JUDGMENT OF THE COURT (Sixth Chamber)

24 February 1994 *

In Case C-343/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van Beroep, 's-Hertogenbosch (The Netherlands), for a preliminary ruling in the proceedings pending before that court between

M. A. De Weerd, née Roks,

F. M. Hulshoff,

J. Steevens,

K. Tjallinks,

A. P. Van Kampen,

* Language of the case: Dutch.

J. T. H. J. Vrolijks, née van Es

and

Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen,

Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen,

Bestuur van de Nieuwe Algemene Bedrijfsvereniging,

Bestuur van de Bedrijfsvereniging voor Hotel-, Restaurant-, Café-, Pension-en Aanverwante Bedrijven,

on the interpretation 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 (Official Journal 1979 L 6, page 24),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Díez de Velasco, C. N. Kakouris, F. A. Schockweiler (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen, by M. H. Schripsema, Director,

— the Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, by L. E. Mollerus and M. H. J. Dijckmeester, Legal Advisers,

— the Bestuur van de Nieuwe Algemene Bedrijfsvereniging, by M. C. R. J. A. M. Brent, Head of the Legal Service for Social Security Affairs of the Gemeenschappelijk Administratiekantoor,

— the Bestuur van de Bedrijfsvereniging voor Hotel-, Restaurant-, Café-, Pension-en Aanverwante Bedrijven, by M. C. R. J. A. M. Brent, Head of the Legal Service for Social Security Affairs of the Gemeenschappelijk Administratiekantoor,

— the Government of the Netherlands, by J. G. Lammers, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Karen Banks and Ben Smulders, members of the Commission's Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, the Bestuur van de Nieuwe Algemene

Bedrijfsvereniging and the Bestuur van de Bedrijfsvereniging voor Hotel-Restaurant-, Café, Pension-en Aanverwante Bedrijven, the two last-named represented by F. W. M. Keunen, Legal Adviser of the Gemeenschappelijk Administratiekantoor, the Government of the Netherlands represented by J. W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the Irish Government, represented by E. Fitzsimmons, Barrister, and the Commission of the European Communities at the hearing on 16 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 8 December 1993,

gives the following

Judgment

1 By order of 30 June 1992, which was received at the Court on 20 August 1992, the Raad van Beroep (Social Security Court), 's-Hertogenbosch (The Netherlands), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation 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 (Official Journal 1979 L 6, page 24).

2 The questions were raised in the course of six sets of proceedings between Mrs De Weerd and five other persons, and the Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen (Trade Association for Retailers, Craftsmen and Housewives) and four other trade associations responsible for the implementation of the Algemene Arbeidsongeschiktheidswet (Netherlands General Law on Incapacity for Work, hereinafter referred to as 'the AAW'), of 11 December 1975.

3 The AAW, which came into force on 1 October 1976, originally conferred on men and on unmarried women, at the end of one year's incapacity for work, entitlement to benefits for incapacity for work the amount of which did not depend on either the other income or the loss of income of the beneficiary.

4 Entitlement to benefits under the AAW was extended to married women by the Wet Invoering Gelijke Uitkeringsrechten Voor Mannen en Vrouwen (Law introducing equal treatment for men and women as regards entitlement to benefits) of 20 December 1979. At the same time that Law made entitlement to benefits subject for all those insured, except certain categories, to the condition that during the year preceding the commencement of his incapacity for work the beneficiary received from his employment or in connection therewith a certain income which was initially set at no less than HFL 3 423.81 (hereinafter referred to as 'the income requirement'). The income requirement applied to all persons whose incapacity for work had commenced after 1 January 1979.

5 By virtue of the transitional provisions contained in the abovementioned Law of 20 December 1979 men and unmarried women whose incapacity for work had commenced before 1 January 1979 continued to be entitled to benefits without having to satisfy the income requirement. Married women whose incapacity had commenced before 1 October 1975 were not entitled to benefits even if they satisfied the income requirement. As for those whose incapacity had began between 1 October 1975 and 1 January 1979, they were entitled to benefits only if they satisfied the income requirement.

6 By several judgments of 5 January 1988 the Centrale Raad van Beroep (Higher Social Security Court) held that those transitional provisions constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 (Treaty Series vol. 999, page 171), and that married women whose incapacity for work arose before 1 January 1979 were entitled with effect from 1 January 1980, the date on which the Law of 20 December 1979 came into force, to AAW benefits on the

same conditions as men, that is to say, without having to satisfy the income requirement, even if their incapacity had commenced before 1 October 1975.

7 The transitional provisions held to discriminate against married women were repealed by a Law of 3 May 1989. Article III of that Law, however, provided that persons whose incapacity for work arose before 1 January 1979 and who applied for AAW benefits after 3 May 1989 had to satisfy the income requirement, and Article IV provided that AAW benefits were to be withdrawn from persons whose incapacity for work arose before 1 January 1979 if they did not satisfy the income requirement. That withdrawal of benefits, which was originally to have been made on 1 January 1990, was postponed to 1 July 1991 by subsequent legislation.

8 By a judgment of 23 June 1992 the Centrale Raad van Beroep ruled that the amount of income required, which in 1988 was HFL 4 403.52 a year, constituted indirect discrimination against women, contrary to Article 26 of the International Covenant referred to above, and to Article 4 (1) of Directive 79/7, and that the income requirement must be regarded as being satisfied if during the year proceeding the commencement of his incapacity for work the beneficiary had received 'some income'.

9 Article 4 (1) of Directive 79/7 provides 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 scope of social security schemes and the conditions of access thereto.

10 Directive 79/7 applies, according to Article 2, to the working population, including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment, and to retired or invalided workers and self-employed persons.

11 The period allowed for transposing the directive, which was fixed at six years by Article 8, expired on 23 December 1984.

12 On 8 May 1989 Mrs De Weerd, whose incapacity for work commenced on 1 January 1976, applied for AAW benefits to the Board of the Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, which rejected her application on the basis of Article III of the Law of 3 May 1989. The other plaintiffs in the main action had the benefits for incapacity for work which they had been receiving withdrawn by the relevant trade associations with effect from 1 July 1991 on the basis of Article IV of the Law of 3 May 1989 on the ground that they did not satisfy the income requirement.

13 Mrs De Weerd and the other plaintiffs in the main proceedings brought an action challenging the decisions refusing or withdrawing benefits before the Raad van Beroep, 's-Hertogenbosch, which concluded that the disputes raised questions concerning the interpretation of Community law and accordingly decided to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a provision such as that set out in Article III of the Netherlands Law of 3 May 1989 (Staatsblad 126) — whereby the rights of married women to AAW benefit, acquired by virtue of Community law as from 23 December 1984 but not (yet) asserted, have been taken away in their entirety on account of the fact that the benefit was applied for out of time as a result of the introduction in the meantime of a new condition for the acquisition of entitlement to benefit — contrary to the Community principle of legal certainty or to any other principle of Community law, such as the requirement of proper implementing legislation?

2. Is a provision such as that set out in Article IV of the Netherlands Law of 3 May 1989 (Staatsblad 126), as amended by the Law of 4 July 1990 (Staatsblad 386) — whereby the rights of married women to AAW benefit (and the rights of others to such a benefit) acquired by virtue of Community law as from 23 December 1984 and (usually only subsequently) asserted, have been taken away as from 1 July 1991 as a result of the introduction in the meantime of a new condition for the acquisition of entitlement to benefit — contrary to the Community principle of legal certainty or to any other principle of Community law, such as the requirement of proper implementing legislation?

3. Can provisions such as those set out in Articles III and IV of the Netherlands Law of 3 May 1989 (Staatsblad 126) — which (in practice) affect exclusively (Article III) or largely (Article IV) married women and which thus in principle create indirect discrimination against those women within the meaning of Article 4 (1) of Directive 79/7/EEC — be objectively justified by budgetary considerations?

   Can that be the case where the setting aside of the measures contained in those provisions would lead to socially unacceptable consequences for the national budget and/or the financing of social security?

   Can expenditure amounting to approximately HFL 85 million per year and approximately HFL 1 000 million on a once-only basis be regarded as unacceptable consequences of that kind?

4. Must a measure such as that set out in Articles III and IV of the Netherlands Law of 3 May 1989 (Staatsblad 126) — in the event of an affirmative answer to Question 1 and/or Question 2 — be declared non-binding *erga omnes*?'

14 The trade associations which are the defendants in the main action preface their observations with the remark that the disputes concern in part persons who fall outside the scope of Directive 79/7 *ratione personae*, as defined in Article 2, because they have not worked or received income from or in connection with employment during the year preceding the commencement of their incapacity; consequently, they are not entitled to rely on the directive. The Netherlands Government adds that in view of the interpretation given by the Centrale Raad van

Beroep to the income requirement in its judgment of 23 June 1992, referred to above, Articles III and IV of the Law of 3 May 1989 now concern at any rate only persons who, having received no income whatsoever from employment during the year prior to the commencement of their incapacity, do not belong to the working population within the meaning of Article 2 of Directive 79/7 and cannot therefore rely on it. Most of the questions which have been referred for a preliminary ruling are therefore without purpose.

15 The Court notes in that regard that the questions referred by the national court for a preliminary ruling relate precisely to the income requirement as the criterion which differentiates between men and women and its compatibility with Directive 79/7.

16 Furthermore, it is apparent from the order making the reference that the national court, which alone is competent to determine in the light of each case the necessity for a preliminary ruling and the relevance of the questions referred to the Court of Justice, is aware that some of the plaintiffs in the main action cannot be regarded as forming part of the working population and falling within the group of persons covered by Directive 79/7. However, it considers that in so far as such persons are affected by the national legislation in question the questions referred may be relevant to the outcome of the disputes concerning them. In addition, the fourth question expressly concerns the issue whether the consequences in national law of a finding that Articles III and/or IV of the Law of 3 May 1989 are incompatible with Directive 79/7, which may result from the replies to the first two questions, may also benefit persons whose situation is comparable to that of the plaintiffs in the main action.

First question

17 By the first question the national court asks in essence whether Community law prevents the application of national legislation which, by making entitlement to benefits for incapacity for work subject to a condition not previously imposed on men, deprives married women of rights which they derive from the direct effect of Article 4 (1) of Directive 79/7.

18 It should be remembered first that Article 4 (1) of Directive 79/7 may, in the absence of appropriate implementing measures, be relied on by individuals before the national courts in order to preclude the application of any provision of national law inconsistent with that article and that as from 23 December 1984, the date on which the time allowed for transposing the directive expired, women are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the directive has not been implemented correctly, those rules remain the only valid point of reference (see *inter alia* Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraphs 11 and 12).

19 As a result, married women whose incapacity for work arose before 1 January 1979 were entitled as from 23 December 1984, by virtue of the direct effect of Article 4 (1) of Directive 79/7, to AAW benefits in the same conditions as men in the same situation, that is to say, without having to satisfy the income requirement.

20 Next, it should be noted that belatedly adopted implementing measures must fully respect the rights which Article 4 (1) has conferred on individuals in a Member State as from the expiry of the period allowed to the Member States for complying therewith (see *inter alia* Case C-377/89 *Cotter and McDermott* v *Minister for Social Welfare and Attorney General* [1991] ECR I-1155, paragraph 25).

21 It follows that a Member State may not impose, in national legislation intended to implement Article 4 (1) of Directive 79/7 and adopted after the expiry of the time-limit set by the directive, a condition which deprives married women of the rights which they derive, as from the expiry of that period, from the direct effect of that provision of Community law.

22 The trade associations, however, maintain that only married women who applied for benefits after the date of the entry into force of that national legislation are deprived of the rights conferred on them by the direct effect of Article 4 (1) of Directive 79/7 and that that legislation applies equally to men who applied after that date.

23 In that regard it should be noted that men whose incapacity for work arose before 1 January 1979 were entitled, prior to the adoption of the Law of 3 May 1989, to AAW benefits without having to satisfy the income requirement and were therefore fairly entitled to claim entitlement prior to that date, whereas married women, who did not satisfy the income requirement, had no reason to apply because under the national legislation applicable at that time they were not entitled to the benefit.

24 In those circumstances, by requiring that such women have applied for benefits before the date of the entry into force of the Law of 3 May 1989, Article III thereof has the effect of reinforcing the discrimination which existed previously, because women who were victims of the discrimination resulting from the income requirement may no longer claim, after that date, AAW benefits to which they were in fact entitled, as from 23 December 1984, by virtue of the direct effect of Article 4 (1) of Directive 79/7.

25 The reply to the first question must therefore be that Community law prevents the application of national legislation which, by making entitlement to benefits for incapacity for work dependent on a condition not previously applied to men,

deprives married women of the rights conferred on them by virtue of the direct effect of Article 4 (1) of Directive 79/7.

Second question

26 By the second question the national court seeks in essence to know whether Community law precludes the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4 (1) of Directive 79/7.

27 As indicated in its title and stated in Article 1, the purpose of Directive 79/7 is to ensure the progressive implementation in the field of social security and other elements of social protection provided for in Article 3 of the principle of equal treatment for men and women in matters of social security. The Court noted in the judgment in Case 71/85 (*Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 17) that that objective is given practical expression in Article 4 (1) of the directive.

28 Directive 79/7 leaves intact, however, the powers reserved by Articles 117 and 118 of the Treaty to the Member States to define their social policy within the framework of close cooperation organized by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented (see *inter alia* Joined Cases 281, 283, 284, 285 and 287/85 *Germany et al* v *Commission* [1987] ECR 3203 and Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205).

29 Moreover, the Court has also held that Community law does not prevent Member States from taking measures, in order to control their social expenditure, which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in Article 4 (1) of Directive 79/7 (see *inter alia* Case 30/85 *Teuling* [1987] ECR 2497 and Case C-229/89 *Commission* v *Belgium*, cited above) . The compliance with that condition of legislation such as that at issue in the main proceedings is the subject of the third question which has been referred for a preliminary ruling.

30 The reply to the second question must therefore be that Community law does not preclude the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4 (1) of Directive 79/7.

Third question

31 By the third question the national court asks whether Article 4 (1) of Directive 79/7 precludes the application of national legislation which makes the grant of benefits for incapacity for work dependent on the requirement of having received some income during the year preceding the commencement of the incapacity, a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds.

32 That question has no purpose in the case of a provision such as Article III of the Law of 3 May 1989, which deprives married women of rights which they derived, as from the end of the time allowed for transposing Directive 79/7, from the direct effect of Article 4 (1) of the directive, thereby reinforcing the direct discrimination which they suffered before the entry into force of the Law of 3 May 1989.

33 Furthermore, it should be remembered that the Court has consistently held that Article 4 (1) of Directive 79/7 precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objectively justified factors unrelated to any discrimination on grounds of sex (see *inter alia* Case C-229/89 *Commission* v *Belgium*, cited above, paragraph 13).

34 That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see Case C-226/91 *Molenbroek* v *Sociale Verzekeringsbank* [1992] ECR I-5943, paragraph 13).

35 Nevertheless, although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.

36 Moreover, to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, which is prohibited by Article 4 (1) of Directive 79/7, would be to accept that the application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.

37 Finally, as the Court has stated in connection with the second question, Community law does not prevent Member States from taking budgetary constraints into account when making the continuance of entitlement to a social security benefit dependent on conditions the effect of which is to withdraw the benefit thereof

from certain categories of persons, provided that when they do so they do not infringe the rule of equal treatment as between men and women laid down in Article 4 (1) of Directive 79/7.

38 The reply to the third question must therefore be that Article 4 (1) of Directive 79/7 precludes the application of national legislation which makes the grant of benefits for incapacity for work subject to the condition of having received some income during the year preceding the commencement of the incapacity, a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds.

Fourth question

39 By the fourth question the national court seeks to know whether, if national legislation is incompatible with Article 4 (1) of Directive 79/7, that provision may be relied on before the national courts to prevent the application of the national legislation solely by persons of the categories covered by the directive as defined in Article 2, or also by all persons affected by the national legislation, even if they are not within the categories to which the directive applies.

40 The Court has already ruled (in Joined Cases 48, 106 and 107/88 *Achterberg-te Riele and Others* [1989] ECR 1963, paragraph 17) that persons not covered by Article 2 of Directive 79/7 may not rely on Article 4.

41 In addition, it follows from the judgment of the Court in Joined Cases C-87, 88 and 89/90 *Verholen and Others* [1991] ECR I-3757 that Article 4 (1) of

Directive 79/7 cannot be relied upon by persons not falling within its scope *ratione personae* even if they are covered by a national social security scheme such as the AAW which itself falls within the directive's scope *ratione materiae*.

42 Finally, in the last-named judgment the Court stated that Directive 79/7 may be relied upon by individuals who suffer the effects of discrimination in a national provision through another person who himself is covered by the directive.

43 The reply to the fourth question must therefore be that only persons falling within the scope *ratione personae* of Directive 79/7 as defined in Article 2 and those affected by discrimination in a national provision through another person who himself falls within the scope of the directive may, if that national legislation is incompatible with Article 4 (1) of the regulation, rely on that article before the national courts in order to prevent the application of the national legislation.

Costs

44 The costs incurred by the Governments of the Netherlands and Ireland, and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Raad van Beroep, 's-Hertogenbosch (The Netherlands), by an order of 30 June 1992, hereby rules:

1) Community law precludes the application of national legislation which, by making entitlement to benefits for incapacity for work dependent on a condition not previously applied to men, deprives married women of the rights conferred on them by virtue of the direct effect of Article 4 (1) of Directive 79/7/EEC of the Council of 19 December 1978 on the progressive implementation of the principle of equal treatment between men and women in matters of social security;

2) Community law does not preclude the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4 (1) of Directive 79/7/EEC;

3) Article 4 (1) of Directive 79/7/EEC precludes the application of national legislation which makes the grant of benefits for incapacity for work subject to the condition of having received some income during the year preceding the commencement of the incapacity, a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds;

4) Only persons falling within the scope *ratione personae* of Directive 79/7/EEC as defined in Article 2 and those affected by discrimination in a national pro-

vision through another person who himself falls within the scope of the directive may, if that national legislation is incompatible with Article 4 (1) of the directive, rely on that article before the national courts in order to prevent the application of the national legislation.

Mancini Díez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 24 February 1994.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber