OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 2 July 1986 *

Mr President,
Members of the Court,

1. In connection with the dispute between the Federatie Nederlandse Vakbeweging [Netherlands Trades Union Federation] and the State of the Netherlands, the Gerechtshof [Regional Court of Appeal], The Hague, has asked the Court to interpret Article 4 (1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24). The central issue in the main proceedings is the conformity with Community law of a provision of Netherlands law on assistance for the unemployed as a result of which married women who are not deemed to be bread-winners are not entitled to unemployment benefit. The national court seeks above all to ascertain whether direct effect must be attributed to the principle of equal treatment in view of the characteristics of the provision in which that principle is enshrined and the failure on the part of the Netherlands to incorporate that directive into national law within the period allocated to the Member States to comply with it (up to and including 22 December 1984).

To begin with, it is appropriate to refer, albeit briefly, to the Netherlands legislation on unemployment benefits. It is to be found in three separate sources. The Werkloosheidswet, the Law on Unemployment, in force since 1 July 1952, is based on a contributory system and unemployed workers receive under it, during the six months following the commencement of unemployment, benefits the amount of which is based on the last pay received. Once that period of six months has expired, the Wet Werkloosheidsvoorziening, the Law on Assistance for the Unemployed, which has been in force since 1 January 1965 (*Staatsblad* 485) and under which benefits are financed by the Treasury, takes over: under that Law the worker is entitled to receive for two years benefits also based on the level of his most recent pay. Lastly, there is the Algemene Bijstandswet, General Law on Assistance, which has been in force since 1 January 1965 and under which benefits are also charged to the State budget: its provisions relate to unemployed persons not entitled to benefit under the first two laws and entitle them to a benefit the amount of which is determined solely by the needs of the worker's family unit.

The provision at issue is Article 13 (1) (point l), of the Law on Unemployment Benefit, which disqualifies from 'entitlement to benefits a worker . . . who, as a married woman, cannot be deemed to be the bread-winner pursuant to rules adopted by the competent minister after hearing the views of the central commission, and who does not live permanently separated from her spouse . . .'. Obviously that provision must be assessed in the light of the aforementioned Directive 79/7/EEC, and, especially, in the light of Articles 4 (1), 5 and 8 thereof. According to Article 4 (1) the principle of equal treatment 'means that

* Translated from the Italian.

there should be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. Article 5 provides that the Member States are to take the measures necessary to 'ensure that any . . . provisions contrary to the principle of equal treatment are abolished'. Article 8 gives the Member States six years from the notification of the directive (23 December 1978) to bring into force the laws, regulations and administrative provisions necessary to comply with the directive.

2. According to the judgment requesting the preliminary ruling, the Netherlands Government initially intended, as part of a wide-ranging reform of the system of social security, to transpose the directive into national law at the same time as it merged the Werkloosheidswet and the Wet Werkloosheidsvoorziening. It was to have included the abolition of the discrimination to which Article 13 gives rise by extending the tenor thereof to cover married men who are not heads of household (see Written Questions Nos 508/84 and 715/84 by Mrs Ien van den Heuvel, MEP, to the Commission of the European Communities, Official Journal 1984, C 256, p. 30, and Official Journal 1985, C 4, pp. 5 and 6).

However, it appeared impossible to implement the reform in the six years stipulated in the Community directive. The government then submitted a draft law setting out a number of transitional rules including the extension of Article 13 in the manner mentioned above; but on 13 December 1984 the draft was rejected by the Second Chamber of the States-General. Five days later, the State Secretary for Social Affairs and Employment informed the President of the Second Chamber that the government intended to draw up a new draft with retroactive effect from 23 December 1984 in order to implement the directive. Parliament was urged to approve the draft by 1 March 1985 (Draft No 18849 submitted on 6 February 1985).

However, on 21 December 1984 (two days before the deadline set by the directive) a circular from the aforementioned State Secretary to the local authorities stated that, pending the new legislation, the provisions of the Wet Werkloosheidsvoorziening, and hence also Article 13 thereof, would continue to be applied. At this point, the Federatie Nederlandse Vakbeweging, whose object under its articles of association is the protection of workers and their families, summoned before the President of the Arrondissementsrechtbank [District Court], The Hague, the State of the Netherlands in interlocutory proceedings, requesting that it be ordered to repeal the requirement relating to the status of bread-winner laid down by the contested provision or, at least, to refrain from applying that provision until the entry into force of the planned reform. By judgment of 17 January 1985, the President of the Court allowed the request and ordered the State to amend Article 13 by 1 March 1985. Both the State and the Federatie Nederlandse Vakbeweging appealed against that judgment.

The judgment requesting the preliminary ruling also makes it clear that both the parties to the main proceedings consider that the provision is incompatible with the principle of equal treatment enshrined in Article 4 (1) of the directive. On appeal, it adds, the Federatie Nederlandse Vakbeweging accused the State of having acted unlawfully by maintaining in force or refusing to refrain from applying Article 13 after 23 December 1984 and by requiring the local authorities to continue to apply it. In its view, since Article 4 has direct effect, the contested provision should cease to have effect as from the aforesaid date.

The Third Section of the Gerechtshof, The Hague, considered the scope of the directive to be unclear and therefore, by judgment of 13 March 1985, stayed the proceedings and referred to the Court, pursuant to Article 177 of the EEC Treaty, three questions for a preliminary ruling, which, for the sake of clarity, I shall reformulate as follows:

1. Has Article 4 of Directive 79/7/EEC had direct effect since 23 December 1984 with the result that from that date Article 13 (1), point l, of the Wet Werkloosheidsvoorziening is inapplicable and that female workers disqualified from receiving benefit under that provision acquire the relevant entitlement?

2. Does it matter whether, in order to implement the directive and neutralize the financial costs involved, the State had alternative possibilities other than simply repealing the provision in question, such as making the entitlement to benefit subject to stricter requirements or limiting the benefits payable to unemployed persons under the age of 35?

3. Does it matter that a transitional provision is necessary in addition to the repeal of the provision and that a choice must be made between several alternative solutions?

Furthermore, on 24 April 1985 the Netherlands Parliament amended the Wet Werkloosheidsvoorziening (*Staatsblad* 230). The new law repealed, retroactively from 23 December 1984, Article 13 (1), point l, and provided, as a transitional measure and in order to guarantee financial cover, that the maximum period for which the benefits could be paid should be reduced in the case of unemployed persons under the age of 35 years. It further provided that Article 13 should continue to apply to workers already unemployed before 23 December 1984 unless they were receiving on that date benefits under the Werkloosheidswet or an allowance provided for in legislation applicable — at least this is my understanding of the matter — to persons who are under an employment relationship but deemed to be unemployed pursuant to Article 6 (1) (a) and (b) of the Werkloosheidswet.

Lastly, I would mention that observations have been submitted to the Court by the parties to the main proceedings, the Commission of the European Communities and the United Kingdom of Great Britain and Northern Ireland.

3. In its first question the national court asked whether Article 4 of Directive 79/7/EEC has direct effect as from the expiry of the time given to the Member States to comply with it. The Federatie Nederlandse Vakbeweging, the Commission and the United Kingdom suggest that this question should be answered in the affirmative, while the Netherlands takes the opposite view. I shall say at once that I agree with the first three parties. The argument of the Netherlands Government, which is based on the discretionary powers given to the Member States with respect to the methods of implementing the principle of equal treatment, is certainly without foundation.

The effectiveness of directives in general and, in particular, the possibility that they may produce direct effects are such well-known subjects that it is not worthwhile exploring them here in depth. I shall therefore merely point out that, according to a consistent line of decisions of the Court, to preclude in principle the possibility of invoking the rights corresponding to the obligations imposed by directives would be incompatible with the binding force which is conferred on directives by Article 189. Especially in cases in which the Council and the Commission have laid down a certain course of conduct to be followed by the Member State, the practical effectiveness of the directive would be

reduced if litigants were precluded from relying on it in legal proceedings and national courts were precluded from taking it into consideration as an 'element of Community law'.

Consequently, a Member State which, in the period allowed to it, has failed to adopt the measures required by a directive is not entitled to rely, as against individuals, on its own failure to fulfil its obligations under that directive. As a result, individuals can invoke provisions which, substantively, are unconditional and sufficiently precise in order to contest the applicability of domestic rules which are incompatible with the directive or in order to assert the rights which those provisions confer on them *vis-à-vis* the State (judgment of 6 October 1970 in Case 9/70 *Grad* [1970] ECR 825; judgment of 4 December 1974 in Case 41/74 *Van Duyn* [1974] ECR 1337; judgment of 1 February 1977 in Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113; judgment of 5 April 1979 in Case 148/78 *Ratti* [1979] ECR 1629; judgment of 19 January 1982 in Case 8/81 *Becker* [1982] ECR 53; and, most recently, the judgment of 26 February 1986 in Case 152/84 *Marshall* [1986] ECR 723).

Having said this, it must be established whether, intrinsically, Article 4 (1) satisfies the requirements of being unconditional and sufficiently precise. As we have seen, Article 4 (1) provides that 'the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status, in particular as concerns: the scope of the schemes [of social security] and the conditions of access thereto, ... the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits ...'.

If, the Commission observes, this prohibition is read in the light of the obligation, laid down by Articles 1 and 8 (1) of that directive, as to the result to be obtained it is impossible not to consider it *clear, complete* and *precise.* If then, the Federatie Nederlandse Vakbeweging points out in addition, it is read in conjunction with Article 5, under which the Member States have a duty to 'abolish' provisions contrary to the principle of equal treatment, it becomes equally clear that the provision is *unconditional* and hence that there is no discretion on the part of the Member States as regards bringing about the result sought by the directive.

I have already mentioned that only the Netherlands Government disagrees with this straightforward argument. In its view, Article 4 does not have direct effect because it does not prescribe the procedures whereby the Member States should implement the principle of equal treatment: for example, the contested provision — which the Netherlands Government admits is undeniably discriminatory — can be amended in at least four different ways all of which, however, are capable of rendering effective the equality between men and women which is required by the directive. The fact that there is such a range of solutions shows how wide a discretion is left to the Member States.

However, the argument which has just been summarized confuses the issue of direct effect with that of the discretion available to Member States in transposing the directive into national law. As I have stated, the clear and unconditional provisions set out in the directive are capable of being superimposed on conflicting national laws and precluding their applicability or limiting it. That does

not mean, however, that that solution is obligatory. A State which considers such a solution to be too onerous may alter its own law by prescribing other procedures, provided that they are compatible with the result sought by the Community legislation. By legislating in that manner the State will inevitably implement in good time the obligation imposed on it.

In particular, it is out of the question that the 'financial difficulties' to which, according to the Netherlands Government, the repeal of Article 13 (1), point l, of the Wet Werkloosheidsvoorziening would give rise could have a bearing on the direct effect of Article 4. Faced with a similar argument, the Court observed that such 'difficulties . . . [are] the consequence of the Member State's failure to implement the directive in question within the period prescribed for that purpose. The consequences of that situation must be borne by the administrative authorities and may not be passed on to [the individuals] who rely on the fulfilment of a precise obligation which has been incumbent on the State under Community law . . .' (judgment in Case *Becker*, cited above, paragraph 47).

The conclusion to be drawn from those observations is plain. As from 23 December 1984 the women against whom the national rules discriminate are entitled to oppose its further application; they may, that is to say, claim the unemployment allowances on the terms laid down for married men and, in any event, without reference being made to the status of bread-winner.

4. The second and third questions seek to establish whether, in order to adapt its legislation to comply with the principles laid down by the directive, the Member State may have recourse to means other than the straightforward repeal of the provision which is inconsistent with the directive and, in particular, whether transitional rules are necessary. I must confess that I have a number of doubts about the admissibility of those questions: since the Court has no jurisdiction to decide upon the compatibility of a national provision and Community law (see judgment of 21 March 1972 in Case 82/71 *Pubblico Ministero* v *Società Agricola Industria Latte (SAIL)* [1972] ECR 119, paragraph 3), it seems clear to me that the Court may not pronounce even on abstract contingencies concerning the manner of incorporation of the directive into national law either.

However, let us admit that the national court is seeking to obtain an interpretation of Community law and, in particular, is asking the Court to define the scope of the directive; in order to answer the national court's question it is sufficient to refer to the judgment in Case *Becker*, according to which the discretion left to the Member States with regard to the forms and methods necessary for the purposes of implementing the directive with regard to the result to be obtained does not prevent one or more provisions of the directive having direct effect (paragraph 30).

5. On the basis of all the foregoing considerations I propose that the Court should answer the questions referred by the Gerechtshof, The Hague, by judgment of 13 March 1985 in the case between Federatie Nederlandse Vakbeweging and the State of the Netherlands in the following terms:

(1) As from 23 December 1984, the day following the last day of the period laid down for the transposition into national law 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, Article 4 (1) thereof, which prohibits all discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status, has direct effect. Private individuals may assert in legal proceedings the individual rights conferred on them by that provision by opposing national rules which are inconsistent and conflicting with the principle of equal treatment.

(2) The contingencies contemplated in the second and third questions have no bearing on the direct effect of Article 4 (1).