OPINION OF ADVOCATE GENERAL ELMER

delivered on 17 October 1996 *

1. In this case, the Pretura Circondariale di Genova (District Magistrate's Court, Genoa) (Italy), has referred to the Court a number of questions on the interpretation of 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 [1] ('Directive 76/207') and 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 [2] ('Directive 79/7').

2. Those questions have been submitted in the context of national legislation under which women employed in an undertaking declared to be in critical difficulty may take early retirement on reaching the age of 50 and receive credit for pension contributions for the period until they reach the age of 55, while the corresponding age-limits for men are 55 and 60 respectively.

The relevant rules of national law

3. Under Article 9 of Law No 218/1952, male employees are entitled to a retirement pension on reaching the age of 60, while female employees are so entitled on reaching the age of 55. For each group, entitlement is conditional on the person concerned being credited with at least 180 monthly contributions or 780 weekly contributions.

4. In its Judgment No 371 of 6 July 1989, [3] the Italian Corte Costituzionale (Constitutional Court) held that both men and women are entitled to work until they reach the age of 60. A woman who chooses not to retire on reaching the age of 55 is entitled to continue to pay contributions and thus obtain a larger pension when she finally leaves the labour market.

5. Article 16 of Law No 155 of 23 April 1981 [4] (hereinafter 'the Law') sets out the rules on early retirement for

* Original language: Danish.

1 — OJ 1976 L 39, p. 40.

2 — OJ 1979 L 6, p. 24.

3 — *Giust. Civ.* 1989, p. 1983.

4 — *GURI* No 114 of 27 April 1981.

employees in undertakings that have been declared to be in critical difficulty by the CIPI (Comitato Interministeriale per il Coordinamento della Politica Industriale) (Interministerial Committee for Industrial Policy Coordination). Within such undertakings, those entitled to take early retirement are women aged 50 and men aged 55, on condition that they have paid at least 180 monthly contributions. Pensions are calculated on the basis of the pensionable period of service plus a period corresponding to that between the date on which the employment relationship is terminated and the date on which the person concerned reaches the age of 55, in the case of women, or the age of 60, in the case of men. Retirement is thus brought forward by up to five years, and employees, irrespective of whether they are men or women, are attributed pension contributions for the period until they reach normal retirement age. Originally, the associated costs were met by the State. At present, however, the undertaking concerned is required to pay to the national Treasury an amount corresponding to 50% of this expenditure.

Facts of the case

6. Livia Balestra, an employee in an undertaking declared by the CIPI to be in critical difficulty, applied to the Istituto Nazionale della Previdenza Sociale (National Institute of Social Security, hereinafter 'the INPS') for an early-retirement pension in accordance with Article 16 of the Law. She was at that time 54 years and seven months old, and was credited by the INPS with five months' contributions corresponding to the period by which, when her employment relationship ended, she fell short of the age of 55 and, thus, entitlement to a retirement pension.

7. On 13 April 1993, Mrs Balestra brought proceedings before the Pretura Circondariale di Genova in which she sought to be credited with contributions for the full period of five years provided for under Article 16 of the Law, contending that there was discrimination on grounds of sex contrary to Articles 3, 37 and 38 of the Italian Constitution.

8. In Judgment No 404 of 18 November 1993 in *Miniati* v *INPS*, [5] the Corte Costituzionale ruled that the scheme under Article 16 of the Law was compatible with the Italian Constitution since it involved full equality of treatment for men and women, taking account of the difference in pensionable ages.

9. Mrs Balestra thereupon argued that Article 16 of the Law was contrary to the principle of equal treatment contained in Directives 76/207 and 79/7.

The relevant rules of Community law

10. The first paragraph of Article 119 of the Treaty sets out the principle that men and women should receive equal pay for equal

5 — *Giust. Civ.* 1994, p. 8.

work. According to the second paragraph of Article 119, '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.

11. Directive 76/207 includes the following provisions:

'*Article 1*

1. The purpose of this Directive is to put into effect in the Member States 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 the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."

2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

Article 5

1. Application of the principle of equal treatment 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.

...'.

12. Directive 79/7 includes the following provisions:

'*Article 1*

The purpose of this Directive 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, hereinafter referred to as "the principle of equal treatment".

Article 2

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.

Article 3

1. This Directive shall apply to:

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

...

— old age,

...

— unemployment;

...

Article 4

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.

...

Article 7

1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

...'.

The questions submitted for a preliminary ruling

13. By order of 19 April 1995, the Pretura Circondariale di Genova submitted the following questions to the Court for a preliminary ruling:

'(a) Is it contrary to the abovementioned EEC directives (Articles 1, 2, 3, 4 and 5 of Council Directive 79/7/EEC of 1978 and Articles 1, 2 and 5 of Council Directive 76/207/EEC of 1976) to establish different age-limits for the working lives of men and women for the purposes of entitlement to early retirement pursuant to Article 16 of Law No 155/81, termination of the employment relationship and calculation of pension benefits in the event of early retirement?

(b) Does the different treatment, with respect to the employment relationship and social-security benefits, which results from the establishment of different age-limits under a legal system, such as the Italian system, under which the retirement age — the only age-limit of significance for the purposes of early retirement — is 60 years of age for men and women alike, infringe the abovementioned provisions of those directives?'

14. Those questions are not very clearly formulated. The first question appears very generally to concern the scope of the principle of equal treatment in relation to dismissal, entitlement to early retirement and the rules on the calculation of benefits. The second question covers in large measure the same ground as the first question, particularly with regard to entitlement to early retirement and the calculation of benefits, but specifies that it is being posed in the context of a legal system, such as the Italian, under which both men and women are entitled to remain at work until they reach the age of 60.

15. In this connection, however, I would stress that it is clear from the case that Mrs Balestra has not claimed that she was

unjustifiably forced to retire against her will. Rather, she is seeking credit for supplemental pension contributions so that she can receive a larger overall pension. The questions submitted thus exceed the parameters of the main proceedings.

16. In its order for reference, the national court states that the age-limits in Article 16 of the Law of 50 for women and 55 for men have the practical result that women have their employment terminated when they reach the age of 50, whereas men have their employment terminated only when they reach the age of 55. Even if it is assumed that this is so, it is still difficult to see how it can be relevant to the main proceedings for the Court to be asked to decide whether such a legal position is compatible with Community law. As already mentioned, Mrs Balestra has not in fact argued that she was unjustifiably forced to retire against her will. I therefore find that the Court should not address this matter, which is purely hypothetical in relation to the main proceedings.

If the Court should, however, wish to address that matter, in the light of its case-law, according to which it is in principle for the national court to assess whether the questions which it submits are relevant, it might be pointed out that the Court ruled, at paragraph 38 of its judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, that Article 5(1) of Directive 76/207, dealing with working conditions, including conditions governing dismissal, had to be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman *solely* [6] because she had attained the qualifying age for a State pension, which age was different under national legislation for men and for women, constituted discrimination on grounds of sex, contrary to Directive 76/207. [7] It is thus contrary to Article 5(1) of Directive 76/207 to lay down a statutory age-limit, different for men and women, which obliges the employee to retire when he or she has reached it. This is so, even if this departure involves the grant of an early-retirement pension. [8] Thus, if the scheme set out in Article 16(1) of the Law has the result that women employed in an undertaking declared to be in critical difficulty are in general involuntarily dismissed when they are aged 50 or over, whereas men are not dismissed until they are aged 55 or over, this will constitute discrimination contrary to Directive 76/207. This will be so even if such a difference follows from the age-limits set for the granting of old-age pensions. [9]

17. Similarly, it is, in my view, difficult to see how it can be of relevance to the main proceedings to obtain a reply to the question

6 — Emphasis added.

7 — See also Case C-328/91 *Thomas* [1993] ECR I-1247, paragraph 17; Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 40; and Case 151/84 *Roberts* [1986] ECR 703, paragraph 37.

8 — See, in this connection, paragraph 32 of the judgment in *Roberts*, cited in footnote 7.

9 — See the judgment in *Marshall*, cited above, paragraphs 36 and 37.

whether age-limits of 50 for women and 55 for men for entitlement to early retirement are compatible with the principle of equal treatment. Such age-limits may well result in discrimination against male employees, not female employees, and the main proceedings here have been brought by a female employee who claims that the Italian system discriminates against women. Consequently, the Court should also refrain from answering that part of the questions submitted.

18. It remains to address the question that is relevant to the main proceedings. That question, which is what the national court actually wishes the Court to address, is whether Directives 76/207 and 79/7 must be interpreted as precluding national rules on early retirement under which male and female employees of an undertaking declared to be in critical difficulty are entitled, for up to five years, to be credited with pension contributions from the date on which they cease working until they reach the age at which they become entitled to a retirement pension, which is 55 for women and 60 for men.

Proceedings before the Court of Justice

19. The national court states that the age-limit of 55 for women for the crediting of pension contributions means that, even though they are entitled, in the same way as men, to work until they reach the age of 60, women over the age of 55 cannot be credited with contributions. Furthermore, the national court takes the view that the derogating provision in Article 7(1) of Directive 79/7 is irrelevant to the present case. On the one hand, early retirement, which results in the employment relationship being terminated prematurely, influences the conditions of employment dealt with in Directive 76/207, which does not contain any similar derogating provision. On the other hand, the present case does not involve merely discrimination with regard to the age for early retirement, but also the criteria for determining the amount to be credited to employees in cases of early retirement.

20. The INPS submits that a legal scheme under which women aged between 50 and 55 could claim credit for five years of pension contributions, irrespective of their actual age at the date on which the employment relationship was terminated, would discriminate against men in so far as male employees could obtain the same amount of credit only if they entered into early retirement on their 55th birthday. The scheme set out in Article 16 of the Law has the result that both men and women are credited with pension contributions for the period until they reach the age at which they become entitled to a retirement pension. The discrimination alleged is therefore a result of the advantage which women have in being entitled to a retirement pension once they have reached the age of 55. The INPS also argues that, if there is discrimination, it is covered by the derogating provision in Article 7(1)(a) of Directive 79/7. Finally, it submits that there is no question of early retirement, but rather retirement, when a women aged 55 or over leaves the labour market.

21. The Commission argues that this case involves social security and not pay, as dealt with in Article 119 of the Treaty, and that Directive 79/7 is the relevant measure in so far as early retirement constitutes a real choice. Directive 79/7 covers early retirement. In the Commission's opinion, the scheme set out in Article 16 of the Law involves discrimination against female employees. After reaching the age of 55, women, in contrast to men, are not entitled to be credited with pension contributions. All other things being equal, male employees who elect, at the age of 55, to take early retirement will receive a higher pension than 55 year-old women who elect to receive the old-age pension. A woman must thus work until she reaches the age of 60 in order to receive the same pension as the male employee. In the view of the Commission, this difference in treatment is not covered by the derogating provision in Article 7(1)(a) of Directive 79/7 since it is not objectively and necessarily connected to the difference in pensionable age. Female employees must therefore, in the Commission's view, be entitled, in the same way as male employees, to be credited with up to five years' pension contributions for the period from age 55 to age 60.

Analysis

Which measure of Community law is relevant?

22. It is first necessary to clarify which rules of Community law must form the basis for a reply to the question submitted, as reformulated above.

23. According to Article 5(1), Directive 76/207 covers working conditions, including the conditions governing dismissal. Pay, which is a fundamental working condition, is, however, not covered by Directive 76/207, since, apart from being covered by Article 119 of the Treaty, it is dealt with separately in Directive 75/117 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, [10] which fleshes out the above Treaty provision. In its case-law, the Court has interpreted 'pay' as also including benefits which, as a result of an employment relationship, are paid after that relationship ceases, for instance in the form of redundancy payments or the grant of a pension. [11] The fact that the benefit is statutory is not conclusive. [12]

24. Nor does Directive 76/207 cover social-security benefits. Social security, which under Article 1(2) of Directive 76/207 is subject to separate treatment, is regulated by

10 — OJ 1975 L 45, p. 19.

11 — See Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 13 and 28; Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 24, and, implicitly, Case 19/81 *Burton* [1982] ECR 555, paragraph 8 in conjunction with paragraph 12.

12 — See, for example, paragraph 16 of *Barber*, cited in footnote 11.

Directive 79/7. It also follows from the Court's case-law that social-security benefits which are directly governed by legislation and obligatorily applicable to general categories of workers are not covered by Article 119 of the Treaty, since such benefits are determined less by the employment relationship than by considerations of social policy. [13] It is for that reason necessary to choose between those measures.

25. Concerning the relationship between Article 119 of the Treaty and Directive 76/207, the Court, in its judgment in Case 19/81 *Burton*, [14] a case concerning a voluntary redundancy scheme, attached importance to whether the question submitted related to the redundancy compensation itself or whether it involved the issue as to whether the conditions of access to the scheme — that is to say, the age-limits — were discriminatory.

26. Similarly, with regard to the demarcation between Directive 76/207 and Directive 79/7, the Court attached importance, in paragraph 32 of its above judgment in *Marshall*, [15] to whether the question submitted concerned the issue of access to a statutory or occupational retirement scheme, that is to say, the conditions for the granting of old-age or retirement pensions (Directive 79/7), or the issue of the fixing of an age-limit with regard to the termination of the employment relationship (Directive 76/207).

27. It can, in my opinion, be inferred from this case-law that Article 119 of the Treaty applies to all benefits (whether in cash or in kind), including pension benefits and redundancy compensation, which result from the employment relationship between the employee and the employer, whereas Directive 79/7 covers benefits (whether in cash or in kind) under general statutory schemes and primarily attributable to considerations of social policy. Directive 76/207 is thus a residual measure, which, *inter alia*, covers conditions of engagement and dismissal relating to benefits other than those in cash or in kind, whether statutory or contractual in origin.

28. In the light of this, it can be held that Directive 76/207 is not relevant to this part of the question submitted. It must accordingly be clarified whether a benefit such as that provided for under Article 16 of the Law falls, in the light of the case-law cited, to be classified as pay or as social security.

29. According to the documents in the case, the purpose served by the benefit is to facilitate reconstruction of undertakings declared

13 — The Court had already held so in its judgment in Case 80/70 *Defrenne* [1971] ECR 445, paragraph 8.

14 — Cited in footnote 11, paragraph 8.

15 — See also paragraph 34 of *Beets-Proper* and paragraph 30 of *Roberts*, cited in footnote 7.

to be in critical difficulty. The scheme is designed to enable an undertaking in critical difficulty to shed redundant employees who add to its costs. The benefit is thus conditional on the recipient's quitting his or her job in a specific undertaking declared to be in critical difficulty. There is therefore a connection with a specific employment relationship. If, that notwithstanding, I take the view that a scheme such as that contained in Article 16(1) of the Law must be classified as social security, this is because it constitutes an integral part of the social-security system. [16] The benefit consists in an advance payment of the normal statutory retirement pension and it is therefore only with difficulty that the benefit can be distinguished from the ordinary social-security system. Moreover, the employer's portion of the costs associated with the credit is paid to the national Treasury as a fiscal charge.

30. I accordingly take the view that the question must be dealt with on the basis of Directive 79/7.

The scope of Directive 79/7

31. According to Article 3(1), Directive 79/7 applies to statutory schemes which provide protection against specified risks, including old age and unemployment.

16 — See, implicitly, Case C-173/91 *Commission* v *Belgium* [1993] ECR I-673, paragraph 20.

32. According to the Court's case-law, Article 3(1) covers benefits which constitute the whole or part of a statutory scheme providing protection against the risks specified. [17] A benefit ensures protection against one of the risks specified if it is directly and effectively linked to the protection provided against the risk in question. [18] The Court has most recently set out its views on the specific content of that criterion in its judgment of 11 July 1996 in Case C-228/94 *Atkins*, which concerned concessionary travel fares fixed by a local authority for elderly and invalid users of public transport. Paragraphs 16 to 19 of the judgment set out the following reasons why the Court took the view that such a benefit did not come within the scope of Directive 79/7:

'... a benefit ... consisting of concessionary fares on public passenger transport services which may be granted to various classes of persons, including persons who have reached statutory retirement age, certain young or disabled persons and any other class of persons to be determined by ministerial order, does not afford direct and effective protection against one of the risks listed in Article 3(1) of Directive 79/7.

17 — Case 150/85 *Drake* [1986] ECR 1995, paragraph 21.

18 — See Case C-243/90 *Smithson* [1992] ECR I-467, paragraph 14; Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraph 15; Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 9; and Case C-228/94 *Atkins* [1996] ECR I-3633, paragraph 11.

The purpose of such a benefit is to facilitate access to public transport for certain classes of persons who, for various reasons, are recognized as having a particular need for public transport and who are, for the same reasons, less well off financially and materially.

Old age and invalidity, which are among the risks listed in Article 3(1)(a) of Directive 79/7, are only two of the criteria which may be applied to define the classes of beneficiaries of such a scheme of concessionary public transport fares.

The fact that the recipient of a benefit is, as a matter of fact, in one of the situations envisaged by Article 3(1) of Directive 79/7 does not suffice to bring that benefit as such within the scope of the Directive (see Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraphs 18 and 19).'

33. The Court thus attaches conclusive weight to the primary objective of the benefit, in *Atkins* the reduction in the cost of public transport. It is not sufficient in itself that the criteria laid down for the granting of the benefit may be the risks listed in Article 3(1)(a) and that the benefit favours groups with special social needs as a result of such risks. While the judgment may at first sight be read as meaning that an assessment must be made of the national legislature's subjective intentions, such a reading of the judgment would be inappropriate. The fundamental requirement of direct and effective protection is in itself the conclusive objective criterion, as appears to follow from paragraphs 16 and 17 of the judgment.

34. The decision in *Atkins* cannot be said to have particularly clarified the issue of the demarcation of the scope of Directive 79/7, but, on the contrary, has left national legislatures with a certain latitude to implement arrangements in favour of the groups at risk covered by the Directive without complying with the fundamental principle of equality if the benefit does not form part of the social-security system, which the judgment interprets narrowly. The decision must therefore be read as expressing the view that Directive 79/7 applies only to benefits which, considered objectively, lie at the heart of social security. In order to come within the scope of the Directive, a benefit must therefore be inseparably linked to protection against one of the risks listed in Article 3(1)(a) of the Directive. As an example of such a benefit, one might refer to that of exemption from prescription charges, which formed the subject-matter of Case C-137/94 *Richardson*. [19] Such a benefit is inseparably linked to the risk of sickness since very few people are inclined, or have the opportunity, to obtain medicaments subject to prescription charges unless they are ill. More difficult problems arise in so far as the benefit consists of cash

19 — Cited in footnote 18.

or another benefit, and, as now follows from the *Atkins* judgment, conclusive significance cannot be attached solely to the fact that one of the risks listed in Directive 79/7 is a direct statutory criterion for the granting of the benefit. In these cases, an effort must be made to determine on the basis of the benefit's objective characteristics whether it is directly and effectively linked to protection against one of the risks listed in the Directive. This is a criterion which will prove particularly difficult to apply in practice.

35. According to the case-law, the requirement in Article 3(1)(a) that there should be a statutory scheme means that the benefit must be provided for by statute. [20] However, no significance attaches to the actual financing of the benefit. Directive 79/7 thus covers both contributions-based benefits and benefits funded solely from State resources. [21]

36. As already mentioned, the scheme under Article 16 of the Law was introduced to facilitate reconstruction of undertakings in critical difficulty. In order to make it attractive for employees who have reached a certain age to take early retirement, such employees are credited with pension contributions for the period from the date on which they cease working to the date on which they reach the age at which they are entitled to receive a retirement pension.

37. The fact that the purpose of this scheme is to facilitate reconstruction of undertakings in critical difficulty ought not, in my view, to be sufficient in itself to bring the scheme in question outside the scope of Directive 79/7, even though the Court's reasoning in *Atkins* points in that direction. This subjective intention on the part of the legislature does not alter the fact that the effort to attain that objective is made with the help of a social benefit intended to ensure for specific groups of individuals, namely women aged between 50 and 54 and men aged between 55 and 59, an income enabling them to leave the labour market up to five years before they become entitled to a retirement pension. Such a scheme for crediting pension contributions means in effect that the date on which an employee becomes entitled to a retirement pension is brought forward by five years and the person concerned is treated, for the purpose of the benefit, as if he or she had continued to work until the date on which entitlement to a retirement pension would normally have arisen. The retirement pension is accordingly brought forward by up to five years. The benefit thus has fundamental similarities and links with the ordinary retirement pension, which, after all, is also intended to ensure that persons who have reached a certain age can leave the labour market and continue to receive a certain income.

20 — See *Richardson*, paragraph 11, and *Atkins*, paragraph 13, cited in footnote 18.

21 — See *Richardson*, cited in footnote 18, which concerned a State-financed scheme for exemptions from prescription charges, and Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, which involved a contributions-based old-age pension scheme.

38. The benefit is contingent on the recipient's having reached a specified minimum age. It is not sufficient for the person concerned to be employed in an undertaking facing critical difficulty, since there is a further requirement that the employee should belong to a specified age group. The benefit is thus triggered by the occurrence of a specific event, namely an employee's departure from the labour market as a result of reaching a certain age laid down in the Law. In my opinion, therefore, age constitutes the fundamental condition for the granting of the benefit. [22]

39. On that basis, I take the view that a benefit such as that provided for in Article 16 of the Law is directly and effectively linked to the risk of old age and must therefore be regarded as coming within the scope of Directive 79/7.

Does Article 16 of the Law discriminate against female employees?

40. As mentioned above, the pensionable age in Italy is 60 for both men and women. However, unlike men, women are entitled to a retirement pension on reaching the age of 55. Under Article 16 of the Law, women employed in an undertaking facing critical difficulty are entitled to take early retirement on reaching the age of 50, whereas men do not become so entitled until they reach the age of 55. Both male and female employees are entitled to be credited with up to five years' pension contributions, corresponding to the period between the date on which they cease working and the date on which they reach the age entitling them to a retirement pension.

41. It is obvious — albeit immaterial to the main proceedings — that such a scheme discriminates against male workers in so far as they become entitled to take early retirement only five years later than women. However, the scheme can also give rise to discrimination against women. Under it, a female employee who retires at the age of 55 will, all other things being equal, receive a lower pension than a 55 year-old male employee who elects to take early retirement, since the latter will have his pension increased by five years' contributions and will thus receive a higher pension, regardless of the fact that he has not paid any more contributions than the female employee. To put it another way: as a result of the fact that, unlike the man, she is not entitled to take early retirement, the woman will be obliged to work and pay pension contributions until she reaches the age of 60 in order to receive the same retirement pension. The scheme therefore, in my view, involves discrimination against women within the meaning of Article 4(1) of Directive 79/7.

22 — See in this connection paragraph 24 of *Drake*, cited in footnote 17, which concerned an invalidity benefit payable to a person caring for an invalid. The Court ruled that such a benefit was covered by Directive 79/7.

Is the discrimination covered by Article 7(1)(a) of Directive 79/7?

42. According to Article 7(1)(a), Directive 79/7 is without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. Since it constitutes an exception to a fundamental principle, Article 7(1)(a) must be interpreted strictly. [23]

43. According to the Court's case-law, that exception covers only discrimination that is objectively necessary in order to avoid disturbing the financial equilibrium of the pension scheme or, in so far as other benefit schemes are concerned, to ensure that the financial equilibrium of the social-security system as a whole is not disrupted and to ensure coherence between the retirement pension scheme and other benefit schemes. [24] It also follows from the Court's case-law that it is not sufficient, in order to regard the financial equilibrium as being disturbed, that the financial burden borne by the State would be increased if the discrimination were to be removed. In defining their social policy, the Member States are at liberty to define the nature and extent of social benefits, provided only that those measures are compatible with the principle of equal treatment for men and women. [25]

44. A benefit such as that provided for under Article 16 of the Law is payable by virtue of the fact that the recipient leaves the labour market and is based on the pension benefit worked out within the contours of the ordinary retirement pension scheme. By bringing forward the date for granting the retirement pension and crediting pension contributions for the period up to the date on which entitlement to a retirement pension normally accrues, the employee is treated, with regard to pensions, as if he or she has attained pensionable age.

45. On that basis, it seems logical to treat an early-retirement scheme, such as that provided for under Article 16 of the Law, as an old-age and retirement pension. It must, however, be borne in mind that this is a special benefit, payment of which is brought forward in time in relation to the date on which entitlement to an ordinary retirement pension accrues. It is for that reason necessary to consider whether the discrimination is objectively necessary in order to ensure coherence between early-retirement pensions and ordinary retirement pensions.

23 — See paragraph 8 of *Thomas*, cited in footnote 7.

24 — See paragraph 18 of *Equal Opportunities Commission*, cited in footnote 21; paragraph 12 of *Thomas*, cited in footnote 7; Case C-92/94 *Graham* [1995] ECR I-2521, paragraph 12; and paragraph 19 of *Richardson*, cited in footnote 18.

25 — See Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraphs 28, 29 and 37, and paragraph 24 of *Richardson*, cited in footnote 18.

46. As already mentioned, the undertakings pay 50% of the costs involved in crediting contributions. An extension of the period for which women are credited with contributions would consequently increase total pension expenditure and thereby increase the overall burden of public costs, just as the undertaking's fiscal burden would also be affected. That, however, is in my opinion scarcely sufficient to justify the view that discontinuance of the discrimination, so that women aged between 55 and 59 can also be credited with up to five years' pension contributions, would disrupt the financial equilibrium of the pension scheme.

47. So far as concerns the issue of coherence between the ordinary retirement pension scheme and the early-retirement pension scheme, it is particularly apposite to mention the Court's decision in *Graham*,[26] which concerned an invalidity pension for persons under pensionable age, paid in the same amount as the full State retirement pension. Once the pensionable age, which was 60 for women and 65 for men, had been reached, the benefit was reduced to the actual level of the retirement pension, that is to say, taking account of contributions paid.

The Court held in paragraph 14 that since invalidity benefit was designed to replace income from occupational activity, there was nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case have stopped working because they had reached pensionable age.

In paragraphs 15 to 18, the Court added that the contrary result would limit a Member State's right to set different pensionable ages for men and women and would also mean that a Member State would be prevented from granting to men who become incapacitated before reaching pensionable age invalidity benefits greater than the retirement pensions which would actually have been payable to them unless it granted to women over pensionable age retirement pensions greater than those actually payable to them, and that women aged between 60 and 65, thus over pensionable age, would receive a higher retirement pension if they became incapacitated before reaching pensionable age than they would if this were not the case. The Court, which found in those circumstances that Article 7(1)(a) was applicable, thus attached importance to the question whether the benefits were, in objective terms, intended to replace one another and whether the suppression of the discrimination might not give rise to a separate form of discrimination.

48. A benefit such as that authorized under Article 16 of the Law is objectively connected to the age-limit for the granting of a

26 — Cited in footnote 24.

retirement pension. Both men and women can take early retirement up to five years prior to the date on which they reach the age entitling them to a retirement pension, and they can thereby be credited with pension contributions for the period from their cessation of work until they reach that age.

49. The expression 'early-retirement pension' indicates that it relates to a benefit which becomes payable prior to the date on which the recipient retires and thus begins to receive a retirement pension. The benefit is therefore intended to guarantee an income for a person who leaves the labour market before becoming entitled to receive a retirement pension. There is a clear connection between the age-limit for the grant of a retirement pension and that for the grant of an early-retirement pension under Article 16 of the Law. It is, however, necessary to examine whether it necessarily follows that women, who are entitled to work until they reach the age of 60, can be denied the right to be credited with pension contributions for the whole or part of the period subsequent to the date on which they reach the age of 55 and thereby become entitled to a retirement pension.

50. The connection between an early-retirement pension and an ordinary retirement pension means that a woman aged over 55 will not be able to take early retirement but will be able only to receive a retirement pension. On that basis, it does not appear logical that female employees who cease work at the age of 54 should be entitled to claim credit for five years' pension contributions and thereby obtain a larger pension than female employees who cease work at the age of 55. Thus, in my view, there is on this point an analogy with the above judgment in *Graham*.

51. Furthermore, in my opinion, the legal position advocated by Mrs Balestra would in itself give rise to discrimination, namely against male employees. A male employee who takes early retirement at the age of 58 would, under the Italian scheme, be entitled to receive credit for two years' pension contributions, whereas female employees who likewise leave work two years prior to the date on which they become entitled to a retirement pension, thus at the age of 53, would, if Mrs Balestra's submissions were to be accepted, be entitled to be credited with five years' contributions.

52. On that basis, I take the view that the discrimination against women with regard to the crediting of contributions resulting from a scheme such as that under Article 16 of the Law necessarily follows from the fact that women become entitled to a retirement pension when they reach the age of 55, whereas men do not become so entitled until they reach the age of 60, and that the discrimination is thus covered by the derogation in Article 7(1)(a) of Directive 79/7. The scheme guarantees that an employee, whether male or female, who takes early retirement will be credited with pension contributions which, from the pension perspective, place that person in the position in which he or she would have been had he or she ceased work on becoming entitled to a retirement pension.

Conclusion

53. I accordingly propose that the Court reply as follows to the questions submitted by the Pretura Circondariale di Genova:

Article 1(1) of 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, and Articles 3(1)(a) and 7(1)(a) 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 must be interpreted as not precluding a national early-retirement scheme under which male and female employees in an undertaking declared to be in critical difficulty are entitled to be credited with up to five years' pension contributions from the date on which they cease work until they reach the age at which they are entitled to a retirement pension, which is 60 for men and 55 for women.