would be covered by the prohibition provided for in Article 4(1) of the directive, cannot be accepted.
- 52 As stated by the Advocate General in point 59 of her Opinion, such a restrictive interpretation, which would entail the acknowledgment, without obvious justification, of a significant lacuna in the scope of the prohibition of discrimination against women, would infringe both the objective of Directive 79/7 – which is to guarantee, as stated in the first recital in its preamble, the progressive implementation of the principle of equal treatment in matters of social security, the fundamental importance of which the Court has repeatedly emphasised (see, *inter alia*, Case C-356/09 *Kleist* [2010] ECR I-11939, paragraph 39 and the case-law cited) – and the effectiveness of that directive.
- 53 In the light of the foregoing, the answer to the first question is that Article 3(1) of Directive 79/7 must be interpreted as meaning that an annual pension adjustment scheme such as that at issue in the main proceedings comes within the scope of that directive and is therefore subject to the prohibition of discrimination laid down in Article 4(1) of that directive.

*The second question*

- 54 By its second question, the referring court asks in essence whether Article 4(1) of Directive 79/7 must be interpreted as precluding a national provision which leads to the exclusion, from an exceptional pension increase, of a specific group of holders of minimum pensions and which provides, with regard to those persons, for a lower increase than the increase applicable to other pension holders, which works to the disadvantage of many more women than men.
- 55 It must be noted from the outset that national legislation such as that at issue in the main proceedings is not directly discriminatory, since it applies without distinction to male and female workers. It is therefore necessary to examine whether it may constitute indirect discrimination.
- 56 According to the Court's settled case-law, indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, inter alia, Case C-537/07 *Gómez-Limón Sánchez-Camacho* [2009] ECR I-6525, paragraph 54 and the case-law cited).
- 57 In that regard, according to the referring court, the consequence of the provisions of the pension adjustment scheme at issue in the main proceedings, in particular of Paragraph 634(10) of the ASVG, in the version resulting from the amending Law of 2007, is that persons such as Ms Brachner, who receive a minimum pension, that is to say, a pension the amount of which is lower than the compensatory supplement standard amount, suffer a disadvantage, since they are excluded from the exceptional increase granted to persons who receive higher pensions and because they are, in principle, entitled only to the lower increase provided for under Paragraph 108h(1) of the ASVG, which was laid down for 2008 at 1.7 %.

- 58 The question thus arises whether that disadvantage actually affects a greater number of women than men.
- 59 In order to reply to that question, it is necessary to examine, as stated by the referring court, whether the category of retired persons suffering from that disadvantage consists of a significantly greater number of women than men.
- 60 A first indication that that disadvantage affects many more women than men, to which significant weight should be attached and which also constitutes an indispensable part of the analysis (see, in the context of 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), Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 59 and 60), relates to the disparity between the number of women in receipt of a minimum pension, expressed as a percentage of the total number of women in receipt of a pension pursuant to the ASVG, and the equivalent percentage of male pensioners.
- 61 Again, according to the statistical data accepted by the referring court, those percentages are 57 % for female pensioners and 25 % for male pensioners, respectively.
- 62 In other words, with regard to persons coming under the ASVG, 75 % of male pensioners were liable to benefit from the exceptional increase in pensions whereas that was the case for only 43 % of female pensioners.

- 63 Such a disparity is large enough to constitute a significant indication capable of justifying the conclusion – which can, however, be drawn only by the referring court – that the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings in fact places at a disadvantage a significantly higher percentage of female pensioners than male pensioners.
- 64 On the assumption that those statistical data will be definitively accepted by the referring court, the indications which can be derived from them will not be invalidated if, in that analysis, account were also to be taken of the exceptional increase in the compensatory supplement standard amount for 2008, also provided for under the amending Law of 2007, from which holders of minimum pensions may in principle benefit.
- 65 A comparison of the respective percentages of male and female pensioners who receive a minimum pension without being entitled to the compensatory supplement – on the ground, essentially, that their overall household resources exceed the standard amount laid down for entitlement to that supplement – with the total number of pensioners of each sex in receipt of a pension pursuant to the ASVG shows that, according to the statistical data provided by the referring court, that percentage is 47 % for female pensioners and 14 % for male pensioners.
- 66 It further appears from those data that 82 % of women in receipt of a minimum pension do not receive a compensatory supplement by reason, mainly, of the rule on aggregation of income, whereas that is the case for only 58 % of men in receipt of such a minimum pension.
- 67 Those statistical findings, if confirmed by the referring court, show that, if account were to be taken of the exceptional increase in the compensatory supplement standard amount for 2008 provided for by the amending Law of 2007, the disparity confirmed between the percentage of female pensioners disadvantaged by the exclusion

of minimum pensions from the exceptional increase provided for under that law and the respective percentage of male pensioners would not be reduced but, on the contrary, would be increased.

- 68 The answer to the second question is therefore that Article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, that court would be justified in taking the view that that provision precludes a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners.

### *The third question*

- 69 By its third question, the referring court asks essentially whether Article 4(1) of Directive 79/7 must be interpreted as meaning that if, in the context of the examination which it must carry out in order to reply to the second question, it were to conclude that, in fact, a significantly higher percentage of female pensioners than male pensioners may be disadvantaged as a result of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings, that disadvantage may be justified by the fact that women who have worked begin to receive the pension earlier, that they receive their pension for a longer period, or because the compensatory supplement standard amount was also subject to an exceptional increase for that same year 2008.

- 70 In that regard it must be noted, first, that, according to the Court's settled case-law, a national measure which constitutes indirect discrimination because, albeit formulated in neutral terms, it in fact works to the disadvantage of far more women than men, is contrary to Article 4(1) of Directive 79/7, unless that measure is justified by

objective factors unrelated to any discrimination on grounds of sex. That will be the case where the measures 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 (see, to that effect, Case C-8/94 *Laperre* [1996] ECR I-273, paragraph 14 and the case-law cited).

- 71 In addition, such a factor can be considered appropriate to achieve the stated aim only if it genuinely reflects a concern to attain that aim pursued in a consistent and systematic manner (see to that effect, inter alia, Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-11869, paragraph 56 and the case-law cited).
- 72 Second, it also follows from the Court's case-law that, while it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent the legislative provision in question is justified by such an objective reason, the Court of Justice, which is called on to provide answers of use to the national court in the context of a reference for a preliminary ruling, may provide guidance based on the documents in the file of the case in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see, to that effect, inter alia, *Seymour-Smith and Perez*, paragraphs 67 and 68 and the case-law cited).
- 73 Finally, the Court has repeatedly 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 (see, inter alia, *Seymour-Smith and Perez*, paragraph 74 and the case-law cited).

- 74 It is, however, for the Member State, as the author of the allegedly discriminatory rule, to show that that rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably take the view that the means chosen were suitable for attaining that aim (see, to that effect, *inter alia*, *Seymour-Smith and Perez*, paragraph 77).
- 75 It is thus necessary to examine whether, in the light of those principles which emerge from the case-law, one or other of the three grounds relied on before the national court, as stated in the wording of the third question referred, is capable of justifying the indirect discrimination at issue in the main proceedings, on the assumption that that discrimination is established by the referring court following the examination which it must carry out by taking into account the indications provided by the Court in reply to the second question referred.
- 76 With regard, first, to the ground of justification based on the fact that female workers become entitled to a pension at an earlier age, with the result that the level of their contributions is generally lower than that of male workers, such a fact, which relates to the balance which must exist in a contributory system of social insurance between the contributions paid and the benefits provided, is one of the factors explaining the on-average lower level of pensions received by female workers.
- 77 That ground cannot, however, under any circumstances justify the exclusion of women in receipt of a minimum pension from entitlement to the exceptional pension increase provided for under the adjustment scheme which is at issue in the main proceedings.
- 78 As explained by the referring court, that adjustment scheme provides for a pension adjustment which is designed to maintain the purchasing power of the pension in the light of consumer price developments.

- 79 Consequently, it is obvious that that adjustment is not a benefit which represents consideration for the contributions paid. It cannot therefore be relied on to justify the exclusion of holders of minimum pensions from the right to adjustment of their pensions.
- 80 Thus, a ground based on the fact that women have generally contributed less than men is not relevant in the context of the examination of a possible justification for the exclusion of women from an adjustment measure such as that at issue in the main proceedings.
- 81 Next, it is necessary to examine the ground based on the fact that women who have worked receive their pensions for a longer period by reason of the on-average longer life expectancy of women.
- 82 That ground, like the ground relating to the lower level of contributions paid by female pensioners, relates to the balance which must exist, in a contributory system of social insurance, between the contributions and the benefits when the level of those benefits is fixed.
- 83 There is, however, no link between that ground and the exclusion of holders of minimum pensions from enjoyment of the exceptional increase provided for by the adjustment scheme at issue in the main proceedings.
- 84 As noted by the referring court, and as stated in paragraph 78 of the present judgment, that adjustment scheme is designed to ensure that the purchasing power of the pension is maintained in the light of consumer price developments.



- 85 Such an objective is unrelated to that on which the ground of justification referred to is based, which, for its part, seeks to ensure a financial balance between the contributions and the benefits when those benefits are fixed.
- 86 The on-average longer life expectancy of women cannot therefore be relied on as a ground capable of justifying the exclusion of holders of minimum pensions from entitlement to an exceptional increase which is designed to guarantee the purchasing power of pensions.
- 87 Finally, it is necessary to examine the third ground, which seeks to justify the exclusion of minimum pensions from entitlement to the exceptional increase provided for with regard to 2008 by the adjustment scheme at issue in the main proceedings, in particular by Paragraph 634(10) of the ASGV, in the version resulting from the amending Law of 2007, that is to say, the exceptional increase, also provided for in respect of 2008 by that same amending law, in the compensatory supplement standard amount to which the holders of minimum pensions are in principle entitled.
- 88 In order to examine whether that ground of justification is well founded, it is necessary, according to the referring court, to take into account the fact that that exceptional increase gives rise to an actual increase in the compensatory supplement only if the condition of aggregation of incomes is satisfied, that is to say, the gross amount of the pension increased by the pensioner's other net income and that of his or her spouse living in their common household must not exceed the relevant amount, whereas the grant of the exceptional increase is not, in the case of higher-level pensions, subject to such a condition that other income must be taken into account.
- 89 In that regard, as the Court has already held, the compensatory supplement is a benefit intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient (Case C-160/02 *Skalka* [2004] ECR I-5613, paragraph 26).

- 90 That benefit thus pursues a legitimate objective of social policy which is unrelated to any discrimination based on sex (see, to that effect, in relation to a supplement to a minimum social security benefit, Case 30/85 *Teuling* [1987] ECR 2497, paragraphs 15 to 17).
- 91 It is also apparent from the Court's case-law that the allocation of an income equal to the social minimum forms an integral part of the social policy of the Member States and that those States enjoy a reasonable margin of discretion as regards both the nature of the protective measures in the social sphere and the detailed arrangements for their implementation (*Molenbroek*, paragraph 15).
- 92 The Court has also held, with regard to national schemes which contain a minimum social security benefit, that supplements to such a benefit, even if they principally benefit men because of the application of rules requiring the taking into account of the spouse's income, were in principle justifiable under Directive 79/7 (*Teuling*, paragraph 17, and *Molenbroek*, paragraphs 16 and 17).
- 93 Likewise, the exclusion from entitlement to the compensatory supplement resulting from application of the rule on aggregation of spouses' income, even if it mainly affects female pensioners, may be justifiable in the light of the objective of ensuring that the pension does not fall below the social minimum.
- 94 However, in so far as the exceptional increase in the compensatory supplement standard amount is relied on as a justification for the exclusion of the holders of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the case in the main proceedings, on the ground that that first-mentioned increase is intended to compensate for the effects of that exclusion, such an income aggregation rule must also be justifiable in the light of the particular objective of the adjustment scheme.

- 95 That, however, is not the case where there is no relationship between that rule on aggregation of income and the specific objective of that adjustment scheme, which, as has already been stated, seeks to maintain the purchasing power of the pensions in the light of consumer price developments.
- 96 On the contrary, the fact that the recipient of a minimum pension or his or her spouse has other income does not at all mean that the amount of such a pension should not, in the same way as higher-level pensions, benefit from the exceptional increase in order to ensure the purchasing power of those pensions.
- 97 The argument that it is not necessary to grant an exceptional increase in cases where pension holders and their spouses enjoy sufficient aggregate resources as not to fall below the social minimum cannot be relied on as objective justification for the difference in the treatment of persons in receipt of a minimum pension and of those who receive higher-level pensions, in so far as the latter have in principle, by reason of the amount of their pensions alone, sufficient resources (see, by analogy, Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraph 16).
- 98 As only the holders of minimum pensions are subject to a condition of aggregation of income for the purpose of assessing whether they may be entitled to the compensatory supplement, an increase in which may cancel out the effects of exclusion from an adjustment measure benefiting the holders of any other pension, the view cannot be taken, in the light of the case-law mentioned in paragraphs 70 to 74 of the present judgment, that the Member State, as the author of the allegedly discriminatory rule, has established that it could reasonably take the view that the exceptional increase in the compensatory supplement, relied upon as a ground of justification under Article 4(1) of Directive 79/7, genuinely reflected a concern to attain the objective of the adjustment scheme at issue in the main proceedings, which is to ensure that the

purchasing power of the pensions is maintained, and that it was pursued in a consistent and systematic manner.

99 There is, moreover, other evidence to support that conclusion.

100 As already stated in paragraph 66 above, it follows from the statistical data produced by the referring court that 82 % of women in receipt of a minimum pension do not receive any compensatory supplement by reason of the rule on aggregation of income, whereas that is the case for only 58 % of men in receipt of a minimum pension.

101 It follows that, in fact, for a very large majority of women in receipt of a minimum pension, the increase in the compensatory supplement standard amount is not such as to cancel out the effects of exclusion from entitlement to the exceptional increase for holders of minimum pensions.

102 Those data show, on the contrary, that, since a significantly larger percentage of men in receipt of a minimum pension receive the compensatory supplement, the exceptional increase in that standard amount is likely to benefit them to a much greater extent, with the result that that measure increases yet further the difference in treatment suffered by women who are in receipt of a minimum pension.

103 In that context, the Court has held that exceptions to the provisions of a law can, in certain cases, undermine the consistency of that law, in particular where their scope is such that they lead to a result contrary to the objective pursued by that law (Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 61, and Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler* [2011] ECR I-6919, paragraph 86).

104 Consequently, the answer to the third question is that Article 4(1) of Directive 79/7 must be interpreted as meaning that if, in the examination which the referring court must carry out in order to reply to the second question, it should conclude that a significantly higher percentage of female pensioners than male pensioners may in fact have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings, that disadvantage cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard amount was also subject to an exceptional increase in respect of the same year 2008.

## Costs

105 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 (Fourth Chamber) hereby rules:

1. **Article 3(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 an annual pension adjustment scheme such as that at issue in the main**

proceedings comes within the scope of that directive and is therefore subject to the prohibition of discrimination laid down in Article 4(1) of that directive.

2. Article 4(1) of Directive 79/7 must be interpreted as meaning that, taking into account the statistical data produced before the referring court and in the absence of evidence to the contrary, that court would be justified in taking the view that that provision precludes a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners.
  
3. Article 4(1) of Directive 79/7 must be interpreted as meaning that if, in the examination which the referring court must carry out in order to reply to the second question, it should conclude that a significantly higher percentage of female pensioners than male pensioners may in fact have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the main proceedings, that disadvantage cannot be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard amount was also subject to an exceptional increase in respect of the same year 2008.

[Signatures]