OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 4 May 1994 *

Mr President,
Members of the Court,

1. These references for preliminary rulings are a sequel of the judgment in *Barber*, in which the Court ruled that:

'it is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal pensionable age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme'. [1]

It therefore follows from that judgment that such discrimination in occupational pension schemes must be abolished. The central question in these cases concerns *the manner* in which this is to be done. Those administering the two pension schemes concerned here have opted to raise the normal pensionable age for women up to the level of that applying to men.

Background to Case C-408/92 *Smith and Others* v *Avdel Systems Limited*

2. Mrs Smith and the other applicants in the main proceedings in Case C-408/92 are, or were, members of a contracted-out occupational pension scheme, the Avdel Pension & Life Assurance Plan ('the Pension Scheme') run by their employer, Avdel Systems Limited.

The Pension Scheme is financed partly by employer's contributions and partly by employees' contributions of 5% of pensionable salary, less tax relief. Under the Pension Scheme, members are entitled to a pension at the normal retirement date or can choose to commute part of their annual pension for a tax-free cash sum. Under certain conditions

* Original language: Dutch.

1 — Judgment in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraph 35 and point 3 of the operative part.

they can also transfer to the Pension Scheme the value of pension rights accrued in previous employment.

Until 1 July 1991 the Pension Scheme provided that the normal pensionable age was 65 years for men and 60 for women. The Pension Scheme was amended with effect from 1 July 1991 to provide for a normal pensionable age of 65 for both men and women. According to the order for reference, the amendment applies both to benefits earned in respect of years of service after 1 July 1991 and to benefits earned in respect of years of service prior to 1 July 1991. More specifically, the consequences of the amendment are as follows:

(a) if a woman retires at the age of 60, her pension will be subject to an actuarial reduction of 4% per annum for each year by which her retirement preceded the age of 65. Under the previous rule she would have received a full pension;

(b) if a woman leaves the Pension Scheme before the normal pensionable date, that is to say, before the age of 65, the acquired pension rights which could have been transferred to another approved scheme or which could have been applied to purchase an insurance policy will be calculated on the basis that her 65th birthday is the normal pensionable date;

(c) if a woman retires at the age of 60, the pension benefits earned in previous employment on the basis that she would retire at the age of 60 will be subject to an actuarial reduction of 4% for each year that she retires before the age of 65. However, the total amount of these pension payments cannot fall below the level of a monetary guarantee given at the time of transfer of rights into the Pension Scheme. This may have the effect of limiting the net overall reduction in those pension benefits.

3. 78 female employees challenged the new rules of the Pension Scheme before the Bedford Industrial Tribunal ('the Tribunal'). Their complaint is based in particular on Article 119 of the EC Treaty. It was agreed between the parties that five individual cases would be selected for a test case. These cases may be divided into three categories as follows:

(a) female employees aged between 60 and 65 who retired after 1 July 1991. This is the case with Mrs Smith, Mrs

Ball and Mrs McHugh. Under the new rules their pensions have been reduced by 20%, 8.3% and 11.28% respectively;

(b) female employees who are still working and who have transferred to the Pension Scheme pension rights acquired in previous employment. This is the case with Mrs Parker. If employees in this category retire between age 60 and age 65, their pension rights will be liable to the abovementioned actuarial reduction of 4% per annum until their 65th birthday, subject to the monetary guarantee mentioned above;

(c) female employees who are still working but are no longer affiliated to the Pension Scheme. This is the position of Mrs Vance, who left the Pension Scheme voluntarily. Although she is entitled to a deferred pension on the basis of the rights which she accrued when she was a member of the Pension Scheme, the value of that pension is calculated on the basis of a normal pensionable age of 65. [2]

4. By decision of 2 November 1992 the Industrial Tribunal decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Where an occupational pension scheme has different normal pension ages for men and women (65 and 60 respectively), and where an employer seeks, in the light of Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, to eliminate that discrimination, is it inconsistent with Article 119 of the Treaty of Rome for the employer to adopt a common pension age of 65 for men and women

(i) in respect of occupational pension benefits received by employees which are based on years of service after the date of equalization which was 1 July 1991;

(ii) in respect of occupational pension benefits received by employees which are based on years of service on or after 17 May 1990, but before the date of equalization, when the date of equalization was 1 July 1991;

2 — The order for reference also mentions a fourth category of female employees who were affiliated to the Pension Scheme but who have since died. Since none of the cases in the main proceedings concerns this category, I will not consider it further.

(iii) in respect of occupational pension benefits received by employees which are based on years of service prior to 17 May 1990, when the date of equalization was 1 July 1991?

2. If the answer to all or part of Question 1 above is in the negative, does Article 119 impose any obligation on the employer to minimize the adverse consequences to women whose benefits are affected by the employer's decision to eliminate the difference in pension ages?

3. If the answer to all or part of Question 1 above is in the affirmative, may the employer, consistently with Article 119, rely on the principle of objective justification by reference to the needs of the undertaking or the needs of the occupational pension scheme as justifying any reduction in the benefits paid to women, and, if so, what factors are relevant in establishing whether such objective justification is established?'

Background to Case C-28/93 Van den Akker and Others v *Stichting Shell Pensioenfonds*

5. Mrs Van den Akker and the other applicants in the main proceedings in Case C-28/93 are all employees of legal entities forming part of the Royal Shell Group. By virtue of that employment they are members of the occupational pension scheme run by the Stichting Shell Pensioenfonds (Shell Pension Fund), the defendant in the main proceedings ('the Pension Fund').

Until 31 December 1984 the rules of that pension scheme drew a distinction between male and female employees in so far as the normal pensionable age for male employees was set at 60 years while that for female employees was set at 55 years. As a result, male employees could participate in the scheme for five more years than their female colleagues, which enabled them to build up a higher pension, although both sexes ceased to acquire pension rights once the maximum number of pensionable years of service had been completed.

With effect from 1 January 1985 that distinction was abolished: the normal pensionable age for all members of the scheme was set at 60 years. The following transitional arrangements were adopted. Female employees who were already members of the scheme on 1 January 1985 had the choice of either taking part in the new scheme and

accepting the raising of the pensionable age from 55 to 60 years, or of taking part in the scheme but maintaining the pensionable age of 55 years. The election had to be made by 31 December 1986. In the absence of an express election for a pensionable age of 60, it was provided that the person concerned would be deemed to have opted for a pensionable age of 55. All the applicants in the main proceedings elected expressly or by implication to maintain the pensionable age of 55.

6. Following the *Barber* judgment the Pension Fund considered it necessary to amend the scheme rules by abolishing, as from 1 June 1991, the possibility afforded to female employees by the rule changes made in 1985 of maintaining the pensionable age of 55 after 1 January 1985.

The following compensatory provisions were introduced at the time of the amendment. First, the amount of the reduction in the cash value of the pension rights acquired for the period up to 17 May 1990 resulting from the amendment was calculated. That reduction was then offset by allowing each member of the scheme to opt, by 1 December 1991 at the latest, for early pension entitlement (corresponding to the cash value) without the early-entitlement abatement provided for in the rules. If no declaration had been made by that date, the person concerned was deemed to have elected for that option.

It appears from the order for reference that the Pension Fund agreed to reconsider the amendment if it were to prove that non-implementation of the amendment would not give rise to a risk of a breach of Article 119 of the EC Treaty. The Pension Fund fears that if the amendment were held to be in breach, male employees in the same position would, if it were not implemented, claim entitlement to the same rights as those conferred on their female colleagues by the transitional arrangements adopted in 1985 and that they would in particular opt for a pensionable age of 55 years.

7. The applicants in the main proceedings take the view that Article 119 and the *Barber* judgment do not make the abovementioned amendment necessary and that for that reason the amendment must be removed. They are seeking an appropriate declaration from the Kantongerecht (Cantonal Court), The Hague ('the Kantongerecht').

The Kantongerecht has considered it necessary to refer the following questions to the Court for a preliminary ruling:

'A. In a pension scheme adopted in the framework of a labour agreement in which, after 1 January 1985, the pensionable age for both male and female members is set at 60 years, is it

contrary to Article 119 of the EC Treaty for the pensionable age for a limited group of female members to remain fixed at 55 years after 17 May 1990, where:

(a) that results from transitional provisions adopted with effect from 1 January 1985 (when, as a result of an amendment to the rules, the pensionable age previously fixed for men at 60 years and for women at 55 years was changed to a uniform pensionable age of 60 years), and

(b) the transitional provisions are solely applicable to female members (prospective members) who on both 31 December 1984 and 1 January 1985 were employed by an employer affiliated to the defendant ("the persons aggrieved"), and

(c) the transitional provisions also provided that the persons aggrieved could elect for a pensionable age of either 55 or 60 years, which election had to be made during a period which had already expired by 31 December 1986?

B. Does it make any difference to the answer to Question A whether the transitional provisions state that in cases where no express election was made within the time allowed the original pensionable age of 55 years is then applicable, or else that the general pensionable age of 60 years is applicable?'

Is the raising of the pensionable age of female employees to that of male employees, in order to comply with the Court's judgment in *Barber*, compatible with Article 119 of the EC Treaty?

8. Despite the points of difference between the two cases, the central question for the Court is the same, namely whether, and, if so, to what extent, an occupational pension scheme can, in order to take account of the consequences flowing from the *Barber* judgment, equalize the age at which a person becomes entitled to a pension by raising the pensionable age for female employees rather than by lowering the pensionable age for male employees. It appears in particular from the *Smith* case that such a step is disadvantageous for female employees since they must in future remain longer at work in order to become entitled to a full occupational pension.

I shall first examine this central question from the point of view of principle and then give a reply to the questions referred to the Court in the two cases.

9. Although the matter in issue is delicate, my view is that the *fundamental* answer is quite clear under Community law. A similar question has been referred to the Court in Case C-200/91 *Coloroll*, in which the High Court of Justice (Chancery Division) seeks to ascertain whether the implementation of the principle of equal treatment requires that the benefits for the disadvantaged sex be increased in all cases or, on the contrary, whether it is consistent with Article 119 for the benefits of the other sex to be lowered. [3] In my Opinion of 28 April 1993 in the *Ten Oever*, *Moroni*, *Neath* and *Coloroll* cases, [4] taking the Court's case-law as my basis, I drew a distinction between pension benefits according to whether they were based on discrimination occurring in the past (after the *Barber* judgment) or they were related to service performed after the introduction of new rules adapted to the principle of equal treatment as a result of that judgment. That distinction must also be maintained in the present cases.

10. As regards benefits based on periods of service completed *in the past* to which discriminatory rules applied, it is necessary, pending rules to abolish such discrimination,

to *increase* the level of benefits of the disadvantaged sex so as to bring it up to that of the advantaged sex. In cases involving sex discrimination the Court has consistently held that the more favourable rules must be applied to the less favoured sex, those rules forming 'the only valid frame of reference' for immediate implementation of the principle of equal treatment. [5]

When applying that case-law, account must naturally be taken of the limitation of the effects in time of the *Barber* judgment. As the Court recently made clear in its judgments in *Ten Oever*, *Moroni* and *Neath*, this means that

'the direct effect of Article 119 of the EEC Treaty may be relied upon, for the purpose

3 — Question 1(2)(iii) in the *Coloroll* case.

4 — Opinion in Cases C-109/91, C-110/91, C-152/91 and C-200/91, [1993] ECR I-4932 and I-4933, point 60.

5 — The Court first developed this criterion in its judgment in Joined Cases 75/82 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509 (paragraph 19) in the context of the right to equal treatment of male and female European Community officials. The Court subsequently applied it to ensure the application of the principle of equal treatment confirmed in Article 4(1) of Directive 79/7/EEC (full reference in footnote 11) for so long as that directive is not (fully) complied with by national legislative bodies (see, *inter alia*, the Court's judgment in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraph 12, and, recently, its judgment of 24 February 1994 in Case C-343/92 *De Weerd (née Roks) and Others* v *Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and Others* (paragraph 18). In its judgments in *Kowalska* and *Nimz*, the Court extended that criterion to Article 119 of the EC Treaty (judgments in Case C-33/89 *Kowalska* v *Freie und Hansestadt Hamburg* [1990] ECR I-2591, paragraph 20, and in Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 18).

of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, subject to the exception in favour of workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law'. [6]

In other words, in the sphere of occupational pensions, the case-law on the 'only valid frame of reference' to which I have just referred can be applied only in respect of periods of service completed after 17 May 1990.

11. The situation is fundamentally different so far as concerns benefits based on new rules adapted to the principle of equal treatment and relating to *future* periods of service, that is to say periods completed after the entry into force of the rules. I share the view taken by Avdel Systems Limited, the United Kingdom, the German Government and the Commission that Community law does not preclude a lowering of such benefits so long as those benefits are set at a level which is the same for both men and women. Any different conclusion would amount to undesirable Community interference in a policy area which at present is the province of the Member States, which, as the Court has consistently ruled, 'enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation'. [7]

Contrary to the arguments of the applicants in both cases, the judgment in *Defrenne II* does not detract from that conclusion. It is true that in that judgment the Court held that, given the social objective underlying Article 119 — as expressed in the improvement in workers' standard of living and working conditions provided for in Arti-

6 — Judgment in Case C-109/91 *Ten Oever* v *Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, paragraph 20 and point 2 of the operative part; judgment of 14 December 1993 in Case C-110/91 *Moroni* v *Firma Collo*, paragraph 31 and point 3 of the operative part; judgment of 22 December 1993 in Case C-152/91 *Neath* v *Hugh Steeper*, paragraph 18 and point 1 of the operative part.

7 — Judgment in Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, paragraph 27; judgment in Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 22; judgment in Case C-226/91 *Molenbroek* v *Bestuur van de Sociale Verzekeringsbank* [1992] ECR I-5943, paragraph 15. See also the recent judgment of 24 February 1994 in Case C-343/92 *De Weerd (née Roks)* (cited in footnote 5), in which the Court ruled, with regard to Directive 79/7, that that directive 'leaves intact ... 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' (paragraph 28). In my view, the same applies to Article 119 of the EC Treaty as well.

cle 117 [8] —, 'the objection that the terms of this article may be observed in other ways than by raising the lowest salaries may be set aside'. [9] As I have already pointed out in my Opinion of 28 April 1993 mentioned above, [10] that ground of judgment must be read in its context: the main proceedings concerned a claim for compensation made by Gabrielle Defrenne against her former employer, Sabena, on account of pay discrimination in relation to service in the preceding decade. The Court's finding may accordingly be regarded as applying only to discrimination *in the past*, with regard to which the Court, as already stated, requires that the more favourable rules should also apply to the less favoured group.

12. Incidentally, for the view advocated here I find support in the recent judgment in *De Weerd (née Roks)*. In that case the Court was asked whether Community law precluded the introduction of national rules which, by making entitlement to benefits for incapacity for work dependent on conditions as to income applicable in future to men and women alike, had the result that women would in future be deprived of rights which until then they had derived from the direct effect of Article 4(1) of Directive 79/7/EEC. [11] Referring to the powers of Member States in matters relating to social policy, the Court replied 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*'. [12]

This also applies to the application of Article 119 of the EC Treaty to occupational pension schemes: while that provision requires that men and women should receive equal pay, it does not require a specific *level* of future occupational pension benefits.

8 — The Court has pointed out many times that, although this provision may be relevant to the interpretation of other Community provisions, it is essentially in the nature of a programme and the attainment of the objectives must be the result of a social policy to be defined by the competent authorities (see the judgment in Case 126/86 *Giménez Zaera* v *Instituto Nacional de la Seguridad Social y Tesorería General de la Seguridad Social* [1987] ECR 3697, paragraphs 13 and 14). The Court has more recently confirmed this view at paragraphs 25 and 26 of its judgment in Joined Cases C-72/91 and C-73/91 *Sloman Neptun Schiffahrts* v *Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts* [1993] ECR I-887, in which it added (at paragraph 27) that Article 117 does not allow any judicial review of the social policy pursued by Member States.

9 — Judgment in Case 43/75 *Defrenne* v *Sabena (Defrenne II)* [1976] ECR 455, paragraph 15.

10 — Point 60 of the Opinion.

11 — 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 (OJ 1979 L 6, p. 24).

12 — Paragraph 29 of the judgment in *De Weerd (née Roks)* (emphasis added), with reference to the judgment in Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497 and the judgment in Case C-229/89 *Commission* v *Belgium*, cited in footnote 7. This principle had already been expressed in paragraph 22 of the *Teuling* judgment and in paragraph 24 of the second judgment, but without the phrase in italics.

Reply to the questions in the *Smith* case

13. Applied to the *Smith* case, this reasoning gives the following result. As the Industrial Tribunal correctly points out in its first question, three situations must be distinguished.

I shall begin with the last situation, where there is a common pensionable age of 65 for male and female employees for pension benefits based on *periods of service prior to 17 May 1990*. From the point of view of Community law, the matter is clear: such a situation is not affected by Article 119 of the EC Treaty since that article has — at any rate as regards discrimination arising from differences in pensionable age — no direct effect as far as those benefits are concerned and no other rule or principle of Community law requiring occupational pension schemes to be adapted to the principle of equal treatment through the introduction of a general (higher or lower) pensionable age can be pointed to. While I sympathize with the position taken by the applicants in the main proceedings and by the German Government, who say that an increase in the pensionable age for women may amount to an impairment of acquired rights comprised in the occupational pension scheme as subsequently modified, this problem can be resolved only by reference to national law, given the absence of Community rules during the relevant period. Actually, the observations submitted by the intervening Governments show that a number of possibilities are available under national law; the United Kingdom here mentions rules of the law of contract and trusts applicable in that Member State, while the German Government mentions the principles of the protection of legitimate expectations and acquired rights existing in German law ('Prinzip des Vertrauens- und Bestandsschutz') as well as the case-law of the Bundesarbeitsgericht (Federal Labour Court). [13] It should be added that Avdel Systems Limited cannot in any way rely on the financial consequences of the *Barber* judgment as justification for a retroactive amendment of the Pension Scheme precisely because that judgment does *not* apply to periods of service prior to it.

14. Next, there is levelling-up of pensionable ages of male and female employees as regards pension benefits acquired by virtue of *periods of service completed between 17 May 1990 and the date of levelling-up, which in this case was 1 July 1991*. Since these periods of service are posterior to the judgment in *Barber*, full application must be

13 — At points 14 and 15 of its written observations the German Government refers in particular to the 'Widows' Pension' judgment of the Bundesarbeitsgericht of 5 September 1989 (3 AZR 575/88, also published in *Betriebs-Berater*, 1989, p. 2400, and in *Der Betrieb*, 1989, p. 2615), in which a '*three-level theory*' was applied in the context of the protection of acquired rights in the implementation of the principle of equal treatment in the case of private widows' pension insurance schemes. According to that theory, an employer will be able to introduce retroactive levelling-up of pensionable ages only if he can specifically demonstrate *compelling reasons* ('zwingende Gründe'), such as the existence of an economic crisis, the reduction of an unplanned over-provision of benefits and a serious breach of fiduciary duty.

given to the rule derived from the case-law of the Court that the principle of equal treatment requires that the rule or rules applying to the more favoured sex (in this case, women) must also be applied to the less favoured sex (in this case, men).

Unlike the Commission (which considers that only the date of payment of the pension is relevant for determining whether Article 119 of the EC Treaty has been complied with), [14] I therefore take the view that Article 119 of the EC Treaty does not permit levelling-up of pensionable ages as regards benefits *acquired* by virtue of those periods of service.

15. Finally, as regards the levelling-up of pensionable ages for benefits acquired by virtue of *periods of service posterior to the date of levelling-up*, I would, for the reasons set out above (see points 11 and 12), agree with the United Kingdom and the German Government that such a step is not contrary to Article 119 of the EC Treaty, provided at least that it complies in full with the principle of equal treatment.

16. This last point brings me to the second question referred by the Industrial Tribunal: even if it does not preclude levelling-up of pensionable ages, does Article 119 of the EC Treaty oblige an employer to minimize the adverse consequences for women whose benefits are affected by the levelling-up? As far as the equalization of benefits which relate to periods of service completed *prior to 17 May 1990* is concerned, the answer is clear: no obligations on the employer can be derived from Article 119 of the EC Treaty in respect of those periods.

There is no need for me to examine the position regarding benefits relating to periods of service between 17 May 1990 and the date of levelling; as I have said, Article 119 here precludes a levelling-up of pensionable ages.

What, then, about levelling for *future* periods of service (that is to say, the years after the levelling date of 1 July 1991, which is the date laid down in the scheme rules)? Mrs Smith and her co-applicants submit that the employer is here bound by the Community principle of proportionality. The method selected for abolishing the prohibited discrimination should not be allowed to reduce

14 — At the hearing, counsel for the applicants in the *Smith* case correctly pointed out that the Commission's argument failed to take account of the inherent characteristics of occupational pension schemes. As the Court pointed out in its judgments, cited above in footnote 6, in *Ten Oever* (paragraph 17), *Moroni* (paragraph 29) and *Neath* (paragraph 14), it is characteristic of occupational pension schemes 'that there is a time lag between the accrual of entitlement to the pension, which occurs gradually throughout the employee's working life, and its actual payment, which is deferred until a particular age'.

the pension benefits of women more than is strictly necessary to meet the needs of the undertaking. Here account must be taken of, *inter alia*, any surpluses in the Pension Fund or alternative methods of financing such as increasing premiums and the extent to which the employer has profited in the past from the maintenance of a discriminatory pension scheme (which is considered to be the case since Avdel Systems Limited has not paid any contributions since 1 June 1989).

This argument is not tenable. Under Article 119 of the EC Treaty employers are obliged to abolish any inequality of pay between male and female employees. In my view, the principle of proportionality cannot be relied on where it would impair implementation of 'as fundamental a rule of Community law as that of equal treatment between men and women'. [15]

17. The third question in the *Smith* case needs an answer only with regard to the second situation relating to pension benefits for employees based on periods of service from 17 May 1990 but prior to the levelling date of 1 July 1991: can the employer still raise the pensionable age for women as regards that period and thereby reduce their benefits *if* he is able to advance objective reasons such as the needs of the undertaking or of the occupational pension scheme?

I am inclined to adopt a restrictive view here. The duration of the period in question and the related costs are, after all, matters in the employer's control: the more rapidly the Pension Scheme is adapted to the principle of equal treatment, the shorter will be the period in which the rule based on the 'only valid frame of reference' will apply and consequently the lower will be the resulting costs for the employer and the Pension Scheme. It does not therefore seem appropriate to me to take, as Avdel Systems Limited suggests, a flexible approach towards application of the criteria which the Court in, *inter alia*, its judgment in the *Bilka* case, [16] has developed for objective justification of *indirect* discrimination. However, I agree with the United Kingdom that the Court cannot exclude from the outset the possibility of objectively justified exceptions.

18. Such a possibility, however, may be used only in exceptional situations, more specifically in order to take account of circumstances which are entirely unconnected with discrimination on grounds of sex and which meet an *acute* need concerning the very existence of the undertaking or the solvency of its occupational pension scheme. So far as

15 — Paragraph 36 of the judgment in *De Weerd (née Roks)*.

16 — Judgment in Case 170/84 *Bilka-Kaufhaus* v *Weber von Hartz* [1986] ECR 1607, at paragraph 36. Those criteria are that the measures should 'correspond to a real need on the part of the undertaking', be 'appropriate with a view to achieving the objectives pursued' and be 'necessary to that end'.

the continued existence of the *undertaking* is concerned, it seems to me that some — but not all [17] — of the factors relied on by Avdel Systems Limited before the Industrial Tribunal [18] are capable of being described as such acute needs: I am thinking, for example, of the need for an undertaking to safeguard vital investments or to deal with sudden staffing problems. [19] So far as the *occupational pension scheme* is concerned, I would consider an exception to be possible where full application of the principle of equal treatment would seriously jeopardize the financial equilibrium, [20] and consequently the solvency, of the scheme. [21] Likewise, given the complex actuarial calculations which may be involved in application of the principle of equal treatment — in the present cases, for instance, separate calculations are required for three different periods of service, I would not exclude the possibility for an occupational pension scheme to give preference to what are, from the administrative and actuarial point of view, less complex arrangements for applying the principle of equal treatment in relation to the period concerned here. Such an alternative approach must, however, take full account of the rights which Article 119 has conferred on individuals since 17 May 1990, the date on which the *Barber* judgment was delivered. [22]

It is obviously for the national courts to assess and review these factors: in particular, it is for them to determine whether the grounds of justification relied on by an employer and/or an occupational pension scheme are unrelated to any discrimination on grounds of sex [23] and entail no greater limitation of the principle of equal treatment than is strictly necessary. [24]

17 — Thus, in my view, no account can be taken of cost factors having general potential effects, such as the potential cost of a limited rise in the price index and the prospects of an economic recession, referred to by Avdel Systems Limited.

18 — Point 7.4 of the order for reference.

19 — Avdel Systems Limited points out the effect on the size of its workforce if a large number of male employees (approximately 90% of its staff) were to exercise the right to retire on a full pension at the age of 60.

20 — The Court's readiness to take account of the financial equilibrium of the scheme in question when deciding whether discrimination is justified is shown by the judgments in, *inter alia*, Case C-9/91 *The Queen* v *Secretary of State for Social Security*, ex parte *Equal Opportunities Commission* [1992] ECR I-4297, paragraphs 15 to 18, (statutory pension scheme), and Case C-338/91 *Steenhorst-Neerings* v *Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475, paragraph 23, (statutory scheme governing work disability benefits).

21 — The mere fact that application of the principle of equal treatment will involve financial burdens having an inevitable impact on the financial equilibrium of an occupational pension scheme cannot therefore be a ground of justification in itself: the situation must involve difficulties which are *impossible or almost impossible to resolve*. If, in view of the limited period of time and the financial position of the pension scheme (for instance, the presence of surpluses, reserves and so on), the difficulties are capable of being resolved, reference may be made by analogy to what the Court held in relation to statutory social-security measures in the judgment in *De Weerd (née Roks)* cited above in footnote 5: '... 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' (paragraph 35).

22 — See, in relation to Directive 79/7, the judgment in Case 80/87 *Dik and Others* v *College van Burgemeester en Wethouders Arnhem en Winterswijk* [1988] ECR 1601, paragraph 14.

23 — See the judgment in Case 171/88 *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung* [1989] ECR 2743, paragraph 15.

24 — Compare the test of proportionality as formulated by the Court in, *inter alia*, its judgment in *Bilka* (paragraph 36) and its judgment in *Teuling*, cited in footnote 12, (paragraph 18); the measures chosen must be *appropriate* with a view to achieving the justified objective and must also be *necessary* to that end. This means that in the case in point the national court must not only consider whether the measure taken by the employer and/or the occupational pension scheme is pertinent, that is to say that it must have a logical connection with the objective pursued (for a case in which the Court held that a measure was not pertinent, see the judgment in Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraph 16), but must also consider whether there is any feasible alternative for the employer and/or the occupational pension scheme which will limit the application of the principle of equal treatment less.

Reply to the questions in the *Van den Akker* case

19. Unlike in the *Smith* case, in the *Van den Akker* case pensionable ages of male and female employees were levelled on 1 January 1985 (before delivery of the *Barber* judgment) and for a limited period of time (from the beginning of 1985 to the end of 1986) female members of the scheme could opt to retain the lower pensionable age. The key question, as formulated in point 8 above, thus shifts in its emphasis towards the impact of the *Barber* judgment on transitional arrangements agreed on before that judgment — and even before the judgment in *Bilka*: [25] must such transitional arrangements, which are limited *ratione personae* and *ratione temporis*, be abolished? If such transitional provisions are maintained, can male employees claim entitlement to the same rights as those applying to female employees who opted for a pensionable age of 55 years under the 1985 transitional arrangements?

20. The opinions expressed by the intervening parties before the Court differ. The applicants in the main proceedings and the Netherlands Government take the view that Article 119 of the EC Treaty does not preclude the transitional arrangements in question. The applicants here refer in particular to the ruling in the *Barber* judgment that overriding considerations of legal certainty precluded legal situations which had exhausted all their effects in the past from being called in question. [26] In the present case, according to the applicants, the effects of the legal situations in question were exhausted upon the last day on which it was still possible to opt for the transitional arrangements, which was 31 December 1986. Any other view would, they submit, fail to take proper account of the fundamental principle of legal certainty.

According to the Pension Fund, on the other hand, it follows from the *Barber* judgment that the transitional arrangements here in question are now prohibited. In view of the way in which the Court restricted the effect in time of its judgment in *Barber*, it is no longer permissible, in the case of entitlements accruing after 17 May 1990, to discriminate by maintaining pensionable ages differing according to sex.

The Commission agrees with this argument. The applicants in the main proceedings cannot, in its view, object to the abolition of the transitional arrangements by relying on Article 119 of the EC Treaty. According to the Commission, Article 119 does not preclude pension benefits for the advantaged group from being lowered in the future to the level of those of the disadvantaged group, so long as the principle of equal treatment continues to be respected. The question whether the applicants' acquired rights have been

25 — Cited in footnote 16.

26 — *Barber* judgment, paragraphs 41 and 44.

impaired is a separate question which in principle must be answered by reference to national law. Nor does the Commission consider it necessary to qualify its view in the light of the facts mentioned by the Kantongerecht in points (a), (b) and (c) of its first question. In particular, the Commission takes the view that the Court's case-law on social-security benefits provides sound arguments supporting the view that the principle of equal treatment must be strictly complied with, even in relation to the transitional arrangements here at issue.

21. Let us look immediately at the case-law referred to by the Commission. It comprises a number of judgments (*Borrie Clarke*, [27] *Dik* [28] and *Johnson* [29]) in which the Court ruled on the compatibility with Directive 79/7 of statutory transitional provisions — generally introduced in order to adapt national legislation to that directive — allowing certain discriminatory rules to retain their effects even after the date by which Directive 79/7 had to be implemented (23 December 1984). [30] The Court emphatically declared this contrary to Directive 79/7. It based its finding primarily on the direct effect of the prohibition of discrimination laid down in Article 4(1) of Directive 79/7 and the obligation to abolish any provisions contrary to the principle of equal treatment which Article 5 of that directive imposes on Member States. [31] The Court also stressed that

'the directive does not provide for any derogation from the principle of equal treatment laid down in Article 4(1) in order to authorize the extension of the discriminatory effects of earlier provisions of national law. It follows that a Member State may not maintain beyond 22 December 1984 any inequalities of treatment which have their origin in the fact that the conditions for entitlement to benefit are those which applied before that date. That is so notwithstanding the fact that those inequalities are the result of transitional provisions adopted at the time of the introduction of a new benefit.' [32]

22. Must this case-law, which requires the principle of equal treatment to have *immediate effect* in time, be applied without restriction to the issues to be resolved in the present case, as the Commission suggests? I

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

28 — Judgment cited in footnote 22.

29 — Judgment in Case C-31/90 *Johnson* v *Chief Adjudication Officer* [1991] ECR I-3723.

30 — In the *Borrie Clarke* case, the United Kingdom defended such transitional provisions relating to invalidity benefits with the argument that it was necessary to safeguard the legitimate expectation of those receiving benefits under the old rules that they would not lose benefits owing to the rule changes (see paragraph 4 of the judgment in *Borrie Clarke*).

31 — See the judgments in *Borrie Clarke* (paragraph 9) and in *Dik* (paragraph 8).

32 — Paragraph 10 of the judgment in *Borrie Clarke*; see also the judgments in *Dik* (paragraph 9) and in *Johnson* (paragraph 32).

have serious doubts in that regard. My doubts are reinforced by, *inter alia*, the fact that, in contrast to Directive 79/7, Directive 86/378/EEC, which applies the principle of equal treatment to occupational social security schemes, [33] contains the following transitional provision in Article 8(2):

'This Directive shall not preclude rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.'

Unlike Directive 79/7, therefore, Directive 86/378 thus contains an express provision stipulating that the new law is to *respect pre-existing situations*. [34]

23. Why does Directive 79/7 not contain such a derogation while Directive 86/378 does? In my view, the main reason is that Directive 79/7 deals with *statutory* [35] social-security schemes, that is to say, in the Court's words,

'social security schemes or benefits such as, for example, retirement pensions, which are directly governed by legislation without any element of agreement within the undertaking of the occupational branch concerned and which are obligatorily applicable to general categories of workers'. [36]

For such schemes the principle of immediate effect of the new law invariably applies. [37] One must also remember that (i) the Member States had six years in which to bring their laws, regulations and administrative provisions into line with Directive 79/7 [38] and that (ii) the directive provides, in the sphere of old-age and retirement pensions, for a derogation regarding the determination

33 — Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40).

34 — The original Commission proposal did not contain this transitional provision. However, Article 10 of the proposal did contain a similar transitional provision regarding the use of actuarial calculation factors differing according to sex.

35 — See Article 3(1)(a) of Directive 79/7 and the second recital in the preamble thereto. Article 3(1)(b) provides that the directive also applies to social-assistance schemes in so far as they are intended to supplement or replace the schemes referred to in Article 3(1)(a).

36 — Paragraph 9 of the judgment in *Ten Oever*, cited above in footnote 6, with reference to paragraph 7 of the judgment in Case 80/70 *Defrenne* v *Belgium* (*Defrenne I*) [1971] ECR 445. See also paragraph 14 of the judgment in *Moroni*, also cited above in footnote 6. Compare this with the definition given in the Court's established case-law of the term 'social security benefit' in Regulation No 1408/71, namely a benefit which 'is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71': see, *inter alia*, the judgments in Case C-78/91 *Hughes* v *Chief Adjudication Officer* [1992] ECR I-4839, paragraph 15, and in Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 29.

37 — For the rationale of this direct applicability, see the classic work by P. Roubier, *Le droit transitoire*, Paris, Dalloz, 1960, p. 340 et seq.

38 — See Article 8(1) of Directive 79/7.

of the pensionable age and the Court has never cast doubt on the validity of that derogation. [39]

Occupational pension schemes, on the other hand, are *based on agreement*. Here transitional law is subject to considerations, such as respect for the free choice of the parties and for the contractual balance, which differ from those governing statutory schemes of general application. In general, where agreements are concerned, the non-retroactive effect of the new law in relation to the old is accepted; immediate application of the new rule must only be guaranteed in so far as the public interest is seriously affected by the continuation of situations which arose under the old law. [40]

24. The principle that a new law should respect pre-existing contractual situations which continue into the future seems to me quite appropriate. However, I take the view that the principle must not be applied here in view of the Court's case-law, more particularly the judgments in *Defrenne II* and *Barber*. In the first of those judgments the Court ruled that since Article 119

'is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'. [41]

The direct (and, in principle, immediate) application of Article 119 to 'horizontal' schemes, in particular contractual schemes, was thereby accepted.

In the *Barber* judgment, as also in the judgment in *Defrenne II*, however, the Court restricted such immediate application by limiting the effect of the judgment in time, thereby conferring on the provision non-retroactive effect. It seems to me, therefore, that the Court, by establishing a transitional rule in its judgments, has itself undertaken the balancing of interests underlying the principle of respecting pre-existing situations and weighed the general Community interest (in having, in particular, uniform and general application of Community law) against the interest of individuals (in having, in particular, legal certainty and protection of legal relations established in good faith). Consequently, it is this transitional rule laid down in the *Barber* judgment which must be

39 — See the judgment in Case C-9/91 *Equal Opportunities Commission*, cited in footnote 20, confirmed in the judgment in Case C-328/91 *Thomas and Others*, cited in footnote 24, paragraph 9.

40 — See, among others, F. Chabas in Mazeaud, Mazeaud and Chabas, *Leçons de droit civil, I, Introduction à l'étude du droit*, Paris, Montchrestien, 1991, No 147, pages 197 and 198; J. Ghestin and G. Goubeaux, *Traité de droit civil. Introduction générale*, Paris, L. G. D. J., 1990, No 373, pages 333 and 334; P. Roubier, *Le droit transitoire*, p. 380 et seq.

41 — Paragraph 39 of the judgment in *Defrenne II*, cited above in footnote 9, subsequently confirmed by the Court in settled case-law, *inter alia* in its judgments, cited above in footnote 5, in Case C-33/89 *Kowalska*, paragraph 12, and in Case C-184/89 *Nimz*, paragraph 17 (in the latter judgment solely in relation to collective labour agreements).

applied for the purpose of interpreting Article 119 of the EC Treaty in relation to occupational pension schemes.

25. In practice, this has the following results. Since, pursuant to the *Barber* judgment, the direct effect of Article 119 of the EC Treaty may be relied on only in respect of periods of service after 17 May 1990, male employees of the Royal Shell Group cannot in any event rely on the incompatibility of the transitional arrangements with Article 119 of the EC Treaty as regards periods of employment prior to the date of the *Barber* judgment. It is also self-evident that female employees who under the transitional arrangements opted to maintain a pensionable age of 55 years and who reached that age before the judgment in *Barber* was delivered are not affected by that judgment: it was precisely their case that the Court had in mind when it held, at paragraph 44 of the *Barber* judgment, that

'overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called in question'.

26. Unlike the applicants in the main proceedings, however, I consider that the situation of female employees who opted under the transitional arrangements for a pensionable age of 55 years but who had not yet reached that age by the date on which the *Barber* judgment was delivered *cannot* be regarded as a situation 'which [has] exhausted all [its] effects in the past': their pension rights continue or continued to accrue after the *Barber* judgment. Periods of service completed by these employees and their male colleagues after 17 May 1990 are governed in full by the final sentence of paragraph 44 of the *Barber* judgment, in which the Court expressly excluded non-retroactive effect of the new interpretation of Article 119:

'Finally, it must be pointed out that no restriction on the effects of the aforesaid interpretation can be permitted as regards the acquisition of entitlement to a pension as from the date of this judgment.' [42]

27. Therefore, as the Pension Fund correctly considered, the transitional arrangements had to be adapted in order to take account of the consequences of the *Barber* judgment. [43] Periods of service between 17 May 1990 and 1 June 1991, the date on which the pen-

42 — When explaining the effect in time of *Barber* in its judgments in *Ten Oever* (paragraph 19), *Moroni* (paragraph 31) and *Neath* (paragraph 16), the Court expressly referred to the reasoning in paragraph 44 of its judgment in *Barber*.

43 — In this connection the Pension Fund also relies on a further argument, namely that in paragraph 32 of the judgment in *Barber* the Court ruled that 'Article 119 prohibits any discrimination with regard to pay as between men and women, *whatever the system* which gives rise to such inequality' (paragraph 32, emphasis added). I will leave aside the question whether that passage should be interpreted in the manner suggested by the Pension Fund. It must, in any case, be read in conjunction with the second sentence of the same paragraph, which makes it clear that the Court does not regard the fact that a pensionable age differing according to sex provided for in contracted-out occupational pension schemes is based on the statutory pension scheme as any justification for discrimination of that kind.

sion scheme rules were changed, are covered by the rule of the 'only valid frame of reference' (mentioned in point 10 above). As far as subsequent periods of service are concerned, the raising of the pensionable age of female employees covered by the transitional arrangements to the pensionable age of male employees is compatible with Article 119 of the EC Treaty, provided that when this is done the principle of equal treatment is fully observed (point 11 above).

28. As regards the question of retroactively raising the pensionable age of female employees in relation to periods of employment falling between the date of the *Barber* judgment and the date of levelling of pensionable ages, I can refer to the reply in the *Smith* case (point 17 above). The parties to the present case did not raise this question, perhaps because of the compensation arrangements worked out by the Pension Fund (point 6 above).

Conclusion

29. I propose that the Court should reply as follows to the questions referred to it in these cases:

in both cases:

It is not contrary to Article 119 of the EC Treaty for an employer, following the judgment of the Court in Case C-262/88 *Barber* v *Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, to raise, in an occupational pension scheme, the pensionable age of female employees for future periods of service to the pensionable age of male employees, provided at least that the principle of equal pay for men and women laid down in that provision is fully respected. Given the limitation in time of the effects of the *Barber* judgment, Community law likewise does not preclude such a step in relation to periods of service completed prior to 17 May 1990. Community law does, however, preclude such a step in relation to periods of service completed between 17 May 1990 and the date on which pensionable ages are levelled. In the case of the lastmentioned periods of service, the principle of equal treatment must be implemented by applying the rules enjoyed by the members of the more favoured sex to members of the less favoured sex.

in Case C-408/92, Smith and Others:

1. In none of the three situations mentioned above does Article 119 of the EC Treaty entail the obligation referred to by the Industrial Tribunal in its second question.

2. In the third situation described by the Industrial Tribunal, it is only in exceptional circumstances that account may be taken, when the principle of equal treatment is implemented, of circumstances which are entirely unconnected with discrimination on grounds of sex and which meet an acute need concerning the very existence of the undertaking or the solvency of its occupational pension scheme. It is for the national court to examine these factors and to ensure that the principle of equal treatment is not limited more than is strictly necessary.

in Case C-28/93, Van den Akker and Others:

In view of the judgment in *Barber*, it is contrary to Article 119 of the EC Treaty to maintain in an occupational pension scheme, in relation to periods of service completed after 17 May 1990, the pensionable age at 55 years for a limited group of female employees who at that date had not yet reached the pensionable age, when the pensionable age for male employees is set at 60 years. The fact that this situation arose under transitional arrangements agreed on before the *Barber* judgment makes no difference.