OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 16 June 2011 [1]

I — Introduction.

1. In accordance with Article 267 TFEU, the Austrian Oberster Gerichtshof (Supreme Court) ('the referring court') referred to the Court a series of questions seeking a preliminary ruling on the interpretation 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. [2]

2. Those questions arise in the context of a legal dispute between an individual in receipt of an old-age pension, Ms Brachner ('applicant'), and the Pensionsversicherungsanstalt (Pension Insurance Office) ('defendant') concerning the pension amount to which she is entitled. The legal dispute essentially turns on whether, in the context of the annual adjustment to pensions to maintain purchasing power provided for under the national legislation on old-age pensions, the applicant has – in comparison with other pensioners – potentially been disadvantaged on grounds of her sex. Ultimately, that raises the question whether complex national social policy mechanisms are compatible with the EU law principle of equal treatment between men and women provided for in Directive 79/7. The dispute concerns, first, whether the scope of Directive 79/7 even extends to such mechanisms. In addition, it will be necessary to examine whether there is a difference in treatment between male and female pensioners and, if so, whether it is objectively justified.

3. The present reference for a preliminary ruling aims, in essence, to establish clarity concerning the compatibility with EU law of various provisions in the Austrian system of pensions adjustment following the judgment of the Austrian Verfassungsgerichtshof (Constitutional Court) of 24 September 2009 on the constitutionality of those provisions, in

1 — Original language: German.
2 — OJ 1979 L 6, p. 24.

particular with regard to their compatibility both with the principle of equal treatment and the constitutionally protected right to the inviolability of property. In that judgment, the Verfassungsgerichtshof confirmed that those provisions were compatible with the Austrian constitution and, consequently, rejected, in particular, as unfounded, the requests lodged by numerous Austrian courts, including the referring court, to have the provisions at issue set aside.

4. Equality for women in personal, social and legal terms constitutes one of the central achievements of European culture. It is the outcome of a historical development which began in the age of the enlightenment with the notion of human rights and asserted itself in the 20th century through the activism of numerous women seeking rights to freedom and self-determination. The anchoring of the notion of equality in numerous declarations and legal instruments in various fields testifies to that fact. [3]

3 — Marie Gouze (1748-1793), known also under the name of 'Olympe de Gouges', who in 1791 wrote the 'Déclaration des droits de la Femme et de la Citoyenne' (Declaration of the rights of women and of female citizens), may be considered a pioneer of the notion of equality for women. Marie Curie (1867-1934), the first woman to teach at the Sorbonne and awarded a Nobel prize, is one of the individuals renowned for their important contribution to combating the discrimination facing women in professional life.

II — Legal framework

A — *European Union law* [4]

5. The first four articles of Directive 79/7/EEC are worded as follows:

'*Article 1*

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".

Article 2

This Directive shall apply to the working population – including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and

4 — In line with the expressions used in the TEU and TFEU, the term 'Union law' will be used as the global expression for Community law and Union law. To the extent that in the following analysis individual provisions of primary law are relevant, the provisions applicable *ratione temporis* will be cited.

persons seeking employment – and to retired or invalided workers and self-employed persons.

Article 3

(1) This Directive shall apply to:

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

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

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

(2) This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a).

(3) With a view to ensuring implementation of the principle of equal treatment in occupational schemes, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

Article 4

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

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

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

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

B — *National law*

6. The relevant national provisions are to be found in the Bundesgesetz vom 9. September 1955 über die Allgemeine Sozialversicherung (Federal law of 9 September 1955 on the general social insurance) (also known as Allgemeines Sozialversicherungsgesetz (General law on social security); 'ASVG'). [5] Paragraph 108 et seq. of the ASVG provides for a comprehensive system of pension adjustments.

7. Paragraph 108(5) of the ASVG defines the adjustment factor as follows:

'Adjustment factor: the Federal Minister for Social Security, the Generations and Consumer Protection shall lay down every year by order, for the following calendar year, the adjustment factor (Paragraph 108f), before 30 November every year at the latest. The order shall be laid before the Federal Government for approval. In so far as not otherwise provided, the adjustment factor must be used for increases in annuities and pensions and in the fixed amounts of social security benefits.'

8. Paragraph 108f of the ASVG provides as follows:

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

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

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

9. In relation to annual pension increases, Paragraph 108h of the ASVG provides as follows:

'(1) With effect from 1 January each year,

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

(b) ...

shall be multiplied by the adjustment factor. ...'

5 — Bundesgesetz vom 9. September 1955 über die Allgemeine Sozialversicherung (Federal law of 9 September 1955 on the general social insurance) (also known as Allgemeines Sozialversicherungsgesetz (General law on social security) or ASVG) BGBl. 189/1955, last amended by Bundesgesetz (Federal law) BGBl. I 150/2009.

10. By order,[6] the Federal minister established an adjustment factor for 2008 of 1.017. That means that in 2008, in principle, all pensions payable under the ASVG were increased by 1.7 %.

11. However, by way of derogation from those provisions, Paragraph 634(10) of the ASVG, as amended by Bundesgesetz (Federal law) BGBl. I 101/2007,[7] provides for an extraordinary pension increase for 2008:

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

(1) between EUR 746.99 and EUR 1 050, it shall be increased by EUR 21;

(2) between EUR 1 050 and EUR 1 700, it shall be multiplied by the factor 1.020;

(3) between EUR 1 700 and EUR 2 161,50, it shall be increased by a rate of between 2 % and 1.7 % (decreasing in a linear manner between those amounts);

(4) greater than EUR 2 161,50, it shall be increased by EUR 36.57.'

12. Pensioners whose pension – as a result of limited contribution periods or a low base figure used for the calculation of their pension – is so low that it does not cover the minimum for subsistence are entitled, in accordance with Paragraph 292 of the ASVG, to a so-called compensatory supplement. That minimum for subsistence is determined in social security law through the establishment of a standard amount for the compensatory supplement. For the purposes of determining entitlement to the compensatory supplement, under Paragraph 292(2) of the ASVG, account must also be taken of the total net

6 — BGBl. II 337/2007.

7 — Bundesgesetz, mit dem das Bundesgesetz über Krankenanstalten und Kuranstalten, das Ärztegesetz 1998, das Privatkrankenanstalten-Finanzierungsfondsgesetz, das Allgemeine Sozialversicherungsgesetz, das Gewerbliche Sozialversicherungsgesetz, das Bauern-Sozialversicherungsgesetz, das Beamten- Kranken- und Unfallversicherungsgesetz, das Arbeitslosenversicherungsgesetz 1977, das Sonderunterstützungsgesetz, das Heeresversorgungsgesetz, das Kriegsopferversorgungsgesetz 1957 und das Familienlastenausgleichsgesetz 1967 geändert werden (Bundesgesetz zur Anpassung von Rechtsvorschriften an die Vereinbarung gemäß Art. 15a B-VG über die Organisation und Finanzierung des Gesundheitswesens für die Jahre 2008 bis 2013) (Federal Law amending the Federal Law on hospitals and sanatoriums, the 1998 Law on medical practitioners, the Law on the fund financing private medical establishments, the General Law on social security, the Law on social security for workers in commerce and industry, the Law on social security for agricultural workers, the Law on health and accident insurance for public servants, the 1977 Law on unemployment insurance, the Law on special assistance, the Law on the welfare of army personnel, the 1957 Law on the welfare of war victims and the 1967 Law on compensation for family expenses (Federal law to amend legislation pursuant to the agreement in accordance with Article 15a of the Federal Constitution on the organisation and funding of the health care system from 2008 to 2013)) BGBl. I 101/2007.

income of the spouse living in the common household. At the same time as Paragraph 634(10) of the ASVG was amended, the same amending law increased that standard amount of the compensatory supplement from EUR 726 to EUR 747 (an increase of approximately 2.81 %) and for spouses living in the same household from EUR 1 091,14 to EUR 1 120 (approximately 2.58 %) (Article 4(41)(a) and (b) of the amending law).

III — Facts, main proceedings and question referred

13. The applicant, who was born on 8 June 1947, receives an old-age pension under the ASVG from the defendant pension insurance office. In 2007, the amount of that pension was EUR 368.16 per month, before tax. By decision of 8 May 2008, the defendant found that, taking into account the adjustment factor of 1.017 for the year 2008, the applicant's monthly pension was to be EUR 374.42 before tax, from 1 January 2008.

14. The applicant brought an action against that decision, seeking payment of a monthly pension of EUR 389.16 before tax from 1 January 2008, on the ground that the pension adjustment made by the legislature with effect from that date is contrary to the principle of equality, inconsistent with the fundamental right to property and, on account of indirect discrimination against women, also contrary to Article 4 of Directive 79/7.

15. The court at first instance granted the application on the ground that the measure constituted unlawful indirect discrimination of women. The appeal court upheld the defendant's appeal. It ordered the defendant to pay the applicant the pension from 1 January 2008 only in the monthly sum of EUR 374.42, before tax, as already ordered and dismissed the remainder of the application. The applicant appealed on a point of law against the judgment of the appeal court and seeks reinstatement of the judgment at first instance.

16. In the context of the appeal pending before it, the Oberster Gerichtshof applied to the Austrian Verfassungsgerichtshof (Constitutional Court) to have set aside in Paragraph 634(10) of the ASVG, as amended by Federal Law BGBl. 101/2007, the phrase 'in excess of EUR 746.99 per month' and in Paragraph 634(10)(1) of the ASVG, as amended by Federal Law BGBl. 101/2007, the phrase 'in excess of EUR 746.99'. The application to have that wording set aside was based on the argument that the provisions by which

the extraordinary pension increase in 2008 was established only for pensions in excess of EUR 749.99 infringe the equal treatment principle under Austrian law. In its judgment of 24 September 2009 given in joined proceedings, the Constitutional Court rejected that application and 143 similar applications from Austrian courts. Following the delivery of that judgment, the appeal proceedings were automatically resumed.

17. The issue now before the national court is the question on which the parties are still in dispute, that is, whether the 2008 pension adjustment adopted by the legislature contravenes Article 4 of Directive 79/7 as it indirectly discriminates against women. The Oberster Gerichtshof concedes that it has doubts as to how that provision of the directive is to be interpreted. On that ground, it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

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

(2) If the answer to the first question is in the affirmative:

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

(3) If the answer to the second question is in the affirmative:

May a disadvantage for female pensioners arising from the annual increase in their pensions be justified by the earlier age at which they become entitled to a pension and/or the longer period during which they receive a pension and/or by the fact that the standard amount for a minimum income, provided for under social law (compensatory supplement standard amount), was disproportionately increased, where the provisions concerning the payment of the minimum income provided for under social law (compensatory supplement) require account to be taken of the pensioner's other income and the income of a spouse living in the common household, whereas in

the case of other pensioners the pension increase takes place without account being taken of the pensioner's other income or the income of the pensioner's spouse?'

IV — Procedure before the Court

18. The order for reference of 9 February 2010 was received at the Court Registry on 8 March 2010.

19. The Austrian Government, Ireland and the European Commission each submitted written observations within the period mentioned in Article 23 of the Statute of the Court of Justice.

20. At the hearing of 13 April 2011, the representatives of the Austrian Government, Ireland and the Commission each appeared to submit oral observations.

V — Main arguments of the parties

A — *The first question*

21. The *Austrian Government* takes the view that although, according to its wording, Directive 79/7 does not cover the adjustment of pensions, the aim of the directive, that is, to ensure equality for men and women in the field of social security, must entail a positive answer to the question.

22. On the other hand, *Ireland* proposes that the answer to be given to the first question should be that Article 4 of Directive 79/7 is to be interpreted as meaning that the annual pension adjustment system (indexation) provided for in the law on the statutory pension insurance scheme does not fall within the scope of the prohibition on discrimination in Article 4(1) of that directive.

23. In support of its legal view, it observes, first, that in order to fall within the scope of the directive a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks specified in Article 4 or a form of social assistance having the same objective. On the basis of that definition, it is clear that the main pension paid to the applicant in the main proceedings since her 60th birthday falls within the scope of Directive 79/7. In contrast thereto, the annual pension adjustment in Austria serves a different purpose, that is, to guarantee all pensioners a minimum level of income. In Ireland's view, therefore, a direct connection with the protection against the risks of old-age is absent.

24. Moreover, Ireland draws an analogy with the case-law on Articles 46 and 51 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, [8] in which the Court distinguished the basic old-age pension from adjustments on grounds of a change in prices etc. On the basis of that case-law, according to Ireland, a distinction must be drawn between the initial calculation of an old-age pension (that is, the procedure to establish the amount of pension payable when first drawn) and the subsequent adjustments as a result of which the benefit rate is adjusted by a specific amount or a percentage to take account of factors such as inflation.

25. In Ireland's view, the initial calculation of an old-age pension falls within the notion of 'calculation of benefits' and, thus, within the scope of Directive 79/7. However, subsequent adjustments to take account of the cost of living do not fall within the notion of 'calculation of benefits' and, consequently, are not covered by Article 4(1).

26. The *Commission* proposes that the answer to be given to the first question should be that Article 4 of Directive 79/7 is to be interpreted as meaning that the prohibition of discrimination in Article 4(1) of that directive also applies to the annual pension adjustment system (indexation) provided for in the law on the statutory pension insurance scheme.

27. It takes the view that Directive 79/7 must be interpreted broadly and includes not only the basic calculation of social security benefits but also their subsequent uprating. The directive would be deprived of its effect if it applied only to the initial determination of a benefit and later indexations fell outside its scope. In an extreme case, Member States could completely exclude members of one sex from all pension adjustments which in the long term would result in significant differences between the pensions of women and men. It cannot be presumed that the Council, as the legislature, intended such a gap in the rules.

28. According to the Commission, the system of annual pension adjustments falls within the scope of Directive 79/7 because it concerns a social security benefit which is directly and by nature connected with protection against risks specified in Article 3(1) of the directive, that is, the fact that in old-age the income needed to cover living costs, or the purchasing power thereof, decreases. The objective of the pension adjustment is to ensure the value of the pension and to maintain its purchasing power. Moreover, it is directly connected to the amount originally awarded which functions, in addition, as the basis for the calculation of a percentual increase.

8 — OJ, English Special Edition 1971 (II), p. 416.

29. Even if one were to presume that a subsequent increase in pensions did not fall within the notion of 'calculation', that would, in the Commission's view, not imply that the directive does not cover subsequent adjustments or indexations of pensions. The list established by Article 4 of Directive 79/7 is indeed not exhaustive, as demonstrated by the provision's wording ('in particular').

B — *The second question*

30. The *Austrian Government* proposes that the answer to be given to the second question is that, assuming the annual pension adjustment system (indexation) provided for in the law on the statutory pension insurance scheme falls within the scope of the equal treatment principle provided for in Article 4 of Directive 79/7, that provision must be interpreted as meaning that a national provision concerning an annual pension adjustment, whereby a potentially smaller increase is provided for a particular category of pensioners, does not constitute discrimination on ground of sex because the number of pensioners of a particular sex within that group of individuals who are affected is not substantial, also in comparison with the total number of the group of pensioners, or because there is no other group available whose situation may be compared with that of the group which is supposedly disadvantaged.

31. In that connection, it argues, first, having regard to the percentages of male (25 %) and female (57 %) pensioners stated by the referring court to be in receipt of a minimum pension, that it cannot be alleged that the relevant measure disadvantaged, as required by case-law, 'a substantially greater percentage of women than men'. Even if case-law has not established a specific percentage to constitute the starting point for indirect discrimination, in the present case the differences in the percentages are not so significant, compared with other cases, so as in reality to be capable of being regarded as discrimination.

32. In addition, it observes that measures adopted in the context of the pension system produce differing effects on both sexes as a result of differences in the employment histories of women and men. If all legislative measures were assessed simply in terms of the percentage of men and women affected, that would deprive Member States, contrary to the existing case-law of the Court, of the autonomy conferred on them by European Union law when defining national social policy. Consequently, in the future, only a linear adjustment of all pensions according to a uniform percentage would be regarded as non-discriminatory.

33. In the view of the Austrian Government, discrimination can be assessed only in the light of a comparison of each group in relation to the total number of pensioners. It follows from an examination of the relevant percentages that in none of the situations concerned were women disadvantaged to such an extent as to constitute discrimination on ground of sex and, for that reason alone, the provision at issue does not contravene Directive 79/7. Separately, it observes that, in order to conclude that a measure discriminates, there must be a clearly defined comparator group. However, in relation to the 2008 pension adjustment, no clearly defined comparator group exists as, depending on an individual's own situation or, where applicable, that of his or her spouse, the amount of the adjustment may differ.

34. *Ireland* proposes that the answer to be given to the second question is that Article 4 of Directive 79/7 does not preclude a national provision concerning an annual pension adjustment whereby a potentially smaller increase is provided for a particular category of pensioners receiving a minimum pension than for other pensioners.

35. In Ireland's view, it must be determined, first, with whose situation that of the applicant must be compared. Second, it must be determined whether that person (or that group of persons) is treated more favourably than Ms Brachner. Where that is answered in the affirmative, it must be determined whether that difference in treatment favours a person of the opposite sex. Where the latter question is answered in the affirmative, it must be determined whether that difference in treatment is justified on objective grounds unrelated to sex. Ireland concludes that the comparisons made by the referring court bear no relation to the situation of the applicant and, as a result, considers the questions referred to be hypothetical and, therefore, inadmissible.

36. Should the Court take a different view and hold the questions admissible, Ireland argues that the facts presented by the national court do not show that the applicant (or a group to which she belongs) was treated less favourably than an identifiable male comparator (or a comparator group composed mainly of men). Admittedly, the pensions of certain groups of pensioners were increased by a greater percentage than those of others. However, not all of those groups were composed mainly of men.

37. In Ireland's view, it is not apparent how the system of compensatory payments might discriminate. Of those in receipt of the compensatory supplement 54% are women,

which corresponds almost exactly to the percentage of pensioners who are women (53%). Therefore, it cannot be said that the group in receipt of the compensatory payment is composed mainly of men or mainly of women. It merely reflects the relevant proportions in the population of pensioners as a whole. The basic pension is adjusted without reference to any other income (meaning that, to that extent, in comparison to the scheme of the compensatory supplement, different principles apply). However, those principles apply both to pensioners in receipt of a minimum pension (who are mainly women) and to pensioners in receipt of higher pensions (who are mainly men). Therefore, it cannot be said that either of these calculation methods favours a group consisting mainly of men to the detriment of a group consisting mainly of women. Even if the group of pensioners in receipt of higher pensions (composed mainly of men) is favoured in any way, the group which is allegedly disadvantaged (the pensioners in receipt of the compensatory supplement) is not composed mainly of women.

38. Finally, Ireland observes that the differences in the extent to which other income is taken into account for the purposes of the compensatory supplement and the normal pension must be regarded as falling within the scope of the discretion accorded to a Member State, according to which in the case of certain benefits it may choose to take account of a recipient's financial situation and, in other cases, may ignore it.

39. The *Commission* proposes that the answer to be given to the second question is that Article 4 of Directive 79/7 is to be interpreted as precluding a national provision concerning an annual pension adjustment whereby a potentially smaller increase is provided for a particular category of pensioners receiving a minimum pension than for other pensioners, in so far as the provision in question adversely affects 25% of male pensioners, but 57% of female pensioners, unless that difference is objectively justified by factors unrelated to discrimination on ground of sex.

40. In support of that view it observes that, according to case-law, a difference in treatment exists where the percentage of female workers who do not satisfy a particular requirement to qualify for dismissal protection is in statistical terms 'considerably smaller' or there is a 'lesser but persistent and relatively constant disparity over a long period'. According to the information provided by the referring court, from which it follows that 57% of women in contrast to 25% of men are in receipt of a minimum pension, it cannot be disputed that there is a negative impact in particular on women and that, therefore, in objective terms, women are less favourably treated. That difference in treatment becomes all the more serious having regard to the fact that the number of women not in receipt of

a compensatory supplement is considerably greater than the number of men not in receipt thereof.

C — *The third question*

41. The *Austrian Government* proposes that the answer to be given to the third question is that, should the Court none the less regard the potentially smaller increase for a particular category of pensioners as discrimination against women, that would be justified as a result of the direct correlation between the extraordinary increase in the compensatory supplement and the objective thereby pursued, that is, to alleviate poverty (as a legitimate social policy objective) and, in that regard, the measure is also appropriate for achieving the aim pursued and does not go beyond what is necessary. That conclusion is not altered by the fact that, for the purposes of the compensatory supplement, regard is had to other income of the pensioner and the income of that individual's spouse or registered partner living in the common household.

42. On the question of justification for the extraordinary increase in the standard amounts for the compensatory supplement, the Austrian Government indicates that the aim of the 2008 pension adjustment was to assist pensioners in receipt of small and minimum pensions. The objective was to make a significant contribution to the fight against poverty in old age. However, individuals, such as the applicant, who have other sources of income (whether in their own name or through their spouse) are not in need of that social policy assistance. In those cases, it can be presumed that, as a consequence of that additional income, they are not at risk of poverty in old age and, hence, do not require an adjustment to their pension over and above that resulting from the consumer price index.

43. In addition, the Austrian Government refers to the judgment of the Austrian Verfassungsgerichtshof of 24 September 2009 in which that court held that the 2008 pension adjustment is in conformity with the constitution and does not infringe any fundamental rights, and, in particular, does not contravene the principle of equality. Moreover, the Verfassungsgerichtshof recognised the direct connection (causal link) between the pension adjustment and the extraordinary increase in the compensatory supplement. Accordingly, account was to be taken of that latter increase when assessing the increase in pensions resulting from the 2008 extraordinary pension adjustment.

44. *Ireland* proposes that the answer to be given to the third question is that a disadvantage for female pensioners arising from the annual increase in their pensions may be

justified where this is necessary and appropriate to achieve a social or economic policy objective unrelated to discrimination on ground of sex. To the extent that a Member State relies on Article 7(1)(a) of Directive 79/7, a disadvantage may be justified also by the earlier age at which women become entitled to a pension and/or the longer period during which they are in receipt of a pension.

45. In support of its legal view, Ireland argues that, within the framework of social assistance regulation, as a matter of necessity, certain groups are provided with assistance whereas others are excluded and, in that connection, complex qualifying criteria and distinctions may be applied. It observes that within the case-law of the Court there are numerous cases in which national provisions were challenged as discriminatory and where the Court held the criteria established by national law to be justified by a legitimate aim. Although budgetary considerations cannot in themselves justify discrimination on ground of sex, the Court has recognised that ensuring the sound management of public expenditure constitutes a legitimate objective. In Ireland's view, when allocating limited public resources in the framework of adopting the annual budget, Member States pursue a series of legitimate social and economic policy objectives which include the distribution of limited public resources between different groups and the sound management of public expenditure. In that exercise, Member States enjoy very broad discretion. Similarly, when from time to time rates have to be adjusted, it may be easier to introduce generalised increases than to calculate an exact percentage for every individual. In the present case, the national court categorised pensions into four groups. However, they could have been categorised completely differently. In the view of the Irish Government, the burden on the national administration would be significantly increased if, before a generalised increase could be applied, a statistical analysis of the relationship between men and women was necessary in relation to every norm.

46. Finally, Ireland observes that, in Austria, there may be different pension ages for men and women. If that is the case, Austria could invoke Article 7(1)(a) of Directive 79/7. That would allow Austria to provide for different rules for men and women where they are 'necessarily' linked to the difference in pensionable age.

47. The *Commission* proposes that the answer to be given to the third question is that a disadvantage for female pensioners arising from the annual increase in their pensions cannot be justified by the earlier age at which they become entitled to a pension or the longer period for which they are in receipt of

a pension, nor by reason of the fact that the standard amount for minimum income provided for in social security law (compensatory supplement standard amount) was disproportionately increased, where the provisions concerning the payment of the minimum income provided for in social security law (compensatory supplement) require account to be taken of the pensioner's other income and the income of a spouse living in the common household, whereas in the case of other pensioners the pension increase takes place without account being taken of the pensioner's other income or the income of the pensioner's spouse.

48. As regards a difference in treatment on grounds of the earlier age at which female pensioners become entitled to a pension, or the longer period for which they are in receipt of a pension, the Commission observes that the number of months for which pension contributions have been credited is already taken into account in calculating the pension amount and may not be taken into account for a second time. As regards the longer average life expectancy of women, the Commission argues that this cannot constitute justification, as a longer life expectancy is a difference typically linked to sex. Moreover, it is difficult to see how exactly the increase in the standard amount of the compensatory supplement constitutes a legitimate objective. Finally, the Commission observes that, although the Court accords the Member States discretion in structuring their social security systems, it requires this to be exercised so that the measures concerned are necessary and appropriate to achieve a social policy objective.

VI — Legal appraisal

A — *Introductory observations*

1. The prohibition on discrimination: principles of EU law

49. The principle of equality between men and women [9] at work constitutes a central tenet of European employment law. [10] The principle of equal treatment for men and

9 — For detailed account of the principle of equal treatment for men and women in Europe, see McCrudden, C., and Prechal, S., *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, Report for the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2009.

10 — In the same vein, see Krimphove, D., *Europäisches Arbeitsrecht*, Munich 1996, p. 140.

women in employment is established at the level of international employment law in the International Labour Organisation (ILO) Convention No 100 of 29 June 1951 on equal remuneration for men and women workers for work of equal value, which numerous Member States have ratified. More specifically, as regards EU employment law, Article 16 of the Community Charter of Fundamental Social Rights of Workers [11] – to which the preamble to the TEU and the first paragraph of Article 136 EC refer – stresses the requirement for equal treatment and the development of equal opportunities for men and women. In addition, as a matter of primary law, Articles 2 EC and 3(2) EC establish as a general objective the promotion of equality between men and women. Moreover, in settled case-law, the Court has emphasised the fundamental importance of that obligation, characterising it as a fundamental rule of Community law. [12]

50. Originally, the EU legislature established in primary law a legally binding principle of equal treatment for male and female workers only in relation to matters of pay, that is, in Article 141 EC (Article 157 TFEU). That provision requires each Member State to ensure that 'the principle of equal pay for male and female workers for equal work' is applied. As a result of the Court's interpretation, that has been extended to a comprehensive anti-discrimination principle. As that provision covers only matters of pay, however, and does not establish a general principle of sex equality at work, since the 1970s the EU legislature increasingly developed through the adoption of numerous legal acts the notion of a universal principle of equal treatment for men and women and, in that regard, rules were also adopted governing social security matters, for example, in connection with workers' social security benefits. [13] The legal instruments adopted include Directive 79/7 – relevant in the present case – which specifically covers the social security aspects of this area of activity and, therefore, to a certain extent

11 — Article 16 of the Community Charter of Fundamental Social Rights of Workers states: 'Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed. To this end, action should be intensified wherever necessary to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development. Measures should also be developed enabling men and women to reconcile their occupational and family obligations.'

12 — On the basic principle, see Case 43/75 *Defrenne* ('*Defrenne II*') [1976] ECR 455, paragraph 12; Case 149/77 *Defrenne* ('*Defrenne III*') [1978] ECR 1365, paragraphs 26 and 27; Case 152/84 *Marshall* [1986] ECR 723, paragraph 36; and Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 38; and, further, Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 36; Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 39; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 60; and Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 85.

13 — See Prechal, S., 'Access to equality: An introduction', in *Access to equality between men and women in the European Community*, Brussels 1993, p. 1 et seq., and Bieback, K.-J., *Die mittelbare Diskriminierung wegen des Geschlechts*, Baden-Baden 1997, p. 22 et seq. However, as Bieback explains in his book, *Europäisches Sozialrecht*, 5th edn, Baden-Baden 2010, p. 535, point 1, regular pay is difficult to distinguish from benefits payable under occupational social security schemes which, in turn, are difficult to distinguish from statutory schemes in particular given the fact that occupational schemes are often heavily dependent on statutory schemes and cannot be sensibly regulated without reference thereto.

supplements the requirements of Article 141 EC. Not least because of the supplementary function of its provisions on social security and also because of the limitations on the EU's competence in employment and social security law at that time, Directive 79/7 was based on the general supplementary competence of Article 308 EC (Article 352 TFEU).

51. However, since then, in that connection, a fundamental change has occurred in the area of European social law, because, since the entry into force of the Treaty of Amsterdam and the application of Article 13 EC (Article 19 TFEU) and Article 136 et seq. EC (Article 151 et seq. TFEU), the European Union has a comprehensive legislative competence in all areas of social security and anti-discrimination law, [14] which has enabled numerous legal acts to be adopted. In this connection, regard should be had to the ultimate confirmation given to the principle of equal treatment for men and women as a result of its inclusion in Articles 21 and 23 of the Charter of Fundamental Rights of the European Union [15]. Those provisions prohibit discrimination on ground of sex and require the European Union and its Member States in the implementation of Union law to ensure equality between men and women in all areas.

2. Coverage of indirect discrimination

52. Directive 79/7 itself has not been amended since it entered into force. Its practical importance arises above all from the fact that it prohibits indirect discrimination, also expressly mentioned in Article 4(1), since direct discrimination in national social security schemes has been almost completely eradicated. [16] The present case, too, concerns an allegation that the national rule at issue discriminates indirectly on grounds of sex, which follows, in particular, as it appears from the reference by the national court that the group of pensioners in receipt of a minimum pension not enjoying an extraordinary

14 — See Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECR I-773, paragraph 18 et seq. See Schiek, D., *Europäisches Arbeitsrecht*, 3rd edn, Baden-Baden 2007, p. 220, and Galantino, L., *Diritto comunitario del lavoro*, Turin 2000, p. 46 et seq.

15 — OJ 2010 C 83, p. 389.

16 — See Krimphove, D., cited above in footnote 10, p. 140, and Haverkate, G., and Huster, S., *Europäisches Sozialrecht – Eine Einführung*, Baden-Baden 1999, point 701, p. 399, who stress that the practical significance of Directive 79/7 concerns the area of indirect discrimination which is also expressly mentioned in Article 4(1).

pension increase consists predominantly of women, although that rule does not explicitly refer to sex as a criterion on which a distinction is based.

53. However, it must be clarified, first, whether Directive 79/7 even covers the pension adjustment provided for in national law. That is the subject-matter of the first question. The second question is whether, in the light of the different proportions of men and women affected, the national rule may be regarded – assuming, that is, the absence of objective justification – as constituting discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7. By its third question, the referring court seeks to establish whether the financial disadvantage experienced by a group of pensioners as a result of the taking into account in their case – unlike in the case of a different group of pensioners to whom the rule does not apply – of their other income and the income of a spouse living in a common household, may be justified. In the interests of clarity, the questions should be examined in the order adopted by the referring court.

54. As a preliminary point, it should be observed in relation to the objection raised by the Austrian Government, to the effect that the Austrian Verfassungsgerichtshof has already dismissed as unfounded concerns raised by the referring court regarding the compatibility of the national rule at issue with the constitutional principle of equality, also encompassing the prohibition on discrimination on grounds of sex, that it is entirely irrelevant to the present reference for a preliminary ruling, because the present proceedings concern only the assessment of whether EU law precludes such rule. According to the settled case-law of the Court, in order to ensure the primacy of EU law, the functioning of that system of cooperation requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality. [17]

B — *The first question*

55. As follows from the observations of the referring court, the parties are agreed that the applicant as a pensioner is within the personal scope of Directive 79/7 and that the rules at issue, in principle, also lie within its material scope. However, the parties dispute whether

17 — See Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 52.

the annual pension adjustment system ('indexation'), which is also provided for in the law on statutory pension insurance, is caught by the prohibition on discrimination in Article 4(1) of Directive 79/7. [18]

56. Among the parties to the preliminary ruling proceedings, only Ireland appears to take a different view on the material scope of Directive 79/7 in relation to the present case. For that reason, I shall deal with this issue separately. For those purposes, it must be considered, first, whether the pension adjustment at issue concerns a statutory scheme offering protection against one of the risks specified in Article 3(1) of Directive 79/7. As the Court has held, in order to fall within the scope of the directive, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks specified or a form of social assistance having the same objective. [19] In other words, the benefit must be directly and substantively linked to protection against one of the risks specified in Article 3(1). [20]

57. In that connection, it must be observed that that provision of Directive 79/7 expressly specifies, inter alia, 'the risks of old age'. Unquestionably, the statutory schemes offering protection against such risks include, first, the old-age pension, to which the applicant is entitled by law. However, that necessarily also includes regular increases in the old-age pension such as the pension adjustment at issue in the present case which, according to the referring court, [21] are intended to ensure that pensions retain their value and maintain purchasing power, in particular, given the fact that, according to the Austrian Government, [22] the legislative purpose of such measures to protect pension recipients against a risk typically associated with old-age, that is, poverty in old-age. The aim of adjustment according to the respective consumer price index is to ensure that the income needed for subsistence and/or its purchasing power does not fall. Therefore, for the purposes of the directive's interpretation, it is irrelevant that its wording does not mention pension adjustments, especially given the fact that the spirit and purpose of Articles 3 and 4 of the directive clearly support an interpretation to the effect that pension adjustments fall within the directive's material scope. In particular, it is difficult to argue that there is

18 — See page 7 of the reference for a preliminary ruling.

19 — See Case 150/85 *Drake* [1986] ECR 1995, paragraph 21; Case C-243/90 *Smithson* [1992] ECR I-467, paragraph 12; and Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraph 15.

20 — See Case C-228/94 *Atkins* [1996] ECR I-3633. See Egger, J., *Das Arbeits- und Sozialrecht der EU und die österreichische Rechtsordnung*, 2nd edn, Vienna 2005, p. 323.

21 — See page 16 of the reference for a preliminary ruling.

22 — See page 18 of the written observations of the Austrian Government.

a significant difference between an old-age pension and its subsequent adjustment as, ultimately, the adjustment is simply a recalculation of the original amount. As the Commission correctly observes, [23] the increase in pensions, as a statutory mechanism to ensure that their value is maintained, constitutes simply a factor involved in the calculation of pensions in a given year.

58. That view is supported not simply by the fact that the amount originally awarded as a monthly pension is used as the basis for calculating a percentual increase. Consideration must also be given to the fact that the original function of the old-age pension, that is, to protect against the risks of old-age, continues to apply also after the adjustment. As a result of subsequent adjustments, a pensioner's entitlement does not – contrary to the argument advanced by Ireland [24] – acquire a different legal quality. Thus, the system of pension increases is directly and substantively linked to protection against one of the risks specified in Article 3(1). The comparison which Ireland seeks to make with income support, a benefit payable in the United Kingdom and examined in *Jackson and Cresswell*, [25] is inappropriate as income support was unambiguously a social assistance benefit for low-earners. It was granted in certain individual situations to persons whose resources were insufficient to cover their needs as defined in national law. It was only logical, therefore, for the Court to hold that Article 3(1) of Directive 79/7 did not apply to such a benefit. [26] However, the situation in the main proceedings is entirely different. The pension adjustment at issue in the present case consists – as the name itself indicates – in a subsequent amendment to the pension amount originally awarded in order to reflect changed circumstances.

59. As a consequence, as is the case with the original determination of the old-age pension, the adjustment of the pension must be interpreted as a 'calculation of the benefit' within the meaning of Article 4(1) of the directive. A different view would imply, ultimately, either that there had been an omission within the directive's scheme or that the EU legislature intended to prohibit discrimination between men and women in the initial determination of old-age pensions but not in their subsequent annual adjustments. Having regard to the directive's aim, specified in the first recital

23 — See paragraph 18 of the written observations of the Commission.

24 — See paragraph 37 et seq. of the written observations of Ireland.

25 — *Jackson and Cresswell*, cited above in footnote 19.

26 — Ibid., paragraph 22.

of the preamble, that is, to ensure the implementation of the principle of equal treatment in the area of social security, that outcome is clearly inconceivable. Consequently, Ireland's argument must be rejected.

60. In the light of the foregoing, Article 4 of Directive 79/7 must be interpreted as meaning that the prohibition of discrimination in Article 4(1) of that directive also covers the annual pension adjustment system (indexation) provided for in the law on the statutory pension insurance scheme.

C — *The second question*

1. General issues

61. As all of the parties to the case observe, in my view, correctly, in the area of social policy Member States have a broad discretion, and that it applies in particular to the type of social protection measures adopted and the specific details of their implementation. [27] However, that discretion is not unlimited, as EU law imposes on Member States strict boundaries to be observed in their exercise of legislative powers. According to the case-law of the Court, Article 4(1) of Directive 79/7 imposes such a limit. [28] In fact, that provision prohibits direct and indirect discrimination on grounds of sex in relation to various matters associated with the grant of social security benefits. Given my conclusion above that the pension adjustment at issue must be regarded as the 'calculation of benefits' within the meaning of that provision, it must be examined in the following section whether the present case involves the issue of discrimination.

2. Provision formulated in neutral terms

62. As has already been intimated, there can be no direct discrimination here, as the pension increase was granted to all pensioners

27 — See Case C-8/94 *Laperre* [1996] ECR I-273, paragraph 18; Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 33; Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 15; and Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 19.

28 — See Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 74 and 75; *Kutz-Bauer* cited above in footnote 10, paragraphs 55 to 57; Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 63; and Case C-385/05 *Confédération générale du travail and Others* [2007] ECR I-611, paragraphs 28 and 29.

without any reference to their sex. That premise is not contested by any of the parties.

63. The national provisions at issue, on which the scheme is based, are evidently not aimed to disadvantage a category of persons of a particular sex. Instead, the 2008 pension adjustment scheme is based on a division of pensioners into several categories, differentiated according to pension amount and to which different adjustments are applied on either a percentage or flat-rate basis. It follows from the judgment of the Austrian Verfassungsgerichtshof of 24 September 2009 concerning the constitutionality of the 2008 pension adjustment, to which the Austrian Government refers in its observations, that such classification is based on the principle of 'differentiation according to social echelons' and results, ultimately, from an agreement between the Austrian Government and the Österreichischer Seniorenrat, an organisation which represents the interests of pensioners in that Member State. Having regard to its reference to the legislative history and the considerations underlying that reform, ultimately, the Austrian Government relies on its discretion in relation to the adjustment of pensions. At any rate, there cannot be any doubt that the national provisions at issue on which the scheme is based are 'formulated in neutral terms', [29] as defined in case-law, and, consequently, in principle, the first criterion for the presumption of indirect discrimination is satisfied.

64. But can the present case be said to involve indirect discrimination? As the Court has consistently held, indirect discrimination contrary to Article 4(1) of Directive 79/7 is present where a national measure, although not directly linked to sex but formulated in neutral terms, works to the disadvantage of a much greater percentage of persons of one sex, unless that measure is based on objectively justified factors unrelated to any discrimination on grounds of sex. [30] That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate

29 — In the view of Egger, J., cited above in footnote 20, p. 323, criteria such as 'part-time work' or 'minor employment' can be used for the purposes of establishing neutral criteria. A similar view is taken by Galantino, L., cited above in footnote 14, p. 194. In the view of Prechal, S., 'Combating indirect discrimination in the Community law context', *Legal Issues of European Integration*, 1993/1, Amsterdam, p. 84 et seq., neutral criteria which may disguise indirect discrimination include also criteria such as 'age limits' (as from a certain age women are engaged in child-raising), 'part-time employment' (as household responsibilities prevent women from taking on full-time positions), 'training requirements' (as women are less likely to have completed advanced training), 'physical condition', 'geographical mobility', etc.

30 — See, inter alia, *Jørgensen*, cited above in footnote 12, paragraph 29; Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 23; Case C-25/02 *Rinke* [2003] ECR I-8349, paragraph 33; *Schönheit and Becker*, cited above in footnote 12, paragraph 67; and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 43.

to achieve that aim and are necessary in order to do so. [31]

65. In accordance with that definition, the relevant issues must be addressed in turn and, consequently, it must be first established whether men and women are treated differently. If a difference in treatment is established, it must subsequently be examined whether it is also justified. [32]

3. Difference in treatment between men and women

66. In accordance with the criteria developed by the Court for the purposes of establishing the existence of indirect discrimination, it must be determined below whether the scheme at issue has a 'more unfavourable impact' [33] on female pensioners than on male pensioners. However, in that connection it must be noted that the Court does not regard every minor difference in treatment, as such, to be relevant. Instead, it follows from a closer examination of existing case-law that for the Court to consider a difference in treatment relevant a certain 'materiality threshold' must be achieved, [34] which is the case where 'far more' [35] or 'a much higher percentage' [36] of persons of one sex are disadvantaged compared with persons of the other sex.

67. In order to determine whether in fact a 'considerably higher percentage' [37] within the meaning of the case-law of female pensioners compared to male pensioners is subject to less favourable treatment, an appraisal of the facts must be carried out which, on account of the requisite proximity to the facts and knowledge of the specific circumstances, is primarily a matter for the national court to establish. In its interpretation of EU law, the Court must base its deliberations on the facts

31 — See *Roks*, cited above in footnote 12, paragraphs 33 and 34, *Nolte*, cited above in footnote 27, paragraph 28, and *Laperre*, cited above in footnote 25, paragraph 14. Thüsing, G., *Europäisches Arbeitsrecht*, p. 69, point 5, notes that the concept of indirect discrimination, that is, where an apparently neutral provision, criterion or practice puts persons having a particular characteristic at a particular disadvantage compared with other persons and such provision, criterion or practice is not objectively justified by a legitimate aim or the means of achieving that aim are not appropriate and necessary (see the definition in Article 2(2) of Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), was first developed in the context of the freedom to provide services before it was applied to sex discrimination in Case 96/80 *Jenkins* [1981] ECR 911.

32 — In essence, this corresponds to the approach proposed by Haverkate, G., and Huster, S., cited above in footnote 16, point 701, p. 399.

33 — See *Seymour-Smith and Perez*, cited above in footnote 28, paragraph 52, and *Schönheit and Becker*, cited above in footnote 12, paragraph 69.

34 — In the same vein, see Steiner, J., 'The principle of equal treatment for men and women in social security', in *Sex equality law in the European Union*, p. 123, footnote 69, who observes that the Court has not established a threshold above which the impact of a rule may be regarded as disproportionate although it would appear that a significant disparity in the percentages is necessary in that regard.

35 — See Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 76; Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 34; and Case C-537/07 *Gómez-Limón* [2009] ECR I-6525, paragraph 54.

36 — See the case-law cited in footnote 30.

37 — See *Schönheit and Becker*, cited above in footnote 12, paragraph 71.

as they appear from the reference for a preliminary ruling and the written observations submitted to the Court. [38]

68. The principal facts are already summarised in the second question. In its reference, the national court adds by way of explanation that in its view the pensioners affected by the 2008 pension adjustment were subject to a difference in treatment inasmuch as pensions below the standard amount of the compensatory supplement (EUR 747) were increased only by 1.7 %, whereas pensions between EUR 747 and EUR 2 160 were awarded a greater increase. According to the statistics submitted for the purposes of the main proceedings, a total of 1 325 762 persons covered by the ASVG, of whom 614 293 were men and 711 469 women, received pensions from their own gainful employment (personal pensions). Within the group of pensioners, a total of 562 463 received a pension not exceeding EUR 750 per month (so-called minimum pensions) and, of those, 408 910 were women and 153 553 men. It follows that, within the group of female pensioners, the proportion of persons receiving a monthly pension not exceeding EUR 750 was 57 %. In contrast, the proportion of persons with a minimum pension (not exceeding EUR 750 per month) within the group of male pensioners was 25 %. Consequently, the percentage of women disadvantaged by the 2008 pension adjustment is approximately 2.3 times greater than the figure for men. [39]

69. In the referring court's view, having regard to the fact that the Court had not hitherto specified a minimum threshold for a presumption of indirect discrimination, it was appropriate in the present case to seek to establish from the Court whether, as a matter of EU law, indirect sex discrimination is present where a considerably greater number of female pensioners is disadvantaged by the scheme in question. I consider that the referring court was indeed correct to observe that the Court has hitherto abstained from laying down a binding threshold or a specific difference in percentages to establish a difference in treatment which is material. [40] An examination of the Court's existing case-law on Directive 79/7 does not result in any

38 — See *Schönheit and Becker*, cited above in footnote 12, paragraph 71; *Molenbroek*, cited above in footnote 27, paragraph 12; *Jackson and Cresswell*, cited above in footnote 19, paragraph 3; and Case 30/85 *Teuling* [1987] ECR 2497, paragraph 14.

39 — See page 10 of the reference for a preliminary ruling.

40 — This view is shared by Prechal, S., 'Combating indirect discrimination in community law context', cited above in footnote 29, p. 85 et seq. However, in her view, this is understandable given the fact that, in some of the references for a preliminary ruling, the national court had already found, for example, that 'predominantly women' were affected by the measure concerned or the questions were premised on a difference in treatment. Moreover, she continues, in accordance with the division of competences between the Court of Justice and national courts, it is for the latter to appraise the facts of the case. However, according to the author, this does not prevent the Court from providing guidance to the national court on *how* those facts should be appraised.

clear conclusion. On the other hand, in cases brought under Article 141 EC on provisions disadvantaging part-time workers, the actual percentage of the particular sex disadvantaged is specified. For example, in *Hill and Stapleton*, [41] the Court found that 99.2 % of clerical assistants who job shared were women as were 98 % of all public sector workers who worked part-time. In *Schröder*, [42] the proportion of part-time workers who were women amounted to 95 % and in *Voß* [43] women accounted for 88 % of the part-time teachers employed by the *Land* of Berlin. A similar situation prevailed in *Schönheit and Becker*, [44] where the proportion of part-time workers employed in the public administration of the *Land* of Hesse who were women amounted to 87.9 %.

70. These examples are certainly not wholly irrelevant for the interpretation of Directive 79/7. However, as the Austrian Government also specifically concedes, ultimately, they are not fully conclusive with a view to establishing the percentage in excess of which a difference in treatment must be presumed relevant within the meaning of the case-law. Moreover, an approach of that kind fails to do justice to the complexity of such an assessment, in particular, having regard to the fact that both the relevant legal and factual elements may differ considerably from one case to the next. As a general rule, it will hardly ever be possible to lay down fixed percentages as, in addition, the absolute figures and the intensity of the effects in each case may also be relevant. [45] Therefore, in my view, it is essential to assess the matter in the context of each individual case, as the Court has hitherto always done in the exercise of its interpretative authority in previous cases.

71. However, the objections raised by the Austrian Government [46] with regard to consideration of the percentages of each sex affected fail to convince me. To the extent that it cautions against the loss of Member State autonomy in the implementation of social policy, it overlooks the fact, first, that this approach simply addresses the logically prior question of whether there is a difference in treatment between men and women, a matter which in itself is not decisive in determining whether prohibited discrimination exists. From the consistent case-law to which I have already referred, it clearly follows that prohibited discrimination cannot be considered to exist unless the measure in question is found not to be justified by objective factors unrelated to discrimination on ground

41 — Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739.

42 — Case C-50/96 *Schröder* [2000] ECR I-743.

43 — Case C-300/06 *Voß* [2007] ECR I-19573.

44 — *Schönheit and Becker*, cited above in footnote 12, paragraph 35.

45 — In the same vein, see Haverkate, G., and Huster, S., cited above in footnote 16, point 706, p. 400.

46 — See paragraph 22 of the written observations of the Austrian Government.

of sex. [47] Second, it overlooks the fact that the legislative authority of the Member States in the area of social policy – recognised both in the Treaties and the Court's case-law – is limited, as I have already indicated, inter alia, by the principle of equal treatment. Therefore, it is only logical that the Court has always stressed that the exercise of such power cannot have the effect of frustrating a principle so fundamental to EU law. [48]

72. On the crucial question whether in the present case the materiality threshold is satisfied, I take the view that, ultimately, this must be answered in the affirmative given the fact that the proportion of female pensioners in receipt of a minimum pension, increased merely by 1.7 % (in contrast to the increase granted to pensions of between EUR 747 and EUR 2 160), is more than twice the proportion of male pensioners in receipt of a minimum pension. Thus, within the category of pensioners whose pensions are in receipt of only minimal support from the Austrian State (that is, disregarding the compensatory supplement) women are over-represented, which in itself points to a difference in treatment. Consequently, the hypothesis put forward by the referring court to that effect appears to me well founded.

73. This conclusion applies inasmuch as consideration is given simply to the effects of the pension increase. However, that disregards the possible advantageous effects of the compensatory supplement to which the Austrian Government refers several times in its observations. In its existing case-law on this point, [49] the Court appears inclined in its assessment of the effects of a particular social policy measure not to take account also of the advantageous effects resulting from the social security scheme which may

47 — See, in the same vein, Bieback, K.-J., *Die mittelbare Diskriminierung wegen des Geschlechts*, cited above in footnote 13, p. 102, who argues that the prohibition on discrimination cannot be regarded as infringed unless the objective justification proffered has been examined and found inadequate. For that reason, in his view, it is incorrect to speak of discrimination where simply divergent negative effects have been established. According to the author, inherent in the notion of the prohibition of discrimination is the absence of justification.

48 — See the case-law cited in footnote 28.

49 — See Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 34. In that passage of the judgment, the Court indicates the approach to be taken by a national court with a view to verifying compliance in an individual case with the principle of equal pay provided for in Article 141 EC. It holds that if national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of Article 141 EC would be diminished as a result. Consequently, according to the Court, it follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies *to each of the elements* of remuneration granted to men or women.

compensate for the disadvantages. [50] Instead, the Court appears to consider simply the effects of the specific measure taken on its own. Accordingly, for the purposes of establishing whether there is a difference in treatment, this approach does not allow, as a general rule, consideration to be given also – in addition to the increase in pension – to the effects of the compensatory supplement. *A fortiori*, no consideration whatsoever may be given to the fact that under national tax law only income in excess of EUR 1 000 is taxed, a feature which is intended, as stressed by the Austrian Government at the hearing, to treat pensioners in receipt of a minimum pension more favourably in financial terms than those in receipt of larger pensions.

74. However, it is unnecessary to determine whether this approach must be maintained. For the purposes of the present case, it is not decisive which approach is taken, as the outcome is substantively the same. I shall demonstrate this below through a consideration, in the alternative, of the effects of the compensatory supplement. If one examines the statistics provided by the referring court, which indicate how many individuals within the category of pensioners in receipt of a small pension are not entitled to a compensatory supplement (for example, because the income of a spouse living in the common household is taken into account for those purposes) and, for that reason, did not benefit from the increase in the standard amount of the compensatory supplement resulting from the 2008 pension adjustment, it may be seen that the number of women in receipt of a minimum pension is clearly much greater. [51] That fact is specifically emphasised by the referring court. [52]

75. Therefore, if one takes account of both criteria (receipt of a minimum pension and no entitlement to a compensatory supplement), it must be concluded that the clear majority of persons affected are women. From that it follows that grant of the compensatory supplement eliminates neither the disadvantage experienced by women in comparison to the group of pensioners in receipt of a higher pension nor the difference in treatment in comparison with male pensioners in receipt of a minimum pension. Therefore, if, following the view taken by the referring court, one regards the more modest increase applied to minimum pensions in comparison with the increase applied to pensions amounting to between EUR 747 and EUR 2 160 to constitute adverse treatment, the over-representation of women within the group of pensioners concerned must imply a difference in treatment between men and women.

50 — This understanding of the case-law appears to be shared by Haverkate, G., and Huster, S., cited above in footnote 16, point 703, p. 400. On their interpretation, the Court has hitherto not allowed other advantageous effects of a social security scheme to compensate for a disadvantage.

51 — Based on the statistics provided by the referring court, 47 % of female pensioners (336 305 out of a total of 711 469 female pensioners) and 14 % of male pensioners (89 387 out of a total of 614 293 male pensioners) were affected.

52 — See page 15 of the reference for a preliminary ruling.

4. Interim conclusion

76. My interim conclusion is that there is a difference in treatment between men and women. However, only if an objective justification for that difference is absent does that constitute indirect discrimination. If one presumes, in accordance with the referring court and as suggested by the wording of the second question, that in the present case such difference in treatment cannot be objectively justified, logically, one must also conclude that the provision at issue which causes the difference in treatment is discriminatory within the meaning of Article 4(1) of Directive 79/7 and, consequently, also precluded by that latter provision.

77. Thus, the answer to be given to the second question is that Article 4 of Directive 79/7 must be interpreted as precluding a national provision concerning an annual pension adjustment whereby a potentially smaller increase is provided for a particular category of pensioners receiving a minimum pension than for other pensioners, in so far as the provision in question adversely affects 25% of male pensioners, but 57% of female pensioners and there is an absence of objective justification.

D — *The third question*

1. Justification for the difference in treatment

(a) Whether reasons in justification have been advanced

78. Whether or not in the present case objective justification is in fact absent can be established only by examining the third question, which specifically raises that legal question.

79. Admittedly, in settled case-law, the Court has held, one the one hand, that it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying irrespective of sex, actually however affects a considerably higher percentage of women than men, is justified by reasons which are objective and unrelated

to any discrimination on ground of sex. [53] On the other hand, in that connection the Court has explained that it is called on to provide answers of use to the national court and, as a consequence, may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment and, in particular, this applies notwithstanding the fact that in preliminary ruling proceedings it is, in principle, for the national court to establish whether such objective factors exist in the particular case before it. [54]

80. As a general rule, it is for the Member State which has introduced such a measure, or the party to the main proceedings who invokes it, to establish before the national court that there are objective reasons unrelated to any discrimination on grounds of sex such as to justify the measure concerned. [55] As the Court clarified in *Schönheit and Becker*, [56] a difference in treatment between men and women may be justified, depending on the circumstances, by reasons other than those put forward when the measure introducing the differential treatment was adopted. In its reference for a preliminary ruling, the national court refers to a series of reasons [57] put forward by the defendant pension insurance office as justification in the main proceedings. Those arguments were implicitly adopted by the Austrian Government as its own for the purpose of the present preliminary ruling proceedings when commenting further on those grounds of justification in its capacity as constitutional representative of the Republic of Austria. The reasons advanced for the difference in treatment are the earlier age at which women become entitled to a pension, the longer period for which women are in receipt of a pension and the extraordinary increase in the standard amounts of the compensatory supplement.

81. For the purposes of the present preliminary ruling proceedings, I intend to examine those reasons below in order to determine whether they may be regarded as objective factors, as defined in the case-law, which may justify a difference in treatment. Further, it must be determined whether they are appropriate, necessary and reasonable to ensure the attainment of the objective pursued by the pension reform, that is, to maintain the purchasing power of old-age pensions. According to the Court's case-law, a measure is appropriate to ensuring the attainment of the objective in question if it genuinely reflects a

53 — See Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 15; *Seymour-Smith and Perez*, cited above in footnote 28, paragraph 67; and *Schönheit and Becker*, cited above in footnote 12, paragraph 82.

54 — See Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, paragraph 24; *Seymour-Smith and Perez*, cited above in footnote 28, paragraph 68; *Kutz-Bauer*, cited above in footnote 12, paragraph 52; and *Schönheit and Becker*, cited above in footnote 12, paragraph 83.

55 — See *Seymour-Smith and Perez*, cited above in footnote 28, paragraph 69; *Kutz-Bauer*, cited above in footnote 12, paragraph 62; and *Schönheit and Becker*, cited above in footnote 12, paragraph 87.

56 — *Schönheit and Becker*, cited above in footnote 12, paragraph 86.

57 — As Bieback explains in *Die mittelbare Diskriminierung wegen des Geschlechts*, cited above in footnote 13, p. 98, unlike a national constitutional court, the Court cannot examine – simply on account of its position in the procedural process – all the possible reasons which might constitute justification but must concentrate on those reasons advanced by the parties.

concern to attain it in a consistent and systematic manner. [58] A measure is necessary if, from among several measures which are appropriate for meeting the objective pursued, it is the least onerous for the interest or legal right in question. [59] There is an unreasonable restriction on the right to equal treatment if the national measure, notwithstanding its contribution to attaining the public interest objective, results in a disproportionate interference with such right.

(b) Examination of the reasons advanced in justification

(i) Earlier age at which women become entitled to a pension

82. The defendant advanced as justification the fact that, having regard to the earlier age at which women become entitled to a pension, the average number of months of contribution taken into account for the purposes of pension calculation is considerably fewer and, as a consequence, a pension calculated on the basis of the insurance principle must be lower.

83. The decision of a Member State to apply a different pension age for men and women is, in principle, a sovereign decision not precluded by Directive 79/7, as Article 7(1) expressly authorises the Member States to exclude this matter from the directive's scope. [60] As regards the question of justification itself, I concur with the view expressed by the referring court to the effect that, in light of the structural principles of contribution-based insurance schemes, it may, in principle, be objectively justified to link the benefits payable under such schemes to the level and period of contributions. Given the fact that, according to the referring court, a contributory notion of old-age pensions evidently also underpins the Austrian statutory pension insurance scheme, it appears objectively justified for female pensioners to have a lower pension income than male pensioners because of their lower contributions and the shorter period for which these are payable as

58 — Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 51, and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 42.

59 — Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21. According to Prechal, S., cited above in footnote 29, p. 89, when considering the justification for indirect discrimination it must be examined whether there was a possibility to achieve the objective pursued in a less discriminatory manner or entirely without discrimination.

60 — In the same vein, see Guggenbühl, A., and Leclerc, S., *Droit social européen des travailleurs salariés et indépendants*, Brussels 1995, p. 466.

a result of the earlier age at which women become entitled to a pension.

84. However, as the referring court [61] and the Commission [62] observe – in my view correctly – it is impossible to discern what might be the link between the contributory nature of the old-age pension scheme and the extraordinary pension increase which adversely affects female pensioners in receipt of a minimum pension. It follows from the observations of the referring court that the annual pension adjustment at issue does not constitute an element of the pension benefit payable whose size is linked to the level and period of contributions. Instead, as was mentioned at the outset, the idea underlying the annual pension adjustment is to maintain the purchasing power of pensions by linking them to consumer prices. However, it is not apparent why the purchasing power of women who receive lower pensions as a result of their shorter period of contribution should not also be maintained. According to the reference for a preliminary ruling, only pensions below the standard amount of the compensatory supplement were not accorded an extraordinary increase. Moreover, if one takes account of the fact that the shorter contribution period of women is already reflected in the payment of lower old-age pensions, there cannot be any objective reason to justify its renewed application to the disadvantage of female pensioners in receipt of a minimum pension by denying them the benefit of an extraordinary increase thereto.

85. Consequently, the shorter period for which women pay contributions as a function of the earlier age at which they become entitled to a pension justifies neither the lower increase applied to minimum pensions in the context of the pension adjustment scheme nor the disadvantage to women in receipt of a minimum pension which results therefrom.

(ii) Longer period for which women are in receipt of a pension

86. A further reason advanced to justify the difference in treatment is the longer period for which women are in receipt of a pension as a function of their greater life expectancy. According to the case-law of the Court, [63] if the fact that one sex is disadvantaged is to be justified, there must be justification based on objective factors 'unrelated to any discrimination on grounds of sex'. However, contrary to the view taken by the referring court [64] and by the Commission, [65] this reason, where relied

61 — See page 13 of the reference for a preliminary ruling.

62 — See paragraph 34 et seq. of the written observations of the Commission.

63 — See point 64 of this Opinion and the case-law cited in footnote 30.

64 — See page 14 of the reference for a preliminary ruling.

65 — See paragraph 41 of the written observations of the Commission.

on as a criterion, cannot be regarded as illegitimate simply because, on average, women have a greater life expectancy than men and, as a consequence, are likely to be over-represented. Although this aspect may be relevant for the purposes of establishing a difference in treatment, of itself, it does not preclude the possibility of justification, a question which requires separate examination. For it to preclude justification, life expectancy, as such, must be deemed a factor that cannot be regarded as objective within the meaning of the Court's case-law.

87. On that issue, in *Neath* [66] and *Coloroll Pension Trustees* [67] the Court admittedly took note of the point that the different life expectancy of men and women was one of the actuarial factors on which the financing of the pension systems at issue in those cases was based. However, the Court did not comment on the compatibility of that factor with the prohibition of discrimination on grounds of sex under European Union law. [68] It merely stated in *obiter dicta* in both judgments that the contributions paid by the employees into occupational pensions schemes, which were covered by Article 119(1) of the EEC Treaty, had to be the same for all employees, male and female, because they are an element of their pay. [69] However, that finding does not of itself allow any conclusions to be reached whether the Court regards life expectancy as a factor that is not objective for the purposes of calculating old-age pensions.

88. Ultimately, however, for the purposes of the present proceedings, that question does not have to be resolved as there is evidently no connection between the period for which persons are in receipt of an old-age pension and the absence of an extraordinary increase in pensions in the case of female pensioners in receipt of a minimum pension. That is evident simply from the fact that the category of pensioners whose pensions were accorded an extraordinary increase also includes women. The extraordinary increase was accorded to that group not because their life expectancy is different from that of the female pensioners in receipt of a minimum pension but because they are already in receipt of a higher pension. However, as I have already stated, it is not apparent why the purchasing power of minimum pensions should not also be maintained. Consequently, the longer period for which women are in receipt of a

66 — Case C-152/91 *Neath* [1993] ECR I-6935, paragraph 24.

67 — Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 74.

68 — See point 55 of the Opinion of Advocate General Kokott in *Association Belge des Consommateurs Test-Achats and Others*, cited above in footnote 14.

69 — *Neath*, cited above in footnote 66, second sentence of paragraph 31, and *Coloroll Pension Trustees*, cited above in footnote 67, second sentence of paragraph 80.

pension cannot be invoked to justify a difference in treatment.

(iii) Extraordinary increase in the standard amounts of the compensatory supplement

89. Finally, it must be examined whether the disproportionate increase in the standard amount of the compensatory supplement can justify the more modest increase in minimum pensions provided for under the 2008 pension adjustment scheme and the resulting fact that, from the perspective of pension indexation, more female pensioners are adversely affected.

— Existence of a legitimate objective of social policy

90. The justification advanced in support of a measure must be examined, inter alia, with a view to its coherence with the objective pursued by way of the provision and which, ultimately, the measure is intended to attain.[70] To that extent, prior to an examination of this reason proffered in justification, it is necessary to remind ourselves of the legislative objectives pursued by way of the provision at issue.

91. According to the Austrian Government, the objective underlying the increase in pensions is the need to maintain their purchasing power, which in itself must be regarded as a legitimate aim of social policy. The increase in pensions, as such, must be distinguished from the scheme of the compensatory supplement whose function, according to the Austrian Government, is to assist pensioners whose pensions are low because, for example, they paid contributions only for a limited period or had low earnings during their working life.[71] The scheme of compensatory supplements is financed through public funds. For that reason, in *Skalka*,[72] the Court deemed the compensatory supplement a form of social assistance and categorised it as a special non-contributory benefit within the meaning of Article 4(2a) of Regulation No 1408/71. Having regard to the fact that the compensatory supplement is deemed a form of social assistance because it seeks to ensure a minimum level of income where an

70 — The Court drew attention to this requirement for coherence most recently in *Association Belge des Consommateurs Test-Achats and Others*, cited above in footnote 14, paragraph 21, in connection with the exercise of legislative authority by the EU legislature.

71 — See paragraph 8 et seq. of the written observations of the Austrian Government.

72 — Case C-160/02 *Skalka* [2004] ECR I-5613, paragraphs 26 and 30.

individual's pension is inadequate, to that extent, it pursues an objective of social policy which must also be regarded as legitimate.

— Whether the measures are appropriate for attaining the objectives pursued

Interaction between the pension increase and compensatory supplement

92. The third question concerns justification for the difference in treatment in light of the complex interaction between the increase in pensions and the compensatory supplement. As I set out earlier, [73] in its assessment of the effects of a particular social policy measure, the Court has declined in its case-law hitherto to take account also of the advantageous effects resulting from the social security scheme which may compensate for any disadvantages. However, although the increase in pensions and the compensatory supplement are, in fact, two separate instruments of national social policy having different effects on old-age pensions, there is, as the Austrian Government convincingly explained, [74] an interaction between the two instruments to which consideration must be given in assessing the issue of justification. Support for that approach is to be found not least in the fact that, by its third question, the referring court requests guidance precisely on this point. I consider it appropriate to accede to that request. Consequently, in the following section, I will consider the combined effect of both instruments.

Lack of coherence as a result of the confusion between different social policy instruments

— Different legal nature of the instruments

93. Concerns as to the appropriateness of each measure, in particular their coherence in relation to their objectives, arise first inasmuch as their legal nature is different and, as a consequence, cannot be regarded as freely interchangeable.

94. In *Teuling* [75] and *Molenbroek*, [76] notwithstanding the fact that the majority of beneficiaries in receipt of the supplement concerned were men, national schemes which provided for supplements to ensure that beneficiaries

73 — See point 73 of this Opinion.

74 — See paragraph 11 et seq. of the written observations of the Austrian Government. See further page 34 of the judgment of the Austrian Verfassungsgerichtshof of 24 September 2009, in which that court takes the view that 'in examining the constitutionality of the rules of the pension system established under the statutory social security scheme, consideration must also be given, where appropriate, to the compensatory supplement as an integral element of that system'.

75 — *Teuling*, cited above in footnote 38.

76 — *Molenbroek*, cited above in footnote 27.

had a reasonable minimum income and which exceptionally excluded the payment of benefits where the applicant had access to sufficient income, for example that of a spouse, were deemed by the Court to be compatible, in principle, with Directive 79/7. [77] However, the measures at issue in those cases were intended to ensure that beneficiaries received an income equal to the social minimum. [78] Consequently, those measures were in substance a form of social assistance. The Court considered such objective to be legitimate on account of the fact that 'the allocation of an income equal to the social minimum formed an integral part of the social policy of the Member States and that those States enjoyed a reasonable margin of discretion as regards both the nature of the protective measures in the social sphere and the detailed arrangements for their implementation'. [79]

95. The supplements examined by the Court in those cases exhibit a similarity with the compensatory supplement at issue here inasmuch as they are by nature a form of social assistance. However, in the context of the present case, that case-law is apt to justify, at most, withdrawal of the compensatory supplement having regard to the adequacy of the income received by the spouse, as in the case of the applicant, but not the absence of an extraordinary increase in pensions for individuals in receipt of minimum pensions which, in fact, is the matter in dispute here. Thus, the abovementioned case-law cannot be applied directly to the present case.

96. In other words, in light of that case-law, the existence of sufficient financial resources may be invoked, in certain circumstances, as justification for withdrawal of the compensatory supplement but not for the withholding of an extraordinary increase in pensions, as the latter measure is by its nature not a form of social assistance but has a fundamentally different legal character.

— Absence of interchangeability between the measures

97. A further argument undermining the coherence of the measures is the fact that they also have different objectives, thus emphasising that they cannot be regarded as freely interchangeable.

98. In light of the observations of the referring court, it must be questioned whether the disproportionate increase in the standard amount of the compensatory supplement may be invoked at all as objective justification

77 — *Teuling*, cited above in footnote 38, paragraph 14, and *Molenbroek*, cited above in footnote 27, paragraph 20.

78 — See *Molenbroek*, cited above in footnote 27, paragraph 14.

79 — Ibid., paragraph 15.

as that measure aims, in fact, to ensure that a greater number of pensioners benefit from the compensatory supplement and not to accord them an extraordinary pension adjustment. According to the Austrian Government, in adopting that measure, the national legislature sought to ensure that pensioners whose income was previously just in excess of the standard amount would, as a result of the more modest increase in those pensions, fall below the standard amount subject to an extraordinary increase and may finally receive a compensatory supplement. [80] However legitimate that social policy measure may appear, it still does not explain why pensioners in receipt of a minimum pension were entirely excluded from the extraordinary increase in pensions, in particular given the fact that the compensatory supplement and the pension adjustment pursue different social policy objectives and, as a consequence, must be distinguished. [81]

99. In other words, to the extent that the pension adjustment scheme at issue implies, in essence, an extraordinary increase in the standard amount of the compensatory supplement while, at the same time, withholding an extraordinary increase for minimum pensions which is for granted for other pensions, that pension adjustment scheme results, ultimately, in a confusion of measures with different social policy objectives. That conclusion is already intimated by the referring court in its analysis of the pension adjustment scheme. [82] Having regard to the disparity between the objectives pursued, from a perspective of coherence, it does not appear logical how exclusion from one social policy measure may objectively be justified by the fact that in its place a different social policy measure applies.

— Inappropriateness of the measure for the purposes of maintaining purchasing power

100. Leaving that on one side, it must be noted that diversion of the compensatory supplement to support old-age pensions cannot eliminate, ultimately, the disadvantage to female pensioners in receipt of minimum pensions given the fact that, if a pensioner has other income or his or her spouse living in a common household has an income, entitlement to the compensatory supplement is withdrawn. That withdrawal of the compensatory supplement results, ultimately, in fact, in the reinforcement of the disadvantage experienced by female pensioners in receipt of minimum pensions in comparison with other groups of pensioners (pensioners in receipt of higher pensions and male pensioners in receipt of minimum pensions). In my observations on the second question and having regard to the information provided by the referring court, I drew attention to the extent of the disadvantage experienced

80 — See paragraph 11 of the written observations of the Austrian Government.

81 — See point 90 et seq. of this Opinion.

82 — See paragraph 16 of the reference for a preliminary ruling.

by female pensioners in receipt of minimum pensions.[83] Therefore, even allowing for a sufficiently wide Member State discretion,[84] it can be doubted whether an increase in the standard amounts of the compensatory supplement, as provided for in the legislation at issue, can ensure that the purchasing power of female pensioners in receipt of minimum pensions is maintained.

— Absence of any necessity for the measure

101. Leaving the previous arguments to one side, that disadvantage raises doubts whether the pension adjustment scheme adopted was necessary to maintain the purchasing power of old-age pensions while respecting the principle of differentiation in accordance with social echelons, as it would have been equally possible to attain that objective, as the Commission convincingly explains,[85] if all pensions below the standard amount of the compensatory supplement had been increased by the same percentage as higher pensions. That would have brought the objective pursued within reach without in any way provoking a difference in treatment.

102. In summary, the disproportionate increase in the standard amount of the compensatory supplement also cannot justify the fact that the scheme for the indexation of pensions has a greater negative impact on female pensioners.

2. Interim conclusion

103. In light of the foregoing, I conclude that the facts at issue in the main proceedings give rise to indirect discrimination on ground of sex within the meaning of Article 4(1) of Directive 79/7.

83 — See point 72 et seq. of this Opinion.

84 — I already referred to the broad discretion accorded to the Member States in the area of social policy in point 61 of this Opinion. Prechal, S., cited above in footnote 27, p. 87, takes the view that, having regard to the importance of the principle of equal treatment between men and women, national courts should not be satisfied by the argument that the interests of the authors of a provision should take precedence over that principle. Instead, she calls for a strict approach to the issue of justification.

85 — See paragraph 44 of the written observations of the Commission.

VII — Conclusion

104. In light of the above considerations, I propose that the Court should answer the questions referred by the Oberster Gerichtshof as follows:

'(1) 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 must be interpreted as meaning that the scope of the prohibition of discrimination in Article 4(1) of that directive also covers the annual pension adjustment system (indexation) provided for in the law on the statutory pension insurance scheme.

(2) Article 4 of Directive 79/7 must be interpreted as precluding a national provision concerning an annual pension adjustment whereby a potentially smaller increase is provided for a particular category of pensioners receiving a minimum pension than for other pensioners, in so far as the provision in question adversely affects 25 % of male pensioners, but 57 % of female pensioners, unless this distinction is objectively justified by factors unrelated to discrimination on ground of sex.

(3) A disadvantage for female pensioners arising from the annual increase in their pensions cannot be justified in any event by the earlier age at which they become entitled to a pension or the longer period for which they are in receipt of a pension, nor by reason of the fact that the standard amount for minimum income provided for in social security law (the standard amount of the compensatory supplement) was disproportionately increased, where the provisions concerning the payment of the minimum income provided for in social security law (the compensatory supplement) require account to be taken of the pensioner's other income and the income of a spouse living in the common household, whereas in the case of other pensioners the pension increase takes place without account being taken of the pensioner's other income or the income of the pensioner's spouse.'