



Gender Perspective of Social Security Law

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Abstract

The main purpose of Social Security Law is to regulate the social protection provided to those who, while carrying out a professional activity, find themselves in situations of need that are protected by the different Social Security systems of states. The purpose of these systems is to guarantee the welfare state and, therefore, they are increasingly inclined to extend their subjective scope of protection beyond those who carry out a professional activity. The gender perspective is not alien to Social Security law. It is essential to analyse Social Security from a gender perspective, not only because it includes protected situations arising from the very nature of women, but also due to the consequences the traditional distribution of roles between men and women has had in the field of Social Security. Both these issues will be studied in this chapter.

10.1 Introduction

The close connection between Social Security Law and Labour Law requires the study of both areas to be undertaken ‘hand-in-hand’, as covered in the chapter “Gender perspective of Labour Law”. The impact of the gender perspective on Social Security law requires analysis to account for labour law issues in the strict sense of the term, such as, the suspension of the employment relationship. It can also extend to tangential issues intrinsic to labour law, such as the prevention of occupational hazards.¹ However, our analysis will focus on the impact of this gender perspective on Social Security.² In light of the above, it must be said that Social Security includes, among its protected situations, situations directly related to women, such as pregnancy, maternity or breastfeeding. Contemporaneously, other situations are included which, being common to all human beings, have not been hermetically sealed from the gender perspective. Despite it being thought at first that the objective nature of such situations would not allow any subjective interference, they are in fact determined by the gender of the person affected. A conclusion can consequently be discarded in the face of the evidence shown by reality.

This chapter will therefore analyse these and other issues, both in which the impact of the gender perspective is obvious and required by the very idiosyncrasy that shapes gender, as well as those in which this idiosyncrasy appears in an

¹ Vid. Chapter Gender Perspective of Labor Law.

² According to William Beveridge (British Minister who is considered the father of Social Security by his 1942 Report Social “Insurance and Allied Services”, known as the Beveridge Report), Social Security is understood as the set of measures adopted by the State to protect citizens against those individual risks that will never cease to occur, no matter how optimal the overall situation in which society lives.

overlapping but no less incisive way. It cannot be forgotten that, although the protection provided by the Social Security system is based on occupational benefits as an employee or self-employed worker, the system has extended its range of protection beyond this sphere. This (protection) has even come under the umbrella of a broader concept of social protection; closely linked to the welfare state and includes complementary measures of protection outside the Social Security system, such as social assistance, third level benefits or complementary level benefits.

10.2 The Scope of the Statutory Social Security Schemes

The origins of Social Security as we know it today can be traced back to the industrial revolution of the nineteenth century. The appalling working conditions to which workers were exposed (long working hours, lack of health and safety protection measures, low pay, child labour, etc.), were aggravated in the case of women and led to the materialisation of a series of risks which had to be dealt with. The notion of social risk appears as opposed to individual risk. Social risk is characterised by the concurrence of two elements; an objective element, and a subjective element. The first entails the generality of the incidence of risk, since it threatens any person. In other words, it is inherent to the very life of human beings in society. The second is the general conviction that the individual alone cannot protect her or himself against the risk, but that it is necessary to organise a collective response to it. This is necessary as the individual does not have the technical and economic means necessary to protect her or himself against such risk, given the generality of the risk, and that its origin is not attributable to the specific individual, It should be pointed out that the emergence of both elements is not simultaneous in time. While the objective element, the generality of the risk, was known from the first stages of the provision of work, even in the primitive forms of slavery and servitude, the emergence of the second element, the concern to arbitrate mechanisms of protection against these risks, arises with the establishment of capitalism; the industrial and bourgeois revolution. It was at this historical moment that awareness of the inadequacy of the protection techniques that had hitherto been used to protect against these risks, came to light. These non-specific techniques, such as individual savings, insurance contracts or mutual-based solidarity systems, were not able to respond to the so-called “social question” arising from the industrial and bourgeois revolution. Thus, during the second half of the nineteenth century, specific protection techniques emerged, including social insurance.

10.2.1 The Right to Social Security: A Gendered Consideration

10.2.1.1 The Backgrounds of the Present-Day Social Security Systems: Bismarck System and Beveridge System

The origin of social insurance, as a response to the inadequacy of non-specific protection techniques, dates back to 1881 and was introduced by German Chancellor

von Bismarck. The first social insurances were thus created; to provide due protection against the materialisation of the contingencies they protected. These included health insurance, industrial accident insurance, and invalidity and old-age insurance, emerging in Germany as protection mechanisms. The Bismarckian system took the private insurance model as a reference, adapted to the protection of what we have called social risks. Its characteristics include: its compulsory nature; its constitution and financing, involving not only the employee, but also the employer and the State, and the public or quasi-public assumption of its management. However, its closed sphere in terms of its markedly professional subjective scope and the plurality of insurances, combined with the consequent dispersion of protected risks, management and financing, highlighted the need to give way to a new system of protection. Thus, in 1942, the publication of the first Beveridge Report in the United Kingdom marked the first step towards the Social Security system. This system has certain peculiarities and differences with respect to the social insurance system. The Social Security system advocated by Beveridge was characterised by an extension of the personal scope of coverage with a tendency towards universality: protection for all citizens and even residents in the country; the tendency towards protection against any risk that might cause a situation of destitution or economic need; seeking to guarantee a minimum income and solve the lack of income as quickly as possible; financing of a fundamentally fiscal origin, either directly (taxes) or indirectly (contributions), and the public nature of Social Security through the direct intervention of the State in its management by means of a single entity that integrates the various social insurances, thus recognising its public service character.

Notwithstanding the above, it should be pointed out that, at present, neither of the two models exists in a pure state, but rather the features and characteristics of one and the other are converging in a single model in which the inspiring principles of both are included. It is true that, depending on the system adopted by each country and even depending on the benefits of the model itself, the welfare or contributory nature prevails.

Therefore, the characteristics of each model are:

Welfare model:

- financing almost exclusively through taxation
- protection only for real situations of economic need
- protection guarantees a vital minimum
- benefits, that are essentially uniform, regardless of the financial contributions of the protected person to the financing of the system.

Contributory model:

- financing basically by contributions
- guaranteeing benefits whose amount depends on the time and value of previous contributions
- benefits tending to guarantee the levels of income received prior to the materialisation of the protected situation that constitutes the situation of need.

What unites the two systems is that “both models in their application and practical evolution in the national systems have a more or less universalist vocation: they maintain a tendency towards a joint treatment of risks (although the differentiated consideration of risks continues to exist); the financing tends more and more to become mixed, with more or less predominance, of financing through contributions; charged to quotas and general State budgets, and finally, both models have attempted to rationalise public management in an increasingly unified manner, although there are also various forms of private collaboration”.³

They are both part of the so-called welfare state, promoted by all Member States of the European Union in the second half of the twentieth century with the aim of improving the quality of life of citizens. The models of social protection are determined by the social objectives of each State; the responses given by each State to social problems give rise to different models of social protection. However, the authors highlight these models have a common element in presenting a structure in which non-contributory social benefits are combined with contributory pensions and supplementary schemes.⁴

In view of the differences between the various national legislations, the EU decided to coordinate the Social Security systems of the Member States with Regulations rather than harmonizing them with Directives.⁵ This coordination will ensure equal treatment for workers who are nationals of Member States, their dependants and heirs. This ensures that when workers exercise their free movement within the Union, they retain rights and benefits acquired, or those in the process of being acquired.

10.2.1.2 The Gender Perspective in the Bismarck System and Beveridge System: Current Implications

The characteristics of each social security model, and the inclination in the configuration of existing models towards one or the other, has an important impact on gender related situations. The situation of women in the labour market, in all its phases and aspects, access to employment, promotion and professional development as well as voluntary exit or not, have important implications in the field of Social Security. The characteristics of the model adopted and the gender aspects in the context of the social protection provided by the system will depend on the characteristics of the model adopted. The characteristics of the contributory model indicated above and the situation of women in the labour market (shorter periods of contribution to social security systems than men, late entry to the labour market or interruptions due to assuming the role of caregiver) assume that said model is not the

³Monereo Pérez (2015); Conde-Ruiz and González (2016), pp. 461–490.

⁴Millán García (2005), p. 197.

⁵“Regulation (EC) No 883/2004 of the European Parliament and of the council of 29 April 2004 on the coordination of Social Security systems” and “Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of Social Security systems”.

most beneficial for the social protection of women. In addition, lower contributions for lower-ranking jobs, part-time contracts or the incidence of pay discrimination, mean that an eminently contributory model has negative repercussions on the social protection that women can receive from it. In contrast, the welfare model can be characterised by its almost exclusively tax-based financing, and the protection only for real situations of economic need. In turn, this guarantees a vital minimum, with benefits that are tendentially uniform regardless of the economic contributions of the protected subject to the financing of the system. Consequently, it is possible to avoid the negative consequences that other models, as described above, can have on the social protection provided to women by ensuring that in similar situations of need, men and women will be able to obtain the same social protection provided by the Social Security system.

The pillars on which the Beveridge model was based,⁶ some of which are still in place today, must be analysed from a gender perspective. This will make it possible to respond to current situations in which the binomial of women and social security continues to require special attention. The main issue continues to be the need to protect women from unpaid work, childcare and care of the elderly, which keeps them away from the labour market and in a situation of lack of protection. A social security system is advocated in which paid and unpaid work is respected; men and women have to be protected from situations of need, both in the exercise of their professional activities and in the assumption of care functions.⁷ This is not at odds with the economic development of the countries. For example, Nordic countries, (Finland, Denmark and Sweden) are some of the most competitive economies in the world, despite their strong social protection.⁸

10.2.2 Conditions of Access to the Statutory Social Security Schemes

In the context of the 1970s when the first gender equality Directives entered into force, one of the areas of concern was Social Security, giving rise to the Social Security Directive. This Directive is the first and only binding instrument in the field of social security. Its existence has made it possible to purge national legislation of direct discrimination, and its transcendental importance now lies especially in the detection of indirect discrimination.

The material scope of the Social Security Directive covers statutory schemes providing protection against the risks of sickness, invalidity, old age, industrial accident and occupational disease, and unemployment.⁹ Unlike the risks traditionally included in national social security systems, it does not apply to survivors' benefits, nor to family benefits, except in the case of increases in benefits intended to

⁶Dale and Foster (1986), pp. 16–17.

⁷Pascal (1997), p. 233.

⁸Pampillón Olmedo (2008), pp. 155–165.

⁹Art. 3.

cover the aforementioned risks. It also includes social assistance, only if it is intended to supplement or complement the protection against some of the foreseen risks. With the exclusion of survivors' benefits and family benefits, one of the shortcomings of this Directive in the fight against the structural discrimination suffered by women becomes evident. These benefits are the ones most often reproducing gender stereotypes, particularly the importance of the family policy adopted by each State to achieve the full integration of women in the labour market and in the strengthening of co-responsibility.

The Social Security Directive excludes certain matters from its scope of application, granting full powers to national legislators in this respect: the determination of pensionable age for the purpose of granting old-age and retirement pensions, and the possible consequences thereof for other benefits; advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children; the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife; the granting of increases for long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife. These are exceptions in the progressive application of the principle of equal treatment, the maintenance of which is also subject to periodic reviews to be carried out by the Member States "*in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned*".¹⁰

There are three starting points to bear in mind. First, the instrument through which the protection of the Social Security system is provided; the benefit (either in kind or in cash). Secondly, access to this protection and, therefore, the conditions that a person has to comply with to obtain this protection. Thirdly, the impact of the principle of equal treatment and non-discrimination.

Regarding the first starting point, the ECJ has reiterated in its case law that a benefit will be considered a Social Security benefit, for the purposes of the European coordination rules on Social Security, when "*it is granted to its beneficiaries, regardless of any individual and discretionary assessment of personal needs, on the basis of their legally defined situation and insofar as the benefit refers to one of the risks expressly listed in those rules*",¹¹ as referred to in Article 3 of Regulation (EC) 883/2004¹² This Article mentions, as regards its material scope, all legislation concerning the branches of Social Security relating to "sickness, maternity and equivalent paternity benefits, invalidity, old age, survivors' benefits, benefits in respect of accidents at work and occupational diseases, unemployment benefits, early retirement, family benefits and death grants". The application of that

¹⁰Art. 7 (2).

¹¹For all of them, Cases C-216/12 y C-217/12 In Joined (ECJ, 19 September 2013).

¹²Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004.

Regulation is excluded when “a Member State assumes responsibility for the damage caused to persons and provides for compensation, such as those granted to victims of war and military action or their consequences; victims of crime, murder or terrorist acts; victims of damage caused by agents of the Member State in the performance of their duties, or victims who have suffered damage for political or religious reasons or because of their origin, are outside the scope of Social Security”.

With regard to the second question, the requirements, it should be pointed out that, despite their differences in each of the possible models existing within the European Union, they can be reduced to three types: inclusion in the corresponding Social Security system; prior deficiency or prior contribution period required for access to these benefits, and specific requirements according to the nature of the protected situation itself.

With regard to the third question, mention should be made of the Council Directive “*on the progressive implementation of the principle of equal treatment for men and women in matters of Social Security*”.¹³ However, the time which has elapsed since its entry into force means that, while maintaining in essence the objective set out in Article 1 of the Directive, “*namely the progressive implementation, in the field of Social Security and other elements of social protection provided for in Article 3 thereof, of the principle of equal treatment for men and women in matters of Social Security!*”, the changing social reality and social developments have called for new responses to ensure the applicability of this principle in the reality which now prevails. This is a function in which the role assumed by the ECJ through its case law has been of relevance.¹⁴

The importance of gender equality in the Social Security systems is also emphasized by Article 1 of Directive 2006/54/EC (the Equal Treatment Directive)¹⁵ which states that its purpose is to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, in particular occupational Social Security schemes.

Both Directives explicitly mention the conditions for access to Social Security benefits.

¹³Council Directive of 19 December 1978 “on the progressive implementation of the principle of equal treatment for men and women in matters of Social Security” (79/7/EEC).

¹⁴As an example, Case C-450/18, *WA v Instituto Nacional de la Seguridad Social (INSS)* (ECJ, 12 December 2019) where it is indicated that Directive 79/7 must be interpreted as meaning that it precludes national legislation, which makes provision for the right to a pension supplement for women who have had at least two biological or adopted children and who are in receipt of contributory pensions under a scheme within the national Social Security system, while men in an identical situation do not have a right to such a pension supplement.

¹⁵Of the European Parliament and of the Council of 5 July 2006 “on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation”.

Article 4.1 of the Social Security Directive¹⁶ for example states that: “the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly, in particular as regards marital or family status, in particular as regards the scope of schemes and the conditions of access to them, the obligation to contribute and the calculation of contributions, as well as the calculation of benefits”. Article 2(f) of the Equal Treatment Directive¹⁷ provides that “schemes not covered by Council Directive 79/7/EEC, the purpose of which is to provide benefits intended to supplement or replace the benefits provided by statutory Social Security schemes, whether membership of such schemes is compulsory or optional, to employed or self-employed workers in an undertaking or group of undertakings, or in a branch of the economy or occupational or cross-industry sector”. Article 5 of Equal Treatment Directive prohibits any direct or indirect discrimination on grounds of sex, in particular as regards the scope of these schemes and the conditions of access to them, the obligation to pay contributions and the calculation of contributions and benefits, including increases due for spouses and dependents, and the conditions for the duration and maintenance of entitlement to benefits.

The following sections will analyse the generic requirements for access to the benefits provided by the Social Security systems. The characterisation of this access is often directly related to the gender issue and requires action on the part of the public authorities, some of which is already underway.

10.2.2.1 The Inclusion in the Social Security System

The first requirement governing eligibility for the protection granted by social security systems is to be included in their personal scope of application. This requirement is met not only, and exclusively, by the performance of an occupational activity but also by family ties with the principal subject for certain benefits. By way of example, the protection afforded in the event of death and survival.

The Equal Treatment Directive expressly prohibits direct and indirect discrimination on grounds of sex in the application of occupational social security schemes.¹⁸ It also sets out some examples of matters which, in relation to inclusion in social security schemes, are to be regarded as contrary to the principle of equal treatment if they are based directly or indirectly on sex.¹⁹ These include: provisions defining the persons eligible to “participate in an occupational social security scheme”; provisions establishing “the compulsory or optional nature of participation in a scheme”, or “laying down different rules as regards the age of entry into a scheme”.

¹⁶Directive 79/7/ EEC.

¹⁷Directive 2006/54/EC.

¹⁸Article 5(a) that: “occupational social security schemes shall not discriminate directly or indirectly on grounds of sex with regard to the scope of application of such schemes”.

¹⁹Article 9(1)(a), (b) and (c).

10.2.2.2 The Obligation to Contribute and the Calculation of Contributions

The second of the requirements for entitlement to certain benefits, without prejudice to some exceptions, is the demand for a prior period of contribution to the system. This requirement is increased in the case of contributory benefits *par excellence*, such as old age or retirement pensions, where longer contribution periods are required.

From a gender perspective this requirement can be criticized. Women's contribution careers tend to be shorter than men's; they may enter the labour market later, suffer frequent interruptions due to dedication to family care, or are only able to accept part-time work.

In this respect, the Equal Treatment Directive recognises the prohibition of any direct or indirect discrimination on grounds of sex in occupational social security schemes. This extends to: the obligation to contribute; the calculation of contributions, the calculation of benefits, including increases due for spouses and dependants, and the conditions for the duration and maintenance of entitlement to benefits.²⁰ The directive furthermore indicates those provisions which are based directly or indirectly on sex in order to establish different conditions for the granting of benefits, or to reserve benefits for workers of one sex. Establishing different levels of benefits, or different levels of contributions for workers or employers, without prejudice to the exceptions provided for, would infringe the principle of equal treatment.²¹ Exceptions, in the latter case, provide for the possibility of setting different levels in the case of defined-contribution schemes, if the aim is to equalise or approximate the amounts of pension benefits for both sexes or, in the case of funded defined-benefit schemes, where the employers' contributions are intended to supplement the financial allocation needed to cover the costs of such defined.

It should be noted that the difficulty lies in identifying those measures which will lead to indirect sex discrimination. While there are fewer provisions which explicitly differentiate on the grounds of sex in terms of the obligation to contribute to the social security system, or in the calculation of benefits, there are often measures which are apparently neutral but factually have a negative effect on women's eligibility for benefits, and on the determination of the amount of benefits.

Example

The calculation of a part-time worker's contributory retirement pension by multiplying the regulatory base by a percentage depends on the length of the contribution period (a period to which a part-time coefficient is applied) gives rise to indirect discrimination. This measure particularly disadvantages women

²⁰ Article 5 b) and c).

²¹ Article 9(1)(h)(i) and (j).

workers in relation to men workers;²² it is mostly women who hold part-time contracts.²³ ◀

10.2.2.3 Other Conditions of Access

In addition to inclusion in the corresponding social security system and the prior contribution requirement, age is a prerequisite for access to certain benefits. For example, the old-age or retirement pension is understood as the typical age pension.

The Equal Treatment Directive states, in similar terms, that provisions based on sex, directly or indirectly, to establish different rules as regards the age of entry into a scheme or to impose different retirement ages, must be considered to be contrary to the principle of equal treatment. This is without prejudice as, stated by Article 13 of the Directive, due to the fact that men and women may require a flexible retirement age under the same conditions, and therefore not considered incompatible with the Directive.

The principle of equal treatment between men and women, and the prohibition of direct or indirect discrimination on grounds of sex, extends to any other condition which may be required for access to the protection of the social security system concerned. This is clear from Article 9(1)(e) of the Directive, by holding that any provision which lays down different conditions for the granting of benefits, or reserves such benefits to workers of one of the sexes, infringes that principle of equality.

Example

In a preliminary ruling the ECJ held that national legislation which, in the event of voluntary early retirement of a worker enrolled in the general social security scheme, makes that worker's right to an early retirement pension subject to the condition that the amount of that pension is at least as much as the minimum pension amount that worker would be entitled at the age of 65, is not discriminatory. The consequence is justified by legitimate social policy objectives (on the condition it is unrelated to sex-based discrimination) even if that law supposes an unfavourable consequence to women compared to men.²⁴ This discretion lies with the court in question to determine. ◀

²²Case C-161/18, Violeta Villar Láiz v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) (ECJ, 8 May 2019).

²³Vid. Gender Statistics Database, Full-time and part-time employment by sex, age and occupation in eige.europa.eu.

²⁴Case C-843/19, INSS v BT (ECJ, 21 January 2021).

10.3 Gender Perspective in Health Insurance

The protection provided by social security systems in situations of need, in which women may find themselves as a result of biological maternity, comes from the legislation protecting the health and safety of working women in such circumstances. We refer to Council Directive 92/85/EEC (Pregnant Workers Directive).²⁵ The protection afforded during these situations will be examined in this subchapter, with the exception of the protection afforded during maternity leave, which is analysed thereafter.

10.3.1 The Protection in the Event of Sickness (Health Care and Sickness Benefits)

Article 5 of the Pregnant Workers Directive provides that, in cases where there is a risk to the safety or health of the worker or an effect on pregnancy or breastfeeding, the employer must take the necessary measures to prevent the worker from being exposed to that risk. To this end: the working conditions and/or working time of the worker concerned may be temporarily adapted; the job may be changed if such adaptation is not possible, and if such a change is not technically and/or objectively possible or cannot reasonably be required for duly justified reasons, the worker concerned shall be excused from work for the whole period necessary for the protection of her safety or health. In the latter case, in accordance with Article 11 of the Directive, either the maintenance of remuneration and/or the provision of an adequate allowance must be ensured.

In response to this requirement, the different social security systems have included in their protective action benefits that respond to this aim, which will be analysed below.

10.3.1.1 The Protection During the Pregnancy

Without prejudice to the provision of health care to which the worker may be entitled for illnesses arising from pregnancy, as well as her right to attend prenatal examinations with guaranteed remuneration,²⁶ the Union legislator provides for financial protection in those situations in which the working woman has to give up her job as a result of the incompatibility of her job with her pregnancy. The financial benefit provided by the social security system, identified as risk during pregnancy benefit, may, in accordance with the provisions of Article 11(4) of the Directive, be subject by the Member States to the condition that the worker in question fulfils certain requirements. This does not include requiring periods of previous work of

²⁵Council Directive 92/85/EEC of 19 October 1992 “on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding”.

²⁶As provided for in Article 9 of Directive 92/85 EEC.

more than 12 months immediately prior to the expected date of childbirth. Thus, for example, in the Spanish social security system, entitlement to the benefit for risk during pregnancy only requires compliance with the condition of being registered in the social security system, and in a situation of registration, no prior contribution period is required.²⁷

10.3.1.2 The Protection During the Breastfeeding

Similarly in relation to risks during breastfeeding, the Pregnant Workers Directive recognises the right for the worker to maintain her remuneration, or the right to an allowance, during the time she is unable to carry out her professional activity. The conditions for access to this financial protection are also left to the legislation of the Member States.

Example

In the case of the Spanish social security system, for example, the economic benefit for risk during breastfeeding shall be granted to the working woman under the same terms and conditions as those laid down for the economic benefit for risk during pregnancy.²⁸ ◀

10.3.2 The Perspective of Gender in the Protection of Accidents at Work and Occupational Diseases

A comparative study of accidents at work suffered by men and women shows that in all the countries of the European Union, the percentage of accidents at work suffered by men is higher than that suffered by women.²⁹ Denmark, Ireland and Luxembourg, are the countries where the difference is smallest.³⁰ The characteristics of the profession also have an influence on these percentages. In occupations related to management or administration, technical profiles or liberal professions,³¹ the percentage of accidents at work suffered by women exceeds that of men in countries

²⁷ Article 187 of the Ley General de la Seguridad Social (General Law on Social Security), the consolidated version of which was approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261, 31 October 2015).

²⁸ Article 189 of the Ley General de la Seguridad Social (General Law on Social Security), the consolidated version of which was approved by Real Decreto Legislativo 8/2015 (Royal Legislative Decree 8/2015) of 30 October 2015 (BOE No 261, 31 October 2015).

²⁹ Information Resource: EIGE, Persons reporting an accident at work by sex, age and size of Enterprise, https://eige.europa.eu/gender-statistics/dgs/indicator/ta_wrklab_wrk_cond_wrkhealthsaf_acc_gen_hsw_ac9.

³⁰ Ibid.

³¹ About liberal professions, vid. In extenso: European economic and social Committee, The State of Liberal Professions Concerning Their Functions and Relevance to European Civil Society, EESC/COMM/05/2013.

including Denmark, Luxembourg, Austria, Finland and Sweden.³² Notwithstanding the above, the data show that more women than men report a work-related health problem.³³

Statistics further convey that women suffer more frequently from bullying, harassment, or humiliating behaviours in the workplace.³⁴

The protection provided by social security schemes for accidents at work and occupational diseases must also respect the principle of equal treatment and non-discrimination. This follows from a joint interpretation of Articles 6 and 7 of the Equal Treatment Directive, stating that there shall be no direct or indirect discrimination on grounds of sex within the scope of application of occupational social security schemes, including those providing protection against the risk of accidents at work and occupational diseases.

Thus, in principle, the requirements for access to benefits deriving from occupational contingencies, and the amount corresponding to them, should not include any differentiation on the grounds of gender. This is without prejudice to the possible indirect effects of any wage discrimination that may exist in the development of certain benefits, due to the chain relationship between the remuneration received, the contribution bases and the regulatory bases determining each benefit.

Example

Finish law³⁵ provides that the lump sum benefit paid to a man is lower than that paid to a woman, both being the same age and under the same circumstances, because life expectancy—different for men and women—is applied as actuarial calculation criterion for determining its amount. The Finnish Government specifies that “the differentiation on account of sex is necessary to avoid placing women at a disadvantage compared to men. Since women have a statistically longer life expectancy than men, the lump-sum compensation to remedy the harm suffered for the remainder of the injured person’s life must be higher for women than for men”. Thus, in its view, the provisions do not discriminate between men and women. However, the ECJ established that Article 4(1) of the Social Security Directive must be interpreted as precluding Finnish legislation because “it must be noted that the taking into account of a factor based on remaining life

³²Information Resource: EIGE, Persons reporting an accident at work by sex, age and occupation, https://eige.europa.eu/gender-statistics/dgs/browse/ta/ta_wrklab/ta_wrklab_wrk/ta_wrklab_wrk_cond/ta_wrklab_wrk_cond_wrkhealthsaf/ta_wrklab_wrk_cond_wrkhealthsaf_acc/ta_wrklab_wrk_cond_wrkhealthsaf_acc_inter/ta_wrklab_wrk_cond_wrkhealthsaf_acc_inter_occ.

³³Information Resource: EIGE, Persons reporting a work-related health problem by sex, age and NACE Rev. 2 activity, https://eige.europa.eu/gender-statistics/dgs/indicator/ta_wrklab_wrk_cond_wrkhealthsaf_incid_hsw_pb6b.

³⁴Information Resource: EIGE, Psychological violence, <https://eige.europa.eu/gender-statistics/dgs>.

³⁵Finnish Law on accident insurance (tapaturmavakuutuslaki) of 1982, as amended in 1992 (‘the Law on accident insurance’) and “Decision No 1662/453/82 of the Finnish Ministry of 30 December 1982 on the criteria for capital values of statutory accident insurance”.

expectancy is not provided for either in Article 4(2) of that Directive, which concerns the provisions on the protection of women on the grounds of maternity or in Article 7(1) of that Directive, which enables the Member States to exclude from its scope a certain number of rules, advantages and benefits as regards social security”.³⁶ ◀

10.4 Gender Perspective in the Protection of Maternity, Paternity and Family

This section will analyse the protection offered by social security, to the exercise of maternity rights and those aimed at reconciling work and family life. This protection is marked in European legislation by the competence retained by Member States over social protection,³⁷ creating complexity in the adoption of commitments.

The importance of such rights having economic protection stems from the fact that this circumstance functions as a factor that enhances their enjoyment. When sufficient and adequate economic protection is guaranteed, parents will have fewer problems in exercising their rights. Eliminating the inconveniences involved in the exercise of reconciliation rights is essential from a gender perspective, because it enhances the exercise of these rights by men, guaranteeing the presence of men in family responsibilities and the reversal of roles.

In addition, such subsidies must be sufficient and adequate so the protected situations do not generate an economic loss during their enjoyment (especially when their enjoyment is mandatory).

10.4.1 Maternity Benefits

The Pregnant Workers Directive,³⁸ requires Member States to take the necessary measures to ensure that workers are granted maternity leave of at least 14 uninterrupted weeks, allocated before and/or after confinement, in accordance with national legislation and/or practice. This must include compulsory maternity leave of at least two weeks, allocated before and/or after confinement,³⁹ and leave for prenatal examinations without loss of pay if such examinations take place during working hours.⁴⁰ The Directive guarantees that during this period an adequate remuneration and/or benefit is recognized. This stipulates an income at least equivalent to the one

³⁶Case C-318/13 X (ECJ, 3 September 2014).

³⁷Article 151 of Consolidated version of the Treaty on the Functioning of the European Union (OJ C 202).

³⁸OJ L 348, (1992).

³⁹Article 8.

⁴⁰Article 9.

the worker would receive in the event of a break in her activities for health reasons, subject to any ceiling laid down under national legislation.⁴¹ With regard to the amount of the remuneration or benefit and, specifically, with regard to the requirement that it be adequate, the ECJ has had occasion to rule as follows:

Example

In a case against the German federal minister for Education and Research⁴² the court analysed whether the financial coverage during a leave from work and during maternity leave requires the payment of an availability allowance when, during these periods, the right to remuneration equivalent to the average salary received during a previous reference period is recognized. The ECJ came to the conclusion that the financial coverage must be adequate, but not necessarily full.

This precedent was confirmed two years later.⁴³ There the ECJ analysed the remuneration consequences of a change of job for a flight attendant who, during her pregnancy, was posted on the ground. In that case, the court came to the conclusion that she is not entitled to the remuneration that she received on average before the transfer, but she was entitled to the basic salary and to the components of the remuneration, or to the complements inherent to her professional condition. This included those complements related to her hierarchical superior status, seniority or professional qualifications. It excluded those that depend on the exercise of specific functions under singular conditions and that tend to compensate the inconveniences inherent to such exercise. ◀

The last attempt to reform the text of the Pregnant Workers Directive took place with a proposal in 2008.⁴⁴ Despite approval from the European Parliament in 2010, it was withdrawn in 2015 (by the Commission?). Among the proposed amendments, the European Parliament emphasized that not only should an adequate remuneration be guaranteed, but one similar to that received and also sufficient. Further amendments included provisions to prevent such enjoyment from having repercussions on future benefit rights, indicating that “the Member States should prevent this possibility and compensate for the possible loss of pension rights”. To this end, the amendment indicated that “*a period of maternity leave must not be prejudicial to the worker’s pension rights and must be counted as a period of*

⁴¹ Article 11.

⁴² Case C-194/08, *Gassmayr v Bundesminister für Wissenschaft und Forschung* (ECJ, 1 July 2010).

⁴³ Case C-471/08, *Parviainen v Finnair Oyj* (ECJ, 1 July 2010).

⁴⁴ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, COM(2008) 637 final.

*employment for pension purposes, and workers must not suffer any reduction of pension rights through taking maternity leave”.*⁴⁵

10.4.2 Paternity Benefits

Reconciliation rights formulated in a gender perspective must be formulated in an individualized manner and be non-transferable. Reconciliation measures require to be individualized in order to promote male exercise of these rights. Accordingly, they must attribute an individual right to each parent without the possibility of transfer, either by creating male entitlements or reserving a period of indistinct parental leave for the father. The most representative measure for the purposes of co-responsibility or reconciliation in terms of gender is paternity leave.

To this effect, the first action of the European Union towards the creation of rights involving the presence of the other parent, arrived with the Directive 96/34/EC (Parental Leave Directive).⁴⁶ Its character was limited by omission of some type of economic compensation; it did not establishing incentives for paternal enjoyment, or contain provisions on the needs of care for dependent elderly people. Such omissions motivated the approval of the new Council Directive. The Directive 2010/18/EU (Revised Parental Leave Directive)⁴⁷ recognised that its precedent had been insufficient to allow both parents to exercise their rights on equal terms. This failure required to be rectified, and a financial benefit during paternal leave to be guaranteed, as “many families may not afford to do so”.⁴⁸ Further, the leaks in the non-transferability in which the conciliatory rights must be configured, prevented “a greater involvement of fathers in caring responsibilities”.⁴⁹

The Revised Parental Leave Directive recognized an individual right to parental leave for workers, men and women, on the birth or adoption of a child. This is in order to care for the child up to a certain age, set at eight years old. A minimum duration of 4 months is guaranteed, of which one month would be non-transferable. At the end of the leave the worker would be entitled to occupy the same or equivalent

⁴⁵European Parliament legislative resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2008)0637 – C6-0340/2008 – 2008/0193(COD)).

⁴⁶Council Directive 96/34/EC of 3 June 1996 “on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC”, OJ L 145 (1996).

⁴⁷Council Directive 2010/18/EU of 8 March 2010 “implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC”, OJ L 68 (2010) and repealing Directive 96/34/EC.

⁴⁸Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM/2017/0253 final - 2017/085.

⁴⁹Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM/2017/0253 final - 2017/085.

job and to maintain the rights acquired, and in the process of acquisition, on the date of commencement of the leave.

However, despite the fact that in its fifth clause, the Directive warns of “the importance of the continuity of the entitlements to social security cover under the different schemes”, it still reiterates that “all matters regarding social security in relation to this agreement are for consideration and determination by Member States and/or social partners according to national law and/or collective agreements”.⁵⁰ In short, the Revised Parental Leave Directive was not the breakthrough that was expected.

In this vain, in 2017 the Commission submitted its proposal for a directive on work-life balance for parents and carers.⁵¹ The objectives set out in this Proposal focus on combating the under-representation of women in employment and supporting women’s careers; improving the conditions for reconciling their professional and private tasks. The aim being to combat the triple gender gap: employment; pay, and pensions.

Directive (EU) 2019/1158 (Work-Life-Balance Directive),⁵² highlights that “[t]he imbalance in the design of work-life balance policies between women and men reinforces gender stereotypes and differences between work and care”. In order to encourage men to assume family responsibilities in the moments after the birth of a child, the Directive creates paternity leave as a “leave from work for fathers or, where and insofar as recognised by national law, for equivalent second parents, on the occasion of the birth of a child for the purposes of providing care”.⁵³ Previous attempts to amend the Pregnant Workers Directive that aimed, among other measures, to incorporate paternity leave failed. With regard to the proposal to amend the Pregnant Workers Directive in 2008, the European Parliament proposed changing its name to include paternity leave and adoption leave.⁵⁴

In this regard Article 4 of Directive (EU) 2019/1158 (Revised Work-Life-Balance Directive) requires Member States to ensure

“that fathers or, where and insofar as recognised by national law, equivalent second parents, have the right to paternity leave of 10 working days that is to be taken on the occasion of the birth of the worker’s child. Member States may

⁵⁰ Clause 5.5.

⁵¹ <https://www.consilium.europa.eu/en/policies/work-life-balance/>; The Proposal for a Directive of the European Parliament and of the Council on the reconciliation of the working and family life of parents and carers, which would repeal Directive 2010/18/EU.

⁵² Directive (EU) 2019/1158 of 20 June 2019 “on work-life balance for parents and carers and repealing Council Directive 2010/18/EU”, OJ L 188 (2019), published on July 12, 2019.

⁵³ Art. 3.1.a.

⁵⁴ European Parliament legislative resolution of 20 October 2010 on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (COM(2008)0637 – C6-0340/2008 – 2008/0193(COD)).

determine whether to allow paternity leave to be taken partly before or only after the birth of the child and whether to allow such leave to be taken in flexible ways. The right to paternity leave shall not be made subject to a period of work qualification or to a length of service qualification. The right to paternity leave shall be granted irrespective of the worker's marital or family status, as defined by national law".

The remuneration or benefit to be received is regulated in article 8, which provides that

"such payment or allowance shall guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health, subject to any ceiling laid down in national law. Member States may make the right to a payment or an allowance subject to periods of previous employment, which shall not exceed six months immediately prior to the expected date of the birth of the child".

The Revised Work-Life-Balance Directive underlines the relevance of economic coverage to guarantee its exercise, encouraging Member States to "provide for a payment or an allowance for paternity leave that is equal to the payment or allowance provided for maternity leave at national level", since the objectives of both permits are similar.

10.4.3 Family Benefits

Together with paternity leave, the most relevant rights created by Directive (EU) 2019/1158 are the new content parental leave, and a new caregiver's leave and absence from work due to force majeure. As this chapter has pointed out, the failure of the previous Directives was the lack of a financial benefit during parental leave, and the non-transferability in its formulation; reflecting the data that "most fathers did not take advantage of their right to parental leave, transferring a considerable proportion of it to mothers".⁵⁵

► **Definition** Parental leave is an individual right "of four months that is to be taken before the child reaches a specified age, up to the age of eight, to be specified by each Member State or by collective agreement."⁵⁶

Carers' leave is an individual right "*of five working days per year*";⁵⁷

⁵⁵Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, COM/2017/0253 final - 2017/085.

⁵⁶Art. 5.

⁵⁷Art. 6.

Time off from work is “the right to time off from work on grounds of force majeure for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable.”⁵⁸

Regarding the economic protection of these rights, only parental leave is attributed a remuneration; determined by the Member States or the social partners. The remuneration requires to be established to facilitate parental leave for both parents equally.⁵⁹ The Revised Work-Life Balance Directive underlines the importance of an adequate level of the respective payments and allowances that are guaranteed by it.⁶⁰

With regard to caregiver’s leave, the Directive stresses that although the Member States are free to decide whether to grant remuneration or a financial benefit, “*they are encouraged to introduce such a payment or an allowance in order to guarantee the effective take-up of the right by carers, in particular by men*”.⁶¹ Therefore, the importance of economic protection for the rights aimed at reconciliation as a stimulus for its exercise, especially for men, must be emphasized; this financial incentive promotes the reversal of roles in the assumption of family responsibilities. Childcare should not cause a financial loss, nor affect the future acquisition of benefit entitlements (for example, when a minimum contribution period is required prior to the event that causes the protection). Social security systems should provide this dual protection for all genders equally.

The ECJ has had occasion to rule on the amount to be received during parental leave, although there was no such coverage at the time, the rulings highlighted the full competence of the Member States:

Example

In 2009⁶² the Court held that it was not discriminatory treatment on grounds of sex contrary to the Social Security Directive, for a national regulation to calculate the social benefit for permanent disability of a female worker according to the salary, reduced due to a reduction in her working hours for childcare and not according to what she would have received if she had maintained her full-time working hours. This case is of great relevance, since the distorting element, the reduction of working hours, was connected to the exercise of a right to conciliation. The Directive does not make it compulsory to grant social security benefits to persons who take care of their child. The financial implications that a decision declaring discriminatory treatment may have on the system are a condition for the rulings of the Court of Justice. Therefore, when such repercussions are not at

⁵⁸ Art. 7.

⁵⁹ Art. 8.

⁶⁰ Directive (EU) 2019/1158, L 188/82 (31).

⁶¹ Directive (EU) 2019/1158, L 188/83 (32).

⁶² Case C-537/07, Gómez-Limón v Instituto Nacional de la Seguridad Social (ECJ, 16 July 2009).

stake, the commitment to gender equality is strengthened, “transferring to the scope of parental leave the doctrine of indemnity derived from the exercise of maternity rights”.⁶³ This decision has to be seen in light of the ECJ’s decision adopted in a further case⁶⁴ where the Court analysed the salary that should be taken into account in the calculation of compensation for dismissal, when the worker had enjoyed a reduced working day for care. The Court concluded it should be calculated by taking into account the salary corresponding to the full working day, and not the salary received during the reduced working day. As we can see, this protection was not applied in a case involving the Spanish National Institute of Social Security.⁶⁵ Article 7(1)(b) of the Social Security Directive safeguards the competence of the Member States to grant advantages to people who have taken on the care of children and who have therefore suffered a chain of disadvantages; a reduction in their professional career; and consequently in their contribution to Social Security, both of which affects future access to benefits. Advantages which, depending on the Directive, may be directed at the retirement age (for example, in reducing the age required for access) or at granting specific benefits (for example, in Spain, suspension of employment to care for a child does not interrupt the contribution to Social Security). ◀

10.5 Gender Gaps in the Pension System

10.5.1 Pension System: Old-Age, Invalidity and Survivors Pensions

The Social Security Directive has not been updated or amended to date. Although it has led to the elimination of direct and indirect discrimination, it has not been sufficient to promote gender equality; women are still generally under-protected in the Social Security systems. Rectification of this would require a radical change in said systems. The Social Security Directive certainly proclaims equal treatment between men and women in Social Security matters. However, reducing it to benefits related to the employment relationship, the Directive does not extend beyond the strict labour sphere, in which there are undoubtedly differences between women and men. There is no recognition of acting in other spheres that reflect the role that has traditionally been attributed to women in the family structure. Remedying this would promote the individualization of the rights of access to Social Security benefits; recognising work performed in the home, and especially in the care of dependent persons (elderly, sick, etc.).

The Social Security Directive excludes certain matters from its scope of application. Of all the matters excluded from the scope of application of the Directive, the

⁶³Lousada Arochena (2014).

⁶⁴Case C-116/08, Meerts contra Proost NV (ECJ, 22 October 2009).

⁶⁵Case C-537/07, Gómez-Limón v Instituto Nacional de la Seguridad Social (ECJ, 16 July 2009).

setting of different ages for access to retirement on the basis of sex should be highlighted. Its importance derives from the fact it conditions their access and configuration to such an important contributory benefit as retirement, directly connected with the profile that generally characterizes their insurance careers. Bearing in mind that the Directive does not establish a maximum period of time for the duration of such an exception, the survival of such exceptions in domestic regulations has been extended to the present day. However, it generalized the forecast of a gradual regime to achieve equalization,⁶⁶ in compliance with the indications contained in the *White Paper of 2012* promoting the equalization of retirement ages; “this persistence of gender inequalities on the labour market leads to lower pension entitlements for women”.⁶⁷ This legal incentive to the retirement of women, prior to those of men, only increases their risk of poverty.

Example

In a case which arose as a result of a reform in the United Kingdom, according to which the retirement age for women would gradually increase from 60 to 65 years. A woman considered that such a change would harm her in the future and filed a complaint before the ECtHR. In its judgement the ECtHR was adamant in stressing that the difference between men and women in terms of retirement ages is currently not justified.⁶⁸ “[A]s the Court found in *Stec and Others*, [. . .], providing for women to receive the State Pension five years earlier than men was originally justified as a means of mitigating financial inequality arising out of women’s traditional unpaid role of caring for the family in the home rather than earning money in the workplace. However, as social conditions changed and increasing numbers of women were no longer substantially prejudiced because of a shorter working life, the difference in the pensionable age for men and women ceased to be justified”.⁶⁹ ◀

However, the ECJ through case law, has gradually established a restrictive interpretation of the exception, making the following clarifications: the possibility of establishing different retirement ages is exceptional; the consequences that may arise for other benefits are limited to existing discrimination in other systems that are necessarily and objectively linked to the difference in age; and, if national legislation does not provide for such a difference or has eliminated it, it is not possible to establish *ex novo* or reinstate such an exception.⁷⁰

⁶⁶The countries that maintain a different retirement age for men and women, with an indication of those that have adopted reforms to achieve homogenization, can be observed in: <https://www.missoc.org/missoc-database/comparative-tables/results/>.

⁶⁷European Commission, White Paper, An Agenda for Adequate, Safe and Sustainable Pensions, Brussels, 16.2.2012, COM(2012) 55 final, p. 12.

⁶⁸App. Nos. 26252/08, Case S.V. Richardson v. UK (ECtHR, 10 April 2012).

⁶⁹Paragraph 23.

⁷⁰Case De Vriendt, C-377/96 (30 April 1998), Case Van Cant, C-154/92 (25 May 1993).

First, direct discrimination was eliminated from the national social security rules. The Court of Justice detected overt discrimination that referred to the concept of “married woman” or “head of household” which reflected the subordinate position attributed to women with respect to the home and work. Thus, we can cite cases of direct discrimination against women: when married women who cohabited with their husbands or were dependent on them were denied access to disability benefits, while married men were granted such benefits under the same conditions; when married women were granted a reduced unemployment benefit in terms of amount and duration, as opposed to those enjoyed by single women and men, married or single, and when, for a certain period of time, the calculation of retirement and old-age pensions for working women was based on lower wages than those of male workers.⁷¹

The ECJ has also found discrimination against men. For example, in a case that analysed a Belgian law on self-employed workers that provided for the possibility for married women, widows and students to be assimilated to persons who do not have to pay any social security contributions when their income did not reach a minimum level.⁷² The ECJ considered the national legislation to be contrary to the Directive, since it did not grant the same possibility to married men or widowers who fulfilled all the conditions required.

Of greater interest have been the pronouncements of the ECJ regarding the possible existence of indirect discrimination, being most common at present. The reasons alleged to objectively justify the existing difference acquire great relevance when it is aimed at achieving a legitimate aim of the social policy of the Member State.

Other examples of indirectly discriminatory regulations are: when an increase in the amount of a disability benefit is provided, taking into account the marital status and income of the spouse to guarantee a minimum subsistence; or, when the granting of, or amount of a pension increase depends on the income of the beneficiary’s spouse.⁷³

Example

In a case an Austrian law regulating a complex system of pension revaluation was discussed, with the increase foreseen for the year 2008 being less advantageous for one group (affecting a greater number of female pensioners) and more beneficial for another group (being mostly male pensioners). The ECJ concluded that: “*a national arrangement which leads to the exclusion, from an exceptional pension increase, of a significantly higher percentage of female pensioners than male pensioners*” cannot be justified “*by the fact that women*

⁷¹Case Drake, C-150/85 (24 June 1986), Case NV, sentencia de 4 de diciembre de 1986), Case McDermott y Cotter, C-286/85 (24 March 1987), Case Brouwer, C-577/08 (29 July 2010).

⁷²Case C-373/89, “Integrity” v Rouvroy (ECJ, 21 November 1990).

⁷³Case Teuling, C-30/85 (11 July 1987), Case Molenbrok, C-226/91 (19 November 1992).

*who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard amount was also subject to an exceptional increase in respect of the same year 2008”.*⁷⁴

In conclusion, and as the specialized doctrine has stated, the Court of Justice usually justifies Public Social Security measures causing an adverse impact when their purposes fall within the social policy competences of the Member States, showing “enormous caution in the face of the possible economic consequences derived from its decisions and the fear of interfering in the social policies of the national legislator”.⁷⁵ ◀

10.5.2 Access to Pension System Benefits (Public and Supplementary—Occupational and Personal—Pension Schemes)

For decades we have been witnessing a strengthening of supplementary, occupational and personal, pension schemes by the European Commission. However, concern has been expressed about the lesser possibilities for women to access and benefit from these systems due to their unequal situation in the labour market. In the following paragraph we will highlight the main aspects of European regulation that have had the greatest gender impact.

With regard to the public system, we have had the opportunity in the second section of this chapter to examine in depth the requirements for enjoying protection and its gender impact. In the previous section, we also examined the issue of the different ages for access to retirement according to sex.

Of these requirements, we can now underline the importance of the requirement of a minimum contribution period, since it has a significant impact on women. In the first place, when the contribution to the system is suspended due to childcare. Therefore, we must reiterate the importance of granting economic benefits that are accompanied by the corresponding contribution to the system. Secondly, because it affects a group of workers with a predominantly female presence, part-time work.

Example

Indirect discrimination continues to be detected in the regulation of the rights of part-time workers in the Social Security system. In a case involving the Spanish General Treasury of the Social Security⁷⁶ the Court declared the Spanish

⁷⁴Case C-123/10, *Brachner contra Pensionsversicherungsanstalt*, (ECJ, 20 October 2011).

⁷⁵Lousada Arochena (2014).

⁷⁶C-385/11, *Elbal Moreno v Instituto Nacional de la Seguridad Social (INSS) y Tesorería General de la Seguridad Social (TGSS)* (ECJ, 22 November 2012).

legislation regulating the social protection of part-time workers was contrary to the prohibition of indirect discrimination on grounds of sex. In sharp contrast, no adverse impact was detected in another case against the (same?) Spanish institution,⁷⁷ handed down on the formulation of the mechanism for the integration of gaps applicable to part-time workers. Finally, in the most recent case,⁷⁸ the court referred to unemployment protection in which the ECJ detected the discriminatory treatment existing in the computation of contributions to determine access to the benefit. Are these three separate cases involving the same Spanish institution? ◀

Occupational regimes were adopted in the Council Directive 86/378/EEC (Equal Treatment in Social Security Schemes Directive).⁷⁹ This Directive was affected by the expansive case law developed by the Court of Justice. Consequently, the Directive was subject to modification a decade later, due to its content being exhausted by case law. The profound recasting process is contained in the Equal Treatment Directive whose Chapter II of Title I under the heading “Equal treatment in occupational social security schemes” devotes articles 5 to 13 to this end. The Directive is applicable to ‘occupational social security schemes’, including those schemes that are not governed by the Social Security Directive, whose purpose is to provide workers “*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*”.⁸⁰

As for employer’s contributions to defined benefit plans, financed by capitalization, differences are accepted by the regulations when such contributions are intended to complete the financial allocation necessary to cover the costs of such defined benefits. These considerations mean that actuarial factors can be used on the basis of sex to produce legitimate differentiations, which the ECJ has ruled on in several cases.⁸¹ In these cases, factors linked to demographic hypotheses were analysed, based on the higher life expectancy of women. This implies that their future pension will be more onerous than that of men, requiring higher contributions from the employer. Indeed, based on forecasts, the Plan’s financing mechanism made adjustments to the pensions to be paid, using a series of objective elements including: the profitability of the Plan’s investments; the rate of salary increase, and certain demographic hypotheses, such as those relating to the life expectancy of the workers. The ECJ held in both cases, that: “*the use of actuarial factors varying*

⁷⁷Case C-527/13, Cachaldora Fernández v Instituto Nacional de la Seguridad Social (INSS) y Tesorería General de la Seguridad Social (TGSS) (ECJ, 14 April 2015).

⁷⁸Case C-98/15, Espadas Recio v Servicio Público de Empleo Estatal (ECJ, 9 November 2017).

⁷⁹Council Directive 86/378/EEC of 24 July 1986 “on the implementation of the principle of equal treatment for men and women in occupational social security schemes”, OJ L 225 (1986).

⁸⁰Art. 2 f).

⁸¹Case C-200/91, Coloroll Pension Trustees v Russell and Others, (ECJ 28 September 1994), and the Case C-152/91, Neath v Steeper (ECJ, 22 December 1993).

according to sex in funded defined benefit occupational pension schemes does not fall within the scope of Article 119 of the Treaty. Consequently, inequalities in the amounts of capital benefits or substitute benefits whose value can be determined only on the basis of the arrangements chosen for funding the scheme are likewise not struck at by Article 119".⁸² The court further ruled in other cases that the cause of discrimination was not the sex itself but the change of sex.⁸³ Specifically, the right of a worker's transsexual partner to access a survivor's pension was denied; the pension was limited to married couples and compliance with this requirement was impossible for same-sex couples. In the case in question, despite having physically changed sex, the claimant could not legally do so, hence the impossibility of getting married. The Court of Justice declared that it is an internal decision of each country to reserve certain benefits to married couples, excluding those who have not married, without any discrimination being invoked. However "*inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right*"⁸⁴ by preventing the enjoyment of a benefit which constitutes an element of remuneration, must be considered contrary to article 141 TFEU.

Finally, the importance of ensuring that pensions are adequate, and the role of supplementary pensions, needs to be emphasized; "from an adequacy perspective, the main function of supplementary pensions is to enhance the income maintenance capacity of pension systems".⁸⁵ However, the Commission noted in the aforementioned White Paper that "*addressing gender equality aspects will also be crucial in order to avoid widening the existing gender gaps, as women currently have fewer opportunities to build up supplementary retirement savings than men*".⁸⁶

10.5.3 Differences in Pension Income Between Women and Men

The cumulative negative effects of the labour and wage gap over the course of a person's working life subsequently spread to access, and value of, pensions, thus, creating or compounding the existing gender gap. As established earlier "the gender pension gap mostly reflects gender pay inequalities (which lead to lifetime earnings inequality and result from differences in past employment, including work intensity

⁸² Paragraph 10.

⁸³ Case C-117/01, K.B. v National Health Service Pensions Agency and Secretary of State for Health (ECJ, 7 January 2001).

⁸⁴ Paragraph 20.

⁸⁵ European Commission, The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU, p. 79: "Supplementary pensions are pension schemes that can be accessed on the basis of professional activity (occupational pensions) or individual pension savings contracts (personal pensions), and that provide additional retirement savings, complementing statutory pensions".

⁸⁶ European Commission, White Paper, An Agenda for Adequate, Safe and Sustainable Pensions, Brussels, 16.2.2012, COM(2012) 55 final.

and career breaks) and the extent to which pension design features mitigate these differences”.⁸⁷

The gender gap in pensions has become the most recent expression of gender discrimination arising from the social and labour situation of women that requires to be addressed. The European Parliament pointed out “*the imperative need to reduce gender gaps in pay and pension*”, underlining the increased number of women “*living in poverty and exclusion, especially older women, whose average pension level is 39% lower than that of men*”.⁸⁸

As the Council recognizes, “the gender gap in pensions has received less attention to date than the gender gap in salaries”.⁸⁹ The phenomenon only recently acquired its own individualization, which must be addressed and eliminated. The gender pension gap in the European Union reaches an average differential of 30.1%,⁹⁰ constituting one of the obstacles “for the economic independence of women in old age, a time when women also face a higher risk of poverty than men”.⁹¹

The need to carry out actions from both a curative and preventive perspective, for both current and future pensioners, has been reinforced. The *Strategic engagement for gender equality 2016-2019*⁹² contains as priority areas, among others, the reduction of existing gender disparities in pay, income and pensions, in order to combat poverty among women. In relation to achieving such objectives, it underlines the relevance of addressing “the causes and consequences of the gender pension gap need to be addressed, as this is an obstacle to the economic independence of women in old age, when they face a higher risk of poverty than men”.⁹³ As key actions, it stipulates the further development of a comprehensive set of measures to address all causes of the gender gap in pensions, in cooperation with the Member States. This includes the requirement to measure and monitor the gender gap in pensions, and to introduce measures to mitigate gender-related factors,⁹⁴ for example in relation to caregiving.

The *A Union of Equality: Gender Equality Strategy 2020-2025* emphasizes that, “accumulated lifetime gender employment and pay gaps result in an even wider

⁸⁷ European Commission, Social Protection Committee, The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU Volume I, 2018.

⁸⁸ European Parliament resolution of 10 March 2015 on progress on equality between women and men in the European Union in 2013 (2014/2217(INI)).

⁸⁹ Council Of The European Union, Equal income opportunities for men and women: closing the pension gender gap, Brussels, 19 June 2015.

⁹⁰ European Commission, A Union of Equality: Gender Equality Strategy 2020-2025, Brussels, 5.3.2020 COM(2020) 152 final.

⁹¹ Council Of The European Union, Equal income opportunities for men and women: closing the pension gender gap, Brussels, 19 June 2015.

⁹² Commission’s 2016-2019 strategic engagement for gender equality.

⁹³ Commission’s 2016-2019 strategic engagement for gender equality, p. 12.

⁹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025, Brussels, 5.3.2020, COM(2020) 152 final.

pension gap and consequently older women are more at risk of poverty than men. Eliminating the gender pay gap requires addressing all of its root causes, including women's lower participation in the labour market, invisible and unpaid work, their higher use of part-time work and career breaks, as well as vertical and horizontal segregation based on gender stereotypes and discrimination".⁹⁵

10.5.4 Measures to Reduce the Gender Pension Gap

The European institutions have continued to work intensively to promote gender equality and are currently committed to combating the persistent triple gender gap; labour, wages and pensions. Various policies are therefore being implemented with this focus.

To combat the triple gender gap, efforts have focused on promoting a greater incorporation of women into the labour market; previously undermined by the attribution of gender roles that link women to conciliatory needs. The objective is to guarantee women's economic independence, increasingly linked to generic benefits for the economy and society. To this end, the *Gender Equality Strategy 2020-2025* prioritises the reduction of existing gender disparities in pay, income and pensions in order to combat poverty among women.⁹⁶

The focus is on the promotion and protection of employment in key areas of gender inequalities: maternity; reconciliation, and part-time work. We will now focus on part-time work, given the previous sections have covered maternity and reconciliation. In this respect, we can observe a change of direction in the European guidelines. Although part-time work continues to be a mechanism by which people manage to remain in the labour market, the consequences of forging a working career built solely or preferably on part-time work are recognized. Consequently, it is emphasized that the percentage of women working part-time is an indicator of gender equality in the labour market. Part-time work is an important factor in keeping women in the labour market, especially after becoming mothers, particular attention must be drawn to the corresponding serious disadvantages; it is one of the key elements contributing to the gender wage gap. In turn, this hinders present and future economic independence, insofar as its impact on access to social protection, especially in terms of unemployment benefits and pensions.

In relation to the gender gap in pensions,⁹⁷ the European Union has suggested that possible gender biases in pension systems should be addressed. It stresses the

⁹⁵Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025, Brussels, 5.3.2020, COM(2020) 152 final.

⁹⁶Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025, Brussels, 5.3.2020, COM(2020) 152 final.

⁹⁷"Pension systems can either attenuate or widen the gap. There are two direct mechanisms in the pension system that mitigate the gender gaps in pensions at the lower and the upper tails of the

importance of carrying out gender impact assessments prior to the adoption of reforms (also in the adoption of public policies), as well as the adoption of measures that “mitigate the negative impacts of work interruptions due to family responsibilities, part-time work and slow wage progression on pension rights”.⁹⁸ In short, it is stated that “the reconciliation model proposed by the European Union closes the way to the use of part-time work as an instrument to solve the tensions between work and family life”.⁹⁹

Example

The promotion by European institutions of measures to mitigate the gender gap in pensions led Spain to create a specific measure for this purpose; the “maternity supplement in the contributory pensions of the Social Security system”.¹⁰⁰ This instrument is granted as compensation for the “demographic contribution to Social Security”, which was declared discriminatory by the ECJ,¹⁰¹ given that its application was intended only for women. The court declared that the measure does not bring “a remedy for the problems which they may encounter in the course of their professional career, and that supplement does not appear to compensate for the disadvantages to which women are exposed by helping them in that career and, thus, to ensure full equality in practice between men and women in working life without “men who find themselves in an identical situation not [being] entitled to such a pension supplement” declaring it as direct discriminatory treatment on grounds of sex. The supplement was subject to a modification that would lead to its reformulation of its name and content, generating the “contributory pension supplement for the reduction of the gender gap”. The controversial reference to maternity and demographic contribution is eliminated, now the expressly stated objective of the measure is the elimination of the gender gap in pensions. ◀

In order to combat the gender gap in pensions, multiple actions must be taken as a whole; “pension systems cannot compensate for all the consequences of adverse events and developments that build up over people’s working lives”.¹⁰²

distribution. First, basic and minimum pensions provide a lower bound for pensions. At the other end of the distribution, the ceiling for coverage or a direct cap on pensions provides an upper bound for pensions paid”. European Commission, The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU, p. 78.

⁹⁸Council Of The European Union, Equal income opportunities for men and women: closing the pension gender gap, Brussels, 19 June 2015.

⁹⁹Martínez Yáñez (2015).

¹⁰⁰Article 60 of the Spanish General Law on Social Security.

¹⁰¹Case C-450/18, WA v Instituto Nacional de la Seguridad Social (ECJ, 12 December 2019, C-450/18).

¹⁰²European Commission, The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU, p. 78.

10.6 Gender Perspective in the Protection in the Event of Unemployment

In accordance with the provisions of Article 3.1 a) of the Social Security Directive, this Directive includes within its scope of application, the protection of the risk of unemployment to be provided by national regimes. As indicated in the preceding paragraphs, the principle of equal treatment must be respected with regard to: the requirements demanded; calculation of the amount of the benefit; the conditions governing its duration, and the requirements to be met to maintain this benefit. Such requirements and conditions need to be established by each of the Member States, without prejudice to the provisions in the “Regulation (EC) no 883/2004 (Social Security Systems Regulation).¹⁰³

10.7 Gender Perspective in Social Assistance and Pension Plans and Complementary Welfare Schemes

The Social Security Directive, as stated in Article 3(1)(b), includes in its scope of application provisions relating to social assistance, insofar as they are intended to supplement or replace the schemes referred to in point (a). These provisions must therefore be covered by the principle of equal treatment, as provided for therein.

What is social assistance and how does it differ from Social Security benefits? Social assistance benefits are usually universal and complementary to Social Security benefits; beneficiaries are required to meet certain conditions, mainly related to an income ceiling. They are financed by the State, generally through the General State Budget. On the other hand, Social Security benefits require that the beneficiary has normally contributed to the system as a result of an occupational activity, and therefore are financed from these contributions.

Example

Examples of social assistance benefits, are:

- a) family financial assistance in cash or in kind, which is granted to families to meet the basic needs of dependent minors when they lack sufficient financial resources to do so. This is aimed at preventing, reducing or eliminating factors that generate situations of difficulty or social risk for minors. This favours their permanence and integration in the family and social environment, thus avoiding situations of lack of protection that could arise if the same circumstances continue
- b) assistance aid for illness or old age

¹⁰³ Regulation (EC) no 883/2004 of the European Parliament and of the council of 29 April 2004 on the coordination of Social Security systems.

- c) minimum income guarantee subsidy in favour of persons whose own or family income is insufficient to cover basic needs. ◀

The study of social protection cannot be concluded without mentioning the complementary level of protection, or third level. This level includes those benefits that are complementary to those provided by the public system and granted by the employer; through collective bargaining agreements, and pension plans (for the purposes of this study, those in which the employer is responsible for recognising the benefits granted by these plans).¹⁰⁴ There are several pronouncements of the ECJ in this respect, where the gender perspective has been taken into account in a broader vision, by considering “sexual orientation” as a possible cause of discrimination. This requires reliance not on the Social Security Directive, but on Council Directive 2000/78/EC (Equal Treatment in Employment Directive);¹⁰⁵ Article 3 of the Directive itself provides that it does not apply to payments of any kind made by public or similar schemes, including public Social Security or social protection schemes. This does not preclude its applicability to the so-called “supplementary level of protection”. Thus, the ECJ has held that Article 1, in conjunction with Article 2, of the Equal Treatment in Employment Directive precludes legislation under which the surviving partner of a registered partnership, after the death of the other partner, is not entitled to a survivor’s pension equivalent to that granted to a surviving spouse simply because it is not expressly recognised for the latter. This despite the fact that, with regard to survival benefit, national law treats registered same-sex partners the same as spouses.¹⁰⁶

10.8 Conclusion

Social Security, as analysed above, includes among its protected situations, situations directly related to the status of women, such as pregnancy, maternity or breastfeeding. However, the gender perspective has not been immune to the protection provided by Social Security systems in situations of need, generated by the materialisation of a risk. Situations of need, in principle, should be neutral regarding to the necessary requirements for its protection. Nevertheless, inclusion in the Social Security systems and access requirements, mainly in terms of prior qualifying periods or the determination of their amount, have required the interpretation of the ECJ when determining the applicability of the principle of equal treatment in this area. Notwithstanding the above, the European Union legislation currently applicable in this area, the Social Security Directive, is proving to be insufficient as a result

¹⁰⁴In extenso, Natali, Pavolini, Vanhercke (2020).

¹⁰⁵Council Directive 2000/78/EC (Equal Treatment in Employment Directive) of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

¹⁰⁶Judgment of the Court (Grand Chamber) 1 April 2008, Case C-267/06, Maruko.

of the new emerging social reality. It is the ECJ which, through its rulings, is managing to adapt the Directive to this reality. Perhaps it is time to call for the adaptation of European Union regulations on Social Security to the gender perspective, understanding this in its broadest sense, in order to take into account any emerging personal situation.

Questions

1. Nowadays, is there only one Social Security Model?
2. Which is the model whose characteristics benefit more women than men, taking into account the labour market?
3. Explain the reasons that justify your answer in the previous question.
4. Which are the European Law rules to ensure respect for the basic principle of equal treatment in the Social Security?
5. Why is the role of the Court of Justice relevant to implement the principle of equal treatment between women and men in social protection?
6. What are the factors that generate the gender pension gap?
7. Indicate possible measures to reduce the pension gap.
8. Why is the provision of a financial allowance relevant to reconciliation rights?
9. What is the purpose and scope of the Directive 79/7/EEC?
10. Does the Directive allow Member States to set different ages for access to retirement based on gender?

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