Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

24 February 2022 *

(Reference for a preliminary ruling – Equal treatment for men and women in matters of social security – Directive 79/7/EEC – Article 4(1) – Prohibition of any discrimination on grounds of sex – Domestic workers – Protection in respect of unemployment – Exclusion – Particular disadvantage to female workers – Legitimate social policy objectives – Proportionality)

In Case C-389/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Contencioso-Administrativo nº 2 de Vigo (Administrative Court No 2, Vigo, Spain), made by decision of 29 July 2020, received at the Court on 14 August 2020, in the proceedings

CJ

v

Tesorería General de la Seguridad Social (TGSS),

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi (Rapporteur) and N. Wahl, Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 30 June 2021,

after considering the observations submitted on behalf of:

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

– the Tesorería General de la Seguridad Social (TGSS), by M.S. Amaya Pilares and E. Ablanedo Reyes, letrados,

– the Spanish Government, by M.J. Ruiz Sánchez and S. Jiménez García, acting as Agents,

* Language of the case: Spanish.

– the European Commission, by I. Galindo Martín and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) and of Article 5(b) and Article 9(1)(e) and (k) of Directive 2006/54/EC of the European Parliament and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

2 The reference has been made in proceedings between CJ and the Tesorería General de la Seguridad Social (TGSS) (General Social Security Fund (TGSS), Spain) relating to CJ's application to pay contributions in respect of unemployment protection.

Legal context

European Union law

Directive 79/7

3 The second recital of Directive 79/7 states:

'Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes'.

4 Article 3(1) of that directive provides:

'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;

…’

5 Article 4(1) of the directive provides:

‘The principle of equal treatment means that there shall be no discrimination whatsoever on [grounds] 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,

…’

Directive 2006/54

6 Article 1 of Directive 2006/54, entitled ‘Purpose’, reads:

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

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

…

(c) occupational social security schemes.

…’

7 Paragraph 1 of Article 2 of that directive, entitled ‘Definitions’, states:

‘For the purposes of this Directive, the following definitions shall apply:

…

(b) “indirect discrimination”: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

…

(f) “occupational social security schemes”: schemes not governed by [Directive 79/7] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.’

8 Article 5 of that directive, entitled 'Prohibition of discrimination', provides:

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

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

…'

9 Paragraph 1 of Article 9 of the same directive, entitled 'Examples of discrimination', provides:

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

…

(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

…

(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.'

Spanish law

The LGSS

10 Article 251 of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree No 8/2015) of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291, and corrigendum BOE No 36 of 11 February 2016, p. 10898) ('the LGSS'), entitled 'Protective function', provides:

'Workers covered by the special scheme for domestic workers shall be entitled to social security benefits under the terms and conditions laid down in respect of this general social security scheme but with the following specific features:

…

(d) the protection afforded by the special scheme for domestic workers shall not include protection in respect of unemployment.'

11 Paragraph 1 of Article 264 of the LGSS, entitled 'Protected persons', provides:

'The following persons are covered by protection in respect of unemployment provided they make provision to contribute for that benefit:

(a) employed persons covered by the general social security scheme;

…'

Royal Decree 625/1985

12 Article 19 of Real Decreto 625/1985, por el que se desarrolla la Ley 31/1984, de 2 de agosto, de protección por desempleo (Royal Decree No 625/1985 implementing Law No 31/1984 of 2 August 1984 on unemployment protection), of 2 April 1985 (BOE No 109 of 7 May 1985, p. 12699, and corrigendum BOE No 134 of 5 June 1985, p. 16992), entitled 'Contributions', provides as follows in paragraph 1:

'All undertakings and workers covered by the general social security scheme and special social security schemes offering protection against unemployment are obliged to contribute in respect of that risk. …'

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

13 CJ is a domestic worker and works for an employer who is a natural person. She has been enrolled in the special social security scheme for domestic workers ('the Special Scheme for Domestic Workers') since January 2011.

14 On 8 November 2019, CJ applied to the TGSS to pay contributions in respect of unemployment protection in order to acquire entitlement to unemployment benefits. Her employer's written agreement to pay the requisite contribution was attached to the application.

15 By decision of 13 November 2019, the TGSS rejected that application on the grounds that, because CJ was enrolled in the Special Scheme for Domestic Workers, Article 251(d) of the LGSS expressly prevented her from contributing to that scheme in order to obtain protection in respect of unemployment. That decision was upheld by the TGSS's decision of 19 December 2019, taken following an administrative appeal brought by CJ.

16 On 2 March 2020, CJ appealed against the TGSS's second decision to the Juzgado de lo Contencioso-Administrativo nº 2 de Vigo (Administrative Court No 2, Vigo, Spain). In support of her appeal, CJ claims in essence that Article 251(d) of the LGSS gives rise to indirect discrimination on grounds of sex in social security matters as regards female domestic workers, who comprise almost all of that group of workers.

17 In that regard, CJ states that, although domestic workers are protected in respect of temporary incapacity, where the incapacity persists they end up losing their jobs, either by mutual agreement or due to the employer terminating the contract, without any unemployment protection, unlike other paid employees. Since the situation of domestic workers who have lost their jobs is not the same as that of workers who are covered by social security, exclusion from unemployment protection means that those workers are also unable to obtain any other benefit or allowance that is dependent on entitlement to unemployment benefit having come to an end.

Accordingly, Article 251(d) of the LGSS places those workers in a situation of social distress, which takes the form not only, directly, of not being able to obtain unemployment benefit, but also, indirectly, of not being able to obtain other types of social assistance.

18 The referring court has doubts as to whether that national provision is compatible with EU law. It points out that the parties to the main proceedings agree that the group of workers enrolled in the Special Scheme for Domestic Workers consists almost exclusively of women. That court considers therefore that, since it denies women belonging to that group the possibility to obtain unemployment benefit, by preventing them from contributing to cover that risk, that national provision constitutes indirect discrimination on grounds of sex in the access to social security benefits. In the absence of any express reasoning in that regard, that discrimination is unjustified and may therefore be prohibited by Directives 79/7 and 2006/54.

19 In those circumstances, the Juzgado de lo Contencioso-Administrativo nº 2 de Vigo (Administrative Court No 2, Vigo) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 4(1) of [Directive 79/7], governing equal treatment, which precludes any discrimination whatsoever on grounds of sex, either directly or indirectly, as regards the obligation to pay social security contributions, and Article 5(b) of Directive [2006/54], which lays down the same prohibition of direct and indirect discrimination on grounds of sex as regards the scope of social security schemes and the conditions of access to those schemes and the obligation to contribute, and the calculation of contributions, be interpreted as precluding a national provision like Article 251(d) [of the] LGSS, which provides: “The protection afforded by the Special Scheme for Domestic Workers shall not include protection in respect of unemployment”?

(2) If the answer to that question is affirmative, must that statutory provision be regarded as an example of prohibited discrimination under Article 9(1)(e) and/or (k) of [Directive 2006/54] in so far as the addressees of the provision at issue, Article 251(d) [of the] LGSS, are almost exclusively women?’

The questions referred

Admissibility

20 The TGSS and the Spanish Government question whether the request for a preliminary ruling and the questions referred are admissible.

21 Regarding, first, the admissibility of the request for a preliminary ruling, they submit in essence that the dispute in the main proceedings does not in fact concern an alleged entitlement to contribute but recognition of an entitlement to unemployment benefits. Therefore, first, the dispute is artificial in the sense that CJ brought proceedings before the referring court on spurious grounds. Secondly, since such an entitlement falls within the jurisdiction of the social courts, the referring court, as an administrative court, lacks jurisdiction to hear such a dispute, so there is no link between the interpretation of EU law sought and the determination of that dispute.

22 The TGSS also submits that, if that dispute did in fact concern recognition of an entitlement to contribute, it would not be necessary to interpret Directive 79/7 in order to resolve it, since the scope of the protective function of the Special Scheme for Domestic Workers is a different matter from how that scheme is financed.

23 In that regard, it should be noted that, in accordance with the Court's settled case-law, in the context of the cooperation between the Court and the national courts, provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 115 and the case-law cited).

24 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 116 and the case-law cited).

25 In particular, as is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it. Thus, the preliminary ruling procedure is based on the premiss, inter alia, that a case is pending before the national courts, in which they are called upon to give a decision which is capable of taking account of the preliminary ruling (judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 117 and the case-law cited).

26 In the present case, as was stated in paragraphs 15 and 18 of the present judgment, first of all, the dispute in the main proceedings concerns the rejection by the TGSS of an application to contribute to protection against the risk of unemployment in order to acquire entitlement to the corresponding unemployment benefits. Next, that rejection is based on the exclusion of those benefits from the Special Scheme for Domestic Workers, within the meaning of Article 251(d) of the LGSS. Lastly, that exclusion, since it applies to a group of workers which consists almost exclusively of women, may, according to the referring court, constitute indirect discrimination on grounds of sex, which is prohibited by Directives 79/7 and 2006/54.

27 In those circumstances, first, the questions posed by the referring court are not hypothetical and, secondly, the interpretation of EU law sought does bear some relation to the purpose of the dispute in the main proceedings, since it does in fact concern recognition of entitlement to unemployment benefits, and does appear necessary, within the meaning of the case-law referred to in paragraph 25 of the present judgment, in order to enable the referring court to deliver judgment by putting it in a position to assess the compatibility of the national provision at issue in the main proceedings with EU law. The request for a preliminary ruling is therefore admissible.

28 That finding is not called into question by the Spanish Government's argument that the referring court lacks jurisdiction to hear the dispute in the main proceedings thus defined, since the latter falls within the jurisdiction of the social courts. It is sufficient to note in that regard that, according to settled case-law, it is not for the Court to call into question the referring court's assessment of the admissibility of the action in the main proceedings, which falls, in the context of the preliminary ruling proceedings, within the jurisdiction of the national court; nor is it for the Court to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and legal proceedings. The Court must abide by the decision from a court of a Member State requesting a preliminary ruling in so far as that decision has not been overturned in any appeal procedures provided for by national law (judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)*, C-658/18, EU:C:2020:572, paragraph 61 and the case-law cited).

29 As regards, secondly, the admissibility of the questions referred, the Spanish Government, joined on this point by the European Commission, contends, first, that Directive 2006/54 is not applicable to the Spanish statutory social security scheme governed by the LGSS. Since those questions concern Directive 2006/54 they should be declared inadmissible.

30 Secondly, the Spanish Government implicitly contends that those questions are also inadmissible since they concern Directive 79/7. In the view of that government, that directive does not require Member States to introduce protection in respect of a particular risk, such as unemployment, which means that an application to contribute in respect of that risk in order to acquire entitlement to the corresponding benefits, such as that at issue in the main proceedings, does not fall within the scope of that directive.

31 It is sufficient to note in that regard that, in accordance with settled case-law, where it is not obvious that the interpretation of an EU provision bears no relation to the facts of the main action or its purpose, the objection alleging the inapplicability of that provision to the case in the main action does not relate to the admissibility of the request for a preliminary ruling, but concerns the substance of the questions (judgment of 28 October 2021, *Komisia za protivodeystvie na koruptsiyata i za otnemane na nezakonno pridobitoto imushtestvo*, C-319/19, EU:C:2021:883, paragraph 25 and the case-law cited).

32 In those circumstances, in the light of the considerations set out in paragraphs 26 and 27 of the present judgment, the questions referred are admissible.

Substance

33 By its questions, which it is appropriate to consider together, the referring court asks in essence whether Article 4(1) of Directive 79/7 and Article 5(b) of Directive 2006/54 must be interpreted as precluding a national provision which excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme.

34 It should be noted in that regard, as a preliminary point, that it is clear from the documents in the file submitted to the Court, and from the wording of Article 251 of the LGSS, that the Special Scheme for Domestic Workers is incorporated into the general social security scheme governed by the LGSS and that those workers are entitled to social security benefits in accordance with the rules and conditions laid down in that general scheme. As regards unemployment benefits in

particular, it follows from Article 264(1)(a) of the LGSS that all employees who come under that general scheme are in principle covered by unemployment protection, provided they pay contributions accordingly.

35 Therefore, since, as was stated in paragraph 26 of the present judgment, the dispute in the main proceedings is about affording to domestic workers unemployment protection from which they are excluded under Article 251(d) of the LGSS, that dispute concerns in essence the personal scope of the unemployment benefits granted by the Spanish statutory social security scheme.

36 It follows, first, that the unemployment benefits at issue in the case in the main proceedings fall within the scope of Directive 79/7 and, therefore, that that directive is applicable to that case. Those benefits form part of a statutory scheme of protection against one of the risks listed in Article 3(1)(a) of that directive, namely the risk of unemployment, and are directly and effectively linked to the protection provided against that risk (see, to that effect, judgment of 14 October 2021, *INSS (Survivor's pension based on a de facto partnership)*, C-244/20, not published, EU:C:2021:854, paragraph 43 and the case-law cited).

37 That means, secondly, that Directive 2006/54 is not applicable to the case in the main proceedings. It is apparent from subparagraph (c) of the second paragraph of Article 1 of Directive 2006/54, read in conjunction with Article 2(1)(f) thereof, that that directive does not apply to statutory schemes governed by Directive 79/7 (judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*, C-450/18, EU:C:2019:1075, paragraph 34).

38 Therefore, in the light of the considerations set out in paragraphs 34 to 37 of the present judgment, in order to answer the questions referred, it is necessary, in essence, to assess whether a national provision such as Article 251(d) of the LGSS, is likely to give rise to discrimination on grounds of sex as regards the personal scope of the Spanish statutory social security scheme, which provides unemployment protection, within the meaning of the first indent of Article 4(1) of Directive 79/7, read in conjunction with the second recital and the fifth indent of Article 3(1)(a) of that directive.

39 In that regard, it should be noted at the outset that a national provision such as that at issue in the main proceedings does not give rise directly to any discrimination on grounds of sex, since it applies without distinction to male and female workers enrolled in the Special Scheme for Domestic Workers.

40 As regards whether the same national provision gives rise to indirect discrimination, it should be noted in the first place that that concept must be understood, in the context of Directive 79/7, in the same way as in the context of Directive 2006/54 (judgments of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 37 and the case-law cited, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 24). It is clear from Article 2(1)(b) of the latter directive that indirect discrimination on grounds of sex occurs where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

41 The existence of such a particular disadvantage might be established, for example, if it were proved that that provision, criterion or practice is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex. It is for the

national court to determine whether that is the case in the main proceedings (see, to that effect, judgments of 8 May 2019, *Villar Láiz*, C-161/18, EU:C:2019:382, paragraph 38, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 25).

42 In a situation where statistical evidence is available to the national court, the Court has held (i) that it is for that court to take into account all those workers subject to the national legislation in which the difference in treatment has its origin, and (ii) that the best approach to the comparison is to compare the respective proportion of workers that are and are not affected by the alleged difference in treatment among the women in the workforce who come within the scope of that legislation with the same proportion of men in the workforce coming within its scope (see, to that effect, judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 52 and the case-law cited, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 26).

43 In that regard, it is for the national court to assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant (judgments of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 51 and the case-law cited, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 27).

44 In the present case, as the Advocate General stated in point 58 of his Opinion, it is appropriate to consider not only the persons enrolled in the Special Scheme for Domestic Workers, but also all the workers who are subject to the Spanish general social security scheme, within which those persons enrolled in the Special Scheme for Domestic Workers are included (see, to that effect, judgment of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 28). Thus, as was stated in paragraph 35 of the present judgment, the national provision at issue in the main proceedings helps to determine the personal scope of the unemployment benefits granted by that general scheme.

45 It should be noted that the statistics presented in the oral submissions of the TGSS indicate, first, that on 31 May 2021, the number of employed persons subject to that general scheme was 15 872 720, of which 7 770 798 were women (48.96% of employees) and 8 101 899 were men (51.04% of employees). Secondly, on the same date, the cohort of employees covered by the Special Scheme for Domestic Workers consisted of 384 175 workers, of which 366 991 were women (95.53% of the persons enrolled in the special scheme, that is to say, 4.72% of the female employees) and 17 171 were men (4.47% of the persons enrolled in the special scheme, that is to say, 0.21% of the male employees).

46 Those statistics show, therefore, that the proportion of female employees covered by the Spanish general social security scheme who are affected by the difference in treatment arising from the national provision at issue in the main proceedings is significantly greater than the proportion of male employees.

47 Therefore, although, following the assessment it was required to conduct, within the meaning of the case-law referred to in paragraphs 42 and 43 of the present judgment, the referring court concluded that those statistics are valid, representative and significant, it must be held that Article 251(d) of the LGSS places female workers at a particular disadvantage in relation to male workers.

48 It follows from the foregoing that that national provision gives rise to indirect discrimination based on sex, contrary to Article 4(1) of Directive 79/7, unless it is justified by objective factors unrelated to any discrimination on grounds of sex. That is the case if that provision reflects a legitimate social policy objective, is appropriate to achieve that objective and is necessary in order to do so, it being understood that it can be considered appropriate to achieve the stated aim only if it genuinely reflects a concern to attain that aim and is pursued in a consistent and systematic manner (see, to that effect, judgments of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraphs 70 and 71 and the case-law cited, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraphs 31 and 32 and the case-law cited).

49 The argument that the situation of domestic workers is not comparable to that of other employed workers enrolled in the Spanish general social security scheme, which was put forward by the Spanish Government to support the contention that there is no such indirect discrimination, is irrelevant in that regard.

50 As the Advocate General stated in point 47 of his Opinion, unlike the case which gave rise to the judgment of 26 June 2018, *MB (Change of gender and retirement pension)* (C-451/16, EU:C:2018:492), referred to by the Spanish Government, the national provision at issue in the main proceedings does not constitute direct discrimination on grounds of sex which could be disputed by alleging that the situation of domestic workers was not comparable to that of other employed workers.

51 As regards, secondly, the existence of a justifying objective factor within the meaning of the case-law referred to in paragraph 48 of the present judgment, it should be noted that, while 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 the national provision at issue in the main proceedings is justified by such an objective reason, the Court of Justice, which is called on to provide answers of use to the national court in the context of a reference for a preliminary ruling, may provide guidance based on the documents in the file of the case in 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 (judgments of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 72 and the case-law cited, and of 24 September 2020, *YS (Occupational pensions of managerial staff)*, C-223/19, EU:C:2020:753, paragraph 58 and the case-law cited).

52 In that context, the Court has repeatedly held that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a broad margin of discretion (judgments of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 73 and the case-law cited, and of 21 January 2021, *INSS*, C-843/19, EU:C:2021:55, paragraph 33), however, it is for the Member State concerned, as the author of the allegedly discriminatory rule, to show that that rule fulfils the conditions set out in paragraph 48 of the present judgment (see, to that effect, judgments of 20 October 2011, *Brachner*, C-123/10, EU:C:2011:675, paragraph 74, and of 17 July 2014, *Leone*, C-173/13, EU:C:2014:2090, paragraph 55).

53 In the present case, the Spanish Government and the TGSS maintain in their written and oral submissions that the legislative policy decision to exclude domestic workers from protection in respect of unemployment is connected with the specific characteristics of that business sector. On the one hand, the area of activity of domestic workers involves high levels of employment with a low level of skill and therefore of pay, and a substantial percentage of workers not enrolled in the social security scheme. On the other hand, the employment relationship of such workers is

characterised by the non-business nature of their employer, who is a head of household not deriving any profit from the paid work of those employees, and by the fact that the relationship is located within the family home, which makes it difficult to carry out checks and inspections to ensure that the conditions for accessing unemployment benefits are met, due to the inviolability of that home.

54 In that context, the rise in wage costs and other costs resulting from the increase in contributions to cover the risk of unemployment might, according to those concerned, result in lower levels of employment in that area of activity, involving falling recruitment and increasing termination of employment, and also situations of illegal work and social security fraud, and might therefore result in reduced protection for domestic workers. The national provision at issue in the main proceedings is therefore designed to safeguard levels of employment and combat illegal work and social security fraud in order to provide social protection for workers.

55 The Spanish Government adds that that national provision is proportionate to the attainment of the legitimate social policy objectives it pursues. With the sole exception of unemployment benefits, domestic workers receive in principle all the benefits granted by the Spanish general social security scheme, despite a lower contribution to the financing of that scheme due to reduced contribution rates. Furthermore, exclusion of protection in respect of unemployment concerns a risk which is not widespread among that group of workers.

56 However, the exclusion of unemployment benefits from the benefits granted by the Special Scheme for Domestic Workers does not lead to a total loss of protection in respect of unemployment, since an exceptional and temporary allowance for loss of work has been created for those workers whose work has been reduced or terminated as a result of the health crisis caused by the COVID-19 pandemic.

57 Regarding, in the first place, the objectives of the national provision at issue in the main proceedings, it should be noted that the objectives relating, on the one hand, to safeguarding levels of employment and encouraging recruitment and, on the other hand, those relating to combating illegal work and social security fraud for purposes of the social protection of workers constitute general objectives of the European Union, as is clear from Article 3(3) TEU and Article 9 TFEU.

58 Furthermore, as the Advocate General stated in essence in point 67 of his Opinion, those objectives have been recognised by the Court as both a legitimate aim of social policy (see, to that effect, judgments of 16 October 2007, *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraphs 64 to 66, and of 2 April 2020, *Comune di Gesturi*, C-670/18, EU:C:2020:272, paragraphs 36 and 37 and the case-law cited) and an overriding reason in the public interest capable of justifying a restriction on the exercise of the fundamental freedoms recognised in the Treaty (see, to that effect, judgments of 16 April 2013, *Las*, C-202/11, EU:C:2013:239, paragraph 28 and the case-law cited, and of 13 November 2018, *Čepelnik*, C-33/17, EU:C:2018:896, paragraph 44 and the case-law cited).

59 Moreover, the Court has held that those objectives could justify a difference in treatment affecting considerably more women than men as regards access to a statutory unemployment insurance scheme (see, to that effect, judgment of 14 December 1995, *Megner and Scheffel*, C-444/93, EU:C:1995:442, paragraphs 27, 28 and 32).

60 In those circumstances, it must be held that the objectives pursued in Article 251(d) of the LGSS are, in principle, legitimate social policy objectives, capable of justifying the indirect discrimination on grounds of sex to which that national provision gives rise.

61 Regarding, secondly, whether that national provision is capable of attaining those objectives, and in particular whether it is implemented in a consistent and systematic manner, it should be noted, first, that the fact of protecting workers through social security schemes entails by nature an increase in the costs associated with that input factor that may, depending on the circumstances of the labour market, affect the level of employment in any sector of that market, and, secondly, that the very existence of such schemes, irrespective of the sector concerned, involves the risk of the protection they offer being used fraudulently.

62 Consequently, in order for the national provision at issue in the main proceedings to be regarded as being implemented in a consistent and systematic manner in the light of the objectives referred to in paragraph 57 of the present judgment, it must be established that the category of workers it excludes from unemployment protection differs in a meaningful way from other categories of workers who are not excluded from it.

63 In that regard, it follows from the observations of the TGSS and the Spanish Government that other categories of workers whose employment relationship takes place within the employer's home and the employer is not a business, or whose area of work has the same specific characteristics in terms of rates of occupation, skill and pay as that of domestic workers, such as gardeners and chauffeurs or agricultural workers and workers employed by cleaning companies, are all covered by unemployment protection, despite contribution rates that are sometimes lower than those applicable to domestic workers.

64 Accordingly, the legislative choice to exclude domestic workers from the unemployment benefits granted by the Spanish general social security scheme does not appear to be implemented in a consistent and systematic manner in relation to other categories of workers who enjoy the same benefits whilst having the same characteristics and conditions of employment as those of domestic workers, as referred to in paragraph 53 of this judgment, and hence similar risks in terms of reduction of levels of employment, social security fraud and illegal work.

65 Furthermore, it is necessary to point out the fact, which is agreed between the parties to the main proceedings, that enrolment in the Special Scheme for Domestic Workers provides, in principle, entitlement to all the benefits granted by the Spanish general social security scheme apart from unemployment benefits. In particular, it is clear from the Spanish Government's observations that that scheme covers, inter alia, risks relating to accidents at work and occupational diseases.

66 In so far as those other benefits appear to pose the same risks of social security fraud as unemployment benefits, that circumstance may call into question also the internal consistency of the national provision at issue in the main proceedings in relation to those other benefits. In that context, it is for the referring court to determine the impact on the consistency of that national provision of the progressive increase in the contribution rates applicable to domestic workers, which the Spanish Government referred to in its written observations.

67 In those circumstances, as the Advocate General also noted, in point 99 of his Opinion, it must be held that the evidence provided by the Spanish Government and the TGSS does not show that the means chosen by the Member State concerned are appropriate to achieve the legitimate social policy objectives, which it is, however, for the referring court to assess.

68 Furthermore, it should also be noted, thirdly, that, if the referring court were nonetheless to find that the national provision at issue in the main proceedings does reflect legitimate social policy objectives and is appropriate to achieve those objectives, it must also determine whether that provision goes beyond what is necessary to achieve those objectives.

69 In that context, it is clear from the order for reference and from CJ's oral submissions that the exclusion of unemployment protection makes it impossible for domestic workers to obtain other social security benefits to which those employees are entitled and the granting of which is dependent on entitlement to unemployment benefits – such as permanent incapacity benefit or social assistance for the unemployed – having come to an end.

70 Since that exclusion entails a greater loss of social protection for domestic workers leading to a situation of social distress, the national provision at issue in the main proceedings does not, subject to determination by the referring court of the alleged consequences of such exclusion for the granting of other social security benefits, appear necessary in order to attain those objectives.

71 In the light of all the above considerations, the answer to the questions referred is that Article 4(1) of Directive 79/7 must be interpreted as precluding a national provision that excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme, where that provision places female workers at a particular disadvantage in relation to male workers and is not justified by objective factors unrelated to any discrimination on grounds of sex.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as precluding a national provision that excludes unemployment benefits from the social security benefits granted to domestic workers by a statutory social security scheme, where that provision places female workers at a particular disadvantage in relation to male workers and is not justified by objective factors unrelated to any discrimination on grounds of sex.

[Signatures]