2. In view of the fundamental importance of the principle of equality of treatment for men and women, Article 1 (2) of Directive No 76/207 on the implementation of that principle as regards access to employment and working conditions, which excludes social security matters from the scope of the directive, must be interpreted strictly. It follows that the exception to the prohibition of discrimination on grounds of sex provided for in Article 7 (1)(a) of Directive No 79/7 on the progressive implementation of the principle of equal treatment in matters of social security applies only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

3. Article 5 (1) of Directive No 76/207 must be interpreted as meaning that it does not allow the Member States the freedom to exempt from the application of the principle of equality of treatment an express or implied condition in a contract of employment concluded on the basis of a collective agreement, if that condition has the effect of terminating 02031the contract of employment on the ground of the age attained by the employee and the relevant age is determined by the age — which is different for men and women — at which the employee becomes entitled to a retirement pension.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 18 September 1985

My Lords,

This case comes to the Court by way of a reference dated 2 November 1984 for a preliminary ruling under Article 177 of the EEC Treaty by the Hoge Raad (Supreme Court) of the Netherlands in an action pending before that court between Mrs Vera Mia Beets-Proper and F. Van Lanschot Bankiers NV.

On 12 May 1969 Mrs Beets-Proper took up employment with Vermeer & Co., a Dutch bank. In 1972 Vermeer & Co. amalgamated with F. Van Lanschot Bankiers NV ('Van Lanschots'). Van Lanschots took on all the staff of Vermeer & Co. According to the reference the employment relationship between Mrs Beets-Proper and Van Lanschots is subject to the collective labour agreement for the banking sector of 1980 and 1981 and the rules of Van Lanschots' pension scheme. Article 1 of those rules defines the pensionable date ('de pensioendatum') as the first day of the month following the month in which male members of the scheme attain the age of 65 and female members the age of 60. Article

3 (1) of the same rules provides *inter alia* that members of the scheme are entitled to an old-age pension as from the pensionable date.

A document on the case file dated 7 May 1969, which I take to be Mrs Beets-Proper's original contract of employment with Vermeer & Co. contains no reference to any age or date for termination of the contract of employment. Neither, it seems, does the collective labour agreement for the banking sector of 1980 and 1981, although it does refer to conditions regarding pensions at some length in Article 20a and Protocols I — V. However, it appears that under Dutch law a contract of employment automatically terminates when the employee reaches the age stipulated in the pension scheme as being the age at which he becomes entitled to a pension (e.g. paragraph 6 of the Opinion of the Procureur-Generaal to the Hoge Raad in the present case; see paragraphs 2.6 and 4.4 of the Opinion of the Netherlands Commission on Equal Treatment for Men and Women at Work, also in the present case, dated 14 February 1983).

Mrs Beets-Proper reached the age of 60 in August 1982. Van Lanschots took the view that her contract of employment accordingly terminated automatically on 1 September 1982. There was no formal dismissal (and hence no request for the consent of the local employment office to a dismissal as required by Dutch law), but from 1 September 1982 Mrs Beets-Proper was no longer admitted to work.

On 16 September 1982 Mrs Beets-Proper applied to the President of the Arrondissementsrechtbank (District Court), Amsterdam, for an interlocutory injunction requiring Van Lanschots to allow her to perform her agreed work as secretary to the directors at Van Lanschots' offices in Amsterdam and to pay her salary from 1 September 1982 until such time as her contract of employment be terminated in a legally valid manner. The President dismissed her application by a judgment of 7 October 1982. Mrs Beets-Proper appealed against that judgment to the Gerechtshof (Regional Court of Appeal), Amsterdam.

On 14 February 1983 the Netherlands Commission on Equal Treatment for Men and Women at Work, whose opinion Mrs Beets-Proper had also sought, delivered an opinion favourable to Mrs Beets-Proper, in which it found (at paragraph 5.1) that direct discrimination between men and women was practised to the detriment of Mrs Beets-Proper by the application of different age limits for the termination of the contract of employment. The Gerechtshof was informed of the Opinion, but it nevertheless upheld the judgment of the President of the Arrondissementsrechtbank by a judgment of 19 May 1983. On 29 June 1983 Mrs Beets-Proper appealed on a point of law against the Gerechtshof's judgment to the Hoge Raad (Supreme Court) of the Netherlands.

The proceedings before the Hoge Raad turn on the proper interpretation of Article 1637ij of the Dutch Civil Code, the first two paragraphs of which provide as follows:

'(1) As regards the conclusion of a contract of employment, staff training, the terms of employment, promotion and the termination of the contract of employment, an employer may not make any distinction between men and women, either directly or indirectly, for example by reference to marital status or family circumstances. The terms of employment do not include benefits or entitlements under pension schemes. The first sentence of this paragraph shall not apply in those cases in which an employee's sex is a decisive factor.

(2) Any clause which is contrary to the first sentence of paragraph 1 shall be void.'

In the national proceedings Mrs Beets-Proper argued that, in so far as the definition of the pensionable age could be read as an implied clause for the termination of the employment contract, it was contrary to the first sentence of Article 1637ij(1) because it made a distinction between men and women, and hence was void pursuant to Article 1637ij(2); Van Lanschots, on the other hand, contended that the definition of pensionable age in its pension scheme rules came within the proviso contained in the second sentence of Article 1637ij(1), according to which the terms of employment which are subject to the prohibition on sex discrimination laid down in the preceding sentence do not include benefits or entitlements under pension schemes. The Procureur-Generaal to the Hoge Raad, who delivered his Opinion on 28 September 1984, summed up the issue thus raised as being whether or not Article 1637ij of the Dutch Civil Code prohibits a distinction being made between men and women with regard to the age at which *entitlement* to pension arises where it is also the age at which the person is *obliged* to retire.

Article 1637ij of the Dutch Civil Code was introduced by the Law of 1 March 1980 (Staatsblad 86) 'adapting the Dutch legislation to the Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women' (i.e. Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Official Journal 1976, L 39, p. 40). The Hoge Raad accordingly took the view that, in order to interpret the proviso contained in the second sentence of Article 1637ij(1) of the Dutch Civil Code, it was necessary to clarify the scope of the relevant provisions of Directive 76/207, and in particular Articles 1 and 5 thereof. To this end it referred the following question to the Court for a preliminary ruling:

'Does Council Directive 76/207 of 9 February 1976 allow the Member States the freedom not to include among the conditions of employment in respect of which equal treatment for men and women must be laid down pursuant to that Directive an express or implied condition concerning the termination of the contract of employment on the ground of the age attained by the employee, where that condition relates to the age at which the employee becomes entitled to a pension?'

In the observations which they have submitted to the Court on that question, Mrs Beets-Proper, the Danish Government and the Commission submit that it should be answered in the negative. Van Lanschots, the Government of the Netherlands and the Government of the United Kingdom, on the other hand, submit that the question should be answered in the affirmative.

Mrs Beets-Proper stresses that sex equality is a fundamental principle of Community law, any exceptions to which must be strictly construed. The exception provided for in Article 7 (1) of Directive 79/7 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) concerns only the grant of pensions and does not extend to the termination of a contract of employment. The latter is covered by Article 5 of Directive 76/207, read with Articles 1 (1) and 2 (1) thereof, which makes no exceptions to the rule of equal treatment for men and women which it lays down. Directives 76/207 and 79/7 cover entirely distinct areas: questions

of termination of employment fall exclusively within the ambit of Directive 76/207. There is no link between conditions of employment and pensionable age either in Community legislation or as a result of the judgment of the Court of Justice in Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555, which can be distinguished on the grounds that it concerned entitlement to voluntary redundancy payments whereas the present case concerns the continuation of an employment relationship. The fixing of an age at which an employment relationship is to terminate — even if it is by way of a pension scheme — remains in all circumstances an element of the employment relationship (paragraph 21 of the Court's decision in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365 at p. 1377)('*Defrenne (No 3)*'). Community law's toleration of a difference in pensionable age (which is in any event provisional) in no ways implies toleration of a difference in age for the purpose of terminating an employment contract.

The Commission asserts first that the fixing of an age limit for terminating a contract of employment plainly falls within the working conditions to which Directive 76/207 applies — (*Defrenne (No 3)*, paragraph 21; *Burton*, paragraph 9). Secondly, the Commission submits that the fact that the termination of a contract of employment is linked to pensionable age does not take such a working condition outside the ambit of Directive 76/207. Such a condition is not excluded from the Directive by Article 1 (2) of that Directive; nor is it within the scope of Directive 79/7 as defined by Article 3 (1) thereof. It follows, in the Commission's view, that the Member States must take the necessary measures to render such clauses unlawful in their national law pursuant to Article 5 (2)(b) of Directive 76/207. *Burton* is distinguishable because the redundancy payments with which that case was concerned were directly linked to pension rights and also because entitlement to them was conditional upon the claimant's being within five years of the pensionable age laid down in national legislation, which brought it within the exception provided for in Article 7 (1) of Directive 79/7, whereas the present case concerns the termination of the contract of employment.

The Danish Government says that the Danish legislation implementing that Directive has always been interpreted as meaning that the principle of equality in working conditions prohibits the retention or introduction of retirement ages which differ according to the sex of workers, although workers are free to choose to retire before reaching compulsory retirement age.

On the other side Van Lanschots argue that Article 1 (2) of Directive 76/207 excludes from the scope of that Directive matters of social security, which include both statutory and occupational pension schemes. Directive 79/7 covers only statutory pension schemes (Article 3 (1) thereof), and leaves occupational pension schemes to be dealt with later (Article 3 (3) thereof). Article 7 (1)(a) of Directive 79/7 allows Member States to fix different pensionable ages for State pensions; the Council's failure to adopt the proposal concerning occupational pension schemes (Official Journal 1983, C 134, p. 7) means that at the present time there

is no prohibition under Community law on fixing different pensionable ages in occupational pension schemes. It follows, in Van Lanschots' submission, that it was entitled at the material time to stipulate in its pension scheme different pensionable ages for men and for women. Under Dutch law, apart from Article 1637ij of the Dutch Civil Code, the termination of the contract of employment at different ages for men and for women is the automatic consequence of the stipulation of different pensionable ages for men and for women in the pension scheme. It follows that as long as Member States have the freedom to tolerate different pensionable ages for men and for women, the consequence thereof, that is to say the termination of the contract of employment at different ages for men and for women as a result of the attainment of pensionable age, is also allowed. Paragraphs 14 — 16 of the Court's decision in *Burton* and the Advocate General's Opinion in that case support this result.

The Government of the United Kingdom broadly supports this approach.

The Government of the Netherlands approaches the question in a slightly different way from Van Lanschots and the Government of the United Kingdom. It says that an (express or implied) condition concerning the termination of a contract of employment on the ground of the age attained by the employee falls within the ambit of Directive 76/207, even where that condition relates to the age at which the employee becomes entitled to a pension but that such a condition does not necessarily constitute discrimination prohibited by that Directive. After referring to the *Burton* judgment and Article 7 of Directive 79/7, it submits that there is no discrimination within the meaning of Directive 76/207 where the difference in the fixing of the date of termination of the contract of employment of men and of women derives from the fact that the pensionable age laid down in a pension scheme is not the same for men as for women.

The Hoge Raad thus has to decide whether the relevant terms of the employment relationship fall within the first sentence of Article 1637ij(1) of the Civil Code, in which case they are void under paragraph (2), or within the second sentence of paragraph (1), in which case they are valid. Since this Article was introduced in order to comply with Directive 76/207, the Hoge Raad, it is to be assumed, will construe those provisions in accordance with the interpretation of the Directive given by this Court in this case (Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraphs 26 and 28).

In such circumstances no question of the direct effect of the Directive arises in this case.

Directive 76/207, which had to be implemented by August 1978, recites that: 'Equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia to be furthered.' The Court has stressed that the elimination of discrimination based on sex forms part of the fundamental rights, the observance of which it has a duty to ensure (*Defrenne (No 3)*, paragraph 27; Case 165/82 *Commission* v *United Kingdom* [1983] ECR 3431 at p. 3448; Joined Cases 75 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509 at p. 1530.

The Directive provides:

Article 1 (1)

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

Article 1 (2)

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

Article 2 (1)

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

Article 5

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

2. To this end, Member States shall take the measures necessary to ensure that:

(a) ...;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) ...'.

The fixing of an age for retirement or termination of employment, in my view, as a matter of interpretation, falls within the words 'working conditions including the conditions governing dismissal'. This view is supported by the Court's judgments in *Defrenne (No 3)*, paragraph 21, Case 163/82 *Commission* v *Italy* [1983] ECR 3273 at paragraph 9, where a provision of national law allowing women to continue working up to the retirement age applicable for men was said to be amongst 'the most important working conditions', and in *Burton*, paragraph 9.

A provision which fixes a different age for retirement for men and women does not accordingly guarantee to men and women the same conditions without discrimination on grounds of sex, and is contrary to Article 5 (1). Member States must take the necessary measures to ensure that such provisions in individual contracts of employment shall be, or may be declared,

null and void or may be amended, unless it has been excluded from the effect of the Article by other provisions of Community law.

I do not consider that Directive 79/7, adopted pursuant to Article 1 (2) of Directive 76/207 has that effect. Directive 79/7 is dealing only with statutory schemes (Article 3 (1)), and social security strictly understood, but not with private pension schemes which, although the subject matter of a proposal pursuant to Article 3 (3) of that Directive, have not yet been dealt with.

In relation to Directive 79/7 it is to be noted that under Netherlands legislation the statutory pensionable age for men and women is identical — 65 years, and the evidence before the Court suggests that Article 7 (1)(a) of the Directive would not be relied on, if indeed that Article enables a Member State to introduce discriminatory rules as opposed to maintaining in force those which already existed (Paragraph 2.5 of the Opinion dated 14 February 1983 of the Netherlands Commission on Equal Treatment for Men and Women at Work).

I do not read Article 7 (1)(a) in any event as covering the position of private employers. It is limited to old age and retirement pensions provided under statutory schemes provided by the State. On the other hand, leaving aside the question as to whether retirement pensions can be considered as deferred pay for the purposes of Article 119 of the EEC Treaty, there is nothing in that Directive, as opposed to the proposal to which I have referred, which prohibits different ages for access to private retirement pension schemes.

Even if different ages may be adopted for private pension schemes, it does not follow that different ages may be adopted for compulsory retirement or cessation of work, even if those ages deliberately are made to coincide with the age at which the worker becomes entitled to a pension.

In this regard the *Burton* decision is not on all fours since there access to a voluntary redundancy scheme was tied to a period related to the ages adopted for the purposes of a national social security scheme. In this case, unlike *Burton*, the ages for men and women coincide under the national scheme. Even if, by analogy with Article 7 (1)(a) of Directive 79/7 and *Burton*, access to benefits under a private pension scheme can be at different ages for men and women, and other benefits be geared to the same age differential, it does not seem to me that it follows that compulsory cessation of work and retirement is on the same basis. A woman may presently be entitled to take a pension earlier than a man; it does not follow as a matter of Community law that she can be compelled to leave work earlier. In my opinion Article 5 (1) is clear and is not cut down in this respect by Directive 79/7 or by the decision in *Burton*. It is not affected by the provision of Netherlands law that retirement automatically occurs on entitlement to a pension.

Accordingly, it seems to me that the question referred by the Hoge Raad should be answered on the following lines:

Council Directive 76/207 of 9 February 1976 does not allow the Member States the freedom not to include among the conditions of employment in respect of which equal treatment for men and women must be laid down pursuant to that Directive an express or implied condition concerning the termination of the contract of employment on the ground of the age attained by the employee, even where that condition relates to the age at which the employee becomes entitled to a pension.

The costs of the parties to the main action fall to be decided by the national court. The costs incurred by the Government of Denmark, the Government of the Netherlands, the Government of the United Kingdom and the Commission are not recoverable.