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A CASE OF DISCRIMINATION BASED ON SEX IN THE STATUTORY SOCIAL INSURANCE IN BULGARIA

Introduction

The principle of equality and non-discrimination is a founding principle of the European Union, and a basic principle acclaimed by all international human rights treaties. The battle against sex and gender discrimination has been at the forefront in the twentieth century and continues in the twenty first century. However, this battle has never been easy. Sometimes the discrimination of women is covert, and needs a careful examination of long lines of legal provisions which, on their face, are often neutral and/or acclaiming sex and gender equality.

One such case is the subject of this article. It looks at how the way the pensions are calculated in Bulgaria is actually in itself discriminating against women. In order to clearly prove this argument, the article starts by looking at different pension models existing in different countries, and their importance for gender equality. It than

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describes in details the pension system in Bulgaria, furthering the discussion with how the legal framework and its implementation result in generating inequality on grounds of sex. To conclude, the article presents the steps undertaken at the national and EU level to contravene this.

The article largely rests on legal discussion, thus on data acquired from legal documents. These include both Bulgarian national law and EU law. It also includes materials elaborating on the nature and models of pensions systems. The personal experiences of the author, who personally participated in all actions taken pursuant to this case, are also used to a large extent, especially in the last section of this article.

1. Different pension models and their importance for gender equality

Bulgaria is one of the countries in Europe and in the European Union (EU) that have an old-age pension models, as different from the traditional three-pillar model (TPM) of old EU Member States. The traditional TPM, upon which EU Directives 79/7/EEC and 2006/54/EC are based, is made up of a statutory public pillar, an occupational pillar and a private insurance pillar. Countries organized according to this pillar include: Cyprus, Denmark, Finland, France, Greece, Luxembourg, Malta, Norway, Portugal, Turkey, Sweden, Ireland, Austria, the Netherlands, Belgium, United Kingdom, Liechtenstein, Italy, Spain, Germany, and the Czech Republic.

However, many countries in Central and Eastern Europe (CEE) chose the World Bank Model (WBM) of social insurance rather than the TPM. The WBM is made up of the following pillars: a first mandatory public pillar; a second privately managed mandatory savings pillar; a third pillar made up of additional private pensions savings and occupational pensions, which has been used in order to better represent the latest pension reforms. WBM countries include: Bulgaria, Lithuania, Estonia, Latvia, Slovakia, Croatia, Slovenia, Poland, Hungary (second pillar already dismantled), Macedonia, and Romania.

As far as gender equality is concerned, as a matter of principle, choosing between the TPM and the WBM per se is irrelevant. What do matter are rather the features of the various schemes, statutory and occupational, which exist in a country and that are used in the TPM or in the WBM. These features further gain on importance in relation to the different working patterns of men and women in the labour market and to the pay gap that exists between them, both of which are circumstances reflected in the pension system.

The adoption of the WBM after the collapse of communism was due to a paradigmatic shift in many CEE countries; it was finalized in the beginning of the twenty-first century, when the strong idea of redistribution and the egalitarian attitude of the pension system turned into pension self-care via privately managed pension funds. Within this process, the original statutory system was generally transformed into a three-pillar model but different, compared to the already existing such model in the EU. Moreover, although attention is regularly given to the CEE countries when discussing the WBM, according to its definition the pension system of Iceland belongs to this group as well.

Currently, countries of the WBM face similar demographic and structural problems as the nations with the TPM, such as the ageing population, changing family patterns, the lowering of the fertility rate and financial sustainability. Moreover, besides the typical and well-known factors, the effects of the current financial crisis have to be managed as well. We can see that in this difficult economic situation old-age pension reforms give priority to financial aspects rather than to gender equality, leaving women quite vulnerable because they are more dependent on the statutory system. The usual response by governments in view of maintaining the financial balance is to regularly increase the retirement age. Although WBM Countries still maintain differences in the age of retirement for men and women.

The specificity of the WBM lies within its second pillar. The purpose of this pillar/tier is to supplement or partially substitute the first pillar and to create opportunities for increasing the replacement ratio of the person's benefit. The second pillar/tier is managed by private insurance companies.

Participation in this pillar/tier can be either mandatory or voluntary, depending on the regulations of the country in question. It is also common that participation is only mandatory for certain groups of persons (for example, those who are at the beginning of their career) due to transitional periods within legal reforms. Conditions under which a retiree acquires the second-pillar/tier pension are closely linked to the first pillar conditions.

The terms according to which the mandatory second-pillar/tier funds can be established and managed are strictly regulated by law. A main and significant issue regarding the calculation of pensions is the application of gender-related actuarial factors. A wide range of life expectancy tables can be found in the WBM countries; the use of the life expectancy factor differs not only from country to country, but from pillar to pillar.

In the second privately managed mandatory savings pillar (second tier of first pillar) gender-related actuarial factors are applied, including on calculating pension amounts, which take into account the different life

expectancy of women. Here the use of gender-related actuarial factors also depends on whether or not the privately-managed and publicly financed mandatory WBM schemes can be classified as a second tier of the first pillar and thereby included under Directive 79/7/EEC, or as private insurances consequently regulated by Directive 2004/113/EC.

Indeed, if the privately managed and publicly financed mandatory schemes were regulated by Directive 79/7/EEC, they would not be allowed to use gender-related actuarial factors. For example, in Slovenia gender-related tables are used in the second pillar/second tier of the first pillar schemes, while it is not available in the first-pillar statutory scheme. In Bulgaria, the pension amount also depends on biometric statistical tables approved by the deputy chairman of the Financial Supervision Commission (FSC). The general features of this system are elaborated in the next section of this article.

2. The pension system in Bulgaria

The Social Security Code in Bulgaria, which entered into force on January 1st, 2000, provides for a pension system based on three pillars:

1. State Pension System: it is part of the State Social Security System. In it, the funds are entirely operated and guaranteed by the State (also called “the First Pillar”). It is a Pay-as-You-Go type with defined contributions.
2. Supplementary Mandatory Pension System: part of the Supplementary Social Security System, this pillar provides for management of the so-called Universal Mandatory Pension Fund and Professional Mandatory Pension Fund only by licensed private companies (also called, “the Second Pillar”).
3. Supplementary Voluntary Pension System: the second part of the Supplementary Social Security System providing for Voluntary Pension Funds that are managed only by licensed private companies (also called, “the Third Pillar”). It represents an optional possibility for supplementary pension coverage, which is up to the personal choice of the insured persons.

Two types of mandatory supplementary pension have been implemented. Firstly, the employees and self-employed born in 1960 or later must become members of Universal Pension Funds (UPFs). Secondly, employees of labour categories I and II (i.e. workers under heavy and hazardous conditions, representing about 4% of the employees) must, regardless of their

age, join Professional Pension Funds (PPFs) in addition to the Universal Pension Funds. Both UPFs and PPFs are independent legal entities managed by private pension insurance companies (PICs), and are regulated by the FSC. The contributions to the mandatory supplementary pension schemes are collected by the National Revenue Agency as a part of the total social security contribution and transferred to the respective pension insurance companies.

The Second Pillar is regulated in the Social Insurance Code, as part of the statutory social security system. Privately managed pension funds have been adversely affected by the decline in the stock market. The financial crisis also decreased the value of the supplementary pension funds and exposed their sensitivity to volatile market conditions. According to the FSC, the average rate of return in 2008 was -20.15% for the UPF, -23.13% for the PPF, and -24.71% for the Voluntary Pension Funds (VPF). In 2009, the situation improved and the average rate of return compared to the net assets of all pension types was positive. The average rate of return for 2005-2009 was slightly greater than 3% per annum.

The crisis affected the different types of pension schemes in different ways, and its effects were felt differently by different generations. The most affected are the workers who are close to retirement, those with long periods of membership in the funded pension schemes, and in particular those whose investment portfolio is heavily exposed to riskier assets such as stocks. In the case of mandatory supplementary pension schemes in Bulgaria, the number of worst affected group was rather limited as most of the members were younger than 50 years of age and thus in the accumulation phase of their retirement savings. However, the experience with the crisis revealed the sensitivity of pension levels in fully-funded defined-contribution schemes with respect to the financial market volatility and the way its consequences had to be borne by workers.

All employees accomplishing a first or second category of work, i.e. whose working conditions are considered to be harder compared to those of the so-called third category, are mandatorily insured by their employer in the PPFs, which make it possible to receive a limited period pension for early retirement. The insured person has the right to this pension until the moment s/he acquires the right to pension for old age from the State Social Security System. These pension payments were supposed to start in 2014, but the starting period has been postponed due to the economic crisis, losses of the private pension insurance companies and a short maturing period.

The affiliation to the mandatory UPFs is compulsory for all insured persons (men and women, without regard to the category of work), born

after December 31st, 1959. They are financed by the contributions of the employers and the employees (for the period 01/01/2009-31/12/2016: 2,8% from the remuneration in charge of the employer and 2,2% for the employee or 5% in total)¹. Each employee has an individual account where his/her contributions are accumulated. In case of insufficiency of the pension reserve, the lack shall be covered by the own funds of the company.² The cumulated amount of funds on the individual account of the insured person gives the right to a lifelong pension which is supplementary to the pension granted from the State Pension System.

3. The (in)applicability of the principle of equal treatment to the Supplementary Mandatory Pension System

Part I “State Social Security” of the Social Security Code upholds the principle of equal treatment of the insured persons, by providing that the public social insurance shall be implemented on the basis of the principle of non-discrimination of the insured persons, and on compulsory compliance and universal coverage of the social insurance, including fund organization of the social insurance resources.³

Part II of this code on the “Supplementary Social Security System” states that the supplementary compulsory retirement insurance shall be performed in observance of the principle of mandatory participation, however does not provide for equal treatment of the insured persons.⁴ The fact that the principle of equal treatment does not apply to the Second Pillar results in practice with a sex-based discrimination of all women in Bulgaria, born after December 31st, 1959, as covered by the legislation currently in force.

4. The unequal treatment of men and women in regard to the size of their pensions from the Universal Mandatory Pension Funds - an infringement of the EU standards

According to article 131 of the Social Security Code, the size of the pension shall be defined “according the accumulated contributions in the

1 Social Security Code [Кодекс за социално осигуряване]. No.67 (2003; last amended 03.01.2014), art.157

2 Ibid, art.193

3 Social Security Code [Кодекс за социално осигуряване]. No.67 (2003; last amended 03.01.2014), art.3

4 Ibid, art.125

individual account of the person and the returns from their investment, with taxes and deductions withheld (...), depending on the life expectancy after retirement and in accordance with the approved biometrical tables”.⁵ Further on, this code provides that a pension shall be determined on the basis of the amount accrued on the individual account from the contributions made and from the return on the investment of the said contributions, reduced by the fees and deductions provided for under the relevant section of the law, and depending on the life expectancy after retirement in accordance with the endorsed biometric tables.⁶ Where the amount of the pension is up to 20% of the social old-age pension, the amount shall be paid to the pensioner in a lump sum or by instalments upon acquisition of entitlement.⁷

Pursuant to article 169 of the Social Security Code, the “size of the supplementary lifelong pension for old age shall be determined on the basis of (1) the accumulated contributions in the individual account; (2) the biometrical tables, approved by the Vice-Chairman of the (Financial Supervision) Commission; and (3) the technical interest rate, approved by the Vice-Chairman of the (Financial Supervision) Commission.”⁸ This article was amended in 2003, and now states the criteria for determining the amount of the supplementary lifelong old-age pension as follows: “(1) the resources accrued on the individual account; (2) the biometric tables, as approved by the Deputy Chairperson of the Commission; (3) the technical interest rate, as approved by the Deputy Chairperson of the Commission.”⁹ The same article provides that the “amount of the fixed-period early-retirement occupational pension shall be determined on the basis of: (1) the amounts accrued on the individual account; (2) the period of receipt; and (3) the technical interest rate, as approved by the Deputy Chairperson of the Commission.”¹⁰

The order of establishment of the pension reserves of the pension insurance companies, which manage a universal pension fund and/or a fund for supplementary voluntary pension security, reads as follows:

“(1) The amount of contributions required for a given pension reserve shall be determined using a prospective method and shall be equal to the

5 Ibid, art.131

6 Ibid, art.131

7 New, SG No. 1/2002

8 Social Security Code [Кодекс за социално осигуряване]. No.67 (2003; last amended 03.01.2014), art.169

9 Amended, SG No. 67/2003, 169

10 Amended, SG No. 67/2003, art.169

positive difference between the present value of the commitments to retired people with lifelong pensions, and the amount of funds in their individual accounts.

(2) The present value of the commitments to retired people for the purposes of establishment of a given pension reserve shall be calculated by the pension insurance company on the basis of the technical interest rate and the biometric tables (life expectance) for the respective year, in a separate way for: 1. the payment of additional lifelong pensions for old age from the universal pension funds; [...] 3. Pension insurance companies shall apply uniform technical interests and biometric tables [...], approved by the Vice-Chairman of the Financial Supervision Commission, in charge of the "Social Security Supervision" department [...] before December 31st of each year."¹¹

Ordinance No.19 of 8.12.2004 fixed the technical interest rate at 2.8% and this rate has been approved by annual decision of the Vice-Chairman of the FSC ever since. It applies in the same manner for both women and men. The same statement cannot be made as far as the biometric tables are concerned. The Additional Provisions of this same Ordinance provide for a legal definition of the biometrical tables, according to which, for the purposes of the calculation of the pension reserves, these tables shall represent a theoretical model, presented in the form of a statistical table, characterizing the ageing pattern of survival and mortality of a certain group of people.¹²

Clearly, this definition does not include gender-specific criteria in the calculation of life expectancy. Nevertheless, in practice the biometric tables annually approved by the Vice-Chairman of the FSC are different for men and women. Moreover, the sole criteria used in the determination of the life expectancy after acquisition of pension rights for the purposes of the application of article 131 of the Social Security Code, turns out to be the sex. In fact, for the purposes of calculation of life expectancy, the biometric tables take into account only one actuarial factor - the sex of the insured persons.

According to articles 131 and 169 of the Social Security Code, the future pensions from the Supplementary Mandatory Social Security System for the insured persons which are born after December 31st, 1959, shall be calculated according to the biometric tables. This leads to the establishment of different social security schemes for men and women. The sex of

¹¹ Article 6 of Ordinance No.19 of 8.12.2004

¹² Ordinance No.19 of 8.12.2004

the insured person is taken into account by his/her pension contract. Since life expectancy is lower for man than for women, this factor shall result into lower pensions for women.

Although not very likely because of the prevalent discrimination of women in labour relations, the years lost because of child labour and child care, as well as because of the existing gender pay gap, for the purposes of testing the above argument on lower pensions for women under all circumstances, let's suppose that a man and a woman have received identical remuneration, paid the same level of contributions for an identical number of years, had the same return on investment and capitalized the same amount of money (represented in the formula bellow with an X). In order to calculate the pension of this woman (Y) and this man (Z), the cumulated amount on their individual accounts will be divided by the number of years they are expected to live after the age of retirement according to the biometrical tables of mortality. Because life expectancy for women (A) is higher than life expectancy for men (B), the woman will receive a lower pension than the man. Or, the calculation will go as follows:

$$\begin{aligned} X : A &= Y \\ X : B &= Z, \\ \text{Where } A &> B \\ \Rightarrow Z &> Y \end{aligned}$$

In addition, there is no provision or practice giving the clients of the mandatory UPFs the choice whether to receive the cumulated amount of money as a lump sum or a sum as a monthly payment.

The enrolment into the supplementary pension schemes of the Second Pillar is not voluntary but mandatory for all people in Bulgaria, born after December 31st, 1959. Therefore, it does not differ in substance from the pension schemes within the definition of the First Pillar, i.e. the State Social Security System. Regardless of this, the principle of equal treatment for men and women is enforced in the First but not in the Second Pillar.

The results of this unequal treatment will appear when the first group of people born after December 31st, 1959, reach the age of retirement i.e. in 2020 and the financial situation of retired women in Bulgaria, in relation to that of men, will become even more deteriorated than it is at present.

4. Action taken by the Bulgarian Gender Research Foundation and women with legal interest

Upon identification of the problem through research, the Bulgarian Gender Research Foundation (BGRF) undertook two parallel steps – one in front of the national courts and one in front of the European Commission.

Firstly, since 2012, BGRF provided legal support to bring cases before the national courts to all interested women born after December 31st, 1959, all Bulgarian citizens, and all permanently living and occupied in Bulgaria. Thus, they are all mandatory involved in the pension system that provides for contributions for supplementary mandatory pension. These contributions are compulsory and are paid to the mandatory UPF. The plaintiffs have filed a lawsuit with the administrative courts in Bulgaria but so far their claims have been rejected for lack of direct legal interest. The petition challenging two of the decisions of the Vice- Chair of the FSC for approval of the biometrical tables based on different life expectance of men and women is currently pending before the Supreme Administrative Court of the Republic of Bulgaria (SAC).

Secondly, in August 2012 the BGRF complained to the European Commission about gender discrimination in the field of social security based on the differential treatment in the second obligatory social insurance pillar in Bulgaria. This step was very much needed as, in view of BGRF, a clear breach of EU law is at place in Bulgaria, including a breach of the very fundamental principles of the EU.

Equality between men and women is a fundamental principle of the EU under the Treaty on the Functioning of the European Union (TFEU) and the case law of the Court of justice of the European Union. Pursuant to Article 8 of the TFEU, “[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.” Therefore, the Treaty imposes a positive obligation to promote equality between men and women in all areas. Also, under the Charter of Fundamental Rights of the European Union, any discrimination based on sex is prohibited and equality between men and women must be ensured in all areas.¹³

The Court of Justice of the European Union (CJEU) has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified.¹⁴ In

13 Charter of Fundamental Rights of the European Union, Arts. 21, 23

14 Case C-127/07, Arcelor Atlantique et Lorraine and Others [2008] ECR p.I-9895, para. 23

that regard, it should be pointed out that the comparability of situations must be assessed in the light of the subject-matter and purpose of the EU measure which makes the distinction in question.¹⁵

In the present case, a statutory scheme in one of the Member States, which provides protection against the risk of old age, is in question. Although it reflects in part pay in respect of work, the applicable measure seems to be 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.¹⁶ According to this Directive, “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 [...] old age [...],”¹⁷ and it applies to “statutory schemes which provide protection against the [...] risks [...] [of] old age [...]”¹⁸ According to its Article 2, it “shall apply to the working population - including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment - and to retired [...] workers and self-employed persons.”¹⁹

Also relevant is Article 4 of this Directive, which provides guidance on the interpretation of the principle of equal treatment. Namely, this article goes as follows:

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

- the scope of the schemes and the conditions of access thereto,
- the obligation to contribute and the calculation of contributions,
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.”²⁰

Article 5 provides that “Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions

15 To that effect, see: *Arcelor Atlantique et Lorraine and Others*, para. 26

16 See Case C-147/95, *Dimossia Epicheirissi Ilektrismou / Evrenopoulos* [1997] ECR p. I-2057, paragraph 20

17 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

18 *Ibid.*, art.3

19 *Ibid.*, art.2

20 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, art.4

contrary to the principle of equal treatment are abolished”²¹, while Article 6 that “Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, possibly after recourse to other competent authorities.”²²

Therefore, for the purposes of the Directive 79/7/EEC, the situation of men and women in regard to the calculation of the amount they should receive from the statutory schemes providing protection against the risk of old age, should be considered as equal. These provisions should be interpreted in the light of the fundamental principle of equality between men and women (the aforementioned provisions of the TFEU and articles 21 and 23 of the Charter of Fundamental Rights of the European Union).

Moreover, Article 14 on the prohibition of discrimination of the European Convention on Human Rights, which has been ratified by all Member States and is part of the constitutional traditions common to the Member States, states that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex [...]”²³ Although Article 14 has effect only in conjunction with rights and freedoms protected by the substantive provisions of the Convention, according to the case law of the European Court of Human Rights, it is applicable to pension schemes when taken together with Article 1 of Protocol No. 1, which provides for the protection of property.

If the Commission considers that the pension schemes satisfy the criteria defined by the Court when construing the meaning of ‘pay’, article 119 should be applied. Also, under Article 157(1) TFEU, each Member State must ensure that the principle of equal pay for men and women for equal work or work of equal value is applied.

In the beginning of 2014 the European Commission answered to the BGRF that after assessment of the Bulgarian law they found that “[...] the way in which gender-differentiated actuarial factors are applied to pension benefits could indeed be considered in breach of Council Directive 79/7/EEC [...]” Based on that, the European Commission informed the BGRF that they contacted the Bulgarian government about this issue as a next step to the complaint procedure. Further developments on this case are yet to be expected, and BGRF will continue the battle for gender equality via actions on both these levels described above.

21 Ibid, art.5

22 Ibid, art.6

23 European Convention on Human Rights, art.14

Conclusion

The law frequently proclaims the principle of equality and non-discrimination and, at the same time, discriminates against a person or a group on grounds of a protected personal characteristic or status. This article aimed to elaborate on one such case.

Although the provisions of the national law spelled out the application of the principle of non-discrimination of insured persons, for the purposes of the section of the pension system which is state and mandatory (known as First Pillar, in this case of the World Bank Model of pension systems), and although the same formula is applied in the same manner when calculating the pension amounts for all insured persons, the formula itself clearly discriminates against women. By adding the life expectancy into the formula, as value established with an act by the Vice-Chancellor of the FSC, as a number which is higher for women, even if equal pension accumulations made in equal amounts in an equal period of time are made by a woman and a man, the woman will always get the lower pension.

This is in clear contravention with the principle of equality, and in clear contravention with EU law, as well as with the law of the ECHR. The contravention with EU law was already confirmed by the European Commission, so now the ball is back in the court of the Bulgarian national authorities to rectify the situation and prevent further discrimination from occurring.

Genoveva TISHEVA

Резиме

A CASE OF DISCRIMINATION BASED ON SEX IN THE STATUTORY SOCIAL INSURANCE IN BULGARIA

Abstract

This article presents the case of discrimination based on sex in the statutory social insurance in Bulgaria, in relation to the amount of pensions which, under national law women can acquire, when compared to the pension that can be acquired by men. It shows how the formal acclamation of the principle of non-discrimination of insured persons, for the purposes of the section of the pension system which is state and mandatory, is not reflected when it comes to calculating the pension amounts, resulting in discrimination against women. The article also shows how this is in breach of the law of the European Union and of the European Convention on Human Rights.

Овој труд го претставува случајот на полова дискриминација во рамки на задолжителното социјално осигурување во Бугарија, заснован на споредбата помеѓу пензиите што им следуваат на жените и пензиите што им следуваат на мажите согласно законот. Трудот покажува како принципот на недискриминација на осигурани лица, формално прифатен за потребите на државното и задолжително пензиско осигурување, не се почитува кога се пресметува висината на пензиите, што доведува до дискриминација на жените. Дополнително, покажува како ваквата практика е во спротивност со правото на Европската унија и Европската конвенција за човекови права.

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