OPINION OF MR ADVOCATE GENERAL DARMON

delivered on 8 December 1993 *

Mr President,
Members of the Court,

1. The Raad van Beroep, s'-Hertogenbosch, has asked the Court once again [1] to define the content and scope 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 (which I shall call 'the directive'). [2]

2. The four questions which it has referred [3] concern proceedings in which six persons challenge the decisions of various trade associations responsible for implementing the Netherlands Law containing the general provisions relating to incapacity for work (Algemene Arbeidsongeschiktheidswet, 'the AAW') refusing in some cases and withdrawing in others entitlement to benefits under the new provisions of the AAW contained in the Law of 3 May 1989.

3. Although the Court is familiar with the legislation in question which has already been the subject of several cases, its development should be recalled briefly; a more detailed explanation is set out in the Report for the Hearing. [4]

4. The AAW, which was introduced by a law of 11 December 1975, gave persons resident in the Netherlands entitlement to benefits the amount of which depended on the degree of incapacity, regardless of other income received or lost by the beneficiary; married women, however, were not entitled to such benefits in any event.

5. The exclusion of married women was removed by a law of 20 December 1979, the date for the entry into force of which was fixed retroactively as 1 January 1978. However, entitlement to benefits was made subject in every case — with the exception of certain categories which are not concerned in this case — to what is commonly called the 'income requirement'. Benefits were payable to anyone who could show that during the year preceding the commencement of their incapacity for work their income was not lower, originally, than HFL 3 423.81.

* Original language: French.

1 — See Cases C-337/91 *Van Gemert-Derks* and C-338/91 *Steenhorst-Neerings* [1993] ECR I-5435 and 5475.

2 — OJ 1979 L 6, p. 24.

3 — The wording appears in the Report for the Hearing: I. Facts and procedure, point 4.

4 — I. Facts and procedure, point 2.

6. That condition was applicable to persons whose incapacity had commenced after 1 January 1979. If it had begun earlier, the Law retained special rules for married women. Those whose incapacity had arisen before 1 October 1975 were entitled to no benefits, even if they met the income requirement, and those whose incapacity began between 1 October 1975 and 1 January 1979 could claim benefits subject to the income requirement, whereas men and unmarried women in the same situation continued to be entitled automatically to benefits.

7. Relying on Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 (which I shall refer to as 'the International Covenant' [5]), the Centrale Raad van Beroep, in a number of judgments delivered on 5 January 1988, ruled that married women whose incapacity for work had arisen before 1 January 1979 were also entitled to benefits without having to meet the income requirement and even if their incapacity had began before 1 October 1975. That right was recognized with effect from the entry into force of the transitional provisions contained in the aforementioned Law of 20 December 1979.

8. That Law was repealed by the Law of 3 May 1989 which provides, in Article III, that persons whose incapacity for work began before 1 January 1979 and who apply for AAW benefits after 3 May 1989 must meet the income requirement, and in Article IV, that AAW benefits are to be withdrawn from persons whose incapacity arose before 1 January 1979 if they do not meet the income requirement, which is applicable to men and women alike; a subsequent provision fixed the date on which that withdrawal was to take effect as 1 July 1991.

9. It is those two articles which are at issue in these proceedings.

10. By a judgment of 23 June 1992, [6] the Centrale Raad van Beroep held that the amount of the income requirement (HFL 4 403.52 per year in 1988) constituted indirect discrimination against women contrary to both Article 4 (1) of the directive and Article 26 of the International Covenant, and that all that could be taken into consideration in that context was 'some income', without any specific limit.

11. According to the order making the reference one applicant was refused AAW benefits on the basis of Article III, her application having been made after 3 May 1989, [7] and benefits have been withdrawn from the other applicants with effect from 1 July 1991 because they did not meet the income requirement.

5 — Treaty Series vol. 999, p. 171.

6 — AAW 1991/463, Administratiefrechtelijke Beslissingen 1992, p. 480.

7 — Another applicant was mistakenly granted AAW benefits although she did not meet the income requirement and had applied for the benefits on 20 February 1990.

12. The Government of the Netherlands and the trade associations have claimed that the questions referred for a preliminary ruling are not relevant to the dispute, the applicants in the main proceedings being outside the scope *ratione personae* of the directive and not having either worked or been in receipt of sufficient income during the year preceding the day on which their incapacity commenced.

13. That argument must be rejected. It is apparent from the findings made by the Raad van Beroep that, apart from the fact that some of them were in fact employed when their incapacity arose, the Court is also asked to rule on the income requirement as a source of discrimination.

14. Moreover, it has been generally held by the Court that the national courts alone are competent to decide the relevance of the questions referred and it is only in rare cases that the Court has refused to answer them. [8]

15. The Court stated thus in *Enderby* [9] that

'it is solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court ...', [10]

and concluded that

'where ... the Court receives a request for interpretation of Community law which is not manifestly unrelated to the reality or the subject-matter of the main proceedings, it must reply to that request and is not required to consider the validity of a hypothesis which it is for the referring court to verify subsequently if that should prove to be necessary'. [11]

16. It is therefore appropriate to rule on the questions which have been referred in this case.

I. First question

17. The national court seeks to know whether a provision which makes entitlement to AAW benefits subject to an income requirement in the case of persons whose incapacity for work arose before 1 January 1979 if they applied for those benefits

8 — Case 244/80 *Foglia* [1981] ECR 3045.
9 — Case C-127/92 [1993] ECR I-5535.
10 — Paragraph 10.
11 — Paragraph 12.

after 3 May 1989 is compatible with Article 4 (1) of the directive if, primarily in the case of married women, it removes a right conferred as from 23 December 1984 by virtue of the direct effect of the directive.

18. A provision such as that at issue does not on the face of it contain any discrimination because the income requirement applies to men and women alike. In fact, it merely determines the conditions governing entitlement to benefits.

19. The difference in treatment becomes apparent, however, on examination of the effects earlier in time which result from the combination of that provision with the earlier provisions of the AAW, since repealed, under which only men and unmarried women were entitled to benefits for incapacity for work without having to satisfy an income requirement.

20. The result is to place at a disadvantage married women who before 3 May 1989 did not apply for benefits, in the knowledge that the national rules excluded them from benefits but being unaware of the judgments of the Centrale Raad van Beroep of 5 January 1988.

21. It is true, as I have said, that that court acknowledged their entitlement regardless of any income requirement. However, judicial decisions cannot be regarded as guaranteeing correct transposition where, as in this case, such entitlement is not recognized by national legislation. Although they may compensate for the deficiencies of the law vis-à-vis Community law, such decisions do not suffice to remove them.

22. Here I must make an observation. Although the national court refers to the 'lateness of the application', a provision such as that at issue cannot be analysed from the point of view of either the time-limits for bringing actions or the time-limits governing administrative actions. In that respect, this case is clearly distinguishable from *Emmot* [12] and *Steenhorst-Neerings*. [13]

23. The fact is that Article III of the Netherlands Law appears neither to impose a time-limit for bringing an action before the national courts, failure to comply with which would result in a time-bar, nor to impose a restriction in time, starting from the application, as regards the grant of the benefits.

24. On the contrary, this would appear to be a substantive provision, immediately applicable, which alters the very substance of the law whilst leaving intact a certain inequality of treatment as regards the period between 23 December 1984 and 3 May 1989 on the ground that a supplementary condition applicable henceforth to all, the income requirement, is not met.

12 — Case C-208/90 [1991] ECR I-4269.
13 — Case C-338/91 [1993] ECR I-5475.

25. It is precisely married women who are affected by this because prior to the adoption of that provision they were either excluded or subject to the condition to which I have referred, whereas men in the same situation were automatically entitled to benefits for incapacity for work.

26. Those circumstances bring to mind the facts which gave rise to the Court's judgment in *Johnson*. [14]

27. Let me recall those facts briefly. The British legislation made

'entitlement to a benefit subject to the previous submission of a claim for a different benefit which entailed a condition discriminating against female workers ...'. [15]

28. That provision prevented Mrs Johnson from obtaining the benefits she wished to receive because, not being entitled to the benefits, she had not applied for them under the old rules.

29. The Court ruled that that was a case of discrimination against women being maintained in breach of Community law in so far as

'by requiring those women to have applied for the non-contributory invalidity pension in order to be able to claim the severe disablement allowance, Section 165A, cited above, in conjunction with Regulation 20 (1), cited above, maintains that discrimination because virtually all the women who suffered the discrimination entailed by the household duties test may not in future claim automatic payment of the severe disablement allowance, whereas men in a comparable situation are automatically entitled to it. Such men were in fact entitled to the non-contributory invalidity pension and could therefore reasonably claim payment of that benefit whereas *women had no reason to make such a claim since they knew that they had no entitlement to it.*' [16]

30. Admittedly, the provision at issue maintained discrimination for the future and to the detriment of women for whom the event giving entitlement to the benefits occurred prior to the date of the entry into force of the new law, whereas Article III of the Netherlands Law is not intended to regulate new situations but the period which elapsed between the day on which the directive ought to have been transposed into national law and 3 May 1989.

14 — Case C-31/90 [1991] ECR I-3723. See also Case 384/85 *Borrie Clarke* [1987] ECR 2865.

15 — Paragraph 33.

16 — Paragraph 31, my emphasis.

31. As regards that aspect the Court's judgment in *Dik* [17] is also very instructive. In that case the provision at issue, a transitional one, prevented women who had become unemployed before 23 December 1984 from obtaining the relevant benefits if they had not previously applied for a benefit to which they were not entitled because they were excluded.

32. The Court held that the directive did not permit such a provision, which maintained after 23 December 1984 a condition discriminating against women.

33. As regards the effects in time of measures implementing a directive after the due date, the Court held that

'... if national implementing measures are adopted belatedly, namely after the expiry of the period in question, the simultaneous entry into force of Directive 79/7 in all Member States is ensured by giving such measures effect retroactively as from 23 December 1984 ...' [18]

and concluded that

'such belatedly adopted implementing measures must fully respect the rights which Article 4 (1) has conferred on individuals in a Member State as from the expiry of the period allowed to the Member States for complying with it ...'. [19]

34. The Court has thus made it clear that after the date by which the directive must have been transposed Member States may not, by means of transitional provisions, restrict or even remove rights which women derive from the direct effect of Article 4 (1) of the directive.

35. Since this is a case of direct discrimination, which is the opinion expressed by the Commission during the oral procedure, there can be no possible justification for it in view of the Court's statement in *Borrie Clarke*: [20]

'... the directive does not provide for any derogation from the principle of equal treatment laid down in Article 4 (1) in order to authorize the extension of the discriminatory effects of earlier provisions of national law.' [21]

36. It should be noted, moreover, that if the provision is held to be incompatible with the

17 — Case 80/87 [1988] ECR 1601.
18 — Paragraph 13.
19 — Paragraph 14.
20 — Case 384/85, cited above.
21 — Paragraph 10.

directive the financial consequences will not be too great because only about 1 000 women are affected and because according to Article 25 (2) of the AAW entitlement to benefits for incapacity for work cannot take effect more than one year before the date on which they are claimed.

37. In the judgment in *Steenhorst-Neerings* [22] the Court held that that provision, which limits the retroactive effect of claims submitted for benefits for incapacity for work, was compatible with the directive. [23]

38. I conclude, therefore, that a national rule which imposes for time passed on married women's entitlement to a benefit a condition which was not originally imposed on men in the same situation is incompatible with Article 4 (1) of the directive where such entitlement is derived from the direct effect of that article.

II. Second question

39. The Court has been asked whether it is 'contrary to the Community principle of legal certainty or to any other principle of Community law, such as the requirement of proper implementing legislation', for married women, and other categories of persons, whose incapacity for work arose before 1 January 1979 and who must therefore satisfy the income requirement to have their AAW benefits withdrawn from effect 1 July 1991 if they do not meet that requirement.

40. A preliminary remark: that question is concerned exclusively with the *withdrawal* of the benefit for the future and not the indirect discrimination which might result from the income requirement, which is the subject of the third question.

41. As the Netherlands Government rightly pointed out in its observations, the directive is in no way intended to regulate the operation of Member States' social security schemes, nor to determine a lower or upper limit on the amount of the benefits given to victims of one of the risks listed in the directive. Its purpose, as expressly stated in Article 1, is 'the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security ...'.

22 — Case C-338/91, cited above.

23 — Paragraph 24 and the operative part of the judgment.

42. In *Federatie Nederlandse Vakbeweging*, [24] the Court stated that

'the objective set out in Article 1 of Directive 79/7/EEC is given practical expression by Article 4 (1), which provides that in matters of social security there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status, in particular as concerns the scope of social security schemes and the conditions of access thereto'. [25]

43. As a result, on the expiry of the time allowed for transposing the directive into national law Member States must ensure that the principle of equal treatment is effectively applied and adopt where necessary national measures which may be either broad or restrictive governing entitlement to and the amount of benefits.

44. As Mr Advocate General Mancini wrote in his Opinion in *Teuling*: [26]

'If a scheme such as that operating in the Netherlands is to be regarded as objectively justified and therefore not contrary to the principle of equal treatment, the fact that the scheme involved a reduction in the amount of benefit for certain beneficiaries is immaterial.' [27]

45. Were it otherwise, Member States would be unable to amend social legislation in order to satisfy the principle of equal treatment without jeopardizing the equilibrium of social security schemes and, in the long term, even payment of benefits.

46. That is why in *Molenbroek* [28] the Court ruled that a national provision adopted on 1 April 1988 which

'without distinction as to sex, makes entitlement to and payment of a supplement for pensioners whose dependent spouse has not yet reached the age of retirement dependent solely on the income received by the spouse from or in connection with employment ...' [29]

was compatible with the directive even though it had the result of reducing the amount of a supplement which had previously been paid.

24 — Case 71/85 [1986] ECR 3855.
25 — Paragraph 17.
26 — Case 30/85 [1987] ECR 2497.
27 — Point 6, second paragraph.
28 — Case C-226/91 [1992] ECR I-5943.
29 — Paragraph 20 and the operative part of the judgment.

47. The conclusion must therefore be that Article 4 (1) of the directive does not preclude the withdrawal, for the future, of a social benefit, provided that it is applied to men and women alike.

III. Third question

48. According to the findings of the national court, which have not been challenged by the Government of the Netherlands or the defendants in the main action, the income requirement applicable henceforth to persons whose incapacity arose before 1 January 1979 affects primarily women, because 5 900 of them are not entitled to AAW benefits as from 1 July 1991 whereas, at the same time, 1 800 men will be excluded for the same reason.

49. The Court has consistently held, however, that where a situation places a larger number of women than men — or vice-versa — at a disadvantage it must be regarded as contrary

'to the objective pursued by Article 4 (1) of Directive 79/7/EEC, unless the difference of treatment as between the two categories of workers is justified by objective factors unrelated to any discrimination on grounds of sex ...' [30]

and that, according to the judgment in *Molenbroeck* cited above,

'that is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so ...'. [31]

50. Although the Court has not yet been asked to rule on whether a difference in treatment may be justified exclusively on budgetary grounds, it is apparent that such grounds have been taken into consideration by the Court in its decisions, notably in *Teuling*. [32]

51. Mrs Teuling-Worms had the amount of her benefits reduced under the provisions of a new law. They were no longer calculated on the basis of the statutory minimum wage, but on the basis of her previous salary. The resulting reduction in her benefits was not compensated for by any supplement because,

30 — Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311. See also Case 170/84 *Bilka* [1986] ECR 1607, Case 171/88 *Rinner-Kühn* [1989] ECR 2743 and Case C-184/89 *Nimz* [1991] ECR I-297.

31 — Paragraph 13.

32 — Case 30/85, cited above.

after taking into account her spouse's income, the couple's income was above the minimum subsistence level.

52. An examination of the purpose of the supplements brought the Court to the conclusion that the scheme was compatible with the directive, because

'[the] guarantee granted by Member States to persons who would otherwise be destitute is an integral part of the social policy of the Member States' [33]

and that

'... Community law does not prevent a Member State, in controlling its social expenditure, from taking account of the fact that the need of beneficiaries who have a dependent child or spouse or whose spouse has a very small income is greater than that of single persons'. [34]

53. The Court referred again to that necessary control by the State of social expenditure in *Commission* v *Belgium*, [35] in which it stated that

'if for reasons of social policy a Member State may exclude single workers from receipt of a benefit, it may, *a fortiori*, reduce the allowance paid to them on the ground that there is no dependent person.' [36]

54. The Court does not, to my knowledge, consider that budgetary constraints are sufficient, by themselves, to reverse the presumption of incompatibility. However, I consider that they may justify, in the light of the nature of the scheme which has been introduced, measures which are at first sight discriminatory.

55. That means that if the purpose of rules is to compensate for loss of income by a member of the working population when he becomes unable to work, a Member State is entitled, when the budgetary resources allocated to payment of the relevant benefits are or may become insufficient, to restrict those benefits to persons whose income from work prior to the materialization of the risk indicates that they were in proper employment.

56. However, such an income requirement cannot be fixed without having regard to the characteristics of the labour market, and in

33 — Paragraph 16.
34 — Paragraph 22.
35 — Case C-229/89 [1991] ECR I-2205.
36 — Paragraph 25.

particular certain conditions special to women's employment, such as part-time employment.

57. It is therefore for the national court responsible for the application of such rules to ensure, with due regard for the criterion of proportionality, that the amount of the income requirement is not intended to discriminate on grounds of sex.

58. The reply must therefore be that Article 4 (1) of the directive must be interpreted as not precluding the application of national legislation on incapacity for work which, without distinguishing on grounds of sex, makes entitlement to a social benefit subject to the condition of having had a minimum income during the year prior to the commencement of the incapacity, even if the effect of that legislation is that more men than women are entitled to benefits, provided that it is justified on budgetary grounds and accords with the nature of the scheme in question.

IV. Fourth question

59. The last question concerns the scope of the directive *ratione personae*. It may be summarized thus: if national law is found to be inapplicable because it is contrary to Community law, can that benefit only persons covered by the directive, or may that benefit be applied to everyone, that is to say, it would seem, persons falling within the scope of the national legislation but not belonging to the 'working population' within the meaning of Article 2 of the directive?

60. The Court has already been asked to rule on that point in relation to the circumstances which gave rise to the judgment in *Achterberg-te Riele and Others* [37] and it has emphasized the two-fold restriction which applies to the scope of the directive.

61. The Court stated that

'the scope *ratione personae* of the directive is determined by Article 2, according to which the directive applies to the working population, to persons seeking employment and to workers and self-employed persons whose activity is interrupted by one of the risks set out in Article 3 (1) (a) ...', [38]

so that

'although according to Article 3 (1) (a) the directive applies to statutory schemes which provide protection against old age, including the scheme at issue in the main proceedings, it may be inferred from Article 2 in conjunction with Article 3 of the directive that the

37 — Joined Cases 48, 106 and 107/88 [1989] ECR 1963.
38 — Paragraph 9.

directive only covers persons who are working at the time when they become entitled to claim an old-age pension or whose occupational activity was previously interrupted by one of the risks set out in Article 3 (1) (a)', [39]

and concluded that

'it follows from this analysis that the directive does not apply to persons who have never been available for employment or who have ceased to be available for a reason other than the materialization of one of the risks referred to by the directive'. [40]

62. That interpretation was confirmed by the Court in *Verholen and Another* [41] in which it declared that the directive could not be extended to persons outside its scope *ratione personae*, even if they were concerned by one of the statutory schemes listed in Article 3 (1).

63. The reply must therefore be that only persons covered by the directive according to its Article 2 may rely on the incompatibility of national rules with Article 4 (1) of the directive.

64. I therefore suggest that the Court should rule that:

(1) Article 4 (1) of Directive 79/7/EEC of the Council of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security precludes national rules which make payment to married women of a social benefit subject, for the past, to an income requirement which is not imposed on men in the same situation, when they could obtain that benefit previously with effect from 23 December 1984 without having to meet that requirement by virtue of the direct effect of the abovementioned provision of the directive;

(2) That provision does not preclude the withdrawal, for the future, of a social benefit, provided that the withdrawal applies to men and women alike;

39 — Paragraph 10.
40 — Paragraph 11.
41 — Joined Cases C-87/90, C-88/90 and C-89/90 [1991] ECR I-3757.

(3) The provision must be interpreted as not precluding the application of national legislation on incapacity for work which, without distinguishing on grounds of sex, makes entitlement to a social benefit dependent on the requirement of having received a minimum income during the year prior to the commencement of the incapacity, even if the effect of the legislation is that more men than women are entitled to the benefit, provided that it is justified on budgetary grounds and is in accordance with the nature of the relevant scheme;

(4) Article 2 of the abovementioned directive is to be interpreted as meaning that only persons covered by it may rely on the incompatibility of national rules with Article 4 (1) of the directive.