OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 29 November 1990 *

Mr President,
Members of the Court,

1. Mrs Cotter and Mrs McDermott are well known to the Court.

2. In its judgment of 24 March 1987 in Case 286/85 *McDermott and Cotter* [1987] ECR 1453, the Court replied to the questions referred to it for a preliminary ruling by the High Court of Ireland as follows:

'(1) Where Council Directive 79/7/EEC of 19 December 1978 has not been implemented, Article 4(1) of the directive, which prohibits all discrimination on grounds of sex in matters of social security, could be relied on as from 23 December 1984 in order to preclude the application of any national provision inconsistent with it.

(2) In the absence of measures implementing Article 4(1) of the directive women are entitled to have the same rules applied to them as are applied to men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference.'

3. Article 4(1) of Directive 79/7 [1] 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:

(i) ...

(ii) ...

(iii) the calculation of benefits including increases due in respect of a spouse and for dependants ....'

4. The date of 23 December 1984 is the date by which the directive should have been implemented in all the Member States.

5. As is recounted in greater detail in the Report for the Hearing, when the High Court ruled on the substance of the case after the reference to the Court of Justice it only partially allowed the applicants' claims, rejecting in particular their claims in respect of increases for adult and child dependants and in respect of 'transitional payments'.

6. The applicants appealed to the Supreme Court of Ireland, which referred the following questions to the Court:

* Original language: French.

1 — Official Journal 1979 L 6, p. 24.

'1. Is the ruling of the Court of Justice in Case 286/85 . . . to be understood as meaning that married women are entitled to increases in Social Welfare benefits in respect of

(a) a husband as dependant, and

(b) a child as dependant

even where it is proved that no actual dependency existed or even if as a result double payments of such increases in respect of dependants would occur?

2. In a claim by women for compensatory payments in respect of discrimination alleged to have been suffered by reason of the failure to apply to them the rules applicable to men in the same situation, is Council Directive 79/7/EEC to be interpreted as meaning that a national court or tribunal may not apply rules of national law such as to restrict or refuse such compensation in circumstances where the granting of such compensation would offend against the principle prohibiting unjust enrichment?'

7. Until 20 November 1986, the date when the new legislative provisions enacted by Ireland in order to comply with Directive 79/7 entered into force, a married man was entitled to an increase on his personal rate of unemployment benefit or assistance in respect of an adult dependant

(a) if his wife lived with him, *or*

(b) if his wife was wholly or mainly maintained by him.

8. In contrast a married woman was only entitled to an increase on her personal rate of unemployment benefit in respect of an adult dependant if her husband

(a) was incapable of self-support by reason of some physical or mental infirmity *and*

(b) was wholly or mainly dependent on her.

9. Essentially the same criteria were applicable to the payment of increases in respect of dependent children.

10. Other provisions in the Irish legislation provided that a married woman could apply to the Minister for Social Welfare to have the adult dependant increase and any increases payable in respect of dependent children paid to her instead of to her husband if her husband was not supporting her or their children.

11. It is thus apparent that the increases on the personal rate of unemployment benefit of one of the spouses were in fact benefits intended for the whole family and not for the particular spouse who was receiving them. That distinguishes the present case

from the cases cited by the applicants.[2] From a common sense point of view the question under which of the two spouses' entitlements the couple was receiving the benefit of those increases was not therefore very significant.

12. It is, however, true that the conditions of eligibility to be satisfied by a husband were much less onerous than those required to be satisfied by a wife, because the husband merely had to prove that his wife (and children) resided with him. The result was that married men could obtain the increases in question even though their wives were gainfully employed themselves, that is to say in situations where they were not financially dependent on their husbands and could contribute to the financial burden of educating their children.

13. In order to have the same system applied to them Mrs Cotter and Mrs McDermott appealed to the Supreme Court. During most of the material period (23 December 1984 to 19 November 1986) they were in fact unemployed whilst their husbands were in employment.

The first question

14. It cannot be denied that the difference in the conditions of eligibility described above was based on sex and that it permitted certain couples to obtain benefits the grant of which was not warranted with regard to the rationale of the benefits. Thus to a certain extent those couples benefited from unjust enrichment.

15. The Irish authorities claim, however, that the adoption of that system

'arose out of the fact that historically the vast majority of Irish married women were dependent on their husbands. Up to the mid-1980s 85% of married women were dependent on their husbands. In recognition of this and to save administrative time and expense the concept of automatic dependency was established' (Paragraph 2.4 of the observations).

16. Even though the percentage cited gave rise to some discussion, the essential truth of that observation was not challenged before the Court.

17. The Irish authorities conclude that to accede to the applicants' claim would result in fact in different situations being treated identically, which, according to the case-law of the Court, would amount to discrimination. Whilst a minority of unemployed married men (that is to say those whose wives had an occupational income of their own) could obtain increases for dependants although that was not warranted by the *ratio legis*, the huge majority of unemployed married women would then also be able to obtain increases although their husbands were not dependent on them.

18. It is obvious to me that we are confronted here with a difference in

2 — See in particular: judgment of 4 December 1986 in Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855; judgment of 24 June 1987 in Case 384/85 *Borrie Clarke* v *Chief Adjudication Officer* [1987] ECR 2865; judgment of 8 March 1988 in Case 80/87 *Dik* v *College van Burgemeester en Wethouders* [1988] ECR 1601.

treatment of a very special sort. Like the two Irish superior courts I find it hard to accept that the principle of equality might require limited unjust enrichment permitted for reasons that are, after all, comprehensible to be counterbalanced by even more extensive unjust enrichment. The applicants themselves would seem to share that uneasiness, but they overcome it by stating, in Paragraph 50 of their observations, that

'whereas "two wrongs do not make a right", they do at least constitute equal treatment'.

19. Is Community law founded on such a formalistic conception of the principle of equal treatment? It is clear that if one took the applicants' contention to its logical conclusion men should be able to obtain paternity leave. In its judgment of 12 July 1984 in Case 184/83 (*Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047), however, the Court ruled against that possibility even in a case where the husband wished to obtain such parental leave instead of his wife and with her consent. (The Commission had supported the opposite argument.) It is true that in that case the Court could base itself on Article 2 (3) of Directive 76/207,[3] which provides that the directive

'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

3 — Council Directive 76/207/EEC 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).

20. The *Hofmann* case shows, however, that the Community court and the national court are entitled to take into consideration the rationale of any given system. The same conclusion is apparent in the judgment of 11 June 1987 in Case 30/85 *Teuling* v *Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497, which also concerned an increase for family dependants. At paragraph 16 of that judgment the Court stated that 'the purpose of the supplements at issue must be considered'.

21. The purpose of the increases at issue here is to give a married couple, one of whom is not gainfully employed and the other is in receipt of unemployment benefit, an increase in that benefit so that the latter may maintain the other spouse and their children.

22. It is thus inherent in the very nature of such a benefit that it cannot be granted twice. As the Irish authorities have pointed out, during one and the same period a husband cannot be wholly or mainly dependent on his wife and the wife wholly or mainly dependent on her husband. Similarly, the children cannot at the same time be wholly or mainly dependent on the mother and wholly or mainly dependent on the father.

23. Furthermore, no-one has alleged during the present proceedings that the Irish authorities have granted married men increases in respect of adult or child dependants in

cases where their wives have already previously obtained the same increases for the same period. The system would in fact have made that impossible. Before being able to obtain unemployment benefit and the increases, a married woman had to prove that her husband was wholly or mainly dependent on her. That presupposed that the husband was not even in receipt of unemployment benefits.

24. Hence the principle of equality may not be relied upon in order to maintain that married women should receive the increases in issue even if their husbands had already received them, because the converse has never been the case.

25. That furnishes a partial reply to the first question, namely that married women are not entitled to the increases in issue if that leads to double payment of those increases.

26. It remains for me to propose a reply as regards the other case posited in the first question, that is to say where it is proved that the husband and children are not wholly or mainly dependent on the wife because the husband is gainfully employed.

27. Here again it could be argued that it is inherent in the very nature of the benefit for dependants that it is payable only if there actually is a situation of dependency, and therefore the administration need only prove that the husband is in receipt of occupational income for the national court not to be required to award the increase for a dependant (or equivalent compensatory payments) to an unemployed wife.

28. In my opinion one is unlikely to be mistaken in concluding that by the term 'dependant' in Article 4 of Directive 79/7 the Council meant only persons actually dependent on other persons.

29. The fact remains, however, that Article 4 did not harmonize the laws of Member States as regards increases for dependants, and it must be understood as referring in that respect to national systems. The Irish legislature decided that married men should be deemed to have a dependent wife and children once it was proved that they resided with him. The fact that that could, in certain cases, lead to the grant of benefits which were not really warranted if the rationale of those benefits was taken into account did not deter it from that course. Despite the misgivings I have expressed above, it seems to me difficult in those circumstances to accept that the Irish State may now oppose the applicants' claim with the argument that they would thereby obtain an unjustified advantage.

30. With regard to the argument that what is sought is identical treatment for different situations, it must be pointed out that at the individual level the fact of upholding the applicants' claims would result in treating identical situations in an identical way, since married women whose husbands have an occupation would be treated like married men whose wives are in paid employment.

31. Of course one might be tempted to argue that the point of reference to be taken

in dealing with the present case is not the system open to criticism operated in the past by Ireland with regard to married men, but the system resulting from the new legislation which entered into force on 20 November 1986 and, as is not disputed, is in conformity with the directive. We are here confronted with the paradoxical situation that if the directive had been implemented by the date specified Mrs Cotter and Mrs McDermott would not be in a position to put forward the claims they do because they would have to show that their husbands and children were actually dependent on them. Nor, however, would Irish married men have been able, between 23 November 1984 and 19 October 1986, to obtain increases for dependants if their wives were gainfully employed. In the event they did obtain such increases. I therefore think that it is nevertheless correct to say that since the measures implementing Article 4 of the directive had not in fact entered into force in Ireland at the material time the only valid point of reference is the system applied during the period in question to married men who were in the same situation as the applicants (see paragraph 2 of the operative part of the judgment in *McDermott and Cotter, supra*).

32. Consequently I would propose that the Court reply to the first question as follows:

'Article 4(1) 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 must be interpreted as meaning that during the period between the date specified for the implementation of that directive and the date when the corresponding national legislation entered into force, married women were entitled to increases in Social Welfare benefits in respect of

(a) a husband as dependant, and

(b) a child as dependant

even where it was proved that no actual dependency existed, if married men were entitled to the same increases without having to produce proof of dependency.'

The second question

33. In its second question the Supreme Court of Ireland asks whether Directive 79/7 is to be interpreted as meaning that a national court or tribunal may not apply rules of national law such as to restrict or refuse compensation of the kind referred to in the first question in circumstances where the grant of such compensation would offend against the principle prohibiting unjust enrichment.

34. In that connection I should point out first of all that a principle of national law may never be invoked by a Member State to prevent compliance with an obligation under Community law. That would run counter to the rule of the supremacy of Community law. Fulfilment of an obligation under Community law can thus be impeded

only by the need to comply with another rule of Community law.

35. That leads me to the question whether the concept of unjust enrichment exists in Community law. The concept can in fact be found in a series of judgments of the Court. It has sometimes been relied on as the basis for a claim to payment. [4]

36. In other cases it has been relied on as a defence either in staff cases, [5] to limit compensation awarded against the Commission, or in cases brought by individuals against Member States to obtain reimbursement of national charges levied in breach of Community law [6] or sums initially paid pursuant to provisions of Community law that were subsequently annulled or declared invalid. [7]

37. Finally, the concept also appears as the basis for certain regulations. Amongst the measures enacted by the Commission there are some that indicate in their preamble that they were adopted for the purpose of avoiding the unjust enrichment of a category of operators. The regulations in question are Commission Regulation No 3682/87 amending Regulation No 2677/85 laying down implementing rules in respect of the system of consumption aid for olive oil, [8] Commission Regulation No 1746/84 amending Regulation No 685/69 on detailed rules of application for intervention on the market in butter and cream, [9] and Commission Regulation No 2936/86 amending Regulation No 2677/85 laying down implementing rules in respect of the system of consumption aid for olive oil. [10]

38. I do not, however, need to examine here the way in which the Court has used the concept of unjust enrichment in the judgments cited because, as stated above in the reply to the first question, in circumstances such as those of the main proceedings the principle of equal treatment surely requires that the advantage, unwarranted *per se*, accorded to a married man (and through him to the couple to which he belongs) should be extended to a married woman in an identical situation (and through her to the couple to which she belongs). The unjust enrichment of the latter may be said to be caused by the unjust enrichment granted to the former.

39. Since the problem of unjust enrichment has thus been dealt with in the context of the reply to the first question, I propose that the Court should hold that in the circumstances the second question has become otiose.

4 — Judgment of 4 April 1960 in Joined Cases 4 to 13/59 *Mannesmann* v *High Authority* [1960] ECR 113; judgment of 11 July 1968 in Case 26/67 *Danvin* v *Commission* [1968] ECR 315; judgment of 3 May 1972 in Case 33/71 *De Haan* v *Commission* [1972] ECR 255; judgment of 7 October 1987 in Case 401/85 *Schina* v *Commission* [1987] ECR 3911.

5 — Judgment of 19 March 1964 in Case 18/63 *Wollast (née Schmitz)* v *European Economic Community* [1964] ECR 85; judgment of 8 July 1965 in Case 110/63 *Willame* v *Commission* [1965] ECR 649.

6 — Judgment of 27 February 1980 in Case 68/79 *Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501; judgment of 27 March 1980 in Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205; judgments of 10 July 1980 in Cases 811/79 and 826/79 *Amministrazione delle Finanze dello Stato* v *Ariete* and *Amministrazione delle Finanze dello Stato* v *Mireco* [1980] ECR 2545 and 2559; judgment of 9 November 1983 in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595.

7 — Judgment of 12 June 1980 in Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887; judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191; for a case where a Member State relied on the fact that the unjust enrichment had ceased to subsist as a reason for not proceeding to recover aid unduly paid under Community law see the judgment of 21 September 1983 in Joined Cases 205 to 215/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2633.

8 — OJ 1987 L 346, p. 19.

9 — OJ 1984 L 164, p. 32. See also the judgment of 17 June 1987 in Joined Cases 424 and 425/85 *Frico* v *Voedselvoorzienings In- en Verkoopbureau*, [1987] ECR 2755, which was concerned with that regulation.

10 — OJ 1986 L 274, p. 13.

Conclusion

40. To recapitulate, therefore, I propose that the Court reply as follows:

'(1) Article 4(1) 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 must be interpreted as meaning that during the period between the date specified for the implementation of that directive and the date when the corresponding national legislation entered into force, married women were entitled to increases in Social Welfare benefits in respect of

(a) a husband as dependant, and

(b) a child as dependant

even where it was proved that no actual dependency existed, if married men were entitled to the same increases without having to produce proof of dependency.

(2) In view of the reply given to the first question, the second question is otiose.'