2. In order to ensure that the progressive implementation of the principle of equal treatment for men and women in matters of social security, referred to in Article 1 of Directive 79/7 and defined in Article 4, is carried out in a harmonious manner throughout the Community, Article 3 (1) of the directive 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. A benefit provided by a Member State and paid to a person caring for a disabled person thus forms part of a statutory scheme providing protection against invalidity which is covered by Article 3 (1) (a).

3. Discrimination on grounds of sex contrary to Article 4 (1) of Directive 79/7 arises where legislation provides that a benefit which forms part of one of statutory schemes referred to in Article 3 (1) of that directive is not payable to a married woman who lives with or is maintained by her husband, although it is paid in corresponding circumstances to a married man.

OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 22 April 1986 *

Mr President,
Members of the Court,

1. In the context of proceedings between Jacqueline Drake and the Chief Adjudication Officer, the Chief Social Security Commissioner of the United Kingdom has asked the Court to interpret two provisions of Council Directive No 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24). In particular, the Commissioner wishes to know: (a) whether a benefit such as the 'invalid care allowance' paid in Great Britain constitutes part of a statutory scheme providing protection against invalidity, covered by the directive; (b) whether the fact that a married woman who lives with her husband is excluded from that benefit constitutes discrimination on grounds of sex, contrary to the directive.

2. Jacqueline Drake is married and lives with her husband; prior to the middle of 1984 she held a succession of full-time and part-time jobs. In June 1984 her mother, a severely disabled person entitled to an attendance allowance under Section 35 of the Social Security Act 1975, came to live with her, and Mrs Drake gave up her job in order to look after her.

* Translated from the Italian.

On 5 February 1985 Mrs Drake applied for an invalid care allowance under Section 37 of the Social Security Act 1975. The Adjudication Officer pointed out that under Section 37(3)(a)(i) married women who live with their husbands are not entitled to the allowance, but in order to expedite the procedure he referred the matter to the Social Security Appeal Tribunal. In a decision given on 1 March 1985 the Tribunal held that that provision constituted discrimination on grounds of sex, contrary to Directive 79/7. The Chief Adjudication Officer appealed against that decision to the Chief Social Security Commissioner who, by an order dated 15 May 1985, stayed the proceedings and referred to the Court the following questions for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) If a Member State provides a benefit payable, (provided certain residence and other conditions are met), to a person who is not gainfully employed and is regularly and substantially engaged in caring for a person in respect of whom a benefit is payable as a severely disabled person by reason of that person requiring attention or supervision as prescribed (and provided that that person meets certain residence and other conditions), does the benefit payable to the first-mentioned person constitute the whole or part of a statutory scheme which provides protection against invalidity to which Article 3 (1) (a) of Directive 79/7/EEC applies?

(2) If the answer to the first question is yes, does a condition that a married woman is not entitled to that benefit if she is residing with her husband or he is contributing to her maintenance above a certain level constitute discrimination contrary to Article 4 (1) of that Directive in circumstances where married men do not have to meet a corresponding condition?'

According to the order of the Commissioner the sole point at issue between the parties is the scope of Section 37(3)(a)(i) of the Social Security Act. The parties are agreed that the claimant fulfils the other conditions of entitlement to the invalid care allowance.

3. In the interests of a better understanding of the questions it may be helpful to summarize the British legislation on invalidity benefits and the relevant Community provisions. The British rules are contained in the Social Security Act 1975. Section 37 provides that 'a person shall be entitled to an invalid care allowance for any day on which he is engaged in caring for a severely disabled person if (a) he is regularly and substantially engaged in caring for that person; and (b) he is not gainfully employed; and (c) the severely disabled person is either such relative of his as may be prescribed or person of any such other description as may be prescribed'.

For the purposes of that rule Section 37 (2) defines 'severely disabled person' as a person entitled to an attendance allowance or other benefit of the same nature. An attendance allowance is paid to a disabled person who requires attention or supervision to the extent set out in the Act (Section 35). Under Section 37 (3) the invalid care allowance is not paid: (a) to any person who is under the age of 16 or is engaged in full-time education; (b) to a married woman who lives with her husband or to whose

maintenance her husband contributes a weekly sum not less than the weekly rate of the allowance; (c) to a woman who lives with a man as husband and wife.

The benefits in question are not contributory and are paid directly to the person who undertakes the care of a disabled person.

The relevant Community provisions are those contained in Directive 79/7, whose purpose is to extend to the area of social security the principle of equal treatment for men and women laid down in Article 119 of the EEC Treaty. That extension is viewed as a gradual process. For present purposes it is sufficient to recall that in the first stage equal treatment was to be implemented in statutory schemes providing protection against 'classic' risks (sickness, invalidity, old-age, industrial accidents, occupational diseases and unemployment) and in the rules on social assistance in so far as they are intended to supplement or replace such schemes; in subsequent stages the principle was to be applied to the rules concerning survivors' benefits or family benefits and occupational schemes.

The Member States may however exclude a number of benefits from the scope of the directive. Among these I would mention the advantages granted in respect of old-age pension schemes to persons who have brought up children, the granting of old-age or invalidity benefit entitlement by virtue of the derived entitlements of a wife and the granting of increases of long-term invalidity, old-age, industrial accident and occupational disease benefits for a dependent spouse.

The effect of the principle of equal treatment is laid down in Article 4. The principle means that there should be no discrimination whatsoever on ground of sex either directly or indirectly by reference in particular to marital or family status with regard to: the scope of the schemes and the conditions of access thereto; the obligation to contribute and the calculation of contributions; the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

4. As I have already stated, the first question referred to the Court seeks to determine whether a benefit such as the invalid care allowance paid in Great Britain constitutes part of a statutory scheme providing protection against invalidity to which Article 3(1)(a) of Directive 79/7 applies. The Chief Adjudication Officer argues that the answer should be in the negative, while the Commission of the European Communities and of course Mrs Drake argue in favour of an affirmative reply.

In support of his contention the Adjudication Officer raises arguments based on the wording and on the intent of the relevant provisions. The first of these may easily be summarized. Under Article 3(1)(a), says the Adjudication Officer, the directive applies 'to statutory schemes which provide protection against . . . [the risk of] invalidity'. The protection must be understood as being provided in respect of the risk *itself*, not risks to third parties. That may be inferred from the provision defining the persons to whom the directive applies; under Article 2 the directive applies to workers whose activity is interrupted by illness, accident or involuntary unemployment and to retired or invalided workers. That is to say, it envisages only

persons *directly* affected by illness, accident or unemployment and excludes from the scope of the directive benefits to which other persons are entitled.

It is clear from Article 2 and from the preamble that the benefits with which the directive is concerned are all work-related. Since it is intended for persons who do not work and thus do not form part of the working population the benefit in question does not fall within that class. Nor can it be said, adds the Adjudication Officer, that it supplements or takes the place of an invalidity pension. Its sole object is to provide a benefit for persons who look after severely disabled persons.

Finally, in regard to the intent of the directive, the Adjudication Officer argues that, far from being a comprehensive code for the implementation of equal treatment in matters of social security, the Directive constitutes only a first step towards placing men and women on an equal footing; that is why benefits such as that at issue in the main proceedings do not come within its ambit.

5. That submission cannot be upheld. There are more persuasive arguments, I think, for the view that the benefit in question lies within the scope of the social security schemes which under the directive are to be immediately subject to the principle of equal treatment, in particular, the scheme regarding invalidity.

As is well known, invalidity is the physical and economic condition of the person concerned resulting from a reduction in his working capacity which has repercussions on his earning capacity. Sometimes it is so serious that the invalid needs assistance from other people in his daily life. In such cases the social security schemes of the Member States generally grant the invalid a special benefit or increase the principal benefit so as to make up all or part of the cost to him of such assistance. The British scheme is different. The two benefits which it provides are paid to two separate persons: on the one hand, the invalid, on the other, the person who furnishes him with care and assistance.

Having said that, let me return to Article 3 (1). According to that article Directive 79/7 applies to 'statutory schemes which provide protection against . . . [the risk of] invalidity' (subparagraph (a)) and to 'social assistance, in so far as it is intended to supplement or replace' the invalidity scheme (subparagraph (b)). There can be no doubt that in that provision the accent is placed on two points: the Community legislature's use of the word 'schemes' (whereas, when it desires to exclude a measure, it has recourse to the much narrower terms 'benefits' 'advantages' or 'entitlements') and the fact that it expressly mentions social assistance provisions. It follows, in my view, that the directive applies to a coherent and comprehensive system of protection against invalidity: it must therefore include *all* the benefits, however defined and organized in the national legal systems, which make up the relevant scheme.

All the benefits: that is to say, even those which, like the benefit at issue here, are paid to a person other than the invalid. There are at least two reasons for which that method of payment should not have the effect of exluding this benefit from the invalidity scheme. The first is that its payment logically depends on a situation of invalidity in the sense that the existence of a person covered by the scheme is a condition *sine qua non* for its payment, as Counsel for the

Adjudication Officer admitted at the hearing. The second is the clear economic link between this benefit and the benefit paid to the invalid; that is to say, the invalid derives an advantage from the fact that a subsidy is paid to the person who provides assistance. The essential point is that the mechanisms used in the United Kingdom (allowance paid to the person who provides assistance) and in the other Member States (increase in the benefit paid to the invalid) may be different, but their objective is in substance identical (see the interim report of the Commission of the European Communities on the implementation of Directive 79/7, COM(83) 793 final, 6.1.1984).

It may also be remarked that the effectiveness of the directive would be seriously compromised if the limits of its application were defined by the way in which a benefit was paid. It is clear that if that were the case a Member State would need only to make a few slight amendments to its legislation in order to exclude numerous sectors of its social security system from the application of the principle of equal treatment.

That solution is not affected by the Adjudication Officer's argument based on the fact that the principle of equal treatment was to be implemented gradually; as I have pointed out in Section 3 of this Opinion, the benefit in question is not one of those (occupational schemes, etc.) which were to be brought into conformity with the principle in a second stage. Nor is there any more merit in the argument that the directive applies only to members of the working population, so that a benefit paid to a person who is not a worker must be considered to be excluded. It seems obvious to me that in a case such as this the persons in favour of whom it is intended that the principle of equal treatment should apply are disabled workers. It is on the basis of the connection between the main benefit paid to invalids and the benefit paid to persons caring for them (but intended to assist them indirectly) that the conditions governing the payment of the second benefit must also be the same for men and for women.

6. In the second question the Chief Social Security Commissioner asks whether the fact that a benefit such as that at issue in this case is not paid to a married woman who lives with her husband constitutes discrimination on grounds of sex contrary to Directive 79/7.

The answer to that question can only be in the affirmative. As Counsel for the Adjudication Officer acknowledged himself, the provisions governing that benefit place certain categories of women (married women who live with their husbands, women who live with a man as husband and wife) at a disadvantage and deprive them of entitlement to the benefit. Furthermore, there are no reasons — nor was it argued that there were any — justifying the resulting discrimination.

7. For all the foregoing considerations I propose that the Court give the following replies to the questions formulated by the Chief Social Security Commissioner in his order of 15 May 1985 in the appeal proceedings between the Chief Adjudication Officer and Jacqueline Drake:

(1) The benefit paid to a person who is not gainfully employed and is regularly and substantially engaged in caring for a person entitled to a social security

benefit as a severely disabled person because his disability requires continued supervision constitutes part of a statutory scheme which provides protection against invalidity as referred to in Article 3(1)(a) of Directive 79/7 or qualifies for inclusion among the provisions of social assistance intended to supplement that scheme.

(2) The fact that certain categories of women (married women who live with their husbands, married women whose husbands contribute a specific amount for their maintenance and women who live with a man as husband and wife) are excluded from that benefit constitutes discrimination on grounds of sex contrary to Article 4 (1) of that directive, in so far as married men and men who live with a woman as husband and wife are not excluded from the benefit in the same manner.