OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 20 November 1991 *

Mr President,
Members of the Court,

1. The High Court of Justice, Queen's Bench Division, has referred to the Court of Justice for a preliminary ruling two questions concerning the interpretation 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. [1]

The High Court asks essentially whether in view of the wording and purpose of the directive the British legislation concerning entitlement to application of the *higher pensioner premium* (to which I shall refer henceforth for the ease of reading as 'the premium') is incompatible with the Community directive inasmuch as men may qualify for it between the ages of 65 and 70, but not women.

2. It is no easy task to describe the national legislation in question in any reasonably concise manner, given its extreme complexity. In addition, the context is made even more complicated by the fact that the premium in question, as will be shown, is not — at least technically — received as a payment in its own right, but is merely one of the elements taken into account in calculating housing benefit: where certain conditions are met, however, it serves to increase the amount of housing benefit.

The housing benefit scheme is set out in section 20 of the Social Security Act 1986; the detailed rules for its application are set out in the Housing Benefit (General) Regulations 1987. Entitlement to the benefit and, in this case, its amount are calculated on the basis of the ratio of the beneficiary's income to an 'applicable amount'; [2] that amount is the aggregate of allowances and premiums available to the various categories of claimants.

One of the premiums which may be included in the applicable amount for the purpose of calculating housing benefit is precisely the premium at issue in this case. It is available to claimants who are aged less than 80 but not less than 60 [3] and who are also in receipt (or were at least in receipt on qualifying for a retirement pension) of an invalidity pension. [4]

* Original Language: Italian.

1 — OJ 1979 L 6, p. 24.

2 — More precisely, housing benefit is equal to the total amount of the rent if income is lower than the applicable amount; if the income is higher than the applicable amount the benefit is reduced by 65% of the amount by which the income exceeds the applicable amount.

3 — Paragraph 10(1)(b)(i), Part III of Schedule 2 to the Housing Benefit (General) Regulations 1987.

4 — Paragraph 12(1)(a)(i) of the abovementioned schedule.

The conditions for obtaining an invalidity pension,[5] which is payable to persons who for reasons of ill-health are unable to work, are laid down in section 15 of the Social Security Act 1975. In principle, an invalidity pension is payable, if all the requisite conditions are met, on reaching pensionable age (which was fixed by section 27(1) of the 1975 Act at 60 for women and 65 for men; alternatively, if the person has passed that age but remains in regular employment it remains available for a maximum of five years after pensionable age has been reached (section 27(5) of the Act provides in fact that persons are deemed to retire five years after having reached pensionable age).

However, by virtue of section 30(3) of the Social Security Act 1975 and the Social Security (Widow's Benefit and Retirement Pension) Regulations 1979 it is also open to those who are already in receipt of an old-age pension, to which they have become entitled after retirement from regular employment or otherwise, to elect to receive an invalidity pension instead of an old-age pension, but that option is limited to a maximum of five years, which run from the date on which pensionable age is reached. In other words, the possibility of electing for an invalidity pension, and the right to receive it, ceases in any event at the age of 65 for a woman and 70 for a man.

Lastly, it should be noted that when entitlement to the invalidity pension which is an essential prerequisite for obtaining the premium ceases, that does not affect entitlement to the premium itself, which thus continues to form part of the applicable amount for the purposes of calculating housing benefit, even after that date.

3. And now I come to the facts of the case. Mrs Smithson was in receipt of an invalidity pension for five years prior to reaching pensionable age. Thereafter she began to draw an old-age pension. It is established that if the legislation at issue had been in force when she reached the age of 60 she would have been entitled to application of the premium, since she met the conditions laid down in the relevant provisions, without its even being necessary to consider the question of election not to draw an old-age pension,[6] an election which Mrs Smithson had been unable to make because when the new housing scheme came into effect she was already 67. The dispute has therefore arisen in fact because the premium was introduced when she had already passed the age-limit for electing to draw an invalidity pension rather than an old-age one.

Nevertheless, it is useful to note that the problem is a general one and that the obstacle encountered by her has a signif-

5 — It should be pointed out that the phrase 'invalidity pension' is intended to refer to a financial allowance to compensate for loss of income due to incapacity for work on grounds of ill-health; such a 'pension' is therefore essentially paid to those who have not yet reached pensionable age or who are in any case regarded as potentially employable.

6 — And in fact anyone who was entitled from the age of 60 to housing benefit and who is in receipt of a severe disability allowance for the eight weeks prior to attaining the age of 60 (an allowance payable, moreover, to anyone in receipt during that period of an invalidity pension), automatically became entitled to have the higher pensioner premium applied — that is, regardless of sex and the different pensionable ages.

icance beyond the fact that her case arose at a time when the premium was not yet in existence. The fact is that it is impossible for a woman between the ages of 65 and 70 to elect for an invalidity pension and therefore it was not possible in any case, during that period, to fulfil one of the essential conditions for application of the premium.

4. In the first question the High Court asks, in essence, whether the fact that a woman between the ages of 65 and 70 cannot, unlike a man, obtain the benefit of the higher pensioner premium provided for in Paragraph 10(1)(b)(i) of Schedule 2 to the Housing Benefit (General) Regulations 1987 constitutes discrimination prohibited by Article 4 of Directive 79/7/EEC.

Article 4(1) of that directive prohibits any discrimination whatsoever on ground of sex, in particular, in the areas to which it applies, as regards 'the scope of the schemes and the conditions of access thereto' (first indent).

Now in this case the difference in treatment as between men and women derives from the fact that application of the premium is linked to receipt of the invalidity pension, with the result that women have five years less than men in which to qualify for the premium. Essentially it is the conditions of access to the premium which differ as between men and women; in fact both may commence to benefit therefrom at the age of 60, but whilst men may qualify for it for ten years thereafter, women may only do so for five.

Having thus identified the discrimination at issue, I should point out that the question referred by the High Court, as is apparent from the order making the reference, is to be understood as seeking to ascertain whether the premium, given its special characteristics, falls within the ambit *ratione materiae* of Directive 79/7 and, if so, whether the alleged discrimination may be justified under Article 7(1)(a) of the directive, in other words whether it is a necessary consequence of the different pensionable ages.

5. As far as the ambit of the directive is concerned, I note first that according to Article 3(1) it applies to statutory schemes which provide protection against, *inter alia*, the risks of invalidity and old-age (subparagraph (a)), and to provisions concerning social assistance, in so far as it is intended to supplement or replace such schemes (subparagraph (b)).

The United Kingdom argues that the housing benefit scheme as such is not covered thereby, and therefore falls generally outside the scope of the directive. It is in fact a general scheme, which is related to income and the amount of the rent: it may be said to be a statutory scheme to combat poverty. In other words, housing benefit being granted to heterogeneous

categories of persons, and thus to persons not necessarily protected against one of the risks listed in Article 3(1) of the directive, it escapes the ambit of the directive.

As to that, I would merely observe that such an argument is not, in principle, sufficient to exclude the applicability of the directive as regards the premium. I recall in that regard the judgment in *Drake*,[7] in which the Court stated that 'Article 3(1) must be interpreted as including *any benefit which in a broad sense forms part of one of the statutory schemes referred to or a social assistance provision intended to supplement or replace such a scheme*.'[8] That means that if it is concluded that the premium does in fact constitute protection against the risks of old age and/or invalidity, it will not be possible to escape the conclusion that it is part of a statutory scheme providing protection against those risks or a form of social assistance intended to supplement that protection.

It is essential to interpret Article 3 broadly, as was emphasized by the Court in *Drake*, in order to guarantee the harmonious implementation of the principle of equal treatment within the Community (paragraph 23). Any other approach would enable Member States to escape their obligations under the directive with ease: they would only need in that case to include in a scheme of general scope, or at least one not specifically intended to provide protection against one of the risks set out in Article 3 of the directive, a benefit which was, on the contrary, taken in isolation, designed precisely to provide protection against those risks.

6. Returning to the facts of the case in hand, I would say next that I cannot endorse the United Kingdom's view that the premium may be regarded in isolation from the benefit of which it forms part because it is merely one of the elements which go to make up the applicable amount for the purposes of calculating housing benefit and not an amount paid out in its own right.

I consider it quite irrelevant, in fact, that the premium is not technically a financial benefit paid as such to the beneficiary. On the contrary, what is relevant in my view is the fact that the premium constitutes, *de facto* and in every case, an economic advantage for those who benefit from it, who become entitled when such a component is applied to higher housing benefit.

In view of the fact that according to the contested United Kingdom legislation the purpose of that increase is to provide additional support for pensioners who have

7 — Judgment of 24 June 1986 in Case 150/85 [1986] ECR 1995, paragraph 23.

8 — The emphasis is mine.

a recognized form of invalidity or at least a disability I do not think there can be any doubt that the premium is covered by Directive 79/7.

It is in essence a 'benefit' which, although encompassed in the more general housing benefit scheme, may be separated from it in as much as it has a well-defined purpose and scope: to aid pensioners who are suffering particular hardship. Consequently, in view of the categories of persons for whom it is intended and its effects, the premium rightly belongs to the scope *ratione materiae* of Directive 79/7. More especially, inasmuch as it is intended to provide additional support for disabled pensioners to enable them to meet the cost of housing, it should be regarded as a form of social assistance intended to supplement the statutory schemes providing protection against the risks of old age and invalidity.

7. Once it has been established that the premium falls within the scope of Directive 79/7, it must be ascertained whether the discrimination already identified, which lies in the fact that unlike men, women cannot claim the benefit of the premium itself between the ages of 65 and 70, falls outside the ambit of the directive because it is a necessary consequence of the different pensionable ages for men and women. In other words, it must be determined whether the difference in treatment is discrimination which is 'justified' under Article 7(1)(a) of the directive, which provides that Member States may exclude from its scope the determination of pensionable age and the possible consequences thereof for other benefits.

Before examining the scope of that exception in relation to the case before us, I consider it appropriate to recall the fact that the Court has repeatedly confirmed that the elimination of sex discrimination forms part of the fundamental rights the observance of which it has a duty to ensure [9] and has stated, moreover, that 'in determining the scope of any derogation from an individual right such as the equal treatment of men and women . . . , the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view . . . '. [10] It follows, as the Court has made clear, that the exception in Article 7(1)(a) must be interpreted restrictively. [11]

8. Now the first question to be asked in the case before us is whether the various conditions for access to the benefit of the premium, and in particular the fact that women have five years less in which to qualify for it, are a necessary consequence of the fixing of different minimum pensionable ages for men and women. At first sight, there would seem to be no such link at all; indeed, the fact that pension entitlement arises at different ages has no effect on the premium inasmuch as the right

9 — See the judgment of 15 June 1978 in Case 149/77 *Defrenne* [1978] ECR 1365, paragraphs 26 and 27.

10 — Judgment of 15 May 1986 in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 38.

11 — See the judgments of 26 February 1986 in Case 152/84 *Marshall* [1986] ECR 723, paragraph 36, and Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 38.

to benefit from the premium arises at a fixed common age (60 years). That means that for the purposes of determining whether such a premium is to be applied, both men and women are regarded as 'pensioners' as from the same age. Consequently, no causal link has been established between the different pensionable ages and the conditions for benefiting from the premium.

Such a conclusion is not surprising inasmuch as the discrimination does not reside, as was already pointed out in the description of the legislation at issue, at least directly, in a link with the fixing of different pensionable ages, but in the fact of having linked the premium to the age at which entitlement to an invalidity pension automatically ceases, that age being different for men and for women (70 and 60 years respectively).

Consequently, it is necessary rather to determine whether there is a causal link between the premium and the invalidity pension, and between the latter and the old-age pension. However, I do not consider that such an examination is indispensable, nor that it is required by a correct interpretation of Article 7(1)(a) having regard precisely to the fact that that provision must be interpreted restrictively.

Let me explain: under the provision to which I have just referred Member States are permitted to exclude from the scope of equal treatment solely the determination of pensionable age, and the possible consequences thereof for other benefits. It is clear that those consequences must be ones which depend *directly* on the different pensionable ages; to admit that those consequences could, in their turn, be the result of a different benefit (provided that — and this remains to be established — the latter is itself a consequence of the different pensionable ages) would be to extend the scope of the provision unreasonably.

On the other hand, and without its being necessary to ascertain in the case before us whether the automatic discontinuance of entitlement to the invalidity pension at different ages is a consequence of the determination of pensionable age, for the purposes and consequences to which Article 7 refers, I need only point out that that result may be achieved in a manner which does not discriminate, for instance by adopting as a condition for granting the benefit of the premium the *existence* of invalidity rather than receipt of the invalidity *pension.*

Consequently, I consider that the answer to the first question referred by the High Court, as I have restated it, should be that a benefit such as the higher pensioner premium, which is related to the age and invalidity of the claimant, is a form of social assistance intended to supplement a statutory scheme within the meaning of Article 3(1)(b) of Directive 79/7. Therefore, the fact that one of the qualifying conditions for application of such a premium is itself a benefit (the invalidity pension) the discontinuance of which is determined by different pensionable ages does not in any event constitute a necessary consequence of the existence of such a difference.

9. In the second question the High Court asks whether Article 4 of Directive 79/7 entitles a woman aged between 65 and 70 to elect on the basis of the relevant national provisions not to draw an old-age pension but to draw an invalidity pension and thus benefit from the higher pensioner premium. In substance, and for the purposes of the relevant Community law, the question thus raised is whether the discontinuance of the invalidity pension at different ages falls outside the scope of the directive because it is covered by the exception in Article 7(1)(a) thereof.

The conclusion I reached regarding the first question in fact makes the second superfluous, as far as the outcome of the main case is concerned. However, for the sake of completeness and should the Court choose not to adopt the approach I have suggested, I consider it appropriate to consider whether the discontinuance of entitlement to an invalidity pension at different ages for men and for women is a necessary consequence of the difference in pensionable age. As regards the interpretation of Article 7(1)(a) the general considerations already set out as regards the first question apply.

I would point out once again that: (a) payment of the invalidity pension ceases automatically five years after pensionable age has been reached; (b) pensionable age has been determined as 65 years for men and 60 for women; (c) a person is in any case regarded as a pensioner five years after having reached pensionable age.

10. In view of that I think it can no longer be denied that the discontinuance of entitlement to the invalidity pension has been determined not on the basis of the different pensionable ages, but on the basis of the age of retirement. However, Article 7(1)(a) of Directive 79/7 tolerates discriminatory practices only if they are a necessary consequence of different pensionable ages, and not if they may be related to different retirement ages. As a matter of fact the

The date on which entitlement to an invalidity pension ceases coincides therefore in fact with retirement. That circumstance is easily explained by the fact that the invalidity pension, being a benefit the payment of which is attributable to loss of income due to incapacity for work, may well be paid beyond the date on which entitlement to an old-age pension arises, in particular up to the date which has been fixed for retirement, precisely because it has been expressly provided that regular employment may be continued even after pensionable age has been reached. [12] In the case before us now, therefore, as the United Kingdom itself emphasized in its observations, the possibility open even to those who are already in receipt of an old-age pension to renounce the latter and draw an invalidity pension has been made available on the basis that many people take up a new job when their employment has come to an end. As a result, the invalidity pension is payable, if the requisite conditions are fulfilled, to persons who are regarded as at least potentially still 'employed'.

12 — It is clear that entitlement to an invalidity pension may arise, for those who have remained in regular employment after reaching pensionable age, only after entitlement to an old-age pension has arisen.

circumstance that women become entitled to a pension before men (a discrimination which is authorized inasmuch as it is based on the age at which they may commence to draw an old-age pension) does not mean, as regards Community law, that they may be *obliged* to go into retirement earlier, especially as the system in force in the United Kingdom does not provide that retirement must follow automatically on becoming entitled to a pension. In other words, the fixing of different pensionable ages cannot result in women being prevented from working as long as men. [13]

The age at which a person must cease work therefore forms part of the *working conditions*, as was stated in that case, governed by Article 5 of Directive 76/207. [14] In that regard I would refer to the judgment delivered by the Court on 26 October 1983 [15] in which the Court stated that a national provision to the effect that women, even if they satisfied the criteria for entitlement to an old-age pension, could elect to continue working up to the retirement age-limit applicable for men, was to be regarded as one of the 'most important working conditions'.

In addition to that, the Court held that the exception in Article 7 did not apply where a woman was dismissed solely because she had reached or passed the age at which she became entitled to a State pension, which age was different for men than for women; [16] nor was it held to apply to a contractual clause terminating the employment relationship on the basis of the worker's age, which was linked to the different ages at which workers became entitled to a pension. [17]

In short, whilst the Court has recognized that benefits linked to national rules providing for a minimum pensionable age which differs for men and women may derogate from the principle of equal treatment, [18] it has always distinguished the moment at which entitlement to an old-age pension arises from that at which retirement occurs, even if those moments may coincide. In conclusion, it seems clear that in the case before us today the discontinuance of entitlement to an invalidity pension five years after reaching pensionable age is essentially linked to retirement age, one of the working conditions referred to in Directive 76/207, and is therefore not covered by the exception in Article 7(1)(a) of Directive 79/7. Consequently, the automatic disconti-

13 — Cf the Opinion of Advocate General Sir Gordon Slynn in Case 152/84 *Marshall* [1986] ECR 723, at pages 725 et seq., in particular p. 730.

14 — Council Directive of 9 February 1976 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 (OJ 1976 L 39, p. 40).

15 — In Case 163/82 *Commission* v *Italy* [1983] ECR 3273, paragraph 9.

16 — Judgment of 26 February 1986 in *Marshall*, cited above, paragraph 38.

17 — Judgment of 26 February 1986 in *Beets-Proper*, cited above, paragraph 40.

18 — Judgment of 16 February 1982 in Case 19/81 *Burton* [1982] ECR 555.

nuance of the right to receive an invalidity pension at a certain age, even though that age is linked to the different pensionable ages determined for men and for women, is not a necessary consequence of the existence of such different ages.

11. In the light of those considerations I propose therefore that the Court rule as follows on the questions raised by the High Court of Justice, Queen's Bench Division:

1. (a) efit such as the higher pensioner premium which is linked to the age and invalidity of the person benefiting therefrom is a form of social assistance intended to supplement a statutory scheme within the meaning of Article 3(1)(b) of Directive 79/7.

   (b) The fact that one of the conditions for entitlement to the benefits of the higher pensioner premium consists in a benefit (invalidity pension) discontinuation of which is tied to the different pensionable ages for men and for women is not a 'necessary consequence' within the meaning of Article 7(1)(a) of the directive.

2. The automatic discontinuance of the invalidity pension five years after reaching pensionable age, inasmuch as it is linked to the different ages set for retirement, is not a necessary consequence of the different ages at which entitlement to an old-age pension arises.