OPINION OF ADVOCATE GENERAL JACOBS
delivered on 27 April 1994 *

My Lords,

1. This case once again raises intricate questions relating to the application of the principle of sex equality. The Centrale Raad van Beroep asks the Court a number of questions concerning the exact scope of the relevant Community rules in relation to pension rights for Dutch civil servants. The questions have to be answered in order to decide a dispute between a retired civil servant (Mr Beune) and the Algemeen Burgerlijk Pensioenfonds (hereafter 'the ABP'), the Dutch public body responsible for the granting of pensions to civil servants and for the management of the corresponding funds. Mr Beune, who is married, contends that he is discriminated against on the basis of sex in that he receives a smaller pension from the ABP than female civil servants who are married, by virtue of the way in which the Dutch legislation arranges the combination of a civil servant's pension with the basic social security pension available to all Dutch residents in the framework of the Algemene Ouderdomswet (General Law on Old-age Pensions, hereafter 'the AOW').

* Original language: English.

The Dutch legislation and the questions referred to the Court

2. I will start by describing the basic social security pension (payable under the AOW), because that is at the origin of the problem before the Court. That pension, to which I shall refer as the AOW pension or the basic pension, is available to all Dutch residents (and also, in certain circumstances, to non-residents who have worked in the Netherlands). The pension is fixed by reference to what is considered to be a social minimum, the aim being to protect all older residents against need. It can be claimed from the age of 65, and is calculated on the basis of a maximum insurance period of 50 years.

3. The AOW makes a distinction between married and unmarried persons. Moreover, in the past it also distinguished between married men and married women. Indeed, until 1 April 1985 a married woman could not lay claim to any basic pension in her own right, but was supposed to benefit from

the pension which her husband received when he reached the age of 65, and which amounted to 100% of the social minimum. Unmarried persons, by contrast, received only 70% of this social minimum.

4. With effect from 1 April 1985, the above-mentioned discrimination against married women was eliminated in implementation of Council Directive 79/7/EEC on equal treatment in social security matters. [1] From that date onwards, both men and women who are married receive 50% of the social minimum. [2] The pension rights of unmarried persons were not changed, and remained at 70%.

5. In addition to the AOW pension, civil servants are entitled to a specific pension by virtue of the Algemene Burgerlijke Pensioenwet (General Law on Civil Service Pensions, hereafter 'the ABPW'). Under that statute entitlement to the pension is not limited to civil servants *stricto sensu*, but extends to other categories of persons such as employees of private education institutions which are financed through public funds; to put it shortly, the ABPW appears to apply to most of the people who in one one way or another are in public service in the Netherlands. The ABPW pension is calculated on the basis of two criteria: the period of employment in public service, and the remuneration which the civil servant in question received during the last two years of his employment. The maximum pension, acquired after 40 years of public service, amounts to 70% of his final wage or salary.

6. The pension is paid out by the ABP, the appellant in the national proceedings. As already mentioned, the ABP is a public body which manages the funds used to pay the pension. Although the pension is determined by statute, the ABP enjoys a large measure of independence from the government. Indeed the ABPW pension broadly resembles the occupational pension schemes for private sector employees as they exist in the Netherlands, which are managed by private pension funds operating in a general framework laid down by statute. I shall mention some specific features of the ABPW system when considering the questions raised by the Centrale Raad van Beroep.

7. The problems in this case have their roots in the combination of ABPW and AOW pensions. As the ABPW pension is determined at a relatively high level (a maximum of 70% of the final wage or salary), the

1 — OJ 1979 L 6, p. 24.

2 — It appears that a married person whose husband or wife has not yet reached the age of 65 receives 70% of the social minimum, and that all persons entitled to AOW receive a supplement of at most 30% of the social minimum if their partner is younger than 65. However, these additional pension rights do not seem to be relevant for this case.

Dutch legislature considered it inappropriate to let civil servants enjoy a complete cumulation of both kinds of pension. In the 1950s it took measures to restrict such cumulation. It provided that, to the extent that the AOW pension related to periods of employment in the public service, it should be 'incorporated' ('ingebouwd') into the ABPW pension, which meant that the relevant amounts were effectively deducted from the latter.

8. However, at that time the case of married women posed a problem in relation to this incorporation rule, because they received no AOW pension in their own right, but instead benefited indirectly from the pension received by their husbands. The Dutch legislature considered it inappropriate fully to incorporate the latter pension, as married women did not actually receive it. A compromise solution was found whereby only part of the AOW pension, received by the husband of a woman civil servant, was to be incorporated into her ABPW pension. That part was set at the level of the AOW pension received by unmarried men and women, namely 70% of the social minimum. As a result, for married women the deduction from their ABPW pension by virtue of the incorporation rule amounted to 70% of the deduction which would have been carried out if they had been of the opposite sex.

9. The 1985 revision of the AOW, eliminating the discrimination against married women, again posed a problem for the incorporation of the AOW pension in the case of married women who were civil servants. As was mentioned above, from 1 April 1985 all married persons receive 50% of the social minimum. After an interim settlement, the Dutch legislature laid down new incorporation rules which took effect from 1 January 1986. These new rules raise no questions with respect to periods of employment subsequent to that date. With respect to ABPW pensions corresponding to those periods there is no longer any difference in treatment between married men and women — as there is no longer any difference in their AOW pensions. However, for periods of employment prior to that date, the old incorporation regime is maintained, with the smaller reduction for married women: it appears that the Dutch legislature wished in this way to protect the expectations of married women who had worked in the public service before 1986. This means that married women who were civil servants before 1 January 1986, and who retire after that date, continue to benefit from the fact that the AOW pension incorporation is calculated on the basis of the AOW pension paid to unmarried persons (70% of the social minimum), and not on the basis of the AOW pension which used to be paid to their husbands (100% of the social minimum), in so far as periods of employment in the public service prior

to 1986 are concerned; and this notwithstanding the fact that they now receive a full AOW pension, which is exactly the same as the one received by married men. That is the difference in treatment contested in this case. Married male civil servants who worked before 1 January 1986 are subject to the incorporation of the AOW pension at 100% with respect to these periods of employment, whereas married female civil servants are only subject to an incorporation of 70%.

10. Mr Beune, the respondent in the main proceedings, retired in 1988, having worked all his life in the public service. He was granted an ABPW pension, to which the old incorporation rules apply. He is subject to a maximum incorporation because he had already worked for 40 years for the government before 1986, whilst for the same years also being insured under the AOW. The incorporation — in other words the deduction from his ABPW pension — amounts to HFL 16 286.59 per year. If he were a married woman, the deduction would only amount to approximately HFL 11 300 per year. Mr Beune claims that he is being discriminated against on the basis of sex, and brought proceedings before the Ambtenarengerecht (Civil Service Court) of The Hague, which decided in his favour on the basis of Directive 79/7. [3] The ABP appealed against that decision to the Centrale Raad van Beroep, which has referred the following questions to the Court:

'(1) Is a statutory scheme with regard to old age within the meaning of Article 3(1)(a) of Directive 79/7/EEC to be construed as covering, *inter alia*, a statutory pension scheme (chiefly) for civil servants of the kind laid down in the ABPW ...?

(2) If so, is the principle of equal treatment laid down in Article 4(1) of that directive to be interpreted as conflicting with the existence of differing rules for the combination of the general pension (AOW) and the civil service pension applying to (retired) married male civil servants, on the one hand, and to (retired) married female civil servants, on the other?

(3) If questions (1) and (2) are answered in the affirmative, is a retired male civil servant entitled, in the absence of a national rule abolishing the unequal

3 — Cited above, note 1.

treatment referred to above, to base a claim on the provisions of Directive 79/7/EEC to the effect that, as far as his entitlement to a civil service pension is concerned, he should be treated in the same way as a married female civil servant who is otherwise in the same circumstances as he?

(4) Does the principle of equal treatment referred to in question (3) have the effect that the inequality of pension entitlements as between married male and female civil servants as is at issue in this case is annulled as from 23 December 1984 even in so far as the entitlement to pension is based on periods (that is to say, periods of service as a civil servant) prior to that date?

Is a factor not considered in the judgments of 11 July 1991 in Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* v *Sociale Verzekeringsbank*, of 8 March 1988 in Case 80/87 *Dik and Others* v *College van Burgemeester en Wethouders* [1988] ECR 1601 and of 24 June 1987 in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, namely that the ABPW pension scheme is financed by capital cover ("kapitaaldekking"), still of relevance in this connection?

In the event that the Court should answer question (1) in the negative, the Centrale Raad van Beroep asks it to answer the following questions:

(5) Is the term "pay" in Article 119 of the EEC Treaty to be understood as covering *inter alia* an old-age pension (chiefly) for civil servants as provided for in the Dutch ABPW?

(6) If question (5) is answered in the affirmative and it must be inferred therefrom that the existence of differing rules applying to (retired) married male civil servants and (retired) married female civil servants as regards the combination of the general pension (AOW) and the civil service pension conflicts with the principle of equal pay for men and women enshrined in Article 119 of the EEC Treaty, can a male civil servant rely on that principle so as to ensure that he is treated in the same way as a married female civil servant as regards his pension entitlement?

(7) Are there points of reference to be found in Community law which, in the

event that questions (5) and (6) are answered in the affirmative, enable the effects of the infringement of Community law to be limited both as regards the period as from when a claim to equal treatment can be asserted and as regards the periods during which the pension entitlement was built up?

(3) If so, can the Community rules be relied upon so as to ensure that male married civil servants such as Mr Beune are treated in the same way as female married civil servants? Is there or can there be a temporal limitation of the effects of those rules?

Is it relevant for the purpose of answering this question that the pension scheme at issue is financed by capital cover ("kapitaaldekking")?'

The Community law setting

11. Essentially, the questions raised by the Centrale Raad van Beroep are as follows:

(1) As regards the principle of equal treatment, which rules of Community law (if any) apply to pensions for civil servants, such as those paid pursuant to the ABPW? Is it Article 119 which applies, or is it Directive 79/7/EEC?

(2) Do the incorporation rules, as applied in this case, conflict with the applicable rules of Community law?

12. This case is the first in which the question is asked whether a statutory pension scheme for civil servants which, at first sight, closely resembles a private sector occupational pension scheme, is to be regarded as falling within the scope of the concept of 'pay' laid down in Article 119 of the EC Treaty. It therefore seems to raise once again the vexed question of how to apply the equal treatment rules to occupational pension schemes. The Court has already made clear in *Bilka* that occupational pensions should, under certain conditions, be regarded as pay within the meaning of Article 119. [4] That was confirmed in the *Barber* case, where the Court decided that contracted-out occupational pension schemes, as they exist in the United Kingdom, come within the scope of Article 119, and that in consequence differences in pensionable age are prohibited. [5] However, the Court also considered that for overriding considerations of legal certainty it was necessary to limit the effects in time of

4 — Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607.
5 — Case C-262/88 *Barber* [1990] ECR I-1889.

its judgment. [6] It held that the direct effect of Article 119 could not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of the judgment (17 May 1990), except by those who had before that date initiated legal proceedings or raised an equivalent claim. That aspect of the ruling not being very fully articulated, the Court was subsequently confronted with questions concerning the exact interpretation of this limitation. It recently decided, in the *Ten Oever* case, that the *Barber* limitation applied also to the supplementary scheme in issue in that case; and explained that limitation as excluding (except for those who had already brought claims) all pension benefits corresponding to periods of employment prior to the date of the *Barber* judgment. [7]

19. The impact of the *Barber* case was such that it came to be examined at the intergovernmental conferences leading to the Treaty on European Union. The entry into force of that Treaty had the effect of annexing a new Protocol to the EC Treaty, stating that:

'For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'

That rider to Article 119 entered into force on 1 November 1993.

14. For completeness I should also mention the Protocol on social policy, which is also now annexed to the EC Treaty by virtue of the Treaty on European Union, and which in turn contains in an annex the 'Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland'. Article 6 of that Agreement, paragraphs 1 and 2 of which are largely a copy of Article 119 of the EC Treaty, introduces a new rule in its third paragraph:

'This Article shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers.'

6 — Ibid., paragraphs 40 to 45 of the judgment.

7 — See Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 15 to 20 of the judgment.

It has not been suggested, however, that that provision is applicable in the present case.

15. In addition to those Treaty provisions, consideration must be given to Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. [8] That directive applies, by virtue of Article 3(1), to (among other things) statutory schemes providing protection against old age, which clearly embraces pension rights. Article 4(1) of the directive stipulates that, within its field of application, 'there shall be no discrimination whatsoever on ground of sex either directly, or indirectly ... as concerns ... the calculation of benefits ...'. The directive should have been implemented by 23 December 1984, and it will be remembered that the Court has consistently held that 'a Member State may not maintain beyond 22 December 1984 any inequalities of treatment which have their origin in the fact that the conditions for entitlement to benefit are those which applied before that date'. [9] The Court has also made it clear that the prohibition of discrimination in Article 4(1) may be relied upon by individuals before the national courts in order to preclude the application of any inconsistent provisions of national law. [10]

16. Lastly, I should also mention Council Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, [11] although it has not been referred to by the Centrale Raad van Beroep, no doubt because the period for implementing the directive expired only on 1 January 1993. While Directive 79/7 applies to statutory social security schemes, Directive 86/378 applies to what are called 'occupational social security schemes'. At first sight the combination of the terms 'occupational', apparently in the sense of 'non-statutory', and 'social security' may seem surprising, but occupational pension schemes are clearly an example of the schemes to which Directive 86/378 is intended to apply. The directive defines occupational social security schemes as:

'schemes not covered by Directive 79/7/EEC whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'. [12]

8 — Cited above, note 1.

9 — See Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraph 10 of the judgment, Case 80/87 *Dik* v *College van Burgemeester en Wethouders* [1988] ECR 1601, paragraph 9, and Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen* v *Sociale Verzekeringsbank* [1991] ECR I-3757, paragraphs 28 to 29.

10 — See Case 384/85, cited in note, paragraph 11 of the judgment, as most recently confirmed in Case C-343/92 *Roks*, judgment of 24 February 1994, paragraph 18.

11 — OJ 1986 L 225, p. 40.

12 — Article 2(1).

Those schemes include, in parallel with Directive 79/7, schemes providing protection against old age, i. e. pension schemes. [13] Again, all discrimination on the basis of sex is prohibited, including discrimination in the calculation of benefits. The Member States should have taken the necessary steps to ensure that all the provisions of occupational schemes contrary to the principle of equal treatment were revised by 1 January 1993. [14] However, there is a general exception to this duty in relation to rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme. [15] Such an exception is not contained in Directive 79/7, but it might prove relevant to the scheme in issue here, and I shall return to it below.

17. That is, very briefly, the Community law setting. In what follows I will first examine which of these rules and instruments applies to the problem of the incorporation of the AOW pension in the ABPW pension. Is it Article 119 of the Treaty, or one of the directives, or perhaps a combination of these? Subsequently, I will deal with the question whether the prohibition of discrimination is being infringed. And lastly, if that question receives an affirmative answer, it will be necessary to examine whether Mr Beune can rely upon the relevant rules, and whether there are any temporal limitations on the effects of those rules.

The applicable rules

18. The first question to be examined is whether Article 119 of the Treaty applies to a pension such as the ABPW pension. The Court made it clear in the recent *Moroni* case, when looking at the relationship between Directive 86/378 and Article 119, that one should first examine whether there is any infringement of the latter provision, and that, if such an infringement is established, there is no further need to examine a possible conflict with the directive, which could not in any event limit the scope of Article 119. [16] The same reasoning is of course also valid for the relationship between Directive 79/7 and Article 119.

19. The Court's case-law provides guidance on what kinds of social security schemes are to be regarded as 'pay' in the sense of Arti-

13 — Article 4.
14 — Article 8(1).
15 — Article 8(2).

16 — Case C-110/91 *Moroni* v *Firma Collo*, judgment of 14 December 1993, [1993] ECR I-6591, paragraphs 22 to 24.

cle 119, and which are not. Already in the first *Defrenne* case, the Court indicated that:

'Although consideration in the nature of social security benefits is not therefore in principle alien to the concept of pay, there cannot be brought within this concept, as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers.

These schemes assure for the workers the benefit of a [statutory] scheme, [to] the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.' [17]

20. Whereas *Defrenne I* dealt with a classic, general, government-organized pension, the *Bilka* and *Barber* cases looked into the question whether private, occupational pension schemes could be regarded as part of a worker's consideration. In *Bilka* the Court paid attention to the fact that the scheme in question, although adopted in accordance with the relevant German legislation, was based on an agreement between the company and its personnel, and had the effect of supplementing the general social benefits paid under national legislation with benefits financed entirely by the employer. The Court also considered that the contractual — as opposed to statutory — nature of the scheme was confirmed by the fact that the scheme was regarded as an integral part of the contracts of employment. [18] On the basis of that analysis, the Court came to the conclusion that the scheme in question fell within the scope of Article 119.

21. In *Barber* the Court developed a similar line of reasoning. It emphasized that the contracted-out private occupational schemes at issue were the result either of an agreement between workers and employers or of a unilateral decision taken by the latter, and that they were wholly financed by the employer or by both the employer and the workers, without any contribution being made by the public authorities. Secondly, it was found that the schemes in question were not compulsorily applicable to general cate-

17 — Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445, paragraphs 7 to 8 of the judgment.

18 — Case 170/84 *Bilka*, cited above in note, paragraphs 20 to 21 of the judgment.

gories of workers, but only applied to workers employed by certain undertakings, as a result of which affiliation to those schemes derived of necessity from the employment relationship. Furthermore, notwithstanding the fact that the schemes were established in conformity with national legislation, they were governed by their own rules. Thirdly, the fact that the contributions and benefits were in part a substitute for those of the general statutory scheme could not preclude the application of Article 119, because the Court came to the conclusion that the economic function of the schemes in question was similar to that of the supplementary schemes which exist in certain Member States (such as the one in *Bilka*). [19]

22. On the basis of those rulings, it is possible to draw up a list of the factors which have been regarded as relevant for answering the question which is considered here:

(1) The degree to which the schemes in question are governed by statute has played an important role. The fact that private, occupational schemes operate in a statutory framework is not a barrier to the application of Article 119, as long as those schemes are governed by their own rules. Social security benefits directly governed by legislation would appear to be outside the scope of Article 119.

(2) For pension schemes to be governed by Article 119 it has been thought relevant that there was an element of agreement or concertation between employers and workers within the undertaking or the occupational branch concerned, or a unilateral decision by the employer. The consensual nature of a scheme is confirmed, for example, by the fact that it is regarded as being an integral part of the contracts of employment.

(3) The financing of the schemes has also been considered relevant. If a scheme is wholly financed by the employer, or by both the employer and the workers, that is an argument in favour of the application of Article 119. By contrast, if the public authorities contribute, that is an indication that the scheme is part of general social policy.

(4) Schemes which are applicable to general categories of workers are not covered by Article 119; the notion of 'general categories of workers', however, needs explanation and is considered below.

(5) If the function of the scheme is to supplement general social benefits paid

19 — Case C-262/88 *Barber*, cited above in note, paragraphs 25 to 27 of the judgment. See also Case C-173/91 *Commission* v *Belgium* [1993] I-673.

under national legislation, Article 119 may apply.

23. Not all those criteria can easily be applied to the ABPW pension which is in issue here. The supplementary character of the scheme poses the fewest problems. The ABPW pension supplements the AOW pension, which is the basic, government-financed, social security pension, and it appears in this respect, to be perfectly comparable to the private occupational pension schemes which operate in the Netherlands and apply to various occupational sectors outside the civil service. It is true that the AOW and ABPW pensions are not fully cumulative, since the incorporation rules provide for a deduction from the ABPW pension. However, in view of the fact that in *Barber* the Court decided that contracted-out schemes, which entirely replace the statutory scheme, [20] are not for that reason alien to the concept of pay, this circumstance seems irrelevant.

24. Whether the civil servants benefiting from the ABPW pension are a 'general category of workers' is difficult to answer, since the Court has provided little guidance for determining what this concept involves. That term might refer to the categories identified under some statutory social security schemes, e. g. manual or non-manual workers, or employed or self-employed workers, as distinct from workers employed, for example, in a particular sector, who would not be regarded as a general category. Indeed, in *Barber* the Court observed that the schemes:

'... are not compulsorily applicable to general categories of workers. On the contrary, they apply only to workers employed by certain undertakings, with the result that affiliation to those schemes derives of necessity from the employment relationship with a given employer.' [21]

Although the government is of course not an undertaking, it could be regarded as a single employer. Moreover, affiliation to the ABPW pension scheme does indeed derive of necessity from the employment relationship with the government, or from employment in the public sector.

25. The other criteria — namely the statutory basis of the scheme, its consensual character, and the financing of the scheme — seem to pose the biggest problems. This is largely due to the fact that the scheme applies to civil servants, employed by the government, which is both their employer and the initiator of general social policy,

20 — Case C-262/88, cited above in note, paragraphs 27 to 28 of the judgment.

21 — Ibid., paragraph 26 of the judgment.

including social security. It is therefore necessary to determine in which of those capacities the government acts in the framework of the ABPW pension.

26. At first sight, it might be thought that the statutory nature of the ABPW pension prevents it from being identified as pay. It is not, as was the case in *Barber* and *Bilka*, a private occupational scheme operating in a general framework laid down by law. Indeed, the amounts of pension benefits which civil servants receive are directly determined by statute. However, I doubt whether this is in any way a decisive criterion. As the ABP has pointed out in its observations, in the Netherlands the entire consideration which civil servants receive is directly determined by statute. Does this mean that the principle of equal treatment, laid down in Article 119, does not apply to employment in the Dutch civil service — or in the civil service in general? That is not the view of the Court. Already in *Defrenne II* it held that Article 119 applies:

'... in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, *whether public or private*'. [22]

27. Moreover, it appears that in some Member States, such as the Netherlands, the remuneration of civil servants (including their pension rights) is determined by statute, whereas in others, such as the United Kingdom, it is not. That also is an indication that the statutory character of this remuneration should not be the decisive criterion leading to the non-applicability of Article 119. Whether or not the remuneration of civil servants is determined by statute depends upon the way in which in a Member State the public service is organized. It appears that Article 109 of the Dutch Constitution provides that the legal status of civil servants is to be determined by statute. That the remuneration which Dutch civil servants receive is pay in the sense of Article 119 was confirmed by the Court in the *Liefting* case. [23]

28. As regards pension rights of civil servants, the essential question would therefore seem to be, not whether they are determined by statute, but whether when determining those rights the public authorities act in their capacity as formulators of the State's general social security policy or in their capacity of employer. That was also the view of Advo-

22 — Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 22 of the judgment, emphasis added.

23 — Case 23/83 *Liefting* v *Academisch Ziekenhuis bij de Universiteit van Amsterdam* [1984] ECR 3225.

cate General Slynn, who said, in relation to pension schemes for Dutch civil servants, in the *Liefting* case:

'The fact that a scheme is statutory is not, in my view, the conclusive test. Legislation may be used for different purposes. If it defines rights and obligations under a social security scheme for all workers, or for groups of workers who are not in any sense "employed by" the State, it is no doubt based on "considerations of social policy" rather than on an employment relationship. On the other hand, if by the same machinery, legislation, rules are adopted in respect of those "employed by" the State, those rules may be an expression of social policy, or they may equally spring from and govern the employment relationship. It is true that the latter may indeed at the same time reflect a State's idea of social policy, but that factor cannot in my view take away their essential characteristic as rules governing the employment relationship. If it were otherwise, civil servants could not rely upon the principle of equal pay for equal work contained in Article 119, and there seems to be nothing in that article or in the case-law of the Court to justify such a result. The relevant question is thus whether what is done is done by the State essentially as an employer.' [24]

24 — Case 23/83, cited above in note, p. 3244.

29. With respect to the ABPW pension, the State was indeed acting as an employer in my view. One indicator is the element of concertation or collective bargaining which appears to be part of the system by which the ABPW pension is determined and the corresponding funds are managed. As became clear in the answers to one of the written questions asked by the Court — as to the status of the ABP and its mode of financing — the ABP is a public body which enjoys a large measure of independence from the central government, and the membership of which is composed on a basis of parity, employers and employees being represented equally. Moreover, the ABP says that, although the pension rights of civil servants are determined by statute, no changes are made thereto except by agreement between employers and employees, and that those rights are regarded as forming part of the overall employment conditions. The extent and effects of concertation are contested by Mr Beune. However, it seems to me that, even in the absence of concertation, pension rights can still be characterized as pay, provided that the State, in determining them unilaterally, does so in its capacity of employer.

30. Another indication of the fact that the State acts in its capacity of employer could be the level of the pension benefits. In the case of the ABPW pension, the maximum amount which a civil servant may receive, after a full career in the civil service, is 70% of the wage or salary paid to him in the last two years of his employment before retirement. That appears to be a somewhat generous continuation of his remuneration, rather than a pension aimed at providing basic social security. Again, it will be recalled that

civil servants also benefit from the AOW, which in any case provides the latter kind of pension. It was precisely because the combination of the AOW pension and the ABPW pension would sometimes lead to the retired civil servant receiving even more pension than his last wage or salary that the incorporation rules in issue were introduced.

31. Lastly, one should look at the way in which the ABPW pension is financed. According to the very detailed reply of the ABP to the Court's written question, such financing takes place almost entirely on the basis of contributions paid by the various public sector employers who employ personnel coming within the scope of the ABPW. Those contributions are determined by statute and are set at a certain percentage of the wage or salary paid. Those percentages are regularly adapted in order to take into account that the ABP operates on the basis of capitalization, and that it should have sufficient, but not greater than necessary, funds as a basis for the payment of pensions. A part of the contributions is deducted from the wages or salaries paid to the civil servants.

32. I should also point out that the ABP enjoys a large measure of financial independence. The contributions which the various public sector employers pay to the ABP are taken up in their annual budgets as expenses relating to remuneration, and the loans which the ABP grants to the central government are part of the overall government debt.

33. To conclude, there is little doubt in my mind that the ABPW pension is provided for by the government in its capacity as employer, and not in the framework of its general social policy. The ABPW pension supplements the basic social security pension in very much the same way as is the case with private occupational pension schemes in the Netherlands; it is paid by virtue of the employment relationship; there appears to be concertation with respect to the level of benefits; and the pension is financed by contributions made by the government in its capacity of employer. The rules concerning the incorporation of the AOW pension into the ABPW pension are therefore subject to the principle of equal treatment laid down in Article 119 of the EC Treaty.

34. Before leaving this issue, however, I should like to address the question whether it is the correct approach to examine one by one the various criteria which I have listed, or whether a more straightforward and direct approach can now be adopted. Such an approach, if reflected in the ruling to be given in this case, may be useful in relation to other forms of pension scheme and could introduce greater legal certainty in this complex and financially important subject.

35. It seems to me that the various criteria which I have discussed may have been useful when difficulties were still emerging or still anticipated in distinguishing and classifying different types of pension scheme. Indeed this may explain why different factors have been given different weight in the cases decided to date. It is questionable whether it is still necessary to take account of them all.

Moreover the present case suggests that some of them are by no means decisive. For example the fact that the terms of the scheme are contained in a State measure and that the employer's contributions come from State funds is of no significance in this case since it is merely a consequence of the fact that the employees concerned are employed by the State.

36. Similarly, what seems significant is the fact that the employer funds the benefits by reason of the existence of the employment relationship, whether or not there is any statutory obligation to do so. I have already suggested that the element of concertation was not essential in the present case. It is true that the Court has stressed the contrast between statutory schemes and consensual schemes, not only in *Defrenne I* [25] itself, but as recently as *Ten Oever*. [26] However, as the United Kingdom has pointed out, although in *Ten Oever* the Court attached importance to the fact that there had been collective bargaining prior to the adoption of the scheme there in issue, that fact has not been treated as decisive in other cases. For example, it was not considered relevant when Article 119 was applied to the benefit in issue in *Rinner-Kühn*, [27] nor in relation to the severance payment in *Barber* [28] itself. Moreover, if the existence of prior collective bargaining were to be retained as a criterion for the applicability of Article 119, difficult questions seem bound to arise as to the degree of collective bargaining which is necessary for Article 119 to apply and indeed as to what degree of collective bargaining there in fact was.

37. Similar considerations apply to the funding of the scheme. Again it seems unnecessary to focus too closely on the precise mechanism by which the scheme is funded. As *Barber* makes clear, benefits derived from employment are pay whether they are paid by the employer directly or through a third party, such as a separate trust in England, or through a separate fund. In the present case there is a separate fund which makes the position somewhat similar to that in *Barber*, as the Dutch Government pointed out. But whether or not there are separate funds, the benefits are still part of the employee's remuneration.

38. The truly decisive factor to my mind therefore is simply the fact that the employee's entitlement to the pension arises out of the employment relationship and can be regarded as part of his remuneration, albeit deferred. That after all is the rationale for the application of Article 119 and is the reason underlying the *Bilka* and *Barber* judgments.

39. The adoption of such a straightforward criterion has a number of advantages. It

25 — Case 43/75, cited above in note 22.

26 — Case C-109/91, cited above in note 7.

27 — Case 171/88 *Rinner-Kühn* v *FWW Spezial Gebäudereinigung* [1989] ECR 2743.

28 — Case C-262/88, cited above in note 5.

avoids the arbitrary distinctions which might otherwise arise between different types of occupational scheme. It makes it possible to assimilate occupational schemes in the public and in the private sector, which seems desirable at a time when the dividing line between those sectors is increasingly fluid. And it avoids the risks of legal uncertainty and litigation. Although the extension of Article 119 to a wider range of occupational schemes could increase financial liabilities, the risks are much less since the expiry of the time-limit for implementation of Directive 86/378 and in the light of the possible temporal limitation on claims based on Article 119.

40. If as I have argued Article 119 applies, does it follow that Directives 79/7 and 86/378 are by definition irrelevant for this case? That cannot be simply assumed. It is indeed clear, as already mentioned, [29] that those directives are not capable of limiting the scope of Article 119 of the Treaty. However, it is not in principle excluded that they contain additional obligations for the Member States, with respect to equal treatment, which could apply to the ABPW pension and the incorporation rules. Moreover, the effect in time of the directives may be different from that of Article 119 — I am of course referring to the temporal limitation proclaimed by the Court in *Barber*, to which I shall return below. [30]

41. As regards Directive 79/7, one could theoretically envisage that certain social security schemes — and in particular perhaps a scheme such as the ABPW pension, which is determined by statute, but applies only to civil servants by virtue of their employment relationship — are covered both by the rules of the directive and Article 119. It will be remembered that the directive applies, according to Article 3(1), to 'statutory schemes'.

42. However, I have difficulties in accepting such a cumulation of rules. For one thing, it does not appear to have been the Council's intention, when adopting the directive, to include social security schemes that would also be covered by Article 119. Moreover, by virtue of the fact that the Court has given a wide interpretation to the concept of 'pay' in Article 119, indicating that it also covers certain social security schemes, the relationship between that provision and Directives 79/7 and 86/378 tends to give rise to difficult legal questions. It seems therefore preferable to hold that, with respect to social security schemes covered by Article 119, Directive 79/7 is by definition inapplicable. That would be consistent with the Court's rulings, referred to above, [31] on the relationship between social security and Article 119, which attempt to make a clear distinction between general social security schemes and those which operate in the framework of the employment relationship. I therefore con-

29 — See paragraph 18.

30 — See paragraphs 51 et seq.

31 — See paragraphs 19 et seq.

sider that Directive 79/7 should be regarded as applying only to those general social security schemes which are 'determined less by the employment relationship between the employer and the worker than by considerations of social policy'. [32]

43. However, it is more difficult to defend a similar view with respect to the relationship between Article 119 and Directive 86/378, on occupational social security schemes. That directive explicitly refers, in its preamble, to Article 119; it applies only to schemes not covered by Directive 79/7; and it specifically refers to the employment relationship. [33] Moreover, the occupational pension schemes which the Court held in *Bilka*, *Barber* and the post-*Barber* cases to come within the scope of Article 119 can without any difficulty be brought within the terms of Directive 86/378; indeed the Court recognized in *Barber* itself that that directive might apply to the schemes in issue there. [34] It would therefore be wrong to hold that Article 119 and Directive 86/378 are mutually exclusive.

44. Furthermore, there seems to be no reason why a scheme such as the ABPW pension should not be subject to the rules of Directive 86/378. It will be remembered that the directive applies to schemes 'not governed by Directive 79/7/EEC', which, in my view, is the case for the ABPW pension. It would not be too artificial to hold that that pension, although laid down by statute, is a scheme

'... whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity or occupational sector or group of such sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them ... .' [35]

Of course, the government is not an undertaking, nor is the public service an area of economic activity. But it could certainly be considered an occupational sector or group of sectors. And the scheme could be regarded as supplementing the statutory social security scheme of the AOW.

45. I shall therefore also examine, in what follows, whether the rules of Directive 86/378 contain any additional obligations for the Member States, going beyond those resulting from Article 119, with respect to a pension scheme such as the ABPW.

32 — See note 17.

33 — See Article 2(1), cited above, paragraph 16.

34 — See below, paragraph 51.

35 — See Article 2(1) of the directive.

The prohibition of discrimination

46. The question whether the incorporation rules infringe the prohibition of discrimination laid down in Article 119 should not detain us for long. As the Court held in *Defrenne II*:

'Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included those which have their origin in legislative provisions ... and which may be detected on the basis of a purely legal analysis of the situation.' [36]

That ruling clearly applies to the discrimination between married men and married women resulting from the different statutory rules as regards the incorporation of the AOW pension in the ABPW pension with respect to periods of employment in the civil service prior to 1 January 1986. The fact that only married persons are the subject of differential treatment based on sex does not of course affect that conclusion.

47. The Commission raises the question whether such a difference of treatment can be justified, and refers to the Court's case-law on justification in cases of indirect discrimination. The Court had already explained in *Bilka*, with respect to a difference in treatment between part-time and full-time workers where most of the part-time workers are women, that the prohibition of discrimination applies unless the difference in treatment 'may be explained by objectively justified factors unrelated to any discrimination on grounds of sex'. [37] In the Commission's view, justification should also be possible in cases of direct discrimination. That view is disputed by the United Kingdom.

48. However, I do not think that it is necessary for the Court to decide whether the Commission is correct in this respect. In the case of the incorporation rules applying to the ABPW pension, I see no possible justification unrelated to the discrimination. The continuation of the old incorporation rules with respect to pension benefits corresponding to periods of employment prior to 1 January 1986 appears to have been decided by the Dutch legislature in order to protect the 'acquired rights' of married female civil servants. [38] That cannot in my view justify the discrimination, since that would amount to justifying all cases of discrimination with respect to pension benefits corresponding to

36 — Case 43/75, cited above in note, paragraph 21 of the judgment.

37 — Case 170/84, cited above in note, paragraph 30 of the judgment.

38 — See above, paragraph 9.

periods of employment prior to the elimination of the discrimination. Moreover, it was clearly possible for the Dutch legislature, in 1985, to avoid any discrimination, without affecting the 'acquired rights' of married women: it could have granted the same benefits to married men.

49. The ABP might seek to meet the last point on the ground that it does not have the resources to increase the benefits for married men, since it works on the basis of capitalization. However, budgetary considerations are also not capable of justifying discrimination. As the Court recently held in *Roks*:

'to concede that budgetary considerations may justify a difference in treatment as between men and women ... would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.' [39]

To the extent that the ABP might object that its budget is separate from the overall government budget, I would point out that in its reply to the Court's question the ABP indicated that it is entirely financed by employers' contributions, with one single exception: it receives funds from the State budget in order to compensate for the costs involved in eliminating the discrimination between widowers and widows.

50. Since I take the view that the discrimination in issue plainly falls within the prohibition of Article 119, it is unnecessary to consider the effect of Directive 86/378, which might cover types of indirect discrimination not caught by Article 119. It goes without saying that the same reasoning would have to be applied if the view were taken that a pension scheme such as the ABPW is governed not by Article 119 of the Treaty but by Directive 79/7.

Possible temporal limitations

51. Having thus reached the conclusion that the ABPW pension is to be regarded as a kind of occupational pension, directly governed by Article 119 of the Treaty, I now turn to the issue of a possible temporal limitation on the effects of the judgment to be given in this case. In *Barber*, which related to the difference in pensionable age in the framework of contracted-out pension

39 — Case C-343/92, cited above in note, paragraph 36 of the judgment.

schemes, the Court approached the issue in the following way. It first referred to the serious consequences which could follow from the judgment. It then pointed out that Article 7(1) of Directive 79/7 authorized the Member States to defer the compulsory implementation of the principle of equal treatment with regard to the determination of pensionable age for the purposes of granting old-age pensions and the possible consequences thereof for other benefits; and the Court added that that exception had been incorporated into Article 9(a) of Directive 86/378, which, the Court stated, 'may apply to contracted-out schemes such as the one at issue in this case'. The Court held that, in the light of those provisions, the Member States and the parties concerned were reasonably entitled to consider that Article 119 did not apply to pensions paid under contracted-out schemes and that derogations from the principle of equality between men and women were still permitted in that sphere. The Court considered that, in those circumstances, 'overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question where that might upset retroactively the financial balance of many contracted-out pension schemes'. [40] The Court accordingly ruled that 'the direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law'. In the post-*Barber* cases decided to date, the Court has held that the same temporal limitation applies to other pension schemes, and has explained that limitation as having the effect of excluding claims in respect of periods of employment prior to the date of the *Barber* judgment (i. e. 17 May 1990), except for those who had brought claims before that date: see *Ten Oever, Neath* and *Moroni.* [41]

52. It is obvious that if that limitation also applies to the ABPW pension, Article 119 cannot be relied upon against the discrimination resulting from the incorporation rules, because that discrimination relates exclusively to pension benefits corresponding to periods of employment prior to 1 January 1986. However, in the case of Mr Beune it is not necessary to deal with this question, because he enters into the category of 'workers or those claiming under them who have before [the date of the judgment] initiated legal proceedings or raised an equivalent claim under the applicable national law'. [42] Indeed, although the precise date when he initiated legal proceedings is not given in the order for reference, it appears that the Ambtenarengerecht of The Hague decided his claim on 28 February 1990 — about 3 months before the *Barber* judgment. This means that he can claim the same pension as married female civil servants, with the lesser reduction of the AOW pension, even if the *Barber* limitation is to apply.

40 — Case C-262/88 *Barber*, cited above in note, paragraph 44 of the judgment.

41 — See Case C-109/91 *Ten Oever*, cited above in note, Case C-110/91 *Moroni*, cited above in note and Case C-152/91 *Neath* v *Hugh Steeper Ltd*, [1993] ECR I-6935.

42 — Case C-262/88 *Barber*, cited above in note, paragraph 45 of the judgment.

53. The Commission suggested at the hearing, however, that if the claims were found to be based on Article 119 they should be limited to the part of the pension corresponding to periods of employment subsequent to the date of the *Defrenne II* judgment (8 April 1976), in which the Court for the first time decided that Article 119 has direct effect and at the same time limited the effects in time of its judgment. [43] It will be more convenient to deal with that suggestion later in the argument.

54. Notwithstanding the fact that Mr Beune's claim does not appear to be subject to the *Barber* limitation, the parties in the main proceedings, as well as the Dutch and United Kingdom Governments and the Commission, have addressed a number of arguments to the question whether the *Barber* limitation applies to the ABPW pension, and to the scope of this limitation. The question is expressly raised, in general terms, by the Centrale Raad van Beroep. And it is of course true that the question remains relevant for all those who are in the same position as Mr Beune, but who did not initiate legal proceedings before 17 May 1990. It would therefore seem advisable to deal with the question.

55. It must be said that the *Barber* limitation is stated in terms apparently intended to be of general application. The Court ruled that:

'The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this judgment ...',

except by those who had already initiated proceedings. [44] The Court's rulings in the post-*Barber* cases, clarifying the scope of the limitation, were equally general. [45] It would seem therefore that the same limitation applies to the ABPW pension, to the extent of course that it is characterized as an occupational pension governed by Article 119.

56. Nevertheless, the Commission expresses doubts whether the *Barber* limitation is applicable here. It considers that the factors which justified a temporal limitation in *Barber* and the post-*Barber* cases are not found here. It will be remembered that in those cases the Court referred to the exceptions relating to the pensionable age and to survivors' benefits in both Directives 79/7 and 86/378 as elements which could have induced the pension funds to think that the

43 — See Case 43/75, cited above in note 22.

44 — Above, paragraph 51.

45 — Ibid.

principle of equal treatment was inapplicable. It is true that those exceptions are irrelevant in this case.

57. However, the essential question is whether the Dutch Government should have assumed, before the *Barber* judgment, that the ABPW pension was covered by Article 119 of the Treaty. I think the answer to that question must be negative. In the first place, it was only in *Barber* that the full scope of Article 119 in relation to occupational pension schemes became apparent. I think that the Dutch Government was entitled to consider, in 1985, when it changed the rules relating to the incorporation of the AOW pension, that the ABPW pension was covered neither by the prohibition of discrimination in Article 119 nor by that in Directive 79/7. One should bear in mind, as was pointed out at the hearing, that at that time there was no case-law on the application of Article 119 to occupational pension schemes. There was also no case-law on the interpretation to be given to Directive 79/7, in particular the fact that discrimination in the payment of benefits was prohibited as from 23 December 1984, even in relation to the effects of earlier legislation. And Article 3(3) of Directive 79/7 suggested that the implementation of the principle of equal treatment in occupational pension schemes was a matter which still awaited legislation. [46] Of course, in 1986 there came the *Bilka* judgment; but very shortly after that judgment the Council issued Directive 86/378, which contains in Article 8(2) an exception which appears to govern the incorporation rules of the ABPW. [47] And it goes without saying that after the *Barber* judgment itself, with its temporal limitation, the Dutch Government could again assume that it did not have to change the rules, as the discrimination only exists with respect to periods of employment prior to the date of the judgment, especially given the broad manner in which the Court limited the effects in time of its judgment.

58. I therefore reach the conclusion that in this case also there are overriding considerations of legal certainty which necessitate a temporal limitation. Of course, one could then take the view that, because the origin of those considerations is not exactly the same as in *Barber*, there should be a fresh temporal limitation, based on the date of the judgment in this case. I do not think, however, that that would be appropriate, for obvious reasons of coherence and clarity; nor do I think that that solution would be consistent with the Court's case-law. Indeed, in *Ten Oever* the justification for a temporal limitation was also not exactly the same as in *Barber*, because the former case dealt with survivors' benefits and not with a difference in

46 — See e. g. Joined Cases C-87/90 to C-89/90 *Verholen and Others*, above note 9.

47 — See paragraph 16 above, and paragraphs 51 et seq.

pensionable age. [48] Nevertheless, the Court applied the same limitation as in *Barber*, without in any way drawing attention to any specific justification. [49] Nor is there anything in the post-*Barber* judgments to suggest that the temporal limitation is confined to discrimination resulting from differences in pensionable age or in survivors' benefits.

59. For all practical purposes the answer to the question does not affect the discrimination in issue in this case, in so far as the relevant periods of employment are concerned, since all the relevant periods of employment are in any case situated before both 17 May 1990 (*Barber*) and the date of the judgment in this case (although it might affect claims brought between the two dates). However, it is also desirable to consider what the consequences would be in other cases relating to occupational pension schemes, if it were to be held that a new temporal limitation was necessary whenever the *Barber* and post-*Barber* justifications did not apply but other justifications did. The effect would be, paradoxically, that in all such cases equal treatment would only be compulsory for periods of employment subsequent to the date of such future judgments. That seems to me too generous a postponement of the implementation of the equal treatment principle.

60. Since the conclusion in my view should be that the temporal limitation of *Barber* applies, it is not necessary to deal with the effect of the Protocol on Article 119, annexed to the EC Treaty by virtue of the Treaty on European Union. As mentioned above, [50] that Protocol provides, in a general way, that benefits under occupational social security schemes are not to be regarded as remuneration in the sense of Article 119 if and in so far as they are attributable to periods of employment prior to 17 May 1990 (the date of the *Barber* judgment). In the view of Advocate General Van Gerven, that provision should be interpreted as merely being a 'declaratory determination of meaning adopted in relation to Article 119 and the case-law of the Court'. [51] That is indeed the approach which most fully respects the 'acquis communautaire', which the Treaty on European Union proposes to maintain and build on. [52] However, as I have said, it is not necessary to consider the effect of the Protocol here since, in the first place, Mr Beune

48 — Case C-109/91, cited above in note. It is true that the difference between *Barber* and *Ten Oever* is more limited than the difference between *Barber* and this case, as in both the former cases the discrimination related to the exceptions in Directives 79/7 and 86/378.

49 — The Court did not follow on that point the Opinion of Advocate General Van Gerven, who took the view that a new temporal limitation should be introduced, based on the date of the judgment in that case: see paragraph 51 of the Opinion.

50 — See paragraph 13.

51 — Opinion of 28 April 1993 in Joined Cases C-109/91, C-110/91, C-152/91 and C-200/91 *Ten Oever and Others*, paragraph 23.

52 — Article B of that Treaty. However, pursuant to Article L of the Treaty the Court has no jurisdiction over that provision.

initiated proceedings before the date of the *Barber* judgment, and since in any event the same temporal limitation applies, in my view, to the ABPW pension which forms part of Dutch civil servants' remuneration in the sense of Article 119.

61. I now turn to the question whether Directive 86/378 adds anything to the temporal scope of the prohibition of discrimination. That question is not relevant for Mr Beune, but it could be for other Dutch civil servants, who have not yet initiated proceedings, and who are therefore in my view subject to the temporal limitation of *Barber*, which effectively means that they cannot rely on Article 119 against the discrimination resulting from the incorporation rules. The directive should have been fully implemented by 1 January 1993. Does this mean that from that date — as with Directive 79/7 [53] — all discrimination with respect to the payment of benefits is prohibited, even if it relates to periods of employment prior to 1 January 1986? The answer to that question, in so far as it applies to the case of the ABPW pension, depends on the interpretation to be given to Article 8(2) of the directive, mentioned above, which provides that:

'This Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.'

At first sight, that exception clearly governs the case of the ABPW incorporation rules: the revision of those rules, in the sense of establishing equal treatment, does not extend to pension rights relating to previous periods of membership; those rights remain subject to the old provisions.

62. The Commission argues however that that exception does not apply to the incorporation rules of the ABPW, as regards periods of employment prior to 1 January 1986, because the revision of those rules took place before the adoption of Directive 86/378. I cannot agree with that argument. It amounts to stating that if a Member State adapted its legislation to the principle of equal treatment before the adoption of the directive, it could not rely on the exception, whereas other Member States which only realized equal treatment when the directive obliged them to

53 — See paragraph 15 above.

do so, would be entitled to maintain exceptions for rights and obligations relating to previous periods of employment. That cannot in my view be right. Moreover, the directive does not in any way indicate that the revision to which Article 8(2) refers is necessarily the revision resulting from the implementation of the directive. One should also bear in mind the general rule that if national legislation is in conformity with the provisions of a directive, even before it is adopted, the Member State in question does not have to take any action at all. [54] That seems to be precisely the case for the Netherlands, in relation to the exception of Article 8(2) as applied to the incorporation rules of the ABPW.

63. I therefore take the view that, to the extent that Directive 86/378 also governs the ABPW pension scheme, the exception of Article 8(2) prevents male married civil servants from arguing that the discrimination in respect of periods of employment prior to 1 January 1986 (which are the only periods in issue in relation to that scheme) is incompatible with the directive, in so far as pension benefits paid out after 1 January 1993 are concerned. It follows that the discrimination resulting from the Dutch rules in issue in this case cannot be challenged on the basis of Directive 86/378.

64. The next question is whether, in the event that the Court decides that it is not Article 119 but Directive 79/7 which governs the ABPW pension scheme, any temporal limitation has to be applied. The ABP and the Dutch Government argue that, since the ABP operates on a basis of capitalization, the Court should decide in the interest of legal certainty that the prohibition of discrimination can only be relied upon in relation to pension benefits corresponding to periods of employment subsequent to the date by which the directive was to be implemented, i. e. 23 December 1984. They appear to regard that, not as a temporal limitation on the effects of the Court's judgment to be given in this case, but as a general interpretation of the scope of Directive 79/7. To uphold that interpretation, however, would be contrary to the existing, and firmly settled, case-law, which holds that Directive 79/7 prohibits all discrimination in the payment of benefits after that date even in relation to the effects of earlier legislation. [55] It is true that the element of capitalization may provide some justification for such an approach. None the less, I cannot accept it. It would imply that in the future one should distinguish, in derogation from the existing case-law, between social security pension schemes which operate on a basis of capitalization and those which do not. For the former, the application of the equal treatment principle by virtue of Directive 79/7 would be postponed to

54 — Compare Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23 of the judgment.

55 — See paragraph 15.

the extent that the pension relates to periods of employment prior to 23 December 1984. That would be adding another layer of uncertainty to the scope of the equal treatment rules in Community law. It would probably give rise to difficult questions as to which pension schemes came under this new approach, and which did not.

65. It may, however, be that the thrust of the argument advanced by the ABP and the Dutch Government is that they could not foresee that Directive 79/7 also governed the ABPW scheme, and that overriding considerations of legal certainty justify a new temporal limitation, namely that, although the directive confers rights to equal treatment in respect of prior periods of employment, those rights can be claimed in respect of a scheme like the ABPW scheme only by those who have already brought claims. That view is supported by the fact that in 1985, when the Dutch legislature changed the incorporation rules, the relationship between the relevant rules of Community law and the pension scheme at issue was, as I have shown, [56] by no means clear. Those considerations are valid, independently of how the Court characterizes the scheme. Legal certainty would therefore again seem to be at stake. That, in combination with the financial consequences which fully retroactive equal treatment would entail for the ABP, would justify a fresh temporal limitation.

66. Finally I return to the question whether a claim such as Mr Beune's should be limited, as the Commission suggests, to the part of the pension corresponding to periods of employment subsequent to the date of the *Defrenne II* judgment (8 April 1976). The suggestion may seem at first sight surprising, since the discrimination of which Mr Beune complains did not start until 1988 when he started to receive his pension. However it seems to me that the Commission's suggestion is correct. The very basis of Mr Beune's claim under Article 119 is that his pension is deferred pay, and in contrast with the position in *Barber* it is a claim based on specific periods of past employment. It would be illogical for claims to deferred pay to relate back indefinitely (and possibly even to a date before the entry into force of the Treaty) when claims to non-deferred pay were limited to the date of the ruling giving direct effect to Article 119. Admittedly, the possible financial consequences which influenced the Court in *Defrenne II* have far less force here. Moreover, this temporal limitation introduces a distinction between pension claims based directly on periods of employment and other pension claims which are not so based, which may seem a regrettable compli-

56 — See paragraph 57 above.

cation. Nevertheless the very logic of treating pensions as falling within Article 119 requires in my view that claims based on specific periods of employment should be limited in a way which corresponds to limitations on other claims to equal pay.

Conclusion

67. I am accordingly of the opinion that the questions referred by the national court should be answered as follows, adopting the general formula which, as I have suggested, will be helpful in other cases, to the effect that benefits paid under a pension scheme other than a general social security scheme are pay in every case where the employee's entitlement to the benefits arises out of the employment relationship:

(1) Benefits paid under a pension scheme for civil servants and other employees in the public sector must be regarded as pay within the meaning of Article 119 of the EEC Treaty where the employee's entitlement to the benefits arises out of the employment relationship.

(2) The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to such benefits based on any period of employment prior to the date of the *Barber* judgment (17 May 1990), except in the case of workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under the applicable national law.

(3) Where a claim to such benefits can be based on a period of employment prior to the date of the *Barber* judgment, the direct effect of Article 119 may not be relied upon in relation to a claim based on any period of employment prior to the date of the *Defrenne II* judgment (8 April 1976).