OPINION OF ADVOCATE GENERAL TESAURO

delivered on 17 September 1992 *

Mr President,
Members of the Court,

1. The questions submitted by the Raad van Beroep [Social Security Court], Amsterdam, seek a preliminary ruling on the interpretation of 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. [1]

The national court's questions concern the scope of the prohibition of discrimination on grounds of sex under the Netherlands system which provides for a supplement in favour of pensioners whose dependent spouse has not reached the age of 65. In particular, the national court asks whether the fact that the award of a supplement and the amount thereof depend on the income received by the younger spouse from or in connection with work constitutes indirect discrimination prohibited by the aforesaid directive if the consequence is that most of those who qualify for the supplement are men.

2. The relevant national legislation and the facts of the case are summarized below; for the details, I would refer the Court to the Report for the Hearing.

The Algemene Ouderdomswet (General Law on old-age insurance, hereinafter 'the AOW'), as amended on 1 April 1985 in order to take account of Directive 79/7/EEC, provides that on reaching the age of 65 any married person is entitled to an old-age pension which, in the case of a full insurance record of 50 years, amounts to 50% of the net minimum wage in force; in the case of unmarried persons, on the other hand, the pension amounts to 70% of the net minimum wage. Furthermore, a married pensioner whose dependent spouse has not reached the age of 65 is entitled to a supplement which is reduced by 2% for each calendar year in which the pensioner's spouse was not insured under the AOW. That supplement may be paid directly to the dependent spouse, at the latter's request.

Until 1 April 1988, the supplement was paid regardless of any income received by the pensioner's dependent spouse. Since that date, however, the grant of the supplement and its amount have depended on the spouse's income; any income received by the dependent spouse from or in connection with employment or self-employment is deducted from the supplement, except for such part of the income as does not exceed 15% of the gross minimum wage and one-third of the amount in excess of the minimum wage.

As from the same date, moreover, the maximum supplement amounts to 30% of the net minimum wage whilst the amount of the

* Original language: Italian.

1 — OJ 1978 L 6, p. 24.

pension, for a married person whose dependent spouse has not reached the age of 65, is equal to 70% of the minimum wage, that is to say, the same amount to which an unmarried person is entitled. In substance, the maximum supplement is equal to the difference between the sum of the maximum pensions of two spouses who are both entitled to an old-age pension and the maximum pension to which an unmarried person may be entitled.

3. That brings me to the facts of the case. Under the AOW, the Bestuur van de Sociale Verzekeringsbank (Board of the Social Insurance Bank, hereinafter 'the SVB') awarded Mr Molenbroeck as from 1 May 1990 a full married person's pension amounting to 70% of the net minimum wage since his dependent wife had not reached the age of 65. He was also awarded a supplement which came to 27.70% of the maximum supplement provided for, the SVB having deducted the wife's income, in accordance with the criteria set by the AOW, from the maximum supplement to which he was entitled.

Mr Molenbroeck appealed to the Raad van Beroep against the SVB's decision concerning the supplement, claiming that the condition for entitlement to the full supplement, namely that the spouse must not have reached the age of 65 and must not be in receipt of income from employment, constituted indirect discrimination on grounds of sex since the majority of those eligible for the supplement in question would be men. In order to ascertain whether the said legislation was in fact incompatible with Article 4(1) of Directive 79/7/EEC, the national court submitted a reference to the Court of Justice.

Before I turn to the individual questions, allow me to draw attention to the 'singular' circumstances of this case. Mr Molenbroeck alleges discrimination against women in seeking to obtain a higher supplement as a man. The plaintiff in the main proceedings seeks a ruling to the effect that no account is to be taken, for the purposes of the award of the supplement and the amount thereof, of any income received by the younger spouse, with the result that pensioners whose dependent spouse has not reached the age of 65 (that is to say pensioners most of whom are men) would always and in any event be entitled to the full supplement.

4. In its first question the Raad van Beroep wishes to ascertain whether the aforesaid grant of a supplement, the award and the amount whereof depend exclusively on the income received by the dependent spouse, constitutes discrimination within the meaning of Article 4(1) of Directive 79/7/EEC if the consequence is that most of those who qualify for the supplement are men.

Let me point out in the first place that Article 4(1) prohibits, in matters of social security, any discrimination on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular so far as concerns the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits. It is thus clear from the very wording of Article 4(1) that the award of a supplement is prohibited if it is directly or indirectly based on the sex of the beneficiary. [2]

2 — See the judgment in Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497, paragraph 12.

It is common ground that the system in question does not draw any distinction on the basis of sex; it is therefore necessary to ascertain whether it exhibits the salient features of indirect discrimination. As the Court has consistently held in this area, [3] there is a presumption of indirect discrimination where legislation which is ostensibly neutral, that is to say it draws no distinction on grounds of sex, in fact *works to the disadvantage* primarily of one sex or the other. Accordingly, where a considerably smaller proportion of women than of men (or vice versa) is found to be eligible for certain benefits, the legislation in question is in principle contrary to Article 4(1) of Directive 79/7/EEC. However, as the Court has made clear, such a presumption of discrimination can be rebutted if the system of benefits is based on 'objectively justified factors unrelated to any discrimination on grounds of sex'. [4]

5. With regard to the case under consideration, allow me to point out first of all that it is undisputed by the parties themselves that most of the beneficiaries of the supplement in question are men and that, in particular, the conditions for the award of the full supplement are met almost exclusively by men. That is so first and foremost because in a couple the younger spouse is normally the wife, a social factor which clearly has nothing to do with discrimination. The legislation in question is not challenged from that angle, but on account of the fact that the award and the amount of the supplement depend on the income of the younger spouse and therefore, in most cases, on the woman's income.

More specifically, the award of a supplement based on the younger spouse's income is said to lead to the consequence that, even in those cases (whose number is already negligible) in which the younger spouse is a man, the woman entitled would scarcely ever be able to obtain the full supplement. The reason is, as shown by the figures supplied during the proceedings, that whilst most women aged between 60 and 65 have no income or, in any event, have only a very small income, men in the same age group are still in employment and are therefore in receipt of income (from employment) the level of which is such as to prevent the spouse entitled to a pension (namely the woman) from qualifying for the full supplement. The obvious consequence of that situation is that, in percentage terms, within the category of pensioners with a dependent spouse aged less than 65, it is predominantly men who qualify for the full supplement.

In the light of the aforesaid case-law of the Court, the supplement in question is therefore contrary to Article 4(1) of Directive 79/7/EEC unless it is based on objectively justified reasons unrelated to any discrimination on grounds of sex. However, I consider that, irrespective of the reasons which may explain the fact that it is predominantly men who are entitled to claim the (full) supplement, the system under consideration in this case contains a provision whose effect is to preclude even at this stage a finding that it discriminates against women: I am referring to the fact that *the supplement is paid directly to the younger spouse, upon request by the latter*. The provision in question implies that the *recipients of the supplement are 'in practice' younger spouses* and therefore, in so far as the supplement is intended for them, they

3 — See, most recently, the judgment in Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 13.

4 — See, in particular, the judgment in *Commission* v *Belgium*, cited above, paragraphs 13 and 14, and the judgment in *Teuling*, cited above, paragraph 13.

are by no means placed at a disadvantage, quite the contrary! I fail to see, therefore, how it is possible to argue that women, who are in substance the main 'beneficiaries' of the supplement, are at a disadvantage in relation to men.

In conclusion, I consider that the distinction made by the system in question between those entitled to the supplement (pensioners) and recipients thereof (dependent spouses), which, moreover, reveals the intended purpose of the supplement, is in itself sufficient to eliminate the discrimination alleged.

6. In the event of the Court taking a different view, it is necessary to establish whether the system in question is based on objectively justified reasons unrelated to any discrimination on grounds of sex.

In that regard, the Netherlands Government and the SVB have pointed out that the purpose of the supplement is to guarantee minimum means of subsistence for couples. The supplement is designed to enable spouses to enjoy a minimum social income, which will remain substantially unchanged even where the supplement is discontinued (when the younger spouse reaches the age of 65) and each spouse then qualifies, if the other conditions are met, for a pension amounting to 50% of the corresponding net minimum wage. In other words, the aim of the supplement is to ensure that a couple's aggregate income is at least equal to the total benefits due to them when they both become entitled to an old-age pension, equal, that is, to the social minimum which the AOW, in keeping with its role as basic insurance, guarantees to spouses who are both entitled to an old-age pension.

The Court has already had occasion to state that the award of a minimum social income forms an integral part of the social policy of the Member States; [5] the award of a supplement in order to guarantee a minimum income for couples is therefore a method whereby the Netherlands pursues in principle a legitimate objective of social policy.

It is necessary to ascertain, however, whether the measure in question is proportionate, that is to say whether the method chosen (the award of the supplement) is adequate and necessary for the achievement of the aim pursued (namely to guarantee a minimum social income for couples). That assessment is in principle a matter for the national court, which alone is competent to appraise the facts and to interpret national law, and whose task ultimately is to establish whether the supplement is in fact intended to guarantee a minimum social income for couples and whether it is necessary for that purpose.

7. In its second question, which consists of two parts, the national court asks whether Article 4(1) of the directive precludes the application of the aforesaid system in so far as no account is taken, for the calculation of the supplement, of any other income

5 — Judgment in *Commission* v *Belgium*, cited above, paragraph 22.

received by the pensioner and, conversely, whether the AOW ceases to be in the nature of a basic benefit where the supplement is not necessary in order to guarantee adequate means of subsistence for persons with a dependent spouse. By that question, therefore, the national court seeks in fact to verify, in relation to the matters specified, the proportionality of the measure in question, that is to say whether it is objectively justified.

In that regard, Mr Molenbroeck maintains that the fact that the pensioner's income is not taken into account means that the supplement is not intended to ensure minimum means of subsistence. The implication is that the supplement is also awarded to pensioners with substantial means of their own, that is to say persons who do not need it as a guarantee of minimum means of subsistence. Moreover, the very fact that the supplement may be awarded even where it is not necessary to ensure minimum means of subsistence has the effect of depriving the benefit paid under the AOW of its character as a basic benefit.

Let me point out first of all that, as the Court has stated in its judgment in *Commission* v *Belgium*, [6] objectives such as that of ensuring a minimum income fall within the sphere of social policy which, as Community law stands at present, is a matter for the Member States which 'enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation'.

Having said that, I would observe that it is undoubtedly true that the failure to take into consideration the pensioner's income or any income, other than income from employment, received by the dependent spouse may lead to situations in which a couple is assured, precisely as a result of the supplement, of an income which exceeds the minimum means of subsistence. That consequence, however, cannot detract from the character of the AOW as a basic benefit in so far as the latter is intended to ensure a minimum social income, irrespective of any other income received by a couple. Moreover, the Court has had occasion to emphasize that Community law does not preclude a Member State, in controlling its social security expenditure, from taking into account the requirements of certain categories, in particular the fact that the expenses borne by persons with a dependent spouse are greater. [7]

In conclusion, the fact that a pensioner's income is not taken into consideration for the purposes of the award of the supplement and the amount thereof is not contrary to Article 4(1) of Directive 79/7/EEC; instead, it is a precondition for the attainment of the objective pursued, namely to guarantee that couples have the same aggregate income to which they will be entitled when both spouses receive an old-age pension and the supplement is thus discontinued.

6 — Cited above, paragraph 22; see, along the same lines, the judgment in Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, paragraph 27.

7 — See the judgment in *Commission* v *Belgium*, cited above, paragraphs 24 and 25.

8. Finally, let me point out that there is no need, in view of the conclusions which I have reached with regard to the first two questions, to consider the third question, in which the issue raised by the national court concerns the consequences, in a case such as this, of a breach of Article 4(1) of the directive.

9. In the light of the foregoing considerations, therefore, I propose that the Court answer the questions submitted by the Raad van Beroep, Amsterdam, as follows:

Article 4(1) of Council Directive 79/7/EEC must be interpreted as not precluding the application of national social security legislation which makes the award to an old-age pensioner with a dependent spouse under the age of 65 of a supplement, and the amount of that award, which is intended for that spouse, conditional on whether the latter receives any income from work, even if a consequence of such legislation is that most of those who qualify for the supplement are men.