OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 15 July 1993 *

Mr President,
Members of the Court,

1. This case concerns a reference by the Court of Appeal of England and Wales for a preliminary ruling concerning Article 119 of the EEC Treaty. The questions submitted arose in a dispute between Birds Eye Walls Limited ('Birds Eye Walls'), the appellant in the main proceedings, and Mrs F. M. Roberts, the respondent in the main proceedings.

Background

2. Mrs Roberts, who was born on 13 June 1930, was employed by Birds Eye Walls, a subsidiary within the Unilever Group, as from 16 February 1970. On 14 August 1987, at the age of 57 years and two months, she retired on grounds of ill health.

The position with regard to her pension can best be summarized as follows. Since her 60th birthday, that is to say as from 13 June 1990, she has been entitled to a *State pension.* The pensionable age for the State pension is 60 for women and 65 for men. She is also entitled to payments under *Unilever's occupational pension scheme.* [1] The pensionable age under that occupational scheme was at the material time also fixed at 60 for women and 65 for men. [2] It emerged at the hearing that in the meantime the scheme had been adjusted in such a way that men and women between the ages of 60 and 65 can retire on the same terms.

3. In addition to the State pension and Unilever's occupational pension, Mrs Roberts also qualifies for *'top-up' payments* wholly financed by Birds Eye Walls and intended for employees compelled to take early retirement on grounds of ill health before attaining the pensionable age. The main purpose of those top-up payments is to place such employees on the same footing as their fellow employees who are able to carry on working until the age of retirement. Those payments are also aimed at ensuring that men and women receive the same overall

* Original language: Dutch.

1 — A so-called 'contributory contracted-out' occupational pension scheme. The salient feature of contracted-out pension schemes is that they replace the statutory pension in part, at least in the case of affiliated employees. See the judgment in Case 192/85 *Newstead* v *Department of Transport* [1987] ECR 4753, at paragraph 3. A 'contributory' scheme means that employees co-finance the pension with their contributions.

2 — Nevertheless, it is clear from the documents in the file that payments had already been made to Mrs Roberts under Unilever's occupational pension scheme before she attained the age of retirement. The circumstances in which those payments were made are not entirely clear. However, they are not at issue either (paragraph 8 below).

pension (occupational pension and State pension combined).

Although the employees concerned are not strictly speaking entitled to those top-up payments, which they do not co-finance, in practice they receive them systematically. In any case, none of the parties to the dispute denies that the payments in question constitute 'pay' within the meaning of Article 119 of the EEC Treaty (paragraph 11 below).

4. In order to determine the size of those payments, Birds Eye Walls first calculates a 'gross retirement pension' (hereinafter 'GRP') for each employee. For those purposes it takes as a basis the employee's final rate of pay and the number of years of service the employee would have completed if he or she had remained in its employ until the normal age of retirement. The GRP, which evidently exists only in theory, is thus used by Birds Eye Walls to determine the overall amount of the pension to which employees who had to leave the company on health grounds would have been entitled if they had been able to carry on working as usual.

In that regard Birds Eye Walls ensures that the GRP to be taken into account is exactly the same for men as for women. If, therefore, for any reason a particular employee's GRP is lower than that of his or her counterpart of the opposite sex, it is raised to the level of that — actual or notional — fellow employee's GRP. [3]

5. Once the GRP has been calculated, Birds Eye Walls grants by way of top-up payments such part of the GRP as cannot be claimed by the employee concerned under other pension schemes. Birds Eye Walls thus pays to employees compelled to leave the company on health grounds the difference between their GRP, on the one hand, and the State and/or occupational pensions for which they qualify, on the other.

6. When that principle is applied in practice, however, a distinction is drawn according to the sex of the recipient. For the sake of clarity, the full period during which pension is paid, that is to say the period commencing with retirement on health grounds and ending with the decease of the recipient, can be subdivided into three separate periods.

From the time they leave the company until their 60th birthday (first period) neither men nor women are entitled to a State pension. Any payments which they receive under Unilever's occupational pension scheme [4] may differ according to the sex of the recipient. However, the top-up payments granted by Birds Eye Walls make up the difference, so that male and female ex-employees ultimately receive the same amount in (occupational) pension payments.

3 — The same adjustment was made in determining Mrs Roberts' GRP. At the time the respondent's GRP was UK £1 295 per annum, whereas her male counterpart's GRP would have been UK £1 302 per annum whereupon Birds Eye Walls raised her GRP to UK £1 302.

4 — Footnote 2 above

Between the age of 60 and 65 (second period) women are already entitled to a State pension, unlike men. For that reason, Birds Eye Walls reduces the top-up pension payments to female ex-employees by the amount of the State pension, whereas male pensioners continue to receive such top-up payments as they were in receipt of before their 60th birthday. The result is that female ex-employees and their male counterparts continue to receive the same overall pension, but that — in contrast to the preceding period — men receive higher top-up payments than women.

From the age of 65 (third period) men are also entitled to a State pension. Birds Eye Walls accordingly reduces their top-up payments as well by the amount of the State pension for which they qualify. To the extent that during this period men receive a higher State pension than their female counterparts, the top-up payments they receive from Birds Eye Walls are lower than those paid to their female counterparts.

7. To summarize, the Court of Appeal finds that, in making top-up payments, Birds Eye Walls draws a distinction between men and women which is indisputably and directly based on sex. Since, however, it is also apparent that 'the object and effect of such treatment [by the appellant] are to equalize the total pension income (State pension plus occupational pension) receivable by the respondent and her male comparator', the question referred to the Court of Justice by the Court of Appeal is, first and foremost, whether or not such treatment is contrary to Article 119 of the EEC Treaty.

Before considering Question 1, I would refer to the Report for the Hearing which contains a more detailed account of the facts of the case and sets out in full the questions submitted for a preliminary ruling.

Question 1

Scope of the dispute

8. It is necessary, in my view, to clarify the exact scope of the dispute in the main proceedings which has led to this question being raised.

The existence of differences in pensionable age between men and women, applied at the time under Unilever's occupational pension scheme and still in force with regard to the State pension (paragraph 2 above), is not at issue in these proceedings. Nor are the concept and calculation of the GRP, as expounded above, challenged by Mrs Roberts. Lastly, Mrs Roberts does not challenge the manner in which Birds Eye Walls makes top-up payments to ex-employees until the

age of 60 (first period, paragraph 6 above) and as from the age of 65 (third period, paragraph 6 above).

9. However, the manner in which Birds Eye Walls calculates the amount of the 'bridging pension', that is to say the pension for ex-employees aged between 60 and 65 (second period, paragraph 6 above), is regarded by Mrs Roberts as contrary to Article 119 of the EEC Treaty. Mrs Roberts contends, to use the words of the Court of Appeal,

'that the fact she receives a payment from a third party (in this case the State) which a male comparator does not receive is *nihil ad rem* and cannot affect the obligation of the employer under Article 119 to pay her and her male comparator equally'.

10. As we know, the Member States must, in accordance with Article 119 of the EEC Treaty, ensure the application of the 'principle that men and women should receive equal pay for equal work'. The Court has frequently had occasion to rule on the precise scope of Article 119. Since its judgment in Case 80/70 *Defrenne I*, the Court has given a broad interpretation to the concept of 'pay', [5] while it has been established since the judgment in *Defrenne II* [6] that Article 119 applies directly

'to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question'. [7]

The Court has also held that the requirements laid down in Article 119 do not apply to discrimination resulting from the application of social security systems and benefits, in particular retirement pensions, [8] but they do apply to contracted-out occupational pension schemes. [9] So far as such schemes are concerned, the Court has stated that

'it is contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.' [10]

11. None of the parties to the dispute denies that the bridging pension at issue here constitutes 'pay' within the meaning of Article 119 of the EEC Treaty and that, in the proceedings before the national court, Mrs Roberts can rely directly on Article 119 in challenging the manner in which Birds Eye Walls grants that pension. Having regard to the consideration that the Court takes a broad

5 — Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445, at paragraph 6, most recently followed by the Court in its judgment in Case C-173/91 *Commission* v *Belgium* [1993] ECR I 673, at paragraph 13.

6 — Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455.

7 — Case 129/79 *Macarthys* v *Smith* [1980] ECR 1275, at paragraph 10, followed by the Court in its judgment in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

8 — *Defrenne I*, at paragraph 12.

9 — *Barber*, at paragraph 28.

10 — Judgment in *Barber*, at paragraph 32. The Court, however, restricted the effect of its judgment in time. The interpretation of that temporal restriction is the central issue in Cases C-109/91 *Ten Oever*, C-110/91 *Moroni*, C-152/91 *Neath* and C-200/91 *Coloroll*, which are pending before the Court. See in that connection my Opinion of 28 April 1993.

approach in interpreting the concept of 'pay' and has in the past already stated that Article 119 is applicable to both contracted-out [11] and non-contracted-out [12] occupational pension schemes, I would go along with the view taken by the parties.

The dispute between the parties turns on whether the manner in which Birds Eye Walls grants a bridging pension to ex-employees who have been compelled to leave the company on health grounds and are aged between 60 and 65 constitutes direct or indirect discrimination against female ex-workers and whether or not such discrimination can be justified. In that regard Mrs Roberts and the Court of Appeal take the view that only indirect discrimination is capable of being justified, whereas the Commission and Birds Eye Walls consider that both direct and indirect forms of discrimination are capable of justification.

Does the possibility of justification on objective grounds depend on whether discrimination is direct or indirect?

12. In my view, the proposition that, in determining the possibility of justifying discrimination, [13] a crucial factor is whether such discrimination is direct or indirect, [14] is problematic.

Birds Eye Walls contends that the Court has hitherto accepted the existence of grounds justifying sex-based discrimination only in cases of indirect discrimination, [15] whereas it has so far treated cases of direct discrimination as incapable of being justified. [16] I do not dispute that but, in contrast to Mrs Roberts, the Court of Appeal and the United Kingdom, I do not consider it possible to draw the inference that direct discrimination can *never* be justified by objective factors. The Court itself has never drawn any such inference. On the contrary, even though in *applying* its concept of discrimination in specific cases of sex-based discrimination the Court has considered only indirect discrimination to be capable of justification, the fact still remains that in *defining* that concept of discrimination the Court in fact refers to the possibility of justification in very general terms. As the Court has consistently held, discrimination is not permissible only where the party accused of it is

11 — *Barber*.

12 — Case 170/84 *Bilka* v *Weber von Hartz* [1986] ECR 1607.

13 — According to the Commission, it is more appropriate to refer to the justification of an inequality of treatment (whether direct or otherwise) than to the justification of discrimination. In its view, discrimination is by definition the unequal treatment of comparable situations (or the equal treatment of situations that are not comparable) *which is not capable of being objectively justified*. I concede that such terminology would be more appropriate but here I have nevertheless adhered to the terminology established in the case-law of the Court, in which the terms 'unequal treatment' and 'discrimination' are used interchangeably. See, for instance, paragraph 32 of the *Barber* judgment, where the Court states that 'Article 119 prohibits any *discrimination* with regard to pay as between men and women, whatever the system which gives rise to *such inequality*' (emphasis added).

14 — That distinction is already apparent in the judgment in *Defrenne II*, footnote 7 above, at paragraph 18.

15 — Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, at paragraphs 10 to 15; *Bilka*, cited above, at paragraph 29; Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2757, at paragraph 12; Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591, at paragraphs 15 and 16.

16 — *Barber*, at paragraph 32, and Case C-177/88 *Dekker* v *VJV-Centrum* [1990] ECR I-3941, at paragraph 12.

'shown to have treated like cases differently, thereby subjecting some to disadvantages as opposed to others, without such differentiation being justified by the existence of substantial objective differences'. [17]

Apart from that, in its judgment in Joined Cases 117/76 and 16/77 [18] the Court ruled, with regard to a prohibition of discrimination laid down in the EEC Treaty, [19] that

'this does not alter the fact that the prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.'

Recently, in a judgment of 7 July 1993, the Court defined the principle of equality in the following terms:

'As the Court has consistently held, the principle of equal treatment viewed as a general principle of Community law requires that similar situations shall not be treated differently and that different situations shall not be treated in the same manner unless such differentiation is objectively justified'. [20]

13. Thus it cannot reasonably be argued that in the past the Court restricted the possibility of justifying discrimination to cases of indirect discrimination. Nor is it desirable, in my view, that the Court should do so in the future, the reason being that direct and indirect discrimination cannot in all cases be distinguished from one another with the same degree of clarity. That is strikingly illustrated by the case now before the Court. According to the Commission, Birds Eye Walls' policy with regard to pensions can be analysed as giving rise to either direct or indirect discrimination. Indeed, it is possible to focus on the fact that the appellant pays to all female ex-employees aged between 60 and 65 a lower bridging pension than to their male counterparts, which presupposes direct discrimination. By the same token, however, emphasis can be laid on the fact that it calculates the bridging pension for all its ex-employees in the same way, namely by deducting from their GRP such pension payments as they can claim from the State or from Unilever — except that the 'chance' result of this method of calculation is that for five years women receive a lower bridging pension. Viewed in those terms, Birds

17 — Joined Cases 17/61 and 20/61 *Klöckner-Werke AG and Hoesch AG* v *High Authority* [1962] ECR 325, at p. 345, which follows earlier rulings such as that in Case 14/59 *Pont-à-Mousson* v *High Authority* [1959] ECR 215, at p. 231. The judgment has itself been followed by the Court, for instance in Case 283/83 *Racke* v *Hauptzollamt Mainz* [1984] ECR 3791, at paragraph 7.

18 — Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St Annen* [1977] ECR 1753.

19 — Specifically, the prohibition under the second subparagraph of Article 40(3) of the EEC Treaty. The same holds true, however, as regards the prohibition of discrimination under Article 119 of the Treaty.

20 — Case C-217/91 *Spain* v *Commission* [1993] ECR I-3923, at paragraph 37.

Eye Walls' policy with regard to pensions constitutes indirect discrimination. [21]

It would therefore seem quite arbitrary, in cases such as this, to make the possibility of justifying a clear inequality of treatment dependent on whether that inequality is direct or indirect.

14. However, even leaving aside the uncertain dividing line between direct and indirect discrimination, I do not consider it desirable to arrive at the categorical conclusion that discrimination directly based on sex cannot be justified. In that connection the Commission refers to the proceedings for a preliminary ruling currently pending before the Court in Case C-32/93 *Webb*. That case is concerned with the dismissal of a woman who, after she was taken on to replace a pregnant employee, discovered that she was pregnant herself. Although dismissal on account of pregnancy indisputably constitutes direct discrimination, [22] the possibility must not be ruled out that such discrimination in a case such as *Webb* might nevertheless be justified having regard to the specific circumstances of the case.

At the hearing reference was made to other examples of situations in which direct discrimination based on sex could none the less be justified. [23] I share the view taken by Birds Eye Walls and the Commission that, exceptionally, situations of that kind may arise.

Existence of an objective justification

15. So far as concerns the actual question of justification on objective grounds, I propose in the first place briefly to consider Mrs Roberts' contention that the fact that she receives a payment from a third party, in this case the State, to which her male counterpart is not entitled (paragraph 9 above), is not relevant to the interpretation of the employer's obligation under Article 119 to provide equal pay for men and women. I cannot go along with that contention since it creates a further inequality in that a company such as Birds Eye Walls would then pay a significantly higher amount by way of pension for female ex-employees aged between 60 and 65 than for their male counterparts. Indeed, the retirement pension which Mrs Roberts receives from the State is to a large extent co-financed by Birds Eye Walls, as her employer. Accordingly, it cannot be designated as a payment 'from a third party' without further qualification. If, in granting a bridging pension, Birds Eye Walls were not permitted to take account of the

21 — Birds Eye Walls even maintains, primarily, that there is no discrimination at all. In support of that contention, the appellant submitted at the hearing that it would also reduce the pension of a male employee who as from the age of 60 acquired entitlement to a — *ex hypothesi* foreign — State pension. However, it has never been alleged that this was more than a mere possibility, in other words that Birds Eye Walls ever actually made such a reduction in the case of a man aged under 65.

22 — *Dekker*, cited above, at paragraph 12.

23 — Those examples were concerned with unequal treatment arising from the objective requirements inherent in the pursuit of a particular occupation (failure to recruit a highly-pregnant ballet dancer for employment in the near future or female applicants for the surveillance of violent male convicts: judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 3 of the operative part) or from particular objective circumstances which make discrimination on grounds of sex necessary or acceptable (exclusion of male candidates where an elderly lady seeks a female companion; the grant of an allowance for a taxi exclusively to female employees who work at night, on the ground that in contrast to their male counterparts they are harassed on their way home).

amount of the State pension which is paid to recipients — even though it is co-financed by the company — it would be paying twice over as regards the pension payable to female ex-employees aged between 60 and 65 (once in respect of the State pension and once in respect of a full bridging pension), but only once as regards the pension payable to their male counterparts (who have not yet acquired entitlement to a State pension).

16. That brings me to the appraisal of the justification relied upon by Birds Eye Walls. In its view, the deductions made in the case of female ex-employees from the age of 60 constitute unequal treatment which is permissible on the ground that their aim is to prevent such women from receiving a higher overall pension (occupational pension and State pension combined) than their male counterparts. According to the appellant, the amounts deducted prevent any inequality from arising between men and women as regards pension payments to ex-employees.

I am strongly swayed by that argument. It seems to me that an inequality of treatment with regard to bridging pensions which, in the words of the national court, has 'the object and effect' of removing or preventing another inequality of treatment, namely in regard to the overall amount of pension payments, and which thus leads to equal treatment in practice, is objectively justified. That is all the more so in a case such as this, since the difference which is at issue and which is applied by the State between the pensionable age for women and that for men, and which lies at the root of the inequality of treatment in regard to the overall amount of pension payments, is merely 'a discrimination which is currently tolerated in respect of retirement pensions but which clearly the Community is working, albeit slowly, to eliminate'. [24] During the oral procedure the Commission was right in pointing out that it is absolutely necessary to prevent such a provisionally authorized derogation from the principle of equal treatment from being elevated to an objective of Community law.

17. In my view, the foregoing considerations are not in any way weakened by the position taken by the Court in *Barber*, to the effect that

'Article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality' (paragraph 32)

and that

'the application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of

24 — Opinion of Advocate General Sir Gordon Slynn in Case 151/84 *Roberts* v *Tate & Lyle* [1986] ECR 703 at p. 710

a comprehensive assessment of the consideration paid to workers' (paragraph 35).

The problem which arose in the *Barber* case differs from that under consideration in this case. The *Barber* case was concerned with the incorporation, which was rejected by the Court, in an occupational pension scheme of a difference between the pensionable age for men and that for women which was applied by the State and was provisionally authorized. In other words, it was concerned with the conditions governing the age for entitlement to occupational pension schemes, a problem which is wholly unconnected with the problem at issue in this case, namely concurrent payments in respect of one and the same State pension. Furthermore, and above all, the practice rejected by the Court in that case had the effect of *reinforcing* the inequality between men and women tolerated with regard to State pensions. These proceedings, on the other hand, are concerned with a bridging pension under an occupational scheme which is calculated in such a way as to *eliminate* that inequality. That difference, in my view, is fundamental: as is apparent from the foregoing, the method of calculation at issue here is aimed at ensuring equal pensions for men and women (paragraph 16 above) and also at preventing a situation in which an employer has to pay contributions twice over for a woman's pension and only once for that of a man (paragraph 15 above). In the result, the principle of equal treatment is thus implemented in respect of each element of the pension scheme and, more particularly, as regards both contributions by the employer and payments to the employee.

Conclusion

18. Since I consider that Birds Eye Walls can justify on objective grounds the policy with regard to pensions at issue here, I have come to the conclusion, in reply to Question 1, that an employer is not in breach of Article 119 of the EEC Treaty if, taking account of the difference between the pensionable age for men and that for women applied by the State and authorized for the time being, he operates an occupational scheme involving payment of a bridging pension using a method of calculation designed to ensure the same overall retirement pension (occupational pension and State pension combined) for male and female ex-employees.

Questions 2 and 3

19. Question 2 is connected with the choice which the United Kingdom's social security system gives married women either to pay their pension contributions in full, entitling them to a full retirement pension in their own right, or to make payments at a reduced rate, entitling them to a reduced retirement pension only (or none at all).

In the case of women who, like Mrs Roberts, have opted for the second alternative and do not therefore receive the State pension at the

full rate, Birds Eye Walls nevertheless calculates the bridging pension as if that were the case. More specifically, the appellant reduces the amount of the bridging pension paid to such women from the age of 60 not by the amount that they *actually* receive from the State but by the amount of State pension that they *could have* received if they had paid pension contributions at the full rate. The Court of Appeal wishes to ascertain the effect of that practice on the Court's answer to Question 1.

Although Mrs Roberts is not therefore entitled to a State retirement pension on the basis of the pension contributions which she paid during her employment, she nevertheless receives from the State a widow's pension equal in amount to a full retirement pension. In its third question, the Court of Appeal seeks to ascertain whether that factor is capable of affecting the answers to Questions 1 and 2.

20. After reading Question 3, the Court may well be inclined to refuse to answer Question 2 inasmuch as it is purely hypothetical. [25] The amounts deducted by Birds Eye Walls from Mrs Roberts' bridging pension would in fact seem to correspond to the State pension actually received by Mrs Roberts, namely her widow's pension. Nevertheless, I propose to deal with Question 2. Since the State grants retirement and widow's pensions on a separate legal basis, [26] that question seems to me to be of more than hypothetical interest.

21. If a company such as Birds Eye Walls were allowed to deduct from the bridging pension paid to an ex-employee such as Mrs Roberts only the amount of State pension that she *actually* receives, the company would be obliged in the case of that ex-employee to make up for the loss of State pension arising directly from her decision to pay contributions at a reduced rate.

I agree with Birds Eye Walls, the Commission and the Court of Appeal that this would constitute an unfair advantage for married female ex-employees who have opted in favour of paying contributions at a reduced rate. Although they have paid considerably lower contributions, they would receive the same overall retirement pension (occupational pension and State pension combined) as those — men, unmarried women and some married women — who have always paid pension contributions at the full rate. Such an interpretation of Article 119 of the EEC Treaty would encourage all married women employed by Birds Eye Walls and similar companies to opt for payment at the reduced rate, which certainly cannot be the purpose of Article 119. Furthermore, that interpretation would be contrary to the principle of equality which the Court still regards as 'one of the fundamental principles of Community law' (paragraph 12 above).

25 — Article 177 of the EEC Treaty does not permit the Court to answer purely hypothetical questions. See the judgment in Case C-83/91 *Meilicke* v *ADV/ORGA F. A. Meyer AG* [1992] ECR I 4871, at paragraphs 25, 32 and 33.

26 — The question would in any event be of more than hypothetical interest if it appeared that State retirement and widow's pensions were cumulative. On that point, however, the documents in the file do not offer a definitive answer

22. It seems to me, therefore, that in granting a bridging pension to married female ex-employees who have opted in favour of paying contributions at a reduced rate, and who consequently receive a reduced State pension, a company such as Birds Eye Walls may nevertheless deduct the amount of State pension that those employees could have received if they had paid pension contributions at the full rate. It is evident that the company may do so *a fortiori* if the female ex-employee in question appears to receive from the State a widow's pension equal in amount to a full retirement pension.

23. In reply to Questions 2 and 3, therefore, I have come to the conclusion that the answer to Question 1 is not affected by the fact that during her employment a female ex-employee has opted in favour of paying contributions at a reduced rate, and consequently receives a reduced State retirement pension only, or none at all, whether increased or not by a widow's pension.

Conclusion

24. In conclusion, I propose that the Court answer the questions submitted by the Court of Appeal as follows:

(1) An employer is not in breach of Article 119 of the EEC Treaty if, taking account of the difference between the pensionable age for men and that for women applied by the State and authorized for the time being, he operates an occupational scheme involving payment of a bridging pension using a method of calculation designed to ensure the same overall retirement pension (occupational pension and State pension combined) for male and female ex-employees.

(2) If during her employment a female ex-employee has opted in favour of paying pension contributions at a reduced rate, her employer is not in breach of Article 119 of the EEC Treaty if he nevertheless calculates the overall retirement pension referred to in the previous question on the basis of the State pension which the female ex-employee concerned could have acquired if she had paid her pension contributions at the full rate. That is so *a fortiori* where the ex-employee concerned is in receipt of a widow's pension equal in amount to a retirement pension.