Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 24 February 2022 [1]

Case C-625/20

KM
v
Instituto Nacional de la Seguridad Social (INSS)

(Request for a preliminary ruling from the Juzgado de lo Social nº 26 de Barcelona (Social Court No 26, Barcelona, Spain))

(Reference for a preliminary ruling – Social policy – Equal treatment for men and women in matters of social security – Directive 79/7/EEC – Article 4(1) – Calculation of benefits – Refusal to award two permanent incapacity allowances under the same social security scheme – The award of two or more incapacity benefits obtained under different social security schemes – Relevant comparators)

1. According to the famous quote attributed to Mark Twain, 'there are three kinds of lies: lies, damned lies, and statistics'. [2] That quote serves to illustrate the persuasive power of numbers in the field of EU anti-discrimination law, whilst also calling for caution when an argument is built entirely on them. On the one hand, numbers and statistical data have a prominent role to play in establishing indirect discrimination, given that a person who claims to suffer from it may have to prove that the group of persons to which he or she belongs is put at a particular disadvantage when compared to a different group. On the other hand, the use of numbers and statistics can be problematic in order to establish indirect discrimination, because the result may vary depending on the reference group used to make the comparison. As one author eloquently put it, 'discrimination is not a static phenomenon', it 'is changeable, it adapts to new circumstances; under attack it becomes subtle, even elusive'. [3] Therefore, it is of paramount importance to identify those groups in a specific and precise manner.

2. The dispute in the main proceedings is between KM, an employee, and the Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute, Spain) concerning the non-recognition of two subsequent occupational invalidity allowances under a single social security scheme.

[1] Original language: English.

[2] Twain, M., 'Chapters from My Autobiography – XX', North American Review No 618, July 5, 1907. It appears, however, that the real origin of the quote can be attributed to many other persons.

[3] Khaitan, T., 'Indirect discrimination', in Lippert-Rasmussen, K. (ed.), *The Routledge Handbook of the Ethics of Discrimination*, Routledge, Abingdon, 2017. Accessed 1 February 2022, Routledge Handbooks Online.

3. More specifically, by the present request for a preliminary ruling, the referring court – the Juzgado de lo Social nº 26 de Barcelona (Social Court No 26, Barcelona, Spain) – is asking the Court for guidance as to which specific proportion of persons should be taken into account when deciding whether the national legislation at hand discriminates indirectly on grounds of sex and gender. The referring court notes that women account for 48.09% of the workers registered in the Spanish General Social Security Scheme (Régimen General de la Seguridad Social) ('the RGSS') and for 36.15% of the workers affiliated to the Special Scheme for Self-Employed Workers (Régimen Especial de Trabajadores Autónomos) ('the RETA').[4] Therefore, the referring court considers that women might be less likely than men to combine the benefits of those two schemes.

4. Consequently, the Court is being called upon to decide whether women are indirectly discriminated on grounds of sex and gender by the Spanish social security system that allows the award of two benefits under different social security schemes, whilst prohibiting the receipt of two benefits under a single scheme, even where the eligibility requirements for both benefits are satisfied.

5. In particular, the Court is asked to determine the appropriate methodology for the purposes of establishing indirect discrimination within the meaning of Article 4 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.[5] As requested by the Court, in this Opinion, I shall focus on the abovementioned methodological aspects in the context of occupational invalidity allowances awarded to employees.

I. Legal framework

A. European Union law

1. Directive 79/7

6. 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".'

7. Article 3(1)(a) of that directive states that it shall apply to statutory schemes which provide protection against, amongst other risks, those of 'sickness' and 'invalidity'.

[4] According to the preliminary reference, those were the data available on 31 January 2020.

[5] OJ 1979 L 6, p. 24.

8. Article 4(1) of Directive 79/7 provides:

'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 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. Directive 2006/54

9. Article 1 of Directive 2006/54/EC[6] provides:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

…

(b) working conditions, including pay;

(c) occupational social security schemes.

…'

10. Article 2(1)(f) of that directive defines 'occupational social security schemes' 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, areas 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, whether membership of such schemes is compulsory or optional'.

B. Spanish law

1. The LGSS

11. Article 9(1) of the Ley General de la Seguridad Social (General law on social security), in the consolidated version approved by Real Decreto Legislativo 8/2015 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (Royal Legislative Decree No 8/2015

[6] Directive 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).

approving the revised text of the General law on social security) of 30 October 2015[7] ('the LGSS'), provides that the social security system is to consist of the general scheme, falling under Title II of that law and the special schemes referred to in Article 10 of that law.

12. Article 10(1) of the LGSS states that special schemes are to be established for occupational activities which, by reason of their nature, special conditions of time and place in which they are carried out, or of the type of production process, require the establishment of such schemes in order to ensure the proper application of social security benefits. Article 10(2)(a) of the LGSS provides that, among others, self-employed workers are to be enrolled in special schemes.

13. Article 163 of the LGSS, entitled 'Incompatibility of allowances', states in its paragraph 1 that allowances under the general social security scheme are to be incompatible with one another, unless expressly provided otherwise. In the event of incompatibility, the recipient must opt for one of them.

2. Decree No 2530/1970

14. Article 34 of Decreto 2530/1970 por el que se regula el régimen especial de la Seguridad Social de los trabajadores por cuenta propia o autónomos (Decree No 2530/1970 governing the special social security scheme for self-employed persons) of 20 August 1970,[8] states that the allowances granted by that special scheme to its beneficiaries are to be incompatible with each other, unless expressly provided otherwise. That article adds that anyone who might be entitled to two or more allowances is to opt for one of them.

3. Royal Decree No 691/1991

15. Real Decreto 691/1991 sobre cómputo recíproco de cuotas entre regímenes de Seguridad Social (Royal Decree No 691/1991 on the reciprocal calculation of contributions between social security schemes) of 12 April 1991[9] provides in its Article 4(1) that, in the case of permanent invalidity, where the person has completed, successively or alternately, contribution periods under more than one scheme – general scheme and special schemes of the social security system – those periods, and those treated as such, which have been completed under the rules governing them, may be aggregated at the request of the person concerned, provided that they do not overlap, in order to acquire the right to an allowance and to determine, where appropriate, the applicable rate for years of contribution or service.

4. Judgment No 3038/2013

16. According to judgment No 3038/2013 of 14 July 2014 of the Sala de lo Social del Tribunal Supremo (Social Division of the Supreme Court, Spain), the two permanent total incapacity allowances would be compatible if they had been awarded under different schemes.

7 BOE No 261 of 31 October 2015.

8 BOE No 221 of 15 September 1970.

9 BOE No 104 of 1 May 1991.

II. The facts of the main proceedings and the questions referred for a preliminary ruling

17. KM worked as an administrative assistant and was in that regard affiliated, from May 1989 to April 1994, to the Spanish general social security scheme, the RGSS.

18. By decision of the INSS of 2 March 1999, KM was considered as having a permanent total incapacity brought about by a non-occupational sickness, which prevented her from carrying on her habitual occupation. Thus, she was entitled to receive the corresponding benefit with effect from 19 November 1998. The benefit was calculated using the contribution to that scheme during the abovementioned period. [10]

19. KM's current habitual occupation is that of day-care assistant and she has been registered to the RGSS in that regard since February 2015. She began a period of temporary incapacity for work on 18 July 2016.

20. On 20 March 2018, the INSS issued a decision in which it declared that KM had a permanent total incapacity as the result of a non-occupational accident in which she had fractured a femur. INSS granted her the corresponding allowance under the RGSS, using the contribution bases for the period from February 2015 to January 2017. [11] The INSS considered that, pursuant to Article 163(1) of the LGSS, the benefits awarded in 1999 and in 2018 were incompatible. Thus, it decided that the applicant was entitled to only one of them.

21. By decision of 23 January 2019, the Dirección Provincial del INSS de Barcelona (Provincial Directorate of the INSS of Barcelona, Spain) rejected the complaint lodged by the applicant.

22. On 12 March 2019, KM challenged that decision before the referring court on the ground that Article 163(1) of the LGSS is contrary to Article 4 of Directive 79/7 and Article 5 of Directive 2006/54. In her view, she should be awarded two permanent incapacity benefits cumulatively. The applicant contends that, as the proportion of women in the special schemes – and, namely, in the RETA – is far lower than the proportion of men, [12] the rules regarding the incompatibility of benefits lead to indirect discrimination on grounds of sex or gender. Therefore, those rules make it harder for women to cumulate benefits, since they make up a proportionally smaller part of special schemes than men.

23. The referring court notes that the dismissal by the INSS of the claims of the applicant is consistent with the recent case-law of the Tribunal Supremo (Supreme Court, Spain), [13] according to which two benefits are deemed compatible where they are awarded under different schemes (usually the RGSS and the RETA, since those are the two largest schemes in terms of membership) [14] and for the same incapacity to work. Nevertheless, under the same scheme

[10] At the hearing, the INSS explained that, in order to calculate such a benefit in relation to the RGSS, it has to take into account the last eight years of the contribution period.

[11] At the hearing, the INSS explained that it has to take into account the contribution of the last 24 months in order to calculate that benefit.

[12] As at 31 January 2020, women represented 36.15% of the workers registered with the RETA.

[13] See point 16 above.

[14] The referring court explains that the RGSS is the scheme that covers employed workers in most sectors and that, on 31 January 2020, it had over 14.5 million members. In that scheme, the distribution between the sexes is more or less equal, with women representing 48.09%. By contrast, in the RETA, which covers self-employed workers in most sectors and which also has a large number of members (over 3 million members), women represent only 36.15%, which does not reflect the proportion of women in either the total national population or the active population.

(usually the RGSS, which is the largest scheme in terms of membership), benefits are incompatible, even though the entitlement to the benefits has been earned through separate contributions.

24. The referring court harbours doubts as to whether such a system constitutes indirect discrimination on grounds of sex prohibited by Article 4 of Directive 79/7 and by Article 5 of Directive 2006/54. The referring court adds that, in the main proceedings, the applicant has proved that she has made sufficient separate contributions to qualify for both benefits, the one awarded in 1999 and the one awarded in 2018. [15]

25. The referring courts points out that the case-law of the Tribunal Supremo (Supreme Court) on the legislation concerning the incompatibility of benefits appears neutral as regards sex, since it makes no distinction on this point but only according to the number of social security schemes to which the person concerned has contributed. However, the referring court casts doubt on the application of that case-law in that it has a greater impact on female workers. In the two largest schemes in terms of membership – the RGSS and the RETA – the benefit of combining different schemes would be far more feasible for men than women, since the proportion of men in the RETA is far higher than the proportion of women. [16] Accordingly, since the compatibility of two allowances is possible only for those acquired under two different schemes and given the greater proportion of men in the RETA, it would appear that it is much easier for men than for women to achieve such compatibility.

26. Moreover, according to the referring court, the lower presence of women in the RETA reflects the fact that they have traditionally found it harder to pursue activities entailing self-employment due to the societal role of women as carers and homemakers. As a result, the referring court considers whether the national rule at issue may lead to indirect discrimination on grounds not only of sex, but also of gender.

27. Finally, the referring court explains that two permanent total incapacity benefits cannot be awarded in respect of the same incapacity under the same scheme. However, it is possible to receive two compatible permanent total incapacity benefits for the same illness or injury if they are awarded under two different schemes.

28. In those circumstances, the Juzgado de lo Social nº 26 de Barcelona (Social Court No 26, Barcelona) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is the Spanish rule on compatibility of benefits established in Article 163(1) of [the LGSS], as interpreted by case-law, which prevents two permanent disability benefits awarded under the same Social Security scheme being deemed compatible, while benefits awarded under different schemes are deemed compatible, even if, in both cases, entitlement has been earned by virtue of separate contributions, contrary to the European rules established in Article 4 of

[15] In that regard, the referring court notes that the permanent *total* incapacity benefit awarded in 1999 was granted on the basis of prior contributions, while the benefit awarded in 2018 did not require a prior contribution period, because it was triggered by a non-occupational accident, meaning that all that was needed was to be registered in the social security system. The referring court also points out that the situation would be different if the second allowance had been awarded on grounds of permanent *absolute* incapacity, because in that case the benefit would be compensation for incapacity to perform work of any kind, which would include incapacity to continue in a specific occupation.

[16] See footnote 14 above.

[Directive 79/7], and Article 5 of [Directive 2006/54], given that the Spanish legislation may give rise to indirect discrimination on grounds of sex or gender, having regard to gender distribution in the different Spanish Social Security schemes?

(2) If the reply to the first question is in the negative, could the Spanish legislation be contrary to the aforesaid European legislation if the two benefits relate to different injuries or illnesses?'

29. Written observations were submitted to the Court by KM, the INSS, the Spanish Government and the European Commission. The Court put a number of written questions to be answered in writing to the INSS and to the Spanish Government. Those parties replied on 6 December 2021. All of the abovementioned parties presented oral arguments before the Court at the hearing on 12 January 2022.

III. Analysis

A. Preliminary remarks

30. At the outset, I should, first, note that the questions referred for a preliminary ruling relate to provisions of both Directive 79/7 and Directive 2006/54. The referring court states that it has mentioned the latter directive in its preliminary reference in the event that it is applicable. The INSS, the Spanish Government and the Commission consider that Directive 2006/54 does not appear to be applicable to the incapacity allowance at issue in the main proceedings, since its scope is limited to occupational social security schemes.

31. In that regard, I must stress that EU law distinguishes between occupational pension schemes, which come under the concept of 'pay' in Article 157(1) and (2) TFEU,[17] and statutory social security benefit schemes, which do not.[18] It is settled case-law that such a contributory disability allowance does not come under the notion of 'pay' within the meaning of Article 157(1) and (2) TFEU or of Directive 2006/54.[19]

32. In the present case, the allowances at issue in the main proceedings are a part of a statutory scheme and provide protection against the risks of sickness and invalidity. Such allowances appear to be less dependent on an employment relationship than on social considerations.[20] As stated by the referring court in the order for reference, the benefit that was awarded to KM in 2018 did not require a prior contribution period, because it was triggered by a non-occupational accident, meaning that all that was needed was to be registered in the social security system. In that regard, according to Article 1 of Directive 79/7, the purpose of that directive is the progressive implementation, in the field of social security and other elements of

[17] The Court has held that the term 'pay' within the meaning of Article 157 TFEU covers pensions which depend on the employment relationship between worker and employer, excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy. Accordingly, that concept cannot be extended to encompass social security schemes or benefits – such as retirement pensions – which are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned and which are obligatorily applicable to general categories of employee (see judgment of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 20 and the case-law cited).

[18] See, to that effect, Opinion of Advocate General Bobek in *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:696, points 24 and 25).

[19] See, to that effect, judgments 13 February 1996, *Gillespie and Others* (C-342/93, EU:C:1996:46, paragraph 14); of 22 November 2012, *Elbal Moreno* (C-385/11, EU:C:2012:746, paragraph 25); and of 14 July 2016, *Ornano* (C-335/15, EU:C:2016:564, paragraph 38).

[20] See, by analogy, judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075, paragraph 29).

social protection provided for in Article 3 thereof, of the principle of equal treatment for men and women in matters of social security. Thus, I take the view that the allowances at issue in the main proceedings constitute protection against two of the risks listed in Article 3(1) of Directive 79/7, namely sickness and invalidity, to which only that directive is applicable.[21] Conversely, those allowances do not fall within the scope of Directive 2006/54.

33. I shall therefore address the questions by reference to Directive 79/7 alone.

34. Second, with regard to the question whether the interpretation of a legal provision by the supreme court of a Member State must be regarded as falling within the scope of Directive 79/7, it should be borne in mind that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts and notably, by national supreme courts.[22] Therefore, the fact that the national rule at issue constitutes a judicial interpretation[23] by the Tribunal Supremo (Supreme Court) cannot remove that national rule – or the national legislation underpinning it – from the application of the provisions of that directive.

35. Third, as pointed out by the Commission, it is worth noting that the second question referred for a preliminary ruling does not require a separate examination by the Court, since it constitutes a subset of the first question. The second question merely specifies the situation at issue in the main proceedings, namely the situation in which two successive incapacities have arisen because of different sickness and invalidity that is already covered by the first question.

36. Because the examination of the possibility of a succession of two incapacities caused by the same sickness or invalidity would be a hypothetical exercise, I take the view that there is no need to assess that issue separately.

B. Assessment of the questions referred

37. By its first and second questions, which should be examined together as they concern the same issue, the referring court is asking, in essence, whether Article 4(1) of Directive 79/7 is to be interpreted as precluding a national rule which allows the award of two or more incapacity benefits obtained under different social security schemes due to two or more incapacities, whilst prohibiting the receipt of two or more such benefits under a single scheme, despite the fact that the eligibility requirements for all those benefits are satisfied.

38. At the outset, I must emphasise that the Court has consistently held that it is for the Member States to organise their social security systems and, in the absence of EU harmonisation, to determine the conditions for the grant of social security benefits. In so doing, the Member States must nevertheless comply with EU law.[24]

39. Pursuant to Article 4(1) of Directive 79/7, the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference, in particular as regards the scope of social security schemes, the conditions of access thereto and the

[21] In addition, it is apparent from subparagraph (c) of the second paragraph of Article 1 of Directive 2006/54, read in conjunction with Article 2(1)(f) thereof, that that directive does not apply to statutory schemes governed by Directive 79/7.

[22] See, inter alia, judgments of 8 June 1994, *Commission* v *United Kingdom* (C-382/92, EU:C:1994:233, paragraph 36), and of 15 March 2018, *Blanco Marqués* (C-431/16, EU:C:2018:189, paragraph 46).

[23] See point 16 above.

[24] See, inter alia, judgments of 4 December 2003, *Kristiansen* (C-92/02, EU:C:2003:652, paragraph 31); of 4 February 2015, *Melchior* (C-647/13, EU:C:2015:54, paragraph 21); and of 10 September 2015, *Wojciechowski* (C-408/14, EU:C:2015:591, paragraph 35).

calculation of social security benefits. When exercising their power in matters of social security, the Member States must comply with that provision which gives concrete expression to the general principle of non-discrimination now enshrined in Article 21 of the Charter. [25]

40. According to the Court's settled case-law, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations, unless such treatment is objectively justified. [26]

41. In the present case, one can rule out that the national measure at issue gives rise to direct discrimination. That measure precludes the receipt of two benefits under a single social security scheme, even where the eligibility requirements for both benefits are satisfied. Since that measure applies without distinction to both male and female workers, it is not directly discriminatory on grounds of sex. It is therefore necessary to ascertain whether it may constitute indirect discrimination. [27]

42. Indirect discrimination is not defined by Directive 79/7. However, according to settled case-law, there is indirect discrimination based on sex in a situation where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage when compared with persons of the other sex. [28]

43. It follows from that definition that the existence of indirect discrimination involves a three-step analysis relating, first, to the neutrality of the provision, criterion or practice at issue, second, to the determination of the persons concerned and those who are in a comparable situation and, third, to the disadvantage brought about by such provision, criterion or practice.

44. In the present case, it is clear to me that the first step of the analysis does not raise any issues, since it is uncontested that the national rule at issue, which applies to both sexes in an indistinctive way, is completely neutral. Therefore, the present Opinion will focus on the remaining two steps. The Court must begin by determining the persons who are to be compared. Next, the Court is to examine the question whether the national rule at issue puts persons of one sex at a particular disadvantage. Since the Court has requested an Opinion that is focused solely on those two questions, I shall not examine the issue of possible justifications for the alleged disadvantage.

[25] See, to that effect, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 38 and the case-law cited).

[26] See, inter alia, judgments of 13 February 1996, *Gillespie and Others* (C-342/93, EU:C:1996:46, paragraph 16), and of 8 May 2019, *Praxair MRC* (C-486/18, EU:C:2019:379, paragraph 73).

[27] See, inter alia, judgments of 27 October 1998, *Boyle and Others* (C-411/96, EU:C:1998:506, paragraph 39), and of 16 July 2009, *Gómez-Limón Sánchez-Camacho* (C-537/07, EU:C:2009:462, paragraph 53).

[28] See, to that effect, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 37 and the case-law cited). While, in the past case-law, the Court defined 'indirect discrimination' as a situation 'where a national measure, albeit formulated in neutral terms, *works to the disadvantage* of far more women than men' (emphasis added) (see, in particular, judgments of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 56 and the case-law cited, and of 22 November 2012, *Elbal Moreno*, C-385/11, EU:C:2012:746, paragraph 29), the current case-law definition is identical to that of Article 2(1)(b) of Directive 2006/54. Regarding the change of formulation, see Opinion of Advocate General Szpunar in *TGSS (Domestic worker unemployment)* (C-389/20, EU:C:2021:777, footnote 28).

1. The determination of the persons who can be regarded as being in a comparable situation to that of the applicant

45. KM submits, in essence, that the INSS infringed the principle of non-discrimination on grounds of sex, since two benefits awarded under different social security schemes are compatible for identical incapacities, whilst the award of the same two benefits under a single scheme, such as the RGSS, is precluded. The INSS and the Spanish Government argue, in essence, that persons who have contributed to social security regimes other than the RGSS are in a different situation from those who have contributed solely to the RGSS.

46. In order to determine whether two situations are comparable, account must be taken of the subject matter and of the purpose of the legislation at issue. Only then may the Court turn to identifying the relevant comparators.

(a) The subject matter and purpose of the national legislation at issue

47. I should recall that it is settled case-law that the comparability of situations must be assessed not in a global and abstract, but in a specific and concrete manner. That assessment must look at all the elements which characterise those situations, in the light, in particular, of the subject matter and purpose of the national legislation which draws the distinction at issue.[29] Furthermore, the requirement relating to the comparability of situations does not require those situations to be identical, but only similar.[30]

48. In the present case, it is apparent from the case file before the Court that the decision at issue relates to the award of two permanent incapacity allowances to KM. Therefore, the subject matter at issue relates to the question whether a person with two or more subsequent incapacities is entitled to receive one or more social security benefits. Subject to verifications to be carried out by the referring court taking into account the objectives pursued by the national legislation granting those benefits, it appears, prima facie, that the purpose of such benefits is to grant social protection to the person affiliated to a social security scheme against risks related to sickness and/or invalidity.

49. Taking into account the subject matter and the purpose of the benefits at issue, there is no difference between a person who suffers from two or more subsequent incapacities to work and has contributed solely to one social security scheme, such as the RGSS, and a person who suffers from those same incapacities but has contributed to many schemes. Both categories of persons require the same social protection against risks related to sickness and/or invalidity.

50. The INSS instead argued and put great emphasis at the hearing on the fact that the persons having contributed to the RGSS and the persons having contributed to the RETA are in a different situation, since the risks covered by those schemes are not the same. I do not agree. I believe on

[29] See, to that effect, judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728, paragraphs 25 and 26); of 16 July 2015, *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, paragraphs 89 and 90); and of 9 March 2017, *Milkova* (C-406/15, EU:C:2017:198, paragraphs 56 and 57 and the case-law cited). See, also, judgments of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others* (C-236/09, EU:C:2011:100, paragraph 29); of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492, paragraph 42); and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 42).

[30] See, to that effect, judgments of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 42), and of 19 July 2017, *Abercrombie & Fitch Italia* (C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited).

the contrary that the comparability assessment for the purposes of Article 4(1) of Directive 79/7 should not be made according to such risks, but according to the entitlement of the social protection.

51. I therefore take the view that a person who suffers from two or more subsequent incapacities to work and has contributed solely to one social security scheme, such as the RGSS, and a person who suffers from those same incapacities but has contributed to many schemes are in a comparable situation as regards the social protection that they require.

(b) The 'disadvantaged group' and its comparator

52. In *Seymour-Smith*,[31] the Court held that the best approach to the comparison of statistics is to consider, on the one hand, the respective proportions of men in the workforce able to satisfy the requirement at issue and the proportions of men unable to do so, and, on the other, to compare those proportions as regards the proportions of women in the workforce. It follows that the situation of the persons who can qualify for a certain right has to be compared to the situation of those who are unable to do so.[32]

53. That approach was recently applied by the Court in *YS* where it was asked, in essence, whether men, as the primary recipients of particularly large pensions compared to women who received substantially smaller pensions on average, were indirectly discriminated against by Austrian legislation which introduced, inter alia, a contribution from particularly large 'special pensions' in order to secure the pension revenue.[33] In order to answer that question, the Court identified, in the first place, the disadvantaged persons at issue. That group of people encompassed the former employees of State-controlled undertakings who were receiving a 'direct defined benefit pension', the amount of which exceeded certain thresholds.[34] The Court then went on to identify the comparator which were the persons receiving an occupational pension from the Federal State or the province in question. In so doing, the Court explicitly excluded former employees of undertakings not controlled by the State and persons receiving an occupational pension other than a 'direct defined benefit pension', such as a pension fund or life insurance policy payments.[35] As a result, since the Court excludes those persons who are not directly concerned by the rule at issue, it seems to me that it takes a rather strict approach for the purposes of defining the groups to be compared.

54. In the present case, since it is established that KM is a worker who has only contributed to the RGSS, it is apparent from the request for a preliminary ruling that the persons that are potentially put at a disadvantage by the national rule at issue are namely workers affiliated to the RGSS and having two or more subsequent incapacities under that scheme. Therefore, taking into account, first, the abovementioned requirement of specific and concrete assessment of the comparability of the situations[36] and, second, that the relevant criterion is the social security protection of the

[31] Judgment of 9 February 1999 (C-167/97, EU:C:1999:60).

[32] Tobler, C., *Limits and potential of the concept of indirect discrimination*, Directorate-General for Employment, Social Affairs and Inclusion (European Commission), 2009, p. 41. The two groups are labelled the 'qualifiers' and the 'non qualifiers'.

[33] Judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 40).

[34] Judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 44).

[35] Ibid., paragraph 45.

[36] See point 47 above.

persons with two or more subsequent disabilities,[37] I take the view that the disadvantaged group, in the present case, encompasses only the persons with two or more subsequent incapacities who have contributed solely to the RGSS.

55. For the sake of completeness, I should emphasise that, since the main proceedings at issue involve a worker who requests the cumulative award of the benefits relating to two incapacities under the RGSS scheme, the Court should not take into consideration those workers who have solely contributed to schemes other than the RGSS. The group put at a disadvantage in the present case are the workers affiliated to the RGSS – and only the RGSS – who cannot combine the benefits due to two or more incapacities, because those workers are only affiliated to that scheme. Whilst it is true that the Spanish incompatibility rule applies to all the different Spanish social security schemes, the situation of persons who are affiliated to just one of those other schemes and who have solely contributed to that scheme has no relevance to the present case. Contrary to the position of the Commission, I believe that it is only by examining the situation of persons who have contributed to a specific social security scheme – in the present case, the RGSS – that the Court can provide the referring court with a useful answer enabling it to rule in the dispute before it, which concerns namely the benefits awarded to a person having been affiliated for two periods to the RGSS.

56. Next, I turn to finding the comparator for the purposes of determining whether the disadvantaged group that has been identified suffers from indirect discrimination on the grounds of sex. The comparator is, in my view, the persons having also two or more subsequent incapacities but who can combine two or more benefits of different social security schemes, since they have contributed to those schemes.

57. It follows that, as regards the granting of social security benefits to persons with two or more subsequent disabilities, a person having solely contributed to the RGSS, such as KM, is in a situation comparable to that of a person having contributed to two or more social security schemes, such as the RGSS and the RETA. Having determined the disadvantaged group and its comparator, I now turn to an analysis of whether there is a difference in treatment between men and women belonging to those two groups.[38]

2. Difference in treatment between men and women

(a) A comparison of proportions of women and men

58. It is settled case-law that the existence of a particular disadvantage might be established, for example, if it were proved that legislation such as that at issue in the main proceedings is to the disadvantage of a significantly greater proportion of persons of one sex as compared with persons of the other sex.[39] That means that indirect discrimination can be established by any means, including on the basis of statistical evidence.[40] In principle, it is for the national court to determine whether the existence of such a particular disadvantage can be established, since

[37] See point 48 above.

[38] See point 49 above.

[39] See, inter alia, judgments of 14 April 2015, *Cachaldora Fernández* (C-527/13, EU:C:2015:215, paragraph 28 and the case-law cited), and of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraphs 37 and 38 and the case-law cited).

[40] See, inter alia, judgments of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 46), and of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 46).

findings of fact are a matter for the national court.[41] In particular, as mentioned in point 52 of this Opinion, in the context of gender discrimination, the Court has previously held that the best approach to the comparison is to consider the respective *proportions* of men in the workforce affected by the rule at issue and of those not affected by it, and to compare those *proportions* as regards women in the workforce.[42]

59. For example, in *YS*, the Court held, first, that the referring court must take into account all those workers subject to the national legislation in which the difference in treatment has its origin. Second, the Court reiterated that the best approach to the comparison is to compare the respective *proportion* of workers that are and are not affected by the alleged difference in treatment among the men in the workforce who come within the scope of that legislation with the same proportion of women in the workforce coming within its scope.[43]

60. As a result, I believe that the term 'proportion' implies that it is not possible to compare whole numbers,[44] but decimals, fractions, or percentages that reflect the part of a certain group in the whole group.[45] In the present case, for the purposes of examining whether there is a difference in treatment between men and women, the referring court needs to look at the situation of women in relation to that of men. More specifically, it needs to compare the two following specific proportions.

61. First, it has to look at the proportion of the women in the disadvantaged group, that is the group of women that are solely affiliated to the RGSS and having two or more incapacities under that scheme, in relation to the women of the advantaged group, that is the group of women affiliated to two or more social schemes and having two or more incapacities under those schemes.

62. Second, the national court must determine the proportion of men who have two or more incapacities and are unable to combine two or more social security benefits in relation to the number of men with such incapacities but who are able to combine two or more social security benefits.

(b) The specific proportions at issue

63. It appears from the answers to the written questions put by the Court and from the hearing that there is no shortage of data. For example, in their answers to those questions, the INSS and the Spanish Government stated that, as of 10 November 2021, the number of women with multiple incapacities and having contributed solely to the RGSS is 3 388, whilst the number of women with multiple incapacities and having contributed to many social security schemes is 3 460. So the ratio between the number of women in the disadvantaged group and that of women in the advantaged group is approximately one to one. The respective figures for men are 4 047 and 7 723, which means that, for men, that ratio is approximately one to two.

41 See, inter alia, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraphs 37 and 38 and the case-law cited).

42 See, inter alia, judgments of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 59); of 6 December 2007, *Voß* (C-300/06, EU:C:2007:757, paragraph 40); and of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 47).

43 Judgment of 24 September 2020, *YS (Occupational pensions of managerial staff)* (C-223/19, EU:C:2020:753, paragraph 52).

44 A proportion is a type of ratio in which the numerator is included in the denominator and may be expressed as a decimal, a fraction, or a percentage.

45 For example, the Court has explained that is not sufficient to consider the number of persons affected, since that depends on the number of working people active in the Member State as a whole as well as the percentages of men and women employed in that Member State (see, to that effect, judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, EU:C:1999:60, paragraph 59).

64. It is for the referring court to determine whether that statistical evidence is valid, representative and significant.[46] As regards those specific figures, it should ascertain whether they may be taken into consideration,[47] mainly in view of the date of the facts giving rise to the dispute.

65. Moreover, I would like to underline that the argument put forward by KM and highlighted by the referring court as regards the number of male and female affiliates under the RGSS and the RETA schemes is not relevant in the present case. In particular, in its reference for a preliminary ruling, the national court stressed the fact that, on 31 January 2020, women represented 48.09% of the RGSS affiliates, whilst they only represented 36.15% of the affiliates of the RETA.[48] Those figures have no relevance in the present case, since they only relate to the total number of women among all the affiliates of the RGSS and RETA, but do not show the proportion of women or men that are disadvantaged. Nor are those numbers able to establish a causal link between the alleged disadvantage, that is the impossibility of combining two or more benefits under the same scheme, and the gender of the workers at issue.

66. For the same reasons, I take the view that the figures submitted by the INSS and the Spanish Government in their written answers, which relate to the participation rate of men and women in one or many social security schemes in October 2021,[49] should not be taken into account by the Court. As the Commission contended at the hearing, those figures only indicate the persons belonging to one or many social schemes at the moment where those figures were made available, whilst the approach presented in point 63 above includes figures that necessarily provide a better historic perspective, since they involve an occurrence of subsequent incapacities over a period of time making those figures less dependent on purely fortuitous events.[50] Such an approach also has the considerable advantage that the considered proportions are irrelevant to the issue of activities that entail higher risks, such as certain activities carried out by self-employed persons who are covered by the RETA, which was mentioned by the INSS and the Spanish Government at the hearing. When comparing the respective proportions of women and men with multiple incapacities having contributed solely to the RGSS in relation to those having contributed to multiple social security schemes, the groups at issue have already been narrowed down to that of persons with multiple incapacities. Thus, such a comparison relies on proportions of persons having already multiple incapacities and not on absolute numbers.

67. Should the national court decide to take into account the data mentioned in point 63 above, it must assess whether the proportion of women with two or more incapacities having contributed solely to the RGSS in relation to women with multiple incapacities having contributed to two or more social security schemes is '*considerably larger*' than that of men to such an extent that it constitutes a 'particular disadvantage' within the meaning of the case-law of the Court.[51]

46 See, to that effect, judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 45).

47 See judgment of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 27 and the case-law cited), and Opinion of Advocate General Szpunar in *TGSS (Domestic worker unemployment)* (C-389/20, EU:C:2021:777, point 56).

48 For specific numbers, see point 24 and footnote 14 above.

49 The INSS and the Spanish Government presented the Court with figures from October 2021, which show that the number of men exercising solely one activity is 10 295 048, whilst the number of men having contributed to more than one scheme is 198 558. For women the respective numbers are 8 917 750 and 185 116.

50 The parties disputed the significance of the COVID-19 crisis on the gender composition of the social security schemes with regard to the statistics of October 2021.

51 See judgment of 21 January 2021, *INSS* (C-843/19, EU:C:2021:55, paragraph 31).

(c) What constitutes a 'considerably larger' or a 'significantly greater proportion' of individuals

68. As I already mentioned above,[52] in accordance with the criteria developed by the Court for the purposes of establishing the existence of indirect discrimination, it must be determined whether the national rule at issue puts women at a *particular disadvantage* compared to men.[53] In that regard, the Court has held that the existence of such a particular disadvantage can be established, for example, if it were proved that the national legislation at issue is to the disadvantage of a *significantly greater proportion* of individuals of one sex as compared with individuals of the other sex.[54] It is important to establish such a proportion in order to determine whether the data at issue illustrate purely fortuitous or short-term phenomena and whether, in general, they appear to be significant.[55]

69. For example, in *Villar Láiz*, while the Court left it for the national court to ascertain whether the national rule at issue disadvantaged a significantly greater proportion of women than men, it took into account the fact that approximately 75% of all part-time workers were women.[56] Moreover, the Court noted that 65% of workers engaged in part-time work were placed at a disadvantage because of the application of the reduction factor at issue in the main proceedings. When almost two thirds of all part-time workers are specifically affected by the contested legislation and when three quarters of all part-time workers are women, the Court seems to suggest, albeit implicitly, that women may be put at a particular disadvantage when compared to men.

70. In the present case, if the referring court decides to take into account the figures that the INSS and the Spanish Government submitted in their written answers,[57] as mentioned in point 63 above, those figures seem to indicate that, whilst approximately two out of three men with multiple incapacities are likely to be able to combine the benefits of two or more schemes,[58] only approximately one out of two women with multiple incapacities is likely to do so.[59] Conversely, approximately half of the women with multiple incapacities are put at a disadvantage by the national rule at issue, while that proportion is only one third for men with multiple incapacities. Consequently, whilst it is entirely for the national court to interpret the data at issue, those numbers reveal, in my view, that proportionally more women than men will be affected by the national rule at issue, since a *significantly greater proportion* of women than men are put at a disadvantage by that rule. Thus, it could be concluded that the national rule at issue has the effect of indirectly discriminating against women. However, should the figures presented before the national court and taken into account by it be different from those presented before the Court, the end result may vary.

52 Point 42 above.

53 See judgments of 27 October 1998, *Boyle and Others* (C-411/96, EU:C:1998:506, paragraph 76); of 20 October 2011, *Brachner* (C-123/10, EU:C:2011:675, paragraph 56); and of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 37).

54 See judgment of 3 October 2019, *Schuch-Ghannadan* (C-274/18, EU:C:2019:828, paragraph 45 and the case-law cited).

55 See, to that effect, judgments of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, EU:C:1999:60, paragraph 62 and the case-law cited), and of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 40).

56 Judgment of 8 May 2019, *Villar Láiz* (C-161/18, EU:C:2019:382, paragraph 42). See also De la Corte-Rodríguez, M., 'Recent cases and the future of Directive 79/7 on equal treatment for men and women in social security: How to realise its full potential', *European Journal of Social Security*, vol. 23(1), 2021, pp. 44-61.

57 See point 63 above.

58 As mentioned in point 63 above, there are 7 723 men with multiple incapacities and having contributed to many social security schemes, while the number of men with multiple incapacities and having solely contributed to the RGSS is 4 047.

59 As explained in point 63 above, the number of women with multiple incapacities and having contributed to many social security schemes is 3 460, whilst the number of women with multiple incapacities and having contributed solely to the RGSS is 3 388.

71. In conclusion, I consider that the answer to the questions should be that Article 4(1) of Directive 79/7 must be interpreted as precluding a national rule that, in effect, puts a significantly greater proportion of women than men at a disadvantage by allowing the award of two or more incapacity benefits obtained under different social security schemes due to two or more incapacities, whilst prohibiting the receipt of two or more such benefits under a single scheme, even where the eligibility requirements for all those benefits are satisfied, which is for the referring court to ascertain.

IV. Conclusion

72. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Juzgado de lo Social nº 26 de Barcelona (Social Court No 26, Barcelona, 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 must be interpreted as precluding a national rule that, in effect, puts a significantly greater proportion of women than men at a disadvantage by allowing the award of two or more incapacity benefits obtained under different social security schemes due to two or more incapacities, whilst prohibiting the receipt of two or more such benefits under a single scheme, even where the eligibility requirements for all those benefits are satisfied, which is for the referring court to ascertain.