

**Case C-244/20****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

8 June 2020

**Referring court:**

Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain)

**Date of the decision to refer:**

28 May 2020

**Appellant:**

F.C.I.

**Respondent:**

Instituto Nacional de la Seguridad Social (INSS) (National Social Security Institute)

**Subject matter of the main proceedings**

An appeal lodged by FCI ('the appellant') against the judgment of the Juzgado de lo Social No 1 de Reus (Social Court No 1, Reus, Spain) of 12 December 2018, which dismissed her claim for a survivor's pension following the death of the person with whom she was living in a de facto partnership.

**Purpose and legal basis of the request for a preliminary ruling**

The issue is whether a situation in which, as the result of a judgment of the Spanish Tribunal Constitucional (Constitutional Court) and the subsequent legislative changes to which it gave rise, surviving members of de facto partnerships resident in Catalonia are denied the right to a survivor's pension, or find it particularly difficult to access the pension, due to failure to satisfy a formal requirement, is compliant with EU law.

## Questions referred

1. Must Article 3(2) of Directive 79/7 of [19] December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, which does not apply to survivors' benefits or family benefits, be declared invalid or treated as such on the ground that it is contrary to a fundamental principle of European Union law, namely equality between men and women, which is declared a founding principle of the European Union in Articles 2 and 3 of the Treaty on European Union and in Article 19 of the Treaty on the Functioning of the European Union, and a fundamental right in Article 21(1) of the Charter of Fundamental Rights of the European Union and also in the long-established and settled case-law of the Court of Justice?
2. Must Article 6 of the Treaty on European Union and Article 17(1) of the Charter of Fundamental Rights of the European Union be interpreted, in the light of Article 1 of Additional Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as precluding a national measure such as that under consideration in the main proceedings (which was prompted by Constitutional Court judgment No 40/2014 of 11 March 2014, the ensuing national case-law and the legislative amendments that implemented the judgment) which — in practice, given the general lack of awareness of the need for formalisation and the absence of any transition period for complying with the requirement — initially prevented members of de facto partnerships governed by the Código Civil Catalán (Catalan Civil Code) from obtaining a survivor's pension, and has subsequently made it extremely difficult for them to access this benefit?
3. Must the fundamental principle of European Union law of equality between men and women, which is included as a founding value in Articles 2 and 3 of the Treaty on European Union, and the prohibition of discrimination on ground of sex, which is recognised as a fundamental right in Article 21 of the Charter of Fundamental Rights of the European Union in conjunction with Article 14 of the European Convention on Human Rights, be interpreted as precluding a national measure such as that under consideration in the main proceedings (which was prompted by Constitutional Court judgment No 40/2014 of 11 March 2014, the ensuing national case-law and the legislative amendments that implemented the judgment) which — in practice, given the general lack of awareness of the need for formalisation and the absence of any transition period for complying with the requirement — initially prevented members of de facto partnerships governed by the Catalan Civil Code from obtaining a survivor's pension, and has subsequently made it extremely difficult for them to access this benefit, to the disadvantage of a far greater percentage of women than men?
4. Must the prohibition on grounds of 'birth' or, alternatively of 'membership of a national minority' as reasons or 'grounds' for discrimination prohibited by Article 21(1) of the Charter of Fundamental Rights of the European Union in conjunction with Article 14 of the European Convention on Human Rights, be

interpreted as precluding a national measure such as that under consideration in the main proceedings (which was prompted by Constitutional Court judgment No 40/2014 of 11 March 2014, the ensuing national case-law and the legislative amendments that implemented the judgment) which — in practice, given the general lack of awareness of the need for formalisation and the absence of any transition period for complying with the requirement — initially prevented members of de facto partnerships governed by the Catalan Civil Code from obtaining a survivor's pension, and has subsequently made it extremely difficult for them to access this benefit?

### **Provisions of EU law cited**

Treaty on European Union (TEU)

Article 2; Article 3(3), second subparagraph; Article 6.

Charter of Fundamental Rights of the European Union

Article 17(1); Article 21(1); Article 33(1); Article 34(1); Article 52(1), (2), (3) and (7).

Explanations relating to the Charter of Fundamental Rights: explanation relating to Article 17 and explanation relating to Article 21.

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

Article 1; Article 2; Article 3(1), (2) and (3); Article 4; Article 5.

### **Provisions of national law cited**

Ley General de la Seguridad Social (General Law on Social Security) (as amended by Law 40/2007 of 4 December 2007, in force until its repeal by Royal Legislative Decree 8/2015)

Article 174 — *Survivors' pensions* — paragraph 3.

General Law on Social Security (the most recent version, following the amendments introduced by Royal Legislative Decree 8/2015 of 30 October 2015)

Article 221 — *Survivors' pensions for de facto partnerships* — paragraph 2.

‘For the purposes of this article, a de facto partnership shall mean a partnership analogous to marriage, formed by individuals who are not prevented from marrying, who are not married to anyone else and who provide proof, by means of the appropriate census registration certificate, that they were in a stable and

publicly acknowledged de facto partnership for an uninterrupted period of not less than 5 years immediately prior to the deceased's death.

Evidence of the existence of a de facto partnership shall be provided by means of a certificate of registration in one of the specific registers held in the autonomous communities or municipalities for the place of residence or by means of a public document recording the formation of the said partnership. The registration or the formalisation of the public document must have taken place at least 2 years before the date of the deceased's death.'

Catalan Civil Code. Law 25/2010 of 29 July 2010 in book two of the Catalan Civil Code, concerning the person and the family

Article 231-1(1) and Articles 234-1 and 234-2.

### **Brief summary of the facts and the main proceedings**

- 1 The appellant lived with her partner, JMPG ('the deceased'), in a marriage-like relationship for a continuous period of more than 20 years, until the partner's death. The relationship produced two children, born on 9 May 1994 and 3 August 1998, who were registered in the joint Family Record Book.
- 2 On 3 July 2017 they applied for registration of their de facto partnership in the Catalonia Register of Stable Partnerships.
- 3 On 16 August 2017 the deceased died, and the appellant applied for a survivor's pension, which was refused by the Instituto Nacional de la Seguridad Social (National Social Security Institute; 'the INSS') by a decision dated 25 October 2017, due to failure to satisfy two requirements, namely failure to provide proof of cohabitation in a marriage-like relationship for a minimum period of 5 years and failure to formalise the de facto partnership 2 years before the death. By a final decision dated 6 February 2018 on the administrative appeal brought by the appellant, the INSS confirmed the earlier decision.
- 4 The appellant filed a claim with Social Court No 1, Reus, which dismissed the appeal in a judgment of 12 December 2018, on the grounds that, although it had been proved that the couple were in a stable and publicly acknowledged de facto partnership, the requirement for the de facto partnership to have been formalised 2 years before the date of death had not been satisfied.
- 5 Before they lived together, both members of the de facto partnership had been married to other partners. The appellant's marriage was dissolved due to the death of the husband on 3 May 2014. A decree of judicial separation was issued on 7 May 1984 in respect of the deceased's marriage, but there is no record of the marriage having been dissolved.

- 6 The appellant has lodged an appeal with the referring court against the judgment of the Social Court.

### **Main arguments of the parties to the main proceedings**

- 7 In their respective written submissions made in response to the order for the submission of arguments issued by the referring court concerning a possible reference to the Court of Justice of the European Union for a preliminary ruling, the appellant supported such a reference while the INSS opposed it, on the grounds that it believed that the discriminatory effects cited had not occurred.

### **Brief summary of the reasons for the request for a preliminary ruling**

- 8 The Ley 40/2007 de 4 de diciembre, de medidas en materia de Seguridad Social (Law 40/2007 of 4 December 2007 on Social Security measures) amended Article 174 of the General Law on Social Security ('the LGSS'). Under Article 174(3), members of what are termed 'de facto partnerships' were able to qualify for a survivor's pension which, until then, had been reserved to married couples, provided that they met the social security contribution requirements and an additional requirement for the surviving partner to be financially dependent on the deceased partner. In this paragraph a de facto partnership was defined as 'a partnership analogous to marriage, formed by individuals who are not prevented from marrying, who are not married to anyone else and who provide proof, by means of the appropriate census registration certificate, that they were in a stable and publicly acknowledged de facto partnership for an uninterrupted period of not less than 5 years immediately prior to the deceased's death'.
- 9 Article 174(3) also established that 'evidence of the existence of a de facto partnership shall be provided by means of a certificate of registration in one of the specific registers held in the autonomous communities or municipalities for the place of residence or by means of a public document recording the formation of the said partnership ... at least 2 years before the date of the deceased's death'. It then introduced an important exception, in that the **fifth and final subparagraph** of the paragraph established that '*in autonomous communities that have their own system of civil law, provided that the cohabitation requirement established in the previous subparagraph is satisfied, the definition of a de facto partnership and the accreditation thereof shall be governed by the provisions of their own specific legislation*'.
- 10 Catalonia is a territory which historically has always had its own system of civil law; this is currently enshrined in the Catalan Civil Code, the contents of which take precedence over any other legislative provision, including the Spanish Civil Code. In Catalonia, de facto partnerships or unions are governed by Article 234 of the Catalan Civil Code. Article 234-1, entitled 'Stable partnerships', establishes that 'two people who live together in a partnership analogous to marriage shall be deemed to constitute a stable partnership where any of the following

circumstances apply: a) the cohabitation lasts for an uninterrupted period of more than 2 years; b) they have a common child during the cohabitation; or c) they formalise the partnership in a public deed'. In other words, unlike the arrangements established in Article 174(3) of the LGSS, which apply in those autonomous communities that do not have their own civil law system, there is no requirement for a de facto partnership to be formalised in a constituent instrument: accreditation of the existence of a partnership analogous to marriage by any means allowed by law is sufficient. Nor is it necessary under the Catalan regime for any previous marriage to have been dissolved.

- 11 In a judgment of 11 March 2014, published in the Official State Gazette of 10 April 2014 ('judgment 40/2014') the Constitutional Court declared that the aforementioned **fifth subparagraph** of Article 174(3) of the LGSS, which provided, as an exception to the general regime, that the specific legislation of those autonomous communities with their own civil law systems applied for the purposes of defining and accrediting de facto partnerships, was void on grounds of unconstitutionality, since the measure entailed unjustified unequal treatment in the regulation of survivors' pensions, which depended on the autonomous community of residence of the surviving partner. The Constitutional Court ruled that the provision was invalid and unconstitutional *ex nunc*, so that the ruling applied to cases arising after the date of the judgment and to existing proceedings in which a final administrative or judicial decision had yet to be issued. In judgment 40/2014 two judges of the Constitutional Court expressed a dissenting opinion; in their view there was no such situation of inequality in access to survivors' pensions for de facto partnerships: it was simply a matter of applying the appropriate law based on place of residence.
- 12 The terms of the operative part of the judgment gave rise to an administrative and judicial practice which, with immediate effect from that point onwards, required partnerships to have been either registered or certified by a notary at least 2 years previously, as a formal requirement *ad solemnitatem*; the requirement applied even to cases where the death occurred before judgment 40/2014 but there were proceedings ongoing in which a final judgment had yet to be issued.
- 13 Moreover, the legislature did not amend the legislation on survivors' pensions in order to remove the subparagraph that had been annulled by the Constitutional Court until a year and a half after judgment 40/2014 was handed down. Royal Legislative Decree 8/2015 of 30 October 2015 approved a new version of the LGSS, in which Article 221, entitled 'Survivors' pensions for de facto partnerships', establishes the legal concept of de facto partnership in identical terms to those of the former Article 174(3) of the LGSS, but without the exception for autonomous communities with their own civil law systems. Likewise, the autonomous Catalan Government did not react to the new situation until it passed Decree Law 3/2015 of 6 October 2015 on the creation of the Catalonia Register of Stable Partnerships. This register did not come into operation until 1 April 2017.

- 14 Neither judgment 40/2014 nor the legislature made provision for any transition period in applying the aforesaid case-law established by the Constitutional Court and the new formal requirement needed in order to qualify for a survivor's pension in Catalonia. Apart from the publication of the aforesaid judgment in the Official State Gazette of 10 April 2014, neither the national Government nor the autonomous Catalan government informed Catalans of the requirement for registration or notarial certification in order to preserve expected access to a survivor's pension in the event of the death of one of the members of a de facto partnership.
- 15 Consequently, the new situation created by judgment 40/2014 initially prevented access to a survivor's pension for those in factio partnerships in Catalonia, given the manifest impossibility of demonstrating that the partnership had been registered 2 years beforehand, and thereafter it hindered access to the pension, for the reasons described. The preamble to Catalan Decree Law 3/2015, which regulates the Register of Stable Partnerships, recognises that 'the urgent and extraordinary need for the proposed regulations stems from the inequality suffered by stable partnerships governed by the Catalan Civil Code as compared with partnerships in other parts of Spain where provision has been made for the aforesaid register, which provides partnerships elsewhere with a means to accredit their existence'.
- 16 Moreover, in both Catalonia and the rest of Spain, survivors' pensions, whether resulting from marriage or from a de facto partnership, are a notably 'feminised' benefit; in other words, more than 90% of recipients are female. This statistic has not been disputed in the main proceedings and has been explained by the traditional distribution of work in family households.
- 17 Overall, in the years immediately after judgment 40/2014, the number of new recipients of survivors' pensions resulting from de facto partnerships in Catalonia halved, while there was no such decrease across Spain as a whole.
- 18 Thus, following the substantial change made to the regulatory framework governing this type of survivor's pension by the Constitutional Court, acting as a 'negative legislator', access to survivors' pensions not only in Catalonia, but also in Aragon and Navarre, has been restricted to '*de jure* partnerships', that is to say, to 'formalised de facto partnerships', which have satisfied the formal requirement for registration or notarial certification described above. The referring court has strictly applied judgment 40/2014 and the temporal effect of the declaration of unconstitutionality, since it was under a legal obligation to do so, and consequently it has been refusing the award of survivors' pensions for de facto couples where the formal requirement for registration or notarial certification was not shown to have been satisfied, even where the death occurred before the judgment in question (in those cases where a final decision had yet to be issued in proceedings). Out of 39 decisions, 36 were issued in proceedings in which the applicant was a woman, reflecting the 'feminised' nature of a benefit that is also based on a premise of financial dependence.

- 19 Although the law does not allow for the adoption of a flexible and case-by-case approach towards the temporal effect of the declaration of unconstitutionality and invalidity in judgment 40/2014 (as regards the need for the de facto partnership to have been registered or notarially certified 2 years before the death occurred), the referring court has doubts over whether the considerable difficulties in accessing the survivor's pension in question experienced in Catalonia as a result of the circumstances we have described — that is, the absence of a transition period to allow for adjustment to the new legal requirement, the lack of information for citizens and the delay in amending the legislation and creating the register of de facto partnerships — have created a situation of inequality, with a clear gender impact, which is contrary to European Union law.
- 20 In practice, while in the rest of Spain de facto couples were aware from 1 January 2008 that, under Law 40/2007, which established the benefit, it was necessary to register or obtain notarial certification in order to qualify for a survivor's pension, in Catalonia a legitimate expectation had been created that there was no such requirement, given the reference in the LGSS to the specific Catalan legislation. The referring court therefore considers, having regard to the facts of the main proceedings, that the appellant and the deceased would have formalised their relationship had they known in time that this was essential in order to qualify for a survivor's pension. They did indeed complete the procedure in July 2017, following the creation of the Catalan Register of Stable Partnerships.
- 21 Under the case-law of the Court of Justice of the European Union ('the Court of Justice'), such a restriction on access to the pension, with the consequent frustration of the expectation of a contributory welfare pension, could be considered to constitute indirect discrimination in that it works to the disadvantage of a far greater number of women than men, despite being formulated in neutral terms (see the judgment of 20 October 2011, *Brachner*, C-123/10, paragraphs 56 and 70, and also the judgments of 22 November 2012, *Elbal Moreno*, C-385/11, paragraph 29, and of 9 November 2017, *Espadas Recio*, C-98/15, paragraph 38). Consequently, if, in view of the circumstances described above, judgment 40/2014 were considered to have produced a situation that can objectively be classed as indirect discrimination on ground of sex, the referring court would be able to adopt a more flexible interpretation of the case-law established by the judgment and of the present Article 221 of the LGSS on survivors' pensions, under the principle of the primacy of EU law, and, having examined each case on its individual merits, the court would be able to recognise an entitlement to the aforesaid pension in those cases arising in the years immediately after judgment 40/2014 where it is completely convinced that the applicant for the survivor's pension and his or her partner did not have an effective opportunity, on equal terms with recipients in other autonomous communities, to be aware of and comply with the new legal requirement in order to qualify for the benefit.
- 22 This conclusion leads to the first question referred by the referring court, which believes there is a need to clarify the questions it has over the validity of Article 3(2) of Council Directive 79/7/EEC of 19 December 1978 on the

progressive implementation of the principle of equal treatment for men and women in matters of social security, given that the article stipulates that ‘this Directive shall not apply to the provisions concerning survivors’ benefits nor to those concerning family benefits’, in the light of a principle which, according to Article 4(1) of the directive ‘means that there shall be no discrimination whatsoever on ground of sex’. The referring court wonders whether the aforementioned exclusion of survivors’ benefits from the protection offered by the directive is not contrary to the fundamental principle of equality of treatment for men and women enshrined in Articles 2 and 3 TEU, Article 19 TFEU, Article 21 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and the case-law of the Court of Justice of the European Union, as well as in Article 33 and Article 34(1) of the Charter.

- 23 Nor should it be forgotten that Article 7(1)(b) of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation includes ‘survivors’ benefits and family allowances’ within the scope of the directive as far as occupational social security schemes are concerned, thus demonstrating that the exclusion established by Directive 79/7 for the same benefits in relation to state social security systems is untenable and outdated, particularly when one considers also that the present case concerns a contributory benefit, that is to say, one based on prior contributions.
- 24 Irrespective of the answer given to the above question regarding validity, the referring court also needs to know whether the situation produced by judgment 40/2014 is contrary to Article 17 and Article 21(1) of the Charter, which enshrine, respectively, the right to property and the prohibition of discrimination on grounds of sex, birth or membership of a national minority, amongst others. Under Article 6 TEU, the Charter has the same legal value as the Treaties.
- 25 As far as the relevance of the questions referred is concerned, it should be recalled that, under Spanish law, the referring court is required to apply the position adopted by the Constitutional Court as regards the *ex nunc* effect of the requirement for the de facto partnership to have been formalised for a prior period of 2 years, and it has no scope to depart from the ruling in judgment 40/2014. It would therefore only be able to relax the strict application of the case-law of the Constitutional Court and the subsequent regulation of survivors’ pensions, under the principle of the primacy of EU law, if the Court of Justice were to reply to the question referred by stating that the factual and legal situation under examination affects the fundamental rights we are seeking to have interpreted.
- 26 With regard to the jurisdiction of the Court of Justice to rule on the questions referred, it is clear from the most recent case-law of the Court that it undoubtedly has such competence (see the judgments of 13 June 2017, *Florescu*, C-258/14; of 17 April 2018, *Egenberger*, C-414/16; of 6 November 2018, *Bauer and Brossonn*, C-569/16 and C-570/16; and of 19 November 2019, *AK*, C-585/18, C-624/18 and C-625/18). The Court of Justice has held that certain fundamental rights are

sufficient in themselves and do not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such. That case-law also shows that it is for the Court of Justice to ensure the proper interpretation of fundamental rights enshrined in the Charter, particularly where they correspond to rights recognised in the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'). In any event, the case concerns both the principle of equality and non-discrimination on ground of sex and also a social security benefit, and both matters fall within areas of European Union competence.

- 27 The first question of interpretation relates to Article 17(1) of the Charter, which establishes that 'everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.' According to the Explanations relating to the Charter of Fundamental Rights, this article is based on Article 1 of the Protocol to the ECHR.
- 28 According to the case-law of the Court of Justice, citing the judgment of the ECtHR of 7 July 2011, *Stummer v. Austria*, where legislation provides for the automatic payment of a social benefit, it generates a proprietary interest for persons meeting the requirements thereof falling within the ambit of Article 1 of Protocol No 1 to the ECHR. The rights resulting from the payment of contributions to a social security scheme thus constitute rights of property for the purposes of that article. However, the right of property enshrined in that article is not absolute and its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union (see the judgment of 13 June 2017, *Florescu*, C-258/14, paragraphs 49, 50 and 51). In this regard, the judgment of the ECtHR of 8 February 2018 in *Nagy v. Hungary* is also highly instructive, in particular paragraphs 80, 82 and 88.
- 29 In judgment 40/2014, the Constitutional Court bases its decision on the need to ensure equal access to the survivor's pension in all the autonomous communities of the Spanish State. However, having regard to the principle of proportionality that must apply to any restriction on fundamental rights recognised in the Charter, the referring court doubts the admissibility of a declaration of invalidity and unconstitutionality that has required the immediate imposition of a formal requirement in administrative and judicial practice even in those cases where the deceased's death took place before the date of the judgment. A more logical solution, which would have respected the legitimate expectations of those affected, would have been to establish a transition period for adapting to the new requirement of at least 2 years, which is the prior registration period required of de facto partnerships.
- 30 Consequently, in the interests of 'a careful consideration of the individual circumstances of the case — in particular, the nature of the change in the

requirement — ... in order to verify the existence of a sufficiently established, substantive proprietary interest under the national law’, as paragraph 89 of the judgment of the ECtHR of 8 February 2018, *Nagy v. Hungary*, expresses it, the referring court needs clarification of whether it is possible to conclude that a proprietary interest protected by Article 17 of the Charter has been affected in those cases where the court is convinced that the affected person — who was fully entitled automatically to receive a survivor’s pension at the relevant time (on the death of the partner) — could not have been aware of and complied with the new formal requirement or would have found it very difficult to do so, for the reasons set out above.

- 31 The next question of interpretation refers to the principle of no discrimination on ground of sex, enshrined as a fundamental right in Article 21(1) of the Charter, in conjunction with Articles 2 and 6 TEU and Article 14 of the ECHR. Article 1 of Directive 79/7 is also relevant, depending on the reply given to the question on the validity of the exclusion of survivors’ benefits. The ‘Explanation relating to Article 21’ of the Charter states that this article draws on Article 14 of the ECHR and that, in so far as it corresponds to that article, it applies in compliance with it. Article 14 of the ECHR establishes that ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.
- 32 The Court of Justice has declared that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see the judgments of 20 October 2011, *Brachner*, C-123/10, paragraphs 56 and 70 and the case-law cited; of 22 November 2012, *Elbal Moreno*, C-385/11, paragraph 29; of 9 November 2017, *Espadas Recio*, C-98/15, paragraph 38; and of 8 May 2019, *VVL*, C-161/18).
- 33 As noted earlier, the restriction on access to survivors’ pensions in the case of de facto partnerships in Catalonia has produced a situation of inequality that has an obvious gender impact because the pension is clearly ‘feminised’ in so far as, although the restriction is formally neutral, in 90% of cases the person affected is a woman; it could therefore be considered to constitute indirect discrimination. In this regard, in circumstances such as those of the present case, where a judgment of the Constitutional Court and the subsequent legislative change (enshrined in the new Article 221 of the LGSS) lead to inequality between groups of people, the Court of Justice has declared that it is for the Member State, as the author of the allegedly discriminatory rule, to show that that rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably take the view that the means chosen were suitable for attaining that aim (judgment of 20 October 2011, *Brachner*, C-123/10, paragraph 74).
- 34 In any event, it is important to note that, in the view of the referring court, there are two measures which the Court of Justice needs to assess separately, namely

the main decision of the Constitutional Court to introduce uniform conditions for accessing survivors' pensions for de facto partnerships across all the autonomous communities of the Spanish State by imposing a requirement for de facto partnerships also to be formalised in Catalonia (and in Aragon and Navarre too), contrary to the provisions in the civil law systems of these autonomous communities, which take precedence; and secondly, the decision concerning the immediate effects of the introduction of those uniform conditions, with no prior warning nor any transitional adjustment period.

- 35 It is similarly noteworthy that neither the Constitutional Court, when it issued judgment 40/2014, nor the legislature, when it passed the new legislation, took into account the negative impact which both measures would have on women, particularly the *ex nunc* requirement for formalisation of de facto partnerships, bearing in mind the feminisation of survivors' pensions.
- 36 It should also be noted that, since this specific benefit presupposes a financial dependence which must exist both at the point when the benefit first becomes payable and throughout the period of receipt (Article 221(1) of the LGSS), it is clearly a survivors' welfare benefit; this is not the case with survivors' pensions for married couples, where there is no such requirement. The situation under consideration could therefore also infringe the fundamental right 'of the family to social, legal and economic protection' in Article 33(1) of the Charter in conjunction with Article 16 of the European Social Charter.
- 37 Finally, with regard to possible reliance on economic grounds concerning the sustainability of the social security system, according to the economic data on the case record, survivors' pensions arising from de facto partnerships account for no more than 1% of all survivors' pensions. Moreover, this is a contributory state pension, that is, one funded by contributions paid into the social security system by the deceased (and the employer).
- 38 The fourth question referred raises the possible existence of a second ground of discrimination, by reason of birth or, alternatively, membership of a national minority.
- 39 As noted earlier, while in the other autonomous communities of the Spanish State, de facto partnerships were aware from 1 January 2008 — the date on which the benefit came into effect (by virtue of Law 40/2007) — of the mandatory requirement to be registered or formally established in order to qualify for a survivor's pension, in Catalonia, Aragon and Navarre there was a legitimate expectation that there was no need to comply with this requirement because the legal definition of de facto partnership established in their own civil law applied. This expectation was supported by administrative and judicial practice prior to judgment 40/2014.
- 40 The situation described above that arose in the wake of that Constitutional Court judgment has also led to inequality as a result, in the present case, of residing in

Catalonia. In that context, the referring court seeks to establish whether that situation could be classed as discrimination by reason of the fact that both partners were born in Barcelona or, alternatively, discrimination due to membership of a national minority, given their political status as Catalans, bearing in mind that, under the Constitution, Catalonia is recognised as a ‘nationality’ and has exclusive competence in the regulation of civil law which, in short, has produced the legal situation that has led to the potentially discriminatory lack of protection and inequality.

WORKING DOCUMENT