OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 29 May 1991 *

Mr President,
Members of the Court,

1. The questions which have been referred to the Court in Joined Cases C-87/90, C-88/90 and C-89/90 by the Raad van Beroep, 's-Hertogenbosch, while leading the Court to consider the problems involved in giving judicial effect to the principle of equal treatment for male and female workers, also call for closer definition by the Court of the way in which Community law must be taken into account by the national courts.

2. The three procedures pending before the national court are concerned with the effects, following 23 December 1984, the date of the entry into force of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [1] of the provisions of the Algemene Ouderdomswet (General Law on old-age pensions) as they stood before they were amended by the Law of 28 March 1985 and the Royal Decree of 26 April 1985.

3. This is not the first time that the Court has had to consider those provisions. [2] In its judgment in *Koks*, [3] the Court declared that under the Algemene Ouderdomswet:

'an old-age pension is in principle granted to insured persons who have reached the age of 65. The category of insured persons includes persons residing in the Netherlands but not persons who reside there because they have a contract of employment and are accordingly insured under the provisions of foreign legislation. Similarly, a married woman residing in the Netherlands whose husband is not insured under the provisions of the relevant Netherlands legislation is not regarded as insured. In general, married women are not entitled, as such, to an old-age pension. However, a married man is entitled to a higher pension than a single person. Provision is also made for the pension to be reduced by 1% for each full calendar year in which the married male beneficiary was not insured between the ages of 15 and 65 years. The same reduction applied to the beneficiary's wife for each calendar year, within the same age bracket, in which she was not insured'. [4]

4. In my Opinion in *Achterberg-te Riele*, [5] I stated that periods in respect of which a married man had not been insured, in particular by reason of a period of work in

* Original language: French.

1 — OJ 1979 L 6, p. 24.

2 — See, for example, judgments in Case 151/87 *Bakker* [1988] ECR 2009; in Case 293/88 *Winter-Lutzins* [1990] ECR I-1623.

3 — Case 275/81 [1982] ECR 3013.

4 — Paragraph 5.

5 — Judgment in Joined Cases 48/88, 106/88 and 107/88 [1989] ECR 1963; Opinion, paragraph 2, at p. 1977.

another State, were deducted in calculating his wife's pension rights, but that, on the other hand, a period of work abroad by a married woman had no effect on the acquisition of pension rights by her husband since he was insured under the Algemene Ouderdomswet in his own right, as an employed person or as a resident. As I emphasized,[6] the Royal Decree of 26 April 1985 abolished with effect from 1 April 1985 the rule that a married woman was not insured under that Law on the ground that her husband was not so insured. However, Article 24(1) of the Law of 28 March 1985 provides that the new provisions are not applicable to old-age pension rights in respect of periods before 1 April 1985.

5. The Court was not called upon in *Achterberg-te Riele* to rule on the compatibility with Directive 79/7 of a legislative provision such as the Algemene Ouderdomswet as it stood prior to 1 April 1985, in so far as the plaintiffs in the proceedings pending before the national courts were not persons covered by the Community directive. The Court ruled, following my Opinion on that point, that Directive 79/7

'does not apply to persons who have never been available for employment or who have ceased to be available for a reason other than the materialization of one of the risks referred to by the Directive'.[7]

6. That proposition, which moreover stems from the very wording of the directive,[8] does however raise certain difficulties in connection with a legislative provision, such as the Algemene Ouderdomswet, which grants benefits to insured persons who may, in some cases, never have formed part of the working population.

7. In Case C-88/90, for example, Mrs van Wetten-van Uden has never worked, except for a few weeks during the Second World War. From 1 March to 1 August 1959, and from 1 August 1961 to 1 October 1965, her husband worked in the Federal Republic of Germany and as a result was not insured under the Algemene Ouderdomswet during those periods. Now a widow and over 65, she has drawn since 1 November 1988 an old-age pension subject to a reduction of 8% in respect of the four years during which her husband was not insured.

8. Similarly, in Case C-89/90, it is apparent that Mrs Heiderijk, since her marriage on 19 January 1949, has no longer been available for work. Between 1 October 1965 and 1 April 1969 and between 1 February 1981 and 1 April 1982 her husband worked in the Federal Republic of Germany, while continuing to reside in the Netherlands. As he was not insured under the Algemene Ouderdomswet for those periods, the increase in his pension which he began to receive in respect of his wife as from 1 December 1987 was reduced by 2% for every year for which he was not insured.

9. The facts in Case C-87/90 are somewhat different. Mrs Verholen was employed by the commune of Roosendaal and Nispen

6 — Loc. cit., p. 1977, paragraph 3.

7 — Paragraph 11.

8 — See the combined effect of Articles 2 and 3 of the Community directive.

from 1 June 1974 and took early retirement on 1 July 1984 at the age of 61. With effect from 1 April 1988, she has received an old-age pension under the Algemene Ouderdomswet. However, her old-age pension was also subject to a reduction of 16% in respect of the eight years (from 1 October 1976 until 1985) during which her husband worked in Belgium and, as a result, was not insured under that Law.

10. The single question submitted in Case C-87/90 concerns the compatibility with the principle of equal treatment in matters of social security of a legislative provision such as the Algemene Ouderdomswet. I shall consider that question last since the questions submitted in Cases C-88/90 and C-89/90 call on the Court to determine first of all the manner in which Community law must be taken into account by the national courts.

I — Case C-88/90

11. The first question in Case C-88/90 refers to the power of a national court to assess of its own motion the incompatibility of a domestic rule with a directive for which the implementation period has elapsed, when the parties to the dispute have not relied on the directive.

12. It is surprising that such an important question has not yet been resolved, as such, by the Court.

13. It is true that in its judgment in *Rheinmühlen*,[9] the Court ruled that Article 177 of the EEC Treaty

'gives national courts the power and, where appropriate, imposes on them the obligation to refer a case for a preliminary ruling, as soon as the judge perceives either *of his own motion* or at the request of the parties that the litigation depends on a point referred to in the first paragraph of Article 177'.[10]

The only issue in that case, however, was the possibility for the national court to refer a case to the Court for a preliminary ruling. It must none the less be said that the Court has already expressly accepted the right of a national court to raise *of its own motion* the existence of a Community rule in order to refer a case to the Court under Article 177. The Court has consistently held that it has jurisdiction

'to give preliminary rulings concerning the interpretation of acts of the institutions of the Community, regardless of whether they are directly applicable'.[11]

It can therefore be taken as settled that a national court may of its own motion raise the existence of a Community rule, even where that rule does not have direct effect, in order to refer a question to the Court.

14. But the fact that a court may raise of its own motion the existence of a Community

9 — Case 166/73 [1974] ECR 33.

10 — Paragraph 3, emphasis added.

11 — Judgment in Case 111/75 *Mazzalai* [1976] ECR 657, paragraph 7.

measure does not *just* mean that it can set in motion the machinery of judicial cooperation under Article 177 of the Treaty. Reference to the Community measure may also lead the national court to disregard, of its own initiative, a domestic law which is contrary to a Community rule which has direct effect. Such a power results from the immediate nature of the application of Community law which the Court has accepted, in particular in its judgment in *Simmenthal*.[12] In that judgment, the Court pointed out that direct applicability

'concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law'[13]

and that the effectiveness of Article 177

'would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court'.[14]

It concluded that

'a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing *of its own motion* to apply any conflicting provision of national legislation'.[15]

15. The question now before the Court, however, does not draw a distinction according to whether or not the Community rule has direct effect. Even though the Court has already recognized the direct effect of Article 4 of Directive 79/7[16] which appears to fall to be applied here, it would be well to emphasize that the national court must, in my view, be recognized as having the power to raise of its own motion the existence of a Community rule *even if that rule does not have direct effect*. As I have said, the Court has already implicitly recognized such a power for the purposes of reference of a matter to the Court for a preliminary ruling. However, such a possibility may equally lead the national court to interpret its domestic law, 'as far as possible',[17] in the light of the wording and the purpose of a directive, as it is required to do by the Court's case-law on what is known in French as 'interprétation conforme',[18] irrespective of whether or not the period for implementation has expired.[19]

16. As I pointed out in my Opinion in *Dekker* and *Handels- og Kontorfunktionaerernes Forbund*,[20] it is appropriate to highlight a distinction underlying the whole structure of the Court's case-law between, on the one hand, the *possibility of relying on* a Community rule, which may not have direct effect, for the purposes of correctly interpreting national law or reference to the Court for a preliminary ruling, and, on the other hand, the *direct application* of a provision of Community law, where there are no national rules or where there are

12 — Judgment in Case 106/77 [1978] ECR 629.

13 — Paragraph 16.

14 — Paragraph 20.

15 — Paragraph 24, emphasis added.

16 — Judgment in Case 71/85 *FNV* [1986] ECR 3855.

17 — Judgment in Case C-106/89 *Marleasing* [1990] ECR I-4135.

18 — Judgments in Case 14/83 *Von Kolson and Kamann* [1984] ECR 1891 and in Case 79/83 *Harz* [1984] ECR 1921; judgment in Case 157/86 *Murphy* [1988] ECR 673.

19 — Judgment in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 15.

20 — Judgments in Case 177/88 [1990] ECR I-3941 and Case 179/88 [1990] ECR I-3979; Opinion, paragraphs 7 to 15.

incompatible rules of national law, this application necessarily presupposing that that provision is recognized as having direct effect.

17. But apart from the cases of recourse to Article 177 or of the duty to interpret national rules in conformity with Community rules, there are other circumstances where a national court may be led to examine of its own motion the compatibility of a domestic rule with a provision of Community law which does not have direct effect. This is essentially where an individual applies to a national court to have the State held liable for infringing its Community obligations. There is no doubt that, as Community law stands, such actions are subject to the domestic law of each Member State. [21] Nevertheless, as regards those national legal systems which recognize State liability, a court may find it appropriate to declare that its domestic law is incompatible with a Community rule, even one not having direct effect, in order to establish that the national authorities have acted wrongfully in such a way as to render the State liable.

18. Those points are not superfluous. If Directive 79/7 has not been correctly implemented in Netherlands law, it is not clear, taking account of the Court's decision in *Marshall*, [22] that Mrs van Wetten-van Uden can rely on Article 4 of the directive against the Sociale Verzekeringsbank. If the national court considers, in the light of the Court's judgment in *Foster*, [23] that that body is not a State body, it will certainly be able to raise of its own motion the existence of Directive 79/7, not in order to disapply its domestic law, but only to attempt, 'as far as possible', [24] to give it an interpretation in conformity with the requirements of the Community measure.

19. It remains to be determined whether the national court has a *duty* to raise of its own motion the existence of a Community rule for the purposes which have just been described. The answer would appear to be affirmative. The primacy of Community law cannot be left to the discretion of the national courts, without the risk of its *uniform* application being seriously compromised. And the national court is under such a duty with regard both to Community rules which have direct effect and to those which do not have such effect.

20. As regards the former, it is for the national court to achieve its 'task . . . to protect . . . the rights conferred upon individuals by Community law'. [25] The Court's judgment in *Salgoil* shows, moreover, to what extent primacy and direct effect are in 'a twin relationship', [26] but also how much those two principles necessarily presuppose that Community law be recognized as being absolutely immediately applicable. The Court ruled that the provisions of Community law

'require the authorities, and in particular the relevant courts of the Member States, to protect the interests of those persons subject to their jurisdiction who may be affected by any possible infringement of the said

21 — Judgment in Case 60/75 *Russo* [1976] ECR 45; see, in that respect, Case C-6/90 *Francovich* [1991] ECR I-5357.

22 — Judgment in Case 152/84 [1986] ECR 723.

23 — Judgment in Case C-188/89 [1990] ECR I-3313.

24 — Case C-106/89, cited above, at paragraph 8.

25 — Case 106/77, cited above, paragraph 16; see also judgment in Case 13/68 *Salgoil* [1968] ECR 453, at pp. 462-463.

26 — Kovar, R.: 'L'invocabilité du droit communautaire devant les juridictions nationales' in *L'avocat et l'Europe des 12 et des 21*, Actes du XIIe congrès de l'association française des centres de formation professionnelle du barreau, 1988, p. 187.

provisions, by ensuring for them direct and immediate protection of their interests'.[27]

The Court's judgment in *Simmenthal* is also very clear in that respect. Any national court 'whose *task it is* . . . to protect . . . the rights conferred upon individuals by Community law'[28] is '*under a duty* to give full effect to those provisions'.[29]

21. As for the second category, it is not a matter for the courts to protect the rights of individuals where a Community rule does not have direct effect. However, when the national court is concerned with a directive without such effect, *it is required* under the Court's case-law to interpret its national law, as far as possible, in the light of the wording and the purpose of the directive. Such a rule is to be inferred from both Article 189 and Article 5 of the Treaty. As the Court ruled in its judgment in *Marleasing*,

'the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts'.[30]

In that instance too, such an obligation is inferred from the primacy of Community law, which presupposes that the rules of Community law are applied uniformly and immediately throughout the territory of the Community. If one finds again here, in the absence of direct effect, the doubtless more traditional doctrines of international law, the fact still remains that a national court, as a State authority, must ensure, for matters within its jurisdiction, that the common rules of law are observed.

22. I shall suggest that the Court give an answer to that effect to the first question in Case C-88/90.

23. The second question in that case refers to the situation where the party to the main proceedings does not come within the scope *ratione personae* of a directive, although the social security scheme at issue in the same proceedings is covered by that directive. The national court asks whether, in such a case, it may review the compatibility of a rule of national law with that directive.

24. This corresponds to the situation at issue in the Court's judgment in *Achterberg-te Riele*.[31] As the national court has declared, Mrs van Wetten-van Uden does not belong to the working population within the meaning of Article 2 of Directive 79/7; however, the statutory schemes providing protection against the risk of old age are referred to in Article 3(1)(a). The Court ruled in its judgment in *Achterberg-te Riele* that

'it may be inferred from Article 2 in conjunction with Article 3 of the Directive that the Directive only covers persons who

27 — Case 13/68, cited above, pp. 462-463.

28 — Case 106/77, cited above, paragraph 16, emphasis added.

29 — Paragraph 24, emphasis added.

30 — Case C-106/89, cited above, paragraph 8.

31 — Joined Cases 48/88, 106/88 and 107/88, *supra*.

are working at the time when they become entitled to claim an old-age pension or whose occupational activity was previously interrupted by one of the risks set out in Article 3(1)(a)'. [32]

25. Directive 79/7 requires that the principle of equal treatment be fully and integrally applied *within the limits of the scope* of the directive. If a person does not come within its scope, the rules of national law at issue are not included amongst those in respect of which compliance with the principle of equal treatment was envisaged by the directive. There is nothing to prevent the Netherlands legislature from extending entitlement to social security benefits to insured persons who are not part of the working population but in such circumstances Community law as it stands does not require that the principle of equal treatment be applied. As I pointed out in my Opinion in *Achterberg-te Riele*, it may seem paradoxical that a provision of national law which protects in the most effective way all the residents of a Member State against the risk of old age should not be reflected in Community legislation with regard to the principle of equal treatment for men and women. Nevertheless, we can do no more than observe that in this respect Netherlands law is ahead of Community law as it now stands. [33]

26. Since the situation at issue in the main proceedings does not come within those envisaged by Directive 79/7, the national court is obviously unable, on this occasion, to review the compatibility of its domestic law with that measure.

27. The third question is more straightforward. The national court asks whether Article 2 determines the scope *ratione personae* of that directive or whether, like Article 3, it refers to the definition of the social security schemes covered by the Directive.

28. In that respect, I can do no more than refer to the judgment in *Achterberg-te Riele* where the Court held:

'The scope *ratione personae* of the Directive is determined by Article 2, according to which the Directive applies to the working population, to persons seeking employment and to workers and self-employed persons whose activity is interrupted by one of the risks set out in Article 3(1)(a).' [34]

29. It is difficult to see how Article 2 would also relate to the determination of the social security schemes concerned by the Directive, since that determination results expressly from Article 3(1)(a).

32 — Paragraph 10.

33 — Loc. cit. paragraph 15.

34 — Loc. cit., paragraph 9.

II — Case C-89/90

30. The one question submitted in Case C-89/90 is also an attempt to mitigate the disadvantages which I pointed out at the beginning of my Opinion. The national court is asking whether it is possible for an individual to rely on the provisions of Directive 79/7 when he suffers the effects of a discriminatory national provision affecting his spouse, who is not a party to the proceedings.

31. That question has arisen because of the particular circumstances of the case. Unlike her husband, Mrs Heiderijk had not, at the material time, reached the age of 65. Her husband therefore drew an old-age pension for himself together with an *increase* to take account of the existence of a dependent person who had not yet reached the age of 65. Married women only become entitled to receive a personal pension from the age of 65, and that pension is paid to the husband, save in certain situations, in particular where the husband has died.[35] That increase was reduced to take account in particular of the periods during which Mrs Heiderijk was not insured under the Algemene Ouderdomswet because her husband was not insured. Only Mr Heiderijk is a party to the main proceedings. According to the national court, Netherlands procedural law does not allow Mrs Heiderijk to intervene in the proceedings.

35 — See the Report for the Hearing in *Bakker* [1988] ECR 2009, at p. 2010, and the factual part of the judgment in *Koks* [1982] ECR 3013, at p. 3015-3016; it is apparent, according to the account given by the Netherlands Government at the hearing, that the pension was paid directly to a married woman when her husband was not himself entitled to a pension under the Algemene Ouderdomswet, when the marriage had taken place after the pension had become payable, and finally when the woman was considered to be the head of the family, which would cover the case where the husband had died.

32. The question is rather delicate. Until now, the discrimination has been relied on by the person who was its actual victim.[36] The Court has not yet had to rule on the delicate problem of ascertaining *who* may rely on Community law before a national court. Hitherto that difficulty has been resolved at a purely national level, in so far as the court hearing the main dispute examines, where necessary, the standing and the interest in bringing proceedings of the person concerned in the light of its domestic procedural rules. If that person may properly bring an action, he may, in order to defend his rights, rely on the existence of a Community rule which he believes to be of benefit to him. Does this mean that only national law is capable of determining who is entitled to rely on Community law? I do not consider that to be the case. Two 'riders' have already been added by the Court's case-law.

33. On the one hand, national legislative provisions cannot undermine the principle of the right to obtain a judicial determination.[37] That would be the case, for example, if a person who was the victim of discrimination prohibited by Community law could not, by reason of purely domestic procedural rules, rely on his rights before a court.

34. On the other hand, the application of such rules must not render virtually impossible the exercise of rights conferred by Community law.[38]

36 — However, see judgment in Case 109/88 *Handels- og Kontorfunktionaerernes forbund i Danmark* [1989] ECR 3199, in which the main proceedings were between two unions.

37 — Judgments in Case 222/84 *Johnston* [1986] ECR 1651 and in Case 222/86 *Heylens* [1987] ECR 4097.

38 — Judgment in Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12.

35. However, in this case, the Court has not been asked to rule on the question whether or not the fact that Mrs Heiderijk, who may be the victim of discrimination, cannot rely in court on the incompatibility of the national law at issue is contrary to the case-law cited above. As I pointed out in my Opinion in *Bakker*, the Netherlands legislation then provided that a pension representing rights acquired by and on behalf of each of the two spouses was paid to the husband alone.[39] It was only in particular cases that a married woman received her old-age pension directly. Not only did periods during which the male worker was not insured have direct consequences on the amount of the benefits payable in respect of his wife, but it was only the husband who received the pension for his wife. Without it being necessary for the Court to determine who was legally entitled to the pension, the Court will declare that the husband draws it and has standing, under Netherlands procedural law, to assert his rights. Accordingly, he must be able, in order to defend those rights, to rely on the provisions of Directive 79/7 which he believes to be of benefit to him.

36. But I must add one more point, in order for the Court's reply to be of use to the national court in arriving at its decision. While Mr Heiderijk may rely on the existence of Directive 79/7, the fact still remains that that measure — need it be said again — does not apply to insured persons who are not part of the working population within the meaning of Article 2. Consequently, the national court will be able to take account of the existence of the directive only if it considers that, under Netherlands law, the *person entitled* to the pension at issue is Mr Heiderijk — who certainly comes within the scope of the directive — and not his wife, who is not among the persons referred to by Article 2. If that is the case, it will be for the court to assess the Algemene Ouderdomswet in the light of Article 4(1) of the directive which prohibits any discrimination whatsoever on ground of sex either directly or indirectly, in particular as concerns 'the calculation of benefits including increases due in respect of a spouse and for dependants'.

III — Case C-87/90

37. The national court will certainly be assisted in that task by the analysis which the Court is called on to make by the one question referred to it in Case C-87/90. As stated above, Mrs Verholen worked from 1974 until taking early retirement in July 1984. She drew that early-retirement pension until April 1988 when she became entitled to an old-age pension under the Algemene Ouderdomswet. While the national court, in the order for reference, took the view that she was part of the working population within the meaning of Article 2 of Directive 79/7, that point was emphatically disputed by the Netherlands Government both in its written observations and at the hearing. According to the Netherlands Government, by taking early retirement, Mrs Verholen voluntarily left her employment and thus can no longer be considered as belonging to the working population.

38. Let me say straight away that I find that argument untenable. In its judgment in *Achterberg-te Riele*, the Court ruled that

39 — Loc. cit. paragraph 3.

'persons who are working at the time when they become entitled to claim an old-age pension or whose occupational activity was previously interrupted by one of the risks set out in Article 3(1)(a)' [40]

come within the scope of Directive 79/7, The risk of old age is expressly mentioned in Article 3(1)(a). Essentially, the Netherlands Government considers that a worker who chooses to take advantage of an early-retirement scheme does not leave his employment owing to the materialization of the risk of old age. It is hard to see why retirement at the age of 61 should not be connected with the risk of old age while such a connection would exist if that retirement occurred four years later. If a person leaves his employment to draw a benefit which is granted on the basis of his *having reached a certain age* and, possibly, of his having worked for a certain number of years, he comes within the scope of Directive 79/7 as determined in Article 2. The considerations connected with the financing of an early-retirement scheme and with its detailed rules are clearly relevant to deciding whether that benefit comes within Article 119 of the EEC Treaty or is to be regarded as a social security benefit, but they do not fall to be taken into account in determining the scope of Directive 79/7. Were the argument of the Netherlands Government to be accepted, all workers in early retirement would be without protection. I consider, in the same way as the national court, that Mrs Verholen is part of the working population within the meaning of Article 2 of the Directive.

39. The Court is thus led to reflect on the compatibility with Article 4(1) and Article 5 of that directive of the *maintenance* of the effects of national legislation which, in certain circumstances, meant that married women were not insured.

40. The national court and the Sociale Verzekeringsbank [41] agree as to the discriminatory nature of the Algemene Ouderdomswet as it stood before 1 April 1985. As I have said, until that date a married woman whose husband had not been insured, in particular because of a period spent working in another Member State, had her pension reduced in proportion to the periods during which her husband was not insured. On the other hand, the periods during which a married woman was not insured had no effect on the acquisition of pension rights by her husband since he, as a worker or a resident, was independently insured under that Law.

41. I have already expressed my views, in my Opinion in *Achterberg-te Riele*, on the maintenance of such effects with regard to the principle of equal treatment. As I have said, valuable guidance on the matter is to be found in the Court's case-law. In its judgment in *Dik*, [42] the Court declared 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. It follows that a Member State

40 — Loc. cit., paragraph 10; see paragraph 24 of this Opinion.

41 — Paragraph 12 of its written observations.

42 — Judgment in Case 80/87 [1988] ECR 1601.

may not maintain beyond 23 December 1984 any inequalities of treatment attributable to the fact that the conditions for entitlement to benefit are those which applied before that date. That is so notwithstanding the fact that those inequalities are the result of transitional provisions'. [43]

Moreover, that judgment is the reaffirmation of consistent case-law. [44]

42. The Netherlands Government and the Sociale Verzekeringsbank take the view that those judgments, which concerned unemployment benefits [45] or the conditions laid down for proof of entitlement to a non-contributory pension, [46] cannot be applied to a scheme of social insurance by capitalization. In my opinion, a distinction between so-called 'risk' schemes and 'contribution' schemes is not appropriate. In its judgment in *Dik* the Court referred to the 'conditions for entitlement to benefit' without making any distinction whatsoever between distributive schemes and capitalization schemes of social insurance. Nor is any such distinction to be found in the text of the directive.

43. Article 8(2) of Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [47] provides that that directive does 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'. It is understandable that for *occupational* social security schemes, which are the financial responsibility of the employers, the Community legislature intended the principle of equal treatment to be applied progressively. But that has no effect in this case, precisely because there is no corresponding provision in Directive 79/7. If the Community legislature intended equal treatment to be applied immediately with regard to *statutory* social security schemes, its wishes must be respected.

44. Furthermore, in a recent judgment, [48] the Court ruled that the principle of equal treatment must apply immediately [49] in the context of proceedings concerning a *contributory* scheme, like the one here. The Court also made it plain that:

'no restriction on the effects of the aforesaid interpretation can be permitted as regards the acquisition of entitlement to a pension as from the date of this judgment'. [50]

45. I shall consider later whether it is appropriate to limit the effects *ratione temporis* of the Court's judgment in this case. I must, however, mention that, since the Court's judgment in *Barber*, persons

43 — Paragraph 9.

44 — Judgment in Case 71/85 *FNV* [1986] ECR 3855, paragraphs 21 and 22; judgment in Case 286/85 *McDermott and Cotter* [1987] ECR 1453, paragraphs 18 and 19; judgment in Case 384/85 *Borrie Clarke* [1987] ECR 2865, paragraph 10.

45 — Cases 286/85, 71/85 and 80/87, cited above.

46 — Case 384/85, cited above.

47 — OJ 1986 L 225, p. 40.

48 — Judgment in Case C-262/88 *Barber* [1990] ECR I-1889.

49 — In fact it is to apply with effect from the date of pronouncement of that judgment, since the Court restricted the effects *ratione temporis* of the judgment, except in the case of those who had initiated legal proceedings or raised an equivalent claim.

50 — Case 262/88, cited above, paragraph 44.

who were previously discriminated against are entitled to a pension which no longer takes into consideration the former discrimination, even if the contributions which they paid beforehand could not take account of this new situation.

46. Contrary to what the Sociale Verzekeringsbank stated in its observations, that does not lead to retroactive application of the directive. [51] It is simply a matter of ensuring the immediate entry into force of the principle of equal treatment for men and women in matters of social security, which presupposes the immediate elimination of any remaining inequalities. The directive would lose much of its effectiveness if it were to be held to be fully and integrally applicable only to persons whose contribution period began after 23 December 1984.

47. As Mr Advocate General da Cruz Vilaça pointed out in his Opinion in *Borrie Clarke*,

'no exception is made for the continuing discriminatory effects of national provisions previously in force, since to maintain those effects is as much contrary to the provisions of the directive as it would be to maintain those national provisions themselves'. [52]

48. In their written observations, the Netherlands Government and the Sociale Verzekeringsbank attempt to demonstrate that the consequences at issue are not the result of a specific transitional provision, but of the application of the principle that any past situation must be assessed in the light of the law applicable at that time.

49. In that respect, it is immaterial whether or not the effects at issue result from a provision adopted as a transitional measure. The effectiveness of Community law cannot vary according to the legal classification of the national legal system in which its requirements apply. Furthermore, it may strongly be argued that this is not a case of implementing the law applicable to a *past* situation. Since 23 December 1984, women have been, and are now, entitled to receive a pension which is no longer calculated on the basis of discriminatory provisions. The *past* situation is the situation regarding pensions paid *before* 23 December 1984 in respect of which the recipients cannot claim the payment of amounts which were not paid as the result of discrimination, since the principle of equal treatment was not yet applicable at that time.

50. Finally, the Netherlands Government argues that, when calculating the retirement pension rights acquired abroad by married men who worked abroad, account is generally taken of the existence of a wife or dependent person for the purposes of an increase in the pension. That argument cannot be accepted. On the one hand, certain legislative schemes provide that a married man and woman each acquire *independent* rights to an old-age pension. On the other, it follows from one of the Court's recent judgments that the principle of equal treatment laid down in Directive 79/7 must be applied immediately and in full, as from

51 — Paragraph 26.

52 — Case 384/85, loc. cit. at p. 2872, paragraph 30.

the entry into force of that measure, 'even if in some circumstances that will result in double payment' [53] of benefits or 'infringes the prohibition on unjust enrichment laid down by national law'. [54]

51. It remains to examine whether it would be appropriate for the Court to restrict the effects *ratione temporis* of its judgment on that particular point. In the field of equal treatment for men and women, the Court has made such a restriction on two occasions. [55] However, it appears to me that the imperative requirements of legal certainty which guided the Court in those two judgments are not so strong a factor in this instance. In its judgment in the second *Defrenne* case the Court recognized for the first time the direct effect of Article 119 of the Treaty, which, remarkably, had not been relied on in any previous case. In its judgment in *Barber*, the Court held that it was discriminatory

'for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal pensionable age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex'. [56]

In the earlier judgment in *Burton*, [57] however, the Court had held that the difference between the age requirements for men and women for acceptance for voluntary redundancy was justified. In the second *Defrenne* case and *Barber* the social partners and the national legislatures were thus not able to anticipate the Court's decision.

52. The circumstances in this case are radically different. Since the Court's judgment of 23 September 1982 in *Koks*, which was therefore prior to the entry into force of Directive 79/7, the Netherlands Government has been aware of the situation of the Algemene Ouderdomswet with regard to the requirements of that Community directive. In *Koks*, the Commission had taken the view that 'the Netherlands legislation, and in particular the Old-Age Law, according to which married women are not insured, unless their husbands are insured under that Law, is contrary to the directive in question and must be amended within a period expiring on 22 December 1984, since the directive was notified on 22 December 1978'. [58] The Court's judgment in *Koks* pointed to the scope of that text by stating:

'*[a]part from Council Directive 79/7/EEC* ... which allows the Member States a period of six years in which to implement the necessary provisions, there is no rule of Community law precluding the Member States from making the right of either spouse to derive benefits under a social security scheme dependent on the affiliation of the other spouse to the same scheme'. [59]

53. The significance of the difficulties described by the Netherlands Government resulting from the financial consequences which it referred to at the hearing cannot be

53 — Judgment in Case C-377/89 *Cotter and McDermott* [1991] ECR I-1155, paragraph 22.

54 — Paragraph 27.

55 — Judgments in Case 43/75 *Defrenne* [1976] ECR 455 (the second *Defrenne* case) and Case C-262/88, cited above.

56 — Case C-262/88, loc. cit. paragraph 35.

57 — Judgment in Case 19/81 [1982] ECR 555.

58 — Case 275/81, cited above, factual part of the judgment, at p. 3019.

59 — Case 275/81, cited above, paragraph 11, emphasis added.

denied. However, it must be found that its refusal to allow the women in question the benefit of the immediate effect of the principle of equal treatment cannot be attributed to ignorance of the defects in the Algemene Ouderdomswet with regard to that principle. I would therefore suggest that the Court do not make use of the possibility of limiting the effects *ratione temporis* of its judgment.

54. I therefore propose that the Court rule:

(1) In Case C-88/90

(a) A national court which is called upon within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions by refusing of its own motion to apply any provision of national law which is incompatible with a Community rule having direct effect; it is also required of its own motion to interpret the provisions of its domestic law as far as possible in the light of the wording and the purpose of the Community provision, even if the latter does not have direct effect;

(b) A national court may not assess the conformity of its domestic law with regard to a Community rule for the benefit of an individual who does not come within the scope *ratione personae* of that rule;

(c) Article 2 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 must be interpreted as determining only the persons who may rely on the provisions of the Directive;

(2) In Case C-89/90

(a) Persons who have standing under national procedural rules to assert their rights to benefits which are included among those referred to in Article 3(1) and (2) of Directive 79/7/EEC may rely on the benefit of that directive and, in particular, Article 4(1) thereof;

(b) However, the provisions of Directive 79/7/EEC are applicable only to persons entitled to the benefits mentioned in Article 3(1) and (2) who are included among the persons referred to in Article 2;

(c) For that purpose, it is for the national court to determine, in the light of its national law, the persons entitled under an old-age pension scheme such as that established by the Algemene Ouderdomswet;

(3) In Case C-87/90

Directive 79/7/EEC must be interpreted as not allowing the Member States to maintain, for any period whatsoever, inequalities of treatment affecting the conditions for the acquisition of old-age pension rights when those benefits have been or are to be paid after 23 December 1984.