OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 20 November 1990 *

Mr President,
Members of the Court,

1. In the present action, the Commission seeks a declaration that by failing to adopt within the period prescribed in Article 8(1) of Council Directive 79/7/EEC [1] the measures necessary to apply the principle of equal treatment for men and women to statutory social security schemes, and in particular by maintaining in force a system of unemployment and invalidity benefits which discriminates against women, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty.

2. The legislation concerned includes the Royal Decree of 8 August 1986 [2] and the Ministerial Decree of 23 January 1987 [3] with regard to unemployment benefits, and the Royal Decree of 30 July 1986 [4] on sickness and invalidity insurance. That legislation divides beneficiaries into three groups. Group 1 comprises workers living with one or more dependent persons (described until 8 August 1986 as 'heads of household'); Group 2 covers workers living alone (referred to as 'single workers'); and Group 3 comprises workers living with a person in receipt of income from employment or replacement income (described until 8 August 1986 as 'cohabitees').

3. Unemployment benefit takes the form of an initial grant of a basic allowance equal to 35% of the previous salary, [5] taken into account up to a specified ceiling. That benefit is paid to all workers in each of the three groups, although those in Group 3 receive it for only 18 months (plus three months per year of work completed), after which they are awarded a flat-rate allowance. [6] In addition a 'loss of single income' allowance equivalent to 5% of previous salary, subject to a ceiling in certain cases, is paid to workers in Groups 1 and 2. Finally, beneficiaries in Groups 2 and 3 receive an 'adaptation supplement' equivalent to 20% of previous salary during the first year of unemployment; those in Group 1 receive the supplement for an unlimited period. Consequently, one year after becoming unemployed, persons in Group 1 receive 60%, those in Group 2 receive 40% and those in Group 3 receive, for the abovementioned period, 35% of their previous salary.

4. Beneficiaries in Group 3 also receive an additional supplementary allowance of BFR 3 640 if the incomes of the persons

* Original language: French.

1 — 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 (OJ 1979 L 6, p. 24).

2 — *Moniteur belge*, 27.8.1986, p. 11825.

3 — *Moniteur belge*, 11.2.1987, p. 1817.

4 — *Moniteur belge*, 2.8.1986, p. 10854.

5 — The relevant provisions use the expression 'mean daily remuneration'; see the reasoned opinion in Annex I to the application.

6 — The amount of that allowance is BFR 10 505 according to the Commission (application, p. 6) and BFR 10 920 according to the Belgian Government (defence, p. 2).

living with them are so low that the household's total incomes amount to less than BFR 29 198.

5. As regards sickness and invalidity insurance, the amount of benefit is fixed at 65% of previous salary, subject to a ceiling in certain cases, for Group 1, 45% for Group 2 and 40% for Group 3.

6. The statistics sent to the Commission by the Belgian authorities by letter of 12 September 1983, based on a survey of 6% of wholly unemployed persons in receipt of benefit in June 1982 show that 81.4% of unemployed persons in Group 1 are men whereas 65.2% of those in Group 3 are women.[7]

7. The Commission considers that the Belgian system of unemployment and invalidity benefit gives rise to indirect discrimination against women, contrary to Article 4(1) of the directive. It does so on the basis of the Court's case-law on part-time workers[8] to the effect that where it is established that a discriminatory measure affects a far greater number of women than men, it is contrary to the principle of equal treatment unless it can be shown to be accounted for by 'objectively justified factors unrelated to any discrimination on grounds of sex'.[9]

8. That case-law is also applicable in situations other than the specific situation of part-time workers. In *Teuling*,[10] for example, the Court held that

'a system of benefits in which ... supplements are provided for which are not directly based on the sex of the beneficiaries but take account of their marital status or family situation and in respect of which it emerges that a considerably smaller proportion of women than men are entitled to such supplements is contrary to Article 4(1) of the directive if that system of benefits cannot be justified by reasons which exclude discrimination on grounds of sex.'[11]

9. The parties appear to be divided on the actual distribution of male and female workers between Groups 1 and 3. It does, however, appear that the figures quoted by the Commission in its application, which are taken from the abovementioned survey, show clearly enough that Group 1 includes an appreciably higher number of men and, conversely, that Group 3 is composed essentially of women.

10. The main difficulty in the present case lies, therefore, in whether or not there are 'objectively justified factors unrelated to any discrimination on grounds of sex'. The

7 — Reasoned opinion issued on 20 June 1988, p. 7 of Annex I to the application.

8 — Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911; Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607; Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743; Case C-102/88 *Ruzius-Wilbrink* v *Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311; and Case C-33/89 *Kowalska* v *Hamburg* [1990] ECR I-2591.

9 — Case 170/84, cited above, operative part and paragraph 30.

10 — Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497.

11 — Paragraph 13.

Court's judgment in *Teuling* provides part of the answer.

11. In that judgment, the Court noted that

'according to the Netherlands Government, the General Law does not link benefits to the salary previously earned by the beneficiaries but seeks to provide a minimum subsistence income to persons with no income from work'

and held that

'such a guarantee granted by Member States to persons who would otherwise be destitute is an integral part of the social policy of the Member States'. [12]

The Court further held:

'Consequently, if supplements to a minimum social security benefit are intended, where beneficiaries have no income from work, to prevent the benefit from falling below the minimum subsistence level for persons who, by virtue of the fact that they have a dependent spouse or children, bear heavier burdens than single persons, such supplements may be justified under the directive'. [13]

It added, finally, that it is for the national court to determine whether the principle of proportionality is observed in that regard, and in particular whether the supplements correspond to the greater burdens which beneficiaries having a dependent spouse or children must bear in comparison with persons living alone. [14]

12. The justification put forward by the Belgian Government in the present case is in part different. [15] It claims that the aim of the legislation in issue is to provide beneficiaries with a *replacement income*. The amount of benefit is therefore, as a general rule, related to that of the previous income.

13. However, it may be concluded from the fact that a ceiling is applied to the previous income and that a flat rate is applied to persons in Group 3 after a certain period of unemployment that the aim is also to ensure a minimum income. The extent to which previous income is taken into account is, moreover, purely relative, since the maximum amount of benefit granted to persons in Group 1 is BFR 29 198 per month, which means that any salary higher than BFR 50 000 per month is taken into account only up to that ceiling. It may be wondered in that respect whether an allowance of BFR 29 198 for two persons with no other income is not just as much by way of being a social minimum as a replacement income.

12 — Case 30/85, cited above, paragraph 16.
13 — Paragraph 17.
14 — Paragraph 18.
15 — Defence, p. 9.

14. The Commission appears to conclude from the grounds of the judgment in *Teuling* that the intention of providing beneficiaries under the system with a replacement income can in no event justify the grant of supplements from the point of view of the directive.[16] In other words, social security schemes providing protection against unemployment or invalidity are not compatible with the requirements of Community law as regards equal treatment unless their aim is to provide minimum means of subsistence and not to award a replacement income.

15. That position is one of principle. As long ago as its interim report on the application of Directive 79/7/EEC,[17] which appeared in 1984, the Commission considered that supplements payable in respect of a dependent spouse are justified if, and only if, the amount of the benefits is equal to the social minimum. The Commission's representative put forward the same point of view in the *Teuling* case.

16. Let me say clearly that I consider it excessive to draw such a conclusion from that judgment. The fact that the Court considered the justification put forward in that case by the Netherlands Government and concluded that it could be deemed to be valid cannot mean that any other ground — particularly when adduced in support of a slightly different social security scheme — would be totally without relevance.

17. It is important, in my opinion, to guard against drawing from paragraph 16 of the judgment the contrary inference that any legislation under which supplements for dependent persons take previous income into account are incompatible with Directive 79/7/EEC.[18] On the contrary, Mr Advocate General Mancini, in his Opinion in *Teuling*, stated that the purpose of the system in question was

'to protect an interest which is justifiably regarded as having priority (namely that of persons for whom, since they have families to support, the calculation of benefits on the basis of the last remuneration would reduce the benefit to below the minimum subsistence level).'[19]

18. The facts in the *Teuling* case were clear. Mrs Teuling-Worms's pension had been reduced because it was no longer calculated on the basis of the statutory minimum wage but on her last wage.[20]

19. In my opinion, the relevant criterion is, as the Court held in *Teuling*, whether the supplements correspond to the greater burdens resulting from a spouse or children not in receipt of income. In other words, it is necessary to consider whether, in a given case, the principle of proportionality has been observed in respect of the amount of the supplements and not to declare in *abstracto*, as the Commission wishes, that the very principle of taking previous income into account is contrary to the requirements of equal treatment.

16 — Reply, p. 13.

17 — Doc. COM(83) 793 of 6 January 1984, p. 9.

18 — Prechal, S., and Burrows, N.: *Gender Discrimination Law of the European Community*, pp. 195 and 196: 'It may be argued that the objective justification test, being a sort of derogation from the principle of equal treatment, must be interpreted as strictly as possible and that increases are only permitted in order to guarantee a social minimum for a person with a dependent spouse or child.'

19 — Opinion, at p. 2513.

20 — Opinion at p. 2510.

20. In paragraph 16 of the judgment in *Teuling*, the Court pointed out that guaranteeing minimum means of subsistence forms an integral part of the social policy of the Member States. That point appears to refer to the Court's settled case-law to the effect that, as Community law stands, the Member States are free to determine the extent of their social protection.[21] The Court went yet further in the field of the protection of women as regards pregnancy and maternity in relation to access to employment and conditions of work when it held, in *Hofmann*,[22] that measures taken to ensure such protection.

'are . . . closely linked to the general system of social protection in the various Member States'[23]

and that

'the Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation'[23]

21. Finally, the judgment in *Teuling*[24] recognized that legislation

'under which the guarantee previously applicable to all workers suffering from an incapacity for work whose income was approximately equal to the statutory minimum wage that their (net) benefits would be at least equal to the (net) statutory minimum wage is restricted to persons having a dependent spouse or child or whose spouse has a very small income'

was compatible with the directive.[25]

22. If, as the Court has held, a Member State may reduce the level of social protection by excluding workers living alone from entitlement to any benefit, then it may, *a fortiori*, choose to award them a reduced benefit in view of the fact that they have no dependents. That is an *expression of social policy* over which Community law at present holds no sway, unless there is discrimination. Whether or not the supplements paid to those who, on the contrary, live with persons not in receipt of an income refer to the previous salary, the essential point is, as I have said, whether the supplements reflect those greater burdens.

23. In the present case, it is not possible to gain from the information given by the parties a clear idea of the situation in Belgium in that regard. It would be necessary to ascertain the average income of persons living with beneficiaries in Group 3, and the average requirements of a family whose members are no longer in receipt of any income. The minimum and maximum amounts given by the Belgian Government in its defence[26] do not show any prima facie evidence of distortion in comparison with the needs of a couple, with or without

21 — It was held, for example, with regard to Article 51 of the EEC Treaty, that the regulations governing social security for migrant workers 'did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims . . . ' Case 100/78 *Rossi* v *Caisse de Compensation pour Allocations Familiales* [1979] ECR 831, paragraph 13; see also Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915, paragraph 8, and Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205, paragraph 7.

22 — Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047.

23 — Paragraph 11.

24 — Cited above, paragraphs 20 to 23.

25 — Paragraph 23.

26 — Pp. 2 and 5.

children, one of whom has become unemployed or unfit for work. This is an action for failure to fulfil obligations, and in the Court's case-law it is for the Commission in such cases to prove the alleged failure. In my opinion, no conclusive evidence has been adduced demonstrating that the supplements in question exceed the amount of the increased burdens due to the presence of a spouse or children not in receipt of income.

24. I should like to make a few more brief observations. To uphold the Commission's arguments would not be without serious consequences. It would in many cases mean requiring a reduction in the amount of the supplements in respect of dependants whenever they exceeded the strict social minimum, even if they did not exceed the amount of the actual financial burden. In other words, such a judgment would oblige certain Member States to *reduce the level of social protection.*

25. Other considerations, however, should not be taken into account. That is true, for example, of the fact that the male workers who form the majority of Group 1 would find their supplements for dependent persons reduced to the amount of the social minimum, thus incurring a loss of income which would also affect their spouses. Such a consequence is not relevant within the framework of Directive 79/7/EEC which, like Article 119 of the Treaty, lays down the principle of equal treatment for *working* men and women, although there can be no doubt that the Community legal order embraces the general principle of equal treatment for men and women, regardless of whether or not they are in work.

26. The same applies to the consideration that the system in issue discourages non-working women from entering the employment market, in view of the reduction in their spouses' unemployment or invalidity benefits which that would entail. If such a factor were to be taken into account, it should be in the context not of Directive 79/7/EEC but of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. [27]

27. For those reasons, I consider that the application should be dismissed.

28. A few more words for the sake of completeness. The Commission appears to be making a separate allegation based on the Belgian Government's failure to comply with a 'standstill' obligation, inasmuch as the situation of women unfit for work was made more unfavourable by the Royal Decree of 30 July 1986 extending the contested scheme to sickness and invalidity insurance. The Belgian Government denies that Articles 117, 118, 118a and 118b impose a 'standstill' obligation.

29. A similar question was already discussed during the procedure before the Court in the *Teuling* case, cited above. It was not necessary for the Court to decide the question, but Mr Advocate General Mancini addressed the subject in his Opinion.

27 — OJ 1976 L 39, p. 40.

'I agree with the views expressed by the Commission in its written observations', [28] he said.

'The Commission takes up and develops a view which has received authoritative support in academic circles according to which even where the directive does not contain an express standstill clause, its notification generates a "blocking effect" inasmuch as it prohibits Member States from adopting measures contrary to its provisions. As is well known, the particular objective of the directive in question is to harmonize the laws of the Member States by removing existing legislative and administrative differences. Clearly, therefore, the very fact of its adoption places an obligation on the Member States to refrain from introducing new measures which may increase those differences'. [29]

30. In my view, the attitude of a Member State which, within the period allowed to it to bring its law into conformity with a harmonizing directive, chooses on the contrary to exacerbate existing distortions calls for consideration in the light, essentially, of Article 5 of the Treaty. [30]

31. It may, however, be wondered whether such an objection is relevant in the circumstances of the present case. Breach of a 'standstill' obligation is possible only when the period for integrating the directive has not yet elapsed. Directive 79/7/EEC was to be integrated into national law by 23 December 1984; the royal decree extending the contested scheme to sickness and invalidity insurance dates from 30 July 1986. It is therefore difficult to discern how this allegation can differ from the first.

32. I therefore propose that this application should be dismissed and the Commission ordered to pay the costs.

28 — P. 2513.

29 — Ibid.

30 — For example, with regard to fisheries, the Court has recognized on the basis of that article that the Member States are under an obligation not to enter into any commitment within the framework of an international agreement which could hinder the Community (Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, paragraphs 42/43 and 44/45); see also Case 61/77 *Commission* v *Ireland* [1978] ECR 417, paragraph 65; Case 141/78 *France* v *United Kingdom* [1979] ECR 2923, paragraph 8; Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, paragraph 10; Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraph 28; see also, with regard to freedom of movement for workers, Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085.