# OPINION OF ADVOCATE GENERAL ALBER

delivered on 15 January 1998 *

## A — Introduction

1. The questions to be answered in the present joined cases originate in eight references for a preliminary ruling from the Belgian Court of Cassation (Hof van Cassatie, Cour de Cassation). Clarification is sought of whether and to what extent Article 7 of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1] permits a different pensionable age for men and women to be maintained temporarily. Of particular importance here is the definition of the term 'pensionable age', on which the method of calculation is based.

2. Under the national rules in question, pensions are calculated differently for men and women on the basis of an assumed employment record of 45 or 40 years respectively. After actual employment of 40 years for women and 45 years for men, the beneficiaries are entitled to a full pension. In the case of a shorter period of contributable employment, the amount of the pension is calculated in fractions of fortieths or forty-fifths.

3. The eight main proceedings are disputes between male pension claimants and the Pensions Office. [2] The claimants adopt the position that the pension each of them is entitled to must, on grounds of equality, be calculated on the basis of an assumed complete record of fortieths, that being the statutory basis for calculation of pensions for women. The Pensions Office considers, however, that since the pensionable age has not yet been definitively equalised, the pension calculation for men must also continue to be made on the basis of an assumed record of forty-fifths.

4. The parties to the main proceedings have pursued the dispute in the competent labour courts, and the courts hearing the cases [3] have come to different decisions on the point. The Arbeidshof, Ghent, found for the Pensions Office, while the Arbeidshof, Antwerp, and the Cour du Travail, Liège, accepted the claimants' contentions.

* Original language: German.

1 — Council Directive of 19 December 1978 (OJ 1979 L 6, p. 24).

2 — Rijksdienst voor Pensioenen, Office National des Pensions.

3 — In Case C-377/96 the Arbeidshof te Gent, Afdeling Brugge (Higher Labour Court, Ghent, Bruges Section); in Cases C-378/96, C-379/96, C-380/96 and C-381/96 the Arbeidshof te Antwerpen (Higher Labour Court, Antwerp); in Cases C-382/96, C-383/96 and C-384/96 the Cour du Travail de Liège (Higher Labour Court, Liège).

5. The problem which led to the Belgian Court of Cassation's references for a preliminary ruling originates in the Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being. [4] That Law allows all men and women employees to retire on completion of their 60th year; that gave rise to the point at issue, namely whether the pensionable age has thereby been equalised generally.

6. For calculation of the amount of the pension, the Law retains the system established by Royal Decree No 50, [5] with the consequence that in calculating the pension the fraction which corresponds to a calendar year (of employment of the person concerned) has 1 as the numerator, while the denominator is the figure 45 or 40, depending on whether a man or a woman is concerned.

7. Because of the retention of the method of calculating the amount of the pension, the Arbeidsrechtbank (Labour Court), Antwerp, had already made a reference to the Court for a preliminary ruling, [6] asking whether the difference in the method of calculation following equalisation of the pensionable age was compatible with Article 4 of Directive 79/7.

8. In paragraph 13 of the *Van Cant* judgment the Court held that:

'If national legislation has abolished the difference in pensionable age that existed between male and female workers — *a question of fact which it is for the national court to determine* — Article 7(1)(a) of Directive 79/7 may not be relied on in order to justify maintaining a difference, which was linked to that difference in pensionable age, concerning the method of calculating the retirement pension.' [7]

9. Although the Court described the existence of a uniform pensionable age as a question of fact and left it to the national court to decide the point, in formulating the operative part of its judgment it no doubt assumed that the pensionable age had already been made uniform in the then state of the law.

10. The Advocate General likewise proceeded from that assumption when he stated in his Opinion that: 'It may be said that the new legislation establishes equality for men and women as regards pensionable age, only a lower age limit being defined ...'. [8]

4 — *Staatsblad/Moniteur Belge*, 15 August 1990.

5 — Royal Decree of 24 October 1967, *Staatsblad/Moniteur Belge*, 27 October 1967, p. 11258.

6 — See the judgment of 1 July 1993 in Case C-154/92 *Van Cant* v *Rijksdienst voor Pensioenen* [1993] ECR I-3811.

7 — Case C-154/92, cited in note 6 (my emphasis).

8 — Opinion of Advocate General Darmon in Case C-154/92 *Van Cant* [1993] ECR I-3811, at I-3820, point 9.

11. There is a certain tension between the Court's statement that the national courts have jurisdiction to assess the abolition of different pensionable ages for female and male workers as a preliminary question of fact and the operative part of the judgment, which makes no reference to that reservation. This inconsistency led to inconsistent court decisions in Belgium. Since no uniform answer was reached to the question whether the different pensionable age for men and women has in fact been abolished, differences consequently also arose with respect to the method of calculating pensions. The ensuing legal disputes eventually led to the matter coming before the Court of Cassation.

12. After the main proceedings were already pending in that court, the Belgian legislature enacted the Law of 19 June 1996 [9] interpreting the Law of 20 July 1990. Article 2 of the Law provides:

'For the purposes of Article 2(1), (2) and (3) and Article 3(1), (2), (3), (5), (6) and (7) of the Law of 20 July 1990 introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being, the term "retirement pension" shall mean the replacement income granted to a beneficiary who is deemed to have become unfit for work by reason of old age, this event being deemed to occur at the age of 65 for male beneficiaries and 60 for female beneficiaries.'

13. The national court is uncertain whether that definition, with its consequences for the calculation of old-age pensions, falls within the exception provided for in Article 7 of Directive 79/7 and is hence compatible with Article 4 of that directive.

14. Under Article 4(1) of Directive 79/7, the principle of equal treatment means that 'there shall be no discrimination whatsoever on ground of sex either directly, or indirectly ..., in particular as concerns:

— ...

— ...

— the calculation of benefits ...'.

9 — *Staatsblad/Moniteur Belge*, 20 July 1996, p. 19579.

15. Article 7 of the directive permits exceptions to that principle. The exception relevant in the present context reads, according to Article 7(1)(a):

'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'.

16. The national court in the eight references for a preliminary ruling formulates identical questions, as follows, for the Court to answer:

1. Is Article 7 of Council Directive 79/7/EEC of 19 December 1978 to be interpreted as leaving the Member States free to determine differently for men and women the age at which they are respectively deemed to have become unfit for work by reason of old age, for the purpose of acquiring entitlement to a retirement pension for employees, and consequently to calculate those pensions differently, in the manner indicated in this judgment?

2. Is that article to be interpreted as precluding men and women deemed to have become unfit for work by reason of old age as from the age of 65 and 60 respectively who, from that age, also lose their rights to social security benefits, such as unemployment benefit, from claiming an unconditional right to a pension as from the age of 60 years, the amount of the pension being calculated differently, according to whether the claimant is a man or a woman?

3. Should the expression 'pensionable age' in Article 7 of Council Directive 79/7/EEC of 19 December 1978 be understood as meaning the age which gives rise to entitlement to a pension, or is it the age at which the employee is deemed to have become unfit for work by reason of old age, in accordance with national criteria, and enjoys the benefit of a replacement income excluding other social security benefits of the same description?

Can that expression be interpreted as covering both of the above definitions?

17. Of the parties to the main proceedings, the Pensions Office and the respondent to

the appeal in cassation in Case C-380/96 took part in the proceedings before the Court, as did the Belgian Government and the Commission. I will return to their submissions below.

## B — Opinion

18. The respondent to the appeal in cassation in Case C-380/96, who took part in the written procedure before the Court, contends that by the Law of 20 July 1990 the Belgian legislature gave men and women equally the possibility of drawing an old-age pension at the age of 60. There are no different conditions depending on the sex of the beneficiary. The time at which men and women may claim an unconditional right to a pension is the same. There is thus no scope for differing methods of calculation.

19. The other parties, the Pensions Office, the Belgian Government and the Commission take a different view. They essentially adopt the same point of view, which may be summarised as follows: By the Law of 20 July 1990 the Belgian legislature, although creating more flexibility for the time when an old-age pension may be drawn, in fact has not yet introduced a uniform pensionable age for men and women. That view is confirmed by the interpretative law enacted in 1996. The Belgian legislature can therefore continue to rely on the exception in Article 7(1)(a) of Directive 79/7. A method of calculating the old-age pension which differs according to sex is therefore also justified.

20. It is common ground that the Belgian pension rules, on the basis of Royal Decree No 50 of 24 October 1967, were based on different pensionable ages for men and women. Under those rules the pensionable age for men was fixed at 65 and that for women at 60. As a consequence, it was assumed that men would have completed a full employment record after 45 years and women after 40. These parameters were made the basis for the calculation of pensions, so that the contributable years actually completed were expressed as forty-fifths for men, whereas for women the years of contributable employment were expressed as fortieths. The same length of contributable employment could therefore, other conditions being equal, lead to a higher pension for a women than for a man.

21. This rigid system of a pensionable age differing according to sex was changed by the Law of 20 July 1990. On the basis of that law, the Court of Justice rightly held in the *Van Cant* case that the principle of equal treatment of men and women prohibits the retention of a difference according to sex in

the method of calculating the pension, if male and female workers may take retirement at the same age. [10]

Where the pensionable age is the same, the method of calculation must consequently also be the same; differences in the amount of the pension as a result of different methods of calculation are then no longer permissible, even if (financially) they are much less substantial than the differences in the amount of the pension which result from a different pensionable age being retained, which Article 7 of the Directive still permits for the time being.

The Advocate General in the *Van Cant* case too observed:

'And how paradoxical, or even shocking, it is, it will be argued, to call into question progress achieved by an advance in legislation whereas the Directive would allow more extensive discrimination to endure provided that it fell within the derogation provided for in Article 7.' [11]

The purpose and nature of the Law of 20 July 1990, in the light of the interpretative law of 19 June 1996, must be elucidated, in order to assess its compatibility with Community law.

22. It may be taken that, formally, the pensionable age has been made flexible, as the title of the 1990 Law [12] itself shows. The form this takes, under Article 2(1) of the Law, is that the old-age pension is paid for men and women in the same way from the first day of the month following the month in which the person concerned applies therefor, and at the earliest from the first day of the month following the month in which he or she completes his or her 60th year.

23. The question thus arises whether as a result of this apparently uniform rule the pensionable age has also, substantively, been made uniform at 60 years. It must also be taken into account here that, under Article 3(1)(b), the old-age pension to be claimed continues, as on the basis of Royal Decree No 50, to be calculated differently for men and women in accordance with an assumed record of fortieths or forty-fifths as the case may be.

24. The new feature compared with the previous rules is, for men, that they may — as previously — claim early retirement, but without having to accept a reduction, with respect to the pension payable, of 5% for each year of anticipated pension. The potential loss in the event of early retirement is thus significantly smaller on the basis of the

10 — Case C-154/92, cited in note 6 above.

11 — Opinion of Advocate General Darmon, cited in note 8 above, point 23.

12 — Law introducing a flexible retirement age for employed workers and adapting their pensions to trends in general well-being.

1990 Law than it was under the previous rules. [13]

25. The new feature for women on the basis of the 1990 Law is that, where they are still active in employment at the age of 60, they may continue to work and thereby complete qualifying periods with a view to the pension they will later receive. If a woman at that age is no longer employed, and is possibly in receipt of substitute payments from other branches of the social security system, [14] it must necessarily be presumed that she has reached the statutory pensionable age and is thus entitled only to an old-age pension.

26. The economic consequences attached to the various possibilities of taking a pension make it clear that a uniform pensionable age for men and women cannot be introduced without altering the existing financial equilibrium. That condition for the introduction of a uniform pensionable age has been consistently acknowledged in the Court's case-law. [15] It is not disputed that the Belgian legislature did not draw such extensive consequences when enacting the Law of 20 July 1990.

27. It is beyond doubt that even after the Law of 20 July 1990 differences still subsist for men and women with respect to possibilities of taking retirement and the respective methods of calculating pension payments. What matters is therefore how the term 'pensionable age' is to be understood — what the national court too in its third question expressly seeks to have clarified — in order to be able to assess whether the pensionable age is to be regarded, following the 1990 Law, as uniform or as still being different.

28. It would be possible to understand by 'pensionable age' the time from which the abstract possibility exists of receiving an old-age pension. If that broad view were taken, the pensionable age could scarcely be determined at a particular age, in so far as it is possible, for example, to claim early retirement. The concept of 'pensionable age' would then have to be understood in as variable a sense as the possibilities in the present case of drawing pensions under the Law of 20 July 1990.

29. The following considerations militate against that view. To begin with, it may be supposed that such a wide understanding of the term 'pensionable age' would create considerable legal uncertainty. That is why the statutory pensionable age is usually the subject of statutory definitions, such as that adopted by the Belgian legislature in the interpretative law of 1996. The question can thus only be whether that statutory definition is consistent with the understanding in

13 — If a man were to apply for his pension at the age of 60, it could be reduced at most by 5/45 compared with a full pension, while under the earlier rules he would have had to expect a loss of 5 x 5%.

14 — E. g. sickness, invalidity or unemployment benefits.

15 — Case C-9/91 *R* v *Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297, paragraph 15; Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraphs 9 and 12; Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer* v *Graham and Others* [1995] ECR I-2521, paragraph 12; Case C-137/94 *R* v *Secretary of State for Health, ex parte Richardson* [1995] ECR I-3407, paragraph 19.

Community law of the concept of 'pensionable age' which is the basis of Directive 79/7.

30. The Court has already had occasion to rule on the term 'pensionable age' in the context of the interpretation of Article 7(1) of Directive 79/7. In the *Equal Opportunities Commission* judgment [16] the Court said that the derogation, which refers to 'the determination of pensionable age for the purpose of granting old-age and retirement pensions', clearly concerns 'the moment from which pensions become payable'. [17] Another passage of that judgment states: 'Consequently, any interpretation of Article 7(1) of the Directive whose effect would be to restrict the scope of the derogations provided for in subparagraph (a) to that of allowing Member States to provide that *men and women do not become entitled to a pension at the same time* and to exclude discrimination with respect to contribution periods would lead to the financial disequilibrium of the pension schemes.' [18]

31. Although the statement in the passage cited relates to a different subject, it may be noted for the present case that the 'pensionable age' within the meaning of the provision is the time when the entitlement to a pension accrues.

32. The Commission has rightly observed that it is open to the national legislature to determine that this must in principle be the accrual of the entitlement to a *full* pension. In that way, in defining the term 'pensionable age', those criteria are excluded which are a factor of uncertainty in determining a particular time.

33. Taking those criteria together, 'pensionable age' within the meaning of the provision may be understood as the time at which, the other material conditions being satisfied, the right to a full old-age pension in principle accrues. That interpretation leaves scope for exceptions provided for in the relevant statutory rules, for example rules on early retirement or the possibility of continuing to work after reaching that time, without calling into question the determination of a normal pensionable age.

34. That is the Community-law context of the new Belgian rules in question, in the form given them by the interpretative law of 19 June 1996. Article 2 of that Law proceeds from the assumption that at a certain point in time the beneficiary is no longer capable of working because of age. An 'old-age pension' is therefore granted as replacement income. The legal fiction sets that point in time differently for men and women, at 65 and 60 respectively, with the basis of calculation being a complete record of 45 or 40 years.

16 — Case C-9/91, cited in note 15 above.
17 — Case C-9/91, paragraph 13.
18 — Case C-9/91, paragraph 17 (my emphasis).

35. In so far as this understanding of pensionable age remains within the bounds of the concept used in Article 7(1) of the Directive, the Member State's definition of pensionable age cannot be objected to from the point of view of Community law.

36. In those circumstances it must be taken that a different pensionable age for men and women was maintained, even after the enactment of the Law of 20 July 1990, and was clarified and confirmed by the Law of 19 June 1996.

37. That finding implies a further question of Community law, namely whether the different pensionable age, which a priori has been lawfully maintained under Article 7(1)(a) of the Directive, with the associated consequences for the method of calculation, may be different for men and women even after the original legal position has been amended.

38. The title, the first recital, and the body of the Directive indicate that what is aimed at is a *progressive* implementation of the principle of equal treatment. Article 7(2) [19] and the second subparagraph of Article 8(2) [20] in particular show that the reasons for the derogations in Article 7(1) of the Directive may well continue to exist, but the exclusions may not be carried forward without review.

39. The possibilities and limits of continued reliance by a Member State on the exceptions in Article 7(1) of the Directive were considered by the Court in the *Bramhill* case. [21] It stated in paragraph 21 of that judgment:

'To interpret the directive ... [as meaning that] ... a Member State ... could no longer rely on the derogation provided for by that provision if it adopted a measure which ... has the effect of reducing the extent of unequal treatment based on sex, would therefore be incompatible with the purpose of the directive and would be likely to jeopardise the implementation of the aforesaid principle of equal treatment.' [22]

40. The Advocate General in that case also pointed out that an approach which had the end effect of impeding progress would conflict with the aim of progressive implementation and would very probably lead to a strengthening of the *status quo*. [23]

19 — This provision reads: 'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.'

20 — This provision reads: 'They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.'

21 — Case C-420/92 *Bramhill* v *Chief Adjudication Officer* [1994] ECR I-3191.

22 — Case C-420/92, cited in note 21 above.

23 — Opinion of Advocate General Lenz of 14 April 1994 in Case C-420/92, [1994] ECR I-3191, at I-3193, point 28.

41. The Belgian legislation in question pursues two aims, as the national court observes on the basis of the *travaux préparatoires* to the Law of 20 July 1990: first, a labour market policy objective, as a measure to promote employment; second — this aspect being emphasised — the Belgian legislature's intention was to take a step to reduce unequal treatment of men and women. Consequently, it is not merely the case that on the basis of the 1990 Law men may already retire at the age of 60 without having to accept the reduction of 5% for each year of pension drawn before completion of their 65th year: women who are in employment may also continue to work, that work giving rise to pension entitlements, after completion of their 60th year.

42. The Law of 20 July 1990 may therefore indeed be seen as *a step* in the direction of equal treatment of men and women in the field of pension law. I observe for the sake of completeness that *further steps* of a legislative nature have in the meantime been taken in the Belgian legal system. The Belgian Government has described the further developments. It states that by a framework law of 26 July 1996 [24] the basis has been created for further innovations. To implement the law the Royal Decree of 23 December 1996 [25] was adopted, providing for the pensionable age of women to be raised progressively to 65 over a transitional period of 13 years. That gradual adjustment is accompanied by a raising of the basis of calculation from fortieths to forty-fifths. In 2009 a uniform retirement age of 65 for men and women will then be attained. The Royal Decree also regulates the corresponding adjustments with respect to other branches of social security.

43. The Law of 20 July 1990 thus forms part of a progression from a different pensionable age for men and women, via a gradual adjustment, to the introduction of a uniform pensionable age. During that process the national legislature may continue to rely on the derogation in Article 7(1) of Directive 79/7 to justify a different pensionable age.

44. Maintaining a different pensionable age implies a different method of calculation of pension benefits. The derogation in Article 7(1)(a) of the Directive admittedly speaks expressly only of the determination of pensionable age on the one hand and the possible consequences for *other benefits* on the other hand. Nevertheless, the differing method of calculation is a consequence which necessarily follows from the determination of pensionable age.

45. It must be stated, following on from the decision in Case C-9/91, [26] that the different pensionable age for men and women cannot be maintained without altering the existing financial equilibrium unless the unequal

24 — *Staatsblad/Moniteur Belge*, 1 August 1996.

25 — *Staatsblad/Moniteur Belge*, 17 January 1997.

26 — Case C-9/91, cited in note 15 above.

treatment with respect to the calculation of benefits is also maintained, [27] especially as the method of calculation of pensions in the present case is a function of the contribution periods. It must therefore be taken that the maintenance for the time being, consistently with Directive 79/7, of a different pensionable age for men and women also justifies the differing method of calculation of pensions.

## C — Conclusion

46. On the basis of the above considerations, I propose the following answer to the national court's questions:

(1) Article 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 leaving it open to the Member States for the time being to determine differently according to sex the age at which men and women are deemed, in the context of entitlement to an old-age pension for employees, to be no longer capable of working on grounds of old age, if and in so far as an amendment to the law which has taken place in the meantime constitutes, taken as a whole, a step in the direction of equal treatment of men and women in matters of social security.

(2) Article 7(1)(a) must be interpreted as permitting a situation where men and women who from the age of 65 or 60 respectively are deemed to be no longer capable of working on grounds of age, and also lose their entitlement to social security benefits such as unemployment benefits from that age, may claim an unconditional right to a pension from the age of 60, with the amount of the pension being calculated in a different way according to whether a man or a

27 — On unequal treatment with respect to *contribution periods* see Case C-9/91, cited in note 15 above, paragraphs 16 and 17; in its observations the Court had in mind both the obligation to contribute and the calculation of pensions (see paragraph 13 of the judgment).

woman is concerned, by reference to the occurrence of the deemed incapacity for work on the ground of age.

(3) The term 'pensionable age' within the meaning of that provision is to be understood as the time at which the entitlement to a full pension in principle accrues, it being open to the legislature of the Member State to define 'pensionable age' in this context as the age at which a worker is deemed in accordance with the Member State's criteria to be no longer capable of working on grounds of age and receives a replacement income which excludes other social security benefits which are also to be classified as replacement income.