between men and women in the matter of working conditions other than the requirements as to pay referred to in Article 119 of the Treaty.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 15 June 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 30 MAY 1978 [1]

Mr President,
Members of the Court,

1. For the third time the Court of Justice has before it a Defrenne case and is called upon to resolve a problem relating to the interpretation of Article 119 of the EEC Treaty which affirms "the principle that men and women should receive equal pay for equal work". As in the two previous cases the reference for a preliminary ruling emanates from a Belgian court (in this instance the Cour de Cassation) and has arisen in the context of an action brought by Miss Defrenne after the termination of her contract of employment with the airline company Sabena.

Let me first summarize the facts of the case.

Miss Defrenne was engaged by Sabena in December 1951 as a trainee air hostess and 12 years later she was promoted to be air hostess-principal cabin attendant but on 15 February 1968 she had to give up her post pursuant to the sixth paragraph of Article 5 of the contract of employment entered into by air crew employed by Sabena whereby in principle employment of female staff terminates automatically when they reach the age of 40 years. Also pursuant to that contract of employment Miss Defrenne received an allowance on termination of service equivalent to 12 months' salary.

On 13 March 1968 Miss Defrenne brought before the Tribunal du Travail (Labour Tribunal), Brussels, an action claiming that Sabena should be ordered to pay to her certain arrears of salary and an additional allowance on termination of service and to compensate her for the damage she had allegedly suffered with regard to her retirement pension. Moreover in an action brought

1 — Translated from the Italian.

before the Conseil d'État on 9 February 1970 Miss Defrenne sought the annulment of the Royal Decree of 3 November 1969 which laid down rules governing the acquisition by flight personnel in civil aviation of the right to a retirement pension but which excluded air hostesses from such a scheme.

In the context of those proceedings the Conseil d'État of Belgium referred to the Court of Justice three questions relating to the interpretation of Article 119 of the EEC Treaty asking the Court to rule first whether the retirement pension granted under the terms of a statutory social security scheme "constitutes a consideration which the worker receives indirectly in respect of his employment from his employer". By judgment of 25 May 1971 the Court of Justice confined itself to answering that question in the negative (Case 80/70, *Defrenne* v *Belgian State* [1971] ECR 445). While it recognized that "consideration in the nature of social security benefits is not ... in principle alien to the concept of pay, there cannot be brought within this concept" as defined in the second paragraph of Article 119 "social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers". In support of that ruling the judgment stated that "these schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy". It accordingly found that "the part due from the employers in the financing of such schemes does not constitute a direct or indirect payment to the worker. Moreover the worker will normally receive the benefits legally prescribed not by reason of the employer's contribution but solely because the worker fulfils the legal conditions for the grant of benefits".

Four years after that judgment in the context of a civil action brought by Miss Defrenne against Sabena the Cour du Travail (Labour Court), Brussels, with regard to a claim for arrears of salary, referred to the Court of Justice for a preliminary ruling two questions concerning the direct effect and the implementation of the aforesaid Article 119. In the well-known judgment of 8 April 1976 the Court of Justice rules *inter alia* that the principle that men and women should receive equal pay, which is laid down in the said article, may be relied on before the national courts and that those courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular, in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public (Case 43/75 [1976] ECR 456). The Court added that a preliminary distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character. The direct effect of the principle that men and women should receive equal pay referred to in the first paragraph of Article 119 is therefore restricted to direct and overt discrimination as described above and at the same time the Court emphasized that the complete

implementation of the aim of the elimination of discrimination on grounds of sex pursued by Article 119 "may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level".

2. By judgment of 23 April 1975 the Cour du Travail, Brussels, had meanwhile rejected the other claims made by Miss Defrenne in which she sought an order that Sabena should pay an additional allowance on termination of service and compensation for the damage suffered with regard to her pension. The applicant lodged an appeal in cassation against that judgment. By order of 28 November 1977 the Belgian Cour de Cassation referred to the Court of Justice the following preliminary question:

"Must Article 119 of the Treaty of Rome which lays down the principle that 'men and women should receive equal pay for equal work' be interpreted by reason of the dual economic and social aim of the Treaty as prescribing not only equal pay but also equal working conditions for men and women, and, in particular, does the insertion into the contract of employment of an 'air hostess' of a clause bringing the said contract to an end when she reaches the age of 40 years, it being established that no such limit is attached to the contract of male cabin attendants who are assumed to do the same work, constitute discrimination prohibited by the said Article 119 of the Treaty of Rome or by a principle of Community law if that clause may have pecuniary consequences, in particular, as regards the allowance on termination of service and pension?."

It is therefore necessary to determine whether the Community rules, and in particular Article 119 of the EEC Treaty, include a directly applicable provision which extends the principle of equality for male and female workers to conditions of employment other than remuneration and, in particular, to those which have pecuniary consequences as is the case with the clause specifying that employment terminates when the employee reaches the age of 40 years, which may have effects on the allowance on termination of employment and on the retirement pension.

3. I should like first to emphasize a point which might be considered rather elementary but which, in my opinion, we should do well not to lose sight of: the real subject-matter of Article 119 is the problem of remuneration not of working conditions in general. This is evident first from the text of the article, the first paragraph of which refers to the principle of equal *pay* and the second paragraph of which gives an exact definition of the term used in the following words: "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". The same conclusion may be drawn secondly from a comparison between Articles 117 and 118 on the one hand and Article 119 on the other: the first paragraph of Article 117 refers to "improved *working conditions* and an improved standard of living for workers" (the need for which is recognized by the Member States) and the matters listed in Article 118 include "labour law and working conditions" but no allusion to working conditions in general is to be found in Article 119. Certainly working conditions include pay; confirmation of this, if it be necessary, is to be found in the Council Resolution of 21 January 1974 concerning a social action programme, point 4 of which lays down *inter alia* action to be undertaken "to achieve

equality between men and women ... as regards working conditions, *including pay*". However whereas working conditions other than pay and holidays with pay are referred to only in Articles 117 and 118, pay is specifically covered by Article 119 and paid holidays by Article 120. That is the way in which Chapter 1 of Title III (social policy) of the EEC Treaty is arranged.

The problem of age limits beyond which employment terminates is in itself undeniably different from that of the problem of pay. Accordingly in order to be able to invoke Article 119 counsel for Miss Defrenne emphasized the financial consequences of fixing a lower age-limit for women: the consequences consist of a small difference in the allowance on termination of service and of the pension. The question whether there is any discrimination as regards pay, which is prohibited by Article 119, must be viewed from this angle.

In this respect I should like to point out that if discrimination with regard to pay does exist it must of course be regarded as indirect discrimination rather than direct discrimination; thus in any event the *direct* application of the principle of equal pay under Article 119 in accordance with the lines drawn by the Court of Justice in the aforesaid Defrenne case of 8 April 1976 would be ruled out.

However, the principal objection to the arguments put forward by Miss Defrenne is different: for discriminatory consequences with regard to pay to arise from the lower age-limit in infringement of Article 119 it would be necessary for the said consequences to fall within the definition of pay given by Article 119 and in each instance there would have to be discrimination between male workers and female workers. Those two conditions are not satisfied in the present instance. With regard to the retirement pension the aforesaid judgment of the Court of Justice of 25 May 1971 in the first Defrenne case ruled out the inclusion of pensions within the concept of pay used in Article 119. Moreover the allowance on termination of service is provided for by Sabena solely in connexion with the compulsory termination of service on reaching the age of 40 years which, as we know, solely affects female workers. Therefore even if it is "consideration ... in cash ... which the worker receives, directly ..., in respect of his employment from his employer" (within the meaning of the second paragraph of Article 119) there does not exist consideration of the same kind and of a greater amount for male workers which would reveal the existence of discriminatory treatment to the disadvantage of female workers.

Counsel for Miss Defrenne attempted to overcome this obstacle by arguing that the benefit in question should be assimilated to the other allowance laid down by Sabena's contract of employment for all air crew, whether male or female, for cases in which after completing ten years' service a worker suffers from permanent physical disability. In such a case the contract of employment grants the right to 18 months' pay while the allowance on termination of service granted to Miss Defrenne when she reached the age-limit laid down for hostesses was only 12 months' pay.

In Miss Defrenne's opinion the position of a hostess who has to stop work on reaching 40 years of age may be assimilated to that of a male colleague who becomes permanently incapable of working. However, I do not think that this view can be accepted. The allowance paid to both male and female workers in the event of permanent physical disability is linked to a fortuitous situation concerning the physical health of the worker and constitutes a form of insurance against the risk of invalidity. Reaching 40 years of age however does not constitute a

fortuitous occurrence (except for the normal uncertainty of survival) which is independent of the physical condition of the worker and is irrespective of the number of years of service completed. The two allowances therefore are of different kinds: the payment on the compulsory termination of service on reaching the age of 40 years in fact constitutes compensation for the restriction of the duration of the employment and the consequent loss of a job at an age at which a person is generally still in perfectly good health.

In the light of all the above considerations, in my opinion, the alleged discriminatory consequences with regard to pay of the termination of employment at the age of 40 years in respect of the pension and the allowance on termination of service cannot be held to constitute an infringement of Article 119 of the EEC Treaty.

4. We have seen that the court making the order for reference did not confine itself to referring to Article 119 of the EEC Treaty; it also raised the hypothesis that the rule that working conditions should be equal, without discrimination on grounds of sex, may be inferred from a general principle of Community law. We must therefore also examine that hypothesis. In my view that examination should be on the following lines: we must ascertain whether the Community principle that there should be no discrimination, which has been upheld in numerous decisions of the Court of Justice, is so formed, from the point of view of its content and the persons to whom it applies, as to give to each individual within the Community the right not to be discriminated against on grounds of sex in the determination of working conditions.

One preliminary point to be clarified is that no prohibition on discrimination in working conditions on the grounds of sex can be drawn, either by deduction or by analogy, from the prohibition of discrimination on grounds of nationality which is expressed in various articles of the EEC Treaty (in general terms in Article 7 and with regard to workers in particular in Article 48 (2)). Nationality is a ground of discrimination quite different from that of sex: each of the two prohibitions can be observed without its entailing a breach of the other. It should also be noted that according to the logic of the Community rules the prohibition on discrimination on grounds of nationality must have a specific nature; it is indeed one of the bases of the Common Market and one which constitutes a condition of its very existence. In short there is a particular reason for the existence of that prohibition, which, in so far as it concerns us, I shall consider solely in the context of the free movement of workers. That is that it extends to foreign workers who are nationals of other Member States the treatment accorded by each Member State to its national workers; such is its content and its scope. It therefore appears to me vain for Miss Defrenne to attempt to draw from the decided cases of the Court of Justice relating to the prohibition on discrimination between workers on grounds of nationality arguments to support the analogous application of the criterion of equality of treatment within such a State between male and female workers.

That said, we are now faced with what in my opinion is the most delicate part of the problem: what is the effect in the present instance of the general prohibition on discrimination which has the force of an unwritten principle of Community law?

I do not think that a lengthy consideration is necessary to show that the rule that there should be no discrimination is a general principle of the Community legal order. The Court of Justice has referred to it on more than

one occasion and has gone so far as to rule that Community measures which conflict with it are invalid. It is a principle contained in the list of fundamental human rights recognized within the Member States and within the context of the European Convention on Human Rights and Fundamental Freedoms; consequently it forms part of Community law and must be protected by the Court of Justice (cf. judgment of 12 November 1969, Case 29/69, *Stauder* v *Ulm* [1969] ECR 419; judgment of 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; judgment of 14 May 1974, Case 4/73, *Nold* v *Commission* [1974] ECR 491 and the judgment of 28 October 1975, Case 36/75, *Rutili* v *Minister for the Interior* [1975] ECR 1219). I may add that in the context of positive law and modern legal thinking the exclusion of discrimination on the ground of sex is one of the fundamental features of the principle in question.

However the significance of the protection of fundamental rights on a Community plane is not the same as on the plane of national law. In the aforementioned judgment in th Internationale Handelsgesellschaft case the Court of Justice emphasized that "the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community". In my view two conclusions are to be drawn from that statement. First the respect for fundamental rights is a limitation on all Community acts: any measure whereby the powers of the Community institutions are exercised is subject to that limitation and in that sense the entire structure of the Community is under an obligation to observe that limitation. Secondly where directly applicable Community measures exist (by the effect of the Treaties of secondary legislation) they must be interpreted in a manner which accords with the principle that human rights must be respected. I do not think that it is possible to say more than that. In particular, legal relationships which are left within the powers of the national legislature must be understood to be subject to the constitutional principle that human rights must be respected which applies in the State to which the relationship is subject, in so far as the internal provisions are not replaced by directly applicable Community provisions.

Turning to the problem facing us here we find that the control of working conditions other than pay (and paid holidays) has up to now been left to the national legislative bodies (and the Community has only intervened by means of Council Directive No 76/207 to which I shall refer presently). Thus it is not possible to derive from the Community principle that there should be no discrimination a directly applicable rule that working conditions should be the same for male and female workers; on the contrary only where it is possible to derive from a specific Community measure a directly applicable provision relating to working conditions will that provision have to be interpreted — if it is not sufficiently explicit on this point — in conformity with the general principle that there should be no discrimination.

5. In support of her view that the prohibition on discrimination on the grounds of sex has direct effect with regard to all aspects of working conditions Miss Defrenne has also referred to the decided cases of the Court of Justice which, in applying the Staff Regulations of Officials of the Communities, has ensured equality of treatment for male and female officials. In its judgments of 7 June 1972 in Case 20/71 *(Sabbatini (née Bertoni)* v *European Parliament* [1972] ECR 345)

and Case 32/71 *Chollet (née Bauduin)* v *Commission* [1972] ECR 363) which both concern the position with regard to the expatriation allowance in the case of marriage the Court ruled that the matter must be governed by uniform criteria irrespective of the sex of the person concerned; consequently, by rendering the retention of the allowance subject to the acquisition of the status of "head of household", which the Staff Regulations generally confer on married male officials, the Council had created an arbitrary difference of treatment. Also with regard to the expatriation allowance the judgments of the Court of 20 February 1975 in Case 21/74 *(Airola* v *Commission* (1975] ECR 221) and Case 37/74 *(Van den Broeck* v *Commission* [1975] ECR 235) confirmed that the concept of "nationals" contained in the Staff Regulations of Officials must be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations. Such unwarranted difference of treatment would result from an interpretation of the concept of "nationals", on which the grant or continuance of the expatriation allowance depends, as also embracing the nationality which was imposed by law on an official of the female sex by virtue of her marriage.

Those judgments do not conflict with the point of view I expressed above. They all concern a relationship which was entirely governed by Community law in which measures of the Community institutions were concerned. It may be added that they also concerned an allowance, the expatriation allowance, which is expressed as a percentage of the basic salary and is granted to workers who satisfy the conditions laid down by the Staff Regulations for the duration of their employment and therefore is regarded as part of their pay. Accordingly the elimination of any difference of treatment between the sexes in that respect can be regarded as being directly required by Article 119 of the Treaty.

6. I have already had occasion to recall that the subject of working conditions is expressly mentioned in Articles 117 and 118 of the Treaty of Rome. I therefore think it is necessary to turn our attention to those articles, to determine their meaning and effects and thus to ascertain to what extent they may contribute to resolving the present problem.

The wording of Article 117 is as follows:

"Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the Common Market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."

Article 118 gives the Commission the task "without prejudice to the other provisions of this Treaty and in conformity with its general objectives... of promoting close co-operation between Member States in the social field" particularly with regard to a list of matters which include "labour law and working conditions". The third paragraph of that article adds "to this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations . . .".

One first point with regard to those two provisions is that neither of them contains a *principle* in the sense of a rule

of conduct. In my opinion Article 117 rather constitutes an *objective;* this is confirmed by the wording of the second paragraph of that article where the purport of the first paragraph is summarized in the words "such a development". It can also not be said to be a directly applicable principle as the provision expressly points to the need for Community and national procedures in order to achieve the objective set out: both Article 117 and Article 118 seem clearly based on an idea of progressive achievement and, as distinct from Article 119, do not lay down any period within which the objective must be achieved.

A second observation which seems relevant relates to the extent of the aim of Article 117. Even if we confine ourselves to a consideration of the subject of working conditions, the idea of promoting improved working conditions in such a way as to ensure their harmonization while the improvement is being maintained would certainly entail numerous types of action. I am thinking in particular of harmonization of working conditions throughout the various Member States and thus in a Community context to the elimination of regional imbalances with regard to work. Of course there is nothing to prevent the concept of harmonization being interpreted as also including the elimination within each Member State of differences in treatment on the grounds of sex; such an interpretation also accords with the presence in the Community order of the general principle that there should be no discrimination. The fact remains however that equality of working conditions for male and female workers constitutes merely a part of the objective set out in Artcile 117.

In short the content and structure of Article 117 and Article 118 confirm the conclusion which I had already reached namely that in the Community order there exists no principle having direct effect which confers on individuals within the Community the right to enjoy equal working conditions without discrimination on grounds of sex.

7. A development of great importance occurred two years ago with the issue of Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal L 39 of 14 February 1976, p. 40). The directive implements one of the more pressing actions included in the aforesaid social action programme contained in the Council Resolution of 21 January 1974. Furthermore it is linked to Article 117 as is shown by the terms used in the third recital in the preamble to the directive where it is stated that "equal treatment for male and female workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are *inter alia* to be furthered".

Among the innovations contained in that directive I feel it necessary to mention: (a) the fact that for the first time equality of treatment for men and women as regards work is defined as an independent "principle" and no longer as the objective or as part of the broad objective of Article 117; (b) the precise indications which are given about the content of both the principle of equality of treatment in general (Article 2 (1)) and of that principle with particular reference to working conditions (Article 5). In this respect it should be noted that amongst the working conditions Article 5 (1) specifically mentions "conditions governing dismissal"; (c) the obligation imposed on the Member States to take the measures necessary to implement the principle and the specification of the aims of such measures (cf. *inter alia* Article 5 (2) and

the laying down of a time-limit which is generally 30 months but which is longer in respect of certain provisions (Article 9); (d) the margin of discretion left to the Member States in certain matters; in this respect it is primarily necessary to refer to Article 2 (2) whereby the directive is to be "without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor"; and (e) the fact that the implementation of the principle of equal treatment in matters of social security is deferred to a later date: Article 1 (2) refers in this respect to *progressive* implementation and provides that the Council will adopt at a later date provisions defining its substance, its scope and the arrangements for its application.

Those characteristics of Directive No 76/207/EEC confirm the main points of what I have said above with reference to Article 117. In particular they confirm that a Community provision was necessary to give a precise form to the principle of equality for male and female workers with regard to working conditions and that measures of the Member States are still necessary for the actual implementation of that principle. Of course if it had been possible to recognize that Article 117 had direct effect the Council directive would not have formed an obstacle to that recognition (as the Court ruled in respect of Directive No 75/117/EEC with regard to Article 119: see the judgment in the Defrenne case of 8 April 1976). However, I have already made it clear that it can certainly not be said that Article 117 has direct effect. It should also be added that if, when the time-limit expires, the Member States do not comply with their obligation to enact the measures prescribed by the directive the way would be open for the enforcement, in the Community system, of personal rights of individuals on the basis of the directive itself; this would of course only be to the extent permitted by the structure of each provision in the directive. I refer in this respect to the case-law of the Court of Justice beginning with the judgment of 6 October 1970 in Case 9/70 *(Grad* v *Finanzamt Traunstein* [1970] ECR 825) and reaffirmed in the judgments of 17 December 1970 in Case 33/70 *(SACE* v *Italian Ministry for Finance* [1970] ECR 1213), 4 December 1974 in Case 41/74 *(Van Duyn* v *Home Office* [1974] ECR 1337) and 1 February 1977 in Case 51/76 *(Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113).

With regard to this last point may I finally say that again in the hypothetical case of the directive of 9 February 1976 not being complied with, the remedy (albeit only partial) offered by the device of its direct effects would be more than ever justified. Indeed whilst it must be admitted that the complexity of the problem of equality of treatment as regards working conditions requires, both in Community law and in national law, implementing measures which are also necessary in order to determine what exceptions and what adjustments may be justified objectively, it must on the other hand be said plainly that the slowness of the Community and of the Member States in implementing the principle of equality without discrimination on grounds of sex is to be roundly deplored. Above all it is surprising that certain Member States still have difficulty in drawing all the logical and practical consequences of a principle — that there should be no discrimination on grounds of sex — as to whose fundamental nature there can no longer be any doubts or reservations.

8. For all the reasons set out above I propose that the Court of Justice should rule as follows in answer to the question referred to it for a preliminary ruling by the Belgian Cour de Cassation by judgment of 28 November 1977:

1. The implementation of the objective of equality of treatment for male and female workers in respect of working conditions other than pay falls outside the scope of Article 119 of the EEC Treaty.

2. The fixing of different age-limits for male and female workers who pursue the same activity is not at present prohibited by any principle of Community law having direct effect for individuals.

3. The principle of equality of treatment for male and female workers assumes importance in the Community order with regard to working conditions other than pay both in the context of the general objective of equality for workers which may be inferred from Article 117 of the EEC Treaty and on the basis of Council Directive No 76/207/EEC of 9 February 1976. However, at the present time that principle does not have direct effect for individual citizens of the Community.