



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

14 September 2023*

(Reference for a preliminary ruling – Social policy – Directive 79/7/EEC – Equal treatment for men and women in matters of social security – Article 6 – National legislation providing for the right to a pension supplement only for women – Preliminary ruling from the Court from which it may be held that that legislation constitutes direct discrimination on grounds of sex – Administrative practice of continuing to apply that legislation despite that ruling – Separate discrimination – Pecuniary damages – Reimbursement of expenditure relating to costs and lawyers' fees)

In Case C-113/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain), made by decision of 2 February 2022, received at the Court on 17 February 2022, in the proceedings

DX

v

Instituto Nacional de la Seguridad Social (INSS),

Tesorería General de la Seguridad Social (TGSS),

THE COURT (Second Chamber),

composed of A. Prechal (Rapporteur), President of the Chamber, M.L. Arastey Sahún, F. Biltgen, N. Wahl and J. Passer, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– DX, by J. de Cominges Cáceres, abogado,

* Language of the case: Spanish.

- Instituto Nacional de la Seguridad Social (INSS), by M.P. García Perea and M.P. Madrid Yagüe, acting as letradas,
 - the Spanish Government, by L. Aguilera Ruiz, acting as Agent,
 - the European Commission, by I. Galindo Martín and A. Szmytkowska, acting as Agents,
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

Judgment

- 1 The request for a preliminary ruling concerns the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).
- 2 The request has been made in proceedings between, of the one part, DX, the father of two children, and, of the other part, the Instituto Nacional de la Seguridad Social (INSS) (National Institute for Social Security, Spain) and the Tesorería General de la Seguridad Social (TGSS) (General Social Security Treasury, Spain) concerning the refusal of that institute to grant him a pension supplement only available, under national legislation, to women who have had at least two biological or adopted children.

Legal context

EU 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 2 of that directive provides:
‘This Directive shall apply to the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment – and to retired or invalided workers and self-employed persons.’
- 5 Article 3(1) of that directive provides:
‘This Directive applies to:
(a) statutory schemes which provide protection against the following risks:
 - sickness,

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

...’

6 Article 4(1) of Directive 79/7 is worded as follows:

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

- the scope of the schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions,
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.’

7 Under Article 5 of Directive 79/7:

‘Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.’

8 Article 6 of that directive states:

‘Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities.’

Spanish law

9 Under Article 53 of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version as approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015), of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291) (‘the LGSS’):

‘1. The right to recognition of benefits shall be time-barred after five years with effect from the day following the day on which the operative event for the relevant benefit takes place, without prejudice to the exceptions provided for in this Law and to the fact that the effective date of that recognition shall be backdated to three months before the date on which the relevant application was made.

If the economic content of the benefits already recognised is affected following requests for review of those benefits, the financial effects of the new amount shall have a maximum retroactive effect

of three months from the date of submission of the application. That rule on maximum retroactivity shall not apply to the correction of clerical, factual or arithmetical errors ...’.

- 10 Under the heading ‘Maternity supplement to contributory pensions from the social security system’, Article 60(1) of the LGSS, in the version applicable to the dispute in the main proceedings, provided:

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

That supplement, which shall have the legal nature of a contributory State pension for all purposes, shall consist in an amount equivalent to the result of applying to the initial amount of the pensions referred to of 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: five per cent.

...’

- 11 Article 10 of the Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 on effective equality between women and men) of 22 March 2007 (BOE No 71 of 23 March 2007, p. 12611) provides:

‘Acts ... that constitute or cause discrimination on grounds of sex, shall be regarded as null and void, and shall give rise to liability [on the part of the person responsible] through a system of reparation or compensation that shall be real, effective and proportionate to the damage suffered, and, where necessary, through an efficient and dissuasive system of penalties that prevents the occurrence of discriminatory conduct.’

- 12 Article 183 of Ley 36/2011, reguladora de la jurisdicción social (Law 36/2011 governing procedure of the social courts) of 10 October 2011 (BOE No 245 of 11 October 2011, p. 106584) states, at paragraphs 1 and 2 thereof:

‘1. Where the judgment declares that an infringement has taken place, the court shall rule on the amount of any damages that may be payable to the applicant for discrimination suffered or any other infringement of his or her fundamental rights and civil liberties, on the basis of both the non-material damage linked to the infringement of the fundamental right and the additional damage and losses arising therefrom.

2. The court shall rule on the amount of the damage, making a careful determination of it where it is too difficult or costly to prove the exact amount, in order to compensate the victim sufficiently and, so far as possible, fully restore him or her to the position he or she was in prior to the damage, and to contribute to the objective of preventing damage.’

- 13 The Criterio de Gestión 1/2020 (administrative position 1/2020) of 31 January 2020, adopted by the Subdirección General de Ordenación y Asistencia Jurídica (Subdirectorate-General for Planning and Legal Assistance) of the INSS ('administrative position 1/2020'), was worded as follows:

'As long as the legislative amendment necessary to adapt Article 60 of the LGSS to the judgment [of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075)] has not been made ..., the following guidelines for the actions of this managing body shall be laid down:

1. The supplement provided for in respect of permanent invalidity, retirement and widows' pensions, governed by Article 60 of the LGSS, continues to be granted only to women who satisfy the conditions laid down by that article, as has been the case so far, so long as the appropriate legal amendment to that article has not taken place.
2. The provisions of the preceding paragraph must logically be interpreted without prejudice to the obligation to enforce final judgments given by the courts which recognise the abovementioned pension supplement for men ...'

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

- 14 DX, the father of two children, was awarded an absolute permanent invalidity benefit by the INSS, with effect from 10 November 2018, on the basis of a calculation amounting to EUR 1 972.87. In the related administrative proceedings, he had not expressly applied for or automatically been granted the right to the 'maternity' pension supplement ('the pension supplement at issue') in respect of retirement, permanent invalidity or widows' pensions provided for in Article 60(1) of the LGSS.
- 15 Relying on the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075) – from which it follows that Directive 79/7 precludes national legislation, such as that provided for in Article 60 of the LGSS, which reserves the grant of that supplement only to women – DX applied to the INSS on 10 November 2020 for recognition of his entitlement to the same supplement, in the amount of 5% of the permanent invalidity benefit which he was receiving.
- 16 By decision of 17 November 2020 ('the rejection decision'), the INSS rejected that application.
- 17 Following the rejection decision, DX brought an action against that decision before the Juzgado de lo Social No 2 de Vigo (Social Court No 2, Vigo, Spain) which, by a judgment of 15 February 2021, referring to the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075), recognised DX's right to the pension supplement at issue, while dismissing the claim for compensation which DX had submitted at the same time. By order of 1 March 2021, that court established the financial effects of that supplement to the effect that DX was entitled to it as from 10 August 2020, including, therefore, the payment of the pension supplement at issue corresponding to the three months preceding his application lodged on 10 November 2020.
- 18 DX and the INSS lodged an appeal against that judgment before the referring court, the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia, Spain).

- 19 Although the INSS is of the view that, in accordance with the principle of legality, DX has no right to the supplement claimed under Article 60 of the LGSS, DX asks, for his part, to be granted the right to that supplement from the date on which he had access to his pension, namely 10 November 2018, on the ground that, if he had been a woman, he would have been informed of that right from that date. For the same reason, he seeks compensatory and exemplary damages for infringement of the principle of non-discrimination.
- 20 The referring court notes, first of all, that, for the purposes of the case in the main proceedings, it is of fundamental importance whether, as it suggests, the INSS's practice set out and published in administrative position 1/2020 – consisting in systematically refusing to grant men the pension supplement at issue and obliging them to bring legal proceedings – must be regarded, in the light of Directive 79/7, as discrimination separate to the discrimination resulting from Article 60 of the LGSS as highlighted in the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075).
- 21 The judgment of 15 February 2021, referred to in paragraph 17 above, is based on the premiss that the rejection decision, while discriminatory, was nevertheless consistent with national law, which alone gave rise to the discrimination at issue, with the result that the discriminatory nature of the rejection at issue in the main proceedings could not give rise to compensation from the INSS.
- 22 Next, the referring court asks, in the event that the rejection decision constitutes discrimination separate from that resulting from Article 60 of the LGSS, what is the date from which the pension supplement at issue should be granted to the person concerned, and in particular whether that grant should be retroactive and begin to run from the date of the event giving rise to the invalidity pension to which that supplement relates.
- 23 Lastly, the referring court asks, first, whether, in order to make good the infringement of EU law allegedly constituted by the rejection decision, it is sufficient, in principle, for the person concerned to be conceded the retroactive grant of the pension supplement at issue without the need for payment of additional compensation, or whether, on the contrary, such compensation should be granted in order, first, to make good the material and non-material damage suffered and, second, to deter such infringements.
- 24 Second, according to the referring court, the question arises as to whether, in any event, it is appropriate, in order to ensure the effectiveness of EU law, that the costs and lawyers' fees incurred in the proceedings undertaken before the Juzgado de lo Social No 2 de Vigo (Social Court No 2, Vigo) and before the referring court should be included as part of the compensation paid for breach of EU law, it being specified that, under national law, the INSS cannot be ordered to pay the amounts relating to those costs and fees, since employment-law proceedings instituted are free of charge for all litigants.
- 25 In those circumstances the Tribunal Superior de Justicia de Galicia (High Court of Justice, Galicia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Must the administrative authority's practice, set out in administrative position 1/2020 [...] of systematically refusing to grant the [pension] supplement at issue to men and requiring them to pursue their claims through the courts, as has happened to the applicant in the present case, be regarded, in accordance with [...] Directive [79/7] [...] as an administrative breach of that directive, which is different from the legislative breach found to have been committed in

the judgment of [...] 12 December 2019 [*Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075)], so that, considered in itself, that administrative breach constitutes discrimination on grounds of sex, in view of the fact that, according to Article 4 of that directive, the principle of equal treatment means that there is to be no discrimination whatsoever on ground of sex, either directly, or indirectly, and that, according to Article 5 of that directive, Member States are to take the measures necessary to ensure that any legislative or administrative provisions contrary to the principle of equal treatment are abolished?

- (2) In the light of the answer to the previous question, and having regard to Directive 79/7 (in particular Article 6 thereof and the principles of equivalence and effectiveness in relation to the legal consequences of non-compliance with EU law), must the effective date of the judicial recognition of the supplement be the date of the application (backdated by three months), or must the effective date be backdated to the date on which the judgment [of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075)] was delivered or published, or to the date of the operative event for the permanent [invalidity] benefit to which the [pension] supplement at issue relates?
- (3) In the light of the answer to the previous questions, and having regard to the applicable directive (in particular Article 6 thereof and the principles of equivalence and effectiveness in relation to the legal consequences of non-compliance with EU law), is it appropriate to award compensation by way of reparation for the loss sustained and exemplary damages, on the ground that that loss is not addressed by the determination of the effective date of the judicial recognition of the supplement, and in any event, must the compensation cover the court fees and costs of legal representation before the Juzgado de lo Social (Social Court) and the Sala de lo Social (Social Chamber) of the referring court?

Procedure before the Court

- 26 By decision of 19 July 2022, received at the Court on 4 August 2022, the referring court withdrew its second question, explaining that, since the date on which it made its request for a preliminary ruling, the Tribunal Supremo (Supreme Court, Spain) had, by judgment of 30 May 2022, settled the question relating to the date on which maternity supplements were granted to male workers, deciding that that date is the date of access to the pension to which those supplements relate.
- 27 The referring court makes clear, however, that the first and third questions are still relevant for the purposes of the dispute in the main proceedings, while stating that it maintains the first question only in so far as, according to the Court, the answer to that question is necessary in order to answer the third question.

Consideration of the questions referred

Admissibility and whether there is any need to adjudicate

- 28 The INSS submits that the first question is inadmissible, in so far as it has already been answered on account of the adoption of new instructions to adapt the practice of that administrative authority to the national case-law mentioned in paragraph 26 above. The Spanish Government

also considers that that question is inadmissible, taking the view that it does not concern the interpretation of EU law, but seeks only a review of the action of a national administrative body in the light of that law.

- 29 The INSS further maintains that the third question is inadmissible, on the ground that, in several judgments delivered by the Tribunal Supremo (Supreme Court) concerning maternity supplements, it was not ordered to pay the costs, since that court took the view that the cases which gave rise to those judgments raised legal doubts. For its part, the Spanish Government considers that that question has become devoid of purpose, since the retroactive grant of the pension supplement at issue, as recognised by the national case-law referred to in paragraph 26 above, would entail *restitutio in integrum*, rendering any additional compensation unnecessary.
- 30 It should be noted, as a preliminary point, that, according to settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is only for the national court before which the main proceedings have been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 31 January 2023, *Puig Gordi and Others*, C-158/21, EU:C:2023:57, paragraph 50).
- 31 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 116).
- 32 As regards the first question, on the one hand, it relates to the assessment, in the light of Directive 79/7, of the administrative practice laid down in administrative position 1/2020. It was by following that practice that, according to the explanations provided by the referring court, the INSS adopted the rejection decision at issue in the main proceedings. The INSS's claim that that practice has now been changed cannot, therefore, lead to a finding that the question is inadmissible.
- 33 On the other hand, it is clear from the explanations given by the referring court and from the very wording of the first question that that court seeks an interpretation of Directive 79/7, and in particular Articles 5 and 6 thereof, for the purposes of assessing the lawfulness of the rejection decision in the light of the requirements arising from that directive. Thus, contrary to the contention of the Spanish Government, that court does not ask the Court of Justice itself to carry out such an assessment.
- 34 As regards the third question, first, it should be noted that, by that question, the referring court seeks to ascertain whether, in the circumstances of the case in the main proceedings, it can be inferred from Directive 79/7 that that court is under a duty to order the INSS to pay the applicant in the main proceedings dissuasive compensation, including, where appropriate, the amount of the costs and lawyers' fees incurred by him in the context of his legal proceedings. In

that regard, it is irrelevant that domestic law does not provide, in the present case, for the possibility of an order for costs and lawyers' fees, the referring court having moreover stated that it is precisely the absence of that possibility which led it to refer the third question.

- 35 Second, in the light of the purpose of the third question as just recalled above, the argument put forward by the Spanish Government that that question has become devoid of purpose cannot be accepted. Indeed, the referring court wishes to know precisely whether, in the circumstances of the dispute in the main proceedings, the fact of retroactively fixing the date for the grant of the pension supplement at issue is sufficient, as that government claims, to restore equal treatment, that aspect thus falling within the substance of that question.
- 36 It follows, first, that the first and third questions are admissible and, second, that there is nothing to indicate that there is no need to answer the third question.

Substance

- 37 By its first and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 79/7, and in particular Article 6 thereof, must be interpreted as meaning that, where an application for the grant of a pension supplement submitted by a male scheme member has been rejected by the competent authority, under national legislation limiting the grant of that supplement to female scheme members only, whereas that legislation constitutes direct discrimination on grounds of sex, within the meaning of Directive 79/7, as interpreted by the Court of Justice in a preliminary ruling delivered prior to the decision rejecting such an application, the national court hearing an action against that decision must instruct the competent authority not only to grant the pension supplement claimed to the person concerned, but also to pay him exemplary damages and to reimburse him, on that basis, the costs and lawyers' fees which he has incurred in court, where that rejection decision was adopted in accordance with an administrative practice of continuing to apply the aforementioned legislation despite that preliminary ruling, thereby obliging the person concerned to assert in court his right to that supplement.
- 38 As a preliminary point, it should be recalled, first, that the Court has already held, in essence, in paragraphs 39, 41, 66 and 67 of its judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075), that Directive 79/7 must be interpreted as precluding national legislation which provides for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory permanent invalidity pensions under a scheme within the national social security system, while men in an identical situation do not have the right to such a pension supplement, as such legislation constitutes direct discrimination on grounds of sex within the meaning of the third indent of Article 4(1) of that directive.
- 39 As is apparent from the explanations provided by the referring court, the rejection decision was adopted under the same national provision as that at issue in the case which gave rise to that judgment, namely Article 60(1) of the LGSS. That court does not, therefore, express any doubts as to the infringement of the principle of equal treatment, as provided for in Article 4(1) of Directive 79/7, by such a national provision.
- 40 Second, the first and third questions are based on the premiss that, in view of the discriminatory nature of the national legislation at issue in the main proceedings and having regard to the national case-law referred to in paragraph 26 above, the referring court will, in any event, have to

resolve the dispute in the main proceedings in the sense that the applicant in the main proceedings is, at least, recognised as having the right to the pension supplement at issue, with retroactive effect from the date from which he had access to his permanent invalidity pension.

- 41 That premiss appears to be consistent with the Court's settled case-law that, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category (judgments of 21 June 2007, *Jonkman and Others*, C-231/06 to C-233/06, EU:C:2007:373, paragraph 39, and of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraph 66 and 67 and the case-law cited).
- 42 Such an obligation is incumbent not only on the national courts but also on all organs of the State, including the national administrative authorities responsible for applying such arrangements (see, to that effect, judgment of 10 March 2022, *Grossmania*, C-177/20, EU:C:2022:175, paragraph 46 and the case-law cited).
- 43 That being said, it should be noted, in the first place, that an individual decision adopted pursuant to legislation that constitutes direct discrimination on grounds of sex, within the meaning of Article 4(1) of Directive 79/7, such as the rejection decision adopted under Article 60(1) of the LGSS, is discriminatory in the same way as such legislation, where that decision reproduces, with regard to the person concerned, the discriminatory elements of that legislation.
- 44 Hearing an appeal against such a decision, the national court will therefore, in principle, be required to take the measure referred to in paragraph 41 above with a view to restoring equal treatment.
- 45 However, in the present case, the referring court pointed out that the rejection decision not only applies national legislation that is contrary to Directive 79/7, but was also adopted in accordance with an administrative practice, reproduced in administrative position 1/2020, which was published following the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075). In accordance with that position, the competent authority in that area, namely the INSS, continues, pending the adaptation of Article 60 of the LGSS to that judgment, to grant the pension supplement at issue only to women who satisfy the conditions laid down by that provision, without prejudice to the obligation to implement final judicial decisions which recognise men as entitled to the pension supplement at issue.
- 46 In those circumstances, it must be stated that a decision refusing to grant men the pension supplement at issue, adopted in accordance with an administrative practice of that kind, which was, moreover, formalised in a published administrative position, is liable to lead, as regards male scheme members, to discrimination with regard to the procedural conditions governing the grant of the supplementary pension at issue, irrespective of the direct discrimination on grounds of sex resulting from the substantive conditions laid down in the legislation at issue in the main proceedings.

- 47 Even though that practice does not preclude that equal treatment may ultimately be restored by means of the grant of that supplement to men, where a judicial decision provides for such an award, the fact remains that that practice implies only for men the need to assert their right to the pension supplement at issue through judicial proceedings, which, in particular, exposes them to a longer period in which to obtain that supplement and, as the case may be, to additional expenses.
- 48 In the second place, Article 6 of Directive 79/7 requires Member States to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination on grounds of sex to pursue their claims by judicial process after possible recourse to other competent authorities.
- 49 Such an obligation implies that the measures in question must be sufficiently effective to achieve the objective pursued by Directive 79/7 of arriving at real equality of opportunity, in such a way that they must be capable of restoring such equality, provide effective and efficient judicial protection and have a genuine deterrent effect on the body which has committed the discrimination (see, as regards working conditions, in particular those relating to dismissal, judgments of 2 August 1993, *Marshall*, C-271/91, EU:C:1993:335, paragraphs 22 and 24, and of 17 December 2015, *Arjona Camacho*, C-407/14, EU:C:2015:831, paragraphs 29 and 31).
- 50 In that regard, where, in the light of the particular circumstances of the breach of the principle of equal treatment concerned, financial compensation is the measure adopted in order to achieve the objective of restoring genuine equality of opportunity, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discrimination to be made good in full in accordance with the applicable national rules (see, to that effect, judgments of 2 August 1993, *Marshall*, C-271/91, EU:C:1993:335, paragraphs 25 and 26, and of 17 December 2015, *Arjona Camacho*, C-407/14, EU:C:2015:831, paragraphs 32 and 33).
- 51 It should also be noted that the payment to the person injured of compensation which covers in full the loss and damage sustained as a result of discrimination on grounds of sex, in accordance with the detailed rules to be laid down by the Member States, is capable of ensuring that such loss or damage is effectively compensated or compensated in a way which is dissuasive and proportionate (see, to that effect, judgment of 17 December 2015, *Arjona Camacho*, C-407/14, EU:C:2015:831, paragraph 37).
- 52 First, where there is a decision such as that referred to in paragraph 46 above, which gives rise to discrimination linked to the substantive conditions for the grant of the pension supplement at issue and discrimination linked to the procedural conditions governing that grant, the national court hearing an action brought against that decision cannot confine itself to adopting, for the benefit of the male scheme member concerned, the measure set out in paragraph 41 above, consisting in granting him the right to the pension supplement at issue with retroactive effect.
- 53 Although such retroactive recognition makes it possible, in principle, to restore equal treatment as regards the substantive conditions for the grant of the pension supplement at issue, it is not appropriate for the purpose of remedying the harm resulting, to the detriment of that member, from the discriminatory nature of those procedural conditions.

- 54 It follows that such a member must also be able to benefit, in addition to the retroactive recognition of the pension supplement at issue, from the measure referred to in paragraph 50 above, namely adequate financial compensation in that it must enable the loss and damage actually sustained as a result of the discrimination to be made good in full, in accordance with the applicable national rules.
- 55 In the present case, it is apparent from the documents before the Court that Spanish law does indeed provide for such a possibility, in that it is apparent from Article 183 of Law 36/2011 that the competent courts in matters of social security must award damages to victims of discrimination, in order to restore them to their situation prior to the discrimination, and to contribute to the objective of preventing damage.
- 56 In that context, it should be noted, second, that it must be possible to take into account in terms of financial compensation the expenses, including the costs and lawyers' fees, incurred by the member concerned for the purpose of asserting his right to the pension supplement at issue, in so far as those costs were caused by the application to him of discriminatory procedural conditions governing the grant of that supplement.
- 57 As has been pointed out in paragraph 50 above, that compensation, based on Article 6 of Directive 79/7, must enable the loss and damage actually sustained as a result of the discrimination to be made good in full.
- 58 Thus, it is not possible to disregard the costs which the person concerned had to incur as a result of the application to him of discriminatory procedural conditions, including, where appropriate, the costs and lawyers' fees relating to the court proceedings which he had to undertake in order to assert his rights.
- 59 In the present case, having regard to paragraph 55 above, it appears, subject to the verification which it is for the referring court to carry out, that Article 183 of Law 36/2011 allows that court to grant the applicant in the main proceedings full financial compensation resulting from Article 6 of Directive 79/7 and, thereby, compensation covering the costs and lawyers' fees incurred by him for the purpose of asserting in court his right to the pension supplement at issue.
- 60 It is irrelevant in that regard that, as that court has pointed out, it is not possible, under the Spanish procedural rules relating to employment law, for it to order the body responsible for the discrimination at issue in the main proceedings to pay the costs, since the compensation covering the costs and lawyers' fees does not fall within such procedural rules, but forms an integral part of the full compensation of the person concerned required by the case-law referred to in paragraph 50 above.
- 61 In any event, while it is for the domestic legal systems of the Member States to lay down the detailed rules according to which the extent of such reparation is to be determined, including the importance to be attached to the fact that the discrimination concerned is the result of a deliberate act of the competent body, those detailed rules cannot adversely affect the very substance of that reparation (see, by analogy, judgment of 21 December 2016, *Gutiérrez Naranjo and Others*, C-154/15, C-307/15 and C-308/15, EU:C:2016:980, paragraphs 65 and 71).
- 62 In the light of all the foregoing, the answer to the first and third questions is that Directive 79/7, and in particular Article 6 thereof, must be interpreted as meaning that, where an application for the grant of a pension supplement submitted by a male scheme member has been rejected by the

competent authority, under national legislation limiting the grant of that supplement to female scheme members only, whereas that legislation constitutes direct discrimination on grounds of sex, within the meaning of Directive 79/7, as interpreted by the Court of Justice in a preliminary ruling delivered prior to the decision rejecting such an application, the national court hearing an action against that decision must instruct that authority not only to grant the pension supplement claimed to the person concerned, but also to pay him compensation enabling the loss and damage actually sustained by him as a result of the discrimination to be made good in full, in accordance with the applicable national rules, including costs and lawyers' fees which he has incurred in court, where that rejection decision was adopted in accordance with an administrative practice of continuing to apply the aforementioned legislation despite that preliminary ruling, thereby obliging the person concerned to assert in court his right to that supplement.

Costs

- 63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Second Chamber) hereby rules:

Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, in particular Article 6 thereof,

must be interpreted as meaning that where an application for the grant of a pension supplement submitted by a male scheme member has been rejected by the competent authority, under national legislation limiting the grant of that supplement to females scheme members only, whereas that legislation constitutes direct discrimination on grounds of sex, within the meaning of Directive 79/7, as interpreted by the Court of Justice in a preliminary ruling delivered prior to the decision rejecting such an application, the national court hearing an action against that decision must instruct that authority not only to grant the pension supplement claimed to the person concerned, but also to pay him compensation enabling the loss and damage actually sustained by him as a result of the discrimination to be made good in full, in accordance with the applicable national rules, including costs and lawyers' fees which he has incurred in court, where that rejection decision was adopted in accordance with an administrative practice of continuing to apply the aforementioned legislation despite that preliminary ruling, thereby obliging the person concerned to assert in court his right to that supplement.

[Signatures]