OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 12 October 1999 *

1. This case concerns the interpretation 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 [1] ('the directive'). The central question which the referring body, the Social Security Commissioner of the United Kingdom, has submitted to the Court concerns the ability of Member States to regulate a social security benefit by introducing, with reference to invalidity benefits, a difference in treatment between male and female workers related to the different retirement ages.

Legal background

Community legislation

2. The purpose of the directive, as stated in Article 1, 'is the *progressive* [2] implementation [...] of the principle of equal treatment for men and women in matters of social security'. As provided by Article 4(1), that principle means that 'there shall be no discrimination whatsoever on ground of sex either directly or indirectly, [...] in particular as concerns: [...] the calculation of benefits [...] and the conditions governing the duration and retention of entitlement to benefits'. Different treatment is however considered justified under Article 7(1)(a) of the directive, which provides that the directive 'shall be without prejudice to the right of Member States to exclude from its scope: (a) the determination of [pensionable] age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'. Article 5 provides that 'Member States shall take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'. Article 8(1) requires them to bring such measures into force within six years of the notification of the directive. Finally, under Article 7(2), the Member States are periodically to examine matters excluded under Article 7(1) in order to ascertain whether such exclusions continue to be justified and should therefore be maintained. By the same reasoning, Article 8(2) requires Member States to inform the Commission 'of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1)' in their

* Original language: Italian.

1 — OJ 1979 L 6, p. 24.

2 — Emphasis added.

respective legal systems 'and of the possibilities for reviewing them at a later date'.

United Kingdom legislation

3. Under the Social Security Act 1975, a benefit entitled 'Special Hardship Allowance' ('SHA') was paid in Great Britain until 1986 to workers who had suffered an accident at work with consequent reduction of their working capacity.

4. By the Social Security Act 1986, the SHA was replaced by another allowance entitled 'Reduced Earnings Allowance' ('REA'). That new allowance is equal in amount to the difference between the earnings at work which the person concerned achieved before and after the accident. The function of the REA is thus to compensate the worker for the diminution in earnings occasioned by the accident.

5. By means of various legislative amendments introduced since 1986, the United Kingdom legislature has sought to restrict the payment of the REA to persons of working age only, so as to use it to compensate for the diminution in earnings arising from the invalidity. To that end, or in other words so as not to pay to workers who had ceased work both the full pension and the full REA (which did not appear consistent with the function of those benefits, both of which were intended to compensate for loss of earnings), cut-off or limiting conditions were imposed on the REA by reference to the different ages for men and women, used by the statutory old-age pension scheme.

6. The United Kingdom social security system, whose compatibility with Community law and in particular with Directive 79/7 of 19 December 1978 is at issue in these proceedings, essentially provides that persons who have been victims of an accident at work or have contracted an occupational disease, who retired between April 1987 and April 1989 and were in receipt of the full REA before retirement, are to receive instead a 'frozen' REA, that is to say, set by reference to a certain date and not capable of variation by reference to successive annual increases in the cost of living.[3] It further provides that persons who retired after April 1989 but are otherwise in the same circumstances as the first category lose the right to the REA and receive, on certain conditions, an allowance entitled 'Retirement Allowance' ('RA') which is lower in amount than the

3 — See paragraph 12 of Schedule 7 to the Social Security Contributions and Benefits Act 1992.

'frozen' REA. The RA, which is granted for life, is equal to 25% of the weekly amount of REA to which the beneficiary was last entitled or 10% of the maximum rate of a disablement pension. [4]

7. With regard to the age at which workers retire in Great Britain, the system is flexible. A person having ceased normal work may choose the moment to retire in the five years following attainment of pensionable age, which is 65 years for men and 60 years for women. [5] A person not having made the choice within that time is deemed to have retired at the age of 70 in the case of a man and 65 in the case of a woman.

8. The enactment of a different retirement age according to sex means that the loss of the right to REA and its replacement with REA at a reduced rate or with an allowance of significantly lower amount such as the RA occur at different times for women and for men.

4 — See paragraph 13 of Schedule 7 to the Social Security Contributions and Benefits Act 1992.

5 — Social Security Contributions and Benefits Act 1992, as amended by the Pension Act 1995.

Facts and procedure

9. The five disputes referred to in the order for reference concern the methods of calculating the invalidity allowance, especially the impact of the different retirement age for men and women on the determination of its amount and, correspondingly, its impact upon the principle of equal treatment between the sexes. There follows a brief summary of the context of each of the disputes, based on the order for reference.

10. Mrs Spencer was born in 1926, suffered an accident at work and was awarded SHA, later converted to REA, from 1967. She exercised her option to start drawing her pension from 23 December 1986, when she had attained the age of 60. An adjudication officer determined that, under paragraph 12 of Schedule 7 to the Social Security Contributions and Benefits Act 1992, she was entitled only to the 'frozen' rate of the REA. A Social Security Appeal Tribunal reversed that determination and awarded her the full rate of the REA, on the basis that a man likewise born in 1926 would in the same circumstances have been entitled to the full allowance until the age of 60. The adjudication officer appealed against that decision on the ground that only the frozen rate of the REA should have been awarded. Mrs Spencer submits that the directive entitles her to the full benefit

up to the age of 65, and that otherwise she would be discriminated against in comparison with male workers. In other words, she challenged the compatibility with Community law of the legislative amendment reducing the REA to a fixed amount, arguing that a man in the same situation as herself would have kept the right to receive the full amount of the benefit.

11. Mrs Hepple was born in 1933, contracted an occupational disease, and was awarded the REA from 27 January 1987. That benefit was cut from 31 March 1996 as she was then over 60 and not working. On appeal, in which she claimed the full amount of the REA on the basis of the principle of equal treatment between the sexes, the Social Security Appeal Tribunal upheld the refusal of the administration. Mrs Hepple has appealed against that decision, arguing that on the basis of the principle of equal treatment the allowance in question could not be reduced until she reached the male retirement age of 65.

12. Mrs Stec was born in 1933, suffered an accident at work, and received the REA from 1990. That allowance was cut from 31 March 1996 as she was then over 60 and not working. On appeal by her, the Social Security Appeal Tribunal reversed the decision of the administrative authority and awarded her the full amount of the REA until the male retirement age of 65. The administration has appealed against that decision.

13. Mrs Hepple and Mrs Stec are thus essentially challenging the lawfulness under Community law of the legislative amendment whereby the REA was replaced by a different allowance at a fixed and lower rate, arguing that, under similar conditions, the downgrading in treatment occurred earlier for a woman than for a man.

14. Mr Lunn was born in 1923, suffered an accident, and was awarded the SHA, later converted to the REA, from 12 May 1974. He began to draw his statutory old age pension in 1993, having reached the age of 70. His REA benefit was cut to the RA from 31 March 1996. On appeal by him, the Social Security Appeal Tribunal confirmed the decision of the administration. Mr Lunn has appealed against that judgment, arguing that he was entitled to receive the fixed-rate REA for life, since a woman of his age would have received such a benefit from 1988.

15. Mr Kimber was born in 1924, suffered an accident at work, and was awarded the SHA, later converted to the REA, from 1982. He received the old-age pension from the age of 70 in 1994. Consequently, his REA benefit was cut to the RA from 31 March 1996. On appeal by him, the

Social Security Appeal Tribunal reversed the decision of the administration, awarding him continuing REA at the full rate on the ground that a woman in his circumstances would have received as much. In fact, a woman born like Mr Kimber on 30 September 1924, who had not opted to receive her pension before 30 September 1994, would have had her REA cut to RA from 30 September 1989; but if she had opted instead to start receiving her pension between 30 September 1988 and 9 April 1989 (as she could, but Mr Kimber could not, have done), she would have received the frozen rate REA for life.

16. Mr Lunn and Mr Kimber are thus essentially challenging the fact that, as they were not awarded the fixed-rate REA, which under similar circumstances women were entitled to receive in the same period, the amount they received under the RA system was lower than a woman in the same situation as themselves received and was thus to be regarded as unlawful under Community law.

17. According to the national court, the central question in all these five disputes is whether national legislation providing for the payment of a benefit like the REA to persons too old to work is a sufficiently significant anomaly to justify its withdrawal at different ages for men and women. It is necessary to determine, in other words, whether or not such a legislative decision is covered by the exception provided for in Article 7(1)(a) of the directive.

18. Having regard to the factual and legislative background, the national court refers the following questions to the Court of Justice:

'1. Does Article 7 of Council Directive 79/7/EEC permit a Member State to impose unequal age conditions linked to the different pension ages for men and women under its statutory old-age pension scheme, on entitlement to a benefit having the characteristics of Reduced Earnings Allowance under a statutory occupational accident and disease scheme, so as to produce different weekly cash payments under that scheme for men and women in otherwise similar circumstances, in particular where the inequality:

(a) is not necessary for any financial reason connected with either scheme; and

(b) never having been imposed before, is imposed for the first time many years after the inception of the two schemes and also after 23 December 1984, the latest date for the directive to be given full effect until Article 8?

2. If the answer to Question 1 is Yes, what are the considerations that determine whether unequal age conditions such as those imposed in Great Britain for Reduced Earnings Allowance from 1988-1989 onwards are necessary to ensure coherence between schemes or otherwise fall within the permitted exclusion in Article 7?

3. If those unequal age conditions are not within the permitted exclusion in Article 7, then does the doctrine of direct effect require the national court (in the absence of national legislation to comply with the directive) to rectify the inequality by awarding an additional payment to each individual concerned in any week when the payment prescribed under the occupational accident and disease scheme for him or her is lower than for a person of the other sex but in otherwise similar circumstances ("the comparator"), without regard to

(a) any converse advantage in other weeks when, for the same individual, a higher payment is prescribed than for the comparator; and/or

(b) the existence or exercise of sex-differentiated options under the pension scheme to choose the pension starting age, the effect of which in conjunction with the unequal conditions under the occupational accident and disease scheme may be to cause altered (and unequal) weekly payments under that scheme: in some weeks to the advantage of the individual, in others to the comparator?

Or, should some account be taken of such matters, and if so what are the principles to be applied in relation to them in giving direct effect to Article 4?'

Questions 1 and 2

19. I am assuming that all parties agree that the British legislation in question is at variance with the principle of equal treatment, and that what needs to be determined in this case therefore is whether that can be justified under Article 7(1)(a) of the directive.

20. In his first question, the Social Security Commissioner asks whether the enactment of different ages for the award of the REA, in parallel with a similar provision regarding the pensionable age, falls within the scope of Article 7(1)(a), especially where such an enactment is not required for financial reasons and did not exist at the time when the directive came into force. If it does, the Commissioner asks in his second question, which is closely linked to the first, what considerations determine whether the different pensionable age affects the invalidity benefit scheme and whether the requirement to ensure coherence between the two schemes or other requirements taken into account by Article 7 may justify possible instances of discrimination under the invalidity benefit scheme. The answer to the second question is so closely linked to the answer to the first that it seems to me to be appropriate to deal with the two questions together.

21. It makes sense to begin by examining Question 1(b), concerning the applicability of the *standstill* rule to the derogation in Article 7(1)(a). First of all, it is necessary to determine whether, under the directive, Member States may introduce *new* forms of discrimination linked by cause and effect to different pensionable age, which are new in the sense that they did not exist before the directive came into force. If the directive is viewed as containing a *standstill* obligation, the extent of the derogation is necessarily limited to those forms of discrimination *existing* at the expiry of the six-year period fixed for the implementation of the directive, that is to say as at 23 December 1984. If that were so in this case, the forms of discrimination between men and women under the invalidity insurance scheme would have to be deemed unlawful, since the provisions which introduced them into the British system for the first time date from 1986, that is to say, after the directive came into force.

In support of the argument that the derogation in Article 7(1)(a) must be interpreted in the light of the *standstill* rule, the applicants and the Commission refer to the literal wording of the relevant provisions of the directive. They argue that in Article 7(2) the words 'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned' mean that States are free to main-

tain in force the exclusions provided for in Article 7(1), but not to introduce further exclusions *ex novo*. They submit that the use of the word 'maintain' and the obligation on Member States to justify 'maintaining' such provisions in their respective systems support that argument.

The second subparagraph of Article 8(2) of the directive also leads to that interpretation. It provides that the Member States 'shall inform the Commission of their reasons for *maintaining* any *existing* [6] provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date'. That wording should be interpreted as presupposing that the derogation referred to in Article 7(1)(a) applies only to forms of discrimination existing at the time of the entry into force of the directive. We have already seen that the forms of discrimination at issue in this dispute were introduced into the British system in 1986, whereas the directive, adopted in 1978, was to be implemented by 23 December 1984, as I said earlier.

That interpretation, the applicants and the Commission argue, is further confirmed by the fact that the directive features the progressive implementation of equal treatment, necessarily implying temporary status for discriminatory national measures based on Article 7(1), the gradual abolition of which, notwithstanding the existence of the derogation, is the result which the directive seeks to achieve. Article 1 of the directive expressly states that the aims of the directive are to be implemented progressively. In that respect, the Commission cites the 1994 judgment in *Bramhill*, [7] in which the Court upheld the compatibility with Article 7(1)(d) of the directive (which permits the granting of increases in certain long-term benefits) of the abolition of such an instance of discrimination for some but not all women, on the ground that a measure of that kind, whilst not eliminating all inequality of treatment, nevertheless had the merit of reducing the instances of discrimination which existed initially.

22. For a number of reasons, I cannot endorse the arguments put forward in support of a restrictive interpretation of the derogation in Article 7(1)(a), and hence the view that the United Kingdom legislation in question is incompatible with the directive.

To begin with, the *standstill* rule is normally stated in express terms, as, for example, in Article 37(2) of the EC Treaty (now, after amendment, Article 31 EC). As we shall see below, the directive contains only a number of ambiguous indications as to the alleged impossibility of introducing *new* forms of discrimination, but it certainly does not contain a statement of the rule in transparent terms, as would seem to me to be necessary, given that it is a rule which concerns the scope of the directive and thus one whose existence and scope

6 — Emphasis added.

7 — Case C-420/92 *Bramhill* v *Chief Adjudication Officer* [1994] ECR I-3191, paragraph 21.

must be capable of being easily grasped by the persons concerned, essentially workers.

Any uncertainty may be dispelled, however, if it is borne in mind that Article 7(1), where it defines the areas within which Member States remain free not to apply the principle of equal treatment between men and women in social security matters, is expressed in general terms stating that the directive 'shall be without prejudice to the right of Member States to exclude from its scope' a series of discriminatory measures including the fixing of an age limit for retirement, which differs according to sex, and the consequences which may follow from that for other social benefits. By the way it is structured, that provision is obviously of general application in that it allows Member States first and foremost to exclude certain forms of discrimination from the ambit of the principle of equality by adopting the relevant provisions and moreover, *a fortiori*, to maintain in force the same forms of discrimination that may already have existed at the time of its entry into force.

There is therefore no justification for holding that Member States may take action in regard to the matters referred to in Article 7(1) solely in order to eliminate existing forms of discrimination or reduce their scope. Such an argument, in my view, is not supported by Articles 7(2) and 8(2), which, as already stated, provide respectively that Member States are periodically to examine excluded matters in order to ascertain whether there is justification for *maintaining* the exclusions and that they are to inform the Commission of their reasons for *maintaining* any existing provisions on the matters referred to in Article 7(1). Reference to Article 7(2) is irrelevant because that provision concerns the possible reduction of the number of exclusions provided for in Article 7(1) and not the lapse of those same exclusions in domestic legal systems. Nor is Article 8(2) relevant, because, if Article 7(1) is interpreted as I suggest above, the *existing* provisions include not only those already in force at the time when the directive came into force but also those adopted *ex novo* after that date, since in relation to those as well there is an obligation to 'inform' the Commission, referred to in the second subparagraph of Article 8(2).

Furthermore, as the defence of the British Government points out, Article 7(1)(d) provides that Member States may exclude from the scope of the directive the consequences of the exercise '*before the adoption of this directive*' [8] of a right of option in social security matters. Such a provision makes it clear that, when the Community legislature found it necessary to introduce a limitation to the scope of the derogation, linking it to conditions which should already have been fulfilled before the

8 — Emphasis added.

adoption of the directive, it formulated the relevant provision in terms that were absolutely clear. The Community legislature would have formulated the relevant rules equally clearly if it had wished to limit the scope of all the exclusions in Article 7(1), by enacting a *standstill* obligation in relation thereto.

23. Although those are the rules of secondary Community legislation which come into consideration, the reference to *standstill* strikes me as not entirely relevant for a more general reason as well. Clearly, the question whether or not a *standstill* obligation exists in relation to certain rules of secondary legislation does not arise where there is an express provision to that effect, since in that case a court is merely required to define the meaning of the express limitation which it must apply, in contrast to a situation where there is no such provision. That is generally the distinguishing characteristic of directives, which has led some to maintain that, before the expiry of the period for their implementation in national law, directives have the effect of blocking the freedom of a State to enact legislation which might compromise their subsequent implementation. [9] But the present case cannot fall within either of those two categories, given that the directive in question contains a provision, Article 7(1), which expressly gives States the right to exclude certain matters from its scope.

Moreover, a *standstill* obligation can arise only before the time-limit for implementing the directive has expired. [10] In this case, however, the new British legislation was clearly adopted after the expiry of the six-year period for implementing the directive, so that this case falls outside the typical framework of a *standstill* obligation arising from a directive, which applies only prior to the expiry of the period for its implementation. In such a case, any conduct on the part of a Member State that is inconsistent with its obligations under the directive constitutes an infringement not of the *standstill* obligation but of the obligations linked directly to the specific content of the directive which has not been implemented and/or to general principles which it embodies.

24. Once the conclusion has been reached that there is no *standstill* obligation, it must be determined whether legislation of the

9 — See the Opinion of Advocate General Mancini in Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2507, especially pp. 2513 and 2514. See also the Opinion of Advocate General Darmon in Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2216, in particular p. I-2222.

10 — See, in that regard, Case C-129/96 *Inter-Environnement Wallonie* v *Région Wallone* [1997] ECR I-7411, paragraph 45; see also the Opinion of Advocate General Darmon, cited above.

kind at issue in this case, which introduces a difference in treatment between men and women in the area of invalidity benefits, may be considered lawful under Article 7(1)(a); in other words, it is necessary to determine the nature of the link which must exist between the different pensionable age and the forms of discrimination in regard to other social benefits for such discrimination to be considered justified under Article 7(1)(a). It should be remembered that, under that provision, Member States retain the right to exclude from the scope of the directive the determination of the age at which workers acquire the right to receive 'old-age and retirement pensions' and also the *consequences* which the choice of certain age-limits may entail for other social security benefits.

In order to reply to the question, therefore, it must be established whether the different system as between men and women for granting the invalidity allowance in question may be described as 'consequent' upon the fixing of different ages for men and women acquiring the right to old-age and retirement pension within the meaning of Article 7(1)(a).

25. The question is not new, the Court having dealt with it in various judgments concerning similar situations. Let me summarise the two most significant ones.

In its judgment of 30 March 1993 in *Thomas*, [11] the Court examined the compatibility with the principle of equal treatment of a national provision which excluded the grant of invalidity benefits to persons who had passed retirement age on account of the fact that that age was different for men and women. The Court found that provision to be at variance with the aforesaid principle, but nevertheless held it to be justified under Article 7(1)(a) of the directive, since it was a consequence which might follow, for benefits other than old-age pension, from the determination of different retirement ages. It stated that such justification existed where the forms of discrimination are 'necessarily and objectively linked to the difference in retirement age' and only where such discrimination 'is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes'. [12] Furthermore, whilst it is for the national court to determine whether such a necessity exists, [13] that does not prevent the Court of Justice from giving appropriate guidance to

11 — Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247.

12 — Paragraph 12.

13 — Paragraph 13.

the national court in making its decision. [14] The Court also stated, with reference to the need to preserve financial equilibrium as between the old-age pension scheme and other benefit schemes, that the grant of benefits under non-contributory schemes to persons in respect of whom certain risks have materialised, regardless of such persons' entitlement to an old-age pension by virtue of contribution periods completed by them, 'has no direct influence on the financial equilibrium of contributory pension schemes'. [15] Starting from that premiss, the Court of Justice seems to be indicating to the national court that the British legislation on invalidity benefits should not be regarded as a consequence of the different pensionable age since it is not necessary in order to ensure the coherence and financial equilibrium of the pension scheme, it being of course for the national court to ascertain whether that condition is met in a particular case.

In its judgment of 11 August 1995 in *Graham*, [16] the Court reiterates the general proposition which appears in the previous judgments, specifically that Article 7(1)(a) of the directive permits not only the setting of different ages for men and women for the purposes of granting old-age and retirement pensions but also the existence of discrimination under other benefit schemes which is necessarily and objectively linked to the differences in pensionable age. Pursuant to that provision, the Court deemed lawful (under the directive) national legislation which, after setting the pensionable age for women at 60 and that for men at 65, first provided that the rate of invalidity pension payable to persons becoming incapacitated for work before reaching pensionable age should be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, secondly, awarded an allowance in addition to invalidity pension to persons aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work. The Court reached that conclusion on the view that the discriminatory nature of those provisions inherent in the limitation and in the supplement to the invalidity pension for those purposes was justified in that they fell within the scope of the derogation in Article 7(1)(a) of the directive by virtue of their being directly and necessarily linked to the differences in the pensionable age. [17] The Court stated in that respect that those forms of discrimination were 'objectively necessary in order to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes'. [18] It found that they were *objectively* linked to the setting of different pensionable ages for men and women inasmuch as they arose *directly* from the fact that a different pensionable age had been fixed. [19] The forms of discrimination in question were

14 — Ditto.

15 — Paragraph 14.

16 — Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer* v *Graham and Others* [1995] ECR I-2521.

17 — Paragraph 11.

18 — Paragraph 12.

19 — Paragraph 13.

necessarily linked to the difference in pensionable age since invalidity benefit was designed to replace income from employment, thus implying that there was nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case stop working because they had reached pensionable age. [20] In the Court's view, an interpretation of Article 7(1)(a) prohibiting States from limiting the amount of invalidity benefit payable to workers before they reached pensionable age and requiring that amount to be fixed at a level corresponding to the old-age pension to which such persons would be entitled on retirement would amount to a limitation on the very right to set different pensionable ages, expressly conferred on Member States by that provision. [21] Finally, the Court pointed out that such a restrictive interpretation would also have the effect of undermining the coherence between the retirement pension scheme and the invalidity benefit scheme because: (a) Member States would not be able to grant to workers still below pensionable age who had become incapacitated for work invalidity benefits higher than the retirement pension but corresponding to the income which they would have received until pensionable age if they had continued to work; (b) women would receive an invalidity pension at the rate of a full retirement pension if, to ensure equal treatment between men and women, the invalidity pension granted to them from the age of 60 were instead to be granted to them, as in the case of men, at the age of 65. [22]

20 — Paragraph 14.

21 — Paragraph 15.

22 — See also, *inter alia*, the judgment in Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, in which the Court held that Article 7(1)(a) of the directive must be interpreted as authorising not only the determination of a different pensionable age according to sex for the purposes of granting old-age and retirement pensions but also other forms of discrimination that are necessarily linked to that difference. Applying that rule, the enactment for men and women of different contribution periods for entitlement to a pension of the same amount must be regarded as permissible since, if such inequality in the duration of the contribution periods is not retained, a different pensionable age for men and women cannot be maintained without altering the existing financial equilibrium (paragraph 16). The Court adds that an interpretation of Article 7(1)(a) which excludes the application of the derogation, that is to say one which precludes contributions of different size from giving rise to a pension of the same amount as a result of the different pensionable age of men and women, would be excessively restrictive because on the one hand it would allow the introduction of different pensionable ages whilst on the other making such a system impossible to attain in practice, requiring the Member State in question to undertake 'a general restructuring of the system of contributions and benefits' within a very limited period, namely before the expiry of the six-year period [for that purpose] laid down by Article 8 of the directive, thus altering substantially the financial equilibrium based on an obligation to contribute until pensionable ages that differ for men and women (paragraph 18). According to the Court, the progressive manner (see Article 1 of the directive) in which the legislature decided to enact that the principle of equal treatment between men and women could not be ensured if the scope of the derogation authorised by Article 7(1)(a) were to be interpreted restrictively. Thus, on the basis of the finding that the derogation is allowed only where necessary in order to attain the objective of that provision of the directive, that is to say to permit Member States to fix a different pensionable age for men and women, the Court recognises that possible instances of discrimination in regard to the obligation to pay contributions and the calculation thereof for pension purposes 'are necessarily linked' to the different pensionable age. See also the more recent judgment in Case C-137/94 *R* v *Secretary of State for Health, ex parte Richardson* [1995] ECR I-3407, in which the Court examined the question whether Article 7(1)(a) permits a Member State which, pursuant to that provision, has set the pensionable age for women at 60 and for men at 65 to lay down also that women are to be exempt from prescription charges from the age of 60 and men only from the age of 65. The Court held that discrimination in the matter of exemption from prescription charges did not fall within the derogation referred to in Article 7(1)(a) because it was not a necessary consequence of the different pensionable age. It came to that conclusion partly on the basis of the general consideration that the grant of pensions under non-contributory schemes without reference to the entitlement of the person concerned to an old-age pension had no direct influence on the financial equilibrium of contributory pension schemes (paragraphs 20 to 24), and partly because, in order to ensure coherence between the pension scheme and other social security schemes, it was not necessary to grant the exemption from prescription charges at an age, namely the pensionable age, established at different ages according to sex and which was not necessarily the age at which working life ceased and revenue diminished accordingly (paragraphs 25 to 27).

26. This case-law shows that, for discrimination in social security matters to be capable of being regarded as justified under Article 7(1)(a), it must constitute the necessary 'consequence' of the fixing of a different pensionable age for men and women. The *Thomas* and *Graham* judgments, the essential passages from which are cited above, supply the guidelines for solving this case. In those judgments, the Court makes it clear that a form of discrimination which has been introduced, that is to say, resulting from the different retirement age (those cases, like the present case, concerned invalidity benefits the scheme of which varied with the retirement age), may be regarded as the 'consequence' of the different retirement age when it is objectively necessary in order to ensure the financial equilibrium of the social security system or coherence between the retirement pension scheme and other benefit schemes. It also makes clear that those forms of discrimination are *objectively* linked to the pensionable age since they flow directly from the fact that the age has been fixed differentially according to sex, and that they are necessarily connected to the same precondition because invalidity benefits are in substitution for earnings, so that, in principle, when retirement takes place and earnings accordingly cease, their function has no further justification. In the *Graham* judgment, the Court explains that if forms of discrimination that have been introduced are to be lawful, they must ensure coherence between the retirement pension scheme and the invalidity benefit scheme in two respects: first, because Member States should not be prevented from granting to workers who become incapacitated for work before reaching pensionable age invalidity benefits corresponding to the earnings which they would have continued to receive if they had been able to continue working; and, secondly, because women would receive an invalidity benefit equal to the retirement pension if, in order to ensure equal treatment, the invalidity allowance were granted to them at the same age as men, namely at 65.

27. In this case, the forms of discrimination considered by the Social Security Commissioner concern women in three cases and men in two. Mrs Spencer argues that the replacement of the full REA with the frozen REA for workers who like herself retired between April 1987 and April 1989 rendered her benefit less favourable than the analogous benefit for men, who, retiring at the later age of 65 and all other conditions being equal, had the possibility of retaining entitlement to the full REA. Mrs Hepple and Mrs Stec argue that the replacement of the REA with a lower benefit, the RA, on the attainment of pensionable age, had worsened their treatment by comparison with that of men in similar circumstances inasmuch as women, retiring earlier than men, cease before them to receive the full amount of the invalidity allowance. Mr Lunn and Mr Kimber complain of reverse discrimination, in favour of women and to their own detriment, arguing that, whereas they were not paid the fixed-amount REA on the ground that in the period between April 1987 and April 1989 they had not yet reached pensionable age, women of the same age and in the same circumstances were able to request retirement and thus acquire the right to the full (albeit 'frozen') amount of REA.

All the forms of discrimination complained of by the applicants and hitherto described are undoubtedly linked in terms of cause and effect to the fixing of different retirement ages for men and women. In order to reply to the first question, it is necessary to establish whether the forms of discrimination introduced are *objectively necessary* in the sense that, without them, Member States would not have been able to introduce into their respective systems a retirement age differentiated according to sex.

28. The applicants and the Commission, using arguments which largely coincide, deny that there must be a link between the different retirement age and the rules introduced since 1986 for invalidity benefits.

29. The applicants argue that the British legislation, by establishing a link between pension rights and invalidity benefits, conflicts with the principle of equal treatment protected by the directive and cannot be regarded as justified under Article 7(1)(a). In support of that argument, they emphasise that, before the reforms of 1986, the pension system and the invalidity allowance system (which at the time was not linked to the retirement age and was paid to entitled persons for life) existed side by side without any problem. That is confirmed by the Social Security Commissioner, who states expressly that the differences in pensionable age had 'co-existed with the Industrial Injuries Scheme [...] for nearly 40 years from 1948', and that, therefore, the 'REA could simply have been left as it was, or a non-discriminatory cut-off age adopted, without upsetting the pension system as it had always operated'. [23]

30. Similarly, the Commission stresses above all that the disputed provision is exceptional in character and should therefore be strictly interpreted. On that point, there is no doubt that the exclusions contained in Article 7(1) constitute a departure from the general implementation, by the methods and the time-limits fixed by the directive, of the principle of equal treatment in social security matters. We have already seen how that factor may influence the interpretation of that provision in a context such as this.

31. Those observations seem reasonable to me. In my view, it is difficult to maintain that the different retirement age necessarily entails the sex discrimination, to the detriment of both men and women, to which the invalidity allowance scheme in force in the United Kingdom gives rise. Such discrimination would seem rather to arise from the (unforced) choice of the national legislature, which has sacrificed equal treatment in order to achieve, as the order for reference puts it, the removal of a blatant anomaly and, in particular, not 'to go on

23 — Paragraph 27 of the order for reference.

paying a benefit such as REA to people too old to work'.[24] Moreover, as the order for reference shows, such discrimination is not objectively necessary to avoid endangering the financial equilibrium of the social security system. I therefore consider that the forms of discrimination which characterise the British system do not constitute the best solution to the problem and that action is needed in order to rationalise the relationship between the two schemes. Furthermore, bearing in mind the need to review the legality of new forms of discrimination in the light of the principle of proportionality, it appears all the more obvious that the fact that Article 7(1)(a) permits discrimination as a result of the difference in pensionable age cannot be understood as permitting only the mechanical application of the various age-limits under the invalidity benefit schemes. On the contrary, the very requirement that the derogation should compromise equal treatment as little as possible should cause that provision to be interpreted as requiring Member States, where appropriate and so far as possible, to take cogent measures of such a kind as not to frustrate the function of the directive and the primary requirement of ensuring compliance with the principle of equal treatment.

Referring to the case-law in *Thomas* and *Graham*, the Commission then maintains that the difference in pensionable age by reference to sex did not make the forms of discrimination introduced under the invalidity benefit scheme from 1986 objectively necessary. That is because those forms of discrimination were not rendered necessary either by financial requirements or by the need to ensure coherence between the pension and invalidity insurance schemes.

The Commission, like the applicants, points out that the two schemes had existed side by side without any problems since 1948, even though the 'pensionable age' factor was not in any way taken into account for the purposes of granting the invalidity allowance and calculating the amount thereof. I have already said that that argument is not without foundation.

32. In contrast, the United Kingdom argues in its defence that the forms of discrimination in question were justified by the need to ensure coherence between the pension and invalidity allowance schemes. It argues in that respect that the allowance is intended to compensate for loss of income from work, and that it would therefore be illogical for a person entitled to such a benefit to continue to receive it even after reaching pensionable age, that is to say beyond the date on which that person would in any event cease to receive income from work. On that point, the United Kingdom Government refers to the judgment in *Graham*, which states that 'since invalidity benefit is designed to replace income from occupational activity, there is nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case stop

24 — Paragraph 28 of the order for reference.

working because they have reached pensionable age'. [25]

33. I can only endorse that proposition. Member States are undoubtedly free to define the scheme of the invalidity allowance by laying down the periods of entitlement to it and the amount thereof. It remains to be seen, however, whether that freedom is subject to any limits and what role if any is played in that respect by the principles of equal treatment and proportionality.

In support of the proposition that Member States are free to introduce under the invalidity allowance scheme forms of discrimination corresponding to the enactment of different pensionable ages by reference to sex, the judgment in *Graham* states that to prohibit such an option would 'undermine the coherence between the retirement pension scheme and the invalidity benefit scheme in at least two respects': first, because it would prevent the grant to men becoming incapacitated for work before reaching pensionable age of invalidity benefits greater than the retirement pensions which would have been payable to them if they had continued to work until reaching pensionable age, while allowing the grant to women of pensionable age of an overall payment higher than that due to them; and secondly, because, if the invalidity allowance payable to women were paid to them, as in the case of men, at a reduced rate as from the age of 65 rather than 60, those women would, if their incapacity for work commenced before they reached pensionable age, that is to say, before the age of 60, be entitled up to the age of 65 to an invalidity allowance equal in amount to the retirement pension. [26]

34. That argument may at first sight seem persuasive. On the other hand, however, the United Kingdom Government has not shown that it was impossible to make the system function logically, that is to say, to render the pension and invalidity benefit schemes coherent, without creating new forms of discrimination or giving rise to less emphatic forms of discrimination. It is significant in that respect that, as I have already pointed out, the Social Security Commissioner held that it was possible to carry out a non-discriminatory reduction in age without disrupting the pension scheme. Thus it does not appear to me to be possible, on the basis of the information available, to exclude other types of action that take account of the requirement to ensure equal treatment, which is the aim of the directive and corresponds to the general principles of the system. In order to justify the derogation, it is not sufficient to point to the inconsistencies in the relationship between the two schemes arising from the reforms introduced from 1986 onwards; it is necessary instead, in my opinion, to demonstrate that those inconsistencies can be remedied only by the means chosen by the United Kingdom legislature (that is to say, by introducing sex discrimination *ex novo* under the invalidity benefit scheme) and, moreover, that such action is proportionate to the objective pursued.

25 — Paragraph 14.

26 — Paragraphs 16, 17 and 18.

Those are all matters of fact which must in any event be established by the national court, and the Court of Justice must confine itself to providing it with general guidelines. [27]

35. The United Kingdom Government also argues, citing once again the judgment in *Graham*, [28] that to interpret Article 7(1)(a) as prohibiting Member States from limiting invalidity benefits payable to persons over retirement age would amount to limiting or even removing their option to lay down different pensionable ages according to sex, an option expressly and unconditionally given to them by Article 7(1)(a).

That argument is not persuasive either, because, as already noted, Member States are free, in order to ensure coherence between the two schemes, to seek and adopt solutions, other than the mechanical application of the different pensionable age to the invalidity benefit scheme, which do not give rise to discrimination. I repeat that it has not been shown that no other solutions exist; conversely it is reasonable to hold that they can be identified by taking action with regard to the amount of the allowance and the periods for which it may be granted.

36. I would add, finally, that in interpreting Article 7(1)(a), account must be taken of the *principle* of equal treatment in the light of the second paragraph of Article 5 of the EC Treaty (now Article 10 EC) whereby '[Member States] shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty', [29] which must also include the equality of treatment which the directive seeks to achieve in a given sector. [30]

37. Against that background, the possibility must be recognised that discriminatory provisions introduced after the entry into force of the directive and falling in theory within the scope of the exclusion in Article 7(1)(a), entail the sacrifice to an excessive extent (that is to say, disproportionately in relation to the objective pursued) of the principle of equal treatment which is set out, with reference to the treatment of workers, in Article 119 of the EC Treaty (now Article 141 EC) and which the directive applies in a given sector, namely that of social security, and thereby prevent the directive itself from carrying out its function. That context lends significance to the overall logic of the directive, which is essentially aimed, progressively over a span of six years, at correcting existing social security legislation so as to bring it into line with the principle of equality between men and women. It follows that a discriminatory provision which by its content undermines the purpose of the directive may be

27 — See, to that effect, the judgment in *Thomas*.

28 — Paragraph 15.

29 — See the Opinion of Advocate General Darmon in Case C-229/89, cited above.

30 — See the Opinion of Advocate General Mancini in Case 30/85, cited above.

regarded as contrary to Community law even where it falls within the wording of the derogation. That purpose may also be undermined by the fact that the same result might have been achieved, as already mentioned, by means of different provisions which, in terms of their intrinsic content and through being supplemented by additional provisions with compensatory effects, do not involve sacrificing equal treatment, or do so to a lesser extent.

38. I therefore suggest, in answer to Questions 1 and 2, that Member States may, as a prerequisite for entitlement to an invalidity benefit, lay down different age conditions according to sex linked to analogous conditions concerning pensionable age, and thus grant different amounts of benefit to entitled men and women whose circumstances are entirely the same except for gender. That is, however, on condition that the difference in amount is necessary to ensure coherence between the pension and invalidity benefit schemes, inasmuch as the sacrifice of equal treatment under the invalidity benefit scheme must in the first place be inevitable given the enactment of a different pension age, and moreover both indispensable in order to achieve the desired result and proportionate to that result. It is for the national court to carry out the necessary assessments. That option on the part of Member States may also, exceptionally, be used to introduce discriminatory provisions which did not exist on the expiry of the period for the implementation of the directive, provided always that the above conditions are met, and providing at the same time where necessary for adequate compensation or adjustments to the rules for calculating the invalidity benefit with a view to counteracting the effects of the discriminatory provisions. In that case as well, it is for the national court to carry out the necessary assessments, establishing whether there are grounds on which the discriminatory provisions can be justified.

Question 3

39. If the national court finds, on the basis of the assessments referred to above, that the discrimination concerning invalidity benefits is not justified under Article 7(1)(a) and is thus contrary to Community law, the question arises as to what means are available to individuals under the legal system to enable them to counteract in practice the consequences of such discrimination on their legal position. In more general terms, it is necessary to determine the effects which a judgment delivered on completion of proceedings for a preliminary ruling on interpretation will have on the national legislation linked to the Community legislation in question, and thus on the legal position of individuals to whom the Community legislation is to be directly applied.

With respect to that aspect of the case, the Social Security Commissioner wishes to ascertain whether and within what limits,

in the absence of national legislation implementing the directive, workers who have been discriminated against may, through the principle of direct effect, apply to the national court for an additional payment, and in particular how the amount thereof should be calculated.

40. Under the case-law of the Court of Justice, persons who have been discriminated against in breach of Article 4(1) of the directive are entitled to be treated in the same way as persons not so discriminated against who are in the same position as themselves, sex being the only difference. Where the directive has not been implemented, the treatment accorded to such persons is generally regarded as 'the only valid point of reference' for eliminating the consequences of the discrimination. [31]

Both the case-law and the parties are in agreement on that general proposition. It remains to be determined, however, according to what parameters the additional payment designed to restore equal treatment is to be quantified. In that respect, the Social Security Commissioner essentially wishes to ascertain whether that calculation must take into account not only the unfavourable position of the person discriminated against in comparison with that of the comparator, but also all the different advantages from which the person discriminated against may in some cases benefit by reason of other aspects of the same social security scheme. The Commissioner also wishes to ascertain, clearly along the same lines, whether that calculation must also take into account the various options offered to workers (and possibly exercised) by reference to the different pensionable age according to sex, which may include the grant to the person discriminated against of benefits which may from time to time be more or less favourable compared with those paid to the comparator.

41. That question must be answered in the affirmative. I have reached that conclusion for the following reasons.

The right to additional benefit has its legal basis in the Community system, and more particularly in the principle of equal pay for workers set out in Article 119 of the EC Treaty (now Article 141 EC), embodied in Article 4(1) of the directive. In applying that principle to individual circumstances, it is necessary, as has been said, to take as a parameter the corresponding treatment accorded to comparators. That parameter consists of the advantages which the national legislation guarantees to the comparator by way of invalidity benefit. The use of that parameter does not therefore lead, as the Commission appears to maintain, merely to an extension to persons placed at a disadvantage of the national scheme applicable to the comparators; such an operation would amount to treating certain national provisions as being differ-

31 — See, *inter alia*, Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraph 18; Case C-408/92 *Smith* v *Avdel Systems* [1994] ECR I-4435, paragraph 16; Case C-28/93 *Van den Akker* v *Stichting Shell Pensioenfonds* [1994] ECR I-4527, paragraph 17.

ent and wider in scope than is the case and would thereby substantially alter the source of the right to the additional benefit, which, as I have said, is to be found within the Community system and not the national systems. Furthermore, in determining the amount of the additional payment, it is not sufficient to refer to the different advantages or disadvantages related to age, but it is also necessary to consider what impact the options referred to in Question 3(b) may have on that amount; these also affect the advantages which the system guarantees to the persons concerned and may therefore vary or even overturn the relationship between the benefits granted to men and women.

Those conclusions are confirmed by the difference in the positions of the applicants in the main proceedings, making it necessary to adopt different solutions in each individual case. It is for the national court to carry out the relevant appraisals and on that basis determine the level of the additional payment.

42. It is appropriate at this point to reiterate that the national legislature is under a duty to enact the necessary measures to implement the directive. I emphasise that duty in particular because it has been found that judicial action as a result of the direct effect of the Community principle of equal treatment is liable to meet major practical obstacles on account of the difficulty of evaluating in each case the differential advantage of the comparator to be used as a parameter for the additional payment, and because in any event, in the case of judicial action, there is always the possibility of inconsistency and the difficulty of reconciling divergent trends.

43. Lastly, a final consideration on a delicate aspect of the dispute to which the parties have not referred. Should the national court, having carried out the factual assessments which it is required to make, as referred to above, conclude that the United Kingdom legislation is incompatible with Community law, the Court of Justice may of its own motion assess whether, having regard to the content and the impact of the judgment, it is possible and appropriate to limit its retroactive effects in accordance with *Barber*. [32]

32 — Case C-262/88 *Barber* v *GRE* [1990] ECR I-1889. See, along the same lines, Case 43/75 *Defrenne* v *SABENA* [1976] ECR 455.

Conclusion

44. For all the above reasons, I propose that the Court should answer the questions submitted by the Social Security Commissioner as follows:

(1) On a proper interpretation of Article 7(1)(a) of Council Directive 79/7/EEC, Member States may, for entitlement to a benefit such as the Reduced Earnings Allowance (REA) provided for under United Kingdom legislation in respect of accidents at work and occupational illnesses, lay down different age conditions according to sex linked to the age conditions for pension entitlement, which are also differentiated according to sex. That is so, however, only if that link and the resultant differences in the amount of the invalidity benefits by reference to sex are necessary to ensure coherence between the pension scheme and the invalidity benefit scheme. Such coherence exists if the enactment of a different pensionable age requires a derogation from the principle of equal treatment, inasmuch as such differentiation could not be introduced without a corresponding adjustment to the scheme of invalidity benefits, and is also proportionate to the result pursued thereby. It is for the national court to carry out the relevant assessments. That option on the part of Member States may also, exceptionally, be used to introduce discriminatory provisions which did not exist on the expiry of the period for the implementation of the directive, provided always that the above conditions are met, and providing at the same time where necessary for adequate compensation or adjustments to the rules for calculating the invalidity benefit with a view to counteracting the effects of the discriminatory provisions. In that case as well, it is for the national court to carry out the necessary assessments, establishing whether there are grounds on which the discriminatory provisions can be justified.

(2) If the discrimination in social security matters does not fall within the scope of the derogation under Article 7(1)(a), and there is no national legislation implementing the directive, persons discriminated against may apply to the national court, under Article 119 of the EC Treaty (now Article 141 EC) and Article 4(1) of the directive, for an additional invalidity benefit. The amount of that benefit is equal to the difference between the value of the benefit payable to the comparator and that of the benefit due, under the national provisions found to be unlawful, to the person discriminated against. Benefits due to the comparator must be interpreted as including all the advantages of the invalidity benefit which are guaranteed to that person under the national legislation. It is for the national court to determine that reference value in each individual case.