principle in respect of insured persons who had previously worked on a part-time basis and from limiting the amount of the allowance to the wage previously received, where that measure affects a much larger number of women than of men, unless that legislation is justified by objective factors unrelated to any discrimination on grounds of sex.

2. If no appropriate measures exist for implementing Article 4(1) of Directive 79/7 and there is indirect discrimination by the State, the class of persons placed at a disadvantage by reason of that discrimination must be treated in the same way and according to the same rules as other recipients of the allowance, such rules remaining the only valid point of reference so long as the directive has not been implemented correctly.

REPORT FOR THE HEARING
delivered in Case C-102/88 *

I — Facts and procedure

1. *Legal and factual background*

According to Article 1 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 (Official Journal 1979, L 6, p. 24, hereinafter referred to as 'the Directive'), the purpose of the 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"' and, according to Article 3(1)(a), it applies in particular 'to the following risks:

(i) sickness,

(ii) invalidity . . .

(iii) accidents at work and occupational diseases . . . '.

Article 4(1) provides as follows:

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

* Language of the case: Dutch.

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

(i) the scope of the schemes and the conditions of access thereto;

(ii) the obligation to contribute and the calculation of contributions;

(iii) 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.'

In the Netherlands, the Algemene Arbeidsongeschiktheidswet (Law on incapacity for work) of 11 December 1975 (hereinafter referred to as 'the 1975 Law') grants entitlement to a disability allowance to 'insured persons aged 17 or over who become incapable of working, where, in the year immediately preceding the day on which they became incapable of working, they received income from or in connection with work in an occupation' (Article 6(1)(a)).

According to Article 6(1)(b), an allowance is to be granted to an 'insured person who, upon the day he reaches the age of 17, is incapable of working . . . '.

Article 6(2) provides that an income of less than 15% of the minimum wage is to be disregarded for the purposes of Article 6(1)(a).

The condition concerning income laid down in Article 6(1)(a) does not apply to certain categories of insured persons aged 17 or over. Those categories, which are listed in the Royal Decree of 28 April 1980 (*Staatsblad* 263), enacted on the basis of Article 6(3) of the 1975 Law, are self-employed persons who work on a full-time basis who have not been able to earn the prescribed minimum, students without any income and unmarried persons who keep house for their parents or for unmarried brothers or sisters.

Article 12 of the 1975 Law provides that the allowance is to be calculated by applying to a basic amount a percentage determined according to the degree of incapacity for work.

The bases of calculation are laid down in Article 10. Paragraphs 2 and 4 of that article each provide for a calculation basis by reference, respectively, to the civil status of the person concerned, the existence of a dependent child and income received from or in connection with work. However, none of the three bases is applicable in the circumstances described in Article 10(5), which, at the material time, provided:

'Notwithstanding the foregoing paragraphs, where, in the year immediately prior to the onset of his disability, a person entitled to a disability allowance did not work for the period to be considered normal in his occupation and partly as a result thereof earned less than an amount 260 times the basic amount which, if this paragraph did not apply, would be applicable to him on the day on which he became incapable of

working, his basic amount shall be the average amount he is deemed, on the basis of rules to be laid down by the Minister, to have earned during that year.'

The plaintiff in the main proceedings held a clerical post in the public school administration in Groningen from 1 October 1978 to 9 March 1981, on which date she stopped work because of invalidity. During her last year of employment, she worked an average of 18 hours a week.

By decision of 15 October 1985, the defendant in the main proceedings granted her a disability allowance under the 1975 Law. The degree of incapacity was fixed at 80% so that the amount of the daily allowance was therefore 80% of a basic amount assessed at HFL 54.24. That basic amount was assessed by reference to the plaintiff's daily average earnings during the year preceding the onset of her disability, pursuant to Article 10(5) of the 1975 Law.

The plaintiff challenged that decision before the Raad van Beroep, claiming that Article 10(5) was less favourable to women than to men.

She stated, referring to official statistics, that 75% of part-time workers were women. Therefore, the fact that Article 10(5) provided for a reduced allowance only for part-time workers was, in her view, tantamount to indirect discrimination on grounds of sex prohibited by the Directive.

The defendant contended, essentially, that Article 10(5) took as the basic criterion the economic value of the work performed by the person concerned and was not therefore based, even indirectly, on any matter relating to sex. It considered that that basic criterion was objectively justified.

2. *Legal assessment by the national court and the questions submitted*

According to the Raad van Beroep, the 1975 Law grants to workers who are not unemployed entitlement to a disability allowance at a level equal to the minimum subsistence income except where the income of the person concerned was lower than the minimum subsistence income, which is in particular the case with a part-time worker. However, the income criterion does not apply to the cases referred to in Article 6(1)(b) of the 1975 Law and the Royal Decree of 28 April 1980. It seems quite possible to the Raad, having regard to the figures produced by the plaintiff, that the number of women affected by the derogating provision in Article 10(5) is considerably higher than the number of men.

In those circumstances, the Raad considers it important to determine whether that provision gives rise to inequality of treatment prohibited by the Directive.

The Raad van Beroep states that, according to previous decisions of the Court (and in particular the judgments of 4 December 1986 in Case 71/85 *FNV* [1986] ECR 3870, of 24 March 1987 in Case 286/85 *McDermott and Cotter* [1987] ECR 1453 and of 24 June 1987 in Case 384/85 *Borrie Clarke* [1987] ECR 2865), Article 4(1) of

the Directive may, as from 23 December 1984, be relied on against any provision of national law which is incompatible with that article. Since the contested decision came into effect on 1 January 1985, that condition as to time is fulfilled in the present case.

Referring to the judgment of the Court in Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607, the Raad van Beroep considers that it is essential, in order to decide whether there is discrimination prohibited by the Directive, to determine whether there is any objective justification for the measure. According to the Raad, such justification would exist if the 1975 Law provided insurance only against the consequences of incapacity for work and was restricted to compensation for loss suffered. However, that is not the case.

The Raad van Beroep is also unsure what the consequences would be if it were found that Article 10(5) of the 1975 Law is incompatible with the directive, particularly with regard to its application to men who have worked on a part-time basis.

Accordingly, by order of 10 March 1988, the Raad van Beroep stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is a system of allowances for (not unemployed) workers in the event of incapacity for work which provides for allowances at the level of the minimum subsistence income except in cases where the wage previously earned by the person entitled to the allowance was, in part because he or she was working on a part-time basis, below that level in accordance with Article 4(1) of Directive 79/7/EEC?

(2) If the answer to Question 1 is in the negative: does the Community rule (which in that case has been infringed) mean that the persons concerned (of both sexes) are entitled to an allowance in the amount of the minimum subsistence income even in the (exceptional) cases referred to in that question?'

3. *Procedure before the Court of Justice*

The order for reference was received at the Court Registry on 30 March 1988.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 4 July 1988 by M. L. Ruzius-Wilbrink, the plaintiff in the main proceedings, represented by B. I. Klaassens, of the Groningen Bar; on 11 July 1988 by the Bestuur van de Bedrijfsvereniging voor Overheidsdiensten, represented by W. M. Levelt-Overmars, Head of the Legal Department for Social Security Matters of the Gemeenschappelijk Administratiekantoor, acting as Agent; on 11 July 1988 by the Netherlands Government, represented by E. F. Jacobs, General Secretary in the Ministry of Foreign Affairs, acting as Agent; and on 6 July 1988 by the Commission of the European Communities, represented by René Barents and Julian Currall, members of its Legal Department, acting as Agents.

Upon 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. However, it asked the Netherlands Government to produce certain legislative texts.

II — Summary of the written observations submitted to the Court

The plaintiff states that she has three children and was divorced on 29 October 1985. She states that the basic principle of the 1975 Law is that the amount of income received before incapacity for work arises has no influence on the amount of the allowance (a principle which, the plaintiff claims, was defended by the Netherlands Government in the judgment of 11 June 1987 in Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497). The basic amounts used for the calculation are determined according to the family situation of the person concerned (whether or not he or she has a spouse, or income regarded as sufficient or dependent children). In those circumstances, the amount awarded may be either higher or lower than the income previously received and is in any event fixed at a specific minimum level. The only exception made is in the case of part-time workers. The amount awarded to such workers depends on the amount of income received and is lower than the minimum which would otherwise apply.

Since the majority of part-time workers, both in the Netherlands and in Europe in general, are women, as shown by figures produced to the Raad van Beroep, the provision in question involves indirect discrimination. The plaintiff also claims that, according to figures from the Sociale Verzekeringsraad, 88% of the recipients of allowances that are reduced because of part-time work are women.

According to the plaintiff, there is no justification for such discrimination. The situation of part-time workers falls outside the scope of the basic principle of the 1975 Law and, moreover, the defendant's view that it would be unjust to grant an allowance higher than the previous income is belied by the fact that in numerous cases the 1975 Law grants entitlement to such an allowance.

Moreover, any justification relied upon must be in conformity with the principle of proportionality, pursuant to the judgment of the Court in *Bilka-Kaufhaus* (cited above). To meet that requirement, the provision must be necessary in order to attain the objective pursued.

The plaintiff considers that it would be less discriminatory to accord to women working on a part-time basis and having dependent children a notional work record for the purposes of calculation, as is done in the case of handicapped people and students (pursuant to Article 5 of the Besluit regels arbeid van normaal te achten duur (Order concerning work treated as being of normal duration) of 3 February 1987, Stbl. 42).

The plaintiff concludes that Article 10(5) of the 1975 Law cannot be applied to her and that she is entitled to an allowance calculated on the normal basis.

The defendant states that the allowances under the 1975 Law are in principle determined according to the degree of incapacity for work and the applicable basic amount. The latter is not dependent on the income previously received, except in the case of part-time workers. Although amended as from 1 January 1987, the 1975 Law still contains a similar provision.

Special provisions govern the cases of entitled persons who received no income or insufficient income (but not on the basis of part-time work) in the relevant period.

The defendant rejects the description of the 1975 Law given in the order for reference. The 1975 Law does not provide for allowances equal to the minimum subsistence income except in the case of total incapacity. Where the incapacity is less than total, the amount of the allowance is calculated by reference to the minimum subsistence income.

With respect to the first question submitted by the national court, the defendant contends that Article 10(5) does not differentiate according to the sex of the entitled person and that there is therefore no direct discrimination in this case.

Since women account for 75% of part-time workers in the Netherlands, it is probable that the great majority of persons receiving allowances under Article 10(5) are also women.

In those circumstances, the defendant considers that, on the basis of the Court's judgment in *Teuling*, cited above, the grant of the lower benefit is contrary to the prohibition contained in Article 4(1) of the Directive unless the reasons for so doing are in no way related to discrimination on grounds of sex.

In that connection, the defendant states that the protection against loss of earnings provided by the 1975 Law is limited to the minimum subsistence income (supplementary insurance for losses in excess of the minimum is governed by other laws).

Entitlement to the allowance is conditional upon a reduction in the income actually received. Article 10(5) reflects the same principle and provides for an individual basis of calculation where the income received from part-time work is less than the minimum subsistence income. If it were otherwise, a worker who had received less than the minimum subsistence income would receive an allowance calculated by reference to that minimum, which might exceed the income actually received. The defendant contends that a provision designed to protect insured persons against decreases in income, which links the amount of the allowance to the amount of income lost, pursues an important objective which is wholly unrelated to any discrimination based on sex.

It maintains that it is justified, even in the light of the Directive, to provide, within the framework of insurance against incapacity for work under which benefits are subject to the ceiling of the minimum subsistence income, for reduced allowances for workers who received less than the minimum subsistence income by virtue of part-time work.

The legislature's reasons for excluding from the rule under Article 10(5) certain categories of insured persons (persons handicapped from an early age, students and others) are wholly unrelated to discrimination on grounds of sex. Moreover, there is nothing in the Directive which requires the inclusion in the exempted categories of women who worked on a part-time basis because of family responsibilities (see paragraphs 41 and 42 of the judgment in *Bilka-Kaufhaus*).

For that reason the defendant proposes that the Court reply to the first question in the affirmative.

If, on the other hand, the Court were to answer that question in the negative, the defendant considers that the second question should be answered in the affirmative. In order to avoid discrimination against men it would then be necessary to apply Article 10(5) neither to men nor to women in the future.

The Netherlands Government states that even if Article 10(5) applies to a considerably larger percentage of women than of men it does not necessarily involve discrimination if the system is justified by reasons wholly unrelated to discrimination on grounds of sex. In that regard the Netherlands Government refers to the *Teuling* judgment.

The Netherlands Government maintains that the 1975 Law is characterized by the floor it provides against the risk of loss of income and the principle of minimum protection. A full-time worker suffering from total invalidity receives an allowance of 70% of the minimum wage, which is increased to 85% or 100% for workers living with their spouses or having dependent children (Article 10 of the 1975 Law). The amount of the allowance does not therefore depend on the income previously received.

By virtue of the risk principle, a part-time worker cannot claim full protection. For the same reasons, the amount of the allowance should not exceed the income received and should, in the case of a part-time worker, be calculated by reference to the lower income actually received.

For the Netherlands Government, the rules at issue are thus justified by the risk principle, which has nothing to do with discrimination on grounds of sex. The system of allowances under the 1975 Law is thus compatible with Article 4(1) of the Directive.

As regards the second question submitted by the national court, the Netherlands Government considers that the judgments of the Court in *FNV* and *Borrie Clarke* provide the necessary basis for an answer. The Court held that in the case of an infringement of Article 4 of the Directive, women are entitled to have the same rules applied to them as men since those rules remain the only valid point of reference in the absence of implementation of the Directive. According to the Netherlands Government, only the national court is competent to appraise the facts, interpret national law and apply it as appropriate.

The Commission divides the first question into two parts: is there discrimination and, if so, is there objective justification for such difference of treatment? In the Commission's view, the only acceptable criterion for ensuring equality of treatment of part-time workers is the pro rata rule, as regards both the income itself (the criterion is derived from the third paragraph of Article 119 of the Treaty) and the social security benefits. That means that the benefit (or the income) should be fixed at a single rate per unit or period of work performed. There is thus no question of discrimination where a worker who has worked less receives less income, even if most part-time workers are women. The Commission relies on the judgments of the Court in *Bilka-Kaufhaus* and in Case 96/80

Jenkins v *Kingsgate* [1981] ECR 911, and considers that the same approach should be taken in matters of social security.

To grant the same allowance to part-time workers and to full-time workers would amount to discrimination against the latter since a lower value would be attributed to their work. Only the pro rata rule can guarantee equality of treatment. It would, however, be fair to provide for an exception if it appeared that the application of the rule meant that a part-time worker who became incapable of working would receive less than the minimum subsistence income. Although most part-time workers are women — who work part time because of family responsibilities — the rule is not attributable to a discriminatory attitude. There is no question of discrimination unless a specific disadvantage attaches only to part-time workers for reasons attributable to the employer or to the competent institution, as in the *Jenkins* and *Bilka-Kaufhaus* cases.

It follows that the link established by Article 10(5) between the income previously received and the allowance to be granted does not in itself constitute an infringement of the Directive. However, the rule laid down in Article 10(5) is the only exception to the general principle, which is not to take account of the level of previous pay. That difference constitutes discrimination against a category of workers composed mainly of women.

It is therefore necessary to seek objective justification in order to escape the prohibition laid down in Article 4(1) of the Directive. According to the judgment of the Court in *Teuling* three conditions must be fulfilled:

(1) the difference between the amount of the benefits must reflect a real difference between the situation of the disfavoured group and that of the favoured group;

(2) the measure from which that difference arises must be appropriate for attaining the objective pursued, which must be a matter of priority;

(3) the said measure must be necessary in order to attain that objective.

As regards the first condition, the Commission considers that it is not fulfilled because it is impossible to compare the needs of the two groups of workers. The needs of full-time workers are taken into account (since the amount of the allowance depends on matters such as civil status) but those of part-time workers are not. In those circumstances, the difference of treatment cannot be said to derive from an objective difference between the situations of the two categories of workers.

The Commission considers that the second condition is not fulfilled either. In response to the defendant's argument that Article 10(5) prevents a worker from receiving an allowance higher than his previous income, the Commission raises the question whether such a consideration can take precedence over the rule of equality of treatment and stresses that Article 10(5) does not apply to other groups of entitled persons whose income was lower than the minimum.

The Commission finds it difficult to see why the needs of those groups are taken into account and not those of part-time workers.

For all those reasons, the Commission proposes that the Court answer the second question in the negative.

With respect to the second question, it considers that if Article 10(5) were not in conformity with the Directive, the national court would be under an obligation to refrain entirely from applying it in order to avoid discrimination on grounds of sex against men. The benefits payable to part-time workers should be calculated by reference to the minimum social wage, like those payable to full-time workers, until such time as the Netherlands legislature takes the appropriate measures. The Commission refers in that regard to the judgment in *FNV*. Consequently, it proposes that the second question be answered in the affirmative.

III — Replies to the questions put by the Court

In response to a request from the Court, the Netherlands Government provided the complete text of the relevant legislation and regulations.

Gordon Slynn
Judge-Rapporteur