1. Community law does not preclude a national court from examining of its own motion whether national rules are in conformity with the precise and unconditional provisions of a directive, the period for whose implementation has elapsed, where the individual has not relied on that directive before the national court.

2. The scope *ratione personae* of Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security is fixed by Article 2 and may not be extended to a person outside that scope on the ground that he comes within a national scheme which, pursuant to Article 3 of the Directive, comes within its scope *ratione materiae*.

3. An individual may rely on Directive 79/7 before a national court if he bears the effects of a discriminatory national provision regarding his spouse, who is not a party to the proceedings, provided that his spouse herself comes within the scope of the directive.

4. Directive 79/7 must be interpreted as not allowing the Member States to retain in force, after the expiry of the period laid down for its implementation, the effects of earlier national legislation which in certain circumstances excluded married women from the benefit of old-age insurance.

# REPORT FOR THE HEARING
## in Joined Cases C-87/90, C-88/90 and C-89/90 *

### I — Facts and written procedure

1. 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 (Official Journal 1979 L 6, p. 24) applies, in the words of Article 2, 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.

Pursuant to Article 3, the Directive applies to statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment.

* Language of the case: Dutch.

Article 4 defines the principle of equal treatment as meaning that there should 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, the obligation to contribute, the calculation of contributions and the calculation of benefits.

Article 5 requires the 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.

The period for implementing the Directive, fixed, in Article 8, at six years, expired for the Netherlands on 23 December 1984.

2. In the Netherlands, the Algemene Ouderdomswet (General Law on old-age pensions) of 31 May 1956 (*Staatsblad*, 281) set up, for Netherlands residents and also non-residents who were subject to income tax on the basis of an occupation in the Netherlands, a general old-age pension scheme in which pension rights are acquired on the basis of the periods of insurance completed.

Persons insured under that Law may claim a pension at the age of 65; those insured without interruption between the ages of 15 and 65 receive the full pension. For any year during which the person concerned was not insured the pension is reduced by some 2%.

An increase is paid to a pensioner who has a dependent spouse who has not yet reached the age of 65. That increase is reduced in respect of any years during which the spouse was not insured.

3. Pursuant to the system applicable until 1 April 1985, which was governed by two Royal Decrees of 18 October 1968 (*Staatsblad*, 575) and 19 October 1976 (*Staatsblad*, 557), Netherlands residents who were exercising an occupational activity in another country and who, because of that work, were insured in accordance with the laws of that country, were not insured under the Algemene Ouderdomswet.

A married woman resident in the Netherlands and whose husband was a Netherlands resident not insured under that Law was herself not insured for the periods during which her husband was not insured. On the other hand, a resident married man with a wife in employment who was not insured was himself fully insured for the periods in question.

4. By the Law of 28 March 1985 (*Staatsblad*, 180), the principle of equal treatment for men and women was introduced into the Algemene Ouderdomswet and, by a Royal Decree of 26 April 1985 (*Staatsblad*, 297), the exclusion of a married woman from insurance under that Law on the ground that her husband was not insured was abolished as from 1 April 1985.

The Netherlands legislature did not adopt any rules pursuant to which persons excluded from insurance under the legislation applicable before 1 April 1985 would henceforth be covered.

5. Mrs A. Verholen, the plaintiff in the main proceedings in Case C-87/90, has always resided in the Netherlands, where she worked as an employed person. At the age of 61 she took early retirement under a scheme connected with her contract of employment. Throughout her period of occupational activity she paid contributions under the Algemene Ouderdomswet.

Her husband, a resident of the Netherlands, worked for six years in Belgium, during which period he was not insured under that Law.

For that reason, the old-age pension granted to Mrs Verholen under that Law when she reached the age of 65 was reduced by 16%.

6. Mrs T. H. M. van Wetten-van Uden, the plaintiff in the main proceedings in Case C-88/90, has never exercised a professional or trade activity.

Her husband, a resident of the Netherlands, worked in the Federal Republic of Germany for a total of more than four years during which he paid no contributions under the Algemene Ouderdomswet.

For that reason, the old-age pension granted under that Law to Mrs van Wetten-van Uden when she reached the age of 65 was reduced by 8%.

7. Mr G. H. Heiderijk, the plaintiff in the main proceedings in Case C-89/90, a Netherlands resident, worked in the Federal Republic of Germany for some years. His wife, who resided with him in the Netherlands, has never exercised a professional or trade activity.

On reaching the age of 65, he obtained an old-age pension under the Algemene Ouderdomswet, supplemented by an increase for his dependent wife, who had not yet reached the age of 65. However, that increase was reduced owing to the years during which his wife was not insured, including the periods during which Mr Heiderijk worked in the Federal Republic of Germany.

8. It was against those decisions of the Sociale Verzekeringsbank, Amsterdam, reducing their pension rights that Mrs Verholen, Mrs van Wetten-van Uden and Mr Heiderijk brought appeals before the Raad van Beroep, 's-Hertogenbosch.

9. Taking the view that those disputes turn on the interpretation of Directive 79/7/EEC, the Raad van Beroep, 's-Hertogenbosch, by orders of 30 January and 15 February 1990, stayed proceedings pending a ruling by the Court of Justice under Article 177 of the EEC Treaty on the following questions.

*Case C-87/90*

'Is it compatible with Article 4(1) (and/or Article 5) of Directive 79/7/EEC for a national provision excluding solely married women from insurance under the Algemene

Ouderdomswet to produce that effect after 22 December 1984, inasmuch as even after that date pensions granted under the Algemene Ouderdomswet to such women may still be reduced by virtue of an insurance condition which did not apply to men?'

*Case C-88/90*

'1. Does Community law preclude the national courts from reviewing (of their own motion) a national legal provision in the light of an EEC Directive, the period for whose implementation has elapsed, if an individual (possibly through ignorance) has not relied on the Directive?

2. Does Community law prevent the national courts from reviewing a national legal provision in the light of an EEC Directive, the period for whose implementation has elapsed, if an individual cannot rely on the Directive because he falls outside its scope *ratione personae*, although he does fall within the scope of a national statutory scheme which is covered by the Directive?

3. Does Article 2 of Directive 79/7/EEC refer to the scope *ratione personae* of the Directive itself or is that article to be regarded as setting out a definition (in addition to the definition in Article 3 of the Directive) of the national statutory schemes covered by the Directive?'

*Case C-89/90*

'May an individual rely on Article 4(1) (and/or Article 5) of Directive 79/7/EEC in proceedings before the national courts in order to challenge the effects of a national discriminatory provision which applied to his or her spouse, who is not a party to those proceedings?'

10. In the order for reference in Case C-87/90, the Raad van Beroep states that the effects of the discriminatory conditions in the Netherlands legislation which subsist after the date for the transposition of Directive 79/7/EEC may be contrary to Article 4(1) of that Directive. The Algemene Ouderdomswet could only to a limited extent be regarded as a so-called accrual system. Rights under that Law are not linked to the completion of a certain period of insurance, but to the fact of having reached the age of 65. Since the payment of contributions does not constitute a condition for a given period to be regarded as a period of insurance, there is no direct connection, or hardly any, between the (compulsory) payment of contributions and the amount of the pension.

In the order for reference in Case C-88/90, the Raad van Beroep points out that the scope *ratione personae* of Directive 79/7/EEC cannot be defined other than as the circle of persons who come within the national social security schemes which concern (in particular) the working population.

In the order for reference in Case C-89/90, the Raad van Beroep points out that the question whether the person concerned in the main proceedings can rely on Directive 79/7/EEC must be resolved in the light of the fact that Netherlands law does not allow the spouse to intervene in the proceedings to challenge the discriminatory effects of the Netherlands legislation.

11. The orders of the Raad van Beroep, 's-Hertogenbosch, were received at the Court Registry on 23 March 1990.

12. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted in the three cases, on 30 June 1990 by the Sociale Verzekeringsbank, Amsterdam, defendant in the main proceedings, represented by E. H. Pijnacker Hordijk and M. Droogleever Fortuyn, of the Bars of Amsterdam and The Hague, on 29 June and 3 July 1990 by the Netherlands Government, represented by B. R. Bot, Secretary-General at the Ministry of Foreign Affairs, and on 21, 22 and 26 June 1990, by the Commission of the European Communities, represented by René Barents and Karen Banks, members of its Legal Service, acting as Agents.

13. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

14. By order of 16 January, Cases C-87/90, C-88/90 and C-89/90 were joined for the purposes of the oral procedure and the judgment.

## II — Written observations submitted to the Court

*Case C-87/90*

1. The *Sociale Verzekeringsbank* refers to the relevant provisions of the Algemene Ouderdomswet, which is an accrual scheme. The amount of the pension depends directly on, and is in direct proportion to, the duration of the insurance history. The discriminatory aspects of the system, which excluded married women in particular from insurance for periods during which their husband was himself not insured, were abolished within the period laid down in Directive 79/7/EEC.

The question in this case resembles somewhat the second question submitted in Cases 48/88 and 107/88 and the third question in Case 106/88, to which the Court found it unnecessary to reply in its judgment of 27 June 1989 in Joined Cases 48/88, 106/88 and 107/88 *Achterberg-te Riele* [1989] ECR 1963. What must be determined is whether Article 4 of Directive 79/7/EEC requires that periods during which a married woman was not insured under the Algemene Ouderdomswet, before the deadline for the implementation of the Directive, must, for the purposes of calculating an old-age pension after that date, none the less be regarded as actual periods of insurance owing to the fact that, for the periods prior to that date, the married woman had not been insured owing to a legislative provision which did not apply to married men.

The Sociale Verzekeringsbank points out that, in its judgment in Case 275/81 *Koks* [1982] ECR 3013, the Court recognized that the provisions to the effect that a married woman was not insured, on the ground that her husband was himself not insured, were compatible with Community law as it then stood. In an accrual system, such as that under the Algemene Ouderdomswet, the fact that a claimant was not insured during certain periods inevitably and definitively leads to a proportionate reduction in the pension. To interpret Directive 79/7 as meaning that the plaintiff in the main proceedings must be considered as having been insured during periods when she was not insured would amount to giving retroactive effect to the principle of equal treatment. Such a solution would lead to unequal treatment between men and women, in the sense that a married woman would be regarded as having been insured despite the fact that she was not required to contribute, whereas a married man whose wife worked abroad was required to pay contributions.

In the Opinion in *Achterberg-te Riele* the Advocate General was wrong to rely on the judgment in Case 80/87 *Dik* [1988] ECR 1601 in order to assert that Directive 79/7 requires that, for the purposes of calculating a pension granted after the deadline for the implementation of the directive, earlier periods during which the recipient was not insured must be regarded as periods of insurance.

In its judgment in *Dik*, the Court did indeed accept that a Member State may not maintain, after the expiry of the period prescribed by the directive, any inequalities of treatment attributable to the fact that the conditions for entitlement to benefit are those which applied before that date, and it added that that applied notwithstanding the fact that those inequalities were the result of transitional provisions. Unlike *Dik*, the instant case does not raise the problem of the extension of an inequality of treatment after the period for transposition prescribed in the directive. Furthermore, the Advocate General ignored the fact that *Dik* related to conditions for the granting of the right to unemployment benefit under a 'risk scheme' which made no reference to an insurance history or an obligation to pay contributions. Furthermore, *Dik* was concerned with the application of certain discriminatory conditions which were in part still applicable after the implementation of the directive.

What is at issue in the instant case is the effect on the amount of an old-age pension of a discriminatory condition regarding affiliation which was applicable before the time-limit for implementation of the directive. The fact that Directive 79/7 makes no clear distinction between risk schemes and schemes for the progressive acquisition of rights does not allow the fundamental difference between the different insurance schemes to be disregarded. Besides, other directives, such as 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 (Official Journal 1986 L 225, p. 40), provide that rights and obligations relating to a period of membership of an occupational scheme prior to revision of that scheme remain subject to the provisions of the scheme in force during that period. The interpretation of Directive 79/7 suggested

by the Advocate General would enable married women to benefit from the pension scheme, even though they had not had to contribute, while married men in a similar situation could only benefit from the same rights provided that they had met their obligation to contribute.

The fact that in the instant case the plaintiff in the main proceedings paid contributions during her periods of work lies in a misunderstanding on the part of the authorities responsible for collecting those contributions and does not justify a different interpretation.

In those circumstances, the Sociale Verzekeringsbank suggest that the first question should be answered as follows:

'Articles 4 and 5 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 do not require that where an old-age pension is granted to a female recipient during periods after 22 December 1984 under an insurance scheme pursuant to which the amount of the old-age pension depends on the length of insurance, that recipient should also be regarded as having been insured under that scheme for periods before 23 December 1984 during which, in accordance with the legislation then in force, she was not compulsorily insured owing to a rule excluding certain individuals from insurance which applied only to married women and not to married men.'

2. The *Netherlands Government* points out that, in its judgment in *Achterberg-te Riele*, the Court defined the scope *ratione personae* of Directive 79/7, which 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 referred to in Article 3(1)(a). The plaintiff in the main proceedings was no longer working at the time she obtained her old-age pension. In order for her to be included in the scope *ratione personae* of the directive, it would have to be accepted that voluntary premature departure from the employment market under a private scheme was equivalent to the materialization of the risk of old age within the meaning of Article 3(1) of the directive.

Even supposing that the plaintiff in the main proceedings did come within the scope *ratione personae* of Directive 79/7, she could not rely on Article 4. Accrual schemes are fundamentally different from risk schemes. Under the former, rights are acquired during periods of insurance and the conditions for being insured are determined by the law in force at the time. In its judgment in *Koks*, the Court recognized that the Netherlands scheme before the implementation of Directive 79/7 complied with Community law as it then stood.

Insurance under the Algemene Ouderdomswet involves an obligation to contribute, which is indissolubly linked to an accrual scheme. A married woman who is not insured because her husband is himself not insured was not required to contribute. The interpretation of Directive 79/7 advocated by the national court is

tantamount to attributing retroactive effect to the directive and must lead to the collection of back-contributions for the periods during which the person concerned was not insured.

3. The *Commission* points out that Directive 79/7 is applicable, pursuant to Article 3, to old-age pensions. The scope of a legal rule is *ratione personae, ratione materiae, ratione loci* and *ratione temporis*. Article 4 of the directive, establishing the principle of non-discrimination, also has a scope *ratione temporis*. Consequently, in accordance with what the Court itself stated in its judgment in *Dik*, Directive 79/7/EEC precludes the extension of the discriminatory effects of earlier provisions beyond the period laid down for the implementation of the directive. The date for implementation is unconditional; the fact that the directive applies directly to situations which originated under earlier discriminatory legislation cannot be regarded as signifying that it has retroactive effect.

Consequently, the Commission suggests that the question should be answered as follows:

'In the context of a scheme where the amount of benefits is proportional to the length of the period of insurance, Directive 79/7 must be interpreted as requiring the Member States to abolish the harmful effects which a difference in the acquisition of rights to benefits, prohibited by the directive, has on the level of benefits in the case of old-age benefits payable after 22 December 1984 in respect of the recipient's own entitlement.'

*Case C-88/90*

1. The *Sociale Verzekeringsbank* points out that, in its judgment in *Achterberg-te Riele*, the Court gave a clear reply to the third question referred by the national court regarding the scope *ratione personae* of Directive 79/7. Never having been a self-employed or employed person, the plaintiff in the main proceedings does not come within the scope of the directive and cannot rely on its provisions.

The second question is similar to part (c) of the first question in Case 107/88 *Achterberg-te Riele*; in its judgment in *Achterberg-te Riele* the Court declared that a person who is not referred to by Article 2 of the directive may not rely on Article 4. Other judgments of the Court in other spheres confirm that it is the scope *ratione personae* or *ratione materiae* of the directive, and not the scope of the national legislation implementing the directive, that is relevant for determining the persons entitled to rely on the directive.

In those circumstances, it is unnecessary to reply to the first question.

2. The *Netherlands Government* points out, with regard to the first question, that to refuse to allow a national court to apply a directive of its own motion would be tantamount to ignoring the binding force of directives by virtue of Article 189 of the EEC Treaty. An individual can only rely on a provision of a directive if it is such as to

confer rights directly on him. Accordingly, it must be accepted that Community law does not preclude a national court from examining of its own motion whether such a provision of a directive may apply to the relationship between an individual and a body responsible for determining the rights of the person concerned in the sphere concerned by the directive.

In those circumstances, the Netherlands Government suggests that the first question should be answered as follows:

'It follows from the binding force which Article 4(1) of Directive 79/7 must be recognized as having pursuant to Article 189 of the EEC Treaty that Community law does not preclude a national court from applying the provisions of that directive in disputes relating to the principle of equal treatment for men and women in matters of social security brought before it, even where an individual does not rely on it.'

With regard to the second and third questions, the Netherlands Government notes that, in its judgment in *Achterberg-te Riele*, the Court defined the scope *ratione personae* of Directive 79/7 with reference to Article 2 which refers to the working population. In the same judgment, the Court declared that a person who is not referred to by Article 2 may not rely on Article 4 of the Directive.

The Netherlands Government therefore suggests that the Court should give the following answer to the second and third questions:

'Taken together, the provisions of Directive 79/7 preclude a national court from applying the principle of equal treatment for men and women in matters of social security to a person who does not fall within the scope *ratione personae* of Article 2 of that Directive.'

3. With regard to the first question, the *Commission* points to the danger of disparate application of the law which would result if a national court were unable to assess whether domestic provisions complied with Community law unless a party relied on the relevant Community provisions before that court. As is shown by the consistent case-law, a national court must apply Community law to the cases brought before it when that law is material.

With regard to the second and third questions, the Commission also refers to the judgment in *Achterberg-te Riele*. Directive 79/7 applies only to the working population as defined in Article 2, and no obligation can be inferred from Articles 2 and 3 combined for the Member States to extend the principle of equal treatment in matters of social security to persons who do not come within the scope *ratione personae* of the directive.

In those circumstances, the Commission suggests that the second and third questions should be answered as follows:

'(1) A national court is required to assess the conformity of domestic law with a directive where the period laid down for implementation of the directive has

elapsed, even where the individual concerned does not rely on the provisions of that directive.

(2) An individual may not rely on the principle of equal treatment laid down in Directive 79/7 when he does not come within the concept of working population defined in Article 2 of that directive, even where he is entitled to a benefit covered by its scope *ratione materiae.*'

*Case C-89/90*

1. The *Sociale Verzekeringsbank* points out that the Court has already ruled, in its judgment in *Achterberg-te Riele* on the scope *ratione personae* of Directive 79/7. The wife of the plaintiff in the main proceedings has never been available for work and thus cannot rely on Article 4 of the directive. Nor, therefore, can the plaintiff in the main proceedings rely on that provision to protect himself against allegedly discriminatory treatment with regard to his wife, the financial consequences of which are borne by him.

2. The *Netherlands Government* points out that the principle of non-discrimination laid down in Directive 79/7 may be relied on by any person concerned, whether the alleged failure to apply the principle has affected himself or his spouse, in so far as it has also been disadvantageous to him. Such a solution is, however, subject to the condition that both the person relying on the principle of non-discrimination and his spouse are persons covered by the directive and are affected by a statutory scheme coming within the scope *ratione materiae* of the directive. In that respect, the Netherlands Government also refers to the scope *ratione personae* of the directive, defined by the Court in its judgment in *Achterberg-te Riele*, and concludes that in the main action the plaintiff's wife cannot be regarded as belonging to the working population within the meaning of Article 2 of the directive.

In the event that the Court should none the less consider that the wife of the plaintiff in the main proceedings is a person covered by the directive, the Netherlands Government emphasizes that the alleged difference in treatment is not contrary to the principle of non -discrimination laid down in Article 4 of the directive. It refers, in that respect, to the observations made concerning the questions in Case C-87/90 regarding the fundamental difference between an accrual scheme and a risk scheme.

3. The *Commission* repeats the observations made concerning Case C-88/90, emphasizing that the principle of equal treatment enshrined in Directive 79/7 may only be relied on where the victim of discrimination forms part of the working population. The spouse of the plaintiff in the main proceedings is not a person covered by that directive.

F. A. Schockweiler
Judge-Rapporteur