Chapter 10

Family Policy Aimed at Demographic Incentives in EU Law

Ágoston Korom

Abstract

This chapter examines the discretion conferred on the Member States of the European Union (EU) in relation to the application of family policy that aims to improve the demographic situation. Incentives for childbearing in pension schemes, as well as the status of the family and the related subsidies, fall within the competence of the Member States. The European Commission generally formulates recommendations in that regard, which lack binding force.

Nonetheless, in these fields, the Court of Justice of the European Union (CJEU) gives effect to primary and secondary EU law ensuring equal treatment of men and women. State subsidies with objectives related to demography do not 'prevail' in the case law of the CJEU. Examining the *ratio decidendi* of the existing case law, it is clear that this is not limited to the acknowledgement of childbearing in pension schemes but covers all state subsidies with similar objectives. In my opinion, this case law is a major obstacle to achieving the related national goals; thus, it is necessary to harmonise the EU law in force and the objectives related to demography.

Keywords: state subsidies; demography; case law; CJEU; marital status; subsidies; competence; Member States; EU law; national legislature on family status; demographic objectives; solutions

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1. Introduction

For experts in demography, family, and other related issues,[1] even the title of this chapter may be startling as family status and the related subsidies fall within the scope of Member State competence. Family policy that is aimed at incentives related to demography is also an area that falls within the scope of the competence of Member States. Neither can we find European Union (EU) law that covers an acknowledgement of childbearing in pension schemes as the most important issues regarding pensions also fall within the scope of the competences of Member States. From time to time, the European Commission formulates recommendations of an economic or other nature in that regard for Member States, but these recommendations lack binding force.

The Court of Justice of the European Union (CJEU) exercises significant control over national legislation regulating the acknowledgement of childbearing in pension schemes,[2] implementing the provisions of EU law that prohibit discrimination on the grounds of sex or age. Subsidies related to family status and other related benefits also fall within the scope of Member State competence. However, the settled case law of the CJEU – based, again, on the requirement for the equal treatment of men and women and the prohibition of discrimination based on age – has developed quite an expansive interpretation in this field.

This chapter analyses the relevant case law of the CJEU with regard to the impact it may have on the family policies of Member States that aim to improve their demographic situations. I will also touch upon an examination of whether the Member States have any discretion related to labour migration, which severely affects the demographic situation of those Member States in Central Europe, with particular regard to sensitive areas such as the migration of physicians and specialist medical staff.

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2. The assessment of subsidies with objectives related to demography in the CJEU case law

2.1. Judgment in the Joseph Griesmar case[3]

The plaintiff in the main proceedings of the Joseph Griesmar case was a civil servant and father of three children. His pension was calculated without taking into account the service credit in respect of his children as, according to French legislation,

1 Apart from penning this paper, the author has not examined any demographic, family law, or other related subjects. He only undertook to participate in the present research, that is, in the examination of the discretion conferred on the Member States by EU law, because the said research sought to fill a gap.

2 For further details in that regard, see: Homicskó, 2023, pp. 149–187.

3 Judgment of the CJEU, C-366/99.

only female civil servants were entitled to such credit. The plaintiff claimed that this constituted a breach of the primary and secondary European Union (EU) law that prohibits discrimination on the grounds of sex, referring to Arts. 119 and 141 EC, as they were numbered at the time, as well as Directive 79/7/EEC.

First, the CJEU recalled that the pensions concerned should be understood to fall within the category of 'pay' for the purposes of Art. 141 EC.[4] The CJEU also examined whether discrimination on the grounds of sex could be established in this case. The principle of equal pay requires that female and male workers receive equal pay provided that they are in comparable situations.[5] According to settled case law, in principle, the situations of male and female workers are comparable as regards child-reading,[6] with the exception – according to the case law – of maternity leave.[7]

In the proceedings, the French government explained that the service credit is reserved for female civil servants who have had children in order to address a social reality, arguing that women play a predominant role in raising and educating children.[8] Thus, this credit aims to compensate for the disadvantages women incur in the course of their professional careers as a result of child-rearing, even if they have not ceased working in order to bring up their children.[9]

According to the CJEU's interpretation, the situations of a male and a female worker may be comparable as regards bringing up children as the fact that the disadvantages arising from child-rearing are generally incurred by women does not prevent their situation from being comparable to that of male workers who have assumed the task of bringing up their children and have, thereby, been exposed to the same career-related disadvantages.[10] The CJEU pointed out that the relevant French legislation[11] does not permit a male worker to receive the service credit, even if he is in a position to prove that he did, in fact, assume child-rearing responsibilities.[12] The Court decided that it was clear that the related national legislation introduced a difference in treatment on the grounds of sex and further examined whether such different treatment is justified.

The French government emphasised[13] the greater frequency of the use of parental leave by female workers and the fact that the duration of their careers is on average 2 years shorter than those of male workers. The French government also stressed that the raising and education of children is one of the most important factors in

4 Judgment of the CJEU, C-366/99, para. 38.
5 Judgment of the CJEU, C-218/98.
6 Judgment of the CJEU, C-366/99, paras. 39 and 41.
7 For further case law, see 312/86 and C-285/98.
8 Judgment of the CJEU, C-366/99, para. 51.
9 Ibid.
10 Judgment of the CJEU C-366/99, para. 56.
11 Art. 12 of the French Civil and Military Retirement Pensions Code.
12 Judgment of the CJEU, C-366/99, para. 57.
13 Judgment of the CJEU, C-66/99, para. 60.

explaining the earlier retirement of female civil servants. The service credit was designed to offset those disadvantages.

The CJEU in no way questioned that Art. 6 of the Agreement on Social Policy of 1993 allows Member States to, *inter alia*, maintain or adopt measures to offset or prevent the disadvantages incurred by women in relation to their careers. However, according to the CJEU's interpretation, the national measure at issue in this case was not of that nature.[14]

2.2. Judgment in the Leone case[15]

The plaintiff in the main proceedings of the Leone case applied for early retirement with the immediate payment of his pension as a father of three children. The application was refused on the grounds that the plaintiff had not taken a career break for each of his children, as is required by the relevant legislation. The plaintiff maintained that, although ostensibly neutral, the relevant regulation was, in fact, more advantageous for women, resulting in indirect discrimination on the grounds of sex to the detriment of male workers.

The opinion of the Advocate General noted that according to the case law, the related national measures constitute the pay received in respect of employment and, as such, fall within the scope of[16] Art. 141 EC, which requires equal pay for female and male workers. The Advocate General also recalled that according to the established case law,[17] a provision, criterion, or practice that is ostensibly neutral as it applies to men and women without distinction, but that in practice puts one of these categories of persons at a disadvantage compared with the other, results in indirect discrimination based on sex. Such a difference in treatment is contrary to EU law, unless the situation of one worker is not comparable to that of the other, or unless the difference can be justified by a legitimate objective and the means employed to achieve it are appropriate and proportionate.[18]

However, a further criterion added by the CJEU derogates somewhat from the opinion of the Advocate General. The Court held that indirect discrimination on the grounds of sex arises where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage compared to those of the other sex.[19] The CJEU found it clear that a national provision[20] providing a service credit, such as that at issue in this case, to benefit civil servants of both sexes provided that they have had a career break of at least 2 consecutive months in order to care for their children, appears to be neutral as the possibility of taking

14 Judgment of the CJEU, C-66/99, para. 62.
15 Judgment of the CJEU, C-173/13.
16 Opinion of the Advocate General, C-173/13, para. 23.
17 Idem, para. 24.
18 Idem.
19 Judgment of the CJEU, C-173/13, para. 41.
20 Judgment of the CJEU, C-173/13, paras. 43–44.

such a career break does not appear to be legally open only to civil servants of one sex.[21] However, the Court held that, notwithstanding the appearance of neutrality, it is clear that the criterion used in the national regulation leads to a situation where many more women than men receive the benefit of this advantage.[22]

The plaintiff in the main proceedings and the European Commission maintained that the French Republic substituted a new mechanism for the earlier one, which, under the guise of measures that are ostensibly neutral as to the sex of the persons to whom these measures apply, in reality, uphold the aims of the earlier mechanism and ensured that the actual effects of it are maintained and perpetuated.[23] The plaintiff in the main proceedings considered that, in essence, the French government's intent was to compensate for the career-related disadvantages suffered by civil servants in the course of their career resulting from the time spent on child-reading.[24]

In the proceedings, the French government further argued that the requirement prescribed by the national legislation for the service credit can be justified from several aspects as taking a career break has a direct impact on the amount of a civil servant's pension, either because no account is taken of periods of career break for the purposes of calculating the pension,[25] or because of the career slowdown they entail. The service credit is, thus, aimed at providing financial compensation for this negative impact.[26]

According to the Court's interpretation, the fact that the service credit scheme for pension purposes includes maternity leave among the forms of career break allowed under the applicable rules, given the minimum duration and mandatory nature of that leave under the national law, means that female civil servants who are the biological parent of their child are, in principle, those who are in a position to benefit from the service credit advantage. After analysing the relevant legislation, the CJEU pointed out that it cannot be concluded or can only partially be concluded that the service credit scheme is genuinely aimed at the objective indicated by the French government.[27] Furthermore, the CJEU criticised the fact that this service credit is fixed, in a uniform manner, for a year, irrespective of the actual duration of the career break.[28]

The CJEU further examined whether the national legislation at issue reflects a concern to attain the aim indicated by the French government, pursued in a consistent and systematic manner by this Member State. In the CJEU's interpretation,

21 According to the national legislation, both male and female civil servants may take career breaks as part of adoption leave, parental leave, parental care leave, or leave in order to be available to bring up a child of less than 8 years of age.
22 Judgment of the CJEU, C-173/13, para. 45.
23 Judgment of the CJEU, C-173/13, para. 61.
24 Idem, para. 62.
25 Judgment of the CJEU, C-173/13, para. 63.
26 Idem.
27 Judgment of the CJEU, C-173/13, para. 65.
28 Judgment of the CJEU, C-173/13, para. 66.

the national legislation failed to meet these rather strict requirements, due, *inter alia*, because under the relevant provision, the service credit is also granted to female civil servants[29] who have given birth during their years of study.[30] A further 'criticism' on the part of the CJEU concerned the fact that under this service credit scheme, in the case of certain children, such as those who were placed under the guardianship of the pension holder or his or her spouse, where this involves actual and permanent custody of the child, the granting of the service credit is subject not only to the criteria of a career break of 2 months but also to the requirement that the children must have been brought up by the applicant for at least 9 years.[31]

The CJEU also examined whether the indirect discrimination identified in the analysis of the national legislation can be justified under Article 141(4) EC. The CJEU recalled its case law, according to which this provision of primary EU law states that in order to ensure the actual equal treatment of male and female workers, Member States may maintain or adopt measures that provide for specific advantages to allow the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.[32] However, according the CJEU's interpretation, this article cannot be applied to the national measures at issue[33] as, according to the established case law, the measures provided for therein are not appropriate to help those concerned in their professional life and, thereby, ensure full equality in practice between male and female workers.[34]

2.3. Judgment in the WA v Instituto Nacional de la Seguridad Social case[35]

The Spanish legislation in the main proceedings of the *WA v Instituto Nacional de la Seguridad Socia*l case, which was 'examined' by the CJEU, grants a pension supplement to women who have at least two biological or adopted children on account of their demographic contribution. Under this national legislation, the supplement was unavailable to men. Applying the specific criteria developed in its case law in this area, the CJEU's judgment examined the difference in treatment. The plaintiff in the main proceedings was a father of two children who challenged a decision refusing to grant him this particular pension supplement.

It is worth examining the most important findings of the opinion of Advocate General Michal Bobek in this case. The opinion stressed that, based on the judgments

29 The CJEU's related criticism targets the fact that no career break was required in that case for the female civil servants to be admissible for the said service credit.

30 Judgment of the CJEU, C-173/13, para. 70.

31 Judgment of the CJEU, C-173/13, para. 72.

32 Judgment of the CJEU, C-173/13, para. 100.

33 Another pension-related credit was also examined by the CJEU in the said judgment; however, as it does not derogate in essence from the presented case law, it is not separately analysed in this chapter.

34 Idem, para. 101.

35 Judgment of the CJEU, C-450/18.

in the Griesmar and Leone cases, the pensions at issue were occupational pensions and, thus, fell under the scope of the principle of equal pay in Art. 157 TFEU. The opinion pointed out that this was the first case where the CJEU had the opportunity to decide whether the approach developed in the previous judgments was applicable to this area, in other words, to benefits that constitute part of a general social security pension scheme. The opinion examined the objectives of the national legislation: according to the relevant Spanish provision, the national law concerned was introduced in acknowledgement of a 'demographic contribution' to social security, although the law adopting the measure does not contain any more specific justification.[36]

The Advocate General found it hard to see how women and men are not in a comparable situation regarding their demographic contribution to the social security system. However, it was clear from the proceedings that the measure concerned was inspired by and pursued a much broader objective, that is, to reduce the gender gap[37] as women more often give up their work to take care of their children, which has a direct impact on both their income and pension, giving rise to a phenomenon known as 'double penalty'.[38] Further statistical evidence presented in the proceedings showed that social security contributions relate directly to gender and the number of children, and that the pension gender gap has a greater impact on women who are mothers of two or more children.[39]

It was clear to the Advocate General from the above-mentioned considerations that the legislation at issue is, in fact, not aimed at protecting women who assume the responsibilities of childcare as it does not contain any condition that would link the concerned benefit with actual childcare. According to the Advocate General's opinion, this results from the fact that the law does not require individuals to demonstrate an interruption of employment[40] or, at least, some reduction of working hours.[41] The Advocate General added that even if that were the stated objective – that is, if we assume that, based on the criteria of EU law,[42] it would not follow that this measure is not aimed at compensating for the disadvantages incurred by female workers who assume childcare responsibilities of – it would be of little avail as the CJEU has consistently held that men and women are in a comparable situation with regard to childcare.[43]

36 Opinion of the Advocate General, C-450/18, para. 58.
37 It should be noted that the Spanish Constitutional Court also found this compensation to be the primary objective of the national measure at issue.
38 Opinion of the Advocate General, C-450/18, paras. 58-61.
39 Opinion of the Advocate General, C-450/18, para. 62.
40 The question arises whether women raising children can be disadvantaged in terms of a reduction in social security contributions, regardless of whether they took leave, their employment was interrupted, or their working hours were significantly reduced.
41 Opinion of the Advocate General, C-450/18, para. 63.
42 Idem.
43 It is clear that the CJEU has the monopoly on the authentic interpretation of EU law, yet it is hard to see how any interpretation can override the facts and tendencies supported by national law as EU law can rather be understood as an obligation for Member States.

According to the settled case law of the CJEU related to this area, discrimination arises due to the application of different rules to comparable situations or the application of the same rule to different situations.[44] The CJEU recalled that Directive 79/7/EEC prohibits either direct or indirect discrimination on the grounds of sex, with reference – in particular – to marital or family status as regards the calculation of benefits.[45] According to the CJEU's interpretation, the grounds of a demographic contribution to social security cannot justify men and women not being in a comparable situation with regard to the award of the pension supplement at issue in this case.[46]

However, the Spanish government explained in the proceedings that the objective pursued by the measure concerned is not only related to demographic goals but also aims to reduce the gap between the pension payments received by men and women. In addition, the Spanish government maintained that the pension supplement at issue is justified on the grounds of social policy as extensive statistical data reveal a difference between the pension payments of men and women, as well as between the pension payments of childless women or those who have had one child and the payments of women who have had at least two children.[47]

According to the CJEU's interpretation, as regards the objective of reducing the gap between the pension payments of men and women, the national measure at issue was intended to protect women in their capacity as parents. The situation of a father and that of a mother may be comparable as regards child-rearing. According to the CJEU's interpretation, the fact that women are more affected by the occupational disadvantages entailed in bringing up children, as it is generally women who carry out that task, does not prevent their situation from being comparable to that of a man, as held in the case law of the CJEU,[48] in accordance with the judgment in the *Griesmar* case.

Accepting the findings of the opinion of the Advocate General, the CJEU held that the existence of statistical data is not sufficient to reach the conclusion that men and women are not in a comparable situation. This was a derogation from the prohibition, set out in Art. 4(1) of Directive 79/7/EEC, that states that all direct discrimination on the grounds of sex is possible only in the situations exhaustively listed in the provisions of that Directive.[49]

Art. 4 of Directive 79/9/EEC recognises the legitimacy of protecting a woman's biological condition during and after pregnancy, as well as that of protecting the special relationship between a woman and her child following childbirth.[50] However,

44 Judgment of the CJEU, C-450/18, para. 42.
45 Judgment of the CJEU, C-450/18, para. 38.
46 Judgment of the CJEU, C-450/18, para. 47.
47 Judgment of the CJEU, C-450/18, paras. 48–49.
48 Judgment of the CJEU, C-450/18, paras. 50–53.
49 Judgment of the CJEU, C-450/18, para. 54.
50 Judgment of the CJEU, C-450/18, para. 56. For further case law, see the Judgment of the CJEU C-184/83, para. 25, and the Judgment of the CJEU C-5/12, para. 62.

according to the CJEU's interpretation, there is nothing in the measure at issue that establishes a link between the award of the concerned pension supplement and taking maternity leave or the disadvantages suffered by a woman in her career as a result of being absent from work during the period following the birth of a child. In addition, this pension supplement is also granted to women who have adopted children; thus, the CJEU construed that the national legislature did not intend to limit the application of the measure to protecting the biological condition of women who have given birth.[51]

Furthermore, the CJEU accepted the statement of the Advocate General that the national provisions do not require women to have actually stopped working at the time they had their children; thus, the condition relating to maternity leave is absent. That is particularly the case when a woman has given birth before entering the job market.[52] Therefore, according to the CJEU, it must be held that the concerned pension supplement does not fall within the scope of the derogation from the prohibition set out in Art. 4(2) of Directive 79/7/EEC

In the following, the CJEU applied its case law, formulated, *inter alia*, in the *Leone* case,[53] holding that, for the same reasons, the measure at issue does not meet the criteria set out in EU law.

3. The role of marital status and the related benefits in the CJEU case law

Before presenting the relevant case law, it is worth examining an answer given to a question for written answer to the European Commission in relation to policies to support families. This question for written answer sought to understand, *inter alia*, whether the Commission considered that supporting Europeans in having more children might also alleviate labour force issues. The second part of the question asked the Commission, with essentially identical content, whether it planned to promote the idea of having more children in light of the current demographic crisis and if not, why? This question for written answer noted[54] that the European Commission has gone to great lengths to promote LGBTQI+ rights and the idea of 'rainbow families', and sought to know whether the Commission considered promoting and facilitating motherhood and proposing policies that support and encourage larger traditional families. According to the Members of the European Parliament who submitted the question, this should also form a part of the 'European way of life'.

51 Judgment of the CJEU, C-450/18, para. 58.
52 Judgment of the CJEU, C-450/18, paras. 59–60.
53 Judgment of the CJEU, C-450/18, para. 65.
54 Question for written answer E-001856/2023

In its answer, the Commission noted that labour shortages are shaped by cyclical drivers and structural determinants, including a reduction as a result of demographic trends, which was analysed by the Commission's 'Employment and Social Developments in Europe 2023' report. The Commission stressed that starting a family and having children[55] is an individual choice and pointed out that it supports Member States in creating favourable social and economic conditions that enable individuals to plan their family lives.[56]

Second, the Commission turned to presenting the related instruments at the EU level. In this regard, the Commission's answer mentioned the Directive on work-life balance, the Pregnant Workers Directive, the European Care Strategy, the European Child Guarantee, the Council Recommendation on early childhood education and care, and the support for investments in childcare facilities under the Recovery and Resilience Facility, as well as the Council Recommendation on adequate minimum income. Finally, the Commission stressed that it is committed to protecting the rights of all families, as enshrined in the EU Charter of Fundamental Rights.[57]

3.1. Judgment in the Tadao Markuo case[58]

Let us first examine the most important finding of the opinion of Advocate General D. Ruiz-Jarabo Colomer in the *Tadao Markuo* case. In 2001, the plaintiff in the main proceedings entered into a life partnership with a person of the same sex, who died in 2005. In the same year, the plaintiff applied for a widower's pension, which was refused on the grounds that, based on the relevant laws, surviving life partners are not entitled to the same benefits as surviving relatives.

The plaintiff lodged an appeal against the decision. According to the interpretation of the Bayerisches Verwaltungsgericht (the Bavarian Administrative Court), the relevant German legislation requires marriage for an individual to be eligible for the widower's pension and holds that the applicable provisions are not to be interpreted broadly. The administrative court added that these provisions are compatible with Paragraph 3 of the German Basic Law.

The Advocate General found it clear that Directive 2000/78 should be applied in this case. The observations lodged by the government of the United Kingdom and the

55 However, noteworthily, nothing in the question for written answer indicates that the Members of the European Parliament who submitted the question would query the individual freedom of choice as regards the starting of families and having children.

56 This may also mean that, in principle, the creation of an environment favourable for planning family life falls within the scope of Member State competence. Nonetheless, the Commission failed to explain in detail the help it provides for Member States to support large families, as indicated in the question.

57 In that regard, the respect for private and family life, home, and communications set out in Art. 7 of the Charter of Fundamental Rights of the European Union should definitely be mentioned. In addition, the right to marry and the right to start a family set out in Art. 9 of the Charter certainly belongs to this issue, which, under the said provision, is to be ensured in accordance with Member States' legislation regulating the exercise of these rights.

58 Judgment of the CJEU, C-267/06.

European Commission are noteworthy. The United Kingdom submitted that in the light of recital 22 to Directive 2000/78, the application of this Directive is excluded in the case of national laws on marital status and the benefits dependent thereon.[59]

Conversely, according to the European Commission, Directive 2000/78 – which, *inter alia*, prohibits discrimination on the grounds of age – should be applied in this case[60] because it satisfies the conditions laid down in the CJEU case law.[61] From recital 22 to the said Directive, the European Commission inferred that Member States have no obligation to place registered partnerships on an equal footing with marriage.[62] However, according to the European Commission's interpretation, if a Member State does treat the two institutions in the same way, the criteria set by the principle of equal treatment must be respected.[63] Pursuant to recital 22 to Directive 2000/78, this directive is without prejudice to national laws on marital status and the benefits dependent thereon. [64]

The Advocate General stressed that the Community has no powers with regard to marital status, which is set out in both Art. 3(1) of the Directive and recital 22 in its preamble – referenced also by the United Kingdom government – thereby leaving intact the competence of the Member States in this sphere and accepting each Member State's definition of marriage, singleness, widowhood, and other forms of 'civil (marital) status'. Nonetheless, according to the Advocate General's interpretation, Member States[65] must exercise that competence in a manner that does not infringe upon EU law.[66] Based on this, the Advocate General found no grounds for disapplying Directive 2000/78 in this case.[67]

59 Opinion of the Advocate General, C-267/06, para. 26.

60 Pursuant to Art. 1 of the said Directive, the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age, or sexual orientation as regards employment and occupation. However, it should be noted that recital 22 prescribes that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

61 Opinion of the Advocate General, C-267/06, para. 27.

62 Opinion of the Advocate General, C-267/06, para. 27.

63 Opinion of the Advocate General, C-267/06, para. 27.

64 The government of the United Kingdom stressed also in this regard that the said Directive is to be construed within the limits of the areas of competence conferred on the Community, which do not include the benefits dependent on marital status. From that, the United Kingdom government concluded that it is not appropriate to consider the rest of the questions referred for a preliminary ruling. Though the Advocate General found that the observation submitted by the United Kingdom government appears well founded, he did not agree with it. In the Advocate General's view, the introductory recitals are useful as criteria for interpretation; nonetheless, their significance must not be overstated.

65 The opinion stressed that the principle of non-discrimination on grounds of sexual orientation is included in Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as in Art. 21 of the Charter. According to the Advocate General, the fact that this principle is fundamental in nature means that respect for the right is guaranteed in the European Union, pursuant to Art. 6 TEU.

66 Opinion of the Advocate General, para. 77.

67 Opinion of the Advocate General, C-267/06, para. 81.

Following these findings, the Advocate General analysed the EU law related to the prohibition of discrimination on the grounds of sexual orientation. The Advocate General's opinion found that if Directive 2000/78 was applied in the case, the national measure at issue should be examined in light of the prohibition of discrimination on the grounds of sexual orientation. The Advocate General stressed that, together with the right of free movement, the principle of equal treatment is the most long-standing and well-established principle of the Community, which began with equal pay for men and women, and later extended beyond the boundaries of this field.[68] According to the Advocate General's opinion, this process continued with groups with certain sexual identities, starting, *inter alia*, with the decriminalisation of same-sex relationships and continuing with the combat against the prejudice and discrimination affecting homosexuals. The Advocate General considered the resolution of the European Parliament in this regard.[69]

The opinion made reference to the fact that not all Member States had outlawed discrimination on the grounds of sexual orientation and neither it this mentioned in the European Convention for the Protection of Human Rights and Fundamental Freedoms, although the case law of the European Court of Human Rights has held that the right to respect for sexual orientation falls within the scope of the convention.[70] The opinion also noted a similar omission in the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966. According to the CJEU's interpretation, the survivor's benefit at issue falls within the scope of Directive 2000/78.[71] The requirements set out in this Directive preclude national legislation under which, after the death of a life partner of the same sex, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse.[72]

3.2. Judgment in the MB v Secretary of State case[73]

In the light of the impact of changes in gender on state retirement pensions and the provisions related to discrimination on the grounds of sex, the judgment in the case *MB v Secretary of State for Work and Pensions* should be mentioned.[74] The plaintiff in the main proceedings was born a male in 1948 and married in 1974. She began to live as a woman in 1991 and underwent sex reassignment surgery in 1995. However, the plaintiff did not hold a full certificate of recognition of her change of gender, as pursuant to the legislation of the United Kingdom, in order for that

68 Opinion of the Advocate General, C-267/06, para. 83.
69 The opinion's starting point was the Resolution of the European Parliament of 8 February 1994 on equal rights for homosexuals and lesbians.
70 Opinion of the Advocate General, C-267/06, para. 86.
71 Judgment of the CJEU, C-267/06, para. 61.
72 Idem, para. 73.
73 Judgment of the CJEU, C-451/16.
74 Judgment of the CJEU, C-451/16.

certificate to be granted, her marriage would have to be annulled. Having reached the age of 60, the plaintiff applied for the retirement pension to which women over 60 are entitled pursuant to the relevant regulation. The application was rejected, as the plaintiff could not be treated as a woman for the purposes of the relevant legislation.

Through the questions referred to preliminary ruling in the legal dispute, the referring court essentially sought to understand whether the provisions of Directive 79/7 – the objective of which is to prevent discrimination in social security benefits on the grounds of sex – must be interpreted as precluding national legislation that requires a person who has changed gender to satisfy the condition of not being married to a person of the gender that he or she has acquired following that change in order to claim a certain type of state retirement pension. The CJEU recalled that although EU law does not detract from the competence of the Member States in matters of civil status and the legal recognition of a change in a person's gender, when exercising that competence, they must comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination.[75]

According to the judgment in the *Richards* case[76] and the case law cited therein, in the scope of the application of Directive 79/7, the principle of non-discrimination should also be applied in the case of a change of gender. Based on the case law, although Member States themselves establish the conditions for the legal recognition of a person's change of gender,[77] the fact remains that, for the purposes of the application of Directive 79/7, persons who have lived for a significant period as a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.[78]

The CJEU stressed that the national legislation at issue treats individuals who have changed gender less favourably as, in order to gain access to a state retirement pension, the condition of marriage annulment does not apply to persons who have retained their birth gender and are married. It follows that the national legislation treats a person who has changed gender after marrying less favourably than it treats a person who has retained his or her birth gender and is married. The CJEU further examined[79] whether the situations of these two categories of persons are comparable.

In the case law examined in this chapter, strong counter-opinions were formulated by the government of the United Kingdom, which holds that the purpose of the national legislation concerned is to avoid the existence of marriages between persons of the same sex; therefore, in this case, such a difference means that the situations

75 Judgment of the CJEU, C-451/16, para. 29.
76 Judgment of the CJEU, C-423/04
77 Judgment of the CJEU, C-451/16, para. 35.
78 Judgment of the CJEU, C-451/16, para. 35.
79 Judgment of the CJEU, C-451/16, para. 39.

of those persons are not comparable.[80] According to the settled case law, the comparability of situations must be assessed in a specific and concrete manner, inter alia, in the light of the objective pursued by the national legislation, which in the case at hand is ensuring protection against the risks of old age.[81]

In the CJEU's interpretation, the difference of marital status invoked by the government of the United Kingdom is not relevant in terms of the pension at issue in this case.[82] The CJEU also held that the national legislation did not meet the conditions set by Directive 79/7.[83]

4. The limitation of the right of free movement of physicians and specialist medical staff in the CJEU case law

4.1. Judgment in the Nicolas Bressol case[84]

The CJEU's judgment in the *Nicolas Bressol* case[85] may bear significance in relation to the possible limitation of the right of free movement guaranteed by citizenship of the Union. After presenting this judgment, I examine whether it has any impact on the Member States of Central Europe.

As regards the circumstances of the case, it is noteworthy that the dropout rate of students at medical universities in France is traditionally very high. Therefore, students with French citizenship enrol in French-speaking universities in Belgium – whose population is much smaller than that of France – and, after obtaining their degree, typically return to the country of their citizenship to practice their profession. It is unnecessary to describe in detail the fact that this process led to almost unbearable conditions in Wallonia, the French-speaking region of Belgium, where the lack of physicians and specialist medical staff caused a public health emergency. However, in principle, the provisions of EU law do not allow the restriction of the right of free movement, the introduction of higher tuition fees,[86] or other similar measures for citizens of other Member States.

For the above reasons, the legislature introduced restrictive measures for students of other Member States in the medical courses at French-speaking universities in Belgium. The Belgian government intended to justify the introduced discrimination with the goal of protecting the homogeneity of the higher education

80 Judgment of the CJEU, C-451/16, para. 40.
81 Judgment of the CJEU, C-451/16, paras. 41–43.
82 Judgment of the CJEU, C-451/16, para. 46.
83 Judgment of the CJEU, C-451/16, para. 52–53.
84 Judgment of the CJEU, C-73/08.
85 Judgment of the CJEU, C-73/08.
86 Access to education is guaranteed by citizenship of the Union.

system and public health. Noteworthily, as regards the homogeneity of the higher education system, the Belgian government claimed that the presence of non-resident students in these medical courses had reached a level that was likely to cause a deterioration in the quality of higher education owing to the inherent limits in the capacity of the educational establishments to welcome them and in the staff available.[87]

According to the CJEU, from the outset, it cannot be excluded that the prevention of a risk to the existence of a national education system and its homogeneity may justify a difference in treatment. However, in the CJEU's view, the justifications put forward must be examined jointly with those linked to the protection of public health as, in the case at hand, they are the same.[88] Noteworthily, the European Commission stated that it took the risks referred to by the Belgian government very seriously, but that, lacking in all the facts, it was unable to judge whether the justification was well founded.[89]

In its assessment, the CJEU cited the judgment in the *Hartlauer* case.[90] It follows from that case law that a difference in treatment based indirectly on nationality may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of health protection. Thus, it must be determined whether the legislation at issue is appropriate for securing this objective and whether it goes beyond what is necessary to attain it.[91]

Through the first and second questions referred to preliminary ruling, the referring court sought to know whether the relevant provisions of EU law should be interpreted as meaning that they preclude a Member State measure that may restrict the number of students with citizenship of other Member States allowed to enrol for the first time to obtain a medical doctor degree or participate in other medical training if an influx of non-resident students arrive, and, as a result of that process, too few students residing in the host community obtain diplomas. It was not disputed in the proceedings that Belgium's national measure introduced a difference in treatment based indirectly on nationality. According to the settled case law, however, such a difference in treatment is prohibited, unless objectively justified in accordance with the CJEU case law as, in such a way, even a difference in treatment based indirectly on nationality may be justified in certain situations.[92] It is for the acting Member State court to decide whether there are genuine risks to public health. The CJEU recalled its case law, which held that discrimination based on nationality[93] can be justified by the objective of maintaining a balanced high-quality

87 Judgment of the CJEU, C-73/08, para. 52.
88 Judgment of the CJEU, C-73/08, paras 53–54.
89 Judgment of the CJEU, C-73/08, para. 61.
90 Judgment of the CJEU, C-169/07.
91 Judgment of the CJEU, C-73/08, para 61.
92 Judgment of the CJEU, C-73/08, paras. 47–50.
93 Judgment of the CJEU, C-73/08, paras. 62–63.

medical service open to all. As mentioned above, the CJEU cited the judgment in the *Hartlauer* case[94] in that regard.[95]

As regards the consequences of the judgment in the *Bressol* case and the relevance of the case law for Central European Member States, a question for written answer was submitted[96] to the European Commission. In its answer, the Commission pointed out, *inter alia*, that a Member State could limit the number of non-resident students from other Member States enrolling for the first time in certain medical and paramedical courses if such a restriction was justified in order to protect public health. Furthermore, the Commission stressed that – even in cases concerning conditions for access to education – the *Bressol* case should not be seen as establishing a general exemption from the prohibition of discrimination. In the Commission's interpretation, aside from the derogations from the right to equal treatment provided for in the Free Movement Directive,[97] each potential restriction of students' right to equal treatment should be assessed on a case-by-case basis.

The written answer to the question lacked a response to the question of whether the CJEU's judgment in the Bressol has certain relevance in the Central European Member States. However, indirect conclusions may follow from the Commission's answer, which highlighted that it is also important to distinguish between the restriction at stake in the Bressol case (which concerns the inward mobility of students) and a potential restriction of the outward mobility of medical professionals. This finding may mean that it is not to be applied in the case of Central European Member States. Nonetheless, in the remaining part of its answer, the Commission explained that any restriction of outward mobility could only be accepted if it was justified in line with EU law and, in particular, with the case law of the Court. In my opinion, the Commission's view was based on the existing case law.

Nevertheless, in its judgment in the *Hartlauer* case,[98] the CJEU not only examined the restriction of the inward mobility of students based on the right of free

94 It is of prior importance that in the said judgment, the CJEU did not examine the citizenship of the Union, but the restriction of one of the most important fundamental economic freedoms, that of the freedom of establishment. In the main proceedings, a company established in Germany applied for permission to set up a private healthcare institution in Vienna. According to the Winer Landesregierung, dental care was adequately ensured in Vienna by public and private non-profit health institutions and other contractual practitioners. Based on expert findings, the Winer Landesregierung held that the health institution whose establishment was sought would not have the effect of substantially accelerating, intensifying, or improving the provision of dental medical care. According to the CJEU's interpretation, Arts. 43 and 48 EC preclude national legislation such as that at issue, under which authorisation is necessary for opening a dental clinic and where the system of prior administrative authorisation is not based on a condition capable of adequately circumscribing the exercise by the national authorities of their discretion. This is because such national legislation is not appropriate for ensuring the attainment of the objectives of maintaining a balanced high-quality medical service open to all and preventing the risk of serious harm to the financial balance of the social security system.

95 Judgment of the CJEU, C-169/07.

96 Question for written answer, E-002128/2023.

97 Directive 2004/38/EC of the European Parliament and of the Council.

98 Judgment of the CJEU, C-169/07.

movement ensured by the citizenship of the Union but also the national legislation restricting the operation of the concerned internal market in the scope of the application of one of the most important fundamental economic freedoms: the freedom of establishment. Although the CJEU eventually found that the concerned national measure was precluded by the right of the freedom of establishment, this decision did not follow from the fact that the public interest related to public health – which was obviously less compelling than that in the *Bressol* case – was not suitable to justify a restriction of the freedom of establishment. Rather, the CJEU held that this national legislation was not capable of adequately circumscribing the exercise by the national authorities of their discretion and that it was not consistent in implementing the public interest objectives indicated by it.

Thus, it does not follow that, under certain circumstances,[99] in the case of one or more Central European Member States, the CJEU would not recognise the possible restriction of outward mobility for reasons of public health.

5. Summary

The most essential question examined in this chapter is how family policy that serves to improve the demographic situation can be placed within the framework of EU law. All in all, it can be determined that, in principle, the area examined in this chapter falls within the scope of Member State competence.[100] The European Commission's written answers also prioritise Member State powers and responsibilities in this area. In legal terms, the Commission primarily takes the Charter of

99 It should be stressed that I do not intend to promote the restriction of the free movement of physicians, and the arguments presented against it here are based solely on the examination of the discretion provided to the Member States to adopt regulations.

100 The question for written answer to the European Commission concerned the migration of the labour force from the Central European Member States. Question for written answer E-002977/2023 sought to know, *inter alia*, what impact the process of labour force migration has on the economic growth of the affected Member States and on the financing of their pension system. In addition, a written answer was sought to the question of whether the Commission plans to adopt measures over and above the cohesion and structural funds in order to limit, *inter alia*, this potential damage, with specific EU funding aimed at solving this problem.
In his answer, Nicolas Schmit made an indirect reference to the responsibility of the Member States, explaining that many workers return to their country of origin, 'provided' that the situation in their country of origin allows it.
The Commission stressed that Romania ranks first in terms of the number of migrating workers, followed by Poland, also highlighting Italy and Portugal. Nonetheless, Schmit acknowledged that the migration of the labour force is expected to also reduce contributions and, later, pensions.
It is clear from the remaining part of the written answer that the European Commission intends to address the demographic problems of the Central European Member States by raising the socioeconomic dynamism of the respective territories and promoting education.

Fundamental Rights of the European Union into account as regards family-related issues. According to the Commission, Member States must address the demographic challenges primarily through educational opportunities and economic development, with a vision that promotes predictable conditions. It is also clear from the given answers that the European Commission does not find it necessary to implement any specific measures to address the problems arising in the fields of economy, growth, or the payment of pensions owing to the migration of the labour force from the Central European Member States, applying an almost pure economic approach in that regard. However, in the long run, this economic approach may not be sufficient to overcome the demographic challenges faced; thus, the introduction of a family policy with incentives related to demography may become necessary.

The CJEU case law analysed in this chapter sheds light on the fact that, despite the resolution of the Commission, EU law may have a major impact on Member State family policies that promote incentives related to demography. It must be stressed that in the examined case law, the CJEU interpreted the EU law provisions rather expansively.

Consequently, researchers addressing this issue from the perspective of national law have not assumed at first sight that the EU provisions under examination here have any relevance in terms of Member States' family policies. In my view, it is crucial to differentiate between the recommendations formulated by the European Commission in this area– which are mostly of an economic nature and lack binding force – and the CJEU case law affecting Member States' family policies aimed at incentives related to demography as the latter, under certain circumstances, may prevent the achievement of the objectives pursued by the national legislature.

The examined case law of the CJEU can be placed in two categories in terms of its impact on family policy with incentives related to demography. First, I analysed the case law related to the acknowledgement of childbearing in pension schemes and pension-related benefits aimed at improving the demographic situation. In the judgments examined herein, the CJEU found that such Member State benefits were 'incompatible with EU law'. Second, we turned to examining the CJEU case law on family status and the related Member State subsidies. It can be ascertained that the CJEU achieved significant legal development in this area, holding that Member States must consider the requirements set by EU law in many fields, even though they fall within Member State competence.

Regarding the implementation of pension scheme subsidies aimed at improving the demographic situation, the following conclusions can be drawn. In the present state of development of EU law, primary and secondary EU Acts prohibiting the different treatment of men and women do not allow Member State legislature to recognise the practice, based on social realities, that, in general, women spend more time on child-rearing than men, which also affects their pension. Although the relevant Acts of EU law allow for the introduction of maternal benefits, they are strictly limited to childbirth and the weeks following it.

In light of the existing case law, it is also not possible to acknowledge the demographic contribution of women through pension schemes. The relevant Acts of EU law allow Member States to provide compensation to a disadvantaged group despite the provisions prohibiting the different treatment of men and women. Nevertheless, the case law precluded such compensation in the case of women who have three or more children, even if the given Member State presented detailed statistical data to support the fact that the pension provided to women raising three or more children was significantly less than that of the rest of the population, leading to social disadvantages.

However, even if, in order to prevent these problems, the Member State legislature chooses the seemingly obvious solution of avoiding direct discrimination in the provision of such benefits on the grounds of sex, it is not certain that these measures will not be precluded by EU law: in the judgment in the Leone case analysed above, the CJEU found that the concerned measure – though apparently neutral in terms of sex – introduced indirect discrimination on the grounds of sex as the benefit was used in greater proportion by women. In addition, in the judgment in the Leone case, further – at first sight not very logical – criticism was formulated against the national legislation, which resulted from specific control criteria developed in relation to EU law. The subject of such criticism was that the benefit introduced by the national legislature also applied to adopted children and those who were born before the women concerned entered the job market.

The social reality – mentioned in the judgment in the *Griesmar* case – is that women spend more time on child-rearing than men, giving rise to the phenomenon known as a 'double penalty' mentioned in the case law, meaning that women not only incur disadvantages in their career but will also receive less pension. If this reality continues and the EU law continues not to allow Member State legislature to address this problem, then a significant number of women may be discouraged from having children. This finding does not require extensive support: a national family policy promoting incentives related to demography can only lead to the expected positive impacts if the relevant legislation exists in the long term and those concerned can rely on the benefits specified in the national measure. Thus, it is crucial that such Member State measures are in line with EU law.

Second, while family status and the related state subsidies fall within the scope of Member State competence – which is also recognised in the case law – as in other areas, the Member States must take EU law into account here as well. Contrary to the above group of cases, this case law requires that same-sex couples and life partners, as well as persons who have undergone gender reassignment, can also use the subsidies and benefits specified by the Member State's legislature. In my view, in this second group of cases, the examined case law of the CJEU does not hinder the introduction and maintenance of a family policy promoting incentives related to demography. However, the case law examined in the first group of cases may, in fact, be a major obstacle to such family policy.

It must be stressed that not only regulations similar to the national measures examined in the judgments of the CJEU may be hindered by the existing case law: if the objective to improve the demographic situation still fails to 'prevail' in the system of EU law, regulation derogating from the measures examined in the existing case law may also be 'filtered out' by the CJEU. EU law may likely preclude family policy measures promoting demographic incentives that derogate from those examined in the analysed judgments, based on the developed *ratio decidendi*. No arguments can be put forward as to why the EU provisions described above should not be applied to other areas falling within the competence of the Member States, although demography-related objectives are not even recognised as a public interest in the CJEU case law.

In that regard, we may consider programmes and subsidies aimed at promoting childbearing in the case of childless couples or at alleviating the financial obstacles of raising children, where the legislature typically introduces conditions based on age. Such conditions may easily be precluded by EU law provisions prohibiting discrimination on the grounds of age or by the case law based upon them. The fact that a national regulation similar to the above has been in force for decades without any conflict with EU law proves nothing but that the European Commission has not yet initiated infringement proceedings against the Member State regulation concerned, and that this regulation has not yet been 'examined' by the CJEU 'with the help' of the preliminary ruling procedure.

The case law of the CJEU in this area allows the Member States significantly more room for manoeuvre than in their internal market rules; however, given the very specific nature of this control mechanism, in the vast majority of cases, it is difficult for the legislature to follow,[101] which can be a source of considerable legal uncertainty.[102] As an illustrative example in this regard, let us look at a CJEU judgment in relation to the Federal Republic of Germany.[103] According to this judgment, the EU provisions prohibiting discrimination based on age precluded the examined national system of promotions and salary increases for judges and civil servants partly based on age. The complications that followed the CJEU's judgment point to the difficulties that arise in understanding and applying the case law developed in the field of discrimination on the grounds of age. The organs of the concerned Member State applied different interpretations as to which categories of civil servants are covered by the CJEU's judgment. A significant number of the concerned judges and civil servants could not assert their rights arising from EU law due to the various interpretations, which in some cases, led to the violation of EU law. These problems

101 Clearly, the CJEU has the monopoly on the authentic interpretation of the EU law; thus, both EU and national bodies must follow its interpretation.

102 Obviously, in that regard, it is not the principle of legal certainty established by the case law of the CJEU that is to be considered, but a practical reality – a significant reduction in the discretion for regulation conferred on Member States – that must be reckoned with.

103 Judgment of the CJEU, C-773/18

were only resolved after more than 10 years[104] with the 'help' of a new ruling of the CJEU.

I consider two possible solutions[105] to the problems described above.[106] According to the first proposal, the secondary,[107] and possibly primary, EU legal Acts cited in the case law should be amended in such a way that they do not affect the family allowances introduced by the Member States to promote incentives related to demography. In this regard, the conceivable solutions are the amendment of the primary law, on the one hand, and, possibly, of the secondary legal Acts, on the other. Art. 141(4) EC could be supplemented by an acknowledgement that the principle of equal treatment does not prevent Member States from maintaining or adopting measures that provide certain advantages for the underrepresented sex, aimed at preventing or compensating the disadvantages they face in their professional advancement in connection with child-rearing.

Article 7(1)(b) of Directive 79/7 states that this Directive is without prejudice to the Member States' right to exclude from its scope, *inter alia*, the advantages of old-age pension schemes granted to persons who have brought up children and the acquisition of benefit entitlement following periods of interruption of employment for child-rearing.[108] For demographic subsidies related to pensions to be in line with EU law, this provision should include only that Member States can provide benefits to persons who bring up children. The provision prescribing the requirement of the interruption of employment for child-rearing should be removed from the text of the Directive.

It should be stressed that this amendment would not mean a shift towards some kind of 'compulsory childbearing', or that there should be discrimination against the

104 As mentioned above, the CJEU has the monopoly on the authentic interpretation of the EU law, which is to be respected by all EU and Member State bodies and upon which the integration held together by law is based. However, the interpretation problems caused in practice cannot be overlooked.

105 Noteworthily, some of the proposals recommend the possible restriction of Union citizenship and the free movement of workers in the case of a health emergency.

106 According to Henri Oberdorf, EU law should be intelligent, that is, it must properly implement public interest. Oberdorf, 2013, pp. 32–33. It is hard to find rational arguments as to why a family policy properly promoting demographic incentives should not be considered as public interest.

107 According to Claude Blumann, in the development of the integration, the importance of the legislature's role kept increasing, although most of the legal literature sees the regulations and directives as Acts of the executive. Blumann, 2011, p. 31.
In the case law of recent years, secondary EU legal Acts are playing an increasingly important role in comparison to the provisions of primary legal Acts, an example of which is the CJEU's judgment in the KOB Sia case (C-206/19). This judgment clearly supports the process described by Blumann, that is, the increase in the importance of secondary EU legal Acts compared to primary legal provisions. This process can certainly facilitate the implementation of demography-related objectives in the framework of EU law.

108 In paragraphs 61–62 of its judgment, rendered in the Instituto Nacional de la Seguridad Social case, the CJEU pointed out that the national regulations in question did not make the awarding of the pension supplement dependent on periods of interruption of employment to raise children, but only on the fact that women recipients have had at least two biological or adopted children and receive a contributory retirement, widow's pension, or permanent incapacity pension.

childless. Rather, the proposed change would allow Member States to provide subsidies that could at least partially compensate for the costs of raising children[109] and would also give couples who would not be able to do so in the absence of such help the opportunity to have children.

If amending the EU rules is not possible, proposals could be made – especially taking the practice of the Central European Member States into account – to change the case law of the CJEU[110] and harmonise the EU objectives formulated in the CJEU judgments examined in this chapter with Member State objectives aimed at promoting demographic incentives. The proposal to amend the case law can basically be approached from two directions. On the one hand, in the scope of discrimination on the grounds of sex, Member State subsidies related to child-rearing should be accepted as a goal of public interest if they provide a certain level of financial compensation for a group disadvantaged in that regard. On the other hand, it should be examined what the consequences would be for the objectives pursued by the secondary EU legal Acts applied in the judgments analysed in this chapter if the case law were modified in such a way that demographic objectives could be included in its framework. In this regard, a broader interpretation of the special relationship between the mother and the child should be considered in the case law, which would enable mothers to be supported not only in the weeks before and after childbirth. Another aspect to consider is that the case law should take into account the statistical evidence provided by Member States, which supports that parents or mothers raising more children receive a lower pension that does not reach the poverty threshold. A solution is also needed to another problem that emerged in the analysed judgments, namely, that if the Member State legislature makes the regulation neutral in terms of sex, then it should not be considered indirectly discriminatory in the case law if a certain group of people use the subsidies in question more often. In the field of discrimination on the grounds of age, further research is required to determine how the demographic measures adopted by Member States could fit within its frameworks. It would also

109 This is not possible in the existing legal environment.

110 In this regard, a difficulty may be posed by the fact that the permanent staff working at the Court of Justice of the European Union submit draft judgments to the judge, in which the previous case law is indicated in each case. Clément-Wilz, 2019, pp. 49–50.
It is beyond dispute that the above may make it difficult to change the relevant case law of the CJEU. Nevertheless, this possibility does not seem completely 'hopeless' because there is an example – despite the above – of changing the case law of the CJEU that has been consistently applied for decades. The judgment in the KOB Sia (C-206/19) case can also be cited in that regard: instead of the primary provisions covering the free movement of capital, the provisions on the freedom of establishment and the service directive were applied in the case of the purchase of agricultural land.
At the same time, Chloé Bertrand's statement can help the realisation of the option I propose: according to her viewpoint, the advocate generals of the CJEU do not want to make moral issues part of the legal disputes in most cases, namely, in the field of abortions. Bertrand, 2015, pp. 86–87. The question of whether it is possible to recognise the social reality that women take on a greater role in child-rearing through some form of support introduced by the Member States can also be considered a moral issue, which should, therefore, be decided at the level of the Member States.

be apt to submit questions for written answer to the European Commission regarding how Member States' demographic objectives can be enforced, taking into account the current regulatory environment and the case law discussed herein. Depending on the Commission's answers to the submitted questions, a related interpretative communication could also be requested. Although such a communication does not have binding force – as the CJEU has the monopoly on authentic interpretation in this field – it could, however, help in solving the problems raised in this chapter. In this latter case, extensive academic cooperation, especially among the Central European Member States, as well as professional-level research will be necessary.

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