# OPINION OF ADVOCATE GENERAL DARMON

delivered on 25 May 1993 *

*Mr President,*
*Members of the Court,*

1. The Arbeidsrechtbank te Antwerpen has referred to the Court three questions for a preliminary ruling, the first of which concerns the compatibility with Directive 79/7/EEC of the Council of 19 December 1978 [1] (hereinafter 'the Directive'), and more particularly with Article 4 thereof, of a method for calculating the retirement pension which takes as the annual basis 1/45 of salaries received in the case of men and 1/40 in the case of women, and where the pensionable age is the same in both cases. The national court then asks the Court whether paragraph (1) of that article has direct effect and, if so, what are the rules to be applied to the disadvantaged persons.

2. I shall briefly outline the facts and the Belgian legislation, referring for a fuller account to the Report for the Hearing. [2]

3. Mr van Cant wished to receive an old-age pension at the age of 65. He therefore applied to the National Pensions Office in Brussels (hereinafter 'the Pensions Office') on 22 June 1990 for a retirement pension with effect from 1 June 1991, the first day of the month following the month of his 65th birthday.

4. The Pensions Office, by decision of 26 October 1990, awarded him an annual pension of FB 465 334, calculated on the basis of the 45 most advantageous calendar years of his employment record. [3]

5. Mr van Cant lodged a complaint against that decision and instituted proceedings in the national court on the ground that his pension should have been calculated, like that of female workers, on the basis of the 40, rather than the 45, most favourable years.

6. As the Belgian national legislation on old-age pensions has recently been amended, I shall examine the two most recent regimes. The first, resulting from Royal Decree No 50 of 24 October 1967 [4] and applicable until 1 January 1991, fixed the normal pensionable age at 65 years for men and 60 for women. That distinction was reflected in a differentiation as regards the level of benefits calculated on the basis of a denominator that could not be higher than 45 for men and 40 for women. In that regard, Article 4 of the Royal Decree provided:

* Original language: French.

1 — Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

2 — I — Facts and written procedure.

3 — For the years prior to 1955, however, the salary was calculated at a flat rate.

4 — *Staatsblad*, 27 October 1967, p. 11258.

'The retirement pension shall be payable on the first day of the month following the month during which the person concerned applies for it, and at the earliest:

1 (a) either the first day of the month following the month during which he or she reaches normal pensionable age: 65 years in the case of a man or 60 years in the case of a woman ...'.

Article 10 of the Royal Decree specified the methods of calculation as follows:

'Entitlement to a retirement pension shall be acquired, for each calendar year, at the rate of a fraction of actual, notional or flat-rate gross salaries ... taken into the extent of:

(a) 75% for a worker whose spouse has ceased all occupational activity ...,

(b) 60% for other workers ...

However, the denominator may not be higher than 45 for a man or 40 for a woman.'

7. Since 1 January 1991 the new regime, introduced by the Law of 20 July 1990, [5] allows all employed workers, irrespective of sex, to take retirement at the age of 60. Article 2 provides that:

'The retirement pension shall be payable on the first day of the month following the month during which the person concerned applies for it and at the earliest on the first day of the month following the month during which he or she reaches the age of 60 years ...'.

8. However, the method of calculation prescribed in Article 10 of Royal Decree No 50 is maintained. In that regard, Article 3 of the new law provides:

'... the fraction corresponding to each calendar year shall have one as its numerator and 45 or 40 as its denominator, according to whether the person concerned is a man or a woman ...'.

9. It may be said that the new legislation establishes equality for men and woman as regards pensionable age, only a lower age limit being defined, but leaves intact the previous rule of calculation by retaining a denominator of 45 for men and 40 for women.

10. This contrast between a unified age and a different method of calculation was the source of considerable discussion in Belgium. The parliamentary debates concerning the new bill [6] showed that the Minister of Pensions, who had introduced the bill, was fully aware of the argument that once pensionable age was the same for men and women the fact that the previous rules for calculating the benefits were maintained exposed the provision to the risk of being incompatible with Article 4(1) of the Directive.

5 — *Staatsblad*, 15 August 1990, p. 15875.

6 — See Annex II to the written observations of the Commission.

11. Faced with a choice between a generalized calculation in forty-fifths, which would have been unfavourable to women, and a uniform calculation in fortieths, which would have risked upsetting the financial equilibrium of the retirement pension schemes, however, the legislature decided to maintain the status quo.

12. Those queries regarding the compatibility of the national legislation with Community law lead me to outline briefly the relevant provisions of the Directive, namely Articles 4 and 7.

13. Article 4 lays down the principle of equal treatment and provides that it

'means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

...

— the calculation of benefits ...'.

14. Article 7 makes provision for Member States which are not in a position to apply such a principle immediately to exclude from the Directive's scope:

'(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.'

15. It will be necessary for the national court, before undertaking any substantive examination of the compatibility of rules such as those under consideration, to determine, first whether they fall within the scope of Article 3 of the Directive and, secondly, whether they give rise to discrimination against men.

16. As regards the first point, the Court has clearly established that

'Social security schemes or benefits, in particular retirement pensions, directly governed by legislation ...' [7]

cannot be brought within the concept of pay as defined in Article 119 of the Treaty, but come under Directive 79/70.

17. As regards the second point, I would note that the discrimination is the result of a difference in the calculation of the salaries received by a person depending on whether that person is a man or a woman, although the pensionable age is the same. The national court has already taken the view in that regard that the national rules were discriminatory. [8]

18. The main problem therefore consists in determining whether the measure in question falls within Article 4 of the Directive, and must therefore be required to ensure equal treatment, or whether it falls under the derogation provided for in Article 7. Although the national court does not expressly refer to

7 — Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445, paragraph 7.

8 — Page 8 of the reference for a preliminary ruling. A woman in the same situation as Mr Van Cant, with the same employment record, would have received a pension that was FB 31 000 per annum higher than his own.

that article, it seems necessary to mention it because it is the determining provision.

19. Let me say at once that a method which consists in calculating the pension payable to a person in a different way according to that person's sex seems to be excluded benefit from the derogation provided for in Article 7 where the age at which it is possible to apply for retirement is the same. As I shall endeavour to demonstrate, such a method is in my view incompatible with the Directive, since no necessary and objective link exists between the discrimination in the rules governing benefits and the pensionable age.

20. Let me add this, however: I have not been insensitive to the argument that the merits of a step forward in terms of social welfare should take precedence over a legal approach which at first sight may appear unduly restrictive.

21. It cannot be disputed that rules establishing a single pensionable age of 60 years for both men and women may be regarded as constituting social progress — a progress inherent in the spirit of the Directive, which, it will be recalled, calls for the progressive implementation of the principle of equal treatment. [9]

9 — The Court has perfectly demonstrated the progressive nature of the principle of non-discrimination, in particular in its judgment in Case C-9/91 *The Queen* v *Minister of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297, paragraph 14, where it held that '... the express purpose of the Directive is to achieve the progressive implementation of the principle of equal treatment for men and women in matters of social security. The progressive nature of the implementation is reflected in a number of derogations, including the one provided for by Article 7(1)(a) ...'.

22. A significant step forward has undoubtedly been taken by the Kingdom of Belgium, and it is understandable that the implementation of the principle could not be achieved immediately, having regard, on the one hand, to the contributory nature of the pensions scheme and, on the other to the financial equilibrium of that scheme, which is characterized by its complex and precarious nature. It is for that reason that the status quo was maintained in relation to the method of calculating the pension.

23. And how paradoxical, or even shocking, it is, it will be argued, to call in question progress achieved by an advance in legislation whereas the Directive would allow more extensive discrimination to endure provided that it fell within the derogation provided for in Article 7.

24. Such a consideration, however, is not sufficient to allow a certificate of conformity to be granted to national legislation such as that at issue.

25. Rather than go into the details of a debate that is more technical than legal, I would merely observe, first, that, as the Commission correctly stated at the hearing, the progressive nature of the implementation of equal treatment could be attained by other mechanisms which indisputably fall within the derogation provided for in Article 7.

26. Furthermore, it is not certain that men make wide use of the new option given to them to take retirement at the age of 60, since the calculation of benefits could prove less favourable for them at that age than at the age of 65, so that they will generally

prefer to wait until they have reached that age in order to benefit from a full pension. [10]

27. Be that as it may, legislation of this type must be examined in the light of Article 7, that is, first, of the rule that that provision is to be interpreted strictly and, secondly, of the need for a link between pensionable age and the detailed rules for calculating the pension.

28. So far as strict interpretation is concerned, in three judgments delivered on 26 February 1986 relating to conditions of dismissal the Court, in identical terms, clearly stated that

'... in view of the fundamental importance of the principle of equality of treatment, which the Court has reaffirmed on numerous occasions, Article 1(2) of Directive 76/207, which excludes social security matters from the scope of that directive, must be interpreted strictly. Consequently, the exception to the prohibition of discrimination on grounds of sex contained in Article 7(1)(a) of Directive No 79/7 applies only to the determination of pensionable age for the purpose of granting old-age and retirement pensions and to the consequences thereof for other social security benefits.' [11]

29. The Court thus distinguished with great exactitude the scope of Directive 79/7 concerning statutory retirement schemes from that of Directive 76/207 [12] in relation to dismissal, while in both cases applying the rule that the derogation is to be interpreted restrictively.

30. The fact that certain conditions regarding dismissal may result from the determination of a pensionable age does not suffice to bring a situation within Article 7 of Directive 79/7. Not all the effects associated with the determination of pensionable age fall within the concept of the 'consequences' thereof, as contemplated by the abovementioned judgments, only the direct consequences in relation to social security benefits. It is not, therefore, the Court's intention to broaden the concept of consequences as expressed in Article 7 but, on the contrary, to limit it exclusively to statutory schemes and to matters directly linked to the grant of entitlement to a pension.

31. Although, in the *Burton* judgment, [13] when questioned with regard to equality between men and women in connection with the possibility of voluntary redundancy for which provision was made in the reorganization of an undertaking by a collective agreement, the Court initially regarded the voluntary redundancy scheme as falling under Directive 76/207, it was subsequently on the basis of the links existing between the measure at issue and the national rules on the determination of pensionable age that the Court envisaged the application of Article 7 of Directive 79/7 before, in the result, concluding that:

10 — See Jean-Jacques Dupeyroux, *Droit de la sécurité sociale*, Dalloz, 10th Edition, 1986, No 173 et seq., especially p. 431.

11 — Case 262/84 *Beets-Proper* v *Van Lanschot Bankiers* [1986] ECR 773, paragraph 38; see also judgments in Case 151/84 *Roberts* v *Tate & Lyle* [1986] ECR 703, paragraph 35, and Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 36.

12 — Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women in relation to access to employment, occupational training and promotion and working conditions (OJ 1976 L 39, p. 40).

13 — Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555.

'The option given to workers by the provisions at issue in the present instance is tied to the retirement scheme governed by United Kingdom social security provisions. It enables a worker who leaves his employment at any time during the five years before he reaches normal pensionable age to receive certain allowances for a limited period. The allowances are calculated in the same manner regardless of the sex of the worker. The only difference between the benefits for men and those for women stems from the fact that the minimum pensionable age under the national legislation is not the same for men as for women'. [14]

32. That indispensable link between age and the determination of entitlement to a pension, apart from following from a restrictive interpretation of Article 7, constitutes, so far as I am concerned, the principal argument which leads me to believe that a logical relationship must necessarily exist between the determination of pensionable age and the measures which result directly therefrom.

33. On that matter, which was already in point in the *Burton* case, the Court confirmed in the *Equal Opportunities Commission* judgment [15] the importance that it attached to the relationship of cause and effect existing between age and the benefits to which it gives rise.

34. That case concerned discrimination which consisted in requiring men to pay contributions for 44 years and women for 39 years in order to obtain a full pension, while pensionable age was fixed at 65 years for men and 60 years for women. Men were therefore obliged to contribute after the age of 60 although women were exempt from so doing.

35. Was the derogation to be limited to the time when eligibility for a pension arose or did it also cover 'other legislative and financial consequences *flowing* from a different pensionable age'? [16]

36. After analysing the content and scope of the derogation contained in Article 7 in relation to the financial equilibrium of the scheme, the Court none the less limited the scope of the derogation, by holding that

'... Article 7(1)(a) ... is to be interpreted as authorizing the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms of discrimination ... *which are necessarily linked to that difference*'. [17]

37. In their recent Opinions in this field, Advocates General Tesauro and Jacobs placed particular emphasis on 'the *causal link* which must exist between a social security benefit and pensionable age' [18] and also the on the fact that 'any discrimination to do with a benefit must ... be a necessary consequence of the difference in the determination of pensionable age for the grand of old-age and retirement benefits'. [19]

14 — Paragraph 15, emphasis added.

15 — Case C-9/91 [1992] ECR I-4297.

16 — Paragraph 12, emphasis added.

17 — Paragraph 20, emphasis added.

18 — Paragraph 5 of the Opinion of Mr Tesauro, delivered on 27 January 1993 in Case C-328/91, emphasis added.

19 — Paragraph 28 of the opinion of Mr Jacobs, delivered on 2 December 1992 in Case C-173/91 [1993] ECR I-673, I-681, emphasis added.

In the present case the national legislation fixes a minimum age of 60 years, *common* to men and women, at which a pension can be claimed. The distinction drawn by the National Pensions Office between pensionable age and the time when occupational activity ceases in my view errs on the side of excessive subtlety. If, as that institution claims, the pensionable age had not fundamentally changed — and that interpretation of a national provision is a matter for the national court alone — then that court would undoubtedly not have considered it appropriate to raise the questions which have been referred to the Court. [20] That, moreover, is the way in which the national court interprets the national legislation. There can be no avoiding the conclusion that the method of calculation, which is still expressed in forty-fifths for men and in fortieths for women, cannot be regarded as a logical consequence of a flexible pensionable age which no longer involves any difference between men and women. There is clearly a break in the causal link between age and the calculation of the pension. The absence of a causal link between the method of calculation and pensionable age is to my mind the principal argument against the application of Article 7 of the Directive.

39. I would add, finally, that in its judgment in Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others*, [21] cited above, the Court very clearly laid down the principle that 'there must ... be a ... link' [22] between pensionable age and the consequences attaching to it. The point at issue in that case was the grant of invalidity benefits which men could claim up to their pensionable age, which was fixed at 65 years, while women were precluded from claiming them beyond the age of 60.

40. After referring to its judgment in the *Equal Opportunities Commission* case, cited above, and the nature of the discrimination 'necessarily linked' to the difference in the determination of pensionable age, the Court went on to state:

'There must, for the same reasons, be a similar link as regards the possible discriminatory consequences for other benefits of the determination of a different statutory retirement age ...'. [23]

'It follows that forms of discrimination provided for in benefit schemes other than old-age and retirement pension schemes can be justified, *as being the consequence of determining a different retirement age* according to sex, only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes ...' [24]

41. Although discriminatory benefits may be justified because they are the inevitable consequence of different statutory pensionable ages for men and women, there conversely, as I have said, it is impossible, *where there is a common pensionable age, to conceive of a method of calculation* — which

20 — It would possibly be for the national court to establish a difference between Article 4 of Royal Decree No 50 of 24 October 1967, which determines 'the normal pensionable age' at 60 or 65 years, and the new Article 2 of the Law of 20 July 1990, the first section of which, devoted to 'pensionable age', allows the person concerned to claim a pension 'at the earliest on the first day of the month following the month during which he or she reaches the age of 60 years'.

21 — [1993] ECR I-1247.

22 — Paragraph 11.

23 — Paragraph 11.

24 — Paragraph 12, emphasis added.

cannot be regarded as another benefit but forms an integral part of the old-age pension itself — *that is different*. Since the factor justifying the discrimination, namely the difference in pensionable ages, no longer exists, the causal relationship with a method of calculation ceases to exist. Furthermore, examination of the question whether the discrimination is necessary for the preservation of the financial equilibrium or the coherence of the social security scheme is only a condition subsequent to the fundamental requirement constituted by the existence of different pensionable ages. Consequently, Article 7(1)(a) of the Directive must give way to Article 4.

42. In that regard, and as a final word on this point, I would maintain that although the principle of the progressive nature of the implementation of equal treatment appears in the actual title of the Directive, the Court clearly ruled against the maintenance of any transitional provision contrary to Article 4. Thus, in its judgment in the *Borrie Clarke* case, [25] the Court held that:

'... the directive does not provide for any derogation from the principle of equal treatment laid down in Article 4(1) in order to authorize the extension of the discriminatory effects of earlier provisions of national law'. [26]

43. That solution, which recurs in subsequent decisions, [27] demonstrates the Court's determination not to allow earlier or transitional schemes which delay genuine equality of treatment to linger on. Assuming that the legislation in point in this case had been in force when the Directive became applicable, it is clear to me that such rules would have been declared incompatible with the principle of equal treatment. The uniform application of Community law in each Member State requires that the interpretation of the Directive be detached from the national context and, consequently, from the merits of a scheme compared with those of the previous scheme. Justification by progressiveness has its limits.

44. By its second question the national court asks the Court to rule whether Article 4(1) of the Directive has direct effect.

45. That subject, which is well known to the Court, does not call for lengthy discussion.

46. Repeating principles already established, the Court pointed out in its judgment in *Federatie Nederlandse Vakbeweging* [28] that:

'... whenever the principles of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, individuals may rely on those provisions in the absence of implementing measures adopted within the prescribed period as against any national provision which is incompatible with the directive ...', [29]

25 — Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865.

26 — Paragraph 10.

27 — See, in particular, judgment in Case 80/87 *Dik* v *College van Burgemeester en Wethanders* [1988] ECR 1601, paragraph 9, Case C-377/89 *Cotter and McDermott* v *Minister for Social Welfare and Attorney General* [1991] ECR I-1155, paragraph 24, and Joined Cases C-87/90, 88/90 and 89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 29.

28 — Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855.

29 — Paragraph 13.

and then stated that Article 4(1) of the Directive was a provision prescribing, in a sufficiently precise manner, the implementation of equal treatment for men and women, before concluding that:

'... Article 4(1) of the directive does not confer on Member States the power to make to make conditional or to limit the application of the principle of equal treatment within its field of application and it is sufficiently precise and unconditional to allow individuals, in the absence of implementing measures adopted within the prescribed period, to rely on it before the national courts as from 23 December 1984 in order to preclude the application of any national provision inconsistent with that article'. [30]

47. The Court subsequently confirmed that position, in particular in the *McDermott and Cotter* judgment. [31] Accordingly, the second question referred by the national court must be answered in the affirmative.

48. It now remains to consider the third question which seeks to have the Court specify the method of calculation applicable. The Court is asked whether the calculation of the pension must be brought into line with the more favourable calculation accorded to women.

49. In relation to situations that were unfavourable to women, the Court considered that where the Directive had not been transposed they should benefit from the same rules as men.

50. Although the inequality of the situations that the Court has already had to consider was often prejudicial to women, the Court has also encountered instances where the reverse was the case. [32] The line of case-law which consists in remedying the discrimination by according to the disadvantaged group the same regime as that of the advantaged group must also be applied in such a situation.

51. The transition, owing to a legislative amendment, from the sphere of the derogation provided for in Article 7 to that of the principle of equal treatment laid down in Article 4 cannot alter the import of the Court's case-law. What is in point is still the incompatibility of rules affecting the correct implementation of the Directive, so that, according to the terms of the *McDermott and Cotter* judgment; [33]

'... until such time as the national government adopts the necessary implementing measures women are entitled to have the same rules applied to them as are applied to men who are in the same situation, since in such circumstances those rules remain the only valid point of reference'. [34]

52. When they are faced with the same type of discrimination, men must have the same rules applied to them as those applied to women.

30 — Paragraph 21.

31 — Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney General* [1987] ECR 1453, paragraph 14; see also the *Borrie Clarke* judgment, cited above, paragraph 9.

32 — See, for example, the *Equal Opportunities Commission* and *Burton* judgments, cited above, and also the *Barber* judgment (Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Company* [1990] ECR I-1889).

33 — Case 286/85, cited above.

34 — Paragraph 18.

53. I therefore conclude that:

(1) Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security precludes a national measure which provides for a common pensionable age from allowing a method of calculating the pension that differs according to sex to remain in force.

(2) The same provision may be relied on as from 23 December 1984 for the purpose of precluding the application of any national rules contrary to it.

(3) In the event of an infringement of the aforementioned provision, the disadvantaged group is entitled to have the same rules applied to it as those applied to the advantaged group in the same situation, such rules remaining, in the absence of the correct implementation of the Directive, the only valid point of reference.