Opinion of Advocate General Sharpston delivered on 21 January 2010

Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini (C-395/08) and Daniela Lotti and Clara Matteucci (C-396/08)

References for a preliminary ruling: Corte d'appello di Roma - Italy

Directive 97/81/EC - Framework Agreement on part-time work - Equal treatment of part-time and full-time workers - Calculation of the period of service required to obtain a retirement pension - Periods not worked disregarded – Discrimination

Joined cases C-395/08 and C-396/08

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1. In these references for a preliminary ruling from the Corte d'Appello di Roma, Sezione Lavoro e Previdenza (Court of Appeal, Rome, Labour and Social Security Division), the Court is asked whether Council Directive 97/81/EC ('Directive 97/81' or 'the Directive') (2) prohibits national legislation that excludes periods not worked pursuant to certain contracts for part-time work from being taken into account for the acquisition of pension rights.

2. The cases also raise a number of issues as regards the applicability of the Directive *ratione materiae* and *ratione temporis*, and the duty of the referring court to provide the Court with the necessary factual and legal material.

Legal framework

Council Directive 97/81

3. The preamble to the Directive contains the following recitals:

'...

(5) ... the conclusions of the Essen European Council stressed the need to take measures to promote employment and equal opportunities for women and men, and called for measures with a view to increasing the employment-intensiveness of growth, in particular by a more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition;

...

(11) ... the signatory parties wished to conclude a framework agreement on part-time work setting out the general principles and minimum requirements for part-time working; ... they have demonstrated their desire to establish a general framework for eliminating discrimination against part-time workers and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike;

...

(18) ... the Commission has drafted its proposal for a Directive in compliance with Article 2(2) of the Agreement on social policy which provides that Directives in the social policy domain "shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings";

...'

4. Article 1 states that the purpose of the Directive is 'to implement the Framework Agreement on part-time work concluded on 6 June 1997 between the general cross-industry organisations (UNICE, (3) CEEP (4) and the ETUC (5)) annexed hereto' ('the Framework Agreement').

5. The preamble to the Framework Agreement contains the following recitals:

'[1] This Framework Agreement is a contribution to the overall European strategy on employment. Part-time work has had an important impact on employment in recent years. For this reason, the parties to this agreement have given priority attention to this form of work. It is the intention of the parties to consider the need for similar agreements relating to other forms of flexible work.

[2] Recognising the diversity of situations in Member States and acknowledging that part-time work is a feature of employment in certain sectors and activities, this Agreement sets out the general principles and minimum requirements relating to part-time work. It illustrates the willingness of the social partners to establish a general framework for the elimination of discrimination against part-time workers and to assist the development of opportunities for part-time working on a basis acceptable to employers and workers.

[3] This Agreement relates to employment conditions of part-time workers recognising that matters concerning statutory social security are for decision by the Member States. In the context of the principle of non-discrimination, the parties to this Agreement have noted the Employment Declaration of the Dublin European Council of December 1996, wherein the Council inter alia emphasised the need to make social security systems more employment-friendly by "developing social protection systems capable of adapting to new patterns of work and of providing appropriate protection to people engaged in such work". The parties to this Agreement consider that effect should be given to this Declaration.

...'

6. Point 5 of the general considerations prefacing the Framework Agreement reads as follows:

'... the parties to this agreement attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life, and take up education and training opportunities to improve their skills and career opportunities for the mutual benefit of employers and workers and in a manner which would assist the development of enterprises ...'

7. Clause 1 of the Framework Agreement states that its purpose is:

'(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working hours in a manner which takes into account the needs of employers and workers.'

8. Clause 3 defines 'part-time worker' and 'comparable full-time worker' for the purposes of the agreement:

'1. The term "part-time worker" refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker.

2. The term "comparable full-time worker" means a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/occupation, due regard being given to other considerations which may include seniority and qualification/skills.

Where there is no comparable full-time worker in the same establishment, the comparison shall be made by reference to the applicable collective agreement or, where there is no applicable collective agreement, in accordance with national law, collective agreements or practice.'

9. Clause 4 is entitled 'Principle of non-discrimination' and provides:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

2. Where appropriate, the principle of *pro rata temporis* shall apply.

3. The arrangements for the application of this clause shall be defined by the Member States and/or social partners, having regard to European legislation, national law, collective agreements and practice.

4. Where justified by objective reasons, Member States after consultation of the social partners in accordance with national law, collective agreements or practice and/or social partners may, where appropriate, make access to particular conditions of employment subject to a period of service, time worked or earnings qualification. Qualifications relating to access by part-time workers to particular conditions of employment should be reviewed periodically having regard to the principle of non-discrimination as expressed in Clause 4.1.'

10. Clause 5 is entitled 'Opportunities for part-time work' and states:

'1. In the context of Clause 1 of this Agreement and of the principle of non-discrimination between part-time and full-time workers:

(a) Member States, following consultations with the social partners in accordance with national law or practice, should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them;

(b) the social partners, acting within their sphere of competence and through the procedures set out in collective agreements, should identify and review obstacles which may limit opportunities for part-time work and, where appropriate, eliminate them.

...'

National law

11. The orders for reference set out the relevant Italian legislation in a very summary manner.

12. They note that, as regards acquisition of pension rights, Article 7(1) of Law No 638/83 provides that the number of weekly contributions to be credited to employed workers during the course of the year for the purposes of calculating the retirement pension paid by the Istituto Nazionale della Previdenza Sociale (National Institute of Social Security, 'INPS') shall equal the number of weeks of that year for which a salary was paid or which are recognised as equivalent in accordance with the rules on notional credit.

13. They further note that, as regards the amount of the pension, Article 9(4) of Legislative Decree No 61/2000 applies, pursuant to which: 'For the purpose of calculating the amount of retirement pension if a full-time employment contract is transformed into a part-time employment contract or vice versa, periods of full-time work shall be taken into account in their entirety and periods of part-time work in proportion to the hours effectively worked.'

14. Finally, the orders for reference specify that Legislative Decree No 61/2000, the Italian legislation implementing Directive 97/81, so far as concerns social security, governs only contributions which are relevant for the purpose of quantifying pensions.

15. The submissions of the INPS, however, contain the integral texts of relevant national legislation, which I set out below. (6)

Legislative Decree No 61/2000

16. It appears from the orders for reference that Directive 97/81 was implemented in Italian law by Legislative Decree No 61/2000 of 25 February 2000. (7) Its Article 1 contains the following definitions:

'...

2. For the purposes of the present legislative decree:

(a) "full time" refers to normal working hours as provided for in Article 3(1) of Legislative Decree No 66 of 8 April 2003 or, where appropriate, the shorter normal working hours determined by any applicable collective agreements;

(b) "part time" refers to working hours determined in the individual contract, which the employee must observe and which are shorter than the working hours mentioned under point (a);

(c) "horizontal part-time employment relationship" means one in which the reduction in working hours, in comparison to full-time work, is fixed in relation to normal daily working hours;

(d) “vertical part-time employment relationship” means one in which it is stipulated that the work is performed on a full-time basis but limited to predetermined periods in the course of each week, month or year.
(d-bis) “mixed part-time employment relationship” means one which combines both types provided for under points (c) and (d) above.
(e) “supplementary work” means work performed beyond the working hours agreed between the parties within the meaning of the second paragraph of Article 2 and within the limits of full-time work.’

17. Article 9 of the decree provides as follows:

‘1. The minimal hourly wage, to be taken into account as the basis for the calculation of social contributions due for part-time workers, is determined by multiplying the number of days worked in a week on normal working hours by the daily minimum provided for by Article 7 of Legislative Decree No 463 of 12 September 1983, converted, with amendments, into Law No 638 of 11 November 1983, and dividing the amount thus obtained by the number of hours worked each week on normal working hours, as provided for by the national sectoral collective agreement for full-time workers.

...

4. For the purpose of calculating the amount of retirement pension if a full-time employment contract is transformed into a part-time employment contract or vice versa, periods of full-time work shall be taken into account in their entirety and periods of part-time work in proportion to the hours effectively worked.’

Legislative Decree No 463 of 12 September 1983, converted, with amendments, into Law No 638 of 11 November 1983

18. Article 7 provides:

‘1. For each calendar year subsequent to 1983, the number of weekly contributions to be credited to employed workers during the course of the year for the purposes of calculating the retirement pension paid by the INPS shall equal the number of weeks of that year for which a salary was paid or which are recognised as equivalent in accordance with the rules on notional credit, [(8)] provided that, for each such week, the remuneration paid, due or notionally credited is not less than 30% of the minimum monthly pension paid by the Fund for employed workers’ pensions [(9)] on 1 January of the relevant year. With effect from the payment period covering 1 January 1984, the lower limit for daily remuneration, including the daily minimum of the mean conventional wage, for all contributions due with regard to social insurance and social assistance, may not be less than 7.5% of the minimum monthly pension paid by the Fund for employed workers’ pensions on 1 January of the relevant year.

2. If that is not the case, a number of weekly contributions shall be credited, equal to the result (rounded upwards) obtained by dividing the total remuneration paid, due or notionally credited during the calendar year by the remuneration mentioned in the previous paragraph. Irrespective of the actual length of the insurance period, contributions determined in this manner shall be attributed to a period comprising the same number of weeks for which remuneration was paid or notionally credited as there are contributions paid, counting back from the last week worked or notionally credited in the year.

3. The provisions in the preceding paragraphs shall apply to periods after 31 December 1983 with respect to the right to benefits other than pensions, for which there is a contribution requirement on the INPS.

4. For the year in which the pension takes effect, the number of weekly contributions to be credited to workers for the period between the first day of the year and the date of retirement shall be determined by applying the rules in the preceding paragraphs only for the weeks included in the relevant period which were actually worked or which have given rise to a notional credit. The same criterion applies to other social and assistance benefits.

...’

Legislative Decree No 564 of 16 September 1996

19. Article 8 provides as follows:

‘1. For vertical, horizontal or cyclical [(10)] part-time workers registered for general compulsory invalidity, old-age and survivors’ insurance or other forms of replacement insurance, periods not worked after 31 December 1996 which are not covered by compulsory contributions can be redeemed by paying the mathematical reserve in accordance with Article 13 of Law No 1338 of 12 August 1962, as amended and supplemented.

2. For the periods mentioned in paragraph 1, the persons concerned may alternatively be authorised to continue paying voluntary contributions to the pension fund to which they belong, pursuant to Law No 47 of 18 February 1983. To obtain that authorisation, they must have paid contributions to one of the insurance schemes referred to in paragraph 1 for at least one year out of the previous five.

3. In order to exercise the option in paragraphs 1 and 2, the persons concerned must prove their status as part-time worker as referred to in paragraph 1 for the entire period for which they request cover through redemption or voluntary insurance.’

The main proceedings and the questions referred

20. By separate applications of 17 January 2005 to the Tribunale di Roma, Ms Tiziana Bruno, Mr Massimo Pettini, Ms Daniela Lotti and Ms Clara Matteucci (‘the claimants’), all employees of Alitalia SpA (‘Alitalia’), requested recognition of qualifying benefit contributions equal to the total number of weeks in the period of part-time work. They stated that they had applied for and obtained (in respect of the periods specified) conversion of their contracts of employment from full-time to vertical-cyclical part-time work. Thus, they worked in some months of the year, but not in others.

21. The INPS treated only the periods worked, excluding periods not worked, as contributory periods for pension purposes.

22. The Tribunale di Roma granted the application by judgment of 15 November 2005. The INPS appealed, noting that, under Article 7 of Law No 638/83, the weekly contributions which qualify for the purpose of pension

benefits are those in respect of which remuneration is actually paid (or which are recognised for those purposes as notional credits).

23. The Corte d'Appello di Roma, Sezione Lavoro e Previdenza, decided to stay proceedings and refer the following questions to the Court:

'(A) Is the Italian State legislation (Article 7(1) of Law No 638/83) which results in periods not worked under "vertical" part-time arrangements not being taken into account as periods of qualifying contributions for the purpose of acquiring pension rights compatible with Directive 97/81/EC, and in particular Clause 4 [of the Framework Agreement] concerning the principle of non-discrimination?

(B) Are those national provisions compatible with Directive 97/81/EC and, in particular, Clause 1 [of the Framework Agreement], which provides that national legislation must facilitate the development of part-time work, and Clauses 4 and 5, which provide that the Member States are to eliminate obstacles of a legal nature which may limit access to part-time work, since it is unquestionable that the failure to take into account for pension purposes the weeks not worked constitutes a significant disincentive to choosing "vertical" part-time working arrangements?

(C) Can Clause 4 [of the Framework Agreement] on the principle of non-discrimination also be extended to various kinds of part-time contracts, in view of the fact that, in the case of "horizontal" part-time work, for an equal number of hours worked and for which remuneration is paid in the calendar year, all the weeks of the calendar year are taken into account under national legislation, whereas they are not in the case of "vertical" part-time work?'

24. Written observations have been submitted by the INPS, the claimants and by Italy.

25. At the hearing on 29 October 2009, the INPS, Italy and the Commission presented oral observations.

Admissibility

26. The present case raises a number of questions as regards its admissibility.

27. The INPS takes the view that the questions referred are inadmissible. It argues that the Framework Agreement does not apply to social security regimes, which fall within the exclusive competence of the Member States, and that it follows that the directive only concerns labour law and not social security law. The questions referred are also irrelevant, and therefore inadmissible, as regards the period before Legislative Decree No 61/2000 entered into force. The INPS therefore takes the view that the Framework Agreement is inapplicable both *ratione materiae* to any, and *ratione temporis* to some, of the facts of the cases before the national court.

28. When considering those arguments, it should be borne in mind that, according to settled case-law, in proceedings under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling. Nevertheless, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (11)

Applicability ratione materiae of the Framework Agreement

29. Provided that the questions referred for a preliminary ruling concern the interpretation of Community law, the Court gives its ruling without, generally, having to look into the circumstances in which the national court was prompted to submit the questions and envisages applying the provision of Community law which it has asked the Court to interpret. The Court only examines the admissibility of a question from the point of view of the applicability *ratione materiae* of the provision of Community law which was submitted for interpretation if that provision is *manifestly* incapable of applying. (12)

30. That does not appear to be the case here. The questions referred should therefore not be declared inadmissible on that basis. (13)

31. That said, I address the applicability *ratione materiae* of the Framework Agreement separately below, when dealing with the substance of the questions. (14)

Applicability ratione temporis of the Framework Agreement

32. It appears from the national file that, as regards Ms Bruno, Ms Lotti and Ms Matteucci, the alleged discriminatory calculation of pension rights pertains, in whole or in part, to periods before the expiry of the deadline for transposition of Directive 97/81 on 20 January 2000.

33. Directive 97/81 was transposed into Italian law by Legislative Decree 61/2000 of 25 February 2000. (15) The INPS takes the view that the questions referred are inadmissible as regards the facts before that measure entered into force.

34. However, at the hearing, the Commission argued that the Directive applies to the calculation of past qualifying periods for access to a future pension, by virtue of case-law settled since the Court's judgment in *Brock*. (16)

35. I agree with the Commission.

36. In *Brock*, the Court was asked whether certain provisions of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, (17) as amended, applied to pensions paid in respect of risks which materialised before 1 January 1964, the date when the relevant amended text entered into force. The Bundesknappschaft (Federal Mineworkers' Association) had argued before the national court that pensions in respect of which the risk materialised before 1 January 1964 could not fall within the provisions

brought into force on that date but continued, even as regards the future, to be subject to the earlier provisions. The Court held that a provision in the regulation according to which, on the one hand, a benefit was to be payable under the regulation even if it related to an event before the date on which the regulation came into force and, on the other hand, the rights of persons for whom a pension as calculated before the regulation entered into force could be reviewed at their request, was in fact only an application of the principle that amending legislation applies, except where otherwise provided, to the effects in the future of situations which have arisen under the law as it stood before amendment. (18)

37. That principle is indeed confirmed by settled case-law. (19)

38. For example, as regards pensions, the Court was asked in *Duchon* (20) whether a national of a Member State who, before the accession of that State to the European Union, was employed in another Member State where he suffered an industrial accident at work and who, after the accession of his home State, applied to the authorities of that State for an occupational disability pension following that accident, fell within the scope of Regulation No 1408/71. (21) Referring to Article 94(3) of the regulation, (22) the Court held that such a person did indeed fall within its scope. The Court referred also to the general principle just mentioned and to Article 94(2) of the regulation, (23) and held that it followed from that provision that a Member State was not entitled to refuse to take into account periods of insurance completed in the territory of another Member State, for the purposes of establishment of a retirement pension, for the sole reason that they were completed before the entry into force of the regulation with regard to the latter Member State.

39. In the present case, neither Directive 97/81 nor the Framework Agreement derogates from the general principle that amending legislation applies – except where otherwise provided – to the future effects of situations which arose under the law as it stood before amendment.

40. Directive 97/81 therefore governs the calculation of qualifying weeks for access to the pension at issue in the main proceedings, to the extent that none of the claimants had retired definitively before the entry into force of the Directive. It is for the national court to establish whether that is the case.

41. The questions referred should therefore not be declared inadmissible by virtue of the inapplicability *ratione temporis* of the Directive and the Framework Agreement.

The duty of the referring court to provide the Court with the necessary factual and legal material

42. At the hearing, the Commission confessed being at a loss to take a position on a dispute that was legally and factually so ill defined as the present case.

43. The information provided by the orders for reference on the exact facts of the case and the exact content of the applicable national legislation is indeed incomplete and equivocal.

44. That is problematic from the point of view of settled case-law according to which the requirement to provide an interpretation of Community law which will be of use to the referring court makes it necessary that the referring court define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. The information provided in orders for reference must not only be such as to enable the Court to reply usefully but must also give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, bearing in mind that, by virtue of the abovementioned provision, only the orders for reference are notified to the interested parties. (24)

45. I am not at all convinced that the orders for reference in the present case meet that requirement.

46. The description of the factual circumstances is sparse. The orders for reference do not specify whether the claimants are already pensioners, whether they are still at work but have noticed the alleged differing manner of calculation and are concerned about their pension, or whether there is some other factual constellation. It is true that those defects are to some extent remedied by the national file (25) and by the submissions of the parties, but a more complete description in the order for reference is clearly desirable.

47. A greater problem lies in the description of the legal context.

48. The premiss on which the national court appears to base its questions is that workers who have a 'vertical' part-time employment contract do not acquire pension rights on the basis of the same calculation as those who have a 'horizontal' part-time employment contract.

49. Unfortunately, the national court does not explain with any clarity the difference between those types of part-time work, or how they are treated differently for the purposes of calculating pension rights.

Horizontal and vertical part-time work

50. Article 1(2)(d) of Legislative Decree No 61/2000 defines a 'vertical part-time work relationship' as one 'in which it is stipulated that the work is performed on a full-time basis but limited to predetermined periods in the course of each week, month or year'.

51. At the hearing, the INPS explained that, while the national court's questions refer to 'vertical part-time work' in general, the problem at issue in the main proceedings only arises in respect of vertical-cyclical part-time work which, it would appear from the orders for reference, entails working some months of the year and not working in the other months. (26)

52. However, the only information in the orders for reference on 'horizontal' part-time work is in the third question, where it is stated that for an equal number of hours worked and for which remuneration is paid in the calendar year, all the weeks of the calendar year are taken into account under national legislation as regards 'horizontal' part-time work, whereas they are not in the case of 'vertical' part-time work.

53. Article 1(2)(c) of Legislative Decree No 61/2000 defines a 'horizontal part-time work relationship' as one in which the reduction in working hours, in comparison to full-time work, is fixed in relation to normal daily working hours. While that is not entirely unequivocal, I understand that horizontal part-time work therefore entails working for part of each working day.

54. It was only during the course of the hearing that the Court was able to establish that that is indeed the correct interpretation.

The different treatment of horizontal and vertical-cyclical part-time work

55. The orders for reference set out Article 7(1) of Law No 638/83, which provides that, as regards the acquisition of pension rights, the number of weekly contributions to be credited to employed workers during the course of the year for the purposes of calculating the retirement pension paid by the INPS shall equal the number of weeks of that year for which a salary was paid or which are recognised as equivalent in accordance with the rules on notional credit. The national court also notes that the INPS treated only the periods worked as contributory periods for pension purposes, and that it excluded periods not worked.

56. However, the national court nowhere sets out the manner in which the number of weeks to be taken into account for the purposes of acquiring pension rights should be calculated.

57. In order to enable the Court to provide a useful interpretation of Community law, it is appropriate that, before making the reference to the Court, the national court should establish the facts of the case and settle any questions of purely national law. (27)

58. It is true that the Court has held that those considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties, which will have to take responsibility for giving judgment in the case, and which is therefore in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling from the Court of Justice. (28)

59. Such a permissive approach to the admissibility of orders for reference is often justified in the light of the twofold aim expressed by Article 234 EC: to ensure the greatest possible uniformity in the application of Community law and to establish for that purpose effective cooperation between the Court and national courts. (29)

60. None the less, in a case where the information given in the orders for reference was contradictory, making it impossible to glean a sufficient understanding of the legal situation, the Court declared the questions referred to be manifestly inadmissible. (30)

61. The lack of clarity in the present orders for reference relates to the difference between horizontal and vertical-cyclical part-time work in the calculation of the number of weeks taken into account for the acquisition of pension rights. That is, however, the very essence of the present case and the premiss on which the questions referred are based.

62. The questions referred could therefore justifiably have been declared inadmissible when the orders for reference reached the Court.

63. How the calculation should be made and what exactly the problem under national law is did become clearer at the hearing after intensive questioning of counsel for the INPS and the agent for Italy.

64. However, it should be borne in mind that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court, the Court is empowered to rule on the interpretation or validity of provisions of Community law only on the basis of the facts and the national law which the national court puts before it. For the Court to make its own findings about the factual and legal situation before the national court would be incompatible with the Court's function under Article 234 EC and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court. (31)

65. Apart from Italy, no Member States have submitted observations. The Court cannot therefore be certain that it has fulfilled its duty to ensure that the opportunity to submit observations is safeguarded.

66. This situation ought to have been avoided.

67. That said, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them. (32) Moreover, the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary. (33)

68. It is true that an order for reference must be expected to be rejected as inadmissible, at an early stage in the procedure, if it contains as inadequate an account of the relevant facts and national law as is the case here. However, in view of the information which the Court has obtained from the hearing, I do not believe that it would be appropriate, or serve the interests of procedural economy, to take such a step now.

Substance

Applicability ratione materiae of the Framework Agreement

69. Do the Directive and the Framework Agreement only concern labour law and not social security law? (34)

70. In *Impact*, (35) a case concerning Directive 1999/70, (36) the Court was asked whether 'employment conditions' within the meaning of Clause 4 of the framework agreement on fixed-term work, annexed to that directive, included conditions of an employment contract relating to remuneration and pensions.

71. The Court referred to its settled case-law according to which the term 'pay' within the meaning of the second subparagraph of Article 141(2) EC covers pensions which depend on the employment relationship between worker and employer, (37) excluding those deriving from a statutory scheme, to the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship than by considerations of social policy. Taking that case-law into account, the Court held that the term 'employment conditions' within the meaning of Clause 4(1) of the framework agreement on fixed-term work covers pensions which depend on an employment relationship between worker and employer, excluding statutory social-security pensions, which are determined less by that relationship than by considerations of social policy.

The Court held that interpretation to be supported by the information in the fifth paragraph of the preamble to the framework agreement in question, in which the parties to the agreement 'recognis[ed] that matters relating to statutory social security [were] for decision by the Member States' and called on the Member States to give effect to the Employment Declaration of the Dublin European Council in 1996 which emphasised, inter alia, the need to adapt social-security systems to new patterns of work in order to provide appropriate social protection to those engaged in such work. (38)

72. The same reasoning must apply *mutatis mutandis* to Clause 4 of the Framework Agreement on part-time work, in issue in the present case.

73. First, that clause sets out the principle of non-discrimination in virtually the same terms as Clause 4 of the framework agreement on fixed-term work, annexed to Directive 1999/70.

74. Second, the third paragraph of the preamble to the Framework Agreement on part-time work similarly recognises that matters relating to statutory social security are for decision by the Member States and refers to the Employment Declaration of the Dublin European Council in 1996.

75. Third, the purpose of Directive 97/81, as defined in Article 1, is to implement the Framework Agreement on part-time work concluded between the general cross-industry organisations (that is, respectively, between organisations representing employers and employees). The Framework Agreement is intended to enable both parties to an employment contract to organise working hours in a flexible way adapted to the specific features of employment in certain sectors and activities. It is not intended to regulate matters relating to social security. (39)

76. Clause 4(1) of the Framework Agreement therefore covers pensions which depend on an employment relationship between worker and employer, excluding statutory social-security pensions, which are determined less by that relationship than by considerations of social policy.

77. It seems to me that, especially given the Delphic nature of the orders for reference, the national court is best placed to decide how to classify the pension scheme at issue in the present case. In doing so, it must apply the criteria established by the Court.

78. For the purposes of assessing whether a retirement pension falls within the scope of Article 141 EC, the Court has stated that the one criterion which may prove decisive is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, adding that that criterion cannot be regarded as exclusive, inasmuch as pensions paid under statutory social security schemes may reflect, wholly or in part, pay in respect of work. However, considerations of social policy, of State organisation, of ethics, or even the budgetary concerns which influenced or may have influenced the establishment by the national legislature of a scheme cannot prevail if three conditions are fulfilled: (i) the pension concerns only a particular category of workers, (ii) it is directly related to the period of service completed and (iii) its amount is calculated by reference to final salary. (40)

79. Those criteria are not necessarily straightforward to apply. They must nevertheless be applied by analogy to the pensions at issue in the present cases.

80. The Court has made it clear that, if those criteria are fulfilled, the pension paid by a public employer to a public servant is entirely comparable to that paid by a private employer to his former employees. (41) Contrary to what the INPS maintained at the hearing, the fact that a pension is provided for by law and administered by a public authority such as the INPS cannot therefore be a decisive criterion to distinguish an occupational pension from a statutory social security pension.

81. On my understanding of the relevant case-law, the national court must examine Alitalia's status under national law in order to establish whether it is a public or private employer. If Alitalia is a public employer, the fact that the pension is paid not by Alitalia itself but by the INPS may be an indication that the pension is comparable to a pension paid by a private employer to his former employees and that it is, therefore, an occupational pension rather than a statutory social security pension. Conversely, if Alitalia is a private employer, the fact that the pension is paid by the INPS may be an indication that the pension is one that is determined by considerations of social policy; and that it is, therefore, a statutory social security pension rather than an occupational pension.

82. It is true that Community law does not detract from the Member States' power to organise their social security systems. None the less, when exercising that power, the Member States must comply with Community law (42) and, in particular, with the principle of non-discrimination. (43) Even if the pension at issue is a statutory social security pension, it must therefore comply with that principle.

83. On that basis, I conclude that the Framework Agreement on part-time work does not apply to statutory social security pensions. It is for the national court to establish whether the pension at issue in the main proceedings falls within that category. Should it conclude that the pension at issue is a statutory social security pension, it must examine whether Italy has exercised its competence as regards social security in accordance with Community law and, in particular, with the principle of non-discrimination.

The questions referred

84. The first and third questions both deal exclusively with Clause 4 of the Framework Agreement, whilst the second question deals with Clause 4 in combination with Clauses 1 and 5. It therefore seems appropriate to answer all three questions together.

85. The first question asks whether Article 7(1) of Law No 638/83, which results in periods not worked under 'vertical' part-time arrangements not being treated as periods of qualifying contributions for the purpose of acquiring pension rights, is compatible with Directive 97/81 and in particular with Clause 4 of the Framework Agreement (principle of non-discrimination).

86. The second question asks more generally whether the national provisions at issue in the main proceedings are compatible with Directive 97/81 – in particular, with Clause 1 of the Framework Agreement (which provides that national legislation must facilitate the development of part-time work) and Clauses 4 and 5 (which provide that the Member States are to eliminate obstacles of a legal nature which may limit access to part-time work). The referring court notes that it is 'unquestionable' that the failure to take into account for

pension purposes the weeks not worked constitutes a significant disincentive to choosing 'vertical' part-time working arrangements.

87. The third question asks whether the principle of non-discrimination in Clause 4 of the Framework Agreement applies as between different types of part-time contracts, in view of the fact that, for an equal number of hours worked and for which remuneration is paid in the calendar year, all the weeks of the calendar year are taken into account under national legislation in the case of 'horizontal' part-time work, whereas they are not in the case of 'vertical' part-time work.

88. The Court does not, in a reference for a preliminary ruling, have jurisdiction to give a ruling on the compatibility of a national measure with Community law. However, it can supply the national court with a ruling on the interpretation of Community law which enables that court to decide the case before it by providing it with the necessary information to determine whether the national measure at issue complies with Community law. (44)

89. I shall therefore treat the three questions, taken together, as asking whether Clauses 1, 4 and 5 of the Framework Agreement preclude legislation such as that at issue in the main proceedings, which distinguishes between vertical-cyclical and horizontal part-time employment contracts in the manner in which weeks are taken into account as periods of qualifying contributions for the purpose of acquiring pension rights.

The difference in treatment under Italian law

90. As I understand it, and drawing heavily on the information obtained at the hearing, the system seems to work essentially as follows.

91. In essence, the criterion for calculating the *amount of the pension* seems to be that the number of hours worked is taken into account in the same way, regardless of whether the work was done under a full-time, horizontal part-time or vertical-cyclical part-time schedule. In its written observations, the INPS states that, in order to determine the duration of the contributions to be taken into account for the calculation of the pension, it is necessary (i) to determine the number of hours remunerated for every calendar year in respect of part-time work and (ii) to divide that number by the number of hours that constitute the weekly working hours for full-time workers. The result of that calculation represents the number of contribution weeks to be taken into account for part-time work. To that number can be added the number of additional contribution weeks that the worker involved can have taken into account (for example, through notional credit (45)). That method for calculating *the amount of the pension* does not, it seems to me, generate a different result depending on whether the part-time work involved was vertical-cyclical or horizontal.

92. Thus, if a full-time work schedule is 8 hours a day, it makes no difference whether one has worked 52 weeks a year, (46) but only 4 hours a day, under a horizontal part-time work schedule or only 26 weeks a year, but 8 hours a day, on the basis of a vertical-cyclical part-time schedule. In both cases, the number of hours worked will be the same (1 040 hours) (47) and it will have the same impact on the calculation of the *amount* of the pension (in my example, 50% of the pension of a full-time worker, which will be calculated on the basis of 2 080 hours).

93. The problem, as the INPS admitted at the hearing, seems to lie in the calculation of the number of weeks necessary to *gain access to a pension* ('qualifying weeks'). Counsel for the INPS explained that in order to gain access to a pension, 1 820 qualifying weeks are necessary. A qualifying week is defined as a week in which work is performed on at least one day.

94. In the example I have just given, that means that, for the same number of hours worked, the horizontal part-time worker will have acquired 52 qualifying weeks, while the vertical-cyclical part-time worker will have acquired only 26 qualifying weeks.

95. The unequal treatment therefore appears to arise from the manner in which qualifying weeks are calculated, which directly determines how long it will take for workers to gain access to a pension. Because only weeks in which work was performed during at least one day count as qualifying weeks, for an equal number of hours worked, vertical-cyclical part-time workers may end up having to work twice as long as horizontal part-time workers to gain access to their pension. In my example, the horizontal part-time worker would have to work 35 years to gain access to a pension, while the vertical-cyclical part-time worker would have to work 70 years. If that person spent his whole career working on a vertical-cyclical part-time basis, he would be unlikely ever to qualify for a pension.

The principle of non-discrimination in Clause 4 of the Framework Agreement

96. Under Clause 4 of the Framework Agreement, part-time workers are not to be treated less favourably as regards employment conditions than comparable full-time workers on the sole ground that they work part time unless different treatment is justified on objective grounds. The prohibition on discrimination in Clause 4 is merely a particular expression of a fundamental principle of Community law, namely the general principle of equality under which comparable situations may not be treated differently unless the difference is objectively justified. (48) That principle can therefore apply only to persons in comparable situations. (49)

97. Clause 4(2) of the Framework Agreement explicitly provides that, where appropriate, the principle of *pro rata temporis* is to apply. (50) The Court has already held that Community law does not preclude a retirement pension being calculated *pro rata temporis* in the case of part-time employment. (51) There, the fact that, in addition to the number of years spent working in the civil service, an official's actual period of service during those years, as compared with the actual period of service of an official who had worked on a full-time basis throughout his career, was also taken into account was held to be an objective criterion unrelated to any discrimination on grounds of sex, allowing his pension entitlement to be reduced proportionately. (52)

98. The system explained above seems to imply that both vertical-cyclical part-time workers and full-time workers have their qualifying weeks calculated in proportion to the number of hours actually worked or, in other words, in accordance with the principle of *pro rata temporis*. It seems logical that someone working 8 hours per day for 52 weeks under a full-time schedule will have exactly twice the number of qualifying weeks as someone

working 8 hours per day for 26 weeks under a vertical-cyclical part-time schedule. So far, so good: there is no discrimination.

99. However, horizontal part-time workers have their qualifying weeks calculated on a basis that is more favourable than the *pro rata temporis* principle. If only weeks in which work is performed during at least one day count as qualifying weeks, (53) someone working 4 hours per day for 52 weeks under a horizontal part-time work schedule will have worked exactly the same number of hours as the vertical-cyclical part-time worker just described, but will have acquired twice as many qualifying weeks.

100. The horizontal part-time worker may also enjoy an advantage over his full-time counterpart. Suppose (to change the example slightly) that instead of working 20 hours a week spread out over five days (4 hours a day), he works 2 and a half days full time (8 + 8 + 4) hours and does not work at all on the remaining 2 and a half days. That work pattern suffices for the week in question to count as a qualifying week. Meanwhile, the equivalent full-time worker has had to work his usual full week (all five days) in order for the week to be counted as a qualifying week.

101. There therefore appears to be two separate forms of unequal treatment: (a) as between the two types of part-time work, to the disadvantage of vertical-cyclical part-time workers, and (b) between horizontal part-time work and full-time work, to the disadvantage of full-time workers.

102. Is such unequal treatment covered by Clause 4 of the Framework Agreement?

103. As the Court confirmed in *Michaeler*, the objective of Directive 97/81 and the Framework Agreement is, first, to promote part-time work and, secondly, to eliminate discrimination between part-time workers and full-time workers. That twofold objective is clear from the terms of Clause 1 of the Framework Agreement and from the recitals in the preamble to Directive 97/81. The Court cited, inter alia, recital 11, according to which the signatories to the Framework Agreement 'have demonstrated their desire to establish a general framework for eliminating discrimination *against part-time workers* and to contribute to developing the potential for part-time work on a basis which is acceptable for employers and workers alike'. (54)

104. It is clear from the wording of Clause 4 of the Framework Agreement that the specific version of the principle of non-discrimination that it contains, while naturally contributing to the promotion of part-time work, is a prohibition on discrimination between part-time and full-time workers. As is clear from the preamble, that implies discrimination *against part-time workers*.

105. Clause 4 can therefore only apply to unequal treatment between different types of part-time work when, as between part-time and full-time workers, that treatment also discriminates *against* part-time workers. Neither of the forms of unequal treatment that I have identified above satisfies that text.

106. Neither is therefore precluded by Clause 4 of the Framework Agreement.

The obligation to identify and review obstacles in Clause 5 of the Framework Agreement

107. At the hearing, the Commission argued that Clause 5(1)(a) of the Framework Agreement precludes legislation such as that at issue in the main proceedings. In accordance with the objective of promoting part-time work, that clause requires Member States to 'identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them'. The Commission relied on *Michaeler*, where the Court held that Clause 5(1)(a) must be interpreted as precluding national legislation which requires that copies of part-time employment contracts be sent to the authorities within 30 days of their signature.

108. I do not agree with the Commission.

109. In *Michaeler*, the contested requirement applied to part-time employment contracts but not to full-time employment contracts. The Court held that the combination of an additional administrative formality and penalties for non-compliance discouraged employers from making use of part-time work and might particularly affect small and medium-sized undertakings which, lacking the resources of larger undertakings, might therefore be inclined to avoid offering part-time work, which it was the aim of Directive 97/81 to promote. (55)

110. The contested requirement was therefore a clear example of a legal or administrative rule that acted as an obstacle for workers wishing to move from full-time to part-time employment.

111. The recitals and substantive provisions of the Directive and Framework Agreement, together with the 'general considerations' of the latter, make it clear that the ratio legis of the Framework Agreement is to improve the possibility for workers to move from full-time to part-time employment or to gain access to part-time employment without having first to pass via full-time employment.

112. The obligation in Clause 5 of the Framework Agreement therefore seems to me to be a specific application of the prohibition of discrimination in Clause 4. Sometimes such discrimination exists when Member States impose an obstacle of a legal or administrative nature on part-time contracts which they do not impose on full-time contracts, as was the case in *Michaeler*. The Member State is then under an obligation to eliminate such obstacles.

113. Here, there is no legal rule or administrative practice that acts as an obstacle to moving from full-time into part-time employment. Indeed, there is no difference in treatment between full-time workers and vertical-cyclical part-time workers as regards the manner in which their qualifying weeks are calculated. Qualifying weeks are calculated for both categories of workers on the basis of the principle of *pro rata temporis*. (56) The unequal treatment arises purely from the *preferential* treatment afforded to a *third* category of workers (horizontal part-time workers) in the calculation of qualifying weeks.

114. The situation would have been different if, say, qualifying weeks were calculated on the basis of the principle of *pro rata temporis* as regards horizontal part-time employment and full-time employment, but on a less advantageous basis as regards vertical-cyclical part-time employment. In that case, there would indeed have been unequal treatment between full-time employment and a specific type of part-time employment to the detriment of the latter. Such a rule would have fallen foul of the prohibition on discrimination in Clause 4 and the Member State would have been required, under Clause 5(1)(a), to eliminate that obstacle.

115. In *Schönheit and Becker*, the Court held that national legislation which leads to a disproportionate reduction of a worker's retirement pension when his periods of part-time work are taken into account cannot be regarded as objectively justified either by the fact that the pension is in that case consideration for less work or on the ground that its aim is to prevent workers employed on a part-time basis from being placed at an advantage in comparison with those employed on a full-time basis. (57)

116. However, that situation does not appear to arise here. The problem is not that vertical-cyclical part-time workers are disproportionately disadvantaged when compared with full-time workers. It is that horizontal part-time workers are, in a particular respect (calculation of qualifying weeks) actually *advantaged* when compared with either full-time or vertical-cyclical part-time workers.

117. It follows that the three questions referred should, on the basis of the analysis thus far, be answered to the effect that neither Clause 4 nor Clauses 1 or 5(1)(a) of the Framework Agreement in principle preclude the introduction of a distinction between various types of part-time work to which different conditions apply, as long as such distinctions do not discriminate in favour of full-time and against (a category of) part-time workers or form obstacles of a legal or administrative nature which may limit the opportunities for part-time work.

118. However, that is not quite the end of the story.

The general principle of equality

119. The prohibition on discrimination in Clause 4 of the Framework Agreement is a particular expression of the general principle of equality. (58) It must therefore be interpreted in accordance with that principle. Any national implementing measures must likewise respect the general principles of Community law, including the principle of equal treatment. (59)

120. Member States are at liberty to introduce distinctions between various types of part-time work. However, the measures that they enact must be compatible and consistent with the objectives and provisions of Directive 97/81 and the Framework Agreement on part-time work; and comply with the general principles of Community law, in particular the principle of equal treatment. (60)

121. It follows that Member States cannot introduce arbitrary distinctions between various types of part-time work that run counter to those objectives and that infringe the general prohibition on discrimination in Community law.

122. On the facts as I understand them, it seems to me that horizontal and vertical-cyclical part-time workers are in comparable situations. The reasons for their different treatment as regards the acquisition of pension rights are not readily apparent. That different treatment may therefore constitute an arbitrary distinction which would in principle fall foul of the general prohibition on discrimination.

123. At the hearing, the agent for Italy and counsel for the INPS were asked whether they wished to advance any justification for the unequal treatment in the present case. Both referred to the fact that, under Italian civil law, a vertical-cyclical part-time contract is suspended ('quiescent') during the periods not worked. This implies that no remuneration is paid and no contributions are made on behalf of the worker. In its written observations, Italy had also argued that workers are free to choose between horizontal and vertical-cyclical part-time work.

124. As to the justification based on national law, it is sufficient to recall that, according to settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify a failure to observe obligations arising under Community law. (61)

125. As to the justification based on workers' free choice between horizontal and vertical-cyclical part-time employment, the documents before the Court suggest that, in reality, no such choice exists for air carrier employees such as the claimants. The nature of their work as flight personnel on board an aircraft makes it very difficult, if not impossible, for employees to choose horizontal part-time employment (for example, working 7 days a week, but only 4 hours a day). One can hardly 'leave the office' after having completed a half day's work when that 'office' is an aircraft in mid-flight. (62) The practical impossibility of organising horizontal part-time work appears to have been confirmed by the applicable collective agreement, which restricts the choice of part-time work for employees such as the claimants to vertical-cyclical part-time employment.

126. Those justifications therefore appear not to be made out.

127. However, it will ultimately be for the national court to decide both whether the unequal manner of calculating the acquisition of pension rights as described by counsel for Italy and counsel for the INPS at the hearing is indeed the method prescribed by national law and, if that is the case, to examine whether there is any objective justification for such unequal treatment. (63)

Conclusion

128. In the light of the above, I conclude that the Court should answer the questions posed by the Corte d'Appello di Roma, Sezione Lavoro e Previdenza, as follows:

– The Framework Agreement annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC does not apply to statutory social security pensions. It is for the national court to establish whether the pension at issue in the main proceedings falls within that category. Should it conclude that the pension at issue is a statutory social security pension, it must examine whether Italy has exercised its competence as regards social security in accordance with Community law and, in particular, with the principle of non-discrimination;

– Clause 4 of the Framework Agreement on part-time work does not preclude national legislation whereby the weeks qualifying for the acquisition of pension rights are calculated in accordance with the principle of *pro rata temporis*. Clause 4 applies to unequal treatment between different types of part-time work only when that treatment also discriminates in favour of full-time workers and against part-time workers. Member States are at liberty to introduce distinctions between various types of part-time work. However, the measures that they enact must be compatible and consistent with the objectives and provisions of Directive 97/81 and the Framework Agreement on part-time work; and comply with the general principles of Community law, in particular the principle of equal treatment.

Member States may not introduce arbitrary distinctions between various types of part-time work that would run counter to those objectives and that infringe the general prohibition on discrimination in Community law.

1 – Original language: English.

2 – Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

3 – Union of Industrial and Employers' Confederations of Europe. As from 23 January 2007, UNICE changed its name into BUSINESSEUROPE, the Confederation of European Business.

4 – European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest.

5 – European Trade Union Confederation.

6 – My translations.

7 – In its written submissions, the INPS states that the Directive was implemented in Italian law by Legislative Decree No 368 of 6 September 2001. However, the title of Legislative Decree No 61/2000 itself indicates that it is intended to implement Directive 97/81, while the title of Legislative Decree No 368 indicates that it is intended to implement Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on *fixed-term* work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43). It is of course for the national court to identify the correct instrument of implementation.

8 – It appears from the materials before the Court that this governs periods assimilated to periods for which remuneration was paid.

9 – Fondo pensioni lavoratori dipendenti.

10 – The orders for reference do not contain a definition of cyclical part-time work. However, they do indicate that what is at issue in the present case is 'vertical' part-time work *on a cyclical basis*, which implies working some months of the year and not in the other months. I shall refer to such work as 'vertical-cyclical part-time work'.

11 – See, most recently, Case C-314/08 *Filipiak* [2009] ECR I-0000, paragraphs 40 to 42 and the case-law cited there.

12 – See Case C-64/06 *Telefónica O2 Czech Republic* [2007] ECR I-4887, paragraphs 22 and 23 and the case-law cited there.

13 – See, by analogy, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 105 to 133.

14 – See points 69 to 83 below.

15 – See points 14 and 16, and footnote 7, above.

16 – Case 68/69 [1970] ECR 171.

17 – OJ 1958, p. 561 (in Dutch, French, German and Italian only).

18 – *Brock*, cited in footnote 16, paragraph 7.

19 – See, for example, the earlier Case 44/65 *Singer et Fils* [1965] ECR 965, at p. 972, and, more recently, Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-0000, paragraph 43, and Case C-443/07 P *Centeno Mediavilla and Others* v *Commission* [2008] ECR I-0000, paragraph 61.

20 – Case C-290/00 [2002] ECR I-3567, paragraphs 19 to 26 and the case-law cited there.

21 – Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and to their families moving within the Community (OJ, English Special Edition, 1971(II), p. 416, amended on numerous occasions).

22 – That paragraph provides for account to be taken of any contingency, to which the right in question relates, even though it materialised 'prior to 1 October 1972 or to the date of [the regulation's] application in the territory of the Member State concerned'.

23 – That paragraph imposes the obligation to take into consideration, for the purposes of determining rights to benefit, all periods of insurance, employment or residence completed under the legislation of any Member State 'before 1 October 1972 or before the date of [the regulation's] application in the territory of that Member State'.

24 – Joined Cases C-124/08 and C-125/08 *Snauwaert and Others and Deschaumes* [2009] ECR I-0000, paragraphs 15 and 16 and the case-law cited there.

25 – The national file is available to the Court, but not to interested parties as defined in Article 23 of the Statute. Whilst it may legitimately be perused to glean additional relevant information, it cannot serve as a substitute for the order for reference.

26 – See footnote 10 above.

27 – Case C-111/01 *Gantner Electronic* [2003] ECR I-4207, paragraph 37. The Court expressed this more cautiously in earlier cases. See, for example, Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 31.

28 – See, for example, *JämO*, cited in footnote 27, paragraph 32; and Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 27.

29 – Case C-221/88 *ECSC* v *Busseni* [1990] ECR I-495, paragraph 13.

30 – Joined Cases C-28/98 and C-29/98 *Charreire and Hirtsmann* [1999] ECR I-1963.

31 – See, by analogy, Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraphs 25 to 27 and the case-law cited there.

32 – See Case C-445/06 *Danske Slagterier* [2009] ECR I-0000, paragraph 65 and the case-law cited there.

33 – Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 42; and Case C-210/06 *Cartesio* [2008] ECR I-0000, paragraph 91.

34 – As argued by the INPS: see point 27 above.

35 – Cited in footnote 13, paragraphs 105 to 134.

36 – Cited in footnote 7.

37 – Often referred to as 'occupational pensions'. See further C. Barnard, *EC Employment Law* (3rd edition, Oxford University Press, 2006), pp. 517 to 520.

38 – *Impact*, cited in footnote 13, paragraphs 131 to 134.

39 – See, by analogy, my Opinion in Case C-537/07 *Gómez-Limón Sánchez-Camacho* [2009] ECR I-0000, point 29. See also C. Barnard, cited in footnote 37, p. 475.

40 – See Case C-267/06 *Maruko* [2008] ECR I-1757, paragraphs 46 to 48 and the case-law cited there.

41 – Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] I-12575, paragraph 58.

42 – See Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-0000, paragraph 63 and the case-law cited there.

43 – *Maruko*, cited in footnote 40, paragraph 59 and the case-law cited there.

44 – Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-0000, paragraph 28 and the case-law cited there.

45 – See footnote 8 above.

46 – Leaving aside holidays.

47 – The calculation is therefore (number of weeks x number of days x number of hours worked per day), i.e. (52 x 5 x 4) for the horizontal part-time worker and (26 x 5 x 8) for the vertical-cyclical part-time worker.

48 – See Case C-17/05 *Cadman* [2006] ECR I-9583, paragraph 28 and the case-law cited there.

49 – Joined Cases C-122/99 P and C-125/99 P *D andSweden* v *Council* [2001] ECR I-4319, paragraph 48; and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 56.

50 – See also my Opinion in *Gómez-Limón Sánchez-Camacho*, cited in footnote 39, point 53, and further the Opinion of Advocate General Kokott in *Impact*, cited in footnote 13, point 101.

51 – *Schönheit and Becker*, cited in footnote 41, paragraph 90; and *Gómez-Limón Sánchez-Camacho*, cited in footnote 39, paragraph 59.

52 – *Schönheit and Becker*, cited in footnote 41, paragraph 91; and *Gómez-Limón Sánchez-Camacho*, cited in footnote 39, paragraph 59.

53 – See point 93 above.

54 – Joined Cases C-55/07 and C-56/07 *Michaeler and Others* [2008] ECR I-3135, paragraphs 21 and 22 (emphasis added). The Court also referred to recitals 5 and 18 in the preamble to the Directive: see point 3 above.

55 – *Michaeler and Others*, cited in footnote 54, paragraphs 25 to 29.

56 – See points 97 and 98 above.

57 – *Schönheit and Becker*, cited in footnote 41, paragraphs 93 to 97.

58 – *Cadman*, cited in footnote 48, paragraph 28 and the case-law cited there.

59 – Case C-241/07 *JK Otsa Talu* [2009] ECR I-0000, paragraph 46 and the case-law cited there.

60 – See, in a slightly different context, *JK Otsa Talu*, cited in footnote 59, paragraph 46 and the case-law cited there.

61 – Case C-369/07 *Commission* v *Greece* [2009] ECR I-0000, paragraph 45 and the case-law cited there.

62 – The same may apply, albeit less dramatically, to other categories of jobs, depending on the way in which various types of work have to be organised.

63 – It seems to me that there could be legitimate reasons to provide for a more generous basis of calculation of qualifying weeks for a certain form of part-time work in particular circumstances, without discriminating in favour of full-time and against part-time workers in general and without running counter to the objectives of the Directive and the Framework Agreement. One could, for example, envisage providing such an advantage for the type of part-time work that is most likely to suit workers raising children. See, for a similar argument as regards parental leave, my Opinion in *Gómez-Limón Sánchez-Camacho*, cited in footnote 39, point 54.