Joined opinion of Advocate General Cosmas delivered on 8 October 1998

Deutsche Telekom AG v Lilli Schröder

Reference for a preliminary ruling: Landesarbeitsgericht Hamburg – Germany

Case C-50/96

Deutsche Telekom AG v Agnes Vick (C-234/96) and Ute Conze (C-235/96)

Reference for a preliminary ruling: Landesarbeitsgericht Hamburg – Germany

Joined cases C-234/96 and C-235/96

Equal pay for men and women - Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) - Protocol concerning Article 119 of the EC Treaty - Occupational social security schemes - Exclusion of part-time workers from a supplementary occupational retirement pension scheme - Retroactive membership - Entitlement to a pension - Relationship between national law and Community law

Deutsche Post AG v Elisabeth Sievers (C-270/97) and Brunhilde Schrage (C-271/97)

Reference for a preliminary ruling: Landesarbeitsgericht Niedersachsen – Germany

Joined cases C-270/97 and C-271/97

Equal pay for men and women - Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) - Protocol concerning Article 119 of the EC Treaty - Occupational social security schemes - Exclusion of part-time workers affiliated to a supplementary occupational retirement pension scheme - Retroactive membership - Entitlement to a pension - Relationship between national law and Community law - Interpretation consonant with Community law

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Opinion of the Advocate-General

I – Introduction

1. The Landesarbeitsgericht Hamburg (Case C-50/96 and Joined Cases C-234/96 and C-235/96) and the Landesarbeitsgericht Niedersachsen (Joined Cases C-270/97 and C-271/97) are asking the Court of Justice for an interpretation of Article 119 of the EC Treaty, of the Court's judgment in Case C-262/88 Barber and of Protocol No 2 concerning Article 119 of the Treaty establishing the European Community annexed to the Treaty on European Union of 7 February 1992.

2. In the main proceedings the claimants are five women who were for years employed part-time by Deutsche Bundespost Telekom in its former capacity as a single company, and the defendants are the two companies resulting from that company's split-up, namely Deutsche Telekom AG (in the first three cases) and Deutsche Post AG (in the latter two cases). The dispute arises from the fact that, during the period at issue, part-time employees of the abovementioned companies, such as the claimants, were excluded from insurance and benefits under the occupational pension scheme operated by those companies, since the scheme was reserved to full-time employees.

3. The questions referred seek, in essence, to ascertain whether in the cases in question there is unfavourable treatment of female employees in comparison with that applied to men, which would be contrary to Article 119 of the EC Treaty; whether the temporal limitation on the reliance by claimants on Article 119 introduced by the Barber judgment and the Barber Protocol also applies to the cases in question; and whether, if so, Community law prevails over any more favourable national provisions which also grant entitlements to the interested parties for the period prior to that judgment and protocol.

4. Since the questions raised are basically common to all the cases, in order to avoid repetition I propose to examine them together in a single text, pointing out any differences wherever necessary.

II - Community legal framework

5. Article 119 of the Treaty, which establishes the principle of equal pay for men and women, states: ... For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

6. That Article was given detailed expression by Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

7. In addition, the principle of equal treatment for men and women was applied to statutory and in occupational pension schemes by Directives 79/7/EEC and 86/378/EEC respectively.

8. Protocol No 2 concerning Article 119 of the Treaty establishing the European Community, and annexed to that Treaty, provides as follows: [f]or the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law. In accordance with Article 239 of the Treaty, this protocol now forms an integral part of it.

III - National legal framework

A - National provisions

9. Article 3 of the Grundgesetz (German Basic Law) states, inter alia, that all persons are equal before the law (paragraph 1), that men and women have equal rights (paragraph 2) and that no one may be prejudiced or favoured because of his sex (paragraph 3).

10. Paragraph 612(3) of the German Bürgerliches Gesetzbuch (Civil Code) provides as follows:

3. In an employment relationship, it may not be stipulated that for the same work or work of the same value, the remuneration of an employee is, by reason of the sex of that employee, to be lower, than that paid to an employee of the opposite sex. A lower level of pay may not be agreed on the basis that, because of the employee's sex, special rules of protection are applicable.

11. In addition, Paragraphs 2 and 6 of the 1985 Gesetz über arbeitsrechtliche Vorschriften zur Beschäftigungsförderung (Law laying down provisions of employment law designed to promote employment, hereinafter the Beschäftigungsförderungsgesetz), which regulate issues relating to part-time work, provide as follows:

2. Prohibition of unequal treatment

(i) An employer may not treat an employee who works part-time differently, because of that part-time status, from employees who work full-time, unless there is objective justification for a difference of treatment.

...

6. Precedence of collective agreements

(i) The provisions of this chapter may be derogated from by collective agreement, even to the detriment of employees.

12. The situation regarding pension insurance for employees of the former Deutsche Bundespost company is as follows. In accordance with Paragraph 24 of the Tarifvertrag für Arbeiter der Deutschen Bundespost (Collective Agreement for German Post Office Workers), employees of Deutsche Telekom and Deutsche Bundespost are compulsorily insured with the Versorgungsanstalt der Deutschen Bundespost (German Post Office Pensions Institution, hereinafter the VAP) under the terms of the Tarifvertrag über die Versorgung der Arbeitnehmer der Deutschen Bundespost (Collective Agreement concerning Pensions for Employees of the German Post Office, hereinafter the Versorgungstarifvertrag) in the version in force at the material time.

13. Paragraph 3 of the Versorgungstarifvertrag provided, in the version in force until 31 December 1987, that employees must be insured with the VAP where, inter alia:

[the employee's] average weekly working hours under his contract of employment amount to at least half the regular weekly working hours in force at the time of a corresponding full-time employee (point b).

14. Paragraph 3(b) was subsequently amended by Collective Agreement No 394 of 6 December 1989, with retroactive effect from 1 January 1988. From then on an obligation to insure arose where the employee's average weekly working hours amounted to at least 18 hours.

15. That provision was later amended again, to the effect that since 1 April 1991 employees have been compulsorily insured with the VAP if their employment is not merely minimal within the meaning of Article 8(1) of the Sozialgesetzbuch IV (Book IV of the German Social Security Code).

B - The case-law of the national courts

16. Up until the Court's Barber judgment, no questions appear to have arisen relating specifically to the validity of the abovementioned provisions on pension insurance, either in connection with the Grundgesetz or as regards Community law.

17. It should however be noted that, as the Commission points out in its written observations in Case C-50/96, the Bundesarbeitsgericht (German Federal Labour Court) had already decided, in a judgment of 14 October 1986 (3 AZR 66/83), that unfavourable treatment of female part-time employees as regards access to a benefit falling within the scope of Article 119 of the EC Treaty was (also) prohibited under Article 3(2) of the Grundgesetz, which lays down that men and women are to be equal before the law and has been in force since 1949. Furthermore, according to that same judgment a temporal limitation of claimants' entitlements was neither justified nor necessary (see also the Bundesarbeitsgericht's judgment of 20 November 1990 (3 AZR 613/89) along the same lines).

18. In its subsequent and already settled case-law, however, the Bundesarbeitsgericht bases rejection of the differential treatment of part-time and full-time employees, and in particular exclusion of the former from insurance with the VAP, on, rather, the principle of equality before the law as deriving from Article 3(1) of the Grundgesetz, independently of the sex of the individual concerned and the percentages of men and women affected (judgment of 16 January 1996 (3 AZR 767/94), for example). In accordance with that same case-law, furthermore, since the constitutional provision concerned regulates the contested matter in full and predates Article 119 of the EC Treaty, there is no question either of relying on Article 119 or, consequently, of applying the temporal limitation imposed by the Barber judgment and the Barber Protocol annexed to that article.

19. The result of that conflict is, in accordance with the Bundesarbeitsgericht's case-law, that those provisions of the Versorgungstarifvertrag which exclude part-time employees from insurance with the VAP are contrary to the constitutional principle of equality and therefore inapplicable, whereas its other provisions remain valid, and that employees excluded from pension insurance consequently acquire entitlements with retroactive effect. The principles of legal certainty and protection of legitimate expectations on which the defendant company (in one case Deutsche Telekom) relied by way of objection cannot defeat the employees' entitlement to inclusion, with retroactive effect, in the occupational pension scheme and the consequences flowing therefrom. The additional cost arising for the company, amounting to DEM 40 to 50 million, could be covered from other sources such as the capital market or company reserves.

IV – Facts

A - Employment history of the claimants and proceedings before the Arbeitsgericht (first-instance Labour Court)

(a) Case C-50/96

20. Lilli Schröder entered the employ of the Deutsche Bundespost Telekom company in 1974. From 20 May 1975 to 31 March 1994, when she retired, she worked on a part-time basis for fewer than 18 hours per week. From 1975 to 31 March 1991 the claimant was not insured with the VAP. Following the most recent amendment of the Versorgungstarifvertrag mentioned above, however, she was insured with the VAP from 1 April 1991. Since 1 April 1994 she has been in receipt of the statutory retirement pension.

21. In her action before the Arbeitsgericht Hamburg, the claimant maintained that she was entitled to compulsory insurance with the VAP with retroactive effect from 20 May 1975, since the exclusion of part-time employees from insurance with the VAP constituted a form of indirect discrimination against women which is contrary both to Article 119 of the EC Treaty and to Article 3 of the Grundgesetz and Paragraph 2 of the Beschäftigungsförderungsgesetz.

She based that assertion on the fact that, according to the figures adduced for 1991, of the defendant's 240 339 full-time employees 169 477 (70.5%) were men while only 70 861 (29.5%) were women, whereas of its 11 521 part-time employees 560 (5%) were men and 10 931 (95%) were women.

In the light of the foregoing the claimant asked that the defendant be required to pay her, from 1 April 1994, a supplementary pension in the amount which would have been payable if she had been insured with the VAP from 20 May 1975 to 31 March 1991. In the alternative, she claimed that she should be insured retroactively from this last-named date at the defendant's expense and, in the further alternative, that she be paid compensation for the period during which she had not been insured.

(b) Joined Cases C-234/96 and C-235/96

22. Agnes Vick (claimant in Case C-234/96) was taken on by Deutsche Bundespost as a part-time employee on 1 July 1971. Until 30 September 1972 she worked full-time and was insured with the VAP. From 1 October 1972 she began to work part-time, for 16 hours per week. For that reason she was deregistered from the VAP and the insurance contributions she had paid were repaid to her. From the abovementioned date until 30 July 1991, when she left the defendant's employ, she was not insured with the VAP. Since 1 August 1991 the claimant has been in receipt of the statutory retirement pension.

In her action before the Arbeitsgericht Hamburg she similarly sought a declaration that she is entitled to be paid a monthly pension in the amount which would have been payable if she had been insured with the VAP from 1 July 1971, together with interest at 4% from each due date.

23. Ute Conze (claimant in Case C-235/96) was employed from 13 September 1971. Until 30 April 1972 she worked full-time and was insured with the VAP. From 1 May 1972 she began to work part-time for 16 hours per week and, as a result, she was deregistered from the pension scheme. Since 1 April 1991 the claimant, who is still in the defendant's employ, has again been insured with the VAP.

24. In her action before the Arbeitsgericht Hamburg, the claimant asked that the defendant be obliged to place her in such a position, when an insured event occurred, as if she had been insured with the VAP from 1 January 1983 to 31 March 1991.

25. In both of these cases the defendant submitted that retroactive insurance of the claimants was contrary to the principle of good faith and to the constitutionally guaranteed principles of freedom of contract and autonomy in collective bargaining. It also submitted that retroactive insurance of all part-time employees would threaten its economic existence.

The defendant further submitted that, in any event, any potential recognition of entitlements to the benefit of the claimants could not have retroactive effect for the period before 17 May 1990, the date on which the Court of Justice delivered its judgment in Barber.

26. The Arbeitsgericht Hamburg upheld the claims, on the ground that the objective preconditions for indirect discrimination against women were present. Prohibition of such discrimination already follows, however, from Article 3(2) of the Grundgesetz. In addition the first-instance court found that there was no constitutional principle preventing retroactive recognition of the claims. For those reasons the Arbeitsgericht decided that there was no question of applying the temporal restriction provided for in the Barber judgment.

(c) Joined Cases C-270/97 and C-271/97

27. Elisabeth Sievers (claimant in Case C-270/97) entered the defendant's employ on 16 September 1964 and left it on 28 February 1988, when she retired. Throughout that period she worked as a part-time employee, with working hours fluctuating between 2.5 and 18 hours per week. In view of her working hours, the claimant was not insured with the VAP.

28. In March 1993 she brought an action before the Arbeitsgericht Hannover and claimed that the defendant be obliged to pay her, from 1 March 1993, such a monthly pension as if she had been insured with the VAP from the outset. In the alternative, she claimed that she should be insured with the VAP for the entire period of her employment with the defendant at its expense and, in the further alternative, she claimed compensation from the defendant for the damage she had suffered through not being insured.

29. Before the Arbeitsgericht the claimant maintained that she had suffered indirect discrimination on grounds of sex, while the defendant contested that assertion and, in addition, maintained that her claims in respect of the period prior to 1 January 1991 were time-barred.

30. The Arbeitsgericht Hannover held that, independently of sex, the differential treatment of part-time and full-time employees was in itself contrary to Paragraph 2(1) of the Beschäftigungsförderungsgesetz and to the constitutional principle of equality; on that ground it upheld the main claim in part and granted her a pension from 1 January 1991. The defendant lodged an appeal against this judgment with the court making the reference.

31. Brunhilde Schrage (claimant in Case C-271/97) entered the defendant's employ in 1960 and worked, with interruptions, up to 1 October 1981 and thereafter continuously, as a part-time employee, until 31 March 1993. By her action she claimed from the latter date such a pension as if she had been insured from 1 January 1964 to 31 March 1993, and also submitted alternative claims similar to those of Elisabeth Sievers.

32. The court upheld the main claim in part, but did not consider her claims in respect of the period prior to 1964 since these were caught by the 30-year limitation period in German law (Article 195 of the Bürgerliches Gesetzbuch [Civil Code]).

B - Proceedings before the Landesarbeitsgerichten (Higher Labour Court)

33. The defendant companies lodged appeals against the respective judgments before the Landesarbeitsgericht having jurisdiction in each case. They maintained that Article 119 of the EC Treaty and the relevant protocol annexed to the Maastricht Treaty prevail over the provisions of national law in the matters which they regulate. Consequently, according to the appellants, the temporal limitation provided for in the Barber judgment and the Barber Protocol must be applied in the cases in point.

34. The claimant-respondents contested that interpretation and argued that the rights they were claiming derived from Article 3 of the Grundgesetz and had always been applicable in Germany. In their view, Community law cannot give rise to a situation in which, where the existing legal position within a Member State prior to delivery of the Barber judgment was the same as the legal position which that judgment has created in Community law, individuals who suffered discrimination prior to the Barber judgment are now no longer able to assert any claim in respect of discrimination on grounds of sex.

35. The courts making a reference observe in general that the cited case-law of the Bundesarbeitsgericht is not undisputed. In particular, they take the view that the exclusion of part-time employees from insurance with the VAP constitutes discrimination in contravention of Article 119 of the Treaty. In addition, on the assumption that the Barber judgment and the Barber Protocol prohibit the retroactive recognition of entitlements from before the date of delivery of that judgment by the Court of Justice, they are disposed to the view that that date represents the farthest limit generally for all claims falling under Article 119. Having regard to the principle of the supremacy of Community law over national law and the requirement for uniform application of Community law in all Member States, the abovementioned temporal limitation applies even where national law recognises entitlements extending to a period predating the Barber judgment. Furthermore, according to those courts it must be borne in mind that the earlier case-law of the Bundesarbeitsgericht itself made it difficult or impossible in Germany, before the Barber judgment, to establish whether the contested provisions of the Versorgungstarifvertrag were contrary to Article 119 of the EC Treaty or to Article 3(2) of the Grundgesetz and

that, consequently, the retroactive recognition of employees' entitlements raises the question of a contravention of the principles of legal certainty and protection of the legitimate expectations of employers. Lastly, the courts making a reference observe that, from the point of view of competition, the economic consequences of retroactivity in the cases at issue would place German undertakings at a disadvantage in relation to undertakings in other Member States.

36. In the light of those doubts, the national courts concerned have referred the following questions to the Court of Justice for a preliminary ruling in each case.

V - Questions referred for a preliminary ruling

37. The questions referred for a preliminary ruling are as follows:

(a) In Case C-50/96 Schröder

1. Where part-time employees working less than 18 hours per week are excluded by gender-neutral wording from eligibility for a supplementary pension operated within the framework of an occupational pension scheme, and approximately 95% of the employees affected by that exclusion are women, does that constitute indirect discrimination against women within the meaning of the case-law of the Court of Justice on Article 119 of the EC Treaty?

2. If Question 1 is to be answered in the affirmative: do the Protocol concerning Article 119 of the Treaty establishing the European Community (the Barber Protocol) and the prohibition of retroactivity contained therein also cover cases of indirect discrimination against women in circumstances such as those described in Question 1?

3. If Question 2 is to be answered in the affirmative: does the prohibition of retroactivity contained in the Protocol concerning Article 119 of the Treaty establishing the European Community (the Barber Protocol) prevail over German constitutional law (Article 3(1) of the Grundgesetz (Basic Law)), which specifically precludes a prohibition of retroactivity in cases such as that described in Question 1?

4. Does the retroactivity permitted by German constitutional law pursuant to Article 3(1) of the Grundgesetz constitute, in a case such as that described in Question 1, an impermissible circumvention of the prohibition of retroactivity in the Protocol concerning Article 119 of the EC Treaty, where, by contrast with Community law, the national law applicable in comparable circumstances, which is also aimed at establishing equality of treatment in occupational pension schemes, operates retroactively in favour of employees, in particular women who are the subject of indirect discrimination?

5. If Question 4 is to be answered in the affirmative: does the application of Paragraph 2(1) of the Beschäftigungsförderungsgesetz (Law for the Promotion of Employment) of 26 April 1985, which purports to allow retroactivity back to 26 April 1985, constitute an impermissible circumvention of the prohibition of retroactivity contained in the Protocol concerning Article 119 of the EC Treaty (the Barber Protocol)?

6. Does the retroactivity permitted pursuant to Article 3(1) of the Grundgesetz in cases such as that described in Question 1 constitute a breach of Community law from the standpoint of disproportionate discrimination against nationals such as the German undertakings affected, or in the light of an interpretation of national law that renders it consistent with the Community rules or a principle of Community law, and does Community law prevail in that respect over national law?

(b) In Cases C-234/96 Vick and C-235/96 Conze

1. Do Article 119 of the EC Treaty, the Barber Protocol No 2 and the relevant case-law of the Court of Justice of the European Communities as primary Community law have priority over the constitutional law (Article 3 of the Grundgesetz (Basic Law)) and ordinary law (Paragraph 2(1) of the Beschäftigungsförderungsgesetz (Employment Promotion Law) and the general principle of equal treatment in labour law) in force in Germany, with the consequence that, where the factual requirements are fulfilled for a claim under Article 119 of the EC Treaty on the ground of indirect sex discrimination in connection with an occupational old-age pension scheme because of unfavourable treatment of part-time workers, benefits can be claimed even under constitutional or ordinary rules of national law, only on the same restrictive conditions as apply to a coincident Community-law claim under Article 119 of the EC Treaty, so that, in divergence from the legal assessment otherwise applicable under national law, even on the basis of grounds of claim under national law benefits are owed only for periods of employment after 17 May 1990, subject to the exception for employees who have initiated legal proceedings or introduced an equivalent claim before that date?

2. Is the answer to the preceding question the same if, on the basis of concurrent national law, entitlement to equal treatment already exists for the simple reason that there is objectively unjustified unfavourable treatment owing to part-time employment, without it being relevant whether there is also indirect sex discrimination because a numerically greater proportion of women workers are treated unfavourably?

(c) In Joined Cases C-270/97 Sievers and C-271/97 Schrage

1. (a) Does Community law require precedence of application or validity (under the second paragraph of Article 5 and Article 189 of the EC Treaty) over national provisions of the Member States which could or would be applicable, by way of concurrence of claims, to the same factual situation and with the same aim of supporting claims to equal treatment in occupational pension schemes, like for example in Germany the employment law

principle of equal treatment generally or, specifically, Paragraph 2(1) of the Beschäftigungsförderungsgesetz (Employment Promotion Law) 1985?

(b) In the case of such a conflict, where Community law confers benefits under occupational pension schemes only if and in so far as they are attributable to periods of employment subsequent to 17 May 1990, whereas the national provisions regulate the same factual situation differently in that they do not exclude retroactive effect, does the precedence of Community law apply generally?

(c) Does such precedence exist only if the economic objective of Article 119 of the EC Treaty, which exists with the social objective, namely the creation of equal competitive opportunities, is specifically affected?

2. Does at least the Community law principle that national law is to be interpreted in a manner consistent with EC law require national provisions on equal treatment in the matter of benefits paid under occupational pension schemes to be interpreted and applied in accordance with the requirements and limitations (prohibition of retroactive effect) of Community law?

VI – Substance

A - Question 1 in Case C-50/96 Schröder

38. This question asks whether the exclusion of female part-time employees from eligibility for a supplementary pension within the framework of an occupational pension scheme is contrary to Article 119 of the Treaty, where 95% of the employees excluded are women.

39. It is undisputed in the case in point that the pension scheme concerned falls within the scope of Article 119 of the Treaty and that the benefit in question constitutes consideration within the meaning of that article.

40. Furthermore, there is no essential disagreement between the parties as to the reply to be given to this question, since the issue has been resolved. It therefore suffices to refer to the settled case-law of the Court of Justice, in accordance with which the exclusion of part-time employees from eligibility for a supplementary pension provided within the framework of an occupational pension scheme constitutes discrimination against women prohibited under Article 119 of the Treaty, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

41. The United Kingdom, in its observations, suggests a method of calculating the respective proportions of men and women to be taken into account in establishing discrimination which differs from that adopted by the courts hearing the cases. However, since this issue does not arise directly in these cases there is no need, in my opinion, to examine it.

B - Questions 2 to 5 in Case C-50/96, the two questions in Cases C-234/96 and C-285/96 and Questions 1(a), 1(b) and 2 in Cases C-270/97 and C-271/97

42. In essence these questions, which it is appropriate to examine together, ask whether Article 119 of the Treaty and the Barber Protocol, as interpreted by the Court of Justice, run counter to national provisions under which part-time employees have a claim to access to insurance and to the receipt of a supplementary pension such as that in question in the main proceedings from a time prior to 17 May 1990, the date of the Barber judgment.

43. They raise two issues: first, whether in the light of Community law cases such as those being contested are subject, as a general rule, to the temporal limitation resulting from the Barber judgment and the Barber Protocol or to some other temporal limitation (see (a) below); and secondly, whether, in accordance with the principle of the supremacy of Community law, that limitation is also applicable where national law confers rights which extend farther back than the date concerned (see (b) below).

(a) The first issue

44. It follows from the Court's case-law subsequent to the Barber judgment that the temporal limitation contained in that judgment, which was incorporated in the relevant protocol, concerns only those kinds of discrimination which employers and pension schemes could reasonably have considered to be permissible owing to the transitional nature of the derogations provided for by Community law and which were capable of being applied to occupational pensions.

45. That being so, as far as the right to join an occupational scheme is concerned the Court has declared that, subsequent to its judgment in Bilka, it was clear that discrimination on grounds of sex constitutes an infringement of Article 119 and that there was no reason to suppose that the professional groups concerned could have been mistaken about the applicability of that article of the Treaty.

46. The Court has also ruled that, since no provision was made in the Bilka judgment for any limitation of its effects in time, the direct effect of Article 119 may be relied upon to claim membership of an occupational pension scheme with retroactive effect from 8 April 1976, the date on which its judgment was delivered in Case 43/75 Defrenne II [1976] ECR I-455 (see paragraph 40), in which that article was first held to have direct effect.

47. Lastly, the Court has stated that membership of a pension scheme would be of no interest to employees if it did not confer entitlement to the benefits provided by the scheme in question and, accordingly, ruled that employees who have been excluded from membership of an occupational pension scheme because of their sex

are not only entitled to retroactive membership but also have a retroactive claim to the corresponding benefits, such as a retirement pension or supplementary pension.

48. From the Community law point of view, therefore, in circumstances such as those in the present cases, employees such as the claimants not only, in any event, have the right to retroactive membership of the pension scheme from 6 April 1976, but are also entitled to the benefits corresponding to that period of insurance.

49. One point needs to be clarified here with regard to the factual framework of the disputes in the main proceedings. It should be noted that receipt of the benefits corresponding to a period of retroactive insurance is subject to the general restrictions and conditions in force on the matter in the Member State concerned, in particular the previous payment by the employee of any required insurance contributions.

50. As the Court has pointed out, where an employee has suffered discrimination based on sex in contravention of Article 119 of the Treaty:

... equal treatment is to be achieved by placing the worker discriminated against in the same situation as that of workers of the other sex.

It follows that the worker cannot claim more favourable treatment, particularly in financial terms, than he would have had if he had been duly accepted as a member.

... [t]herefore ... the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

51. In the present instance, as already indicated in my account of the background to these cases, the first claimant and the last two claimants merely sought payment of the supplementary pension based on the notional calculation of the period for which they were employed part-time (that is, without retroactive membership of the scheme); in the alternative, they sought retroactive membership of the scheme at the expense of the defendants, and in the further alternative, compensation for the period of non-membership. That is, they claimed in all cases the benefit of the relevant entitlements at no cost to themselves. Similar claims were also put forward by the two other claimants.

52. That construction cannot be accepted, however, since entitlement to benefits is not an independent right but one consequent upon membership of the scheme which confers those benefits (in this instance, membership of the VAP). Furthermore, if the claimants were to receive the contested benefits free of charge that would constitute another form of discrimination, in their favour, against those full-time employees who have paid contributions for years, which is the reason why such an interpretation was also rejected in the judgment in the Fisscher case.

53. Consequently, as concerns membership of an occupational pension scheme such as that at issue in the main proceedings and receipt of the corresponding benefits, the relevant time-limit, from the point of view of Community law, is 8 April 1976, the date of the decision in Defrenne II, and not 17 May 1990, the date on which the Barber judgment was delivered and to which the protocol concerning that judgment also refers.

(b) The second issue

54. Now that I have clarified the first issue involved, the question that arises is whether the abovementioned temporal limitations are also applicable where, as in the present instance, national law regulates the same matters more favourably.

55. In essence the claimants, the United Kingdom and the Commission maintain basically that, if German law confers more extensive rights than Article 119 of the Treaty, neither that article nor the temporal limitations required for its implementation are applicable. The defendants, on the other hand, contend that, where a case falls within the scope of Article 119 of the Treaty, in accordance with the principle of the supremacy of Community law that article and the temporal limitations connected with it must be applied, even to the exclusion of more favourable national provisions.

56. The defendants' argument cannot be accepted.

57. First, the significance of the temporal limitations established by the Court's judgments in Defrenne II and Barber needs to be clarified.

58. According to settled case-law, the direct applicability of Community law means that its rules must be fully and uniformly applied in all Member States from the date of their entry into force and for so long as they continue in force. Those provisions are a direct source of rights and duties both for the Member States and for individuals who are parties to legal relationships under Community law, and it is the task of the national courts to protect those rights.

59. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

60. Moreover, according to settled case-law, the interpretation which, in the context of Article 177 of the Treaty, the Court of Justice gives to Community law clarifies the meaning and scope of the rule concerned as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by national courts even to legal relationships arising and established

before the judgment ruling on the request for interpretation. In other words, the effects of a judgment of the Court providing an interpretation normally date back to the time at which the rule interpreted came into force.

61. That being so, a restriction by the Court of the effects of a judgment providing an interpretation is a quite exceptional step justified only by overriding considerations of legal certainty. That is the case where national authorities, by reason of excusable legal mistake, have introduced and applied, over a long period, rules contrary to Community law which have produced wide-ranging effects and to overturn those effects would cost far more than their maintenance. No restriction, however, is permitted for the future.

62. It is therefore self-evident that the issue of the meaning and applicability of a rule as interpreted by a judgment of the Court must not be confused with the issue of a limitation on the effects of the judgment providing that interpretation. An interpretation always (that is, even where the Court limits the effects of its judgment) has retroactive effect dating back to the time at which the rule concerned came into force. It merely clarifies the meaning and binding force which the rule has in itself and always had; it does not create them. A limitation of the effects of the judgment providing the interpretation, on the other hand, merely consists in depriving individuals of the possibility of relying on and exercising the rights conferred on them by the rule thereby interpreted and in force.

63. The following conclusions may be drawn from the foregoing:

First, the question of applying the principle of the supremacy of Community law arises only if national provisions are contrary to Community law, that is, when there is a conflict between Community law and national law. Consequently, it does not arise when the national provisions are in compliance with Community law.

Secondly, limitation of the effects of a judgment of the Court is a concessionary measure to which the latter resorts after assessing the consequences which the national provision contrary to Community law has produced. Consequently, a limitation of the effects of a judgment of the Court again necessarily presupposes a conflict between Community law and national law. However, such a limitation is inconceivable where a national provision is in accord with Community law, since that would lead to a reversal of Community law.

64. In circumstances such as those in the main proceedings, therefore, the fundamental question is whether national provisions such as those at issue in the main proceedings are in accord with or contrary to Community law.

65. I would point out that in these cases the national provisions at issue are not the provisions of the Versorgungstarifvertrag in their various successive versions. The provisions at issue are the provisions of the Versorgungstarifvertrag as they now apply after having been retroactively expurgated of the rules which, in accordance with the case-law of the Bundesarbeitsgericht as described earlier (see point 16 et seq. above), were contrary to Article 3(1) of the German Grundgesetz. It is those provisions which constitute the national legal framework of the questions referred for a preliminary ruling, regardless of the purely domestic-law issue of how and why the national courts arrived at that conclusion.

66. Under those provisions, as described above, since 1949 part-time employees (both men and women) must enjoy the same treatment as full-time employees (both men and women). The exclusion of part-time employees from membership of the VAP and receipt of the supplementary pension has accordingly always been unconstitutional. This means that all part-time employees (including women) are entitled to retroactive insurance with the VAP and receipt of the corresponding benefits.

67. It should therefore be noted that the national provisions, in the context of regulating the more general issue (that is, establishing equality of treatment of part-time employees with full-time employees), also regulate the more specific issue of establishing equality of treatment of female part-time employees with full-time employees, which is the contested issue in the cases in point. Consequently, the same facts fall within the scope of two superimposed legislative systems: Article 119 of the Treaty, which prohibits discrimination against the comparatively larger number of female part-time employees, and the national provisions, which impose a general prohibition of discrimination against part-time employees as compared with full-time employees.

68. In view of their content, the national provisions are entirely consistent with Article 119 and indeed are even of broader scope than that article both in time (since they cover a period prior to the Treaty's entry into force) and as regards the persons covered (since they apply to all part-time employees independently of sex and of the percentages of men and women) and also, in all probability, the matters covered (since, in the light of the broad wording of Article 3(1) of the Grundgesetz, on which the Bundesarbeitsgericht based its reasoning, the establishment of equal treatment relates to the employment conditions in general of the two categories of employee and not merely to the matter of pay).

69. Consequently the national provisions, inasmuch as they are more extensive than Article 119 of the Treaty and consistent with it, can legitimately constitute an independent basis for the claims presented by the claimants before the national courts. There is therefore no question either of any contradiction or of any conflict between national law and Community law and, accordingly, no occasion for application of the principle of the supremacy of Community law.

70. It also follows from the foregoing that, in circumstances such as those of the present cases, no temporal limitation of the effects of the judgment of the Court is possible. That is so firstly because, as the claimants and the Commission rightly point out, that limitation concerns rights which the persons concerned derive from Community law (whereas in the present circumstances, as explained above, the claims put forward are legitimately based on national law), and secondly because a limitation of the effects of the judgment of the Court is in any event inconceivable where the national provisions are consistent with the provisions of Community law as interpreted, since that would lead to a reversal of Community law.

71. If the defendants' view were accepted, Article 119 would appear, on the one hand, to require during the first stage equalisation of pay for men and women within the Member States, but, on the other hand, to frustrate

such equalisation by then imposing restrictions on national measures which already implement the requirement concerned from an even earlier date. In terms of both logic and law, however, that signifies a contradiction which is unacceptable within the framework of Community law. Whereas reasons of legal certainty, that is, reasons likewise stemming from Community law, have by way of exception served to justify the retroactive maintenance of national measures which are contrary to Article 119, there is no express provision or general principle which permits the setting aside of national provisions that are consistent with Community law.

C - Question 6 in Case C-50/96 and Question 1(c) in Cases C-270/97 and C-271/97

72. In essence, these questions seek to ascertain whether, having regard to the economic objective of Article 119 and the fact that other Member States have not adopted provisions similar to those contested, the compatibility with Article 119 of the Treaty of national provisions such as those at issue in the main proceedings can be called into question on account of the resulting economic burden on the undertakings affected.

73. According to the argument submitted by the defendant companies, which the referring courts also seem to accept, retroactive insurance with the VAP of part-time employees and the founding of claims on their part entail for the companies concerned a serious economic burden which renders them less competitive in relation to similar undertakings in other Member States. That does not appear to be compatible either with the requirement that conditions of competition within the Community be equal or with the objective of Article 119, which is not only social but also economic in that it seeks to impose the same economic operating conditions for undertakings. The other parties, by contrast, either reject that line of argument (the claimants) or consider a response unnecessary in the light of the answers to the other questions (the United Kingdom and the Commission).

74. The defendants' view cannot be accepted.

75. I would point out, first, that their arguments essentially relate to the practical repercussions for the defendant companies of the declaration by the Bundesarbeitsgericht that the provisions of the Versorgungstarifvertrag which excluded part-time employees from membership of the pension scheme were unconstitutional. Similar arguments had also been presented before that court but, as I recounted earlier, were rejected on the grounds that the economic burden for the undertakings did not seem significant, that it could be covered with other resources and that that damage was, in any event, of less significance than the damage caused to the employees by their exclusion from the pension scheme (see points 17 and 19 above). Further, as I have also already stated, the highest German labour law court decided that neither the principles of legal certainty and protection of legitimate expectations nor any general principle precluded that conclusion.

76. Those issues have therefore arisen because of the conflict between lower-ranking and higher-ranking rules within the national legal system and of the changes made within that system as a result. That being so, in so far as it contests the interpretation given by the Bundesarbeitsgericht to Article 3 of the Grundgesetz, which constitutes the framework of the questions referred for a preliminary ruling, the above line of argument cannot be taken into consideration here, since it entails the interpretation of national law, which falls within the competence of the national courts (in this case the Bundesverfassungsgericht, before which appeals to that end are in fact still pending).

77. There remains to be examined, therefore, whether any question of the interpretation of Community law is involved, which only the Court of Justice has jurisdiction to give.

78. The defendant companies attempt to derive an argument from the objective of Article 119. They maintain that, alongside its social objective, that article also has an economic objective which consists in providing equal competitive opportunities for undertakings in the Member States. The achievement of that objective would, however, be jeopardised if only undertakings in certain Member States had to suffer the consequences of the retroactive adjustment of national provisions to Community law while others benefited from the maintenance of inequalities.

79. It is true that, in its judgment in Defrenne II, the Court of Justice ruled, first, that ... the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women as regards pay (paragraph 9), while stating, secondly, that ... this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasised by the Preamble to the Treaty (paragraph 10).

80. Nonetheless, regardless of whether that economic objective truly reflected the intentions of the historical Community legislature, it no longer corresponds to present-day thinking. In a community governed by the rule of law, which respects and safeguards human rights, the requirement of equal pay for men and women is founded mainly on the principles of human dignity and equality between men and women and on the precept of improving working conditions, not on objectives which are economic in the narrow sense set out above. Furthermore, in its more recent case-law the Court has stated that the principle laid down by Article 119 simply expresses in a specific form the general principles of equality and non-discrimination, which are fundamental principles of Community law.

In my opinion, therefore, the presumed economic objective of Article 119 cannot in any event be relied on in order to avoid giving effect to national provisions which are, for the rest, in accord with that article.

81. As regards the issue of the retroactivity of the economic burden, I would in any event point out that, as is clear from the foregoing, on account of the findings of the Bundesarbeitsgericht (see my points 17 to 19 above)

and of the option of levying contributions from the employees concerned retroactively (see my point 49 et seq. above), that argument no longer has any real basis.

82. Irrespective of that, it should be noted that the retroactive effect of the national law to 1976 does not give rise to any problem of incompatibility with Community law. That is because even if the national measures had not been adopted the parties concerned would anyway have achieved the intended purpose by relying on the direct effect of Article 119. In respect of that period, the lack of adequate resources or simply the financial difficulty for the employers is a problem which must be resolved on the basis of national law and cannot affect the present cases. Consequently, the only issue to be examined is whether provisions such as those being contested are contrary to Community law to the extent that they have retroactive effect covering the period before 1976 and up to the entry into force of Article 119.

83. It should be recalled in this connection that, before they were pronounced unconstitutional, those provisions of the Versorgungstarifvertrag which gave rise to discrimination against the claimants were contrary to Article 119 of the Treaty and that, from the end of the first period, Germany was under a continuous obligation to abolish them. In addition, it is apparent from the Court's case-law that a Member State can validly fulfil its obligations under Community law retroactively. From the point of view of Community law, therefore, the national provisions legitimately have retroactive effect as from the period at issue.

84. The argument concerning the economic burden on the undertakings, even assuming it to be true as regards its factual basis, does not undermine that conclusion.

The provisions of Article 119 take account of the interests of all the economic partners - employees, employers and the institutions providing the benefits. The consideration given to these last two groups by Community law is, in my view, apparent both from the transitional stage provided for in the first paragraph of Article 119 (a period allowing Member States and also employers to adjust to the new conditions) and from the temporal limitations introduced by the judgments in Defrenne II and Barber and by the relevant protocol.

85. It must not, however, be forgotten that the main purpose of Article 119 is to confer rights on those groups of employees who suffer systematic discrimination on grounds of sex, who as a rule, given the traditional structures and stereotypes still existing in our societies, are groups of female employees.

86. That being so, it must be accepted that the concern of the Community legislature to safeguard, in the matter of equal pay, the legitimate economic interests of groups other than employees has already been given sufficient expression by the abovementioned express provisions and the limitations introduced by the case-law of the Court in interpreting in this case as well the presumed intention of the Community legislature. No further obstacle to or limitation on the implementation of the requirement contained in Article 119 of the Treaty is justified. As I have stated, therefore, the possible economic repercussions for those groups resulting from national measures adopted with a view to implementing the requirement contained in Article 119 do not justify either a further temporal limitation of the effects of the judgment of the Court or, even less so, an objection to those measures from the point of view of Community law.

87. Lastly, the fact that other Member States may not have complied with Article 119 to the same extent as Germany does not affect the present cases. As the Court has ruled:

The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.

To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article 164 of the Treaty.

VII - Conclusion

In view of the foregoing, I would propose that the Court reply to the questions referred to it for a preliminary ruling as follows:

(1) The exclusion of part-time employees from an occupational pension scheme such as that at issue in the main proceedings constitutes discrimination prohibited under Article 119 of the Treaty, where that measure affects a comparatively far greater number of women than men and is not justified by objective reasons unrelated to any discrimination on grounds of sex.

(2) Employees who have suffered discrimination such as that described above as concerns the right to membership of an occupational pension scheme and to the payment of benefits on the basis of that scheme may rely on the direct effect of Article 119 in contesting national provisions contrary to that article retroactively from 8 April 1976, the date on which the Court delivered its judgment in Defrenne II.

(3) Neither Article 119 nor any other provision or general principle of Community law precludes the application of national measures under which discrimination contrary to Article 119 such as that described above is remedied with retroactive effect from a period prior to the judgment in Defrenne II.

(4) Any financial problems resulting for the undertakings concerned from the application of such retroactive national provisions must be resolved, taking account of the principle of equal pay, on the basis of national law and have no bearing on the replies to the above questions.