Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 May 2014[1]

Case C-318/13

X

(Request for a preliminary ruling from the Korkein hallinto-okeus (Finland))

(Directive 79/7/EEC — Equal treatment for men and women in matters of social security — Article 4(1) — Accident insurance for workers — National law — Lump-sum compensation for long-term injuries resulting from an accident at work — Determination of the level of entitlement — Different levels of entitlement for men and women by reason of differences in the statistical life expectancies of the sexes — Member State liability — Sufficiently serious breach of EU law)

I – **Introduction**

1. The fact that women have a statistically higher life expectancy than men is well known. However, should men, for that reason alone and without a specific examination of each individual case, receive a lower benefit in the case where a scheme providing accident insurance for workers grants compensation in the form of a single lump-sum payment for a health problem with lifelong consequences?

2. That question is central to the present case. It offers the Court the opportunity, further to the judgment in *Test-Achats*,[2] to clarify its case-law on the principle of equal treatment for men and women under EU law in the context of a further matter in the field of insurance law.

3. The present case calls for an examination, first of all, of whether that principle precludes provisions of national law under which the amount of an insurance claim is determined by reference to parameters dictated by the statistically different life expectancies of men and women. Secondly, in the event that the national law proves to be contrary to EU law, it raises the question whether the Member State is liable and, thirdly, if so, the question whether the effects of the judgment should be limited in time.

1 — Original language: German.

2 — Judgment in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100.

II – **Legal framework**

A – *EU law*

1. Directive 79/7[3]

4. In accordance with Article 3 of Directive 79/7, that directive is to apply, inter alia, to statutory schemes which provide protection against invalidity, accidents at work and occupational diseases.

5. Article 4 of Directive 79/7 provides:

‘(1) The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly, … in particular as concerns:

— …

— …

— the calculation of benefits … 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.’

2. Directive 2004/113[4]

6. Before Article 5(2) of Directive 2004/113 was declared invalid,[5] that provision permitted differences in treatment on grounds of sex, subject to certain conditions, as follows:

‘Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals’ premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. …’

3. Directive 2006/54[6]

7. Article 5 of Directive 2006/54, under the heading ‘Prohibition of Discrimination’, provides, with respect to occupational social security schemes:[7]

‘Without prejudice to Article 4 [[8]], there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards

3 — 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).

4 — 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).

5 — Judgment in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100.

6 — Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

7 — Article 2(1)(f) of Directive 2006/54 defines these as schemes ‘not governed by Directive 79/7 ... whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them …’

8 — This provision gives expression to the principle of equal pay.

…

(c) the calculation of benefits … and the conditions governing the duration and retention of entitlement to benefits.'

8. Article 9(1) of Directive 2006/54 provides:

'Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

…

(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

…'

B – *National law*

9. According to the submissions of the Finnish Government, Finnish employers have a statutory obligation to use private insurance companies to insure their workers against the risk of long-term health-related injury resulting from accidents at work.

10. If the insured event materialises, insurance benefits are provided in the form of either periodic payments or a lump-sum settlement ('workplace accident compensation'). In the case of less serious injuries, compensation in the form of a single lump-sum payment is mandatory. [9]

11. The amount of that lump-sum settlement depends on the average life expectancy of the injured person. The determining factors in this regard are, on the one hand, the injured person's age and, on the other hand, for the projection of remaining life expectancy, his or her sex. Since men are statistically assumed to have a shorter life expectancy, under Finnish law, women receive a higher level of compensation than men, albeit in comparable situations.

III – **Facts of the dispute in the main proceedings and the questions referred**

12. In 2005, Mr X was awarded workplace accident compensation in the form of a single lump-sum payment by the competent insurer for a workplace accident which he had suffered in 1991. For the sole reason of her sex and the statistically higher life expectancy associated with it, a woman in otherwise comparable circumstances would have received EUR 278.89 more than was paid to Mr X. [10]

9 — At the time of the workplace accident in question, the relevant provisions were Paragraphs 14 (192/1987), 18a (526/1981), and 18b (1642/1992) of the Tapaturmavakuutuslaki ('Law on accident insurance') (608/1948), as well as a decision of the Ministry of Social Affairs and Health of 30 December 1982 concerning the criteria governing the capital values of accident and survivor pensions under the statutory accident insurance scheme and the criteria governing the payment of a lump-sum in lieu of a pension. Since January 2010, the rules governing the criteria for calculating workplace accident compensation in the form of a single payment have been contained in Paragraph 18e (1639/2009) of the Law on accident insurance. So far as the present proceedings are concerned, the criteria laid down in those provisions correspond to the calculation criteria set out in the aforementioned decision of the Ministry of Social Affairs and Health.

10 — It is not clear from the request for a preliminary ruling whether that compensation was determined by reference to the legal position applicable in 2005 or that applicable in 1991.

13. In 2008, an action brought by Mr X, in which he claimed that his workplace accident compensation should also be determined in accordance with the more favourable criteria applicable to women, was definitively dismissed by the court of final instance in this case, the Vakuutusoikeus (Social Court).

14. By an action brought in 2009, Mr X is now seeking from the Finnish State damages in the amount of the difference outstanding to him, plus interest on arrears.

15. The referring court has referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 4(1) of Directive 79/7 to be interpreted in such a way that it precludes national legislation on the basis of which the different life expectancies of men and women are used as an actuarial calculation criterion for statutory compensation as part of social security payable due to an accident, if, by using this criterion, the single compensatory settlement payable to a man is smaller than that payable to a woman of the same age and in a similar situation in other respects?

(2) If the answer to Question 1 is affirmative: does the case involve a sufficiently serious breach of EU law, this being a condition for Member State liability, particularly when account is taken of the following:

— in its case law, the Court has not taken a specific position on the question of whether gender-based actuarial factors may be taken into account in the determination of statutory social security benefits falling within the scope of application of Directive 79/7;

— in its judgment [delivered] in [*Association belge des Consommateurs*] *Test-Achats* [*and Others* C-236/09, EU:C:2011:100] the Court has stated that Article 5(2) of Directive 2004/113 (Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services), which allows such factors to be taken into consideration, is invalid but has stipulated a transitional period prior to the provision becoming invalid; and

— in Directives 2004/113 and 2006/54 (Directive on the implementation of the principle of equal opportunity and equal treatment of men and women in matters of employment and occupation) the EU's legislator has allowed, on certain conditions, gender-based actuarial factors to be taken into account in the calculation of benefits referred to in these Directives, and on the basis of this the national legislature has assumed that these factors can also be considered in the area of statutory social security referred to in this case?'

IV – **Assessment**

A – *First question referred*

16. By its first question, the national court seeks to ascertain, in essence, whether Article 4(1) of Directive 79/7 precludes national legislation which, in the case of lump-sum settlements for workplace accidents, has the effect of treating men less favourably than women for the sole reason that men are statistically assumed to have a lower life expectancy.

17. As a preliminary point, it needs to be examined whether Directive 79/7, which, in accordance with Article 3(1)(a) thereof, is to apply to statutory schemes which provide protection against the risk of invalidity and the risk of accidents at work and occupational illnesses, is relevant in the present case. For only if it is can the first question be answered meaningfully. If it is not, that question bears no relation to the reality of the dispute in the main proceedings.

1. Scope *ratione materiae* and scope *ratione temporis* of Directive 79/7

a) Scope *ratione temporis*

18. The Finnish Government submits that Directive 79/7 is not applicable *ratione temporis*, since the accident in question occurred in 1991, that is to say before the Republic of Finland's accession to the European Union in 1995. The legal position relevant to the adjudication of the main proceedings, it contends, is therefore that applicable in 1991. In its view, that legal position cannot be assessed in the light of Directive 79/7 because the latter is not applicable to situations arising prior to the Republic of Finland's accession.

19. Workplace accident compensation, however, is intended to make reparation for any future consequences of the accident that took place in 1991. Consequently, the present case does not concern the adjudication of a situation which had already come to a definitive end before the Member State's accession. [11]

20. It is settled case-law, however, that the future effects of a situation which arose under the application of an old rule are assessed in accordance with the legal position applicable subsequently. [12] The same must also be true of the future effects of a situation which arose before a Member State's accession but which produces effects in the period following that accession.

21. Since Directive 79/7 became applicable [13] in the territory of the Republic of Finland at the time of Finland's accession, it is, from the point of view of its scope *ratione temporis*, relevant to the workplace accident compensation at issue here.

b) Scope *ratione materiae*

22. There may also be doubts about the substantive relevance of Directive 79/7, given that, while the directive in question applies only to 'statutory' social security schemes, the compensation at issue here, according to the Finnish Government, comes from certain private insurance companies entrusted with the tasks connected with the statutory accident insurance scheme.

23. It is true that workplace accident compensation in Finland is thus paid not directly by the competent public authorities but by private insurance companies within the framework of a statutory compulsory insurance scheme. However, the way in which a benefit is granted is not decisive for the purposes of its classification as falling within the scope of Directive 79/7. The test is rather whether a

11 — Unlike, therefore, in the judgment in *Ynos*, C-302/04, EU:C:2006:9, paragraphs 35 to 38.

12 — See, inter alia, the judgment in *Stadt Papenburg*, C-226/08, EU:C:2010:10, paragraph 46 and *Elektrownia Pątnów II*, C-441/08, EU:C:2009:698, paragraphs 32 and 34.

13 — See Article 166 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1) and the judgment in *Österreichischer Gewerkschaftsbund*, C-195/98, EU:C:2000:655, paragraphs 52 to 55).

benefit provided for in a statutory provision is directly and effectively linked to the protection provided against one of the risks specified in Article 3(1) of the Directive.[14] This must be considered to be the case so far as concerns workplace accident compensation, which is paid directly to injured parties and granted in accordance with the Law on accident insurance.

24. Accordingly, the Finnish legislation at issue is to be regarded as a statutory scheme which provides protection against the risks of invalidity and accidents at work and must therefore be assessed in the light of Directive 79/7. Directives 2004/113 and 2006/54, on the other hand, are not relevant, since Article 3(4) of the former states that it is 'not [to] apply to matters of employment and occupation', and Article 2(1)(f) of the latter governs occupational pension schemes directed specifically at undertakings and is not applicable to a nationwide accident insurance scheme.

25. Since Article 4(1) of Directive 79/7 provides that 'there shall be no discrimination whatsoever on ground of sex either directly, or indirectly' in the calculation of benefits, it must now be examined whether the use of actuarial criteria constitutes unequal treatment on grounds of sex (Section 2) and, if so, whether there are any obvious grounds for justification for such treatment (Section 3).

2. Unequal treatment through the use of actuarial parameters linked to differences in the statistical life expectancies of the sexes

26. The fact that the level of the lump-sum compensation for workplace accidents is assessed differently is directly linked to the sex of the claimant and his or her statistical life expectancy.

27. In the opinion of the Finnish Government, however, this does not put male claimants in a worse position. Rather, the differentiation between the sexes is necessary in order not to discriminate against women in favour of men. Since women have a statistically higher life expectancy, the compensation intended to serve as lump-sum reparation for the injury sustained for the duration of the estimated remaining lifespan of the person concerned must be higher for women than it is for men.

28. There is therefore, in its submission, no unequal treatment of men and women. Rather, each person receives the amount actuarially due to him or her.

29. That objection, however, could, at most, *justify* the unequal treatment under Finnish legislation of men and women in the payment of lump-sum benefits, but it would not in itself be such as to challenge the assertion that men and women are treated unequally.

30. We must now examine the potential grounds for justification.

3. Grounds for justification for unequal treatment

31. When examining which factors may constitute grounds for justification of unequal treatment in the context of workplace accident compensation, we must look first of all at Directive 79/7.

a) Relevant grounds for justification under Article 4 of Directive 79/7

32. Article 4 contains an unequivocal and definitive rule to the effect that, other than in matters relating to maternity, it does not generally permit discrimination on grounds of sex in the grant of benefits.

14 — See, in that regard, the judgment in *Atkins*, C-228/94, EU:C:1996:288, paragraphs 11 and 13.

33. On that basis, the Finnish legislation would be unjustifiable not least because, by relying on sex-specific life expectancies, it introduces a criterion for differentiation — contrary to the principle of equal treatment laid down in the Directive — which the EU legislature did not intend to be applied within the framework of Directive 79/7.

34. After all, the fact that Directive 79/7 does not expressly prohibit the use of statistical life expectancies based on sex cannot be interpreted as meaning that the Finnish legislature is at liberty to introduce that criterion in the context of the grant of benefits. This is contradicted not only by the wording of Directive 79/7 but also by a comparison with the scheme of Directives 2004/113 and 2006/54. In the latter two directives, although the EU legislature considered the notion of permitting 'actuarial' [15] [16] calculation factors based on sex to be unobjectionable, subject to certain conditions, it none the less felt it necessary to make an express statement to that effect. Since Directive 79/7 does not contain such a specific derogation, the logical converse inference is that, from the point of view of the will of the EU legislature at least, sex-specific actuarial considerations are not permitted in the context of Directive 79/7.

35. In the opinion of the Finnish Government, however, the different levels of benefit are none the less justified because, in the context of lump-sum compensation, they follow intrinsically from the differences in life expectancy according to sex. If the position were otherwise, women, who live statistically longer, would be at a disadvantage as compared with men, since the single payment is intended to make good the consequences of the accident for the rest of the insured person's life.

36. The Finnish Government thus turns on their heads the objections raised against it and takes the view that it has an obligation of sorts under primary law to award men less than women when it comes to the payment of lump-sum compensation.

37. As I shall demonstrate below, however, that submission is ultimately unconvincing.

b) Relevant grounds for justification under primary law?

38. In the light of primary law, direct discrimination on grounds of sex is — with the exception of specific incentive measures to benefit members of a disadvantaged group — permissible only if it can be established *with certainty* that there are *relevant differences* between men and women which necessitate such treatment. [17]

i) The meaning of 'relevant differences'

39. Relevant differences between men and women which are capable of having a bearing on the grant of accident insurance benefits might be said to exist, at most, if, in the individual case concerned, there were irrefutable support, founded on sex alone, for the assumption that certain factors material to the grant of the benefit are present or absent. [18] Furthermore, such differences would be *legally* relevant only if that differentiation were consistent with the fundamental principles of EU law. [19]

15 — See, to that effect, Article 5(2) of Directive 2004/113, which has now been repealed.

16 — See, to that effect, Article 9(1)(h) of Directive 2006/54.

17 — See point 59 et seq. of my Opinion in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2010:564.

18 — On the subject of 'gender-related insurance practices which remain possible', see the Commission's Guidelines on the application of Council Directive 2004/113/EEC to insurance, in the light of the judgment of the Court of Justice of the European Union in Case C-236/09 (*Test-Achats*) (OJ 2012 C 11, pp.1, 3 and 4).

19 — See, in that regard, points 42 to 67 of my Opinion in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2010:564.

40. The Finnish legislation assumes without exception that women have a statistically higher life expectancy than men and, on that basis, considers the sex of the insured person to be a factor relevant to lump-sum benefits based on lifespan.

41. That sex-specific projection does not, however, include all facets of life expectancy. Thus, on the one hand, it is, from a factual point of view alone, too general and does not produce balanced results. On the other hand, moreover, normative considerations in primary law also indicate that it is not permissible to use gender as a criterion relevant to the grant of benefits.

42. It is now necessary to look at the objections, first factual and then normative, which militate against the relevance of sex-based projections of life expectancy to the grant of benefits.

ii) Factual objections to the relevance of sex-based projections of life expectancy

43. Contrary to the view expressed by the Finnish Government, it cannot be said with certainty that, in the context of workplace accident compensation, a woman always has a higher life expectancy than a man of the same age.

44. After all, the Finnish Government fails to take adequate account not least of the fact that the specific circumstances in which the injury arose have an impact on remaining life expectancy. In the case of certain health problems resulting from an accident, it cannot readily be assumed that women might have a higher life expectancy than men in a comparable situation.

45. Moreover, a criterion for projecting life expectancy which is based solely on sex stops too short for the further reason that it masks other important factors — such as, in addition to the accident's consequences, the geographical origin and place of residence of the person concerned,[20] his or her lifestyle and significant aspects of his or her economic and social circumstances — and therefore gives nothing more than a distorted representation of reality.

46. Consequently, gender alone cannot, even from an abstract point of view, constitute a relevant difference in the context of the grant of benefits.

47. The fact that life expectancy projections founded on sex alone are not an appropriate basis on which to determine lump-sum compensation becomes even more apparent in the light of the specific circumstances of insured individuals, from which it is clear that the inherent logic of the Finnish legislation dictates — as the Finnish Government conceded at the hearing — that a woman suffering from a fatal illness, notwithstanding her own low life expectancy, would, by reason of her sex alone, receive a higher level of compensation than a man of the same age but in significantly better health. If Finnish law makes no provision for adjustments to take account of individual circumstances in such cases, but indiscriminately takes sex as its point of reference, this cannot constitute a relevant criterion for the assessment of workplace accident compensation.

48. Aside from such factual misgivings about the use of sex as a criterion, there are also normative objections which indicate that its use as such is not permissible. I shall look at these below.

20 — It is also worth noting that, statistically, life expectancy can vary enormously, not only across the world but also between individual geographical areas in one and the same territory.

iii) Normative objections to the relevance of sex-based projections of life expectancy

49. The Finnish criterion for projections of life expectancy, which is based on sex, must be evaluated in the light of the normative parameters that flow from EU primary law. The fundamental principles of the European Union include, in accordance with Article 2 TEU, inter alia, the principle of equality between men and women, which, moreover, is enshrined as a fundamental right in Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

50. As I previously made clear in my Opinion in *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2010:564), given the importance that attaches to the principle of equality between men and women, and in light of the system of values espoused by EU law, there is no justification for using sex, on the basis of a one-size-fits-all approach to statistics, as a kind of substitute criterion for other distinguishing characteristics which are less easily identifiable but, ultimately, of genuine relevance for insurance purposes.

51. If certain characteristics do have a decisive impact on life expectancy,[21] they must, rather, be identified as such, evaluated appropriately and assigned to specific groups of persons on a gender-neutral basis. They may not, therefore, in accordance with the scheme of the law, be assigned to a particular sex unless the characteristic concerned is invariable and biologically specific. If that were not the case, individuals to whom the characteristic in question does not apply would be disadvantaged or favoured for no good reason other than their sex.

52. Moreover, in the context of the normative assessment of actuarial criteria based on sex, it must be borne in mind that Article 21 of the Charter refers to the prohibition of discrimination on grounds of sex in the same breath, as it were, as the prohibition of discrimination on grounds of race, colour and ethnic origin.

53. Rules which are directly linked to gender — with the exception of those based on unquestionably biological characteristics such as maternity — are, therefore, in accordance with the system of values adopted by the EU legislature, just as unacceptable as those based on race or colour and are in consequence not to be permitted in the field of social security law, whatever the findings of any statistical surveys may be.[22]

54. If the position were otherwise, there would be, on the one hand, a risk that the prohibition on discrimination laid down by the Charter would be undermined under the veil of statistics and, on the other hand, a risk of unsuitable outcomes in individual cases if reliance were mechanically placed on statistics which are ultimately irrelevant to the case in question rather than on material criteria which are relevant for the purposes of projections of life expectancy.

iv) Interim conclusion with respect to the first question referred

55. Accordingly, there is no support either in Directive 79/7 or in primary law for the inference of grounds for justification for unequal treatment on grounds of sex-specific statistics.

56. Article 4(1) of Directive 79/7 is therefore to be interpreted as precluding national legislation under which the different life expectancies of men and women are used as an actuarial criterion in the calculation of the statutory social security benefits payable following an accident at work, if, when that criterion is applied, the single settlement payable to a man proves to be lower than the compensation which a woman of the same age would receive in a comparable situation.

21 — See points 66 and 67 of my Opinion in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2010:564.

22 — See points 49 to 51 and points 62 to 67 of my Opinion in *Association belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2010:564.

57. In the light of the foregoing, the Finnish courts seised of the insurance proceedings at issue — at least in so far as those proceedings were brought against a State authority or a body to be regarded as equivalent to such an authority — should actually have refrained from applying the discriminatory provision and should instead, in the absence of a non-discriminatory provision of national law, have awarded Mr X the higher amount reserved under Finnish law for women. [23]

58. This did not happen, however.

59. Since the proceedings before the Social Court have since been definitively closed, the question now arises, at least in so far as the judgment of the Court of Justice in the present case does not constitute a ground for reopening the decision in those proceedings [24] with a view to allowing the Finnish courts to adjudicate on Mr X's case in a manner consistent with EU law, as to whether the Finnish State is now liable for the difference plus interest which, in accordance with Finnish law and contrary to EU law, was withheld from Mr X.

B – *Second question referred*

60. By its second question, the national court seeks to ascertain, in essence, whether, so far as concerns the rules governing lump-sum compensation for accidents at work, the Republic of Finland can be accused of having committed a breach of EU law which is sufficiently serious to render it liable.

61. Clearly militating against such a breach, in the view of the referring court, are the lack of any relevant case-law in respect of Directive 79/7, the transitional period provided for in *Test-Achats* (C-236/09, EU:C:2011:100) and the fact that the national legislature assumed, in the light of Directives 2004/113 and 2006/54, that there was no objection in law to actuarial considerations based on sex (Section 2).

62. Before that view can be evaluated in detail, we must first clarify (Section 1) which point in time is to be regarded as relevant in relation to any breach of EU law by the Republic of Finland. That question is important for the purposes of establishing the framework of EU law against which the existence of a serious breach is assessed.

1. Relevant point in time and legal framework for assessing the existence of a breach of EU law

63. The potentially relevant points in time are the date of the accident at work (1991), the date on which the benefit was granted by the insurer (2005) and the date on which the action was definitively dismissed by the Social Court (2008).

64. In this connection, it must be borne in mind, first of all, that the breach of EU law affecting Mr X did not come into being until 2008, when the Finnish court gave its final decision.

65. Secondly, it must be pointed out that, at that point in time, there was no case-law on the question of whether actuarial considerations based on sex are permissible within the framework of Directive 79/7; indeed, the Commission had not even seen the need to bring proceedings for failure to fulfil obligations against the Republic of Finland.

23 — See, in that regard, the judgment in *Jonkman and Others*, C-231/06 to C-233/06, EU:C:2007:373, paragraph 39.

24 — See, in that regard, *Kühne & Heitz*, C-453/00, EU:C:2004:17, paragraphs 26 to 28.

66. It is worth noting, furthermore, that, in matters of insurance law related to Directive 79/7, that is to say those dealt with in Directives 2004/113 and 2006/54, the EU legislature approved actuarial considerations based on sex, subject to certain conditions, in 2004 and 2006, and the Commission itself was still fiercely defending that point of view in *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100) in 2010. A lasting rethink of that position seems to have been instituted only in the context of the present case, the judgment in which, however, was not given until 2011, that is to say some three years after the final decision of the Finnish Social Court.

67. On the basis of those presuppositions, I shall now examine whether it must be assumed that a serious breach of EU law giving rise to liability was committed in 2008.

2. Existence of a sufficiently serious breach?

68. Damage caused to an individual as a result of a breach of EU law must be compensated where, first, the rule of law infringed is intended to confer rights on individuals, secondly, the breach is sufficiently serious and, thirdly, there is a direct causal link between the breach of the obligation incumbent on the State and the damage sustained by the injured parties. [25]

69. The national court's question is concerned only with the second of the aforementioned conditions of liability. It is therefore necessary only to clarify what is meant by a 'sufficiently serious' breach and whether such a breach was committed in this case.

a) Meaning of a sufficiently serious breach

70. In considering the question to be examined by the referring court, of whether it is to be assumed that a breach of EU law sufficiently serious to render the State liable has been committed, the referring court must, as part of an overall analysis, take into account, first, the clarity and precision of the provision infringed, secondly, the extent of the discretion which the infringed provision leaves to the national or European Union authorities, thirdly, the question of whether or not the breach was committed deliberately or whether or not the damage was caused deliberately, fourthly, whether any error of law was excusable or inexcusable, and, fifthly, the fact that the conduct of a European Union body may have contributed towards the omission, adoption or retention of national measures or practices in a manner contrary to EU law. [26]

71. Those factors must now be examined and combined with the issue raised in the second question to form an overall analysis of the matter.

b) Sufficiently serious breach of Article 4 of Directive 79/7 by the Republic of Finland?

72. While the first two factors set out in point 70 may point to a sufficiently serious breach in the present case, the three that follow are more indicative of the contrary.

73. For, even if the wording and legislative context of Directive 79/7 preclude actuarial considerations based on the sex of the person concerned with sufficient clarity and precision, and without leaving any discretion to the national legislature, the Finnish legislature and the Finnish courts almost certainly cannot be assumed to have committed a deliberate and wholly inexcusable breach of law in 2008.

25 — See, inter alia, *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428 and *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 51.

26 — *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996 :79, paragraph 57.

74. Rather, the lack of any relevant case-law and the fact that no proceedings for failure to fulfil obligations were brought to challenge such discrimination, on the one hand, and the trend, in evidence from 2004, for the EU legislature largely to permit actuarial considerations, on the other hand, indicated that, in 2008 in any event, that is to say before the judgment in *Test-Achats* (C-236/09, EU:C:2011:100), the Finnish legislation was not, despite the unambiguous wording of Directive 79/7, contrary to EU law so clearly as to compel the assumption of a deliberate and wholly inexcusable error of law by the Finnish authorities.

75. It is true that the institution of proceedings for failure to fulfil obligations lies at the discretion of the Commission. If, however, relevant proceedings for failure to fulfil obligations have been brought, there may for that reason alone be good grounds for assuming that, in the case of ongoing unlawful conduct, a Member State tolerates and may even approve breaches of EU law. If, on the other hand, no proceedings for failure to fulfil obligations have been brought, the Member State in question, although not exonerated on that ground alone, also does not necessarily lay itself open to the accusation of having knowingly allowed any breaches of EU law to continue.

76. Furthermore, in the present case, the Member State can hardly be accused of committing an inexcusable breach of EU law such as to render it liable when the EU legislature itself committed the same breach in a different but similar context, that is to say in Directive 2004/113. It would be a step too far to expect the Member States, in the enactment of their national legislation, to conduct themselves more prudently and conscientiously than the EU legislature itself. Indeed, the legislative activity of the EU legislature in the period between 2004 and 2008 may itself have lulled the Finnish legislature into the false sense of security that the parameters which it had selected were in conformity with EU law in the context of social security too.

77. In the light of the foregoing, the answer to the second question referred must be that the assessment of the conditions governing Member State liability is a matter for the national courts, but that, in order to assist the Member State concerned in connection with the question of whether a sufficiently serious breach of EU law has been committed, it is important to take into consideration in particular that:

— in its case-law, the Court has not expressly taken a position on whether actuarial factors based on sex may be taken into account in the calculation of benefits under statutory social security schemes which fall within the scope of Directive 79/7;

— the Court did not declare invalid Article 5(2) of Directive 2004/113, which allows such factors to be taken into account, until its judgment in *Test-Achats*, (C-236/09, EU:C:2011:100) and, moreover, held that there should be a transitional period before that invalidity became effective; and

— in Directive 2004/113 and Directive 2006/54, the EU legislature allowed such factors to be taken into account in the calculation of benefits within the meaning of those directives, subject to certain conditions, and the national legislature assumed on that basis that the factors in question could also be taken into account in the field of the statutory social security schemes at issue in the present case.

78. Against that background, we must look, finally, at the question of whether it is appropriate to limit the temporal effects of the judgment in the present case.

C – *Temporal limitations of the effects of the judgment?*

79. It must be pointed out first of all in this regard that, when interpreting a provision of EU law, the Court of Justice, by its judgment, explains and clarifies the meaning and scope of that provision as it should have been understood and applied from the time of its entry into force. Accordingly, a limitation of the temporal effects of such a judgment is an exceptional measure which, inter alia, presupposes that there would otherwise be a risk of serious economic consequences. [27]

80. The parties to the proceedings have not adduced any conclusive evidence in this regard.

81. Militating against the existence of serious economic consequences in the present case is, rather, the fact that the provision of the Finnish accident insurance legislation which is contrary to EU law is primarily applicable to small claims cases. It is unlikely that these will impose an enormous additional cost burden on the social security system, even if the more favourable lump-sum value previously reserved for women is henceforth applicable also to men.

82. Accordingly, there is no reason to limit the temporal effects of the judgment in the present case.

V – **Conclusion**

83. In light of the foregoing, I propose that the Court should answer as follows the two questions referred for a preliminary ruling:

(1) 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 national legislation under which the different life expectancies of men and women are used as an actuarial criterion in the calculation of the statutory social security benefits payable following an accident at work, if, when that criterion is applied, the single settlement payable to a man proves to be lower than the compensation which a woman of the same age would receive in a comparable situation.

(2) The assessment of conditions governing Member State liability is a matter for the national courts. In order to assist the Member State concerned in connection with the question of whether a sufficiently serious breach of EU law has been committed, however, it is important to take into consideration in particular that:

— in its case-law, the Court has not expressly taken a position on whether actuarial factors based on sex may be taken into account in the calculation of benefits under statutory social security schemes which fall within the scope of Directive 79/7;

— the Court did not declare invalid Article 5(2) of Directive 2004/113, which allows such factors to be taken into account, until its judgment in *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100), and, moreover, held that there should be a transitional period before that invalidity became effective; and

— in Directive 2004/113 and Directive 2006/54, the EU legislature allowed such factors to be taken into account in the calculation of benefits within the meaning of those directives, subject to certain conditions, and the national legislature assumed on that basis that the factors in question could also be taken into account in the field of the statutory social security schemes at issue in the present case.

27 — See, in that regard, *Endress*, C-209/12, EU:C:2013:864, paragraphs 33 to 40.