# OPINION OF ADVOCATE GENERAL GULMANN
delivered on 1 June 1994 *

*Mr President,*
*Members of the Court,*

1. In this case the Court of Justice is asked to rule on whether it is compatible with Community law to apply a national rule which limits the period in respect of which arrears of social security benefits may be claimed to twelve months before the date on which the claim was made, in a situation where the claim is based on a provision in a directive with direct effect which was not properly transposed into national law. The reply to the questions posed by the Court of Appeal requires that a position be taken on the scope of the judgments delivered by the Court on 25 July 1991 in *Emmott* [1] and 27 October 1993 in *Steenhorst-Neerings.* [2]

## The background to the case and the questions referred to the Court

2. On 19 December 1978 the Council adopted Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. [3] Article 4(1) of the directive prohibits any discrimination whatsoever on grounds of sex, in particular as concerns the scope of social security schemes and the conditions of access thereto. Under Article 8 the directive was to be implemented in national law within six years of its notification, that is to say by 22 December 1984 at the latest.

3. In 1981 Mrs Johnson was awarded non-contributory invalidity benefit ('NCIB') pursuant to Section 36(1) of the Social Security Act 1975. In 1982 Mrs Johnson began living with a male companion. At that point there was a condition under Section 36(2) of the Social Security Act 1975 governing a woman's entitlement to NCIB that not only should she be unfit for work but also that she should be unfit to carry out normal household duties. On the basis that Mrs Johnson did not fulfil that latter condition, payment of NCIB was terminated.

* Original language: Danish.

1 — Case C-208/90 [1991] ECR I-4269.

2 — Case C-338/91, [1993] ECR I-5475.

3 — OJ 1979 L 6, p. 24.

4. The so-called 'household duties' test applied only to women. Men were thus entitled to NCIB without having to fulfil that additional requirement in the Act. NCIB was abolished by the Health and Social Security Act 1984 with effect from 29 November 1984, that it is to say shortly before the expiry of the time-limit for implementing Directive 79/7, and a new form of benefit was introduced for severe disablement (the Severe Disablement Allowance — 'SDA'), to which men and women were entitled under the same conditions.

5. The conditions of entitlement to SDA were generally more stringent — albeit the same for both sexes — than the conditions formerly applicable under the Social Security Act. Transitional provisions were adopted in the Social Security (Severe Disablement Allowance) Regulations 1984, which also came into force on 29 November 1984. The Court of Appeal has explained that the transitional provisions, in particular Regulation 20, meant that those who were entitled to NCIB immediately prior to the abolition of that form of benefit were automatically entitled to the new benefit without needing to prove that they fulfilled the requirements for its payment, that it is to say they were given what was described as a passport to entitlement to the new SDA. [4]

6. Regulation 20 in the 1984 Regulations was the subject of a reference to the Court in the *Borrie Clarke* case. In its judgment [5] the Court held that the transitional provisions continued a discriminatory system which was incompatible with the principle of equal treatment in Article 4(1) of Directive 79/7. The Court noted that, as it had held in previous cases, Article 4(1) had direct effect and accordingly ruled:

'[I] t follows from Article 4(1) of the directive that, as from 23 December 1984, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been implemented correctly, those rules remain the only valid point of reference. In this case, that means that if, as from 23 December 1984, a man in the same position as a woman was automatically entitled to the new severe dis-

4 — Regulation 20(1) is worded as follows: 'Any person who, immediately before both 10 September 1984 and 29 November 1984 was entitled to a non-contributory invalidity pension shall be entitled for 29 November 1984 and for any subsequent days which together with 29 November 1984 fall within a single period of interruption of employment, to a severe disablement allowance whether or not —
(a) he is disabled for the purposes of Section 36 of the Act, or
(b) 29 November 1984 is appointed for the purposes of Section 11 of the 1984 Act in relation to persons of his age,
if he satisfied the other requirements for entitlement to such an allowance.'

5 — Case 384/85 [1987] ECR 2865.

ablement allowance under the aforesaid transitional provisions without having to re-establish his rights, a woman was also entitled to that allowance without having to satisfy an additional condition applicable before that date exclusively to married women.' (Paragraph 12). [6]

7. On 17 August 1987 Mrs Johnson claimed SDA, via the Citizens Advice Bureau, on the basis of Regulation 20. An Adjudication Officer rejected her claim and that decision was upheld by the Sutton Social Security Appeal Tribunal. An appeal against the decision was then made to the Social Security Commissioners, who referred a number of questions to the Court of Justice for a preliminary ruling. The Court gave its ruling on 11 July 1991. [7] Following the Court's judgment the Social Security Commissioners decided on 16 December 1991 that Mrs Johnson should be entitled to SDA with effect from 16 August 1986, that is to say twelve months before she made her claim.

8. The limitation on the period in respect of which arrears of benefit may be obtained resulted from Section 165A, Subsection (3) of the Social Security Act 1975, which was introduced by Section 17 of the Social Security Act 1985 and came into force on 2 September 1985. The provision reads as follows:

'Notwithstanding any regulations made under this section, no person shall be entitled

(c) to any other benefit (except disablement benefit or reduced earnings allowance or industrial death benefit) in respect of any period more than 12 months before the date on which the claim is made.'

9. In the meantime (on 25 July 1991) the Court of Justice had delivered its judgment in the *Emmott* case. Here the Court was replying to a reference from the High Court of Ireland concerning a provision in the Rules of the Superior Courts 1986 which provided that an application for leave to apply for judicial review should be made within three months from the date when grounds for the application first arose, unless the national court considered that there was

6 — It was stated in the present case that Regulation 20 has never been amended and that claims must accordingly continue to be based directly on Article 4(1) of the directive.

7 — Case C-31/90 [1991] ECR I-3723. The questions referred to the Court concerned both the personal scope of Directive 79/7 and the compatibility with Article 4 of the directive of a national rule such as that laid down in Section 165A of the Social Security Act 1975, the effect of which was that a person who had not applied for NCIB before that benefit was abolished could not claim automatic payment of SDA under Regulation 20. It follows from the Court's reply that persons who, like Mrs Johnson, were seeking employment at the time of the onset of their disability are covered by the personal scope of the directive and that they may rely on Article 4 of the directive in order to have set aside national legislation which makes entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which has since been abolished and which entailed a condition that discriminated against female workers.

good reason for extending the period within which the application was to be made. The court of reference asked essentially whether such a general national time-limit for bringing proceedings could preclude Mrs Emmott from bringing a claim in direct reliance on Article 4(1) of Directive 79/7, which had not been properly transposed into Irish law. The Court replied as follows:

'Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by Article 4(1) of 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, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system.'

10. Mrs Johnson did not rely on the Court's judgment in the *Emmott* case before the Social Security Commissioners. She did do so, however, on appeal from their decision to the Court of Appeal, where she claimed essentially that it followed from the judgment in *Emmott* that authorities could not rely on a time-limit such as that laid down in Section 165A in a situation where the United Kingdom had not properly transposed the directive's provisions into national law and individuals were therefore unable to ascertain the full extent of their rights; she was therefore entitled to arrears of benefits not just from 16 August 1986 but from 23 December 1984, that is to say from the time when the Member States should have implemented Directive 79/7. In order to reach a decision on that submission the Court of Appeal referred the following questions to the Court of Justice:

'1. Is the decision of the European Court of Justice in *Emmott* (Case C-208/90) to the effect that Member States may not rely on national procedural rules relating to the time-limits for bringing proceedings so long as that Member State has not properly transposed Directive 79/7 into its legal system to be interpreted as applying to national rules on claims for benefit for past periods in cases where a Member State has implemented measures to comply with that Directive before the relevant deadline but has left in force a transitional provision such as that considered by the European Court of Justice in Case 384/85 *Jean Borrie Clarke*?

2. In particular in circumstances where

(i) a Member State has adopted and implemented legislation to fulfil its obligations under Council Directive 79/7 ("the Directive") prior to the deadline laid down in the Directive

(ii) the Member State introduces ancillary transitional arrangements in order to safeguard the position of existing social security beneficiaries

(iii) it subsequently transpires as a result of a preliminary ruling by the Court of Justice that the transitional arrangements breach the Directive

(iv) an individual brings a subsequent claim for benefit shortly after the preliminary ruling referred to above relying on the transitional arrangements and the Directive in a national tribunal pursuant to which that individual is awarded the benefit for the future and for 12 months prior to the bringing of the claim in accordance with the relevant national rules on payments for the period prior to the making of the claim

must that national tribunal disapply those national rules on arrears of payment from the date that the deadline for implementation of the Directive has expired that is 23 December 1984?'

**The decision of the Court of Justice in *Steenhorst-Neerings***

11. On 27 October 1993, that is to say after the written procedure in this case was completed but before the oral procedure had taken place, the Court of Justice delivered its judgment in the *Steenhorst-Neerings* case, which has significant parallels with, and possibly contains the answer to, the questions referred in this case.

12. The *Steenhorst-Neerings* case was referred to the Court by the Raad van Beroep (Social Security Court), 's-Hertogenbosch (Netherlands). The case concerned provisions in the Netherlands General Law on Incapacity for Work (Algemene Arbeidsongeschichtheidswet — the 'AAW'), under which married women whose incapacity for work arose before 1 October 1975 — as distinct from other

insured persons under the law — were not entitled to AAW benefits. Those provisions were applied to Mrs Steenhorst-Neerings who, since 1963, had been in receipt of a Netherlands invalidity pension. Referring to Article 26 of the International Covenant on Civil and Political Rights, the Centrale Raad van Beroep (Higher Social Security Court), in judgments delivered on 5 January 1988, decided that regardless when their incapacity for work arose, married women were entitled to AAW benefits from 1 January 1980, when the Netherlands law introducing equal treatment for men and women concerning the right to benefits entered into force. Subsequently Mrs Steenhorst-Neerings applied on 17 May 1988 for AAW benefits, which she was awarded from 17 May 1987, that is to say twelve months prior to her application. The limitation of the period in respect of which arrears of benefits could be obtained resulted from Article 25(2) of the AAW, according to which benefits for incapacity for work cannot commence earlier than one year before the date on which the application is made.

13. In view of the fact that from 23 December 1984 women in Mrs Steenhorst-Neerings' position could have claimed AAW benefits directly on the basis of Directive 79/7, the Raad van Beroep referred a question to the Court for a preliminary ruling on whether a time-limit such as that laid down in Article 25(2) of the AAW could be applied in a situation where Directive 79/7 was not properly transposed into national law.

14. The Court prefaced its reply to that question by holding that

'The right to claim benefits for incapacity for work under the same conditions as men conferred on married women by the direct effect of Article 4(1) of Directive 79/7 must be exercised under the conditions determined by national law, provided that, as the Court has consistently held, those conditions are no less favourable than those relating to similar domestic actions and that they are not framed so as to render virtually impossible the exercise of rights conferred by Community law ... [8]

The national rule restricting the retroactive effect of a claim for benefits for incapacity for work satisfies the two conditions set out above.' (Paragraphs 15 and 16).

15. The Court then dealt with the Commission's argument that it followed from the

8 — In a long series of cases the Court has held that 'in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens derive from the direct effect of Community law', provided, however, that those conditions satisfy the said two requirements: see paragraph 16 in *Emmott* and in particular the judgments in Case 33/76 *Rewe* [1976] ECR 1989, at paragraph 5, and Case 199/82 *San Giorgio* [1983] ECR 3595, at paragraph 12.

judgment in *Emmott* that the time-limits for proceedings brought by individuals seeking to avail themselves of their rights were applicable only when the provisions in a directive had been properly transposed into national law and that that principle applied in the case in point. The Court rejected that argument on the following grounds, which I consider it useful to cite in full:

'19. The Court held in *Emmott* that so long as a directive has not been properly transposed into national law individuals are unable to ascertain the full extent of their rights, and that therefore until such time as a directive has been properly transposed a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive, and that a period laid down by national law within which proceedings must be brought cannot begin to run before that time. However, the facts in *Emmott* are clearly distinguishable from those of this case.

20. In *Emmott*, the applicant in the main proceedings had relied on the judgment of the Court in *McDermott and Cotter* (Case 286/85 [1987] ECR 1453) in order to claim entitlement by virtue of Article 4(1) of Directive 79/7, with effect from 23 December 1984, to invalidity benefits under the same conditions as those applicable to men in the same situation. The administrative authorities had then declined to adjudicate on her claim since Directive 79/7 was the subject of proceedings pending before a national court. Finally, even though Directive 79/7 had still not been correctly transposed into national law, it was claimed that the proceedings she had brought to obtain a ruling that her claim should have been accepted were out of time.

21. It should be noted first that, unlike the rule of domestic law fixing time-limits for bringing actions, the rule described in the question referred for a preliminary ruling in this case does not affect the right of individuals to rely on Directive 79/7 in proceedings before the national courts against a defaulting Member State. It merely limits the retroactive effect of claims made for the purpose of obtaining the relevant benefits.

22. The time-bar resulting from the expiry of the time-limit for bringing proceedings serves to ensure that the legality of administrative decisions cannot be challenged indefinitely. The judgment in *Emmott* indicates that that requirement cannot prevail over the need to protect the rights conferred on individuals by the direct effect of provisions in a directive so long as the defaulting Member State responsible for those decisions has not properly transposed the provisions into national law.

23. On the other hand, the aim of the rule restricting the retroactive effect of claims for

benefits for incapacity for work is quite different from that of a rule imposing mandatory time-limits for bringing proceedings. As the Government of the Netherlands and the defendant in the main proceedings explained in their written observations, the first type of rule, of which examples can be found in other social security laws in the Netherlands, serves to ensure sound administration, most importantly so that it may be ascertained whether the claimant satisfied the conditions for eligibility and so that the degree of incapacity, which may well vary over time, may be fixed. It also reflects the need to preserve financial balance in a scheme in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year.'

16. On that basis the Court of Justice replied to the question referred to it as follows:

'Community law does not preclude the application of a national rule of law according to which benefits for incapacity for work are payable not earlier than one year before the date of claim, in the case where an individual seeks to rely on rights conferred directly by 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 with effect from 23 December 1984 and where on the date the claim for benefit was made the Member State concerned had not yet properly transposed that provision into national law.'

**The question whether the present case can be distinguished in any relevant way from the Steenhorst-Neerings case**

17. At the hearing Mrs Johnson's principal plea in law was that the present case can be distinguished from the *Steenhorst-Neerings* case and that the Court should not therefore reach the same conclusion as it did in that case.

Referring to paragraph 23 of the *Steenhorst-Neerings* judgment, Mrs Johnson claims that the reasons which led the Court in that case to treat a time-limit on the payment of arrears of benefit differently from a time-limit for initiating proceedings on which the Court ruled in the *Emmott* case are not relevant to a case such as hers.

18. First, with regard to the Court's reference to the *need to enable the authorities to ascertain whether the claimant satisfied the conditions of eligibility for the benefit*, Mrs Johnson contends that although this feature is present for some social security benefits, it cannot be said to be a universal feature of social security. According to Mrs Johnson, in the *Steenhorst-Neerings* case the determinant factor was that a benefit was involved which depended on the degree of invalidity, which

could vary over time, and assessment in respect of earlier periods was therefore difficult. In other cases, however, no administrative problems are caused in respect of assessment of earlier periods. Mrs Johnson maintains that in order to be eligible for the benefit she simply had to show that she had been unfit for work since 1984, which she has unquestionably proved.

Mrs Johnson adds that under English law the *burden of proof* is on the plaintiff. If, therefore, the lapse of time means that it is impossible to investigate earlier circumstances and in consequence claimants cannot adduce evidence in support of their claim, their claims must in any event be rejected.

19. Secondly, With regard to the Court's reference to the *need to preserve financial balance in a social security scheme* in which claims submitted by insured persons in the course of a year must in principle be covered by the contributions collected during that same year, Mrs Johnson also states that that can form the basis for a particular way of dealing with certain social security benefits, namely contributory benefits, which are paid out from a finite fund, but not for social security benefits such as those in this case which are non-contributory. With benefits of that type, the payment of arrears will cause expenditure for the Member State in question, but no more than would have been the case if the directive had been properly transposed within the prescribed time-limit.

20. Accordingly Mrs Johnson suggests that the first question referred to the Court should be answered as follows:

'A Member State may not rely on national rules for past claims of benefit so as to avoid the payment of arrears in circumstances where Directive 79/7 has not been properly transposed, where payment of the benefit in question can be made without any impact on the past balance of a finite fund, and where no other administrative difficulty is caused by the need to investigate entitlement to arrears.'

21. Mrs Johnson emphasizes that it is for the national court to assess whether those conditions are satisfied.

22. The UK and Irish Governments and the Commission do not consider that there is any basis for treating this case differently from the *Steenhorst-Neerings* case. The United Kingdom Government contends that the rule which is the subject of the present

case has the same purpose [9] and in substance is identical with the rule which was the subject of the *Steenhorst-Neerings* case. [10]

23. With regard to the Court's reference to *the need for the authorities to be able to ascertain* that the conditions of eligibility are satisfied, the UK Government states that this relates to the general aim of the rule in question and not to its application to this particular case. The purpose of Section 165A is, however, the same as the purpose of the Netherlands rule which, according to the UK Government, is not contested by Mrs Johnson.

The UK Government understands Mrs Johnson's plea as meaning that she is claiming that under circumstances such as those in her case there will be no administrative difficulties in ascertaining proper entitlement. According to the UK Government it would, however, give rise to legal uncertainty and confusion if the applicability of a rule were evaluated on the specific facts of an individual case. A solution according to which a rule such as Section 165A could not be applied when the claimant could prove entitlement for periods which go further back in time, would, moreover, deprive the *Steenhorst-Neerings* judgment of any practical effect. It is precisely in those circumstances that the rule is intended to have effect.

24. The UK and Irish Governments contend that the problems which arise with payments of arrears of benefits cannot be resolved by stating that the *burden of proof* of eligibility lies with the claimant. It will not normally be difficult for claimants to produce a basis for their claim. Problems arise, however, when the authorities have to ascertain whether the claimant has discharged the burden of proof, since it can be difficult to produce counter-evidence against a claim which goes far back in time.

25. With regard to the need to preserve *financial balance* in a social security scheme, the UK Government contends that neither in Directive 79/7 nor in the case-law of the Court is there any suggestion that a distinction should be drawn between contributory

9 — In its written observations the United Kingdom described the purpose of the UK rule as follows: 'It is considered reasonable to place some limit on the period for which benefit can be backdated. It is consistent with the general principles of legal certainty expressed in the limitation periods, and it is necessary for the efficient running of the social security system. The more distant the occurrence of a contingency, the more difficult it will be to obtain and evaluate evidence about it, and the greater the problems of administration. Contingencies such as invalidity are increasingly hard to ascertain the further they recede into the past, and even with easily-provable events such as childbirth, marriage or widowhood, the complete absence of time-limits would slow down administration by requiring more complicated record-keeping over a longer period and retrospective adjustments. Moreover the absence of limitation periods on arrears of payment would mean that a greater proportion of the social security budget would be liable to go on arrears of benefit rather than to current need which would run counter to the basic principle of the social security system.'

10 — The UK Government points out in this connection that in its written observations in the *Steenhorst-Neerings* case the Netherlands Government expressly referred to Section 165A of the Social Security Act 1975 and that the UK Government and Mrs Johnson requested the Court to join the two cases.

schemes and non-contributory schemes. Mrs Johnson and Mrs Steenhorst-Neerings base their entitlement on the same provision in Directive 79/7 and they should therefore be treated in the same way. Both the UK and Irish Governments contend further that the need to ensure financial balance also applies to non-contributory schemes since it is necessary for every social security scheme to have a budget which can be established with reasonable certainty in advance.

26. In my view there can be no doubt but that Section 165A and the Netherlands rule on which the Court ruled in the *Steenhorst-Neerings* case basically serve the *same purpose*, namely to ensure sound administration of the social security schemes, the *same content*, namely to limit the period in respect of which arrears of benefits may be obtained to twelve months before the date of the claim, and the *same effect*, since both lead to the result that Mrs Johnson and Mrs Steenhorst-Neerings lose the entitlement to benefits to which under Community law they had a substantive right from 1984 and that is the case even though the reason for their not having submitted their claims in due time was that the Member States in question had not properly implemented Directive 79/7.

27. In my opinion, therefore, there can be no doubt but that the two rules must be assessed in the same way in Community law.

28. It seems to me clear that in its reference in paragraph 23 of the *Steenhorst-Neerings* judgment to the administrative and financial considerations underlying the national rule in question the Court was not intending to lay down requirements governing the compatibility with Community law of such national time-limits, but was solely describing what, generally speaking, is the purpose underlying rules of that type. As stated, I have no doubt but that the purpose behind Section 165A is basically the same as the purpose behind the Netherlands rule.

29. It is presumably correct, as claimed by Mrs Johnson, that certain conditions for obtaining social security benefits can be more difficult to ascertain in respect of earlier periods than others. It is possibly also correct that the need to preserve financial balance within a social security scheme is more pressing for contributory schemes than for non-contributory schemes. However that is not sufficient reason for treating national time-limits which do basically serve the same purpose differently. It would give rise to an unclear legal situation and, moreover, hardly be consistent with the settled case-law of the Court of Justice in this area if the compatibility with Community law of national time-limit rules should depend not only on the purpose of the rule in question (see paragraphs 22 and 23 of the *Steenhorst-Neerings* judgment) but also on a closer examination

of whether the rule in question was necessary in every situation in order to fulfil its purpose.

**Should the Court amend the replies which it gave in the *Emmott* and *Steenhorst-Neerings* cases?**

30. In her alternative plea, Mrs Johnson claims that the Court's judgments in the *Emmott* and *Steenhorst-Neerings* cases are irreconcilable, since it is not possible to make a sensible distinction between time-limits for initiating proceedings and time-limits on the payment of arrears of social security benefits and the Court should therefore amend the replies which it gave in those cases.

31. Referring to paragraph 21 of the *Steenhorst-Neerings* judgment, Mrs Johnson claims that the Court — in the same way as the Commission in its written observations in the present case — seems to draw a distinction between time-limits which only preclude claims for earlier periods (such as that in *Steenhorst-Neerings*) and time-limits which also have the effect of precluding claims for future periods (such as that in *Emmott*) so that only the application of time-limits of the latter type is likely to be incompatible with Community law.

Mrs Johnson does not accept that it is possible to make such a distinction and stresses that *Emmott* was a case in which the sole object was to obtain arrears of benefits. According to Mrs Johnson a denial of judicial review could, moreover, never preclude claims for future periods since such claims — at all events in English law — arise week by week. As far as future benefits were concerned, Mrs Emmott could therefore simply have submitted a fresh claim and applied for judicial review of a subsequent rejection within the prescribed three-month period. The time-limit on initiating proceedings was, in other words, only significant because Mrs Emmott wished to obtain arrears of benefits.

Mrs Johnson concludes that there is no substantive difference between her case and that of Mrs Emmott. Both cases concern claims for benefits for earlier periods. The cases should not therefore — as a consequence of the judgment of the Court in the *Steenhorst-Neerings* case — be treated differently.

32. On that basis Mrs Johnson claims that Court should reformulate the answers that it gave in *Emmott* and *Steenhorst-Neerings* and instead give a reply which can be applied to both types of time-limits and which is similar to Advocate General Mischo's Opinion in the *Emmott* case, according to which time-limits must be calculated from the time when the person concerned should reason-

ably have been aware of his or her rights. [11] Such a solution would, according to Mrs Johnson, justify the decisions reached in *Emmott* and *Steenhorst-Neerings* on their facts and it would respect the principle at the heart of the Court's judgment in the *Emmott* case, namely 'that Member States are under an obligation to bring national law into conformity with Community law, as expressed in directives, and that, therefore, nationals of Member States should not be penalized if they do not act until Community law has been properly transposed.'

33. The UK and Irish Governments and, it would seem, the Commission find it reasonable and right that the Court in the *Steenhorst-Neerings* case reached a result different from that of the *Emmott* case. The Irish Government and the Commission state that in the light of the Court's judgment in *Steenhorst-Neerings* the *Emmott* judgment should be regarded as a decision founded on its facts. With a view to showing that the two judgments are not irreconcilable, the UK and Irish Governments and the Commission have on the basis of the judgments attempted to establish general criteria for deciding whether national rules on time-limits are compatible with Community law.

34. The UK and Irish Governments claim that the time-limit on which the Court ruled in the *Emmott* case was characterized by the fact that it completely precluded the bringing of any proceedings at all with a view to establishing the merits of the claim, whereas the time-limit which was the subject of the *Steenhorst-Neerings* case simply limited the payment of arrears of benefits. The UK and Irish Governments consider that the limitation period in the *Emmott* case was such as to render virtually impossible the exercise of rights conferred by Community law and refer to the fact that such national procedural rules, according to the Court's consistent case-law, are incompatible with Community law. [12]

35. The Commission distinguishes between time-limits which wholly wipe out claims for earlier periods and reasonable time-limits,

11 — Advocate General Mischo proposed that the questions referred to the Court in the *Emmott* case should be answered as follows: 'In an action such as that described in the question, the competent authorities of a Member State do not infringe Community law by relying on national procedural rules, in particular those relating to time-limits, if the same time-limits apply to actions of a similar scope brought under national law. Such time-limits should also be of reasonable length and should begin to run only from the time when the person concerned should reasonably have been aware of his rights and his exercise of those rights must not have been made impossible in practice by the attitude of the competent authorities.'

12 — See paragraph 14 above and the judgments referred to in footnote 8.
The Irish Government adds that under no circumstances can the time-limits — as suggested by the UK Government in its written observations — be treated differently according to whether the Member State has completely failed to transpose a directive (as in the *Emmott* case) or has undertaken a partly incorrect transposition (as in the *Steenhorst-Neerings* case and the present case). The Irish Government points out that in such a situation a Member State could simply deliberately choose to transpose a directive incorrectly.

but adds that the distinction is not very satisfactory. The Commission considers that on the present basis it is not possible to lay down a general criterion governing what constitutes a reasonable time-limit, but is in any case of the view that a time-limit of twelve months satisfies that requirement.

36. Referring to paragraph 20 of the *Steenhorst-Neerings* judgment, the Commission states further that there is also a possible ground for treating the *Emmott* and *Steenhorst-Neerings* cases differently in the circumstance that the authorities in the *Emmott* case had acted in a way which was to some extent likely to mislead Mrs Emmott.

37. The UK Government does not consider that the Court should follow Advocate General Mischo's Opinion in the *Emmott* case and hold that time-limits should be calculated from the time when the persons concerned should reasonably have been aware of their rights. The UK Government considers it doubtful, in the first place, whether the Advocate General had the present situation in mind when he delivered his Opinion. Secondly, the UK Government does not believe that the solution proposed could work in practice and points out in this connection that it was rejected by the Court in its judgment in the case. [13] Lastly, the UK Government states that that solution would also involve considerable potential liabilities for the Member States. The Commission, too, has misgivings about following the solution proposed by Advocate General Mischo which, in its view, would give rise to significant legal uncertainty, not least because, according to the Commission, it would have to be applied to all actions based on Community law provisions, that is to say not merely directives but also regulations and Treaty provisions. According to the Commission, the Court's judgment in the *Steenhorst-Neerings* case can be seen as a balancing operation between the value of legal certainty on the one hand and the value of equity on the other.

38. When the Court's judgments in the *Emmott* and *Steenhorst-Neerings* cases are compared on their facts, it might at first glance appear difficult to understand why the national time-limits in question were treated differently under Community law. Both cases concerned national time-limits the effect of which was to preclude claims for arrears of social security payments and in both cases the claimants had a substantive claim to the benefits in question under Com-

13 — The Court stated as follows: 'So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights. That state of uncertainty for individuals subsists even after the Court has delivered a judgment finding that the Member State in question has not fulfilled its obligations under the directive and even if the Court has held that a particular provision or provisions of the directive are sufficiently precise and unconditional to be relied upon before a national court.'

munity law but had been unable to ascertain the full extent of their rights and hence had not made their claims in time because the Member State in question, contrary to its Community law obligations, had not properly transposed the directly on which the claim was founded.

39. Those difficulties are, however, in my view, of no significance for the decision in the present case. The Court's judgment in the *Steenhorst-Neerings* case contains the answer to the question raised here. As stated, there are no relevant differences between the time-limits in the two cases and no grounds have been advanced which could cause the Court to alter the conclusion it reached in its judgment in the *Steenhorst-Neerings* case which, in my view, is perfectly consistent with the Court's settled case-law to the effect that it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law.

40. There is accordingly no reason for the Court to enter into an examination of the scope of the judgment in the *Emmott* case and of the possible need to amend that judgment. The decisive point is that in the *Steenhorst-Neerings* judgment the Court explained the difference between the two national time-limits and held that they could be evaluated differently in Community law on the basis of that difference. Let me, however mention that in my opinion it is important that the Court pointed out the general and fundamental differences between the two types of time-limit. Administrative time-limits, such as those in *Steenhorst-Neerings* and the present case, do not preclude individuals from relying on Community law but simply limit the period in respect of which current benefits can be required to be paid with retroactive effect. The limitation period in the *Emmott* case was, however, general and in practice precluded reliance on Community directives which had not been properly transposed into national law, regardless of the type of claim submitted.

## Conclusion

41. In view of the foregoing I would suggest that the Court answer the questions referred to it as follows:

'Community law does not preclude the application of a national rule of law according to which an invalidity benefit is payable not earlier than one year before the date of claim, in the case where an individual seeks to rely on rights conferred

directly by 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 with effect from 23 December 1984 and where on the date the claim for benefit was made the Member State concerned had not yet properly transposed that provision into national law.'