OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 11 July 1996 *

1. In order to give a decision on an interlocutory question concerning the grant of legal aid to Mrs Züchner, the Hanseatisches Oberlandesgericht (Higher Regional Court), Bremen (Federal Republic of Germany), has asked the Court of Justice to give a preliminary ruling pursuant to Article 177 of the EC Treaty on the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1] (hereinafter 'Directive 79/7').

2. It appears from the file that Mr Züchner, who was a self-employed businessman, is paralysed in the lower half of the body as a result of an accident in 1972 and is now unable to look after himself. The home care which he has needed since then has been provided by his wife, who states that she obtained special training for the purpose. It is not clear whether, when she began to look after her husband, Mrs Züchner was or had been previously gainfully employed in any way or whether she was seeking work.

3. Under German law there are three kinds of home assistance to which a sick person is entitled (haüsliche Krankenpflege): [2]

— therapeutic care (Behandlungspflege), characterized by its medical component consisting in the administration of medicinal preparations, injections, taking the temperature, application of therapy, and so on;

— personal assistance for basic needs (Grundpflege), which includes services such as day and night supervision, assisting the patient with his personal hygiene, with taking food, getting up and going to bed, etc.;

— domestic help (hauswirtschaftliche Versorgung), consisting in washing the patient's clothes, shopping, cleaning his home, and so on.

* Original language: Spanish.

1 — OJ 1979 L 6, p. 24.

2 — See in particular paragraphs 37, 38 and 55 to 57 of the Sozialgesetzbuch V.

In particular, Paragraph 37 of the Sozialgesetzbuch V (Social Welfare Code, Book V — hereinafter 'the SGB V') provides as follows:

'(1) In addition to medical treatment (ärtzliche Behandlung), insured persons shall, in their own home or that of their family, receive home nursing by suitably qualified personnel if hospital treatment is called for but cannot be provided or if it is possible to avoid or reduce the duration of hospital treatment by means of home nursing. Home nursing shall comprise the basic care and therapeutic care necessary in any particular case, and domestic help. The maximum period of entitlement shall be four weeks for each period of sickness. In justified exceptional cases the sickness insurance fund may grant permission for home nursing for a longer period if the medical service finds that this is necessary on the grounds set out in the first sentence above.

(2) Insured persons shall receive therapeutic care by way of home nursing in their own home or that of their family if this is necessary to ensure that the purpose of the medical treatment is attained. The rules may provide that, in addition to the therapeutic care referred to in the first sentence, the sickness insurance fund shall also supply basic care and domestic help as home nursing. For this purpose the rules may specify the duration and extent of the basic care and domestic help referred to in the second sentence. The benefits referred to in the second and third sentences shall not be granted after a need for care of the kind provided for in Book XI arises.

(3) Entitlement to home nursing shall arise only where there is no person living in the household who can assist and care for the patient to the extent necessary.

(4) If the sickness insurance fund is unable to provide personnel for home nursing, or if there is any reason for refraining from doing so, the insured persons shall be reimbursed for the reasonable cost of obtaining such personnel themselves.'

4. On 14 March 1985 the Handelskrankenkasse (Ersatzkasse) Bremen (hereinafter the 'HKK'), the voluntary sickness insurance fund of which Mr Züchner is a member, gave a written undertaking to assume direct responsibility for the home therapeutic care or, if this were not possible, to reimburse to Mr Züchner up to DM 80 daily if he arranged for someone to provide such care. The action brought by Mr Züchner against the HKK before the Sozialgericht München following a dispute concerning the right to reimbursement ended with a settlement whereby the defendant paid the plaintiff an agreed sum as reimbursement of the cost of home nursing up to 23 February 1987 and undertook to reimburse the plaintiff in the

future for the cost of such care on production of wage receipts or comparable supporting documents.

5. Between 1 January 1991 and 31 March 1995 Mr Züchner claimed and received a cash benefit of DM 400 per month for home care. Paragraph 57 of the SGB V provides as follows:

'(1) Upon application by insured persons in need of special care (Schwerpflegebedürftigte Versicherte), the sickness insurance fund may, instead of providing home care, pay them a cash sum of DM 400 per calendar month if they are able themselves to obtain the services of a carer who provides care in an appropriate manner and to a sufficient extent.

(2) The cash benefit (Geldleistung) referred to in subparagraph 1 shall be paid only where the carer is able to provide sufficient care even though gainfully employed.

...'

6. On 1 April 1995 the Law regulating insurance for assistance in the case of need for special care (Pflegeversicherungsgesetz), which was added to Book XI of the Social Welfare Code (hereinafter 'the SGB XI'), came into force. The following provisions of the new law are relevant here:

'Paragraph 14. Definition of need for care (Pflegebedürfigkeit)

(1) Persons who by reason of a physical or mental illness or handicap need special or considerable help for a period of time expected to be not less than six months, for the ordinary functions which regularly recur in the course of daily life, are in need of care within the meaning of this Book.

...

Paragraph 19. Definition of carers (Pflegepersonen)

Carers within the meaning of this Book are persons who, otherwise than by way of gainful employment, look after a person in need

of care as defined in Paragraph 14 for not less than 14 hours per week in that person's domestic environment.

...

Paragraph 36. Care benefit in kind

(1) Persons in need of care who are looked after in their own household or another household in which they have accommodation shall receive basic care and domestic help as a benefit in kind (häusliche Pflegehilfe). Home care shall be provided by qualified personnel who are appointed by the care insurance fund or employed by mobile care agencies with which the fund has concluded a contract for services (Versorgungsvertrag). Home care may also be provided as a benefit in kind by individual persons with whom the fund has concluded a contract pursuant to Paragraph 77, subparagraph 1.

(2) Basic care and domestic help shall include assistance with the functions referred to in Paragraph 14.

(3) The entitlement to home care shall comprise, on a monthly basis:

...

3. for persons of class III in need of care, benefits totalling not more than DM 2 800.

...

Paragraph 37. Invalid care allowance (Pflegegeld) for care services procured by the person in need of care

(1) Persons in need of care may apply for an invalid care allowance in lieu of home care. The claim shall be conditional upon the person concerned using the allowance, in full, to procure the necessary basic care and domestic help by employing a carer to look after them appropriately. The monthly allowance shall be:

...

3. for persons of class III in need of care, DM 1 300.

...'

7. It follows from the legislation cited above concerning persons in need of care that the invalid care allowance provided for by Paragraph 37 of the SGB XI is paid by the care fund to the person in need of care even if the care is provided by a member of his family, whereas the higher amounts provided for by Paragraph 36 of the SGB XI represent the maximum which the fund must pay as a benefit in kind if the care is provided by personnel appointed by the fund or employed by another agency with which the fund has a contract for that purpose, or by individuals with whom the fund has a contract.

The plaintiff states that she looks after her husband. Consequently it appears correct to assume that, according to these provisions, Mr Züchner is entitled to receive from the care insurance fund the invalid care allowance under Paragraph 37 of the SGB XI, the amount of which is probably that for class III, but that he is not entitled to the higher amounts laid down by Paragraph 36 for benefits in kind because they are paid by the fund not to the insured member but as remuneration to the person with whom it has a contract to provide home care services for him.

8. In July 1993 Mr Züchner submitted a claim, retrospectively for the period from 1 March 1985 to 31 July 1993, for reimbursement by the HKK of the cost of the home care services undertaken by his wife. On 6 August 1993 the claim was refused, primarily on the ground that payment in respect of all claims up to 23 February 1987 had been made as a result of settlement of the action before the Sozialgericht. Secondly, as the services had been provided by his wife, national law ruled out the reimbursement of her costs because entitlement to home nursing arose only where there was no one living in the household who could look after the patient to the extent necessary and, finally, the right to social security benefits was statute-barred after four years. The HKK added that since January 1991 Mr Züchner had received DM 400 per calendar month under Paragraph 57 of the SGB V. The documents before the Court do not show whether Mr Züchner challenged that refusal.

9. On 10 August 1993, that is to say immediately after the HKK refused retrospective recognition of Mr Züchner's claim for reimbursement of the expenses for the home care services provided for him by his wife, the latter applied to the Landgericht Bremen for legal aid to bring an action for compensation against the HKK, from which she claims, in

addition to payment for those services during the relevant period, interest, loss of earnings and compensation totalling DM 419 390. Her application was refused by order of 20 January 1994.

10. Mrs Züchner appealed against the order to the Hanseatisches Oberlandesgericht Bremen on the basis of Directive 79/7, alleging discrimination on the ground that, in practice, only married women could find themselves in a situation such as hers. The appeal was dismissed, the court finding that the action contemplated by the plaintiff did not offer a sufficient prospect of success.

11. The plaintiff subsequently lodged an informal objection before the same court, which set aside its previous (negative) order by order of 2 March 1995. Taking the view that the decision to be given concerning the grant of legal aid depends on the interpretation of certain provisions of Community law, the national court has referred the following questions to the Court of Justice for a preliminary ruling:

'1) Does the plaintiff, as the wife of the insured person who is in need of care, belong to the working population within the meaning of Article 2 of the Directive (79/7/EEC)?

2) Although Paragraph 37(3) of the SGB, Book V, is formulated in neutral terms with regard to sex, does it discriminate, within the meaning of the Directive, against the plaintiff as a woman?

3) Does the plaintiff, who is not insured by the defendant, have direct entitlement, or does her husband, as the insured person, alone have direct entitlement?

4) Is the defendant itself liable, as an organ of the State (substitute sickness insurance fund)? If not, who is liable in its stead?

5) Does a claim for breach of official duty, irrespective of fault, exist under the law of the European Communities, or can a claim for breach of official duty arise only from Paragraph 839 of the German Civil Code, in conjunction with Article 34 of the Grundgesetz (Basic Law)?'

The Community provisions

12. The scope *ratione personae* of Directive 79/7 is defined by Article 2 as follows:

'This Directive shall 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.'

Its scope *ratione materiae* is defined by Article 3 in the following terms:

'1. This Directive shall apply to:

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

— sickness,

— invalidity,

— 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).

2. This Directive shall not apply to the provisions concerning survivors' benefits nor to those concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a).

3. ...'.

Article 4 of the Directive provides as follows:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or

indirectly by reference in particular to marital or family status, in particular as concerns:

— 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.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.'

13. Observations in the present case have been submitted by the plaintiff in the proceedings for legal aid, Mrs Züchner, represented by her husband, and also by the defendant, the German and British Governments and the Commission.

14. The plaintiff has pointed out that this will be the first time that the Court of Justice gives a preliminary ruling in the context of legal aid proceedings, as legal aid is normally refused when it is sought in order to bring an action for damages against a Member State or one of its agencies for breach of Community law.

Jurisdiction of the Court of Justice to reply to the questions

15. I believe that this is the first time that the Court of Justice has been called upon to give a preliminary ruling relating to an application for legal aid by a party to proceedings before a national court. The Hanseatisches Oberlandesgericht Bremen is unquestionably a court or tribunal for the purpose of Article 177 of the Treaty. Nevertheless, although none of those who have submitted observations in this case have referred to the problem, it is appropriate to consider whether a preliminary ruling can be sought in the context of this interlocutory application for legal aid.

As I have said, the questions have been referred in order to determine an informal objection to the dismissal on appeal of an application for legal aid which was made before the action on the substance was commenced.

As the grant of legal aid depends on the action having a sufficient *prima facie* prospect of success, and as no further appeal would lie against a refusal of legal aid in the present appeal, and as the court which has to determine the application has found it necessary to submit these questions concerning the interpretation of the Directive, I consider that the Court should answer them.

It has been consistently held that, in the framework of the cooperation between the Court of Justice and national courts laid down by Article 177 of the Treaty, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. [3]

Question 1

16. The national court takes the view that the plaintiff does not belong to the 'working population' within the meaning of Article 2 of Directive 79/7, but considers that a broad interpretation is possible in so far as she provides services which go beyond the normal work of a housewife. However, the court does not consider that it has authority to adopt a broad interpretation and leaves that responsibility to the Court of Justice.

17. The plaintiff considers that the national court's first question should be answered in the affirmative for a number of reasons. She states that, although she did not have to give up an occupation in order to look after her husband, it was a fact that she could not have worked and there should be no distinction between giving up work in order to look after a disabled person and being prevented from working by the extent and the intensive nature of the care needed by that person. In either case the care needed makes it impossible to pursue an occupation and, for that reason, the person looking after the disabled person should be deemed to belong to the working population. In that connection the plaintiff cites the Court's judgment in the *Drake* case, [4] which states that a person who has given up work in order to look after a disabled person must be regarded as a

3 — See Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 7; Case C-134/94 *Esso Española* v *Comunidad Autónoma de Canarias* [1995] ECR I-4223, paragraph 9; and Case C-125/94 *Aprile* [1995] ECR I-2919, paragraph 16.

4 — Case 150/85 *Drake* v *Chief Adjudication Officer* [1986] ECR 1995.

member of the working population for the purposes of Directive 79/7. Finally, the plaintiff adds that even if she were not deemed to belong to the working population for the purposes of Article 2, she could still rely on the Directive because her husband had to give up work because of his disability.

18. The defendant, in its written observations, merely proposes that the Court's reply to the first question from the national court should be that the plaintiff does not belong to the 'working population' within the meaning of Article 2 of Directive 79/7. She is a housewife and is not gainfully employed: the only purpose of gainful employment is to earn a living, and there is no such intention in the present case. The plaintiff provides services which, as a wife, she has both a legal and a moral obligation to provide. The defendant adds that the plaintiff, in the context of her marriage, has to carry out work which others would not have to do, but that is the inevitable consequence of her husband's disability.

19. The German Government proposes that the answer to the first question should be in the negative, relying on the Court's judgment in the *Drake* case, [5] to the effect that a person whose work has been interrupted by one of the risks referred to in Article 3 must be regarded as a member of the working population within the meaning of Article 2 of Directive 79/7. In the opinion of the German Government, a precondition in all cases is the existence of previous work which has been interrupted, and the mere fact of looking after a disabled family member is not sufficient.

20. The United Kingdom has serious doubts as to the admissibility of the questions. It submits, first, that they are not necessary for determination of the proceedings pending before the national court and, secondly, that the particulars given in the order for reference are not sufficient to enable the Member States and the Community institutions to submit appropriate observations.

First, the questions on which the Court is requested to give a ruling relate to the interpretation of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. However, in the order for reference itself the national court states that there is no direct discrimination in this particular case and that the contested national provision — assuming that it affects far more women than men — is justified by objective factors unrelated to discrimination. According to the Court's case-law, [6] it is for the

5 — Ibid.

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

national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent a legislative provision, which, though applying regardless of the sex of the worker, actually affects a greater number of women than men, is justified by reasons which are objective and unrelated to any discrimination on grounds of sex. As, in the present case, the national court itself states that a provision which may have a discriminatory effect is objectively justified, there is no reason for requesting an interpretation of Directive 79/7.

Secondly, the United Kingdom states that the deficiencies in the order for reference make it particularly difficult to formulate any observations in the present case. Nevertheless, should the Court find the questions admissible, the United Kingdom suggests that, in default of more information concerning the facts, the questions should be examined on the basis of alternative hypothetical assumptions. If Mrs Züchner had been working or seeking work when her husband had the accident, and if she had given up work or seeking work in order to look after him, she would, as a person who gave up work because of one of the risks listed in Article 3, belong to the working population within the meaning of Article 2 of Directive 79/7. However, if she had not been working or seeking work before the accident, she would not belong to the working population and would not therefore be entitled to rely on Directive 79/7 because, according to the Court's case-law, the Directive applies only to persons who are available for employment or who are no longer available because of the materialization of one of the risks referred to in Article 3. [7] Finally, the United Kingdom takes the view that, if the Court finds the questions admissible, it should answer only the first, and the reply should be as follows: the plaintiff belongs to the working population within the meaning of Article 2 of the Directive only if, before her husband's accident, she was a worker, or self-employed or was seeking work and her activity was interrupted solely because one of the risks mentioned in Article 3 of the Directive materialized in relation to her husband.

21. The Commission makes two preliminary points. First, the national court has referred the question in order to assess the compatibility with Community law of a domestic provision which, by providing that entitlement to home nursing as such or to reimbursement of the cost of the personnel procured by the patient himself arises only where there is no one living in the patient's household who can assist and look after him to the extent necessary, could amount to indirect discrimination. Secondly, the home nursing regulated by Paragraph 37 of the

7 — See Case 31/90 *Johnson* v *Chief Adjudication Officer* [1991] ECR I-3723, paragraph 27.

SGB V can be the only matter in issue because the insurance fund grants the invalid care allowance under Paragraph 37 of the SGB XI, which covers basic care and domestic help, even if the insured person is looked after by family members living with him.

22. The Commission observes that Mr Züchner belonged to the working population when he had the accident and that he is entitled to appropriate benefits under the sickness insurance scheme. Therefore he is within the scope *ratione personae* of Directive 79/7 and the benefits he receives fall within the scope *ratione materiae* of the Directive. However, that fact alone is not sufficient for him to be able to rely on it before a national court if he is adversely affected by a domestic provision which discriminates against his wife since, as the Court found in the *Verholen* judgment, [8] it is also necessary for the wife to be within the scope *ratione personae* of the Directive.

The Commission adds that in the *Drake* judgment [9] the Court extended the meaning of 'working population' in so far as it found that a person who gave up her work in order to look after a disabled relative must fall within the scope *ratione personae* of Directive 79/7.

For the Directive to apply in the main proceedings, the Commission considers that the plaintiff, as a person who provides home care for someone who is disabled, must belong to the 'working population'. In addition, the services must be so regular and substantial that they must be regarded as work. Because of the nature and extent of the services provided by the plaintiff for her husband, the Commission considers that she falls within the scope *ratione personae* of Directive 79/7 as defined in Article 2.

23. In the alternative, the Commission adds that, assuming that the person receiving the care belongs to the working population, there are three situations in which the Directive may also apply to the person providing the care, namely where she has given up her work in order to provide care, where she worked previously but can do so no longer, for example because she has retired and, finally, where she has given up work for some other reason and is seeking other work. Article 4(1) of the Directive, which prohibits discrimination on grounds of sex, would apply to those cases because the protection of the person receiving care also extends to the person providing it.

In the Commission's opinion, there are two situations in which the plaintiff would not be protected by Article 4(1) of the Directive against discriminatory provisions, and her

8 — See Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* v *Sociale Verzekeringsbank* [1991] ECR I-3757.

9 — Cited in footnote 4 above.

husband would not be able to claim that he had been adversely affected by such discrimination:

(1) if the person providing care has not previously worked and has undertaken to look after her husband in addition to doing the normal housework;

(2) if she has given up work for reasons other than those listed in Article 3(1)(a) of the Directive and is not seeking work.

24. The Commission concludes its observations on question 1 by stating that there are insufficient factual particulars to enable the plaintiff to be classified in one of those five categories. It proposes that the Court should reply to the effect that persons who look after a sick person in their household, in cases where the care needed is so substantial by reason of its nature and the time it takes that, if it were not provided by a member of the household, a self-employed or employed person would have to be recruited to undertake it, belong to the working population for the purposes of Articles 2 and 3 of Directive 79/7, and in any case a person who, in order to look after her disabled husband, has had to give up work or who has previously worked and is no longer able to do so or who is seeking work also belongs to the working population.

25. I would point out, first, that, of the home nursing services provided for by the contested provision (Paragraph 37 of the SGB V), that is, therapeutic care, personal assistance for basic needs and domestic help, in a situation such as Mr Züchner's, where there is a need for special care for a period expected to be not less than six months, the last two items are governed by the SGB XI, which provides for the payment of an invalid care allowance, on application by the insured person, if he himself arranges for someone to look after him, irrespective of whether the carer lives under the same roof. It follows, by a process of elimination, that the only benefit which the insurance fund can refuse under Paragraph 37(3) is therapeutic care, whether as a benefit in kind or by way of reimbursement of the cost of the personnel whom the patient has himself found, if there is someone in his household who can undertake the necessary care.

26. I agree with the United Kingdom Government regarding the almost complete absence of factual particulars in the order for reference, which makes it difficult to give the national court a reply which will be of use in giving a decision in the interlocutory proceedings before it, although the Commission has taken the trouble to furnish quite

detailed information on the proceedings which to a large extent makes good the deficiency.

27. It is perfectly clear from the order for reference that, from the start, the national court considers that the plaintiff does not belong to the working population within the meaning of Article 2 of Directive 79/7, but thinks it possible that this Court might interpret the term broadly, bearing in mind that the plaintiff provides services going beyond normal care in the context of marriage.

28. It is necessary to ascertain whether, having regard to the facts of the present case, Mrs Züchner can be considered to belong to the working population. Article 2 of Directive 79/7, which sets out the scope *ratione personae* of the Directive, states that it 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.

29. In principle the term 'working population' in the Directive is very wide compared with, for example, the definition in paragraph 5 of the Resolution concerning statistics on the working population, employment, unemployment and underemployment. [10]

According to that definition, 'the working population includes all persons of either sex who carry out work to produce goods and to supply services in the economy, as defined by the systems of National Accounts and Financial Statements of the United Nations, during a specified reference period. Under those systems, the production of goods and the supply of services in the economy include the entire production and processing of raw materials — whether they are intended for the market, for barter or for the producer's own consumption — the production of all other goods and the supply of all other services for the market and — in the case of households which produce goods and supply services for the market — the part of such production which is intended for their own consumption'.

Under paragraphs 12 and 13 of the Resolution, persons who do housework, retired persons and persons who are ill or disabled do not form part of the 'working population'.

10 — Adopted by the 13th International Conference of Labour Statisticians, convened in Geneva by the board of management of the International Labour Organization, 18 to 29 October 1982. International Labour Organization, Geneva 1983.

30. From a comparison of the two definitions, it can be seen that workers whose work is interrupted by illness or accident and invalided workers are within the definition of 'working population' for the purpose of Directive 79/7, whereas, to go by the definition in the abovementioned Resolution, they are not.

31. This is not the first time that the Court has had to decide whether what at first appears to be a borderline case is within the scope *ratione personae* of Directive 79/7. When replying in the *Drake* judgment [11] to questions referred for a preliminary ruling by the Chief Social Security Commissioner with the object of assessing the compatibility with Community law of a national provision which laid down the requirements for granting an allowance for the care of a disabled person, the Court stated as follows: 'Under Article 2, the term "working population", which determines the scope of the directive, is defined broadly to include "self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment ... [and] retired or invalided workers and self-employed persons". That provision is based on the idea that a person whose work has been interrupted by one of the risks referred to in Article 3 belongs to the working population. That is the case of Mrs Drake, who has given up work solely because of one of the risks listed in Article 3, namely the invalidity of her mother. She must therefore be regarded as a member of the working population for the purposes of the directive.' Mrs Drake, who was married and lived with her husband, had worked for many years, both full-time and part-time, until her mother, who was severely disabled, came to live with her, whereupon Mrs Drake gave up her work in order to look after her.

32. In the *Johnson* judgment [12] the Court found that a person who gave up her work in order to attend to the upbringing of her children does not fall within the scope of Directive 79/7 as a worker whose activity has been interrupted by one of the risks specified in the directive since that is not one of the risks specified in Article 3(1)(a) of the directive. Nevertheless, the Court added that such a person could still be regarded as falling with the scope of Directive 79/7 as a person seeking employment whose search is made impossible by the materialization of one of those risks because, in order to be a member of the working population within the meaning of Article 2, it is sufficient for the person concerned to be a person seeking employment and it is unnecessary to draw a distinction based on the reason for which the person concerned left previous employment or even whether or not that person was previously engaged in an occupational activity.

The Court takes the view that the person concerned must prove that he or she was seeking employment at the time when one of

11 — Cited in footnote 4 above, paragraph 22.

12 — Cited in footnote 7 above, paragraphs 19 to 22.

the risks materialized and that it is for the national court to determine whether that person was actually seeking employment at the time when he or she was affected by one of the risks specified in the directive, by considering in particular whether that person was registered with an employment organization responsible for dealing with offers of employment or assisting persons seeking employment, whether that person had sent out job applications to employers and whether certificates were available from firms stating that the person concerned had attended interviews.

33. In the *Nolte* and *Megner* judgments [13] the question arose whether Article 4(1) of Directive 79/7 should be interpreted as meaning that national provisions under which employment regularly consisting of fewer than 15 hours' work a week and regularly attracting remuneration not exceeding one-seventh of the average monthly salary is excluded from the statutory sickness and old-age insurance schemes, or under which employment regularly consisting of fewer than 18 hours' work a week by its nature or which is limited in advance by a contract of employment is excluded from compulsory contribution to the statutory unemployment insurance scheme, constitute discrimination on grounds of sex where considerably more women than men are affected thereby and where those provisions are not justified by objective factors unrelated to discrimination.

Before examining that question, the Court considered the problem of whether persons with short working hours and a job of the kind described above belong to the working population within the meaning of Article 2 of Directive 79/7. In that connection the Court found that the fact that a worker's earnings do not cover all his needs cannot prevent him from being a member of the working population and it went on to refer to its case-law to the effect that where employment yields an income lower than the minimum required for subsistence [14] or normally does not exceed 18 hours a week [15] or 12 hours a week, [16] or even 10 hours a week, [17] that does not prevent the person in such employment from being regarded as a worker within the meaning of Articles 48 or 119 of the EC Treaty or of Directive 79/7, as the case may be. The Court added that the fact that some of those judgments do not refer to social security law and are not concerned with the interpretation of Article 2 of Directive 79/7 cannot call that finding into question because the judgments cited define the concept of a worker in the light of the principle of equal treatment. [18]

34. Likewise in the recent *Posthuma-van Damme* judgment [19] the Court observed that the definition of the working population is very broad, since it covers any worker, including persons who are merely seeking

13 — See Case C-317/93 *Nolte* [1995] ECR I-4625 and Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741.

14 — See Case 53/81 *Levin* v *Secretary of State for Justice* [1982] ECR 1035, paragraphs 15 and 16.

15 — See Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraphs 7 and 17.

16 — See Case 139/85 *Kempf* [1986] ECR 1741, paragraphs 2 and 16.

17 — See *Rinner-Kühn*, cited in footnote 6 above, paragraph 16.

18 — See *Nolte* and *Megner*, cited in footnote 13 above, paragraphs 19 and 21, and 18 and 20 respectively.

19 — See Case C-280/94 *Posthuma-van Damme* [1996] ECR I-179, paragraphs 20 and 21.

employment, and that a person who, in the year preceding the commencement of incapacity for work, did not receive a certain income from or in connection with work does not necessarily fall outside the scope *ratione personae* of Directive 79/7.

35. However, in my opinion the judgment which is decisive for determining whether Mrs Züchner belongs to the working population for the purpose of Directive 79/7 was delivered by the Court in the *Achterberg-te Riele* case, [20] in reply to questions referred by the Raad van Beroep, Utrecht, asking whether Article 2 of Directive 79/7 must be interpreted as meaning that the Directive applies to persons who have not had an occupation and are not seeking work and persons who have had an occupation which was not interrupted by one of the risks referred to in Article 3(1)(a) of the Directive and are not seeking work.

The Court's reply to those questions was in the negative and the grounds stated were as follows: 'The scope *ratione personae* of the directive is determined by Article 2, according to which the directive applies to the working population, to persons seeking employment and to workers and self-employed persons whose activity is interrupted by one of the risks set out in Article 3(1)(a), that is to say illness, invalidity, old age, an accident at work or an occupational disease, or unemployment.

Although according to Article 3(1)(a) the directive applies to statutory schemes which provide protection against old age, including the scheme at issue in the main proceedings, it may be inferred from Article 2 in conjunction with Article 3 of the directive that the directive only covers persons who are working at the time when they become entitled to claim an old-age pension or whose occupational activity was previously interrupted by one of the risks set out in Article 3(1)(a).'

The Court concluded from this that: 'the directive does not apply to persons who have never been available for employment or who have ceased to be available for a reason other than the materialization of one of the risks referred to by the directive'. [21]

36. It is clear from the definition in Article 2 of the Directive and the judgments cited that, for a person to be considered to belong to the working population for the purpose of the directive, he must be an employed or self-employed person whose work has been interrupted by the materialization of one of the risks referred to by Article 3(1)(a) in relation to himself or, in certain cases, to a third party, or he must be a person seeking work whose search has been interrupted for the same reason.

It is well known that the Court has always construed 'working population' widely in

20 — See Joined Cases 48/88, 106/88 and 107/88 *Achterberg-te Riele* [1989] ECR 1963.

21 — Ibid., paragraphs 9 to 11.

that it considers that the directive applies also to persons whose work or search for work has been interrupted because one of the specified risks has materialized in relation to another person. Nevertheless I would point out that, when deciding whether the person concerned belongs to the working population, the Court has on no occasion overlooked the requirement that he must be employed or self-employed or seeking work, that is to say a person who is available for employment or is seriously trying to find employment.

37. I have already said that the documents before the Court do not show that the plaintiff had work which she gave up in order to look after her husband or that she was actively seeking employment. In her observations she states that she did not have to give up any work in order to care for her disabled husband, but that in any event it was impossible for her to take up any work and there should be no distinction between giving up work in order to look after a disabled person and being unable to take up work because the extent and the intensity of the care required by the invalid occupies all the carer's time.

38. I cannot agree with the plaintiff. It seems to me that there is a fundamental difference between the two situations in that, in the first, a person has left the employment market in order to look after her husband whereas, in the second, the person concerned has never even entered that market or intended to do so. Therefore the two situations cannot be treated as the same for the purposes of Community law. As the Court observed in *Achterberg-te Riele*, [22] Article 119 of the EEC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [23] and Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [24] (hereinafter 'Directive 76/207'), pursuant to which Directive 79/7 was adopted, seek to ensure equal treatment between men and women not generally but only in their capacity as workers.

39. In my opinion, as Community law stands at present, the conclusion must be that the plaintiff does not belong to the working population for the purposes of Directive 79/7 because, in order to look after her disabled husband, she did not give up work which she already had or stop seeking work, and in this connection it is immaterial that the services she provides go beyond the normal degree of care in marriage. In fact, I agree with the view expressed by the Court

22 — Ibid., paragraph 12.
23 — OJ 1975 L 45, p. 19.
24 — OJ 1976 L 39, p. 40.

in *Hofmann* [25] with regard to Directive 76/207 and consider that Directive 79/7 is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between spouses.

40. In the light of my proposed reply to the first question, it seems to me unnecessary to examine any of the other questions. Nevertheless, in case the Court disagrees, I shall deal with the second, third and fourth questions and the first part of the fifth — the second part of the fifth relates to problems of interpretation of domestic law for which the Court has no jurisdiction.

Question 2

41. By its second question the national court asks whether the plaintiff, as a woman, is discriminated against, within the meaning of the Directive, by a national provision pursuant to which an insured person's entitlement to home nursing provided for by the sickness insurance fund, either directly or by way of reimbursement of the cost of the personnel procured by the invalid himself, arises only where there is no one living in the invalid's household who can provide the necessary amount of care and help.

25 — See Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, paragraph 24.

42. The national court itself states that it does not consider that there is discrimination because the domestic provision in question is formulated in neutral terms so far as sex is concerned; although the provision affects significantly more women than men, it is justified by objective factors unrelated to discrimination, being based on the status of the person providing assistance as a member of the household, who, in large segments of the population, is almost always the wife, but without giving rise to a difference of treatment which has no objective basis; the provision applies to all persons providing care to invalids and to all invalids, irrespective of sex and family circumstances; and, finally, the plaintiff has not been refused benefits, contrary to Article 4 of the directive, which a (married) man in the same situation would have received.

43. The plaintiff contends that it is primarily the female members of the family who are discriminated against if the sickness insurance fund refuses benefits in kind or the reimbursement of costs incurred for personnel procured by the invalid himself (the alternative provided for by Paragraph 37(4) of the SGB V) where the personnel in question belong to his family because a man has the obligation of meeting the needs of his family and, because of his occupation, is prevented from looking after an invalided family member. The plaintiff adds that, in looking after her husband, she not only refrained from work but also failed to acquire a pension entitlement of her own and now has a retirement pension which is so small that she will have to depend for the rest of her life on

social assistance. The fact that she provided the home care which the defendant would otherwise have had to pay for resulted in the unjust enrichment of the latter.

44. The defendant contends that the contested national provision creates no discrimination on grounds of sex, that it has not been shown that the situation described by the plaintiff affects more women than men, and that the national provision reflects the duty of mutual support which is laid down by family law and arises on moral grounds.

45. The German Government states that, if there is discrimination, it could only be indirect discrimination against women, but it remains to be shown that the contested provision affects more women than men, without being objectively justified.

As, under Paragraph 37 of the SGB V, it is the insured person who is entitled to the benefits, he is the only person who could be deemed to be adversely affected by the contested provision, and not the members of his family. The rule does not distinguish according to the sex of the person who provides home care, but between, on the one hand, insured persons who live with other persons who can look after them and therefore cannot claim the right to have that service paid for by the insurance fund and, on the other hand, insured persons who live alone or with other persons who are not in a position to look after them. In all such cases the insured persons may be men or women. In the German Government's opinion, the plaintiff has not shown that she is discriminated against by the national provision in question or that most of the insured persons whose claims for home nursing are refused are men.

46. In the Commission's view, it must be presumed that, as the national provision makes no distinction between men and women, it does not give rise to direct discrimination. However, it would fall into the category of indirect discrimination if it were shown that it adversely affected a higher proportion of women than men, unless the provision was justified by objective factors unconnected with discrimination on grounds of sex.

On this point the Commission states that at present more than 90% of old people who live in their own homes and depend on another person to look after them are cared for by relatives and that the chief responsibility in this respect is undertaken by far

more women than men. [26] On the basis of this information the Commission concludes that the application of the national provision in question constitutes unequal treatment. However, according to the Court's case-law, unequal treatment may be justified if the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so. [27]

Although recognizing that it is for the national court to determine whether a provision which discriminates indirectly may be objectively justified, the Commission comments on some possible grounds of justification in the present case in order to give the national court appropriate guidance, pointing out that this practice is sometimes followed by the Court in its judgments. [28]

47. In its opinion, the adverse effect of the contested German provision on family members cannot be deemed to be offset by the advantage which the spouse or children with low incomes would obtain if they were insured under the compulsory sickness insurance scheme without having to pay contributions. The Commission adds that it is incompatible with Article 4(1) of Directive 79/7 to set off, within a social security scheme, the disadvantages connected with one benefit against the advantages connected with another. Furthermore, the idea of ensuring that a social security scheme can work by limiting the benefits, as well as budgetary considerations, may be the underlying reasons for a Member State's decisions on social policy, but they are not in themselves objectives pursued by that policy and therefore they cannot justify a decision which operates to the detriment of one sex.

48. The Commission proposes that the reply to the second question should be that Article 4(1) of Directive 79/7 must be interpreted as precluding a domestic provision under which an insured person is entitled to home nursing only if there is no one living in the household who can attend to and care for him to the extent necessary, since such a provision affects far more women than men, unless it is justified on objective grounds unrelated to discrimination on grounds of sex.

49. If the Court finds that the plaintiff belongs to the working population, it may go on to examine the question whether, as a woman, she is discriminated against for the purpose of Article 4(1) of Directive 79/7, which prohibits, in matters of social security, discrimination on grounds of sex either directly, or indirectly by reference in particular to marital or family status, especially as

26 — The information given by the Commission is from the Fifth Family Report — Families and Family Policy in United Germany: the Future of Human Resources, BT-Drs. 12/7560, p. 191 et seq.

27 — See Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraph 34, and Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 13.

28 — The Commission mentions Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 14, and *Rinner-Kuhn*, paragraph 14, and *De Weerd*, paragraph 35, cited in footnotes 6 and 27 respectively.

concerns the scope of social security schemes and the conditions of access thereto.

50. On this point I agree with the national court that, as the contested provision makes no distinction according to sex, it can be stated at the outset that there is no direct discrimination and it seems to me that the same conclusion must be reached with regard to indirect discrimination.

51. There is no doubt that the home nursing which the insured person can claim from the sickness insurance fund forms part of the statutory scheme which in the Federal Republic of Germany offers protection against the risks of sickness and/or invalidity listed in Article 3(1)(a) of Directive 79/7 and that, therefore, such nursing falls within the scope *ratione materiae* of the Directive.

In the *Drake* case [29] the Court held that the Member States may provide protection against the consequences of the risk of invalidity in various ways, for example, as in that case, by providing for two separate allowances, one payable to the disabled person himself and the other payable to a person who provides care, while another Member State may arrive at the same result by paying an allowance to the disabled person at a rate equivalent to the sum of those two benefits. The Court then added that, 'in order ... to ensure that the progressive implementation of the principle of equal treatment 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) 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'.

52. It must be borne in mind that, as Advocate General Darmon rightly observed in his opinion in the *De Weerd* case, [30] 'the directive [79/7] is in no way intended to regulate the operation of Member States' social security schemes .... Its purpose, as expressly stated in Article 1, 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"', and that, as the Court emphasized in its judgment in the same case, [31] 'Directive 79/7 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'.

29 — Cited in footnote 4 above, paragraph 23.

30 — Judgment cited in footnote 27 above; see point 41 of the Opinion.

31 — Ibid., paragraph 28.

53. Therefore the Member States are free to regulate the operation of their social security systems and to define the nature and scope of social protection measures, as well as the specific details for implementing those measures, provided that the principle of equal treatment of men and women is observed.

As we have seen, protection against the risks of sickness and/or invalidity under the German social security scheme is characterized, first, by the fact that, in contrast to the United Kingdom system examined in the *Drake* judgment, [32] if the insurance fund does not grant benefit in kind, in all cases it is the insured person who is entitled to reimbursement of the cost of the personnel whom he has procured to look after him and, secondly, by the fact that the insured person cannot claim the benefit in kind or the reimbursement of costs if he lives with another person who can provide the necessary care and assistance.

54. It seems to me that, as Community law stands at present and in the light of the judgments I have cited, Directive 79/7 does not prevent a Member State from arranging protection against the risks of sickness and/or invalidity under its social security system in such a way that, where the insurance fund does not grant benefits in kind, in all cases it is the insured person who is entitled to reimbursement of the cost of the personnel whom he has procured to look after him. It remains to be seen whether the provisions of the directive, in particular Article 4, prevent domestic law from refusing the insured person both the benefits in kind and the reimbursement of costs, as the case may be, if he lives with another person who can look after him.

55. The Court has consistently held that Article 4(1) of Directive 79/7 precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. [33]

56. Both the plaintiff and the Commission maintain that the provision at issue introduces indirect discrimination because it works to the disadvantage of more women than men, as the persons who live with an invalid and are in a position to look after him are mostly women. I do not deny that the second statement is correct, but I cannot agree with the first.

32 — Cited in footnote 4.

33 — See, most recently, *Nolte* and *Megner*, cited in footnote 13, paragraphs 28 and 24 respectively, and *Posthuma-van Damme*, cited in footnote 19, paragraph 24.

57. Since the purpose of Directive 79/7 is progressive implementation of the principle of equal treatment for men and women in matters of social security, it can be stated that the contested national provision, which forms part of one of the statutory social security schemes referred to by Article 3(1)(a) of the directive, does not adversely affect the social security rights of persons who live with a disabled person and can give him the necessary care and help.

For that reason such a provision cannot have a discriminatory effect even though in present-day society there are more women than men looking after family members who are ill.

58. Under a system displaying such features, the only persons placed at a disadvantage are the insured persons, who are not entitled to home nursing if they live with someone who can look after them. In order to show that the contested provision is detrimental to the social security rights of far more women than men, in my opinion it would be necessary to prove that the sick or disabled insured persons living with someone who can look after them, and not the persons who provide the care, are mostly women. Only then would a national provision such as that in question here be discriminatory for the purpose of Directive 79/7.

59. The plaintiff also alleges that she is the victim of discrimination because the fact that she has devoted herself to caring for her husband has prevented her from working.

In my opinion, the contested national provision likewise cannot be considered contrary to Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards, *inter alia,* access to employment. No one is compelled by the national provision to give up work in order to look after a sick or disabled person with whom he or she lives, or is prevented from working or seeking work, because the right to home nursing in the form of benefits in kind or the reimbursement of the cost of personnel procured by the sick or disabled person himself is not refused to every insured person who lives with other persons, but only to insured persons in whose household there is another person who is in a position to give them the necessary care and attention.

60. Therefore, in my opinion, as Community law stands at present, a national provision which refuses an insured person who is ill the right to home nursing at the cost of the insurance fund, in the form of benefits in kind or reimbursement of the cost of personnel whom he has procured for himself, where that insured person, who alone is entitled to that right, lives with another person who can give him the necessary care and attention, does not constitute discrimination on grounds of sex for the purpose of Directive 79/7.

Question 3

61. The purpose of the national court's third question seems to be to ascertain whether the plaintiff, who is not insured by the defendant, can rely on Directive 79/7 or whether her husband alone, as the insured person, can do so.

62. This question has already been answered in the Court's case-law. In the *Verholen* judgment, [34] where the question was whether the person concerned could rely on Directive 79/7 when he suffers the effects of a national provision involving discrimination against his spouse, who is not a party to the proceedings, the Court observed that 'the right to rely on the provisions of Directive 79/7 is not confined to individuals coming within the scope *ratione personae* of the directive, in so far as the possibility cannot be ruled out that other persons may have a direct interest in ensuring that the principle of non-discrimination is respected as regards persons who are protected'. The Court added that although in principle it is for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection, [35] and that the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community law. [36] The Court replied in the affirmative to the question submitted, provided that the wife who was the victim of discrimination herself came within the scope of Directive 79/7.

63. In the *De Weerd* case [37] the Court was asked by the Raad van Beroep, 's-Hertogenbosch *inter alia* whether, if a national provision is incompatible with Article 4(1) of Directive 79/7, that provision may be relied upon before the national courts to prevent the application of the national legislation solely by persons of the categories covered by the Directive, as defined in Article 2, or also by all persons affected by the national legislation, even if they are not within the categories to which the directive applies.

In its judgment the Court stated that Article 4(1) of Directive 79/7 cannot be relied upon by persons not falling within its scope *ratione personae* even if they are covered by a national social security scheme which itself falls within the directive's scope *ratione materiae*, and replied that 'only persons falling within the scope *ratione personae* of Directive 79/7 as defined in Article 2 and those affected by discrimination in a national

34 — Cited in footnote 8 above, paragraph 23.

35 — See Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 17, and Case 222/86 *Unectef* v *Heylens* [1987] ECR 4097, paragraph 14.

36 — See Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 14.

37 — Cited in footnote 27 above, paragraph 41.

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

64. In the light of that decision, the reply to the present question will depend entirely on the Court's reply to Question 1 because, if it finds that the plaintiff does not belong to the working population within the meaning of Directive 79/7, neither she nor her husband can rely on the directive in order to prevent the application of allegedly discriminatory national legislation. If, on the other hand, it is found that the plaintiff does belong to the working population, either she or her husband can rely on the directive in order to prevent application of the same national legislation.

Question 4 and Question 5, first part

65. It appears that, by these questions, the national court seeks to ascertain whether the defendant would be liable as an organ of the State and, if so, what would be the nature of its liability, if it were found that the contested national provision led to discrimination on grounds of sex within the meaning of Directive 79/7.

66. In examining these questions as thus reformulated, I must assume that the liability referred to by the national court is the liability of the State for harm caused to individuals by breaches of Community law for which the State can be held responsible, and that the defendant, the Handelskrankenkasse (Ersatzkasse) Bremen, must be deemed to form part of the State in the broad sense.

67. The Court has held, in the *Francovich* judgment, [38] that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsible, and that the principle of State liability for harm caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

In the same judgment the Court went on to say: 'Where ... a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled. The first of those conditions is that the result

38 — See Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357, paragraphs 33 and 35.

prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.' [39]

68. Unlike the *Francovich* case where, because the provisions of a directive were not sufficiently precise and unconditional, the persons concerned were unable to rely on certain rights against the State before the national courts in the absence of domestic measures implementing them within the specified time-limit, the present case concerns a provision which has direct effect.

The Court has consistently held that 'Article 4(1) of Directive 79/7 may, in the absence of appropriate implementing measures, be relied on by individuals before the national courts in order to preclude the application of any provision of national law inconsistent with that article and that as from 23 December 1984, the date on which the time allowed for transposing the directive expired, women are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the directive has not been implemented correctly, those rules remain the only valid point of reference.' [40]

Furthermore, according to the Court's judgment in *Marshall I*, [41] where a person involved in legal proceedings is able to rely on a directive against the State, he may do so regardless of the capacity in which the latter is acting.

69. As the Court recently observed in its judgment in *Brasserie du Pêcheur*, [42] 'the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty ... The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State.'

The Court added that 'the purpose of reparation is to redress the injurious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In

39 — Ibid., paragraphs 39 and 40.

40 — See *De Weerd*, cited in footnote 27 above, paragraph 18, and Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865, paragraphs 11 and 12.

41 — See Case 152/84 *Marshall* v *South West Hampshire Area Health Authority* [1986] ECR 723, paragraph 49.

42 — See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* v *Germany* [1996] ECR I-1029, paragraph 20.

that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.' [43]

70. In the light of those decisions, and assuming that the Court's reply to the first question is in the affirmative, the reply to the fourth question and the first part of the fifth must be that the defendant, as an organ of the State, may be liable and reparation may be claimed before the national courts by individuals who have sustained damage if it is shown that the contested national provision gave rise, after 23 December 1984, the date on which the time-limit allowed for amending national law so as to conform with Directive 79/7 expired, to discrimination in social security matters on grounds of sex.

71. As I said in point 40, it is unnecessary to reply to the second part of the fifth question since it refers to problems of the interpretation of domestic law, for which the Court has no jurisdiction.

Conclusion

72. In the light of the foregoing considerations, I suggest that the Court should reply as follows to the questions referred to it by the Hanseatisches Oberlandesgericht Bremen:

(1) The plaintiff does not belong to the working population for the purposes 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 because she did not, in order to look after her disabled husband, give up work which she already had or stop seeking employment, and in that connection it is immaterial that the services she provides go beyond the normal degree of care in marriage.

43 — Ibid., paragraphs 21 and 22.

If the Court does not share this view, the replies to the other questions should be as follows:

(2) Article 4(1) of Directive 79/7 does not preclude a national provision under which an insured person is not entitled to home nursing at the cost of the insurance fund, in the form of benefits in kind or reimbursement of the cost of personnel whom he has procured for himself, where the insured person, who alone is entitled to that right, lives with another person who can give him the necessary care and assistance.

(3) If the plaintiff does not belong to the working population within the meaning of Directive 79/7, neither she nor her husband can rely on the directive in order to prevent the application of allegedly discriminatory national legislation. If, on the other hand, the plaintiff does belong to the working population, either she or her husband may rely on the directive in order to prevent the application of the same national legislation.

(4) The defendant, as an organ of the State, may be liable and reparation may be claimed before the national courts by individuals who have sustained damage if it is shown that the contested national provision gave rise, after 23 December 1984, the date on which the time-limit allowed for amending national law so as to conform with Directive 79/7 expired, to discrimination in social security matters on grounds of sex.