OPINION OF ADVOCATE GENERAL ELMER
delivered on 30 April 1996 *

1. Does a special statutory travel concession for persons over a certain age fall within the scope 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 Directive')? That is the principal question in this case.

The relevant provisions in the Directive

2. The Directive was adopted on the basis of Article 235 of the EEC Treaty. It is clear from the second recital in the preamble that the principle of equal treatment in matters of social security should be implemented 'in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes'.

Article 1 states that the purpose of the Directive is '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 scope *ratione personae* of the Directive is set out in Article 2, according to which the Directive is to apply 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'.

The scope *ratione materiae* of the Directive is set out in Article 3(1), according to which the Directive is to apply to:

'(a) statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

* Original language: Danish.
1 — OJ 1979 L 6, p. 24.

— old age,

— accidents at work and occupational diseases,

— unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).'

Article 4(1) of the Directive defines the principle of equal treatment:

'... there shall be no discrimination whatsoever on ground of sex either directly, or indirectly ... in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

...'.

Article 7(1)(a) provides that the Directive is to be without prejudice to the right of Member States to exclude from its scope *inter alia* 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

The relevant national legislation

3. Originally in the United Kingdom there were a number of local schemes, whereby, without any specific legal basis, concessions were granted *inter alia* to the elderly for the use of public transport. In *Prescott* v *Birmingham Corporation*, [2] however, the Court of Appeal held that local authorities were *ultra vires* in granting such benefits which constituted discrimination in favour of certain classes of persons at the expense of the rest.

4. By the Public Services Vehicles (Travel Concessions) Act 1955 local authorities were empowered to introduce such schemes. From the account of the debate on the bill in the House of Commons on 18 February 1955 it appears that its purpose was to empower local authorities on the one hand to operate collective transport undertakings

2 — [1955] Ch 210.

and on the other to assist certain deserving groups of people in need. Edward Short, who introduced the bill, stated that 'the real issue ... is one of broad principle which is one of national rather than purely local importance. One of the glories of our system of local government is that it gives wide discretionary powers to local authorities for administering our social services. ... A great many of them are concerned with subsidising various classes of people in some form — the rent of council houses, meals for old people, travel for school children, clothing for school children, maintenance grants for school children and so on.'

5. The relevant provisions are contained in section 93 of the Transport Act 1985 ('the Act'), which empowers local authorities to provide a travel concession scheme entitling certain categories of person to free or reduced-price travel on public passenger transport services. Under section 93(7) of the Act the following persons are eligible for such concessions:

'(a) men over the age of sixty-five years and women over the age of sixty years;

(b) persons whose age does not exceed sixteen years;

(c) persons whose age exceeds sixteen years but does not exceed eighteen years and who are undergoing full-time education;

(d) blind persons, that is to say, persons so blind as to be unable to perform any work for which sight is essential;

(e) persons suffering from any disability or injury which, in the opinion of the authority or of any of the authorities responsible for the administration of the scheme, seriously impairs their ability to walk; and

(f) such other classes of persons as the Secretary of State may by order specify.'

The ages specified in section 93(7)(a) correspond to pensionable ages in the United Kingdom.

6. By the Transport Act 1985 (Extension of Eligibility for Travel Concessions) Order 1986 made in exercise of the power conferred by section 93(7)(f), the Secretary of State for Transport added further classes of persons to those eligible for a travel concession scheme:

(a) persons suffering from mental handicap;

(b) persons who have been refused a driving licence on medical grounds;

(c) persons who are deaf or dumb;

(d) persons whose sight is impaired to such an extent that they cannot reasonably accurately estimate the size and speed of movement of vehicular traffic;

(e) persons who are without the use of both arms;

(f) specified companions of any eligible persons who, in the opinion of the relevant authority are so severely disabled or handicapped as to require the assistance of a companion in order to be able to travel on public transport.

7. It is for the individual local authority to define the persons to whom the scheme applies, provided that they are eligible within the meaning of the above provisions.

8. On the basis of the above provisions, the first defendant in the main proceedings, Wrekin District Council, introduced a scheme which covers men over the age of 65, women over the age of 60, and disabled persons. The scheme does not, however, cover young persons. The persons covered by the scheme can, for a payment of UK £2 (corresponding to ECU 2.43), obtain either National Transport Tokens worth UK £16 (corresponding to ECU 19.42), or a bus card which gives entitlement to use the buses in Shropshire at half-price fares. For UK £43 (corresponding to ECU 52.18) those eligible can also buy a 'Travel Stamp' which entitles them to use buses in the Wrekin area at no further cost. At the hearing Wrekin District Council and the United Kingdom explained that it is difficult to quantify the

advantage that the scheme represents for an individual beneficiary. The value of a bus card depends on the number of times it is used: the greater the need of the persons involved for transport and the more they use their card the more valuable the scheme is to them.

9. The concessionary travel scheme is financed from public funds. In 1991/92 the local authorities' costs in reimbursing bus operators in connection with the scheme amounted, for the whole of the United Kingdom, to UK £410 million (corresponding to ECU 497.6 million).

Facts of the case

10. The plaintiff in the main proceedings, Stanley Charles Atkins was, when the application was lodged on 25 June 1991, 63 years old and a member of the working population. He brought proceedings in the Queen's Bench Division of the High Court of Justice, claiming that, in breach of the principle of equal treatment, he was the victim of unlawful discrimination on the ground of sex since he had been refused a travel concession under a scheme operated by Wrekin District Council, whereas a woman of the same age would have been entitled to such a concession.

Preliminary questions

11. By order of 23 May 1994 the Queen's Bench Division of the High Court of Justice referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'1. Is the concessionary travel scheme operated by the first defendant within the scope of Article 3 of Directive 79/7/EEC?

2. If the answer to question 1 is yes, does Article 7(1)(a) of Directive 79/7/EEC apply in the circumstances of this case?

3. If there has been a breach of Directive 79/7/EEC, can the direct effect of that Directive be relied on to support a claim for periods prior to the date of the Court's judgment by persons who have not prior to that date brought legal proceedings or made an equivalent claim?'

First question

12. By its first question the national court seeks to ascertain whether Article 3(1) of the Directive should be interpreted as covering a scheme subsidizing pensioners' use of public transport such as that operated by Wrekin District Council.

Procedure before the Court

13. Mr Atkins claims that this is a statutory scheme providing protection against old age, invalidity and so forth, and that it is thus, under Article 3(1), covered by the Directive. The scheme was established pursuant to section 93(7) of the Act and is therefore a statutory scheme. The Act has a social aim, in that its purpose is to enable subsidized travel on public transport to be provided to certain socially vulnerable groups, whose physical mobility and financial resources are generally limited. The concession is, furthermore, directly linked *inter alia* to old age, since any person over the qualifying age is eligible for the benefit regardless of his or her personal or financial circumstances.

14. Wrekin District Council, the United Kingdom and the German and Swedish Governments contend, however, that the scheme in question falls outside the scope of the Directive, since it constitutes neither the whole nor part of any statutory scheme providing protection against any of the risks specified in Article 3(1)(a) and is not a form of social assistance within the meaning of Article 3(1)(b). The scheme does entail that those entitled obtain certain social advantages, in the same way as others obtain education or use recreational facilities, but that does not mean that the scheme is covered by the term 'social security' as mentioned in Articles 51 and 118 of the Treaty. Social security provides protection against certain risks and is thus related to other forms of insurance. It is up to the local authorities whether and to what extent schemes such as the one at issue here are set up, and the local schemes are very varied in their scope. Thus this is not a statutory scheme within the meaning of the Directive. Lastly, there is no direct and necessary link between the scheme and the risks listed in Article 3(1), since the scheme assists those entitled with their transport costs, which is not in itself a risk covered by the provision. In that connection it is immaterial that old age is one of the criteria of eligibility used.

15. The Commission has stated that the scheme in question must be regarded as

falling within the scope of the Directive. The concessions granted under the scheme can obviously not, in the Commission's view, be regarded as social security in the sense that the term is used in Regulation No 1408/71 [3] ('the Regulation'), since it is not a scheme resembling insurance. Nor can the concessions be regarded as social assistance, since they are not based on need. The Directive, which has its legal basis in Article 235 of the Treaty, must, however, also be regarded as covering social protection in a broad sense (see, for instance, the use of that expression in Articles 1 and 3 of the Directive). The purpose of the Directive requires the principle of equal treatment to be extended to all forms of social protection, regardless whether the Member States have chosen to apply the resources available for social security or social assistance in the traditional sense, or for other forms of social protection. It is in the list of risks covered that the Directive's limits are set. The scheme at issue in this case is a statutory scheme which is directly and effectively linked to the risks mentioned in Article 3(1) of the Directive and the scheme is therefore covered by the Directive *ratione materiae*. The fact that the Act also allows local authorities to extend the scheme to the young cannot remove the scheme from the ambit of the Directive, since the Directive would otherwise be too easy to circumvent.

General remarks concerning the scope ratione materiae of the Directive

16. I shall first examine whether the scope *ratione materiae* of the Regulation is coextensive with that of the Directive.

17. Under Article 4(1) and (2) of the *Regulation*, it is to apply to all legislation concerning general and special social security schemes, whether contributory or non-contributory, relating to the specified risks, including old-age benefits. On the other hand, social assistance, that is to say benefits which are awarded following an actual assessment of the recipient's needs, fall outside the scope of the Regulation (Article 4(4)).

18. According to the Court's case-law, the delimitation of the scope of the Regulation *ratione materiae* takes place in two phases. First, it is asked whether the benefit is awarded under legislation which gives those entitled a statutory right, leaving no room for any individual or discretionary assess-

3 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as consolidated in Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). The regulation is based on Article 51 of the Treaty as regards employed persons and on Article 235 as regards the self-employed.

ment of personal need or circumstances. [4] No significance is attached to the way the benefit is financed. [5] Next it is asked whether the benefit provides protection against certain specified risks. From the case-law may be cited Case 249/83 *Hoeckx* concerning a Belgian scheme under which persons with inadequate means were assured of a minimum income, where the Court stated that the aim of the benefit was not to mitigate the effects of any particular risk specified in the Regulation. [6]

19. National schemes can, on the basis of their scope *ratione personae*, their purpose and the provisions laid down for their implementation, be related both to social security and to social assistance, and in connection with the Regulation an assessment of a somewhat discretionary character must be made as to the category under which the benefit falls. The example may be cited of Case C-356/89 *Newton*, which concerned a United Kingdom mobility allowance awarded on the basis of statutory objective criteria, namely whether an applicant was suffering from physical disablement such that he was unable to walk or virtually unable to do so. [7] The Court found that, first, the benefit sought to ensure a minimum level of income for handicapped persons who were entirely outside the social security system and, secondly, provided supplementary income for recipients of social security benefits who suffered from physical disablement affecting their mobility. In connection with the latter group, the benefit was to be deemed to fall within the field of social security within the meaning of Article 51 of the Treaty and the legislation adopted in implementation of that provision. [8] The benefit was thus covered by the scope *ratione materiae* of the Regulation. On the other hand, only some of those entitled were covered by the scope *ratione personae* of the Regulation, as defined in Article 2(1) (and see Article 1(a)).

20. According to its title, the *Directive* concerns the progressive implementation of the principle of equal treatment for men and women in matters of social security, and under Article 3(1), the Directive is to apply to 'statutory schemes which provide protection against' specified risks, including old age, and to social assistance, in so far as it is intended to supplement or replace such schemes.

21. Schemes covered by the scope *ratione materiae* of the Regulation may well be deemed to be covered by the scope *ratione materiae* of the Directive in so far as the risks covered by the Regulation are also covered by the Directive. It should be recalled that in *Newton* the Court regarded a mobil-

4 — See the judgments in Case C-66/92 *Acciardi* [1993] ECR I-4567, paragraph 14; Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 29; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15.

5 — See the cases cited in footnote 3: Case C-66/92 *Acciardi*, paragraph 18; Case C-111/91 *Commission* v *Luxembourg*, paragraph 31; and Case C-78/91 *Hughes*, paragraph 21.

6 — [1985] ECR 973, paragraphs 13 and 14.

7 — [1991] ECR I-3017.

8 — See paragraphs 14 and 15.

ity allowance for the disabled as being covered by the scope *ratione materiae* of the Regulation.

22. However, in my view it is not possible to draw the converse conclusion and equate the term 'social security' within the meaning of the Regulation with the scope of the Directive as laid down in Article 3(1)(a). There is nothing in the Directive to suggest that the expression 'social security' in the Directive should be understood in the same way as it is in the Regulation, let alone in any precise sense. The expression 'social security' is thus also used in the Directive's title ('... equal treatment for men and women in matters of social security'), where it is quite clear that it is used in a different and wider sense than in the Regulation. In the title the expression covers not only 'statutory schemes which provide protection' but also social assistance referred to in Article 3(1)(b).

23. The second recital in the preamble, too, according to which the principle of equal treatment in matters of social security should be implemented in the first place 'in the statutory schemes which provide protection against the risks of ... old age ... and in social assistance ...' shows that Article 3(1)(a) of the Directive must be understood as meaning that the Directive not only covers social security benefits as referred to in the Regulation, but also other benefits which provide social protection.

24. It could be argued that when Article 1, which sets out the purpose of the Directive, speaks of 'the field of social security and other elements of social protection provided for in Article 3', the expression 'social security' in Article 1 here refers to Article 3(1)(a) concerning statutory schemes which provide protection against specified risks and the term 'other elements of social protection' in Article 1 to Article 3(1)(b), concerning social assistance intended to supplement or replace the schemes referred to in Article 3(1)(a). However, Article 1 does not, as Article 3(1)(a) does, use the term 'assistance' but rather the term 'social security and other elements of social *protection*' and the word 'protection' is applied only in Article 3(1)(a) but not in Article 3(1)(b). Hence it must be assumed that the expression 'other elements of social protection' in Article 1 does not, or does not only, refer solely to Article 3(1)(b), but also covers at least some of the benefits included in Article 3(1)(a).

25. Article 3(1) does not itself use the term social security or similar expres-

sions [9] to delimit the scope of the Directive. It would have been natural to use that term in Article 3(1)(a) if that provision was to be so limited, instead of using the wider term 'statutory schemes which provide protection'.

26. The fact that the Directive goes further than the Regulation must be viewed in the light of the Directive's being an autonomous legislative measure which has a purpose different from that of the Regulation. It does not aim, as the Regulation does, to coordinate certain national social security schemes, but rather to ensure that national schemes concerning social protection comply with a fundamental right, namely the principle of equal treatment for men and women. I would here refer to the general Community law principle according to which an interpretation must seek to ensure the effectiveness of the legislative measure in question. The fact that the Directive was adopted on the basis of Article 235 also means that the language used in Articles 51 and 118 of the Treaty becomes irrelevant when the Directive is being interpreted.

27. The above interpretation is consistent, in my view, with the Court's case-law hitherto concerning Article 3(1) of the Directive. The Court has stated that 'in order to ensure that the progressive implementation of the principle of equal treatment ... is carried out in a harmonious manner throughout the Community, Article 3(1) must be interpreted as including any benefit which *in a broad sense* forms part of one of the statutory schemes referred to or a social assistance provision intended to supplement or replace such a scheme'. [10] In order to fall within the scope of the Directive a benefit must constitute the whole or part of a statutory scheme providing protection against one of the specified risks or a form of social assistance having the same objective. [11] That condition is satisfied when the benefit is *directly and effectively* [12] linked to protection against one of the specified risks, including old age and invalidity. [13] Thus the decisive factor is that the benefit should protect against a risk covered by the Directive, which presupposes that there is a direct and effective link between the benefit and the risk in question.

28. In its case-law the Court has not based the delimitation of the scope of the Directive on the traditional criteria invoked by Wrekin District Council, the United Kingdom and the German Government such as membership, periods of employment and the insurance aspects, just as no significance has been

9 — Such as, for instance, branches of social security or social security schemes.

10 — See Case 150/85 *Drake* [1986] ECR 1995, paragraph 23 (emphasis added).

11 — See the judgments in Drake, cited above, paragraph 21; Case C-243/90 *Smithson* [1992] ECR I-467, paragraph 12; Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraph 15; and Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 8.

12 — Note concerning only the Danish version.

13 — See the above-cited judgments in *Smithson*, paragraph 12; *Jackson and Cresswell*, paragraph 15; and *Richardson*, paragraph 8.

attached to way the benefit is financed. In *Richardson*, [14] the Court thus held that a publicly-financed prescription charge exemption scheme was covered by the Directive despite the fact that the benefit was unrelated to such traditional criteria. In my opinion there are also substantial reasons that militate against laying down such requirements. There are of course a number of Member States where protection against sickness, old age, and so forth is based on the payment of contributions earmarked for sickness insurance funds, pension schemes etc. There are, however, also Member States where the social security schemes are not so based but are financed completely out of public funds through general taxes and charges (with subsequent redistribution). The Danish national pension and sickness insurance systems can be mentioned as examples of statutory schemes ensuring protection against old age and sickness respectively which today are financed purely from taxes and charges, with no form of contribution or membership requirement, and the benefits awarded without regard to periods of employment. It is clear that such schemes are covered by Article 3(1)(a) of the Directive.

29. Finally, it can be concluded from paragraph 13 of the *Richardson* judgment that no requirement follows from the term 'statutory schemes which provide protection' to the effect that the benefit should technically form part of national rules on social protection. No specific limitations may be read into the word 'scheme' and the fact that an individual Member State has chosen to make a sphere of legislation the responsibility of one minister or another cannot be a basis for drawing a conclusion as to whether a benefit under that legislation provides protection in the Community law sense. [15] The extent to which that is the case must depend on an assessment of the specific character of the benefit. The Directive accordingly covers all benefits comprised in schemes which provide protection against the risks enumerated in the Directive, however they are defined and regulated in the various national legal systems. [16]

Is there a statutory scheme in this particular case?

30. A benefit such as the concessions operated by Wrekin District Council has, like the prescription charge exemption scheme in *Richardson*, its basis in a statute and is implemented through the exercise of delegated powers. [17] The fact that the scheme (having its basis in a statute) is introduced and operated by local authorities for their particular area cannot, in my view, be regarded as significant. It is often appropriate for a scheme

14 — See footnote 11.

15 — I would refer here to point 12 of my Opinion in the *Richardson* case, from which it appears that it is difficult to find a more neutral expression.

16 — See point 5 in Advocate General Mancini's Opinion in the *Drake* case referred to in footnote 10.

17 — See *Richardson* cited in footnote 11, paragraph 11.

to be operated by the authorities which have to meet the costs involved and cover such costs by raising the amounts required. It appears from the record of the debates in the House of Commons that in the United Kingdom 'social services' have traditionally been operated locally. Such traditions may vary from Member State to Member State and the need for effective and uniform application of the Directive requires that no significance should be attached to such differences when delimiting the scope of the Directive and thus of the principle of equal treatment. Correspondingly, as stated in point 29 above, the benefit cannot be kept outside the scope of the Directive solely on the ground that it has its basis in the Transport Act 1985 and thus does not technically depend on a parent act the aim of which is social protection. [18] Accordingly I consider that a benefit such as that operated by Wrekin District Council is in the nature of a statutory scheme within the meaning of the Directive.

Does the scheme provide protection against old age?

31. Article 3(1)(a) of the Directive requires the benefit to provide protection against *inter alia* old age. It can of course be discussed in a more general way whether persons of 60 or 65 years old are affected by the risk of old age. The Directive does not, however, itself define that risk by reference to a specific age, nor does it aim to harmonize such matters. The Directive must accordingly be assumed to refer to the sense in which the term is applied by individual countries in their domestic legal systems.

32. The aim of the Directive is to ensure a fundamental right, namely the right to equal treatment as regards benefits which provide protection against certain risks, including old age. It must follow from the expression 'provide protection' that the benefit must have a social objective and be directed towards remedying the consequences of a person's being affected by a particular risk, including old age. Obvious examples are old age pensions, which give the elderly the possibility of leaving the employment market while maintaining a certain standard of living, or exemption from prescription charges which ensure that elderly people, for example, suffering from illness are not discouraged from taking the necessary medicine on financial grounds. Schemes for home help or meals on wheels also constitute part of the social safety net for the elderly, who otherwise often give up cleaning, shopping or making meals.

33. As a rule, it is a characteristic of old age that the ability to move about alone is reduced. Many of the elderly develop

18 — Ibid. paragraph 13.

problems as regards mobility, sight, hearing and reaction times. When they reach pensionable age and retire most people suffer an abrupt deterioration of their financial situation. A company car will be withdrawn and it is either difficult or impossible to obtain the means to acquire and/or maintain a car. Shopping and maintaining links with family and friends therefore presuppose, for many of the elderly, use of public transport. The possibility of using public transport is, moreover, particularly important to the elderly in less populated areas. Schemes offering cheap public transport must therefore, in my view, be regarded as an important part of the social safety net for the elderly. It cannot be reasonable to compare a benefit subsidizing the use by the elderly of public transport with cheap theatre or cinema tickets for the elderly as the United Kingdom has sought to do. Access to cheap public transport is something quite different and socially much more important for the average elderly person than schemes which enable him or her to visit the opera or ballet cheaply.

34. The fact that access to free or reduced-price transport is a considerable social benefit for the elderly is consistent with the fact that the necessary legal basis for these travel concessions in the United Kingdom was enacted, according to the record of the debate in the House of Commons, with a clear social aim. The scheme was compared, for example, with housing rent subsidy and meals for the elderly. Travel concessions such as those operated by Wrekin District Council on the basis of the Act thus have, in my view, an essential function of social protection.

35. It must, moreover, be irrelevant that in the United Kingdom the choice was made to allocate the benefit not by direct payment of a cash amount but by way of a publicly-financed scheme which allows the elderly to pay lower prices when using public transport. A cash amount would not ensure to the same degree that the mobility of the groups of persons covered was increased, since it could be used for other purposes. Indeed, the travel concessions scheme at issue in this case is framed in such a way that the financial advantage of the scheme is directly proportionate to the public transport needs of the person in question. Furthermore, it is quite possible that the total public expenditure incurred by the scheme might be less than the total use of the scheme made by the elderly in financial terms. The scheme might

well be organized in such a way that the public authorities obtain a discount by indicating that those entitled should use public transport outside peak hours.

Are the concessions directly and effectively linked to protection against old age?

36. As mentioned, it is a requirement, under the case-law of the Court, that the benefit should be directly and effectively linked to protection against one of the risks listed in Article 3(1)(a). The specific content of that requirement must now be examined.

37. In the *Drake* case [19] the Court concluded that the Directive applied to a scheme under which certain persons providing care for a disabled person were entitled to an invalid care allowance. In paragraph 24 the Court stated that the benefit was dependent on the existence of a situation of invalidity, inasmuch as such a situation was a *conditio sine qua non* for its payment.

38. In its judgment in *Smithson,* the Court held, conversely, that the Directive did not cover a scheme the purpose of which was to guarantee any person whose real income was lower than a notional income a special allowance enabling that person to meet housing costs. [20] In paragraphs 15, 16 and 17 the Court stated as follows:

'However, Article 3(1)(a) of Directive 79/7 does not refer to statutory schemes which are intended to guarantee any person whose real income is lower than a notional income calculated on the basis of certain criteria a special allowance enabling that person to meet housing costs.

The age and invalidity of the beneficiary are only two of the criteria applied in order to determine the extent of the beneficiary's financial need for such an allowance. The fact that those criteria are decisive as regards eligibility for the higher pensioner premium is not sufficient to bring that benefit within the scope of Directive 79/7.

The premium is in fact an inseparable part of the whole benefit which is intended to compensate for the fact that the beneficiary's income is insufficient to meet housing costs, and cannot be characterized as an autonomous scheme intended to provide protection

19 — See footnote 10.

20 — See footnote 11.

against [certain] [21] of the risks listed in Article 3(1) of Directive 79/7.'

39. The fact that the Directive does not cover general schemes which, under certain conditions, benefit anyone, regardless whether they are affected by any of the risks specified in the Directive was confirmed in *Jackson and Cresswell.* [22] The Court referred to the fact that the benefit, which was aimed at ensuring that its recipients had a minimum income to meet their needs, was granted on the basis of an income criterion 'independently of any consideration relating to the existence of any of the risks listed in Article 3(1) of the Directive'.

40. Most recently, the Court has held in *Richardson,* [23] referred to above, that the Directive applies to a prescription charge exemption scheme since that benefit is only granted to specified groups of persons in respect of whom the risk in question, in the case in point sickness, has materialized.

41. From that case-law it can be concluded that it is not sufficient that the recipient of the benefit is *in fact* affected by one of the risks listed in the Directive and consequently is in a situation of need. [24] If the converse were true, the Directive would cover practically every benefit, which would hardly be consistent with the wording of the Directive. It is not, furthermore, sufficient that the specified risks form part of calculation rules which can affect the amount of the benefit where the benefit itself is granted without particular consideration of those risks. It is the benefit or scheme itself which must be directly and effectively linked to those risks.

42. A scheme such as that operated by Wrekin District Council entails those entitled being awarded a benefit from public funds on a statutory basis irrespective of the existence of a situation requiring the exercise of a discretion. It is not a benefit for which any group in the population could qualify. The benefit is granted solely to clearly-defined groups of persons who are affected by the risks of old age and invalidity. As was the case in *Drake* [25] and *Richardson,* [26] it is thus a condition of entitlement directly defined by statute that a specific risk has materialized. As stated in point 33 above, elderly people often have a special need for public transport inasmuch as it is often not possible for them to get around in any other way.

21 — Translator's note: examination of the context and other language versions suggests that instead of 'one of the risks' the text should have read 'certain of the risks'.

22 — See footnote 11.

23 — See footnote 11, paragraphs 11 and 12.

24 — See *Jackson and Cresswell,* paragraph 18. The Court did not follow Advocate General Van Gerven who, in his Opinion, favoured a very broad interpretation to the effect that it was enough that the recipient was in fact affected by one of the specified risks where there were no other benefits which guaranteed the person in question the necessary subsistence level.

25 — See footnote 11, paragraph 24.

26 — See footnote 11, paragraph 12.

43. The question could arise as to whether the fact that the scheme covers both the elderly and the disabled and that the Act also provides a basis for including the young means that it is not a benefit covered by the Directive. In other words is it a requirement that the scheme should protect against only one particular risk? Such a restriction cannot, in my opinion, be derived either from the wording of the Directive or from the Court's case-law. Article 3(1)(a) refers to the risks covered without laying down a requirement that the scheme or benefit should be directed solely at one particular risk, and in paragraph 17 of the abovementioned *Smithson* judgment the Court stated, to the same effect, that the benefit could not be characterized as an autonomous scheme 'intended to provide protection against [certain] of the risks listed in Article 3(1) of Directive 79/7'.

44. An interpretation to the effect that the scheme must be linked to only one risk could also, on the one hand, bring about a non-uniform application of the Directive in the Community and, on the other hand, reduce the scope of the Directive. If a mobility allowance were granted solely to the disabled, it would clearly be covered by the Directive (see the above cited *Newton* judgment). If the elderly could also obtain the same benefit, however, on that interpretation neither of the two categories of persons would be covered by the equal treatment principle, which in my view could lead to arbitrariness in the law. A benefit should not, therefore, be excluded simply because under the parent legislation several of the risks specified in Article 3(1)(a) of the Directive are protected.

45. Under the Act young people may also be covered by the local schemes; that power has not, however, been used by Wrekin District Council, whose scheme covers only the elderly and the disabled. A benefit should not, however, be excluded from the scope of the Directive simply because in addition to the risk groups covered it is granted to a risk group which is not covered by the Directive. The fact that young people too have the possibility of obtaining a travel concession which caters for their obvious need for cheap access to public transport, does not, in my view, weaken the benefit's direct and effective link with the risks covered by the Directive. The opposite view would make it very easy for the Member States to remove a benefit from the scope of the Directive. On the other hand it cannot be excluded that a scheme which, conversely, defined a very large number of risk groups entitled to benefit could be regarded as being so general in character that on that ground it fell outside the ambit of the Directive. That is not, however, the case with a scheme such as that based on section 93 of the Transport Act 1985, where only the disabled, the elderly and the young qualify for the benefit.

46. To sum up, I consider that a scheme subsidizing the use of public transport by the elderly such as that operated by Wrekin District Council has the character of a statutory scheme which is linked to a sufficient degree to protection against the risk of old age and is therefore covered by the Directive.

47. In view of the foregoing, I suggest that the Court answer the first question to the effect that Article 3(1)(a) 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 covering a statutory scheme whereby public authorities subsidize the use of public transport by the elderly.

Second question

48. By this question the national court is in essence asking the Court to elaborate on its interpretation of Article 7(1)(a), according to which the Directive is to be without prejudice to the right of Member States to exclude from its scope *inter alia* the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

49. Mr Atkins states that the scheme is non-contributory and the concessions are granted regardless of the beneficiaries' contribution to the old-age pension system; hence it is not necessary to apply the derogation in order to preserve equilibrium in the pension system. There is, moreover, no necessary connection between the travel concession and the old-age pension system.

50. The United Kingdom claims that application of Article 7(1)(a) should not presuppose an objectively necessary link between pensionable age and another benefit in the strict sense, but should only require a reasonable and proportionate link. The United Kingdom and Wrekin District Council state further that to remove the discrimination would undermine the financial basis of the scheme which is to a large extent financed by the local authorities.

51. The Commission takes the view that the Court has already given the necessary interpretation and accordingly suggests that the Court should maintain its position.

52. The Court has already had the opportunity of setting out its view of the content of the derogation in Article 7(1)(a). [27] From that

27 — See in particular the judgments in Case C-137/94 *Richardson* [1995] I-3407; Case C-92/94 *Graham* [1995] I-2521; Case C-328/91 *Thomas and Others* [1993] I-1247; Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297.

case-law it is clear that, as an exception to a fundamental principle, the provision should be interpreted strictly. [28] The Court has further stated that the second phrase of Article 7(1)(a) covers only discrimination which is objectively and necessarily linked to a difference in retirement age. [29] Discrimination must therefore be objectively necessary in order to maintain financial equilibrium in the old-age pensions system or the social security system as a whole, or in order to ensure consistency between the old-age pensions system and other benefit schemes. [30]

53. As far as the point concerning the financial equilibrium of the pensions system is concerned, the Court specified in the *Thomas* judgment [31] that there is not a sufficiently direct influence on financial equilibrium in the case of the grant of a non-contributory benefit to persons in whom certain risks have materialized, regardless of the entitlement of such persons to an old-age pension by virtue of contributions.

54. The concessions operated by Wrekin District Council on the basis of the Act have no connection with the extent of entitlement to an old-age pension nor with the overall financing of the pensions system. To remove the discrimination would not, therefore, in my opinion, affect the financial equilibrium of the pensions system.

55. It is not sufficient, in order to bring Article 7(1)(a) into operation, that removal of the discrimination — regardless of how it were brought about — could involve an increase in the overall costs of non-contributory schemes. Under settled case-law Member States are at liberty to define the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented; they may also take 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 for men and women. [32] What must be regarded as decisive, however, is whether, if the derogation cannot be used, that will lead to the beneficiaries being entitled to the payment of several benefits which cover the same needs. [33] In the present case there has been no indication that that would be the case.

28 — See *Thomas and Others*, cited above, paragraph 8.

29 — See the above-cited judgments in *Richardson*, paragraph 18; *Graham*, at paragraph 11; and *Thomas and Others*, paragraph 11.

30 — See the above-cited judgments in *Richardson*, paragraph 19; *Graham*, paragraph 12; and *Thomas and Others*, paragraphs 12, 15 and 16.

31 — See paragraph 14. The case concerned the rejection of claims for severe disablement allowance and invalid care allowance by persons who continued working after they had reached the normal pensionable age for women.

32 — See generally the *Richardson* judgment, cited in footnote 11, paragraph 24.

33 — See the *Thomas* judgment cited in footnote 26, paragraph 15.

56. In the *Richardson* judgment referred to above, the Court held that there was no necessary link between statutory pensionable age and a prescription charge exemption scheme. The Court referred to the fact that since the elderly will generally incur more prescription charges than younger people at a time when they will normally have less disposable income, that may provide some justification for exempting them from prescription charges above a certain age, but that consideration does not require that benefit to be granted at statutory pensionable age and therefore at different ages for men and women. [34] Just as a woman who has reached the statutory pensionable age is entitled to continue to pursue her occupational activities beyond that age and may thus find herself in the same situation as a man of the same age who is still a member of the working population, a man may draw a retirement pension before he has reached statutory pensionable age and thus find himself in the same situation as a woman of the same age who is drawing the retirement pension to which she is entitled. [35] Those arguments can, in my view, be carried over to the present case.

57. An interpretation according to which a benefit such as that operated by Wrekin District Council was regarded as covered by Article 7(1)(a) would, in my view, lead to every benefit protecting against old age being covered by that derogating provision. The Member State would merely have to make the benefit conditional on the recipient's having reached pensionable age. Such a legal position would, however, be hard to reconcile with the fact that the risk of old age is expressly covered by the Directive and must accordingly be intended to have a real content. It should, therefore, be an exception and not the rule that benefits for the elderly which are not in the nature of an old age pension should be regarded as covered by Article 7(1)(a).

58. Unlike the invalidity pension at issue in Case C-92/94 *Graham* [1995] ECR I-2521, which was a benefit designed to be replaced by an old-age pension, the concessions are, on the contrary, a supplementary benefit protecting against old age, without that necessarily entailing that the benefit should be linked to pensionable age. The concessions are not framed in such a way that they are only given to elderly people who have left the employment market, in which case the benefit could be considered to be a form of supplement to the old-age pension. They are subject solely to the condition that the beneficiary has reached a certain age, 60 years for women and 65 years for men. As in the *Richardson* case, it is easy to imagine the concessions being granted to a woman who is continuing to work, whilst being refused to a man who has left the employment market.

59. In summary, in the light of the foregoing I propose that the Court reply to the second question to the effect that Article 7(1)(a) of the Directive should be interpreted as mean-

34 — See paragraph 26.
35 — See paragraph 27.

ing that the derogating provision is not applicable to a travel concessions scheme such as that operated by Wrekin District Council.

Third question

60. The Court has held, *inter alia* in its judgment in Case 286/85 *McDermott and Cotter,* [36] that Article 4(1) of the Directive prohibiting discrimination on grounds of sex has direct effect. In its third question the Court is asked in substance to decide whether there are grounds for limiting the temporal effect of the judgment should it be held that the Directive is to be interpreted to the effect that travel concessions such as those at issue in the main proceedings are covered by the Directive without there being a basis for applying Article 7(1)(a).

61. The United Kingdom and Wrekin District Council have requested the Court to limit the temporal effect of such a judgment, referring to the fact that there was no reason to believe that the Directive precluded maintenance in force of section 93 of the Act, and that administratively it would be difficult to check the factual basis of claims for refunds. Furthermore the issue of the financial consequences, in particular for local authorities, is raised. In Annex 2 to Wrekin District Council's written observations to the Court, it is estimated that to reduce the age limit for men to 60 years would lead to a 13.1% increase in the number of persons entitled to travel concessions and an annual increased cost of UK £53.7 million (corresponding to ECU 65.17 million).

62. Mr Atkins and the Commission maintain, however, that there are no grounds for limiting the temporal effect of the judgment, since there was no conduct on the part of a Community institution which could have led to the United Kingdom relying upon it in good faith. The financial consequences cannot *per se* justify a limitation on the temporal effect of a judgment.

63. According to settled case-law, the effects of the Court's interpretation of a legal measure are not restricted as from delivery of the judgment. The Court's interpretation of a legal measure establishes simply how the measure must be, or ought to have been,

36 — [1987] ECR 1453, paragraph 16.

understood. [37] It is for the Court alone to decide on a restriction of a judgment's temporal effects, [38] but it is only exceptionally, in application of the general principle of legal certainty, that there is reason for it do so. [39] In examining the cases the Court has given decisive weight to whether the decision represents a development in Community law, [40] to whether a Community institution's conduct or attitude has given rise to a reasonably founded assumption that there was no conflict with Community law, [41] and, finally, to the actual consequences of not restricting the judgment's temporal effect. [42] The financial consequences of a judgment for a Member State cannot *per se* found such a restriction. [43]

64. As stated, it is my view that the Directive must be interpreted as covering travel concessions such as those operated by Wrekin District Council. It cannot be excluded that a judgment reflecting that interpretation would give rise to a large number of refund claims concerning relatively small amounts. From the administrative point of view that could be very burdensome for authorities. The extent of that burden would, however, depend to a great extent on national rules of evidence and limitation. Even though, in my opinion, there may well be more scope for restricting the temporal effects of a judgment than there has hitherto appeared in the case-law of the Court in cases where the judgment would otherwise involve considerable administrative consequences or an enormous strain on the national court system, I must point out that in the present case no evidence has been produced to the Court to indicate that there is a sufficient basis for regarding a restriction of the judgment's temporal effects as necessary in order to avoid such major consequences.

65. Moreover, I consider that the proposed interpretation is consistent both with the wording of the Directive and the Court's case-law hitherto. In my view, therefore, no new development of Community law or departure from previous case-law is involved such as would afford a basis for any legitimate expectation.

66. Neither the Commission nor any other Community institution can be regarded as having given grounds by its conduct to justify interference with the effects in time. It will be noted that it is quite irrelevant that the Commission made no objection to

37 — See, for example, Joined Cases C-197/94 and C-252/94 *Bautiaa* [1996] ECR I-0000, paragraph 47, and Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 39.

38 — See Case 24/86 *Blaizot* [1988] ECR 379; Case C-262/88 *Barber* [1990] ECR I-1889; and Case C-228/92 *Roquette Frères* [1994] ECR I-1445.

39 — See, for example, the above-cited judgments in *Blaizot*, paragraph 28, and *Barber*, paragraph 41.

40 — See, for example *Blaizot*, cited above, paragraph 31.

41 — See, for example, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 72 and 73; *Blaizot*, paragraphs 32 and 33; *Barber*, paragraph 43; and Case C-163/90 *Legros* [1992] ECR I-4625, paragraphs 31, 32 and 33.

42 — See, for instance, *Defrenne*, paragraph 74, and *Blaizot*, paragraph 34.

43 — See, for example, Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, paragraphs 20, 21 and 22; *Richardson*, paragraph 37; and *Bautiaa*, cited in footnote 36, paragraph 55.

section 93 of the Act or to the schemes operated under it. [44]

67. In conclusion, there has, in my opinion, been no evidence in this case to suggest that there is a sufficient basis for restricting the temporal effects of the judgment.

68. I therefore propose that the answer to the third question should be that there is no reason to restrict the judgment's temporal effects, so that the direct effect of Directive 79/7/EEC may also be relied on to support a claim concerning a period prior to the Court's ruling, regardless whether the claim is raised by persons who had not previously brought proceedings or made an equivalent claim.

Conclusion

69. In view of the foregoing, I would suggest that the Court answer the questions referred to the Court by the High Court of Justice, Queen's Bench Division, by order of 3 August 1994 as follows:

(1) Article 3(1)(a) 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 covering a statutory scheme whereby public authorities subsidize the use of public transport by the elderly.

(2) Article 7(1)(a) of Directive 79/7/EEC should be interpreted as not being applicable to a travel concessions scheme such as that operated by Wrekin District Council.

(3) There is no reason to restrict the judgment's effects in time, so that the direct effect of Article 4(1) of Directive 79/7/EEC may also be relied on to support a claim concerning a period prior to the Court's ruling, regardless whether the claim is raised by persons who had not previously brought proceedings or made an equivalent claim.

44 — See the *Richardson* judgment referred to in footnote 11, paragraph 37.