OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 25 October 1990 *

My Lords,

1. This case has been referred to the Court under Article 177 of the EEC Treaty by the Tribunal du travail, Nivelles, Wavre Section. It concerns the compatibility of certain provisions of Belgian law with Directive 79/7/EEC on equal treatment for men and women in matters of social security (Official Journal 1979 L 6, p. 24). The plaintiff in the main action is the Caisse d'assurances sociales pour travailleurs indépendants 'Integrity' ASBL, which in 1983 instituted proceedings against Mr Jean Leloup, a self-employed architect, for the recovery of unpaid social security contributions. During the course of the proceedings, Mr Leloup died and they are now being contested by his widow, Mrs Nadine Rouvroy, and their three children.

The background

2. By virtue of Article 1 of Royal Decree No 38 of 27 July 1967 ('the decree'), the social security regime applicable in Belgium to the self-employed covers three categories of benefit. These are (a) family benefits; (b) retirement pensions and survivors' benefits; (c) sickness and invalidity benefit. The contributions payable are based on the insured person's income. However, under Article 12(2), persons who would otherwise have to pay contributions are not required to do so if, in addition to their self-employed activities, they are habitually engaged in another main occupation and their income from working on a self-employed basis does not exceed a certain limit.

3. The scope of Article 12(2) of the decree was extended by Article 37 of the Royal Decree of 19 December 1967 ('Article 37'). This provision enabled married women, widows and students who did not meet the requirement relating to engagement in another occupation to apply to be treated in the same way as persons covered by Article 12(2) of the decree. According to the defendants, the aim of this concession was not made clear at the time of its introduction, but the Belgian Government has explained in the course of these proceedings that its purpose was to exempt from the requirement to pay contributions certain categories of people, such as housewives and students, who carried on self-employed activities on a subsidiary basis but whose main activity did not constitute 'work' for the purposes of labour law. Any self-employed activity carried on by such people would necessarily be limited in time and the amount earned modest, but prior to the introduction of Article 37 they were unable to rely on Article 12(2) of the decree.

* Original language: English.

4. In the main action, the defendants claim that the failure of Article 37 to extend to married men the rights it gave to married women, widows and students is contrary to Directive 79/7. The following question has therefore been referred to the Court for a preliminary ruling:

'Does Article 37 of the Royal Decree of 19 December 1967 laying down general rules for the implementation of Royal Decree No 38 of 27 July 1967 organizing social security for self-employed persons comply with 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?'

5. The Court clearly cannot answer this question as framed, for it asks for a ruling on the compatibility with Directive 79/7 of a specific provision of Belgian law. It is well established that the Court has no jurisdiction under Article 177 to give such a ruling (see, for example, the judgment of 7 March 1990 in Case C-69/88 *Krantz* [1990] ECR I-583). I would therefore interpret the question as asking the Court whether a provision of national law which permits married women, widows and students who work in a self-employed capacity to apply for exemption from a requirement to pay social security contributions if their income from working in that capacity does not exceed a certain level, and notwithstanding the fact that they do not engage in any other paid work, is compatible with Directive 79/7 if the same facility is not extended to married men and widowers. Although the dispute before the referring court concerns the rights of a married man, no one has suggested that there is any relevant difference between the position of married men and that of widowers.

Directive 79/7

6. The purpose of Directive 79/7 is, according to Article 1, 'the progressive implementation . . . of the principle of equal treatment for men and women in matters of social security'. Article 2 of the directive provides as follows:

'This directive shall apply 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.'

By virtue of Article 3(1)(a), the directive applies to statutory schemes providing protection against, *inter alia*, sickness, invalidity and old-age. The directive does not apply to survivors' benefits or family benefits, 'except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a)' (Article 3(2)).

7. Article 4(1) of the directive provides that:

'The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex, either directly, or indirectly by reference in particular to marital or family status, in particular as concerns . . . the obligation to contribute and the calculation of contributions . . . '

8. As the Commission points out, Article 4 therefore prohibits discrimination on the basis of sex in relation to the obligation to contribute to statutory social security schemes offering protection against sickness, invalidity and old-age. These risks are all covered by the decree. Moreover, it is clear from Article 2 of the directive that Mr Leloup fell within its scope *ratione personae.*

9. The Court's case-law on the directive establishes that the prohibition on discrimination laid down in Article 4(1) produces direct effect as from 23 December 1984, when the deadline for giving effect to the directive expired. The case-law also makes it clear that, until the necessary implementing measures are adopted by the Member States, the members of one sex are entitled to have applied to them any more favourable rules applicable to members of the opposite sex who are otherwise in the same situation, 'since in such circumstances those rules remain the only valid point of reference' (see, for example, Case 286/85 *McDermott and Cotter* [1987] ECR 1453, paragraph 18).

The question referred

10. The Belgian Government claims that the application of Article 37 depends not on sex but on socio-economic criteria, married women, widows and students being more likely than married men and widowers to carry on activities as self-employed persons on a subsidiary basis. However, the fact that married men and widowers are not entitled to rely on Article 37 even where, in similar circumstances, they are carrying on such activities is in my view enough to render that provision incompatible with the principle of equal treatment. The Belgian Government also points out that male students may invoke Article 37 and that not all women, but only married women and widows, may do so. This second point is simply irrelevant to the question whether that provision is discriminatory: the important point is that married men and widowers are not entitled to invoke it.

11. In addition, the Belgian Government emphasizes that Article 37 does not take effect automatically, but that anyone wishing to rely on it must apply to be treated in the same way as persons covered by Article 12(2) of the decree. Whether or not such an application is made is said to depend in practice on the applicant's right to claim benefits. The Belgian Government points out that the self-employed are only entitled to benefits in their own right if they have paid contributions. Nevertheless, those who seek the benefit of Article 37 will normally have a derived right to benefit by virtue of the contributions paid, in the case of married women and widows, by their husbands, and, in the case of students, by their parents. Although married men, who are at present unable to invoke Article 37, have since 1985 also been able to claim derived rights to certain types of benefit, in

practice many married women only have short working careers. As a result, the derived rights of their husbands are negligible.

12. Moreover, the Belgian Government argues, to repeal Article 37 or to extend it to married men would create indirect discrimination. Its repeal would result in more women than men being required to pay contributions because there are more married women than married men who, on top of their domestic responsibilities, work to a limited extent on a self-employed basis to help make ends meet. If Article 37 were extended to married men, it would be necessary to ensure, so it is claimed, that both spouses in one family did not seek to rely on it, for otherwise a situation might arise in which neither was entitled to benefit. Furthermore, because many married women only engage in paid work for a fraction of their potential working lives, the benefits payable would in some circumstances be less generous where the husband invoked Article 37 than where the wife did so.

13. The short answer to some of these points is that, as the Commission observes, Directive 79/7 makes no distinction between positive discrimination in favour of the members of a particular sex and negative discrimination. Within its field of application, it requires all discrimination on the grounds of sex to be abolished. Member States cannot therefore justify inequalities of treatment on the basis that the provisions at issue are favourable to women.

14. A more principled response to the general approach of the Belgian Government is that the assumptions underlying it — that in all marriages the husband will be the main breadwinner and that any paid work done by the wife will be no more than ancillary — are themselves discriminatory. They make no allowance for couples who wish to organize their lives on alternative lines. It was for the benefit of such people, among others, that Directive 79/7 (and the Community's other legislation on equal treatment for men and women) was adopted. Each of the problems alluded to by the Belgian Government can, and under the directive must, be resolved in a non-discriminatory manner so that a person's right to invoke a provision like Article 37 depends not on an arbitrary characteristic like sex but on objective factors such as the person's income and the amount of time he or she devotes to paid work. If a choice has to be made as to which spouse in a family is to be entitled to the benefit of a provision such as Article 37, Member States are not entitled to prevent the husband from doing so on the assumption that it will always be more advantageous to the family for the wife to do so.

15. I am, however, doubtful whether Article 37 can be said to be incompatible in its entirety with Directive 79/7. It will be observed that some of the benefits available to the self-employed under the decree

(namely family benefits and survivors' benefits) are, at least in certain circumstances, excluded from the scope of Directive 79/7 by Article 3(2). The question therefore arises — although it has not been dealt with by those who have submitted observations — whether the directive applies only in so far as the contributions are related to benefits covered by the directive. On that question, I would take the view that the directive applied globally to the contributions payable under the decree if they could not be linked to any particular benefit. If the directive were not to apply in such circumstances, then its application would be frustrated, as regards the obligation to contribute, whenever Member States included within the ambit of discriminatory national provisions benefits which were not covered by the directive alongside benefits which were so covered.

16. The position in the instant case, however, may be different. It appears from the Rapport au Roi drawn up prior to the adoption of the decree that it was the government's intention that, although single contributions would be made, the amounts paid would be apportioned among the risks enumerated in Article 1. Those who have submitted observations in the course of these proceedings do not discuss the question how contributions paid under the decree are dealt with. The Belgian Government was not represented at the hearing and was not therefore in a position to shed any light on the matter. In my view, if the sum claimed by the plaintiff (should it be recovered) would be apportioned among the risks referred to in Article 1 of the decree, then the directive affords a defence only in so far as the plaintiff's claim relates to contributions in respect of benefits which fall within the scope *ratione materiae* of the directive. The fact that Belgium chose to incorporate in the same legislation provisions concerning benefits which fall within the scope of the directive together with provisions concerning benefits which fall outside its scope cannot in my view render the directive applicable to the latter provisions.

17. I would therefore answer the question referred by the Tribunal du travail as follows:

'(1) It is incompatible with Council Directive 79/7/EEC of 19 December 1978 for national law to exclude married men and widowers who work on a self-employed basis from the right to apply in certain circumstances for exemption from a requirement to pay contributions to a statutory social security scheme which provides protection against any of the risks to which that directive applies, if a similar facility is extended to married women and widows in the same circumstances.

(2) Where a statutory social security scheme containing provisions which discriminate on grounds of sex:

(a) covers risks which fall within the scope of the directive as well as risks which fall outside its scope; and

(b) apportions the contributions payable among the risks covered by the scheme;

then the directive applies only to contributions relating to risks which fall within the scope of the directive.

(3) The principle of equal treatment laid down in Article 4(1) of the directive may be relied upon before national courts and tribunals as from 23 December 1984 so as to preclude the application of any national provision which is inconsistent with it.

(4) Where the directive has not been fully implemented, the members of one sex are entitled to have applied to them any more favourable rules applicable to members of the opposite sex in the same situation.'