

OPINION OF ADVOCATE GENERAL ALBER

delivered on 16 September 1999 *

A — Introduction

1. The Oberster Gerichtshof (Supreme Court), Austria, has made the present reference to the Court for a preliminary ruling, which concerns the interpretation and application of Article 7 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 in order to determine the compatibility with Community law of a statutory provision which establishes, as from 1 September 1996, different pensionable ages² for men and women in respect of a benefit described as an 'early old-age pension on account of incapacity for work'.

2. This derogating provision states, by way of exception to the rule of equal treatment, that the age for initially receiving an old-age pension can (in general) be different for men and women. However, this exception is not applicable to the other benefits

mentioned in Article 3 of the Directive, such as those paid in the event of invalidity.

3. The contested provision contained in Paragraph 122c of the Bauern-Sozialversicherungsgesetz³ (Farmers' Social Insurance Law, hereinafter 'the BSVG') states that '[a] male insured person is to be entitled to an early old-age pension on account of incapacity for work after completion of his 57th year, and a female insured person after completion of her 55th year, if he or she ...'. This provision repealed an otherwise identical rule which provided that '[a] male or female insured person is to be entitled to an early old-age pension on account of incapacity for work after completion of his or her 55th year, if he or she ...'.

4. The applicants in the main proceedings (hereinafter 'the applicants') are 13 farmers aged between 55 and 57 years who applied for an early old-age pension on account of incapacity for work. Because they had not yet completed their 57th year at the material time, their applications were rejected. They subsequently brought legal proceedings to challenge this decision and appeals on points of law are currently pending before the Oberster Gerichtshof.

* Original language: German.

1 — OJ 1979 L 6, p. 24 (hereinafter 'the Directive').

2 — This note is of no concern for the English language translation of the present Opinion.

3 — As amended by the Strukturanpassungsgesetz (Structural Adjustment Law) 1996 (BGBl. 1996/201).

5. The referring court has reservations as to the contested provision's compatibility with Directive 79/7. It considers it questionable whether the Austrian provision falls under the derogation contained in Article 7(1)(a) of the Directive. The derogation allows Member States to exclude from the scope of the Directive 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'. However, if the benefit in question were to be characterised as an 'invalidity' benefit⁴ within the meaning of the Directive, it would not be covered by the derogation and the unequal treatment in respect of entitlement to the benefit would thus be prohibited pursuant to the principle of equal treatment as set out in Article 4 of the Directive, which is directly applicable since 23 September 1984.

6. There are good reasons for categorising the benefit at the level of Community law as an invalidity benefit within the meaning of the Directive. According to the national court, the reduced capacity for work of the potential beneficiary is an indispensable prerequisite for entitlement to the benefit. A historical analysis of the benefit's origins reinforces the impression that it constitutes an invalidity benefit within the meaning of Community law. The benefit was originally referred to simply as a 'pension on account

of incapacity for work'.⁵ Over the years, the conditions for the grant of the benefit were relaxed in order to remove the severest cases of hardship in the economic sector concerned. Nevertheless, the nature of the benefit has not essentially changed. The mere fact that 'old-age pension' has been used in the title of the benefit since 1993⁶ does not make it an old-age or retirement pension within the meaning of the Directive.

7. 7. A further doubt on the part of the referring court as to the incompatibility of the unequal treatment between men and women, introduced in 1996, arises from Article 7(2) as well as the overall purpose of the Directive from which it can be inferred that the derogation in Article 7(1) of the Directive may be maintained only for a specific transposition period. In accordance with the Court's case-law, the referring court comes to the conclusion that amendments to discriminatory provisions within the scope of the derogation laid down in Article 7(1) are regarded as compatible with the Directive only if they move in the direction of the removal of unequal treatment. However, the national legislation at issue is a step in the opposite direction, since a discriminatory provision between men and women has been adopted, where before there was none.

5 — See Paragraph 79(1) and Paragraph 70b of the Bauern-Pensionsversicherungsgesetz (Farmers' Pension Insurance Law, 'the PVG', in force since 1 January 1971).

6 — See the 18th amendment to the BSVG (in force since 1 January 1979), which entered into force on 1 July 1993 (BGBl. 1993/337).

4 — See Article 3(1)(a) of the Directive.

8. 8. The Oberster Gerichtshof therefore refers the following questions to the Court of Justice:

B — Discussion

1. *The first question*

‘1. Is Article 7(1)(a) of Directive 79/7/EEC to be interpreted as allowing Member States to determine different pensionable ages only for pension rights which are granted exclusively on the basis of the risk of old age, or is that derogation applicable also to pension rights which are granted only from a specified age but in addition are granted only because of invalidity (incapacity for work)?

2. Are the provisions of Article 7(1)(a) and (2) of Directive 79/7/EEC to be interpreted as allowing a Member State to alter a previously existing identical provision on pensionable age (in this case completion of the 55th year for men and women) after the end of the transposition period, in such a way that a different pensionable age for men and women (in this case completion of the 57th year for men and the 55th year for women) is now determined?’

9. The applicants, the Austrian and United Kingdom Governments and the Commission have all taken part in the proceedings. I shall return to their submissions within the framework of my legal analysis.

10. As regards the applicability of the derogation in Article 7(1)(a) of the Directive, I would point out that it applies, on the one hand, to old-age and retirement pensions and, on the other, to the possible consequences of the determination of pensionable age for other benefits. The derogation must therefore be analysed in two stages. Firstly, the benefit in question must be categorised and, if appropriate, the relevant criteria in Community law must be defined. Only once it is accepted that one is not dealing with an old-age or retirement pension will it be necessary to examine whether the determination of different pensionable ages, as under the national legislation at issue, is to be interpreted as a consequence of having lawfully determined different pensionable ages for the benefit in question.

11. In respect of their assessment of the first question, the applicants rely to a great extent on the referring court’s analysis. Since a reduced capacity to work is the primary prerequisite for the grant of the benefit, it should be regarded as an invalidity benefit within the meaning of the Directive. It is thus not covered by the derogation in Article 7(1)(a) of the Directive.

12. As a preliminary, the Austrian Government points out that the benefit in question is not, from a systematic point of view, a special feature of farmers' social insurance, but is also to be found in the same terms in the social insurance scheme for self-employed persons in the commercial sector (GSVG) as well as in the social insurance scheme for employees (ASVG).

be regarded as an early old-age pension for which the minimum age for both sexes has been set at 55 years. At the same time as the creation of the early old-age pension on account of reduced capacity for work, the early old-age pension on the ground of permanent incapacity for work was introduced for farmers and traders.⁹

13. The Austrian Government is of the opinion that the discrimination at issue is justified on the basis of Article 7(1)(a) of the Directive. It holds the view that the old-age pension on account of reduced capacity for work/incapacity for work constitutes an old-age pension within the meaning of the Directive. In this context the Austrian Government refers to the benefit's historical development. It submits that different pensionable ages exist in Austria, namely 65 years for men and 60 years for women. Moreover, it is possible to receive early old-age pensions which can be claimed as early as five years in advance of normal pensionable age for a range of legal reasons such as unemployment or an extended period of contribution. Under the Federal constitutional law on different pensionable ages for male and female insured persons⁷ the pensionable age for men and women is being harmonised and raised in the long term. Since the comprehensive pension reform of 1993,⁸ which combined different kinds of benefits, the benefit at issue should

14. The Austrian Government puts forward several considerations of a systematic nature, which are intended to demonstrate the benefit's similarity to a conventional old-age pension. Worth mentioning in this regard are the protection of professional and trade activity as well as the waiting period, which simplify the grant of the benefit in comparison to a simple invalidity benefit. The rule by which the payment of benefits is terminated if a professional activity is pursued is also applicable in the context of the provisions on old-age pensions, but does not apply to an invalidity pension. Lastly, when 'regular pensionable age' is reached, the benefit at issue becomes a 'normal' old-age pension.

15. The Austrian Government makes no secret of the fact that the Structural Adjustment Law was carried by budgetary considerations, not least in order to fulfil the 'Maastricht criteria'.

7 — Bundesverfassungsgesetz über unterschiedliche Altersgrenzen von männlichen und weiblichen Sozialversicherten of 29 December 1992 (BGBl. 1992/832).

8 — 51st amendment to the ASVG (BGBl. 1992/335).

9 — 18th amendment to the BSVG (BGBl. 1993/337); 19th amendment to the GSVG (BGBl. 1993/336).

16. Since the Austrian Government is ultimately of the opinion that the 'early old-age pension on account of incapacity for work' constitutes an old-age pension within the meaning of Article 7(1)(a) of the Directive, it is only in the alternative that it submits observations on the consequences of the pensionable age on other benefits, which might constitute a justification.

17. Against the background of an analytical examination of the relevant case-law of the Court of Justice,¹⁰ the Austrian Government holds the view that coherence between the old-age pension scheme and the other benefit schemes to be considered, on the one hand, and the financial aspects, on the other, speak in favour of the early old-age pension on the ground of reduced capacity for work/incapacity for work being categorised as a benefit directly related to the different pensionable ages. The derogation set out in Article 7(1)(a) of the Directive is therefore applicable in any event.

18. The United Kingdom Government begins by stating that it does not see any reason to question the referring court's categorisation of the benefit at issue as a pension on account of incapacity for work. It then goes on to remind the Court that, in order for a benefit to fall under the derogation in Article 7(1)(a) of the Directive, it must be necessarily and objectively

linked to the different pensionable ages. Since the statutory amendment which gave rise to the discrimination at issue was made for financial reasons, it is difficult to see how such an amendment could be necessarily linked to the different pensionable ages.

19. The Commission also considers that the referring court's finding, that the benefit at issue constitutes an invalidity benefit, is correct. By reference to the Court's case-law, the Commission states that derogating provisions must be construed strictly and comes to the conclusion that an early old-age pension granted by reason of the occurrence of an event insured against, other than old age, within the meaning of Article 3 of the Directive, is not an old-age or retirement pension within the meaning of Article 7(1)(a) of the Directive. In order to answer the question whether the unequal treatment at issue constitutes a consequence for another benefit of different pensionable ages, it is necessary to examine whether the inequality is objectively and necessarily linked to the different pensionable ages, noting that considerations of a budgetary nature do not, as a rule, suffice to establish such a link. For all these reasons the Commission submits that Article 7(1)(a) is not applicable.

Assessment

20. The legal categorisation of the benefit at issue is ultimately an assessment of

¹⁰ — Case C-328/91 *Thomas and Others* [1993] ECR I-1247; Case 9/91 *Equal Opportunities Commission* [1992] ECR I-4297; Case C-92/94 *Graham and Others* [1995] ECR I-2521; Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105.

national law that is to be carried out by the referring court. Nevertheless, such an assessment must take place within parameters laid down by Community law, and it is the Court of Justice's task to specify those parameters.

21. Article 3 of the Directive defines its scope. Pursuant to Article 3(1)(a) thereof, the Directive it to apply to

'statutory schemes which provide protection against the following risks:

- sickness,
- old age,
- accidents at work and occupational diseases,
- unemployment'.

22. In order to be able to categorise a benefit under one of the risks, one must ascertain its characteristics. Such objective criteria should also make it possible to draw a clear dividing line between the different risks. In the case of an 'old-age benefit' the essential prerequisite of entitlement is the fact of having reached statutory retirement age. Where an 'invalidity benefit' is concerned, however, there must be a permanent incapacity for work on account of physical or psychological disabilities. In the case of an 'unemployment benefit' it is usually required, for example, that the beneficiary is not in an active employment relationship, but that he is nevertheless, in principle, ready to take up work again, which is manifested by the fact that he puts himself at the disposal of the employment authorities as someone looking for work.¹¹

23. Categorising a benefit can present problems where — as is the case here — it contains elements of one risk in addition to those of another. What can also be confusing is when the term 'pensionable age' is understood — as is the case here by the Austrian Government — to mean an *incapacity for work due to old age* or, as is the case in another context, where it is defined as the date after which the beneficiary is

¹¹ — Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869, and Case C-320/95 *Ferreiro Alvite*. See also the Opinion of Advocate General Alber in *Alvite*, point 19.

deemed *no longer fit for work by reason of old age*.¹²

24. Nevertheless, such circumstances should not be permitted to stand in the way of clear definitions. Even if the statutory retirement age is linked to incapacity for work, whatever form it may take, that involves a presumption which can take the form of a legal fiction. Maintaining the physical ability to work is quite possible despite having attained the statutory retirement age, which, in itself, does not cast doubt on the fact that the pensionable age has been attained. On the other hand, the objective attainment of a certain age is necessary and sufficient.¹³

25. When it comes to the risk of invalidity, the situation is fundamentally different. In this regard a disability which impairs a person's capacity for work is objectively required. This is true of the benefit at issue in the present case. The criterion of age may constitute a significant factor in respect of the risk to be insured. Viewed from the point of view of social policy, one may take the view that reduced capacity for work combined with old age is certainly

more serious.¹⁴ As the benefit to be categorised in the present case demonstrates, considerations of social and employment policy, such as easing the burden of a particular economic sector and the campaign against social inequalities, can also play a role in the conception of a social benefit, without casting doubt on the nature of the benefit itself. The criterion of having attained a minimum age also enables the circle of potential beneficiaries to be defined objectively. Thus it should not be used as a constitutive element when categorising the benefit.

26. The circumstances in which beneficiaries actually receive this benefit, as outlined by the Austrian Government at the hearing, do not, as a rule, preclude such an approach. If in 1998 the share of early old-age pensions on account of incapacity for work in the farmers' social insurance scheme represented 50% of all the early old-age pensions granted, which, when compared with all the pensions granted, represents a share of 39%, whereas the share consisting of 'bone fide pensions on account of incapacity for work' represents only 15%, then this indisputably represents a large share. However, it must not be forgotten that, in the context of the conditions for granting the benefit, the criterion of incapacity for work is linked to that of the protection of professional or trade activity, which results in the necessity of

12 — This is the wording in a Belgian provision, see Joined Cases C-377/96 to C-384/96 *De Vriendt and Others*, cited in note 10, paragraph 21; and the Opinion of Advocate General Alber in *De Vriendt*, I-2107, point 34.

13 — There are clearly other requirements for entitlement to a pension, such as having been insured for a certain amount of time, having paid contributions during the required number of years etc.

14 — A comparable situation is experienced in respect of unemployment amongst older workers, so that one often finds hybrid forms of social benefits for this group of persons (see *Martínez Losada and Others* as well as *Ferreiro Alvide*, both cited in note 11), which are referred to as 'early retirement provisions', as is the case, according to the Austrian Government's submissions, under Austrian law.

establishing incapacity for work¹⁵ in respect of a specific activity — in the agricultural sector. The detailed rules on the conditions for receipt of the benefit are, as expressly confirmed by the Austrian Government, dictated by considerations of social policy. This, however, does not prevent incapacity for work from representing a constitutive element in categorising the benefit.

27. For the rest of my analysis I shall assume that the benefit in question is an invalidity benefit within the meaning of Article 3 of Directive 79/7, so that it does not fall within the scope of the first derogation in Article 7(1)(a) of the Directive, but may perhaps be regarded as 'another benefit' for which the determination of different pensionable ages has 'consequences'.

28. In *Graham*,¹⁶ the Court of Justice accepted unequal treatment between men and women in respect of entitlement to and calculation of certain invalidity benefits under United Kingdom law as consequences for other benefits of the determination of different pensionable ages for men and women. The particular matters at issue in *Graham* were a reduction of the invalidity pension as from retirement age — 60 years for women and 65 years

for men — to the level of the old-age pension actually payable, and an invalidity allowance paid in addition to the invalidity benefit which was granted only to persons who had become incapacitated at least five years before retirement age, that is to say before completing their 55th year for women and their 60th year for men.

29. In its analysis the Court established the following criteria in respect of the 'consequences ... for other benefits' within the meaning of Article 7(1)(a) of the Directive which may justify unequal treatment. As had already been established in *Thomas*,¹⁷ it is limited to the forms of discrimination existing under the other benefit schemes which are *necessarily* and *objectively* linked to the difference in pensionable age.¹⁸ This is so where such forms of discrimination are 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.¹⁹

30. Whereas in *Graham* there was an objective link between the pensionable age and the discrimination at issue because the disagreeable consequence, consisting of a reduction in the benefit, took place directly upon reaching pensionable age, that is not

15 — Note that the terms (reduced) incapacity for work and incapacity to be professionally active are used interchangeably by the Austrian Government.

16 — Cited in note 10.

17 — Cited in note 10.

18 — See *Graham*, cited in note 10, paragraph 11; emphasis added.

19 — See *Graham*, cited in note 10, paragraph 12.

so in the present case. There is no link between the determination of pensionable ages and the minimum qualifying age for the early old-age pension on account of incapacity for work. The conditions for granting the benefit and the age limit fixed for the early old-age pension on account of incapacity for work are unconnected with the general old-age pension scheme. The only point in common between the two schemes is the statutory retirement age, since it is at this time that the early retirement benefit on account of incapacity for work is replaced by the normal old-age pension.

31. By comparison with the statutory retirement age, the minimum age for receipt of the benefit at issue was chosen rather inconsistently. Whereas it was set for women at the age of 55 years, namely five years before statutory retirement age, it was set for men at 57 years, namely eight years before retirement age.

32. At the hearing, the Austrian Government conceded that if the different qualifying ages for the benefit had been set at 50 years for women and 55 years for men, a symmetrical increase of two years in the age limits, that is to say to 52 years for women and 57 years for men, would certainly have presented no problems. The situation in the present case was however different, in that the 'pensionable age' for this benefit was also set at 55 years for women. Since an increase in the age required beyond this 'normal age for an early pension' would have represented a

systematic anomaly under Austrian law, it had to remain unchanged for women, whereas it was increased by two years for men. Furthermore, there is no obligation for a State, which has laid down a difference of five years between the pensionable ages for men and women, automatically to transpose that difference to all the consequences for other benefits.

33. This line of reasoning can however not conceal the fact that, *prior to* the statutory amendments at issue, a *discrimination-free* scheme was in place, the form of which was not dictated by the statutory retirement age since the benefit at issue was unconnected with it.

34. It is therefore not easy to see why the discrimination introduced by the statutory amendment in respect of the minimum age for receiving the early old-age pension on account of incapacity for work should be *necessarily* linked to the statutory retirement age. On the contrary, the earlier statutory scheme under which there was no discrimination and which functioned perfectly well indicates that there is no necessary link between the age required to receive the benefit, which is now different, and the statutory retirement age. The age of 55 which was the same for both men and women was changed neither uniformly nor in a manner proportionate to the statutory retirement age. For this reason it is only with difficulty that the coherence of the schemes may be submitted as a justification for the unequal treatment at issue.

35. As regards the financial equilibrium of the social security schemes concerned, it should be noted that there were economic reasons at the root of the statutory reform. The budgetary considerations mentioned are, however, to be understood as general austerity measures intended to ease the burden on the national budget, which are unconnected with the financing and economic structuring of the social benefits concerned, in the strict sense. The Austrian Government has in any event failed to produce any arguments, general budgetary considerations aside, which show that the schemes were interdependent. Fulfilling the 'Maastricht criteria' was certainly a requirement under Community law. However, this does not justify doing so in a manner which leads to discrimination. The Court has consistently held that budgetary considerations cannot in any event justify discrimination on the ground of sex.²⁰

36. It follows that the difference in the qualifying age for men and women for an early old-age pension on account of incapacity for work cannot be regarded as objectively or necessarily linked to the statutory retirement age. The second alternative provided by Article 7(1)(a) of the Directive cannot therefore be relied upon to justify the unequal treatment. This is the case irrespective of whether Article 7(1)(a) of the Directive authorises Member States merely to maintain existing forms of dis-

crimination or, in certain cases, allows them also to introduce new forms of discrimination. This conclusion leads me directly to the second question which, in my opinion, needs to be answered only in the alternative.

2. *The second question*

37. By its second question, the referring court seeks to ascertain whether the subsequent introduction of different pensionable ages is covered by Article 7(1)(a) and (2) of the Directive.

38. It should first be stated that 'subsequent' designates, first, the period immediately following the date on which the Directive became binding for the Member State. In the case of the Republic of Austria that is the date on which it joined the European Economic Area, namely 1 January 1994, or, at the latest, the time it became a member of the European Community, namely 1 January 1995. On the other hand, the term 'subsequent' refers to the notion that a rule had previously existed which provided for equal treatment.

39. Also to be clearly stated is the fact that, according to the logic of the foregoing analysis, it was not the pensionable age in the strict sense of the term, which was

20 — For example Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 35 et seq.

subsequently set at different ages, but rather the qualifying age for a social benefit for which the pensionable age might have 'consequences'.

40. The applicants take the view that Articles 7(2) and 8(2) of the Directive preclude the subsequent introduction of new exceptions to the principle of equal treatment. The provisions to be introduced or measures to be adopted within the meaning of those articles can be only those which contribute towards the achievement of the fundamental objective of the Directive or evaluations and analyses which may serve to ascertain whether maintaining such exceptions is still justified. They claim that Austrian law is contrary to the Directive.

41. The Austrian Government begins by pointing out that the raising of the qualifying age for men for the early old-age pension on account of incapacity for work may certainly be regarded as a measure implementing the fundamental principle of equal treatment within the meaning of the Directive, because the qualifying age for men had previously been 10 years lower than the 'normal' pensionable age, but only five years lower for women. This difference has now been reduced to three years. In so far as different pensionable ages for the early old-age pension on account of incapacity for work can be justified on the basis of coherence with the normal pensionable

age, this justification is valid for the entire transposition period until the principle of equal treatment has been fully implemented. The national legislature must be free during that period to pursue its national objectives. Should the Court of Justice not subscribe to this view, then it would be necessary to raise the qualifying age for both men and women from 55 to 57 years. This would, however, be diametrically opposed to the Directive's inherent objective of maintaining, where possible, existing favourable treatment for women during the transposition period.

42. Ultimately the Austrian Government considers that a change in the law, by means of which a previously uniform qualifying age for an early old-age pension on the ground of incapacity for work was increased, for men only, by two years, is covered by Article 7(1)(a) of the Directive. At the hearing, the Government explicitly referred to the fact that Article 7(1)(a) contained no indication by which one might infer that it constituted a standstill clause. That article refers to 'the determination of pensionable age' and not to 'the maintaining of pensionable age'.

43. According to the United Kingdom Government, the second question seeks to ascertain whether the derogating provision

in Article 7(1)(a) constitutes a standstill clause, which precludes Member States from introducing any new measure that is discriminatory even if that measure falls within the scope of Article 7(1)(a). The Government answers this question in the negative. Such a standstill requirement cannot be inferred either from the wording of the Directive or from the case-law of the Court.

Commission have all used the concept of standstill requirement or standstill clause, I shall define the content of that concept for the purposes of further analysis.

44. The Commission takes the view that the purpose of the derogation in Article 7(1) is to implement the objective of equal treatment for men and women. It follows that the provision must be construed as a type of standstill requirement. A Member State would be overstepping the freedom accorded it by the provision to adapt its pension schemes, were it to strengthen an existing form of discrimination, or even introduce a new form. This conclusion is supported by the wording of Article 7(2) which refers to maintaining the exclusions, which would indicate that it is permissible to maintain, but not introduce, discriminatory measures.

46. Literally, the concept could be understood as a requirement to maintain the legal situation as it was when the Directive entered into force. However, since the Directive, as is clear from its wording and purpose, is intended to achieve the progressive implementation of the principle of equal treatment in matters of social security, such a static understanding seems to me inappropriate in the present context. A standstill requirement could nevertheless also be construed as precluding any deterioration in the status quo as it was when the Directive entered into force. This certainly corresponds to the meaning attributed to the concept by the parties and is consistent with an objective-orientated interpretation of the Directive. Nevertheless, this conclusion does not answer the question as to the form an amendment must take in order for it to be perceived as an improvement in the situation and thus a step in the right direction.

Assessment

45. Since the Austrian Government, the United Kingdom Government and the

47. It is clear that the Directive's objective is equal treatment for men and women in

matters of social security, even if certain matters have been excluded from the Directive's scope for a period of time which *a priori* has not been defined.²¹ The purpose of the derogation in Article 7(1)(a) of the Directive has been described in the Court's case-law as temporarily maintaining the advantages accorded to women with respect to retirement.²²

48. Those 'advantages accorded to women' can nevertheless have an adverse effect on them in respect of both the calculation of the benefit and its consequences on other benefits. Such adverse consequences for the pension rights of women have been accepted by the Court.²³ The problem is thus the criterion by which to measure the intended step against the Directive's aim.

49. The improvement in women's entitlement to benefits by comparison with an initially less favourable situation, as was the case in *Bramhill*,²⁴ can be regarded,

without the need for elaborate legal analysis, as a step in the direction of the Directive's objective.²⁵

50. In the present case it is substantially more difficult to determine what would constitute progress within the meaning of the Directive. As the Austrian Government has correctly pointed out, under the non-discriminatory legislation which was applicable to the early old-age pension on account of incapacity for work prior to the 1996 statutory amendment, women were placed at a relative disadvantage, because they were entitled to the benefit only five years before reaching statutory retirement age, whereas men were potentially entitled to the benefit ten years prior to reaching normal pensionable age. To raise the qualifying age for the benefit at issue by the same amount for men and women would, it is true, be consistent with an objective defined as absolute equality of treatment, but it would have a greater adverse effect on women. A way out of this conflict of interests is by no means obvious.

51. The starting point of any analysis should be the principle, reiterated in the settled case-law of the Court, that derogations are to be construed strictly.²⁶ Statutory amendments intended to eliminate unequal treatment without at one and the same time achieving complete equality are

21 — See Article 7(1)(a) to (e) of the Directive.

22 — See *Thomas*, cited in note 10, paragraph 9.

23 — See *Graham*, cited in note 10, and Case C-139/95 *Balestra* [1997] ECR I-549.

24 — Case C-420/92 *Bramhill* [1994] ECR I-3191.

25 — The discrimination against women in *Bramhill* was permissible due to the derogation contained in Article 7(1)(d). The benefit at issue was granted to a larger circle of women by virtue of the law, nevertheless without thereby achieving equal treatment.

26 — *De Vriendt*, cited in note 10, paragraph 25, with further references.

permissible only where the scope of any derogation is clearly outlined. Therefore, provisions which maintain unequal treatment, even in a milder form,²⁷ are not precluded *per se*.

53. However, for the purposes of the present case, this problem does not need to be analysed in any further detail because, in accordance with my view on the answer to the first question, the derogation in Article 7(1)(a) of the Directive, which is to be construed strictly, is not materially applicable in the present case.

The effects in time of an interpretative judgment

52. The introduction, on the other hand, of unequal treatment into a scheme of benefits which had previously not been discriminatory represents something quite different. The fact that it had initially been possible to organise a type of benefit in a neutral way can serve as an indication that the derogation was not applied. It cannot be regarded as 'maintaining the exclusions concerned' within the meaning of Article 7(2) of the Directive where, when adopting subsequent laws, the derogation is for the first time invoked as a legal basis. To that effect, nor can Article 7(1) be considered independently from Article 7(2). Even if paragraph 1 only mentions 'the determination of pensionable age', the use of the term 'maintaining' in paragraph 2 implies that the derogation in paragraph 1 must at least be invoked in order to justify a subsequent statutory amendment which is discriminatory. Any subsequent introduction of new forms of unequal treatment would therefore be impossible.

54. The Austrian and United Kingdom Governments suggest limiting to the future the effects in time of the Court's judgment in the event that it holds the Austrian rules to be incompatible with Community law. The Austrian Government refers in this context to the major financial repercussions.

55. According to the settled case-law of the Court, national courts may, and as a general rule must, apply the rules of Community law as interpreted by the Court even to legal relationships arising and established before the judgment ruling on the request for interpretation.²⁸ According to that case-law, any limitation to the principle of the retroactive effect of an

27 — See, for example, *Bramhill*, cited in note 24.

28 — Joined Cases 66/79, 127/79 and 128/79 *Salumi and Others* [1980] ECR 1237, paragraph 9, and Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 16.

interpretative judgment, by analogy with the second paragraph of Article 174 of the EC Treaty²⁹ (now Article 231 EC), can be contemplated, on an exceptional basis, when it is justified by considerations of legal certainty arising from all the public and private interests involved.³⁰ Such is the case where there is a risk of serious economic repercussions as well as uncertainty as to the scope of the Community provisions in question.³¹ Only when both conditions are satisfied can a legitimate need to protect the expectation that a national rule is compatible with Community law be recognised. In this context I must again stress the fact that the risk of financial repercussions per se does not constitute a ground for protecting the expectation that rules will be maintained.

scheme, but rather of general budgetary considerations which served to satisfy the Maastricht criteria, which has no objective link with the coherence of the social security systems. Second, for purely practical reasons, the financial burden involved will be limited, since the present case concerns a pension on account of incapacity for work. An essential criterion in order to qualify for the benefit is a finding of (at least partial) incapacity for work. This is hardly possible retroactively.

56. The conditions required in order to justify limiting the temporal effects of an interpretative ruling on Article 7(1)(a) of the Directive are not satisfied in the present case. It is true that the Austrian Government explains that incompatibility of the current rules with Community law would entail considerable economic burdens. The alleged additional burdens must however be viewed in perspective. First, the statutory amendment at issue was not, as such, the result of the costs of the relevant economic sector of the social insurance

57. As regards protecting the expectation that national rules are compatible with Community law, I would note the following. In respect of old-age insurance, the consequences of the 'necessary link' between a form of discrimination and differing pensionable ages have been clearly established by the Court in its earlier rulings.³² The criteria for assessing the 'necessity', and the 'objective link' have also been established by the Court in a way that leaves no room for legal doubts. In the light of the previous, non-discriminatory rules which were applicable for several years, the Republic of Austria could hardly have had any reasonable doubt that the *introduction* of discriminatory qualifying ages was not *necessary* within the meaning of this case-law.

29 — Case C-228/92 *Roquette frères* [1994] ECR I-1445, paragraph 19.

30 — Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 74 to 75, and Case 24/86 *Blaizot* [1988] ECR 379, paragraph 28.

31 — Joined Cases C-363/93 and C-407/93 to C-411/93 *Lancry and Others* [1994] ECR I-3957, paragraph 40 et seq.

32 — See *Thomas and Graham*, both cited in note 10.

C — Conclusion

58. On the basis of the foregoing considerations, I propose the following answer to the national court's request for a preliminary ruling:

Article 7(1)(a) of Directive 79/7/EEC must be interpreted as not permitting a Member State to apply the derogation for which it provides to benefits which, although granted after a certain age, are nevertheless only granted on account of invalidity (incapacity for work).