Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 10 September 2019[1]

Case C-450/18

WA
v
Instituto Nacional de la Seguridad Social

(Request for a preliminary ruling from the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3 of Gerona, Spain))

(Reference for a preliminary ruling — Female and male workers — Equal treatment in matters of social security — Directive 79/7/EEC — Invalidity pension — Pension supplement granted to mothers of two or more children in receipt of a contributory social security pension — Article 157(4) TFEU — Positive action — Measures aimed at compensating for career-related disadvantages of female workers)

I. Introduction

1. Spanish law provides that *women who have had two or more biological or adopted children* are entitled to a supplement to their contributory social security retirement pension, widow's pension, or permanent invalidity pension. The applicant in the main proceedings ('the Applicant'), a father of two daughters, challenged a decision of the national social security authority refusing to grant him a similar supplement to his permanent invalidity pension.

2. The referring court wishes to know whether the national provision establishing the pension supplement for women, which does not grant such a right to men, infringes the EU prohibition of discrimination on grounds of sex.

3. The Court has already had the opportunity to address the issue of pension systems granting advantages linked to motherhood to female workers only. The cases *Griesmar*[2] and *Leone*[3] concerned, however, occupational pensions for civil servants, which fell under the principle of equal pay, enshrined in Article 157 TFEU. By the present case, the Court is invited to set out whether a similar approach should also apply to cases concerning benefits which are part of a general social security pension scheme.

1 Original language: English.

2 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648).

3 Judgment of 17 July 2014 (C-173/13, EU:C:2014:2090).

II. Legal framework

A. EU law

4. According to the third recital of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security,[4] 'the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity; … in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment'.

5. The purpose of Directive 79/7 is, according to its first article, 'the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as "the principle of equal treatment"'.

6. Pursuant to Article 3(1), Directive 79/7 shall apply to:

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

…

– invalidity,

…'

7. Article 4 of Directive 79/7 establishes:

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

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

8. According to Article 7(1)(b) of Directive 79/7, that directive shall be 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'.

4 Council Directive of 19 December 1978 (OJ 1979 L 6, p. 24).

B. Spanish law

9. Article 60(1) of the Ley General de la Seguridad Social (General Law on Social Security, 'LGSS')[5] provides as follows:

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

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

(a) In the case of two children: 5%.

(b) In the case of three children: 10%.

(c) In the case of four or more children: 15%.

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

III. Facts, procedure and the question referred for a preliminary ruling

10. By decision of the Instituto Nacional de la Seguridad Social (National Social Security Institute, Spain, 'the INSS') of 25 January 2017, the Applicant was granted an absolute permanent invalidity pension of 100% of the basic amount, which came to EUR 1 603.43 per month plus revaluations.

11. The Applicant filed an administrative complaint against that decision claiming, essentially, that since he was the father of two daughters, he was entitled to receive a supplement in the amount of 5% of the pension on the same terms as women.

12. By decision of 9 June 2017, the INSS dismissed that administrative complaint and confirmed its decision of 25 January 2017. The INSS stated that the maternity supplement, as its name indicates, is a supplement granted exclusively to women in receipt of a contributory social security benefit who are mothers of two or more children, because of their contribution to social security in terms of demographics.

13. On 23 May 2017, the Applicant brought an action against the decision of the INSS before the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona, Spain), the referring court. He sought the recognition of the right to receive an increase in his pension of 5% of the basic amount of his absolute permanent invalidity pension in the form of a supplement equivalent to the maternity supplement granted under Article 60(1) of the LGSS.

5 Approved by Real Decreto Legislativo 1/1994 (Royal Legislative Decree 1/1994) of 20 June 1994 (BOE No 154, of 29 June 1994, p. 20658) in the consolidated version approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291), as amended by Ley 48/2015, de 29 de octubre, de Presupuestos generales del Estado para el año 2016 (Law 48/2015 on the general State Budgets for 2016) (BOE No 260 of 30 October 2015, p. 101965).

14. On 18 May 2018, the referring court was notified that the Applicant had died on 9 December 2017. The Applicant's wife took over the claim as his legal successor and pursued it further in the main proceedings. [6]

15. According to the referring court, the concept of *a contribution in terms of demographics* is one that is equally valid as regards both women and men, since reproduction and responsibility for bringing up, looking after, feeding and educating children lies with anyone who has the status of parent, regardless of their gender. Furthermore, a career break following the birth or adoption of children, or in order to bring up natural or adopted children, can be equally detrimental to women and men. The referring court believes that, from that point of view, the rules on the maternity supplement laid down in Article 60(1) of the LGSS introduce an unjustified difference in treatment in favour of women, to the detriment of men who are in an equivalent situation.

16. However, the referring court acknowledges that, from a *biological* point of view, there is an undeniable differentiating factor, for, when it comes to reproduction, women make a far greater personal sacrifice than men. Women have to deal with a period of pregnancy and with birth, which involves clear biological and physiological sacrifices, together with the disadvantages that that entails for women, not only in physical terms but also in the area of employment. The referring court believes that, from a biological point of view, the maternity supplement governed by Article 60(1) of the LGSS provides for a supplement in favour of women which is justified. No man will be in an equivalent situation. The situation of a male worker is not comparable with that of a female worker who is faced with the professional disadvantages which a career break for pregnancy and the birth of a child involves. That court, however, harbours doubts as to the implications for the present case of the case-law of the Court, in particular the judgment in *Griesmar*. [7]

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

'Does a national legislative provision (specifically, Article 60(1) of the [LGSS] which grants the right to receive a pension supplement –– in view of their contribution to social security in terms of demographics –– to women who have had biological or adopted children and are in receipt of a contributory retirement, widow's or permanent incapacity pension under any scheme within the social security system, but, on the other hand, does not grant that right to men in an identical situation, infringe the principle of equal treatment which prohibits all discrimination on grounds of sex, enshrined in Article 157 [TFEU] and in 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 and recast by Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation?'

18. The Applicant, the INSS and the European Commission submitted written observations. Those interested parties, as well as the Spanish Government, which also replied to written questions from the Court, presented oral submissions at the hearing held on 13 June 2019.

6 References to the Applicant in this Opinion should be construed accordingly.

7 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648).

IV. Analysis

19. This Opinion is structured as follows. First, I will start with the identification of the relevant instrument of EU law that is applicable to the benefit at issue in the present case (A). I will then proceed to the interpretation of the relevant provisions that apply to the present case, which are contained in Directive 79/7 (B). Finally, since I will conclude that that directive is to be interpreted as precluding a measure such as the one at issue in this case, I shall examine whether the national provision could, nevertheless, be covered by the general 'positive discrimination' exception provided for in Article 157(4) TFEU (C).

A. Applicable instrument of EU law

20. The order for reference poses the question of the compatibility of Article 60(1) of the LGSS with the principle of equal treatment as enshrined in Article 157 TFEU and in Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. [8]

21. The Applicant endorses the EU legal framework identified in the order for reference. Conversely, the INSS, the Spanish Government and the Commission disagree with that position and submit that the applicable EU law instrument in the present case is Directive 79/7. The Applicant argues, in the alternative, that that directive is in any case applicable.

22. I agree that the applicable legal instrument is Directive 79/7.

23. The Court is naturally bound by the facts of the case as established by the national court, as well as by the scope of the questions and the overall framework of the case as defined by the national court in the order for reference. That is nonetheless not the case as far as the applicable EU law is concerned. The Court is entitled to interpret all the relevant provisions of EU law necessary for national courts to decide the actions pending before them, even if those provisions are not expressly identified in the questions referred to the Court. [9] *Iura (Europaea) novit Curia (Europaea).*

24. EU law distinguishes between occupational pension schemes, which come under the concept of 'pay' in Article 157(1) and (2) TFEU, [10] and statutory social security pension schemes, which do not. [11]

25. The case-law of the Court has consistently confirmed that 'social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers' cannot be brought within the concept of 'pay' in Article 157 TFEU. This is because 'these schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.' [12]

8 Directive of the European Parliament and of the Council of 5 July 2006 (recast) (OJ 2006 L 204, p. 23).

9 See to that effect, for example, judgment of 19 September 2013, *Betriu Montull* (C-5/12, EU:C:2013:571, paragraphs 40 and 41 and the case-law cited).

10 See, for example, judgment of 17 May 1990, *Barber* (C-262/88, EU:C:1990:209, paragraphs 25 to 28).

11 See, for example, judgment of 25 May 1971, *Defrenne* (80/70, EU:C:1971:55, paragraphs 7 and 8).

12 See, for example, judgment of 25 May 1971, *Defrenne* (80/70, EU:C:1971:55, paragraphs 7 and 8).

26. The Applicant submitted at the hearing that the present case concerns a contributory pension that depends on the previous employment. A higher salary gives rise to an entitlement to a higher pension. That is why, in his view, the benefit at issue should be considered as 'pay' within the meaning of Article 157(2) TFEU.

27. It is true, as the Applicant submits, that the case-law has identified *the criterion of employment* as a decisive factor for characterising a pension scheme as 'pay'.[13] Nevertheless, the fact that a pension scheme is funded through contributions the calculation of which depends on the salary hardly turns that pension scheme automatically into 'pay'. Indeed, the test devised by the Court entails an overall analysis which does not rely on a single criterion, such as the contributory nature of a benefit.[14] Even though social security benefits may relate to the concept of pay and may be linked to employment through contributions, benefits governed by statute without any element of negotiation within the undertaking or sector applicable to general categories of employees have been found to fall outside the concept of 'pay'.[15]

28. The Court has already had the opportunity to address different benefits coming under the Spanish general social security scheme. It has consistently found that contributory benefits, such as retirement pensions and unemployment benefits, as well as the permanent invalidity pension, to which the supplement at issue applies, are not covered by the concept of 'pay', but fall under the framework of Directive 79/7.[16]

29. In my view, there is no reason to depart from that approach in the present case. There is little doubt that the benefit at issue forms part of a social security scheme governed by legislation — to the exclusion of any element of agreement — and that it is applicable to the working population in general and not to a specific category of workers.

30. Directive 2006/54 follows the same distinction established by the case-law on Article 157(2) TFEU with regard to the concept of 'pay'. The directive's scope is specifically limited to 'occupational social security schemes', which are defined to the exclusion of statutory social security schemes.[17]

31. As a result, the benefit at issue does not fall within the concept of 'pay' in the sense of Article 157(2) TFEU. It is thus also not covered by Directive 2006/54.

32. The EU law instrument applicable to the present case is therefore Directive 79/7. The benefit at issue supplements a social security permanent invalidity pension, which is part of a statutory scheme of protection against one of the risks set out in Article 3(1)(a) of that directive, namely invalidity. Like the pension itself, the supplement is directly and effectively linked to protection against the risk of invalidity. It is intrinsically connected to the materialisation of that risk and seeks to ensure that its beneficiaries are properly protected against the risk of invalidity[18] by reducing the gender gap.[19]

13 See, for example, judgment of 28 September 1994, *Beune* (C-7/93, EU:C:1994:350, paragraph 43) or of 29 November 2001, *Griesmar* (C-366/99, EU:C:2001:648, paragraph 28).

14 On the issue of the contributory nature of a benefit and its qualification as 'pay', see Opinion of Advocate General Sharpston in *Espadas Recio* (C-98/15, EU:C:2017:223, points 34 to 38).

15 See, to that effect, for example, judgment of 25 May 1971, *Defrenne* (80/70, EU:C:1971:55, paragraphs 7 and 8) or of 28 September 1994, *Beune* (C-7/93, EU:C:1994:350, paragraph 24).

16 With regard to contributory retirement pensions, also covered by the pension supplement at issue in this case, see, for example, judgments of 22 November 2012, *Elbal Moreno* (C-385/11, EU:C:2012:746, paragraph 26), and of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 56). With regard to unemployment pensions, see judgment of 9 November 2017, *Espadas Recio* (C-98/15, EU:C:2017:833, paragraphs 33 and 34). With regard to permanent invalidity pensions, see judgments of 16 July 2009, *Gómez-Limón Sánchez-Camacho* (C-537/07, EU:C:2009:462, paragraph 63), and of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215, paragraphs 26 and 34).

17 See recitals 13 and 14. According to its Article 1(c), Directive 2006/54 applies to 'occupational social security schemes', with those schemes being expressly defined in Article 2(1)(f) as 'schemes not governed by Directive 79/7 …'.

18 See, to that effect, with regard to adjustment mechanisms, judgment of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675, paragraph 42 et seq.).

19 See, on the objectives of the measure, Section B(1)(b) of this Opinion.

33. All those considerations lead me to the conclusion that it is necessary to reformulate the preliminary question as referring to Directive 79/7.

B. Does Directive 79/7 preclude a measure such as the one at issue?

34. The analysis of the compatibility of the national provision at issue with Directive 79/7 involves three steps. First, are women and men in a comparable situation for the purposes of the application of the national provision at issue? (1). Second, does the national provision at issue amount to discrimination under Article 4(1) of Directive 79/7? (2). Third, if that is the case, could Article 60(1) of the LGSS be covered by one of the derogations provided for by Article 7 of that directive? (3).

1. Comparability

35. Discrimination involves applying different rules to comparable situations or applying the same rule to objectively different situations.[20] Pursuant to settled case-law of the Court, the analysis of comparability must be carried out not in a general and abstract manner, but in a specific manner, *in the light of the benefit concerned*. This entails taking due account of the aims of the specific national measure or benefit concerned.[21] Therefore, the (stated) legislative aims are of particular relevance when it comes to ascertaining the comparability between female and male workers.

36. The case-law of the Court, as well as secondary legislation, has singled out situations where female and male workers are simply not comparable because of the biological condition of women, which is understood to cover pregnancy, birth and the period that immediately follows birth.

37. On the one hand, with regard to the situation of *maternity* leave, the Court has held that women are 'in a special position which requires them to be afforded special protection, but which is not comparable either to that of a man or to that of a woman actually at work'.[22] The Court has consistently stated that 'the situation of a male worker is not comparable to that of a female worker where the advantage granted to the female worker alone is designed to offset the occupational disadvantages, inherent in maternity leave, which arise for female workers as a result of being away from work'.[23]

38. On the other hand, the Court has found the positions of working mothers and fathers to be comparable with regard to many other circumstances related to *parenthood and childcare*. Women and men are in a comparable situation in their capacity as parents and when it comes to bringing up their children.[24] As a result, they are in a comparable situation, for example, as regards their possible need to reduce their daily working time in order to look after their children,[25] or their need to use nursery facilities when they are in employment.[26]

20 See, for example, judgment of 14 July 2016, *Ornano* (C-335/15, EU:C:2016:564, paragraph 39 and the case-law cited).

21 See to that effect, for example, judgments of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraph 33), and of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited). See, in greater detail on the comparability analysis, my Opinion in *Cresco Investigation* (C-193/17, EU:C:2018:614, points 64 to 79).

22 See, for example, judgments of 13 February 1996, *Gillespie and Others* (C-342/93, EU:C:1996:46, paragraph 17), and of 14 July 2016, *Ornano* (C-335/15, EU:C:2016:564, paragraph 39).

23 Judgment of 29 November 2001, *Griesmar* (C-366/99, EU:C:2001:648, paragraph 41). See also judgment of 16 September 1999, *Abdoulaye and Others* (C-218/98, EU:C:1999:424, paragraphs 18, 20 and 22).

24 See, for example, judgments of 25 October 1988, *Commission* v *France* (312/86, EU:C:1988:485, paragraph 14); of 29 November 2001, *Griesmar* (C-366/99, EU:C:2001:648, paragraph 56); of 26 March 2009, *Commission* v *Greece* (C-559/07, not published, EU:C:2009:198, paragraph 69); and of 16 July 2015, *Maïstrellis* (C-222/14, EU:C:2015:473, paragraph 47).

25 Judgment of 30 September 2010, *Roca Álvarez* (C-104/09, EU:C:2010:561, paragraph 24).

26 Judgment of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 30).

39. Therefore, it is essential to determine in the present case whether the national rules at issue are connected with the particular biological features of women pertaining to pregnancy, birth and maternity (a). If that is not the case, it becomes crucial to identify the objective aims of the measure at issue in order to determine whether female and male workers are in a comparable situation in that regard (b).

(a) A measure relating to protection on the grounds of maternity under Article 4(2) of Directive 79/7?

40. Article 4(2) of Directive 79/7 sets out that 'the principle of equal treatment shall be without prejudice to the provisions relating to the protection of women *on the grounds of maternity*'. According to the third recital of that directive, 'the implementation of the principle of equal treatment in matters of social security does not prejudice the provisions relating to the protection of women on the ground of maternity' and 'in this respect, Member States may adopt specific provisions for women to remove existing instances of unequal treatment'.

41. That provision can be regarded as an acknowledgement of the lack of comparability between women and men in view of their biological condition, in line with the case-law highlighted above in point 37 of this Opinion.

42. Can the measure at issue be considered as a provision 'relating to the protection of women on the grounds of maternity' in the sense of Article 4(2) of Directive 79/7?

43. The Spanish Government and the INSS submit that Article 60(1) of the LGSS is covered by Article 4(2) of Directive 79/7. The INSS states that the measure is inherently connected with maternity, since the women covered by it are mothers: if there is no maternity, the situation that the national provision is intended to remedy does not arise at all. The Spanish Government argued at the hearing that Article 4(2) of Directive 79/7 should be understood as allowing measures of positive discrimination for reasons of maternity and should be interpreted in a broad way in the light of Article 157(4) TFEU and of Article 23 of the Charter of Fundamental Rights of the European Union ('the Charter').

44. Conversely, the Applicant and the Commission consider that the measure at issue cannot be covered by Article 4(2) of Directive 79/7. Those interested parties defend a narrow reading of that provision in the sense that it covers only the aspects connected with the biological condition of women. That would be the case, in particular, of the period covered by maternity leave.

45. The expression 'on the grounds of maternity' is not defined in Directive 79/7. To my knowledge, Article 4(2) of that directive has not been interpreted by the Court to date. However, the Court has interpreted on several occasions similar provisions in the context of Article 2(3) of Directive 76/207/EEC,[27] which in terms rather similar to those of Article 4(2) of Directive 79/7 established that that directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

27 Article 2(7), as amended, of Council Directive 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), amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15). That article has been superseded by Article 28 of Directive 2006/54.

46. In the context of Article 2(3) of Directive 76/207, the Court has considered that the 'maternity' exception must be interpreted strictly.[28] The Court has consistently linked its application to the biological condition of women and the special relationship which exists between a woman and her child. Therefore, only measures connected with the protection of women during pregnancy, birth and maternity leave have been considered covered by that provision.[29] Conversely, measures not strictly connected with protecting women in those situations have been deemed not to fall within the 'maternity' exception.[30]

47. This strict approach to the concept of 'maternity' has also been applied by the Court in order to determine whether the situations of female and male workers are comparable for the purpose of applying the principle of equal pay in Article 157 TFEU in the area of occupational pensions. In *Griesmar*, the Court stated that a measure could be accepted if it were designed to 'offset the occupational disadvantages which arise for female workers as a result of being absent from work during the period following childbirth, in which case the situation of a male worker is not comparable to that of a female worker'.[31] However, the Court explicitly refused to consider the disadvantages incurred by women in the course of their professional career by virtue of their predominant role in bringing up children as linked to 'maternity leave' or to any disadvantage incurred as a result of being absent from work after birth.[32] This was, in part, because the credit at issue in that case was also granted in respect of adopted children without it being linked to a prior grant of adoption leave to the mother.[33]

48. Thus, the concept of 'maternity', as interpreted by the Court, relates to the specific biological reality which makes women and men non-comparable: pregnancy, birth, and maternity leave. This circumscribes the object of that special protection not only *ratione materiae*, but also, logically, *ratione temporis*, as the maternity exception cannot be considered to cover any subsequent event(s) or situation(s) simply by virtue of having been a mother. *Maternity* must therefore be understood in a narrow manner. It cannot be equated with the more general concepts of *motherhood* or *parenthood*.

49. The INSS and the Spanish Government suggest departing from that approach in the context of Directive 79/7 and embracing a broader understanding of 'maternity' as 'motherhood'. When questioned about the reasons for suggesting such a broad reading at the hearing, the Spanish Government argued that Article 4(2) of Directive 79/7 should be construed, in the light of Article 157(4) TFEU and Article 23 of the Charter, as opening the door to measures of positive discrimination regarding motherhood in the broad sense.

50. I do not find this argument convincing. As I will explain in detail below,[34] a potential legal basis for positive action in the context of the present case could perhaps be found outside Directive 79/7, in Article 157(4) TFEU. Here it suffices to note that the measures allowing for different treatment of women and men that are protective measures on grounds of maternity within the scope of Directive 79/7 are based on a different premiss and logic than the general rules on positive action in

28 See, for example, judgment of 15 May 1986, *Johnston* (222/84, EU:C:1986:206, paragraph 44).

29 See, for example, on maternity leave, judgment of 18 November 2004, *Sass* (C-284/02, EU:C:2004:722, paragraph 33); on an additional period of maternity leave, judgment of 12 July 1984, *Hofmann* (184/83, EU:C:1984:273, paragraphs 25 and 26); and on specific arrangements concerning the possible use of a period of leave by employed mothers or fathers, judgment of 19 September 2013, *Betriu Montull* (C-5/12, EU:C:2013:571, paragraphs 61 to 65).

30 See, for example, judgments of 25 October 1988, *Commission* v *France* (312/86, EU:C:1988:485, paragraphs 13 and 14) regarding several 'special rights for women' protecting women in their capacity as older workers or parents, and of 30 September 2010, *Roca Álvarez* (C-104/09, EU:C:2010:561, paragraphs 26 to 31) concerning a leave period that, despite being called 'breastfeeding leave', was in fact detached from breastfeeding as such and could be considered as aiming at childcare. See also, to that effect, judgment of 16 July 2015, *Maïstrellis* (C-222/14, EU:C:2015:473, paragraph 51) regarding parental leave.

31 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648, paragraph 46).

32 Ibid., paragraph 51.

33 Ibid., paragraph 52.

34 See Section C, points 93 and 96 to 98.

Article 157(4) TFEU. To suggest that later, general provisions on positive action should be allowed interpretatively to twist the understanding of comparability in older, specific sectoral legislation, effectively rendering one of its key provisions toothless, does not appear to me to be a good recipe for statutory interpretation.

51. In short, I see no good reason to give the concept of 'grounds of maternity' a different and broader meaning in the context of Directive 79/7. Rather the opposite, as the Commission correctly cautions: a broad understanding of the 'maternity' derogation would allow for different treatment in situations where working mothers and fathers are indeed in a comparable situation, therefore defeating the very purpose of the directive.

52. On the basis of that reasonably narrow interpretation of 'grounds of maternity', which must, in my view, also apply in the context of Directive 79/7, I do not see how the measure at issue could be considered covered by the exception contained in Article 4(2) thereof.

53. A glimpse at the specific features of the measure at issue confirms that conclusion. The maternity supplement set out in Article 60(1) of the LGSS is not connected with any of the specific situations of pregnancy, birth and maternity leave. It does not in fact require any of those situations as a condition for benefiting from the maternity supplement.

54. First, as the Applicant notes, not every female worker having access to the maternity supplement might have actually enjoyed a period of maternity leave. Since, under national law, adoption leave can be enjoyed equally by women and men,[35] it may well be that a woman can benefit from the maternity supplement despite not having taken such leave or, for that matter, neither having been pregnant nor having given birth. Second, when a child has two mothers,[36] both of them will be entitled to the maternity supplement but only one might have actually taken maternity leave. Since the measure at issue does not contain any condition according to which women must have stopped working at the time when they had children, the connection with maternity leave would also be missing, for example, in situations where a woman gave birth before entering the workforce. Third, the fact that the measure does not apply to mothers of one child confirms that it is not connected to the protection of maternity.

55. Thus, all in all, the measure is under-inclusive of situations that are clearly and objectively connected with maternity, while being over-inclusive of situations that are not. Such a legislative design can hardly fit within the confines of Article 4(2) of Directive 79/7.

56. It would also appear that both the INSS and the Spanish Government eventually acknowledged that the specific objective of Article 60(1) of the LGSS is far broader than the objective of protecting women on grounds of maternity in the (narrow) sense posited above.

57. All of those considerations confirm that Article 60(1) of the LGSS does not contain any element establishing a relationship between the supplement and the professional disadvantages linked to the concept of 'maternity' in the sense of Article 4(2) of Directive 79/7.

35 According to Article 48(5) of the Ley del Estatuto de los Trabajadores (Law on the Workers' Statute), in the version resulting from Real decreto legislativo 2/2015 (Royal Legislative Decree 2/2015) of 23 October 2015 (BOE No 255 of 24 October 2015).

36 The Applicant explains that this is possible according to Article 44(5) of Ley 20/2011, de 21 de julio, del Registro Civil (Law 20/2011 of 21 July 2011 on the Civil Registry) (BOE No 175 of 22 July 2011).

(b) What are the aims of the measure at issue?

58. According to Article 60(1) of the LGSS, the maternity supplement was introduced in acknowledgment of a 'demographic contribution' to social security. As the Commission points out, the preamble to the law adopting the measure does not contain any more specific justification than that. [37]

59. If one were to focus on the stated aim of Article 60(1) of the LGSS itself, it would be hard to see how women and men are not in a comparable position regarding their 'demographic contribution' to the social security system, as both still seem to be necessary for procreation. [38]

60. However, as it transpires from the drafting history and the policy context described by the Commission, the INSS and the Spanish Government, the measure at issue was inspired by and pursues a much broader objective.

61. It follows from the submissions of the Commission, as well as from the written response of the Spanish Government to the question posed by the Court, that the parliamentary amendment which is at the origin of the measure at issue signalled a need to recognise the gender dimension of pensions and to eliminate or at least *reduce the gender gap in pensions*. [39] This is because women more often give up their work to take care of children, which has a direct impact on their income as well as on their pensions, giving rise to the phenomenon known as the 'double penalty'. [40] The measure aims therefore at introducing the concept of a 'demographic contribution' in order to recognise the effort made by women in taking care of and bringing up children to the detriment of their professional activity. [41] This was also considered to be the underlying objective of the measure by the Spanish Constitutional Court: the objective is to compensate mothers who, despite their intention to have a longer professional life, have dedicated themselves to childcare, with the result that they have not been able to pay contributions over as many years as other workers. [42]

62. The INSS, moreover, produced statistical evidence showing that social security contributions relate directly to gender and the number of children. The gender pension gap has, according to that evidence, a greater impact on women who are mothers of two or more children.

63. A first preliminary conclusion can be drawn from the elements just mentioned. It is clear that the measure at issue is *not* in fact aimed at protecting women who assume childcare responsibilities. Indeed, Article 60(1) of the LGSS does not contain any condition that would link the benefit at issue with actual childcare. It does not require demonstrating a period of leave, an interruption of employment, or at least some reduction of working hours. Admittedly, even if that were the stated objective, it would be of little avail, since the Court has consistently held that fathers and mothers are in a comparable position with regard to childcare. [43]

37 Ley 48/2015 de 29 de octubre, de Presupuestos Generales del Estado para el año 2016 (Law 48/2015 on the General State Budgets for 2016) (BOE No 260 of 10 October 2015).

38 In spite of some initial hesitation concerning the possibility of parthenogenetic activation of oocytes commencing the process of development of a human being in a non-fertilized human ovum (see judgment of 18 October 2011, *Brüstle*, C-34/10, EU:C:2011:669, paragraph 36, but see also judgment of 18 December 2014, *International Stem Cell Corporation*, C-364/13, EU:C:2014:2451, paragraph 38), it would appear that, even under EU law, both sexes are still necessary for conception.

39 *Boletín Oficial de las Cortes Generales* — Congreso de los Diputados (1.9.2015, Serie A, No 163-4, pp. 2812 to 2814).

40 Plan Integral de Apoyo a la Familia (PIAF) 2015-2017 (Comprehensive Family Support Plan 2015-2017), approved by the Council of Ministers on 14 May 2015 (available at www.mscbs.gob.es/novedades/docs/PIAF-2015-2017.pdf).

41 Informe sobre el complemento de maternidad en las pensiones contributivas (Report on the maternity supplement to contributory pensions) sent in June 2015 to the Comisión de Seguimiento y Evaluación de los Acuerdos del Pacto de Toledo (Evaluation and follow-up Commission of the Agreements of the Toledo Pact) by the Spanish Government.

42 Order of the Tribunal Constitucional (Constitutional Court, Spain) of 16 October 2018 (No 3307-2018, ES:TC:2018:114A, paragraph 3(b)).

43 See the case-law cited above in footnotes 29 and 30.

64. The second preliminary conclusion is that the genuine objective of the measure at issue appears to be the *reduction of the gender gap* in pensions, on the basis of general statistical data which show that women who are mothers of more than one child are particularly disadvantaged as regards their pension entitlements.

65. The latter objective immediately begs the question whether such a structural situation of inequality is sufficient to render women and men non-comparable in any given situation.

66. In my view, that cannot be the case. It is true that, in some instances, the case-law of the Court has taken into account differences affecting different groups of persons in order to reject their comparability.[44] However, the Court has deemed comparable the situation of persons belonging to different age groups that were affected by structural problems, such as unemployment.[45] Moreover, the Court has cautioned against relying on generalisations and statistical data precisely because this is likely to lead to discriminatory treatment of women and men in a given situation.[46] Indeed, the existence of strong statistical evidence which demonstrates structural differences affecting women does not exclude that there are situations in which women and men are placed in a comparable situation.

67. I see no reason not to follow the same approach in the present case. Moreover, arguments related to the different situations in which groups find themselves, provided that such a difference would not be so considerable as to render the groups wholly non-comparable, are to be properly assessed at the justification stage[47] or, if relevant, within the framework of assessment for 'positive action'. In particular, 'positive action' allows for a departure from the individual approach to equality in order to take into consideration the disadvantageous situation of a group, with a view to achieving substantive equality.[48]

68. As a result, I must conclude that the existence of general, structural inequality in pensions does not preclude that female and male workers who are parents of two or more children are in a comparable position when it comes to the benefit in question, namely access to (a supplement to) a contributory invalidity pension.

2. Discrimination

69. Because of the nature of the measure at issue, the analysis of whether Article 60(1) of the LGSS is discriminatory is bound to be extremely brief. The provision reserves the benefit of the supplement exclusively for women. It therefore constitutes direct discrimination based on sex, which affects the calculation of benefits in the sense of Article 4(1) of Directive 79/7.

44 Judgment of 1 October 2015, *O* (C-432/14, EU:C:2015:643, paragraphs 37 to 39).

45 See judgment of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraphs 26 and 27).

46 See, to that effect, judgment of 3 September 2014, *X* (C-318/13, EU:C:2014:2133, paragraph 38). See also, regarding arguments rather similar to the ones put forward by the Spanish Government and the INSS in the present case, judgment of 29 November 2001, *Griesmar* (C-366/99, EU:C:2001:648, paragraph 56).

47 On the internal transitivity between those categories, see my Opinion in *Cresco Investigation* (C-193/17, EU:C:2018:614, points 61 and 62).

48 See, in this connection, Opinion of Advocate General Tesauro in *Kalanke* (C-450/93, EU:C:1995:105, point 8). See, for my proposal in this sense, Section C of this Opinion.

70. As the Commission correctly points out, within the framework of Directive 79/7 it is not possible to justify such an instance of direct discrimination.[49] A derogation from the prohibition of direct discrimination on grounds of sex is possible only in the situations exhaustively set out in that directive.[50] It is therefore necessary to examine whether the measure at issue could be covered by Article 7(1) of Directive 79/7.

3. Article 7(1) of Directive 79/7

71. Because of the particularly sensitive nature of social security and due to widespread differences in treatment between women and men at the time when Directive 79/7 was negotiated, Article 7(1) allowed Member States to exclude certain matters from the scope of the directive. Indeed, Directive 79/7 aimed 'only' at the 'progressive' implementation of the principle of equal treatment between women and men.[51] The exceptions in Article 7(1) thus cannot be logically linked to a systematic attempt at the protection of women or positive discrimination. They aim, rather, at preserving certain elements of the social security systems that existed at the time of the adoption of the directive.[52]

72. Amongst the matters that Member States are allowed to exclude from the scope of Directive 79/7, Article 7(1)(b) refers to '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'.

73. The INSS and the Spanish Government argue in general terms that the measure at issue in the present case is covered by that exception.

74. The Applicant, conversely, claims that the exception in Article 7(1)(b) is not applicable. That exception is, in the Applicant's view, only applicable to old-age pensions, not to invalidity pensions such as the one at issue.

75. I see no objection to applying Article 7(1)(b) to a permanent invalidity pension. Indeed, even if the first part of that provision refers to an 'old-age' pension, that is not the case of the second part, which refers generally to the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children. In fact, the Court has already applied the exception contained in Article 7(1)(b) in the context of Spanish permanent invalidity pensions.[53]

76. However, Article 7(1)(b) is not applicable in this case for a different reason. As the Applicant correctly points out, Article 60(1) of the LGSS is *not related to any actual interruption of employment* due to the bringing up of children. The maternity supplement is awarded regardless of the existence of an interruption in employment, whether in the form of maternity or parental leave, or of any other kind.[54]

49 See, by analogy, judgments of 18 November 2010, *Kleist* (C-356/09, EU:C:2010:703, paragraph 41), and of 12 September 2013, *Kuso* (C-614/11, EU:C:2013:544, paragraph 50).

50 See, to that effect, judgment of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraph 50 and the case-law cited).

51 See judgments of 11 July 1991, *Johnson* (C-31/90, EU:C:1991:311, paragraph 25), and of 16 July 2009, *Gómez-Limón Sánchez-Camacho* (C-537/07, EU:C:2009:462, paragraph 60).

52 As emphasised by the case-law, even if those objectives are not stated in the recitals to Directive 79/7, 'it can be inferred from the nature of the exceptions contained in Article 7(1) of the directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored'. See, for example, judgments of 30 April 1998, *De Vriendt and Others* (C-377/96 to C-384/96, EU:C:1998:183, paragraph 26), and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 35).

53 Judgment of 16 July 2009, *Gómez-Limón Sánchez-Camacho* (C-537/07, EU:C:2009:462, paragraphs 60 and 63).

54 Above, point 63.

77. I would like to add, for the sake of clarification, that even if a measure such as the one at issue were actually linked to an interruption of employment due to the bringing up of children, that would not, in my view, mean that it could be subsumed under the exception set out in Article 7(1)(b).

78. As the Commission and the Applicant correctly argue, the exceptions contained in Article 7(1) of Directive 79/7 were designed in the context of a *progressive elimination* of disparities of treatment,[55] and must be interpreted strictly.[56] Even though Article 7(2) and Article 8(2) of that directive refer to the possibility for Member States to 'maintain' existing provisions, Article 7(1) has not been interpreted by the Court as a strict standstill clause. The case-law accepts that Article 7(1) of Directive 79/7 can apply to the subsequent adoption of measures that cannot be separated from pre-existing measures falling within that derogation, as well as to amendments to such measures.[57]

79. However, the rule at issue in the present case cannot be considered, on any reasonable construction, as being connected to a *progressive advancement* towards the full application of the principle of equality between women and men in the field of social security. The measure was adopted in 2015, several decades after Directive 79/7 came into force. It was inserted into a national legal context where no similar provision existed to which it could be linked. It is therefore not possible to consider the measure as necessary for or inseparable from any pre-existing regime making use of the derogation provided in Article 7(1)(b). It is, moreover, unconnected with the overall aim of Article 7(1) of preserving the financial equilibrium of the social security system.

80. As a result, I must conclude that the measure at issue in the present case cannot be considered covered by the exception provided for in Article 7(1)(b) of Directive 79/7.

C. Article 157(4) TFEU

81. Despite my finding that Article 60(1) of the LGSS is precluded by Directive 79/7, it remains to be analysed whether the measure at issue may nonetheless be permissible under Article 157(4) TFEU, a provision which was extensively discussed by the interested parties that submitted observations in this case.

82. Article 157(4) TFEU states that 'with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'. That provision thus makes it possible to 'redeem' or render compatible again EU law measures which are not covered by the specific exceptions or derogations provided for in secondary law in the field of sex equality.[58]

83. However, the scope of Article 157(4) TFEU remains unclear. First, it remains unresolved whether Article 157(4) TFEU is limited to the sphere of 'equal pay' or has a broader scope of application (1). Second, what kind of measures can be considered as covered by this provision, in particular regarding measures to 'compensate for disadvantages in professional careers'? (2) Having analysed these two key

55 See, for example, judgment of 7 July 1992, *Equal Opportunities Commission* (C-9/91, EU:C:1992:297, paragraph 14).

56 See, for example, with regard to Article 7(1)(a), judgment of 21 July 2005, *Vergani* (C-207/04, EU:C:2005:495, paragraph 33 and the case-law cited).

57 See, judgments of 7 July 1994, *Bramhill* (C-420/92, EU:C:1994:280), and of 23 May 2000, *Hepple and Others* (C-196/98, EU:C:2000:278, paragraph 23), as well as the Opinions of Advocate General Saggio in *Hepple and Others* (C-196/98, EU:C:1999:495, points 21 to 24), and of Advocate General Mischo in *Taylor* (C-382/98, EU:C:1999:452, points 66 to 69).

58 See, for example, suggesting that Article 157(4) TFEU can apply to situations where a national measure has been declared incompatible with the specific rules of secondary EU law permitting positive action, judgments of 28 March 2000, *Badeck and Others* (C-158/97, EU:C:2000:163, paragraph 14); of 6 July 2000, *Abrahamsson and Anderson* (C-407/98, EU:C:2000:367, paragraphs 40, 54 and 55); and of 30 September 2004, *Briheche* (C-319/03, EU:C:2004:574, paragraphs 29 to 30).

issues in general, and suggested that certain carefully drafted national measures in the field of social security pensions could be covered by Article 157(4) TFEU, I am still bound to conclude that the measure at issue in the present case is not one of those, since it fails to meet the basic requirements of proportionality (3).

1. The scope of Article 157(4) TFEU and 'equal pay'

84. The benefit at issue does not come within the concept of 'pay' within the meaning of Article 157(2) TFEU.[59] Could Article 157(4) TFEU therefore redeem a national measure that does not fall within the scope of Article 157(2) TFEU?

85. When asked about this issue at the hearing, the Commission submitted that, bearing in mind that the concept of 'professional careers' in Article 157(4) TFEU is very broad, the scope of this provision is not limited to the concept of 'equal pay'. It could thus also apply to the field of social security.

86. I agree with the Commission that there is no reason to limit the scope of Article 157(4) TFEU to the field of 'equal pay'.

87. Admittedly, the particular provision that enables Member States to adopt 'positive action' measures is placed in Article 157 TFEU, which was historically related to 'equal pay'. However, a number of elements support the view that paragraph 4 of that provision reaches beyond the specific 'equal pay' field.

88. First, the wording of Article 157(4) TFEU is clearly rather broad. It sets out an exception to the 'principle of equal treatment' between women and men, not to 'equal pay', without placing any explicit limitations as to the areas in which it shall apply.[60] The measures allowed by this provision are described in equally broad terms as 'measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity' or 'to prevent or compensate for disadvantages in professional careers'. The objectives of Article 157(4) TFEU are similarly set out by reference to the very broad aim of 'ensuring full equality in practice … in working life'.

89. Second, from a systematic point of view, any potential overall limitation of Article 157 TFEU to the specific area of 'equal pay' is already broken by Article 157(3) TFEU, which constitutes a broad legal basis going well beyond the principle of equal pay, and including the adoption of 'measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'.[61]

59 See above, points 27 to 31 of this Opinion.

60 See Tobler, C., 'Sex Equality Law under the Treaty of Amsterdam', *European Journal of Law Reform*, Vol. 1, No 1, Kluwer Law International, 2000, pp. 135 to 151, at p. 142.

61 Langenfeld, C., 'AEUV Art. 157 Gleiches Entgelt für Männer und Frauen' in Grabitz, E., Hilf, M., and Nettesheim, M., *Das Recht der Europäischen Union*, C.H. Beck, Munich, 2019, Werkstand: 66. Rn. 84. See also Krebber, S., 'Art 157 AEUV' in Callies, C., and Ruffert, M., *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, C.H. Beck, Munich, 2016, Rn. 73.

90. Third, it is true that in the past, the Court embraced a 'narrow' interpretation of the positive action exception enshrined in Article 2(4) of Directive 76/207, stating that that provision constituted a derogation from the equal treatment principle.[62] That position has nonetheless been progressively abandoned.[63] It does not feature in the case-law concerning the broader and overarching positive action exception contained in Article 157(4) TFEU. That is, in my view, not by chance. Article 157(4) TFEU constitutes the primary law consolidation of a vision of substantive equality in the field of sex equality, and not a mere derogation that should be interpreted narrowly.

91. I therefore think that Article 157(4) TFEU should be interpreted as allowing, under the 'positive discrimination' umbrella, measures that would otherwise be prevented by the principle of equal treatment enshrined in Directive 79/7, as long as those measures indeed seek to ensure 'full equality in practice between men and women in working life', and to provide 'for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity' or 'to prevent or compensate for disadvantages in professional careers'.

92. There is, however, another preliminary matter: does Article 157(4) TFEU apply to the field of social security? Indeed, that field remains under a specific regime, cut off somewhat from all the other instruments in the field of sex equality regarding working conditions and pay, and governed by the only survivor of the 'old' directives, adopted on the basis of Article 235 EEC (current Article 352 TFEU).[64]

93. Nevertheless, from a broader point of view, it must be emphasised that to exclude the field governed by Directive 79/7 from the scope of Article 157(4) TFEU would lead to the rather paradoxical consequence of isolating the social security field and excluding it from the goal of achieving substantive equality in practice pursued by that provision. This is because the provisions of Directive 79/7 providing for the possibility of a derogation, Article 4(2) and Article 7, are not well suited as vehicles for positive discrimination. This is mostly because of the narrow interpretation that both deserve, but also, and more specifically, because of their different structures and purposes.

94. Moreover, as already indicated, Directive 79/7 is the 'last of the Mohicans' of the equality legislation of the 1970s and 1980s still standing. The beauty, clarity and simplicity of its language, which, in view of the legislative drafting of today, can only be admired, should not detract from the fact that the social reality faced and tackled in 1978 is bound to be different from that faced some 40 years later.

95. However, having made those allowances, I am still of the view that accepting, under certain conditions, Article 157(4) TFEU as justification for narrowly tailored measures in the field of social security falling under Directive 79/7, but apparently at odds with its provisions, is systematically and logically preferable to the alternative advocated by the INSS and the Spanish Government, namely to start interpreting and in fact modifying the concepts contained in Directive 79/7 in the light of Article 157(4) TFEU and whatever vision of (substantive) equality.[65]

62 See judgment of 17 October 1995, *Kalanke* (C-450/93, EU:C:1995:322, paragraph 21).

63 See, to that effect, judgment of 11 November 1997, *Marschall* (C-409/95, EU:C:1997:533, paragraph 32), which no longer refers to the obligation of 'strict interpretation', or judgments of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 39), and of 30 September 2004, *Briheche* (C-319/03, EU:C:2004:574, paragraph 24). See also, by analogy, judgment of 22 January 2019 *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 65).

64 Other 'old' directives in this field have either been recast through Directive 2006/54 — the legal basis of which is Article 157(3) TFEU — or amended by legal acts adopted on that same legal basis (this is the case of Council Directive 76/207, cited above, and also of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19); Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40); and Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56)).

65 Above, point 50.

96. As already outlined above, Article 4(2) of Directive 79/7 accepts that men and women are not comparable in the specific situation of maternity, but it does not, as such, establish a specific avenue for 'positive action'.[66] It is true that the conceptual foundations of positive action share some elements of the reasoning that underlies the findings of non-comparability related to maternity precisely due to the specific situation of disadvantage suffered by one of the identified groups and the aim of achieving substantive equality.[67] However, at least in the field of sex discrimination, these two conceptual categories — maternity as one of the features precluding comparability and the possibility of taking positive action to remedy or compensate for the disadvantages suffered by women — are kept as separate categories in the legislation and case-law.[68]

97. This is no mere coincidence. Indeed, the logic underlying both exceptions is different: an exception concerning measures for the protection of women on grounds of maternity, such as Article 4(2) of Directive 79/7, is based on non-comparability with regard to a very specific biological reality that will never change. It is not aimed at remedying or compensating a pre-existing imbalance or structural disadvantageous situation, which may disappear with social progress. In fact, Article 4(2) of Directive 79/7 operates independently of any pre-existing situation of disadvantage or underrepresentation.

98. Moreover, from the point of view of the functions and objectives of the maternity exception and positive action, the distinction is of considerable importance. Many of the disadvantages suffered by women emanate from a socially constructed role attributed to them, and a broad interpretation of the 'maternity' exception as covering 'motherhood' is likely to perpetuate and further petrify those roles, therefore running counter to the very purpose of positive action.

99. In the case of Article 7 of Directive 79/7, its limited scope, linked to the progressive nature of the directive, already constitutes an important objection to regarding that provision as a suitable avenue for positive action in the field of social security. Moreover, as already noted, the purpose of that provision is not so much linked to the idea of substantive equality, but to the logic of maintaining some pre-existing differences to the 'advantage' of women, while also preserving the fiscal balance of social security systems.[69]

100. In sum, excluding social security from the scope of Article 157(4) TFEU would mean that Directive 79/7 would be the only specific instrument of secondary law in the field of social policy implementing the EU principle of equality between women and men that is excluded from the substantive approach to equality heralded by Article 157(4) TFEU as the general 'positive action' provision on grounds of sex.

66 See points 41 and 50 of this Opinion.

67 See, for example, judgment of 18 March 2004, *Merino Gómez* (C-342/01, EU:C:2004:160, paragraph 37), where Article 2(3) of Directive 76/207 is linked to the aim to 'bring about equality in substance rather than in form'. See also judgment of 30 April 1998, *Thibault* (C-136/95, EU:C:1998:178, paragraph 26).

68 This is confirmed by the fact that the measures for the protection of women on grounds of maternity and positive action are covered by different legal bases, as the Commission submitted at the hearing. The 'maternity' exception is provided for in Article 28(1) of Directive 2006/54, whereas the general provision regarding positive action is in Article 3 of the directive. This was also the case of Directive 76/207, where two different provisions were also devoted to those different categories (Article 2(3) and (4) — after amendment, Article 2(7) and (8)). Different provisions are also devoted to the 'maternity' exception and 'positive action' in Article 4(2) and Article 6 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37). But see Opinion of Advocate General Tesauro in *Kalanke* (C-450/93, EU:C:1995:105, point 17), which seems to portray Article 2(3) of Directive 76/207 as a measure of 'positive action'.

69 See above footnote 52 and the case-law cited.

101. I find that consequence difficult to embrace. Thus, Article 157(4) TFEU should also serve to justify a national measure that would otherwise be discriminatory within the specific legal framework established by the applicable secondary EU law, including Directive 79/7, inasmuch as such a measure complies with the requirements of that Treaty provision, namely, that those measures aim to ensure 'full equality in practice between men and women in working life', and provide 'for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity' or 'to prevent or compensate for disadvantages in professional careers'.

2. Compensation for disadvantages in professional careers

102. The Commission, despite having accepted that Article 157(4) TFEU could potentially apply in the field of social security, submits that the measure at issue in the present case cannot be subsumed within the 'positive action' exception provided for by that article on the basis of the interpretation that the Court has given to its predecessors in the judgments in *Griesmar* and *Leone*.

103. In *Griesmar*, the Court interpreted Article 6(3) of the Agreement on Social Policy[70] in a case concerning a service credit for children, which was awarded to female civil servants under an occupational retirement scheme. The Court found that that measure did not come within the positive action measures envisaged by Article 6(3) of the Agreement on Social Policy. The measure did not appear 'to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life'. The Court noted that, 'on the contrary, that measure is limited to granting female civil servants who are mothers a service credit at the date of their retirement, *without providing a remedy for the problems which they may encounter in the course of their professional career*'.[71] This was confirmed in *Leone*,[72] as well as in several Treaty infringement judgments concerning certain advantages conferred on female civil servants regarding retirement age and the number of years of service required for retirement.[73]

104. At first sight, the considerations in those judgments are also perfectly valid for the discussion of Article 157(4) TFEU in the present case. Indeed, the maternity supplement affects the pension entitlement after the recognition of a situation of permanent absolute invalidity and not during the professional career of the Applicant.

105. A second look reveals, however, two issues with such an analogy: a more technical one, and a principled one.

106. First, the more *technical* argument: the case-law in *Griesmar* and *Leone* need not necessarily be read as completely excluding the possibility to have resort to Article 157(4) TFEU in any situation which is connected with the need to compensate for past disadvantages. The statements in those judgments must be viewed in the context of the circumstances of the specific case in question. Indeed, where the *sole measure* that exists to tackle a structural problem like the gender gap consists of compensation after retirement, it is indeed legitimate to suggest that the national provisions do not provide a remedy to problems encountered by women in the course of their professional careers. In

70 The origin of Article 157(4) TFEU is Article 6(3) of the Agreement on Social Policy between the Member States of the European Communities excluding the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 91), which was incorporated into Community law by Protocol No 14 on Social Policy to the Maastricht Treaty.

71 Judgment of 29 November 2001 (C-366/99, EU:C:2001:648, paragraph 65). Emphasis added.

72 Judgment of 17 July 2014 (C-173/13, EU:C:2014:2090, paragraphs 100 to 103).

73 Judgments of 13 November 2008, *Commission* v *Italy* (C-46/07, not published, EU:C:2008:618, paragraph 57), and of 26 March 2009, *Commission* v *Greece* (C-559/07, not published, EU:C:2009:198, paragraphs 66 to 68).

such circumstances, providing only for compensation after retirement could even contribute to perpetuating a traditional distribution of the roles of women and men by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties,[74] with women effectively only receiving a 'pay-off' at the end of their careers.

107. The situation is rather different, in my view, where a national measure, such as the one at issue in the present case, forms part of a *broader system* of national law that includes different measures seeking to actually remedy the problems encountered by women in the course of their professional careers. In such a case, it cannot be excluded that, as a matter of principle, if there exists a general legislative context that aims at offsetting the disadvantages that women are exposed to by supporting them *in the course of their professional life*, a measure having the impact of *compensating past disadvantages* could legitimately be devised under Article 157(4) TFEU. Such a measure would indeed be *ancillary* to the main system of compensation measures effective during professional life. It would be remedial and temporary in nature in order to tackle, in the name of intergenerational justice, the situation of those who could not benefit from the progression towards equality in the social security system.

108. If such a reasonable and indeed substantive equality oriented interpretation of the scope of Article 157(4) TFEU were not embraced, then it would be time, in my view, to rethink the approach of this Court as a matter of principle.

109. First, there is the text of Article 157(4) TFEU. It clearly refers to the objective of ensuring equality in practice by encompassing not only measures aimed at easing *access* and preventing disadvantages,[75] but also *compensation* for those disadvantages. That provision supersedes, in my view, the perhaps not entirely useful focus on the dichotomy between equality of opportunity and equality of results that had dominated much of the previous case-law interpreting different legal provisions.[76]

110. Second, the interpretation of the scope of Article 157(4) TFEU must logically adapt to the specificities of the field at issue. If it is accepted that Article 157(4) TFEU applies to the field covered by Directive 79/7, compensation for disadvantages in professional careers must necessarily cover the consequences in the present of past disadvantages. I fail to see how it could be otherwise in the area of social security, where the disadvantages in pensions will mostly be felt once the person leaves the job market. It is difficult to see how the issue of the *currently existing* gender pension gap could possibly be tackled by easing access for women to the labour market or by measures adopted while they are still active in the labour market (those measures would avoid *a potential future* gender pension gap), while categorically excluding any measures that would become applicable once they leave the job market (where the real and more urgent problem lies).

111. Third, such an approach to Article 157(4) TFEU would indeed lead to too narrow and exclusionary a result, since it would result in the prolongation of the disadvantages suffered by women throughout their working lives into their retirement period.[77] The practical result would be morally questionable: since *full equality in practice* applies only to equality of opportunity *during their*

74 See, to that effect, judgments of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 41), and of 30 September 2010, *Roca Álvarez* (C-104/09, EU:C:2010:561, paragraph 36).

75 It should be noted that Article 23 of the Charter also seems to cover only the 'access' side of the equation, but reaches beyond that: 'The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

76 See, in particular, regarding the exclusion of approaches to 'positive action' which may include a 'results-oriented' approach aimed at compensation for the past, Opinion of Advocate General Tesauro in *Kalanke* (C-450/93, EU:C:1995:105, point 9). See also, on this discussion, Opinion of Advocate General Poiares Maduro in *Briheche* (C-319/03, EU:C:2004:398, points 48 to 50).

77 In agreement on this point with the Opinions of Advocate General Jääskinen in *Amédée* (C-572/10, EU:C:2011:846, points 58 and 59), and in *Leone* (C-173/13, EU:C:2014:117, point 57).

working lives, nothing after their exit from the labour market can ever be compensated, even if the disadvantage clearly flows from inequality experienced during their working lives, and will logically manifest itself later. In such a scenario, equality of opportunity would only be a helpful concept if it included an equal opportunity to change the past.

112. I would therefore suggest that not only can Article 157(4) TFEU serve to justify a national measure that would otherwise be discriminatory within the specific legal framework established by the applicable secondary EU law, including Directive 79/7, it can also be invoked for measures that aim at compensating for disadvantages experienced during professional careers that, although originating in inequality during working life, only manifest themselves later, upon leaving the job market.

113. However, EU law consistently subjects positive action measures to the test of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim at hand. The principle of equal treatment must be reconciled as far as possible with the requirements of the aim thus pursued.[78]

114. I shall now turn to these requirements in the context of the present case.

3. The present case

115. The INSS and the Spanish Government insist on the supplementary corrective nature of the benefit at issue. According to those interested parties, the 'maternity supplement' fits within the broader legislative framework which aims at compensating the effects on pensions of the disadvantages experienced by women during their professional life. Several measures have been described, including measures which compensate for contributions during the period following birth, maternity leave and parental leave, as well as measures in the field of employment, such as the guarantee of longer periods of paternity leave. However, those measures do not apply retroactively and cannot therefore remedy the situation of older generations that could not benefit from them. Moreover, in view of those measures, the Spanish Government submits that the need to maintain the 'maternity supplement' in the future would be periodically reassessed.

116. All those elements would need to be considered by the national court, in order to assess whether the measure at issue is indeed of a complementary compensatory nature in the framework of a broader system, which aims in fact at offsetting the disadvantages suffered by women during their professional careers.

117. However, although it is theoretically possible to apply Article 157(4) TFEU to the present case, I must nonetheless conclude that, on the information presented to this Court, the benefit at issue, as currently devised, would not in any case pass the test of proportionality required by that provision. I am bound to agree with the Commission on this point: the measure at issue does not comply with the proportionality principle.

118. First, from the point of view of its appropriateness, it must be noted that the measure at issue does not apply to non-contributory pensions which are arguably more affected by the gender gap, bearing in mind that it is women of older generations who are less likely to reach even the necessary number of years to claim contributory pensions.

78 See, with regard to Article 2(4) of Directive 76/207, judgments of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 39), and of 30 September 2004, *Briheche* (C-319/03, EU:C:2004:574, paragraph 24). In general, see my Opinion in *Cresco Investigation* (C-193/17, EU:C:2018:614, point 111).

119. Second, as the Commission notes, the measure only applies to the pensions that started to be paid out in 2016, therefore leaving out women from the generations that are most likely to be affected by the gender gap. In my view, this fact creates such strong dissonance between the (officially stated) aim of the measure and the means chosen for its realisation as to render it inappropriate to achieve that stated aim. [79]

120. Third, the measure at issue does not meet the requirement of necessity. Article 60(1) of the LGSS relies on the exclusive and automatic criterion of sex. It only applies to women and does not admit of any kind of consideration of the situation of men in comparable situations. There is no possibility to apply the same measure to men who have been affected by interruptions of their careers or reduced contributions connected with bringing up their children. [80]

121. A closing remark is in order: neither the legitimacy of the objective pursued by the national measure nor the statistical evidence adduced by the national authorities attesting to the existence of the gender gap *qua* structural problem have been called into question. Moreover, national rules in the field of social security aimed at remedying the gender gap by means of compensation could, in my view, be pursued under Article 157(4) TFEU. However, Article 60(1) of the LGSS in its current form fails to fulfil the requirements of both appropriateness and necessity so as to satisfy the standards of the principle of proportionality, which must be complied with in order to render such a measure permissible under Article 157(4) TFEU.

122. Those considerations lead me to the conclusion that the measure at issue in the present case is not permissible under Article 157(4) TFEU, and is therefore incompatible with EU law.

V. Conclusion

123. On the basis of the foregoing considerations, I propose that the Court answer the question referred by the Juzgado de lo Social n.º 3 de Gerona (Social Court No 3, Gerona, Spain) as follows:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is to be interpreted as precluding a national provision such as the one at issue in the present case, which, on the one hand, confers the right to receive a pension supplement on women who are mothers of two or more children and who become entitled to a contributory permanent incapacity pension after its entry into force, but, on the other hand, does not contain any possibility to grant that right to men in any situation.

79 In fact, it could be reasonably assumed that such a measure of social policy, while not remedying the past, would rather have the effect of cementing and petrifying exactly the traditional repartition of roles the effects of which it states that it wishes to remedy for the future.

80 See, to that effect, judgment of 29 November 2001, *Griesmar* (C-366/99, EU:C:2001:648, paragraph 57). Regarding the role of 'saving clauses' opening up positive action measures to men in specific circumstances, see judgments of 11 November 1997, *Marschall* (C-409/95, EU:C:1997:533, paragraph 33); of 28 March 2000, *Badeck and Others* (C-158/97, EU:C:2000:163, paragraph 36); and of 19 March 2002, *Lommers* (C-476/99, EU:C:2002:183, paragraph 45).