# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 12 May 2005 [1]

1. By this question referred for a preliminary ruling, the Commissione tributaria provinciale di Novara (Provincial Tax Court, Novara), Italy, wishes to know whether Article 141 EC or Directive 76/207/EEC [2] preclude national legislation according different tax treatment to men and women on grounds of age, in relation to compensation received from the employer as a consequence of premature termination of the employment relationship.

## I — Legal framework

### A — *Community law*

1. Article 141 CE

2. This provision establishes:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

1 — Original language: Spanish.

2 — 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 (OJ 1976 L 39, p. 40); it was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) which came into force on 5 October 2002.

(b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

3. These basic rules are reinforced by various pieces of secondary legislation, such as 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, [3] and the aforementioned Directive 76/207, which are mutually exclusive in scope. [4]

2. Directive 76/207

4. Article 1 emphasises that the aim of the directive is to implement the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training, and as regards working conditions and, on certain conditions, social security. [5] This means, according to Article 2(1), that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.

3 — OJ 1975 L 45, p. 19.

4 — Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraphs 48 to 51. Advocate General Kokott expresses the same view in her Opinions in Case C-313/02 *Wippel* [2004] ECR I-9483, point 64, and Case C-19/02 *Hlozek* [2004] ECR I-11491, points 96 and 97.

5 — Cabeza Pereira, L., 'El derecho de la mujer a trabajar en igualdad: apuntes sobre el estado de la cuestion', *Revista española de derecho del trabajo*, No 104, March/April 2001, p. 211, note 65, points out that this directive offers lesser guidelines than Convention No 111 of the International Labour Organisation of 1958, concerning Discrimination in respect of Employment and Occupation.

5. Under Article 5(1), application of the principle with regard to 'working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'; subparagraph (2) requires Member States to take the measures necessary 'to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision'. [6]

6. Under Article 1(2) the Council is required, with a view to ensuring the progressive eradication of discrimination in matters of social security and acting on a proposal from the Commission, to adopt provisions defining '[the] substance, ... scope and ... arrangements for [the] application' of the principle of equal treatment, which include Directive 79/7/EEC. [7]

3. Directive 79/7

7. Under Article 3(1), the provisions of the directive are to apply to statutory schemes which provide protection against sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and also to rules governing social assistance which supplement or replace those schemes.

6 — Directive 2002/73, cited above, abolished this requirement, but its content is inferred from the new wording of Article 3, since Article 3(1)(c) provides that its provisions shall be observed in 'employment and working conditions, including dismissals, as well as pay provided for in Directive 75/117/EEC' and Article 3 (2)(a) retains the States' responsibility for ensuring that 'any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'.

7 — 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).

Article 3(2) provides that the directive is not to apply to survivors' benefits, maternity benefits or family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of a spouse or dependant. [8]

8. Article 4 provides that, in the interests of uniformity, there must be no discrimination whatsoever on ground 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 ...'.

9. Article 5 requires Member States to take 'the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished'. However, Article 7 (1) allows them to depart from the Community measures in 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits' (Article 7(1)(a)), and also other advantages and entitlements.

B — *Italian law*

10. Article 9 of Law 1272 of 6 July 1939, as amended by Article 2 of Law 218 of 4 April 1952, [9] granted pensions to male workers at the age of 60 and to female workers at the age of 55, although, under Article 1 and the table in Annex A to Legislative Decree No 503 of 30 December 1992, [10] those ages were raised to 65 and 60 respectively.

8 — The legislation concerning this matter is completed by 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), amended by Council Directive 96/97/EC of 20 December 1996 (OJ 1997 L 46, p. 20).

9 — 'Riordinamento delle pensioni dell'assicurazione obbligatoria per l'invalidità, la vecchiaia e i superstiti', GURI N° 89, of 15 April 1952, Ordinary Supplement.

10 — 'Norme per il riordinamento del sistema previdenziale dei lavoratori privati e pubblici, a norma dell'articolo 3 della Legge 23 ottobre 1992, n° 421', GURI N° 305, of 30 December 1992, Ordinary Supplement.

11. Law 155 of 23 April 1981 [11] allows the employees of companies declared to be in crisis by the Comitato Interministeriale per il Coordinamento della Politica industriale to take early retirement from the age of 55 in the case of men and 50 in the case of women.

12. Decree No 917 of the President of the Republic of 22 December 1986 [12] governs the tax treatment of severance pay under schemes to encourage retirement and draws a distinction between the two sexes. Article 17(4a), which was added by Decree Law No 314 of 2 September 1997, [13] provides:

'In the case of sums paid in relation to cessation of the employment relationship in order to encourage workers who have passed the age of 50 years in the case of women and 55 years in the case of men to take voluntary redundancy, [14] as provided for in Article 16 (1)(a), [15] the tax shall apply at a rate equal to one-half of the rate applied for the taxation of severance pay and the other allowances and sums mentioned in Article 16(1)(a).'

## II — The facts, the main proceedings and the question referred to the Court

13. Mr Vergani joined a voluntary redundancy scheme run by his employer, Chubb Insurance Company S.A. On 14 November 2001, when he had reached the age of 51, he resigned from the company, receiving compensation of ITL 751 000 000 (EUR 387 859.13), from which personal income tax was deducted at the rate of 33.95%.

11 — 'Adeguamento delle strutture e delle procedure per la liquidazione urgente delle pensioni e per i trattamenti di disoccupazione, e misure urgenti in materia previdenziale e pensionistica', GURI N° 114, of 27 April 1981, Ordinary Supplement.

12 — 'Approvazione del testo unico delle imposte sui redditi', GURI N° 302, of 31 December 1986, Ordinary Supplement.

13 — 'Armonizzazione, razionalizzazione e semplificazione delle disposizioni fiscali e previdenziali concernenti i redditi di lavoro dipendente e dei relativi adempimenti da parte dei datori di lavoro', GURI N° 219, of 19 September 1997, Ordinary Supplement.

14 — The Italian text reads '... al fine di incentivare l'esodo dei lavoratori ...'.

15 — This reads as follows: 'a) Trattamento di fine rapporto di cui all'articolo 2120 del Codice Civile e indennità equipollenti, comunque denominate, commisurate alla durata dei rapporti di lavoro dipendente, compresi quelli contemplati alle lettere a) e g) del comma primo dell'articolo 47, anche nelle ipotesi di cui all'articolo 2122 del Codice Civile; altre indennità e somme percepite una volta tanto in dipendenza della cessazione dei predetti rapporti, comprese l'indennità di preavviso, le somme risultanti dalla capitalizzazione di pensioni e quelle attribuite a fronte dell'obbligo di non concorrenza ai sensi dell'articolo 2125 del Codice Civile.'

14. The Agencia delle Entrate Ufficio di Arona (Revenue Authority of the Italian Ministry of Finance) rejected his application for a 50% reduction in the tax rate and a refund of EUR 70 757.22, the amount of the capital and accrued interest, since the tax benefit applied to male workers who are over 55 years old.

15. An appeal has been brought against that decision before the Commissione tributaria provinciale di Novara, which has stayed proceedings and, before giving judgment, has referred the following question to the Court of Justice:

'Does Article 17(4a) of Decree No 917/86 of the President of the Republic infringe, conflict with or in any event create conditions of unequal treatment as between men and women prohibited by Article 141 EC (formerly Article 119 of the EC Treaty) and by Directive 76/207/EEC in so far as, in like circumstances, it grants the advantage of taxation of voluntary redundancy incentives and of sums paid in connection with the cessation of employment relationships at a rate reduced to one-half (50%) for workers who have passed the age of 50 years in the case of women and the age of 55 years in the case of men?'

## III — Procedure before the Court of Justice

16. Written observations were submitted within the period laid down by Article 20 of the EC Statute of the Court of Justice by Mr Vergani, the Italian Government and the Commission.

17. At the hearing held on 14 April 2005 Mr Vergani's representatives and the Commission's agent presented oral argument.

## IV — Equality between workers of the two sexes in the Union

18. To make it easier to reply to the question referred for a preliminary ruling, a few points should first be made concerning the prohibition on discrimination in employment, [16] beginning with the legislation in the Treaties, continuing with the main statements of the prohibition and ending with the specific

16 — Balaguer Callejón, M.L., 'Derecho comunitario y derecho interno en la interdicción de la discriminación por razón de género', *Revista de Derecho Constitucional Europeo*, No 1, January-June 2004, p. 383, maintains that European legislation in this field is often more advanced than that of some States, in particular with regard to employment.

criteria for establishing the existence of discrimination contrary to Community law.

## A — *Primary law*

19. The legal position of women in Europe in the 1950s can be distinguished from their position throughout history when they were not accorded proper recognition. By way of example, Fray Luis de León, in his work *La Perfecta Casada*, claimed that Woman was by nature 'flaca y deleznable más que otro animal y de su costumbre e ingenio quebradiza y melindrosa' ('weaker and more fragile than any other creature, and by inclination and habit frail and finicky'). [17] There were, however, other voices in the 16th century which bore testimony to the injustice; the most forceful of them is that of Teresa de Ávila, writing, in *Camino de perfección*: 'No lo creo yo, señor, de vuestra bondad y justicia, que sois justo juez y no como los jueces de este mundo, que como son hijos de Adán y, en fin, todos varones, no hay virtud de mujer que no tengan por sospechosa' ('Yet, Lord, I cannot believe this of Thy goodness and righteousness, for Thou art a righteous Judge, not like judges in the world, who, being, after all, men and sons of Adam, refuse to consider any woman's virtue as above suspicion'). [18]

20. When the European Communities were established, the principle of equality of the sexes was subject to serious shortcomings, which have been eradicated in a continual process of improvement. [19]

21. The founding Treaties, in accordance with their aim of promoting trade, did not deal directly with those issues. The main provisions were designed to prevent employees being excluded on grounds of nationality (former Article 48 of the EC Treaty) and to ensure their social protection (former Article 51 of the EC Treaty), in the context of the free movement of the factors of production. In their turn, the scant provisions which granted rights specifically with regard to employment, such as equal pay for men and women (former Article 119 of the EC Treaty), were designed to avoid 'social dumping', which would distort competition between the Member States [20] although reference was also made to the need to promote improved living and working conditions, so as to achieve equality through progress (former Article 117 of the EC Treaty) and the European Social Fund was

17 — Fray Luis de León, *La Perfecta Casada*, edited by Javier San José Lera, Espasa Calpe, col. Austral, Madrid, 1992, p. 86. (Translation taken from J.A Jones and J. San José Lera, *A Bilingual Edition of Fray Luis de León's* La Perfecta Casada, Edwin Mellen Press, Wales, UK, 1999, p. 33.)

18 — Teresa de Ávila, *Camino de perfección*, edited by María Jesús Mancho Duque, Espasa Calpe, col. Austral, Madrid, 1996, p. 81, note 170, which refers to the Códice de El Escorial. (Translated and edited by E. Allison Peers from the critical edition of P. Silverio de Santa Teresa, C.D., first ed. Sheed & Ward, 1946, ed. Burns & Oates, 2002.)

19 — See López López, J., and Chacartegui Jávega, C., 'Las políticas de empleo comunitarias sobre inserción de la mujer en el mercado de trabajo. Del principio de igualdad retributiva en el Tratado de Roma a la constitucionalización comunitaria del principio de igualdad de trato y de oportunidades en el Tratado de Ámsterdam', *Revista española de derecho del trabajo*, No 99, 2000, pp. 5 et seq.

20 — Ordóñez Solís, D., *La igualdad entre hombres y mujeres en el derecho europeo*, Ministerio de Trabajo y Asuntos Sociales y Consejo General del Poder Judicial, Madrid, 1999, p. 44.

established (former Articles 123 et seq. of the EC Treaty). [21]

22. The order of priorities when the process was undertaken explains the scant Community initiative in this field, which was essentially directed towards facilitating the movement of workers and coordinating the support mechanisms. However, in the 1970s other issues were tackled, and provisions were adopted concerning equality in relation to pay (Directive 75/117), access to employment, vocational training and promotion, and working conditions (Directive 76/207) and social security (Directive 79/7).

23. The Single European Act [22] did not deal specifically with equality in employment, but introduced into the basic legislation rules designed to improve the working environment and also the health and safety of workers (former Article 118a of the EC Treaty), created the Structural Funds in order to achieve economic and social cohesion (former Articles 130a et seq. of the EC Treaty), and also promoted dialogue in this field (former Article 118b of the EC Treaty).

24. With the Treaty on European Union [23] this Community gained an independent identity, distinct from economic policy, since one of the objectives of the Union and of the Community is to promote social progress and a high level of employment and protection (former Article B of the Treaty on European Union and Article 2 of the EC Treaty, respectively), although the most significant innovations were contained in the Protocol on Social Policy — which the United Kingdom did not sign —, based on the Community Charter of the Fundamental Social Rights of Workers of 1989, [24] which included an agreement on the issue, in which equality of opportunity and treatment was mentioned (Article 2(1)).

25. The Treaty of Amsterdam [25] underpins the principle by expressly stating it as one of the aims of the Community, which has as its task '... by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, ... to promote

21 — Rocella, M. and Treu, T., *Diritto del Lavoro della Comunità Europea*, 2nd ed., Ceadm, Padua, 1995; Colina, M., Ramírez, J.M. and Sala Franco, T., *Derecho Social Comunitario*, 2nd ed., Tirant lo Blanch, Valencia, 1995; and Sempere Navarro, A.V., in the prologue to the book by Burrun Abad, F.J., Melendez Morillo Velarde, L. and Perez Campos, A.I., *Cuestiones laborales de derecho social comunitario*, Aranzadi, Pamplona, 2002, pp 21 to 30.

22 — OJ 1987 L 169, p. 1.

23 — OJ 1992 C 191, p. 1.

24 — COM (89) 471 final.

25 — Treaty amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997 (OJ 1997 C 340, p. 1).

... equality between men and women ...' (Article 2).[26] It confirmed the principle by introducing a new paragraph in Article 3, according to which, in all the activities referred to in that provision, the Community aims to eliminate inequalities, and to promote equality, between men and women.[27] Also, the Agreement on Social Policy is incorporated into the EC Treaty; its content is enlarged and it is given greater force. Especially significant is the express acceptance of the fundamental social rights (Article 136 EC), particular emphasis being placed on equality between male and female workers.

26. Against this legislative background, the Treaty of Nice,[28] which is for the time being the most recent addition to the European project, concerns aspects such as the combating of social exclusion.

27. More relevant is the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 at the Nice European Council, since, apart from the controversy regarding its legal nature, it has had a significant influence on legislation planned and approved since it was proclaimed.

28. Finally, the Treaty establishing a Constitution for Europe[29] places equality among the values on which the Union is based, and specifically mentions equality between 'women and men' (Article I-2); it states that the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men ...' (the second subparagraph of Article I-3(3)); and, in the section dedicated to fundamental rights, it cautions that 'equality between women and men must be ensured in all areas, including employment, work and pay' although that principle 'shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex' (Article II-83). There is other evidence of this in the provisions regulating social policy: provision is made for supporting and complementing activities of the Member States designed to ensure 'equality between women and men with regard to labour market opportunities and treatment at work.' (Article III-210(1)(i)), and Member States are required to ensure 'that the principle of equal pay for female and male workers for equal work or work of equal value is applied'; they are authorised to

26 — Rodríguez-Piñero and Bravo-Ferrer, M., 'Igualdad de género y políticas comunitarias', *Relaciones Laborales*, No 6, 2000, pp. 3 et seq.

27 — According to Leclerc, S., 'L'égalité de traitement entre les hommes et les femmes: l'ascension d'un droit social fondamental', in the joint work *L'Union européenne et les droits fondamentaux*, Bruylant, Brussels, 1999, pp. 215 and 216, this new provision extends the scope of the principle beyond the social context, formulating it in positive terms, not only as a derivation of the prohibition on discrimination.

28 — OJ 2001 C 80, p. 1.

29 — OJ 2004 C 310, p. 1.

maintain or adopt measures 'to make it easier for the under-represented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers'; at the same time, it provides that European laws or framework laws are to establish measures to avoid distinctions 'in matters of employment and occupation' and also in respect of pay (Article III-214).

1. The principle of equal pay

B — *Content*

29. 'The elimination of discrimination based on sex' is one of the fundamental rights, [30] having become, both quantitatively and qualitatively, a significant aspect of Community social policy. [31] It affects three main areas: salaries, access to employment, professional careers and working conditions, and also matters of social security. [32]

30. This proposition 'is one of the foundations of the Community', [33] being the most striking expression of the prohibition against discrimination between male and female workers. [34] It is acknowledged in Article 141 EC, whose economic component, which focuses on the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social theme on which the provision is based. [35] I have already expressed the view, in point 32 of my opinion in *Mayer*, [36] that the legislation contains a provision not usually found in an international agreement. First, it represents a social ideal and the means — albeit indirect — of harmonising employment policy in the Union. Secondly, it establishes a legal obligation of result, [37] an economic and social objective in itself. Its wording is based on Article 2 of Convention 100 of the

30 — Case 149/77 *Defrenne III* [1978] ECR 1365, paragraph 27; see, to the same effect, Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32.

31 — Pérez del Río, T., *Una aproximación al derecho social comunitario*, Tecnos, Madrid, 2000, p. 87.

32 — Montoya Melgar, A., Galiana Moreno, J.M., and Sempere Navarro, A.V., *Derecho Social Europeo*, Tecnos, Madrid, 1994, in particular Chapter 2, 'La acción comunitaria a favor de la igualdad laboral por razón de sexo', pp. 49 et seq.

33 — Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 12.

34 — Quintanilla Navarro, B., *Discriminación retributiva. Diferencias salariales por razón de sexo*, Marcial Pons, Madrid, 1996, pp. 63 to 168.

35 — Case C-50/96 *Schröder* [2000] ECR I-743, paragraph 57.

36 — Case C-356/03 *Mayer* [2005] ECR I-295.

37 — Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 38.

International Labour Organisation of 1951. [38]

31. The essence of this legislation turns on the meaning of 'pay', which the Court of Justice has defined gradually over time, [39] extending it to any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, from his employer in respect of his employment [40] under a contract of employment, by virtue of legislative provisions or on a voluntary basis. [41] A study of the case-law reveals that the persons concerned have a common denominator since, without drawing particular attention to this point, the cases have made clear that the payer must be the employer, even if it is a public body. [42] This is apparent from Article 141 EC itself.

32. Apart from that, it is necessary to consider other secondary legislation, such as Directive 75/117.

## 2. The principle of equal treatment

33. Following the amendments made by the Treaty of Amsterdam, Article 141(3) EC

38 — Ellis, Evelyn, *EC Sex Equality Law*, 2nd ed., col. Oxford EC Law Library, Ed. Clarendon Press, Oxford, 1998, p. 62. Also Cruz Villalón, J., 'Los intersticios de penetración de la prohibición de discriminación en el derecho comunitario', in the joint work *La igualdad de trato en el Derecho comunitario*, Aranzadi, Pamplona, 1997, particularly pp. 38 et seq.

39 — By way of example, the Court of Justice has held that the following constitute pay: travel facilities provided by a railway company for former male employees after their retirement and which extended to members of their families, so that relatives of former female employees should also enjoy those facilities on the same terms (Case 12/81 *Garland* [1982] ECR 359); occupational pension plans based on an agreement between the employer and employee representatives financed, entirely or partly, by the company (Case 170/84 *Bilka* [1986] ECR 1607); continued payment of a salary during sick leave (Case 171/88 *Rinner-Kühn* [1989] ECR 2743); benefits paid in connection with redundancy and pensions paid under private occupational schemes (Case C-262/88 *Barber* [1990] ECR I-1889); compensation paid to staff council members, in the form of paid leave or overtime pay for attendance of training courses providing the knowledge necessary for working on staff councils, even though during the training courses they do not perform any of the work provided for in their contract of employment (Case C-360/90 *Bötel* [1992] ECR I-3589); the right to join an occupational pension scheme (Case C-57/93 *Vroege* [1994] ECR I-4541, and Case C-128/93 *Fisscher* [1994] ECR I-4583); payment on termination of employment (Case C-249/97 *Gruber* [1999] ECR I-5295); a voluntary and revocable Christmas bonus paid as an incentive for future work or as a reward for loyalty to the undertaking (Case C-333/97 *Lewen* [1999] ECR I-7243); or a bridging allowance paid in addition to severance pay (*Hlozek*, cited in footnote 4).

40 — Case 80/70 *Defrenne I* [1971] ECR 445, paragraph 6; Case 192/85 *Newstead* [1987] ECR 4753, paragraph 11; Case C-152/91 *Neath* [1993] ECR I-6935, paragraph 28; Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 56; and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 42; also the judgments in *Garland*, paragraph 5, *Barber*, paragraph 12, and *Coloroll Pension Trustees*, paragraph 77, all cited above.

41 — *Garland*, paragraph 10, *Barber*, paragraph 20, and *Lewen*, paragraph 21, cited above.

42 — The judgment in Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 12, points out that the principle is binding on both private employees and public authorities.

contains the principle of 'equal treatment of men and women in matters of employment and occupation'. Previously, Directive 76/207 had recognised that homogeneity must be assessed at each stage or in every circumstance of the working relationship, [43] since it affects not only salaries; the directive specifically mentions access to employment, vocational training and promotion, and also working conditions, including the conditions governing dismissal. [44] This last situation must be widely construed, as referring to every kind of cessation or termination of the employment relationship, irrespective of the name given to it by the parties, including termination by mutual agreement. [45]

34. The problems of retirement call for particular attention. The Court of Justice has declared that an age limit for compulsory dismissal pursuant to a company's general policy falls within the term 'dismissal' referred to above, even if the dismissal involves the grant of the pension, so that 'the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive No 79/7 applies only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'. [46]

3. Equality with regard to benefits

35. Directive 79/7 concerns the impact of the principle on the contingencies and risks provided for in the statutory social security schemes — Directive 86/378 does the same but in respect of occupational schemes. [47]

36. According to the case-law, in order to fall within the scope of the directive the benefit must be directly and effectively linked

43 — Durán López, F., 'La igualdad de trato entre hombres y mujeres en la Directiva 76/207, de 9 de febrero de 1976', in the joint work *Cuestiones actuales del Derecho del trabajo. Estudios ofrecidos por los catedráticos españoles de Derecho del trabajo al profesor Manuel Alonso Olea*, Ministerio de Trabajo y Seguridad Social, Madrid, 1990, pp. 406 et seq.

44 — Case C-271/91 *Marshall II* [1993] ECR I-4367, paragraph 19.

45 — Case 19/81 *Burton* [1982] ECR 554; and Case 151/84 *Roberts* [1986] ECR 703.

46 — Case 152/84 *Marshall I* [1986] ECR 723, paragraphs 34 and 36; and *Roberts*, paragraphs 34 and 35.

47 — Recio Laza, A., *La seguridad social en la jurisprudencia comunitaria*, La Ley, Madrid, 1986; also Fernández Domínguez, J.J., *La mujer ante el Derecho de la seguridad social. Antiguos y nuevos problemas de la igualdad de trato por razón de sexo*, La Ley, Madrid, 1999.

to the protection provided against one of the risks specified in Article 3(1). [48]

C — *A finding of discrimination*

37. In the absence of a legal definition, the Court of Justice gives a similar meaning to inequality in the three situations mentioned. It has repeatedly stated that inequality arises through the application of different rules to comparable situations or the application of the same rule to different situations. [49] In order to make the appropriate assessment it is necessary to ascertain whether the provisions at issue have a more unfavourable impact on workers of one sex or the other. [50] Indirect discrimination — through the adoption of a measure which, although couched in neutral terms, in fact harms a far greater number of women than men — is also unacceptable unless justified by objective factors unrelated to any discrimination based on sex. [51]

38. In this last respect it has stressed that measures which meet a legitimate aim of social policy, provided they are suitable and requisite for attaining that end, are not contrary to the principle of equal treatment; [52] budgetary considerations cannot in themselves justify such measures. [53]

## V — Analysis of the question referred for a preliminary ruling

39. The above considerations make it necessary, in the present case, to identify the

48 — Case C-243/90 *Smithson* [1992] ECR I-467, paragraphs 12 and 14; Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraphs 15 and 16; and Case C-137/94 *Richardson* [1995] ECR I-3407, paragraphs 8 and 9, inter alia. Applying these criteria, it has been held as a matter of fact that the directive does not cover concessionary fares for the elderly on public passenger transport services (Case C-228/94 *Atkins* [1996] ECR I-3633); additional benefit paid to persons having insufficient means to meet their needs (*Jackson and Cresswell*); child-raising allowance intended to secure maintenance of the family while the children are growing up (Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895); and advantages in respect of old-age pension schemes granted to persons who have brought up children or benefit entitlements provided where employment has been interrupted in order to bring up children (Case C-297/93 *Grau-Hupka* [1994] ECR I-5535). On the other hand, the Community legislation has been held to apply to benefit paid to a person providing care for an invalid (Case 150/85 *Drake* [1986] ECR I-1995), and winter fuel payments to persons who have reached retirement age (Case C-382/98 *Taylor* [1999] ECR I-8955).

49 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 16; and Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 39.

50 — Case C-167/97 *Seymour-Smith and Pérez* [1999] ECR I-623, paragraph 58; and *Schönheit and Becker*, paragraph 69.

51 — Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 22; Case C-457/93 *Lewark* [1996] ECR I-243, paragraph 31; Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, paragraph 34; Case C-189/01 *Jippes* [2001] ECR I-5689, paragraph 129; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 50; and *Rinner-Kühn*, paragraph 12, and *Rodríguez Caballero*, paragraph 32.

52 — Judgments in Case C-226/91 *Molenbroek* [1992] ECR I-5943, paragraph 13; and Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 41.

53 — Judgments in Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 35; *Jørgensen*, paragraph 42; and *Schönheit and Becker*, paragraph 85.

relevant provisions of Union law, to investigate whether there may have been discriminatory treatment and, if so, to establish whether it may be justified.

42. Also, obligations to the tax authorities are not within the ambit of social security, irrespective of whether a statutory or occupational scheme is involved. The fact that some charges are fixed with a view to achieving social objectives does not make them measures protecting against risks. Therefore, Directive 79/7 cannot apply.

A — *Determination of the applicable Community legislation*

43. It remains to be considered whether Directive 76/207 comes into play; as I have mentioned, it extends equality to practically all aspects of working life, in particular working conditions, including those relating to termination of the contract.

40. The question referred for a preliminary ruling concerns the Italian tax rules on severance pay. The argument is not about the amount of the sum received or retirement age, but about the fact that women bear a lighter tax burden than men.

44. In principle, although that legislation is more frequently used for reacting against discrimination by the employer, it also extends to discrimination arising out of collective bargaining or discrimination by the State itself, one of whose duties is to abolish any laws, regulations or administrative provisions which promote, cause or give rise to situations of inequality.

41. With this as the point of departure, the rules on equal pay may be discounted, since amounts of personal income tax paid by taxpayers do not form part of the salary, despite the breadth of that term in the Community sphere, because they are not paid by the employer in respect of the employment. Furthermore, conversely, they cannot be regarded as paid by the State on the basis of such a connection. Consequently, reliance on Article 141(1) and (2) EC and Directive 75/117, and also the case-law which has interpreted them, must be ruled out.

45. The compensation received by workers on severing their link with an undertaking is subject to tax under the relevant fiscal measures, on which the final figure depends; therefore, national tax systems are affected by the provisions of Directive 76/207, although they may also be affected by other provisions.

B — *Tax treatment of severance pay*

46. Decree No 917 of the President of the Republic determines the tax rate for payments made in relation to voluntary redundancy, applying a reduced rate in the case of women over the age of 50 and men over the age of 55.

47. Workers receive the tax advantage at one age or the other, depending on their gender. A distinction is therefore drawn in favour of women, since, in a situation in which a man and a woman are the same age, the woman contributes less to the Treasury on a supplementary payment received as a consequence of the termination of the employee-employer relationship, and thus obtains a larger net sum.

48. That is Mr Vergani's position. As he was 51 years old when the chargeable event occurred, he was refused the tax concession which a female worker in the same undertaking and in the same situation would have enjoyed.

49. The finding of an infringement of the principle of equality makes it necessary to ascertain whether there is any justification for it.

C — *Justification for the unequal treatment*

1. Early retirement age

50. Italy tries to justify the discriminatory national provision by claiming that it is based on the regulations concerning the early retirement age, which was fixed by the Law of 23 April 1981 at 55 and 50 years, depending on whether the employees of the companies declared to be in crisis are male or female, respectively. However, this connection, although clear, is not a ground for the discrimination concerned because:

First, the dispute in this case does not relate to the different age limit for early termination of contracts but to the fact that that distinction operates in respect of tax.

Second, it disregards other possible ways in which the employment relationship may come to an end. According to the argument put forward by the Italian State, the tax concession provided for in Article 17(4a) of the Presidential Decree applies only in the cases stated in the Law of 23 April 1981. However, Article 17(4a) refers, without specifying further, to any 'cessation of the employment relationship in order to encourage ... voluntary redundancy', whereas the Law applies when that situation occurs in undertakings in crisis.

51. In other words, in contrast to the Commission's submission, the tax scheme reflects the disparity in age for early retirement only in the circumstances provided for by the Law of 1981, which does not include all the possible situations, amongst them that of Mr Vergani.

2. National social policy

52. The Court has consistently held that Member States have a broad discretion when choosing the measures capable of achieving their aims in this respect. [54] That is why the rules set by one country, according to its needs and interests, may justify women stopping work earlier than men, in which case Directive 79/7 comes into play, particularly Article 7, which authorises the exclusion from its scope of the determination of pensionable age for the purposes of granting pensions and other benefits dependent on that eventuality.

53. However, the exception stated in that provision, as I have pointed out, 'is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to the difference in pensionable age', which is the position when the financial equilibrium of the social security system or the coherence between the retirement pension scheme and other benefits schemes is jeopardised. [55] The dispute therefore centres on the fact that the different time stipulated for cessation of the employment relationship is linked to the grant of a tax reduction.

54. Furthermore, as I have already pointed out, the aforementioned directive is not applicable to the present case.

55. It is also necessary to clarify whether the privileged rate benefits women. In the context of the national legislation, it is difficult to accept that its aim is to favour female workers or to ensure that they are not prejudiced, by encouraging them to cancel their contracts sooner. If the objective of the tax reduction were that all employees should receive a comparable income, reliance could be placed on the judgment in *Birds Eye Walls*, by virtue of which that purpose would provide valid grounds for discrimination. However there is no evidence to establish

54 — Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 33; Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paragraph 29; and Case C-281/97 *Kruger* [1999] ECR I-5127, paragraph 28.

55 — Judgments in Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 20; Case C-92/94 *Graham and Others* [1995] ECR I-2521, paragraph 11; Case C-139/95 *Balestra* [1997] ECR I-549, paragraph 33; Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 25; and Case C-303/02 *Haackert* [2004] ECR I-2195, paragraph 30.

either that that is the intention or consequently that the situation is the same. [56]

3. Economic reasons

56. Finally, it is necessary to consider whether the discrimination at issue protects economic or financial interests, as the Commission maintains.

57. That is not a valid option since, according to the judgment in *Roks and Others*, 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). [57]

58. Furthermore, not even the State concerned has sought to rely on that ground. [58]

D — *Corollary*

59. It follows from the foregoing considerations that a reduction in tax levied on severance pay, which applies at different ages for men and women, is contrary to Article 2(1) and Article 5(1) of Directive 76/207 and that that discrimination is not justified by objective factors unrelated to the sex of the workers.

60. The same conclusion is reached if, hypothetically, recourse is had to the principle of equal pay, in the sense given to it by the Court of Justice on numerous occasions since the aforementioned judgement in *Barber*, it being pointed out that to impose an age limit which differs according to sex for granting or calculating company benefits is contrary to Article 141 EC, even if the difference is based on the respective retirement ages provided for by the national pension scheme. [59] This assessment is perfectly capable of being applied to the tax treatment of any remuneration.

56 — Case C-132/92 *Birds Eye Walls* [1993] ECR I-5579.

57 — See to the same effect Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 53; and the judgment in *Kutz-Bauer*, paragraph 59.

58 — Nor did the Commission, in answer to the question I put to it at the hearing, explain this assertion or furnish concrete evidence in support of it, but merely stressed the neutrality of the Italian legislation.

59 — Inter alia Case C-110/91 *Moroni* [1993] ECR I-6591, paragraphs 10 and 20; and Case C-408/92 *Smith and Others* [1994] ECR I-4435, paragraph 11.

## VI — Conclusion

61. In the light of the foregoing considerations, I suggest that the Court of Justice give the following reply to the Commissione tributaria provinciale di Novara, Italy:

'Community law, specifically 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, precludes the application to female workers when they have passed the age of 50 years, but to male workers only when they have passed the age of 55 years, of a reduction in tax on sums paid to them in connection with the cessation of the employment relationship in order to encourage voluntary redundancy.'