REPORT FOR THE HEARING
Case C-337/91 *

I — Facts and procedure

1. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24, 'Directive 79/7') applies, according to Article 2, to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons.

According to Article 3(1) the Directive applies to statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment.

However, Article 3(2) provides that

'this Directive shall not apply to the provisions concerning survivors' benefits ...'.

Article 4(1) provides as follows:

'The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits 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) of Directive 79/7 provides that Member States may exclude certain matters from the scope of the Directive. Under Article 7(2):

'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.'

* Language of the case: Dutch.

Under Article 8, the six-year period allowed for complying with the Directive expired, for the Netherlands, on 23 December 1984.

2. In the Netherlands, the Algemene Arbeidsongeschiktheidswet (General Law on incapacity for work, hereinafter 'the AAW'), which is applied by trade associations ('bedrijfsverenigingen'), provides for benefits to be paid after the first year of incapacity for work up to the age of 65. The amount of the benefit corresponds to a percentage, which is fixed in particular by reference to the degree of incapacity for work, of the statutory minimum wage and, for incapacity between 80 and 100%, the benefit is 70% of the minimum wage.

Article 32(1)(b) of the AAW provides as follows:

'Benefits for incapacity for work shall be withdrawn:

(...)

b) when a woman to whom they have been granted becomes entitled to a widow's pension or temporary widow's benefit under the Algemene Weduwen-en Wezenwet.'

The Algemene Weduwen-en Wezenwet (General Law on Widows and Orphans, 'the AWW'), which is applied by the Sociale Verzekeringsbank (Social Security Fund), entitles widows of insured persons, subject to certain conditions, to widows' pensions up to the age of 65. The amount of the pension is calculated on the basis of the net monthly minimum wage and the gross amount is fixed in such a way that a widow without a dependent child is entitled to 70% of the net minimum wage.

Under Article 23(1) of the AWW, the benefit is granted, on the submission of a claim, by the Sociale Verzekeringsbank. According to Article 23(2), the latter may, by way of exception to paragraph (1), grant the benefit automatically.

Under Article 25(1) of the AWW, the widows' pension commences on the first day of the month during which the person concerned fulfils the conditions laid down for the right to a pension. However, Article 25(3) provides that the pension cannot commence more than one year before the first day of the month during which the claim was submitted or the pension was granted automatically, subject to a decision to the contrary which the Sociale Verzekeringsbank may take in particular cases under paragraph (5).

On the face of it, the AWW does not entitle widowers to survivors' pensions. However, in two judgments of 7 December 1988 (AWW 1987/17 and AWW 1987/46, published in *Rechtspraak Sociale Verzekering 1989/67*), the Centrale Raad van Beroep (Higher Social Security Court) held that entitlement to AWW benefits must be granted without distinction as to sex. It based its opinion on Article 26 of the International Covenant on Civil and Political

Rights ('the International Covenant') of 19 December 1966 (*Treaty Series*, vol. 999, p. 171), which provides as follows:

'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

In addition, in a judgment of 23 May 1991 (AAW 1986/322, published in *Administratiefrechtelijke Beslissingen 1991, 544*), the Centrale Raad van Beroep decided that in the case of widowers the legal consequences of the award of AWW benefits must be given full effect when benefits provided for by another law were involved and that Article 32(1)(b) of the AAW was therefore equally applicable to men, so that since 23 December 1984 the result of that provision was that men, too, must forfeit their benefit under the AAW if they became entitled to a widower's pension. The Centrale Raad concluded that from that date Article 32(1)(b) of the AAW operated neither direct nor indirect discrimination against women.

In a subsequent judgment of 30 January 1991 (AWW 1990/105, published in *Rechtspraak Sociale Verzekering 1991/182*), the Centrale Raad van Beroep made the entitlement to AWW benefit thus conferred on widowers retrospective to 23 December 1984, the date on which Directive 79/7 should have been transposed into national law, basing itself primarily on reasons of practicality. In the same judgment, the Centrale Raad took the view that the status of widowers was a 'special case' within the meaning of Article 25(5) of the AWW, as during the period prior to the judgments of 7 December 1988 there was great uncertainty as to whether widowers could claim benefits under the AWW, but it held that the Sociale Verzekeringsbank must exercise the option to give a widower the right to such a benefit at a date more than one year before the first day of the month during which the claim was submitted only in a situation where, failing this, it could be said that there was 'particular hardship' with regard to the recipient of the benefit.

It should also be noted that on 12 March 1991 a draft law was laid before the Dutch Parliament for an Algemene Nabestaandenwet (Law on the provisions generally applicable to survivors, *Kamerstukken II*, 1990-1991, 22013, Nos 1-3), which aims to give statutory effect to the principle of equal treatment for men and women with regard to survivors' benefits.

3. Mrs A. M. van Gemert-Derks, the plaintiff in the main proceedings, who was born on 16 January 1937, became self-employed in 1972. In February 1982 she was found unfit for work and was granted benefit under the AAW on the basis of incapacity for work of between 80 and 100% with effect from 31 January 1983.

On 23 October 1987 her husband died. Consequently she was granted a widow's pension under the AWW with effect from 1 October 1987.

By decision of 8 January 1988 the Bestuur van de Bedrijfsvereniging voor de Chemische Industrie (Board of the Trade Association for the Chemical Industry), the predecessor in law of the Nieuwe Industriële Bedrijfsvereniging (New Trade Association for Industry), the defendant in the main proceedings, withdrew the plaintiff's benefit under the AAW with effect from 1 October 1987, pursuant to Article 32(1)(b) of the AAW. It appears from the order making the reference that the transition from the AAW scheme to the AWW scheme entailed, for Mrs van Gemert-Derks, a reduction of between some tens of guilders and HFL 100 per month in the net benefit she was receiving.

4. Mrs van Gemert-Derks lodged an appeal against this decision with the Raad van Beroep, 's-Hertogenbosch, which, in a judgment of 30 October 1986 (AAW 86/939, delivered in a similar case between Mrs A. van de Broek-Jaspers and the Bestuur van de Nieuwe Algemene Bedrijfsvereniging), had ruled that since 23 December 1984, Article 32(1)(b) of the AAW had been contrary to Community law, and in particular the relevant provisions of Directive 79/7, and should therefore no longer be applied, so that concurrent benefits under the AAW and the AWW became possible, should the case arise. In spite of the subsequent case-law of the Centrale Raad van Beroep mentioned above, particularly the judgment of 23 May 1991 (AAW 1986/322), which had set aside the judgment of 30 October 1986 of the Raad van Beroep, 's-Hertogenbosch, the latter considered that the matter before it raised questions of the interpretation of Community law and it therefore decided, by order of 17 December 1991, to refer the following questions to the Court of Justice under Article 177 of the EEC Treaty:

'1. Is it compatible with Community law for a national court to interpret Article 26 of the International Covenant on Civil and Political Rights — which is binding on (at least) 11 of the 12 Member States — as meaning that that article requires as from 23 December 1984 full equal treatment as between men and women in the field of statutory survivors' pensions, if that area is only temporarily excluded from the jurisdiction of the Community?

2. Is a national provision such as that contained in Article 32(1)(b) of the AAW — which according to the Centrale Raad van Beroep ceased on 23 December 1984 to have direct discriminatory effect with regard to women inasmuch as "the effect of benefits being lower as a result of the transition from AAW benefit to AWW benefit may now occur just as well in the case of men" — compatible with Article 4(1) of Directive 79/7/EEC if the national provision continues in practice to bring about a drop in income for all widows who are unfit

for work (whether 100% or, as in this case, only partially) and only in exceptional cases (that is to say, in cases where "special hardship" has led to the award of a widower's pension with long retroactive effect and there is a possibility of claiming back the AAW benefit) for widowers in a comparable situation?

3. If Question 1 or Question 2 is answered in the negative: under Community law is it for the national court to decide whether national legislation such as that described in the second question is wholly inapplicable or to interpret it as requiring a deduction to be made? If not, which approach is most compatible with Community law?'

5. In the order making the reference, the Raad van Beroep observes firstly, to explain the reasons which led it to refer the first question, that all the Member States except the Hellenic Republic have now ratified the International Covenant. Secondly, it considers that the abovementioned Article 26 of the Covenant includes the principle of equal treatment for men and women in the matter of social security, an area which in any case has in principle been within the competence of the Community since 23 December 1984. Article 3(2) of Directive 79/7, which provides that the Directive does not apply to the provisions concerning survivors' benefits, removes that part of the sector of social security from the competence of the Community. However, according to the Raad van Beroep, this exception is only temporary. In view of the Court's case-law concerning the relationship between Community law and 'ordinary' international law, as stayed, *inter alia*, in Case 22/70 *Commission* v *Council* ('AETR') [1971] ECR 263, in Joined Cases 21/72 to 24/72 *International Fruit Company* [1972] ECR 1219, and in Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, the question arose whether national courts were bound to interpret Article 26 of the Covenant with regard to equal treatment for men and women as regards survivors' benefits as uniformly as possible and in the light of the development of Community law, and to conclude that Article 26 did not yet require complete equality of treatment for men and women with regard to statutory pensions for surviving spouses. Under these circumstances, the interpretation of Article 26 of the International Covenant given by the Centrale Raad van Beroep, particularly in the abovementioned judgment of 7 December 1988 (AWW 1987/17), if not followed by the other Member States, would make it more difficult to adopt a Community approach in this area and would thus conflict with Article 5 of the EEC Treaty. Furthermore, according to the court making the reference, this interpretation could imply that the exception laid down by Directive 79/7 concerning survivors' benefits is invalid because it is contrary either to Article 26 of the International Covenant which, as an expression of a fundamental right set out in an international agreement ratified by (almost) all the Member States, has t' e force of a fundamental principle of Community law, or to the Community principle of equality.

Finally, the Raad van Beroep observes that a negative reply to the first question would render the second question unnecessary because then the case-law of the Centrale Raad van Beroep, to the effect that Article 32(1)(b) of the AAW has applied also to men since 23 December 1984, would have to be deemed null and void with the result that it could then be accepted that this provision has a direct discriminatory effect against women and that it should not have been applied after 23 December 1984 because it is contrary to Article 4(1) of Directive 79/7. According to the court making the reference, a negative reply to the first question would probably not have any directly detrimental effects for Dutch widowers because the abovementioned draft law for an Algemene Nabestaandenwet contains statutory provisions relating to widowers' pensions and the widowers' pensions previously paid in accordance with the case-law of the Centrale Raad van Beroep could not be recovered.

With regard to the second question referred to the Court, the Raad van Beroep considers that, even following the abovementioned judgments of the Centrale Raad van Beroep, it would be very exceptional for a widower to receive a pension under the AWW after 23 December 1984 and consequently to have his benefit under the AAW withdrawn. Apart from a few exceptions, claims for widowers' pensions were not submitted until after the judgment of the Centrale Raad of 7 December 1988 (AWW 1987/17) so that, under Article 25(3) of the AWW and subject to any exception allowed in a case of 'special hardship' under Article 25(5), widowers' pensions were generally granted at the earliest from 1 December 1987. Therefore, according to the Raad van Beroep, when Mrs Gemert-Derks' benefit under the AAW was withdrawn on 1 October 1987 pursuant to Article 32(1)(b) of the AAW, the reduction in income accompanying the application of this provision would have affected all widows (totally) unfit for work and only a very small proportion of widowers (totally) unfit for work. Therefore the national court considers that, leaving aside the question whether there was formal equality from 23 December 1984 to 1 December 1987 for men and women (totally) unfit for work, there was at least *de facto* inequality between the two categories during that period. This *de facto* inequality was aggravated by the fact that, in cases where a widower's pension was granted with longer retrospective effect to widowers who had received benefits under the AAW, there was no possibility, or only a limited possibility, of recovering the benefit paid under the AAW, so that the widowers concerned received both benefits together (for a certain period).

With regard to the third question referred to the Court, the Raad van Beroep states that, if the Court's reply to the second (or the first) question is in the negative, the Raad van Beroep would then have to decide whether Article 32(1)(b) of the AAW should not be applied at all (as it had already decided in the abovementioned judgment of 30 October 1986, AAW 86/939), or whether that provision must be interpreted as requiring a deduction to be made in the sense that, in appropriate cases, the AAW benefit would be paid only to the extent that it exceeded the AWW pension. On this point, the Raad van Beroep states that it takes the provisional

view that the deduction principle entails, in effect, an amendment to the legislation which could be in excess of its authority and that it cannot necessarily be ruled out that the fully effective application of Community law requires a negligent legislature to be confronted with all the consequences of its action or inaction. In the same context, the national court concludes, from the fact that the benefit and the amount of the pension under the AWW are completely independent of the other income of the person concerned and that the AAW benefit is normally a benefit which is provided in cases where income is no longer received from work, that it is not necessarily clear that it is neither possible nor permitted to receive such benefit and a pension under the AWW concurrently.

6. The order made by the Raad van Beroep, 's-Hertogenbosch, was lodged at the Court Registry on 30 December 1991.

7. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged on 10 April 1992 by the Netherlands Government, represented by T. P. Hofstee, Deputy Secretary-General at the Ministry of Foreign Affairs, acting as Agent, on 13 April 1992 by the German Government, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Joachim Karl, Regierungsdirektor in the same Ministry, acting as Agents, on 14 April 1992 by the Bestuur van de Nieuwe Industriële Bedrijfsvereniging, the defendant in the main proceedings, represented by C. R. J. A. M. Brent, Head of the Legal Service for Social Security Affairs of the association 'Gemeenschappelijk Administratiekantoor', on the same day by the Commission of the European Communities, represented by Karen Banks and Ben Smulders, members of the Commission's Legal Service, acting as Agents, and on 29 April 1992 by the United Kingdom, represented by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by Christopher Vajda, Barrister.

8. 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.

II — Written observations lodged by the parties

A — First question

9. The *Bestuur van de Nieuwe Industriële Bedrijfsvereniging* does not share the opinion expressed by the Raad van Beroep, 's-Hertogenbosch, in the order making the reference, that national courts must, in the area of equal treatment of men and women in relation to survivors' benefits, interpret Article 26 of the International Covenant as uniformly as possible in the light of the development of Community law. On the contrary, it concludes from the case-law of the Court of Justice cited by the national court, particularly the judgment in Case 22/70, cited above, that so long as the Community has adopted no measures whatsoever laying down common rules to implement a common policy as provided for by the Treaty, the Member States remain competent. Therefore it considers that, with regard to survivors' benefits, for which no Community rule has yet been laid down, the Member States, and consequently their courts, remain free to give direct effect to Article 26 of the International Covenant and, if nec-

essary, to interpret it as they see fit. According to the Bestuur, to accept a different viewpoint would mean that, until Community measures were adopted, the national courts would be compelled to treat widowers in a way which gave rise to discrimination against widows.

The Bestuur adds that, in accordance with the Court's settled case-law, as confirmed by the judgment in Case C-260/89 *ERT* v *Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, paragraph 42, the Court has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. As the AWW is not at present within the scope of Community law, the Court cannot apply Article 26 of the International Covenant to the AWW.

Consequently the Bestuur proposes that the first question be answered in the affirmative.

10. The *German Government* interprets the first question as meaning that the national court wishes to know whether Article 26 of the International Covenant forms an integral part of Community law. It submits that the reply to the question, understood in this way, must be in the negative. Firstly, the International Covenant is dated 19 December 1966 so that the possibility of its binding the Community must, under Article 234 of the Treaty, be ruled out. Secondly, so far as international treaties on the protection of human rights are concerned, the Court has hitherto referred only to the European Convention on Human Rights and the additional protocols, while expressly emphasizing that it is a treaty in which all the Member States had cooperated or to which they had acceded, which is not the case with regard to the International Covenant. Furthermore, Article 26 of the International Covenant cannot apply in the present case because the principle of equal treatment is the subject of a specific provision of the EEC Treaty, Article 7, which, however, applies only within the scope of application of the Treaty. Apart from Article 119, the Treaty does not prohibit discrimination on grounds of sex. With regard to the general Community principle of equality, it commands observance only in the Community, as the Court has expressly stated that the principle is not required to be applied directly in the legal systems of the Member States (see the judgment in Case 149/77 *Defrenne III* [1978] ECR 1365). Finally, it must be borne in mind that Article 3(2) of Directive 79/7 expressly excludes survivors' benefits from its scope.

11. The *Netherlands Government* observes, first, that the question whether the Interna-

tional Covenant is or should, like the European Convention on Human Rights, be a model to be followed in giving concrete form to the protection of fundamental rights in the Community legal system can be left open because, unlike the Convention, the International Covenant has not been ratified by all the Member States. Moreover, there is likewise no point in considering whether Article 26 of the International Covenant may have direct effect in Community law because the latter already recognizes a general principle of equality which is regarded as one of the fundamental principles of the Community legal system, expressed in many instances in the Treaty and in the Court's case-law.

Secondly, Directive 79/7 is based exclusively on Article 235 of the Treaty, which confers on the Community legislature a discretionary power in conformity with the political responsibility for attaining the objects of the Treaty specified by Article 2. In addition, the Court has on various occasions held that the Community legislature has a discretion to proceed towards harmonization only in stages and to require only the gradual abolition of differences in the laws of the Member States (see judgments in Case 37/83 *Rewe-Zentrale* v *Direktor der Landwirtschaftskammer Rheinland* [1984] ECR 1229, paragraph 20, and Case C-63/89 *Les Assurances du Credit* v *Council and Commission* [1991] ECR I-1799, paragraph 11). This idea is made explicit by the title, the preamble and Article 1 of Directive 79/7, according to which the purpose of the Directive is the 'progressive implementation' of the principle of equal treatment in statutory social security schemes. With regard to the temporary exclusion of survivors' benefits from the attempt at gradual harmonization in this field, it is explained by the fact that the Community institutions aimed to cover first of all the areas of social security in which women were less well treated, while provisionally retaining social security schemes which at that time, at least in the law of the Netherlands, mainly favoured women. The Netherlands Government considers that, under these circumstances, it was open to the Community legislature to leave the national legislature power temporarily to establish schemes for granting survivors' benefits without prejudicing the Community principle of equality. Consequently, in the present state of Community law, this area continues to be governed, at least temporarily, by the provisions and principles of domestic and international law in force in the Member States (see the *Defrenne III* judgment cited above, paragraph 32).

The Netherlands Government adds that it is scarcely necessary to point out that the situation would be the same even if the Community principle of equality had to be given a wider meaning in keeping with the terms of Article 26 of the International Covenant. In so far as this article, as interpreted by the Human Rights Committee of the United Nations, is of concern to the Community legislature, it requires the principle of equality to be observed in an area of social security only if, and to the extent that, legislation has actually been passed in the area in question.

With regard to the substance of the first question, the Netherlands Government considers that it seeks to establish whether an interpretation by a national court of Article 26 of the International Covenant which would imply a greater advance in equal treatment than that imposed on the Member States by Directive 79/7 in the field of statutory social security schemes is compatible with Community law. In this connection the Netherlands Government observes, firstly, that it is doubtful whether the interpretation by a court of a Member State of that State's international obligations is open to review by the Court under Article 177 of the Treaty, particularly in relation to a matter which, as in the present case, is not covered by any Community measures whatever. According to the Netherlands Government, the Court likewise has no jurisdiction, in the present state of Community law and in an area such as that in question here, to ensure the uniform interpretation of Article 26 of the International Covenant.

The Netherlands Government goes on to say that, as neither the Treaty nor Directive 79/7 imposes obligations on the Member States in the area of statutory schemes for survivors' benefits, the reference to Article 5 of the Treaty, which requires the Member States to 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community' is irrelevant. It adds that even if Article 5 were applicable, under no circumstances could it be concluded that it had been violated in any way. Firstly, the disputed national case-law concerning Article 26 of the International Covenant had made it possible to achieve greater equality of treatment in the Dutch legal system than that required by Directive 79/7 which, although it excluded survivors' benefits from its scope, certainly did not compel the Member States to allow inequalities in treatment in this area to continue in existence. Secondly, the national case-law in no way affected the spirit, the letter or the object of the proposal submitted by the Commission to the Council on 27 October 1987 for the adoption of a directive completing the implementation of the principle of equal treatment for men and women in statutory and occupational social security schemes (COM (87) 494 final, OJ 1987 C 309, p. 10).

The Netherlands Government therefore proposes that the following reply be given to the first question:

'Community law in no way precludes a national court from interpreting Article 26 of the International Covenant on Civil and Political Rights, of 19 December 1966, as meaning that since 23 December 1984 that article entails complete equality for men and women in the area of statutory survivors' pensions.'

12. The *United Kingdom* contends, firstly, that statutory schemes for survivors' benefits are not within the ambit of Community law and, secondly, that the Court's jurisdiction

does not extend to national laws outside the ambit of Community law.

It indicates, firstly, that Directive 79/7 is based on Article 235 of the Treaty which is applicable where action by the Community appears necessary to attain one of the objectives of the Community and the Treaty has not provided the necessary powers for that purpose. The United Kingdom also observes that, unlike the provisions concerning the exceptions allowed by Article 7 of Directive 79/7, the Directive contains no express provision for the re-examination of the exceptions allowed by Article 3(2).

The United Kingdom then refers to the Court's settled case-law, recently followed in the judgment in Case C-159/90 *Society for the Protection of Unborn Children Ireland* v *Grogan* ECR I-4685, paragraph 31, to the effect that, in matters outside the scope of Community law the Court would not give a ruling on the European Convention of Human Rights and would not apply it, and considers that the same approach must be adopted *a fortiori* with regard to the International Covenant, including Article 26.

Finally, it contends that the reply to the first question would be the same even if the question had raised the problem of the applicability of the Community principle of non-discrimination to statutory schemes for survivors' benefits. In this context it refers to the *Defrenne III* judgment (cited above), from which it follows that the principle of non-discrimination does not apply to areas for which the Community legislature has not assumed responsibility.

Accordingly, the United Kingdom proposes that the Court reply as follows to the first question:

'Article 3(2) of Council Directive 79/7 does not require the Member States to implement the principle of equal treatment with regard to a statutory scheme for survivors' benefits. Article 26 of the International Covenant on Civil and Political Rights does not affect the validity, the scope or the interpretation of Article 3(2) of Council Directive 79/7.'

13. The *Commission* considers that, in a field such as that of statutory benefits for survivors which, at present, is not covered by Directive 79/7 or governed by any other measure of Community law, the Member States are free to apply the principle of equal treatment for men and women in a manner which satisfies the Member State in question, provided that this does not create, directly or indirectly obstacles to giving full effect to Community law in fields where it imposes the abovementioned principle. The fact that this is done on the basis of an international treaty, such as the International Covenant, does alter that because the Court has found on numerous occasions (see Joined Cases 60/84 and 61/84 *Cinéthèque* v *Fédération Nationale des Cinémas Français* [1986] ECR 2605, paragraph 26; Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719,

paragraph 28; and Case C-260/89, cited above, paragraph 42), in relation to the European Convention on Human Rights, that it has no power to examine the compatibility with that Convention of national rules which do not fall within the scope of Community law.

Therefore the Commission proposes that the following reply be given to the first question:

'The interpretation by the national court of Article 26 of the International Covenant on Civil and Political Rights as meaning that, since 23 December 1984, that article has required full equal treatment for men and women in the field of statutory benefits for survivors, whereas this matter lies outside the scope of Council Directive 79/7/EEC, is compatible with Community law provided that this interpretation does not prejudice the effectiveness of the abovementioned Directive.'

B — Second question

14. The *Bestuur van de Nieuwe Industriële Bedrijfsvereniging* admits that, according to the strict wording of the law, only widows are entitled to the benefits provided for by the AWW, but points out that with effect from 23 December 1984 the case-law of the Centrale Raad van Beroep granted men the right to the same benefits. As a result, Article 32(1)(b) of the AAW now applies to men also and they may therefore also lose their right to the AAW benefits.

The Bestuur likewise admits that at the time when Article 32(1)(b) of the AAW was applied to Mrs van Gemert-Derks, i. e. 1 October 1987, that provision affected women only and in certain cases entailed a reduction in income, where the person concerned received benefits under the AAW calculated on the basis of incapacity for work of between 80 and 100% and when those benefits were replaced by the pension provided for by the AWW for widows without dependent children. Mrs van Gemert-Derks thus suffered at the beginning a gross monthly loss of HFL 338.67, corresponding to a net loss of HFL 0.70. However, the Bestuur points out that the monthly pension which Mrs van Gemert-Derks has received under the AWW since 1 January 1992 is HFL 160.36 gross and HFL 10 net more than the benefit she would have had under the AAW if she had not been entitled to the AWW pension.

The Bestuur adds that there is no automatic transfer from AAW benefits to an AWW pension. In practice an AWW pension is granted only when a claim is made and the entitlement to AAW benefits ceases under Article 32(1)(b) of the AAW only after the AWW pension is actually granted. When the competent authorities are informed of the death of the spouse of an insured person who receives benefits under the AAW, they draw the attention of the insured person to the fact that he or she may submit a claim for benefits under the AWW. At the same

time, however, they always point out that, if benefits are granted under the AWW, the insured person will lose the benefits which he or she was receiving under the AAW. Likewise, when the Sociale Verzekeringsbank receives a claim for an AWW benefit, and if it appears that the insured person already receives benefits under the AAW, it informs the person concerned of the potential financial consequences of changing from the AAW scheme to the AWW scheme, also informing him or her that the claim may be withdrawn but that the right to submit a later claim will not be lost. In this connection the Bestuur refers to Directive 89/17 of the Sociale Verzekeringsbank of 10 July 1989 on the development and the application of the law concerning the coexistence of the AWW and the AAW.

It follows that Article 32(1)(b) of the AAW is applied uniformly to men and women, that the application of this provision is not automatic and that, in the case of Mrs van Gemert-Derks, the financial disadvantage it has entailed in the past has been minimal and, at present, it actually results in an increase in income. Therefore the Bestuur proposes that the answer to be given to the second question should be that a provision of national law such as Article 32(1)(b) of the AAW is compatible with Article 4(1) of Directive 79/7.

15. According to the *Netherlands Government*, the second question is based on the premise that provisions regulating coexisting benefits, such as Article 32(1)(b) of the AAW, fall within the scope of Directive 79/7. However, in view of Article 3(1) of the Directive, which provides that it does not apply to 'statutory schemes' for invalidity in particular, and Article 3(2), which excludes from its scope 'the provisions concerning survivors' benefits', it must be asked whether 'provisions' concerning survivors' benefits which are included in 'statutory schemes' such as the AAW, which in principle relates to the risks covered by Article 3 of Directive 79/7, should not also be excluded from its scope. If so, a provision regulating coexisting benefits, such as Article 32(1)(b) of the AAW, would not be covered by Directive 79/7 because that provision refers to the AWW.

With regard to the question whether, during the period from 23 December 1984 to 1 December 1987 the equal treatment for men and women which was legally guaranteed from 23 December 1984 with regard to Article 32(1)(b), was not implemented *de facto*, the Netherlands Government observes, firstly, that it considers the account of the facts contained in the question from the national court to be mistaken in fact and in law, as it assumes that there was a reduction in income in all cases of transfer from AAW benefits to an AWW pension. As the amount of the benefit for incapacity for work also depends on the degree of incapacity for work and the income previously received, if the latter was lower than the minimum level

in the case of part-time employment, it could turn out to be less than the pension granted under the AWW.

The Netherlands Government goes on to observe that, in the abovementioned judgment of 23 May 1991 (AAW 1986/322), on the basis of the findings that, firstly, more women than men receive an AWW pension because, in the case of a couple, the woman is normally the younger and, furthermore, on average they live longer than men, and, secondly, that more men than women work and therefore receive AAW benefits, the Centrale Raad van Beroep concluded that there was no evidence of indirect discrimination.

Finally, the Netherlands Government adds that, even if there was unequal treatment, there would still be no infringement of Directive 79/7 because the contested provision of the AAW is justified by objective circumstances. The AAW and the AWW both have the aim of guaranteeing a minimum level of benefits on the occurrence of the risks of incapacity for work and death respectively and therefore it would not be desirable for persons confronted by the simultaneous materialization of both risks to be able to obtain both benefits and receive in total more than the minimum level of benefits covered separately by each law. According to the Netherlands Government, the primacy given to the entitlement to the AWW pension is, in absolute terms, the more favourable choice for widows because the pension is generally higher than the AAW benefits for married women, most married women who are incapable of working receiving a partial AAW benefit as a result of have had part-time employment.

Consequently the Netherlands Government proposes that the following reply be given to the second question:

'Article 4(1) of Directive 79/7 does not preclude the suspension, by a national provision in a statutory scheme providing protection against invalidity, of the right to benefits for incapacity for work by reason of becoming entitled to a survivor's pension.'

16. The *Commission* observes, firstly, that although on reading the text of the AAW and the AWW it seems that a woman automatically loses her entitlement to AAW benefits (which are withdrawn 'when a woman ... becomes entitled to a widow's pension', cf. Article 32(1)(b) of the AAW) and also becomes automatically entitled to an AWW pension on the date of her husband's death, certain circulars and the practice followed by the bodies responsible for administering both laws reasonably permit the conclusion that the entitlement to AAW benefits ceases to exist when, after submitting a claim, the person concerned becomes actually entitled to an AWW pension. If this were the case, it

would be difficult to see how the reduction in income arising from the transfer to the AWW scheme from the AAW scheme affects more women than men because it would be the direct result of a decision by the beneficiary concerned (man or woman) who had chosen to transfer from the AAW scheme to the (less favourable) AWW scheme. In any case, where it is simply open to those concerned to claim an AWW pension, there can be no question of infringing the principle of equal rights for men and women in similar situations, that is to say on the death of a spouse, in the area of insurance against incapacity for work.

The Commission adds, however, that it would be of a different opinion if, on the death of her husband, a woman had automatically (that is to say, inevitably) to change schemes, with all the negative financial consequences which that would entail, whereas a man would do so only under special circumstances over which he could himself have some influence, for instance by claiming 'undue hardship'. The Commission considers that, if this were the case, it could with a reasonable degree of certainty be concluded from the order making the reference that AAW benefits could not have been granted in the case of Mrs van Gemert, whereas they could have been in the case of a widower for the period from 1 October 1987 (the date when Mrs van Gemert's benefits took effect, which coincides with the date on which she lost entitlement to AAW benefits) to 1 December 1987 (the nearest date on which, in principle, a widower who had lost his spouse on the same date as Mrs van Gemert could transfer from the AAW scheme to the AWW scheme).

Therefore the Commission proposes that the following reply be given to the second question:

'A provision of national law on the basis of which a woman loses the entitlement to benefits under national insurance against the financial consequences of long-term incapacity for work, if as the result of her husband's death she automatically becomes entitled to a survivor's pension, is incompatible with Article 4(1) of Council Directive 79/7/EEC if the actual application of that national provision entails in principle a reduction in income for a widow unfit for work, whereas for a widower unfit for work this is the case only in exceptional circumstances.'

C — Third question

17. The *Bestuur van de Nieuwe Industriële Bedrijfsvereniging* observes firstly that it is necessary to reply to the third question only if Article 32(1)(b) of the AAW is found to be incompatible with Article 4(1) of Directive 79/7 which, in its opinion, is not the case.

In any case it considers that, as this is a purely internal matter, the national court is perfectly free not to apply Article 32(1)(b) of the AAW or to interpret it as a rule which aims to prevent coexisting benefits or to adopt some other approach.

It adds, for the sake of completeness, that Community law never requires a Member State to pay concurrently two social security benefits which, like those provided for by the AWW and the AAW, are in the nature of basic benefits.

18. The *Netherlands Government* considers that, in view of the replies it has proposed for the first two questions, it is unnecessary to reply to the third.

19. The Commission observes that, as the Court has consistently held, it is for the national court to rule that a national provision found to be contrary to Community law is inapplicable and the consequences of this for the national legal system are in principle a question of national law. However, it adds that when these consequences are determined, the rights conferred by Community law on the persons concerned must not be adversely affected (see Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and the Attorney General* [1987] ECR 1453; Case 80/87 *Dik* v *College van Burgemeester en Wethouders, Arnhem* [1988] ECR 1601; and Case C-31/90 *Johnson* v *Chief Adjudication Officer* [1991] ECR I-3723). It considers that in the present case a rule of deduction, within the meaning given by the court making the reference, is sufficient to safeguard the rights which the widow may claim under Directive 79/7.

Therefore the Commission proposes that the following reply be given to the third question:

'Community law leaves the competent authorities of a Member State free to choose the form and the means of bringing the situation described (in the proposed reply to the second question) into conformity with the provisions of Article 4(1) of Council Directive 79/7/EEC.'

P. J. G. Kapteyn
Judge-Rapporteur