OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 19 January 1988 *

Mr President,
Members of the Court,

1. By order of 19 February 1987, received at the Court Registry on 19 March 1987, the Raad van Beroep (Social Security Court), Arnhem, asked the Court for a preliminary ruling on the application *ratione temporis* of Council Directive 79/7 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).

Those questions arose in two cases between A. Dik and A. Menkutos-Demirci and the Municipality of Arnhem and a case between H. G. W. Laar-Vreeman and the Municipality of Winterswijk. The plaintiffs, all married women, complain that they are denied the right to unemployment benefit provided for under the 'Wet Werkloosheidsvoorziening' (Law on Unemployment Benefit) (hereinafter referred to as the 'WWV'), which applied from 1 January 1965 (*Staatsblad* 1964, 485). The refusal by the two authorities to recognize the said benefit was based in particular on Article 13 (1) point l, according to which there is no entitlement to benefit in the case of 'workers . . . who, having the status of married women, may not be described as "wage earners" (kostwinster) under rules adopted by the competent Minister after consulting the Central Commission, or who do not live permanently separated from their husbands'.

That provision was repealed with retroactive effect as from 23 December 1984 by the Law of 24 April 1985 (*Staatsblad* 230) which entered into force on 1 May 1985. Article II, point A, thereof contains the following transitional provision:

'The amendment to Article I, point A, shall not apply to a worker who lost his employment before 23 December 1984 unless he was not in receipt at that date of the benefit under the Werkloosheidswet (Law on unemployment, hereinafter referred to as the "WW") . . . or unemployment benefit paid under a scheme applicable to persons whose relationship as regards work is not regarded as an employment relationship within the meaning of Article 6 (1) (a) (b) of the Werkloosheidswet.'

The abolition of the condition relating to wage-earner status does not apply to workers who have lost their employment or for whom the maximum period provided by the WW expired before 23 December 1984 and who, if there had been no such provision, would have been entitled to unemployment benefit within the meaning of the WW.

The plaintiffs Dik, Menkutos-Demirci and Laar-Vreeman became unemployed before 23 December 1984 and remained so thereafter and since they were not wage-earners they were denied entitlement to the benefit provided for by the WW. They thereupon challenged before the Raad van Beroep the decisions by which the representative bodies of the respective municipalities had rejected their claims. In order to determine the compatibility of the abovementioned restriction with Directive

* Translated from the Italian.

79/7 the national court has requested a preliminary ruling on two questions:

'(1) Does Directive 79/7 confer on the Member States a discretion to include in the law implementing the directive a transitional provision on the basis of which a "wage-earner" requirement continues to apply even after 23 December 1984 to a married woman who became unemployed before 23 December 1984?

(2) Is it compatible with the directive for a transitional provision such as that referred to in question 1 to be given retroactive effect from the date at which the period prescribed in Article 8 (1) of the directive expired? '

2. The answer to the first question is not difficult. In the judgment of 4 December 1986 in Case 71/85 *(State of the Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855), it was precisely in relation to the Netherlands rule on unemployment benefit that the Court interpreted the obligation not to discriminate between men and women which Article 4 (1) of Directive 79/7 lays down in respect of social security. I would recall that at the time of the facts of that case the Netherlands had not yet implemented Directive 79/7. Article 13 (1) of the WWV was therefore in force and a transitional rule was in the process of being adopted and was to be incorporated in the Law of 24 April 1985 (for more details of the Netherlands rules on unemployment benefit and the problems raised in that country by the transposition of Directive 79/7 I should like to refer to my Opinion in that case delivered on 2 July 1986).

Like the judgment of 24 June 1986 in Case 150/85 *(Drake* v *Chief Adjudication Officer* [1986] ECR 1995), the judgment in Case 71/85 recognized the direct effect of Article 4 (1). The Court held in particular that 'where no measures have been adopted to implement Council Directive 79/7/EEC, Article 4 (1) thereof . . . could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with that article. In the absence of measures implementing that article women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the said directive has not been implemented, those rules remain the only valid point of reference' (paragraph 23).

As early as that occasion, this Court held, at least by implication, a transitional rule to be incompatible with the direct effect of the principle of equal treatment. Referring to its judgment of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, according to which the States' discretion in relation to the choice of methods for complying with their obligation does not prevent the provisions of a directive from being relied upon, the Court held in paragraph 25 that 'a Member State may not invoke its discretion with regard to the choice of methods for implementing a principle of equal treatment in the field of social security laid down in Directive 79/7/EEC in order to deny all effect to Article 4 (1) thereof, which may be invoked in legal proceedings even though the said directive has not been implemented in its entirety'.

I would also recall to mind that in its judgment of 24 June 1987 in Case 384/85 *(Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865), the Court was concerned with the compatibility of a transitional and retroactive rule with Article 4 (1). In that case, called upon to determine whether the direct effect of the principle of non-discrimination affected a transitional rule adopted after the entry into force of the directive and intended to extend the discriminatory effects of the previous rule, the Court held that 'the directive does not provide for any derogation from the principle of equal treatment'. It added 'that a Member State may not maintain beyond 22 December 1984 any inequalities of treatment which have their origin in the fact that the conditions for entitlement to benefit are those which applied before that date. That is so notwithstanding the fact that those inequalities are the result of transitional provisions adopted at the time of the introduction of a new benefit' (paragraph 10). Finally, the Court confirmed that in the absence of sufficient implementation of the directive after its entry into force, the sole valid criterion is the application of the same scheme to men and women who are in an identical situation.

There is no doubt that those principles apply to the present case.

3. The second question concerns the possibility of giving retroactive effect to measures implementing a directive which were adopted after the expiry of the period allowed to the Member States for that purpose. The question put by the national court is related to the particular situation in which it is called upon to give judgment but more generally it is concerned with the manner in which obligations under directives are implemented in national law. The lawfulness of retroactive laws must therefore be determined on the basis of national laws.

From the Community point of view it seems to me that in any event this question, as the Commission of the European Communities suggests, should be answered in the affirmative. It is true that in the present case the direct effect of Article 4 (1) allows it to be relied upon from the date by which the directive had to be implemented; in that respect, therefore, the possible retroactivity of the rules implementing the directive is of no consequence.

On the contrary, in cases where such effect cannot be recognized I think that to deny Member States the possibility of *subsequently* taking action by making implementation retroactive to the expiry of the period provided for implementation would mean preventing the harmonizing effect inherent in directives from unfolding in all the legal systems from the same date.

4. On the basis of those considerations I propose that the following answers should be given to the questions put by the Raad van Beroep, Arnhem, by order of 19 February 1987 in the cases between A. Dik and A. Mekutos-Demirci and the

Municipality of Arnhem Commune and between H. G. W. Laar-Vreeman and the Municipality of Winterswijk:

'(1) As from 23 December 1984, the appointed day for the implementation of Council Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, Article 4 (1), which prohibits any discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, has direct effect.

In the absence of any measures sufficiently implementing the said provision married women are entitled to have applied to them the scheme established for men in like circumstances. They may therefore rely before the national courts on the rights conferred on them by Article 4 (1) notwithstanding a transitional rule by virtue of which a married woman who became unemployed remains subject even after that date to a condition requiring her to have the status of a wage-earner;

(2) Implementing provisions enacted after the expiry of the period prescribed for implementation which makes implementation retroactive to the expiry of the said period are not incompatible with Article 4 (1) of Directive 79/7.'