OPINION OF ADVOCATE GENERAL JÄÄSKINEN delivered on 15 July 2010[1]

Table of contents

1 — Original language: French

I — Introduction

1. The reference for a preliminary ruling concerns the interpretation of the general principles and provisions of Union law, both primary and secondary, relating to discrimination on grounds of sexual orientation in employment and occupation.

2. The reference was made in connection with proceedings between Mr Römer and the Freie und Hansestadt Hamburg [2] relating to the latter's refusal to grant the former a supplementary retirement pension of an amount as high as he requested, since the method of calculation used by his former employer was more favourable to married pensioners than to pensioners who, like him, live in a civil partnership registered under German law.

3. The reference for a preliminary ruling gives the Court the opportunity to explain and even to supplement the approach it took in the judgment in *Maruko*, [3] given by the Grand Chamber on 1 April 2008, which related to the refusal to recognise a man's entitlement to a pension as part of the survivor's benefits provided for under the compulsory occupational pension scheme of which his deceased life partner had been a member. The Court also has the opportunity to state its opinion regarding the full significance of its case-law on the right to equal treatment, which it has developed, in particular, in the judgments in *Mangold* [4] and *Kücükdeveci*, [5] in a context parallel to that of discrimination on grounds of sexual orientation, namely, discrimination on grounds of age.

4. In this case, the Court is invited, inter alia, to define the scope *ratione materiae* of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Directive' or 'Directive 2000/78'), [6] to specify the components of direct or indirect discrimination on the basis of sexual orientation, within the meaning of that legislation or of other provisions of Union law, and also to define the effects in time of the replies that will be given. Unfortunately, this task is rendered more difficult for the Court, particularly as regards comprehending the national law, by the fact that the Federal Republic of Germany has not submitted observations on the questions referred for a preliminary ruling, while the Land of Hamburg has merely lodged very cursory pleadings in the matter before the Court.

2 — The 'Free and Hanseatic City of Hamburg' is both a town and one of the 16 Federal States (Länder) which make up Germany. According to Paragraph 4(1) of the Verfassung der Freien und Hansestadt Hamburg (Constitution of Hamburg) of 6 June 1952, state and municipal activities are not separated there.

3 — Case C-267/06 *Maruko* [2008] ECR I-1757.

4 — Case C-144/04 *Mangold* [2005] ECR I-9981.

5 — Case C-555/07 *Kücükdeveci* [2010] ECR I-365.

6 — OJ 2000 L 303, p. 16.

II — Legal framework

A — *Union law*[7]

1. Charter of Fundamental Rights of the European Union

5. Article 21(1) of the Charter of Fundamental Rights of the European Union[8] is worded as follows: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

2. EC Treaty

6. The Treaty of Amsterdam[9] introduced new wording of Article 13(1) of the EC Treaty, according to which: 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

7. Article 141 EC provides:

'1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. 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.

7 — Since the main proceedings relate to the application of German legal provisions in their version dating from before the Treaty on the Functioning of the European Union entered into force on 1 December 2009, reference will be made to the provisions of the EC Treaty according to the numbering applicable prior to that date.

8 — The Charter, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), was amended and given binding legal force at the time of the adoption of the Treaty of Lisbon (OJ 2007, C 303, p. 1).

9 — OJ 1997 C 340, p. 1.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job....'

3. Directive 2000/78

8. Recitals 13 and 22 in the preamble to the Directive, which was adopted on the basis of Article 13 EC, state:

'(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.'

9. Article 1 of the Directive provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

10. Under Article 2 of the Directive:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary,...'

11. Article 3 of the Directive is worded as follows:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals and pay;

...

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes....'

12. Under the first paragraph of Article 18 of Directive 2000/78, Member States had in principle to adopt the laws, regulations and administrative provisions necessary to comply with the Directive by 2 December 2003 at the latest or could entrust the social partners with the implementation of the Directive as regards provisions concerning collective agreements.

B — *National law*

1. Basic Law

13. Article 6(1) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, 'the Basic Law') [10] provides: 'Marriage and the family shall enjoy the special protection of the State'.

10 — Basic Law for the Federal Republic of Germany of 23 May 1949, BGBl. III 100-1

2. Law on registered life partnership

14. Paragraph 1 of the Gesetz über die Eingetragene Lebenspartnerschaft (Law on registered life partnerships) of 16 February 2001 [11] as amended by the Law of 15 December 2004 [12] ('the LPartG') provides, with regard to the form and conditions for establishing such a partnership:

'(1) Two persons of the same sex establish a partnership when they each declare, in person and in the presence of the other, that they wish to live together in partnership for life (as life partners). The declarations cannot be made conditionally or for a fixed period. Declarations are effective when they are made before the competent authority....'

15. Paragraph 2 of the LPartG provides:

'The life partners must support and care for one another and commit themselves mutually to a lifetime union. They shall each accept responsibilities with regard to the other.'

16. Under Paragraph 5 of that Law:

'The life partners are each required to contribute adequately to the common needs of the partnership by their work and from their property. The second sentence of Paragraph 1360, Paragraph 1360a and Paragraph 1360b of the Civil Code, and the second subparagraph of Paragraph 16, apply by analogy.'

17. Paragraph 11(1) of that Law, concerning the other effects of civil partnership, provides:

'Save provision to the contrary, a life partner shall be regarded as a member of the family of the other life partner.'

3. Provisions applicable in the Land of Hamburg with regard to welfare

18. The national legislation relevant to the main proceedings is composed of two legislative measures adopted by the Land of Hamburg, [13] namely, the Hamburgisches

11 — BGBl. 2001 I, p. 266.

12 — BGBl. 2004 I, p. 3396. According to the national court, these are the provisions which are relevant to the present case.

13 — The information provided by the national court and by the Commission is not complete as regards the exact wording of the applicable provisions. However, I consider it adequate for the purpose of examining, in the light of Union law, the benefits paid on the basis of those provisions.

Zusatzversorgungsgesetz (Law of the Freie und Hansestadt Hamburg on supplementary pensions, 'the HmbZVG') of 7 March 1995 [14] and the Erstes Ruhegeldgesetz der Freien und Hansestadt Hamburg (Law on supplementary old-age and survivors' pensions for employees of the Freie und Hansestadt, 'the First RGG') [15] in the version of 30 May 1995, most recently amended on 2 July 2003.

4. The HmbZVG

19. Paragraph 1 of the HmbZVG states that it applies to persons employed by the Freie und Hansestadt Hamburg and to any person to whom the Freie und Hansestadt Hamburg must pay a pension within the meaning of Paragraph 2 (pension holders). According to Paragraph 2, the pension is granted in the form of a retirement pension (Paragraphs 3 to 10) or a survivor's pension (Paragraphs 11 to 19). Paragraph 2a provides that employees share the pension costs by paying a contribution at the initial rate of 1.25 %. According to Paragraph 2b, the obligation to contribute begins on the date on which the employment relationship is agreed and ends on the date on which the employment relationship ceases. Paragraph 2c states that the contribution is calculated on the basis of the taxable pay received by the employee and that it is paid by means of a deduction from pay.

20. Paragraph 6 of the HmbZVG provides that the monthly amount of the pension corresponds, for each full year of employment giving entitlement to a pension, to 0.5 % of pay included in the calculation of the pension. [16]

21. The pay included in the calculation of the pension is listed in Paragraph 7, while the periods of employment giving entitlement to a pension, and also those which do not, are set out in Paragraph 8.

22. Paragraph 29 of the HmbZVG relates to the transitional provisions concerning pension-holders who fell within the scope of the second sentence of Paragraph 1(1). Paragraph 29(1), read in conjunction with Paragraph 29(5), states that that category of pension-holder continue to receive, by derogation inter alia from Paragraph 6(1) and (2), a pension equal to the amount which they received in July 2003 or which they would have been entitled to receive, under subparagraphs 2 and 4, in December 2003.

14 — HmbGVBl. p. 53.

15 — Gesetz über die zusätzliche Alters und Hinterbliebenenversorgung für Angestellte und Arbeiter der Freien und Hansestadt Hamburg (Erstes Ruhegeldgesetz – 1. RGG) in der Fassung der Bekanntmachung vom 30. May 1995 (GVBl. p. 108).

16 — The Commission points out that a similar rule is also laid down by Paragraphs 1, 1a, 1b, 1c, 6, 7 and 8 of the First RGG.

5. The First RGG

23. Paragraph 10(6) of the First RGG provides:

'(6) The net income to be taken into account for the purposes of calculating the pension is determined by deducting from the income included in the calculation of the pension (Paragraph 8)

1. the amount of income tax which would have had to be paid [less the amount paid to the Church (Kirchenlohnsteuer)] in application of tax category III/0, in the case of a married pensioner not permanently separated at the date on which the retirement pension is first paid (Paragraph 12(1)), or a pensioner who, on that day, is entitled to claim child benefit or the equivalent,

2. the amount of income tax which would have had to be paid at the date on which the retirement pension is first paid (less the amount paid to the Church) in application of tax category I, in the case of all other pensioners. …'

24. Under the final sentence of Paragraph 8(10) of the First RGG, if the conditions laid down in Paragraph 10(6)(1) of the First RGG are not satisfied until after the retirement pension has begun to be paid, tax category III/0 shall, if the party concerned so requests, be applied from that date.

25. It should be added that the amount to be deducted under tax category III/0 is significantly lower than that to be deducted under tax category I/0.

III — The case in the main proceedings

26. The parties dispute the amount of the pension which the applicant in the main proceedings, Mr Römer, may claim from November 2001.

27. From 1950 until he became unfit for work, on 31 May 1990, Mr Römer worked for the defendant in the main proceedings, the Freie und Hansestadt Hamburg, as an administrative employee. He has, since 1969, lived continuously with Mr U. On 15 October 2001, the applicant in the main proceedings and his companion entered into a registered life partnership, in accordance with the LPartG. Mr Römer informed his employer of this by letter of 16 October 2001. By another letter, dated 28 November 2001, he requested a recalculation of his ongoing pension entitlement on the basis of the more advantageous deduction of income tax under tax

category III, with effect from 1 August 2001 according to the information given by the national court, although the applicant in the main proceedings states in his observations that he had asked for that increase in his pension only from 1 November 2001.

28. By letter of 10 December 2001, the Freie und Hansestadt Hamburg informed Mr Römer that he was not entitled to the application of tax category III, instead of tax category I, on the grounds that, in accordance with Paragraph 10(6)(1) of the First RGG, only married, and not permanently separated, pensioners and pensioners entitled to claim child benefit or an equivalent benefit were entitled to the application of tax category III.

29. In accordance with the 'statement of pension rights' drawn up by the Freie und Hansestadt Hamburg on 2 September 2001, Mr Römer's monthly pension, from September 2001, determined on the basis of tax category I, amounted to DEM 1 204.55 (EUR 615.88). According to Mr Römer's calculations, which are not disputed by his ex-employer, that monthly retirement pension would have been, in September 2001, DEM 590.87 (EUR 302.11) higher if tax category III had been applied.

30. The case was brought before the Arbeitsgericht Hamburg, Germany. Mr Römer considers that, in the calculation of his pension payment, in accordance with Paragraph 10(6)(1) of the First RGG, he is entitled to be treated in the same manner as a married, not permanently separated, pensioner. He points out that the criterion of 'married, not permanently separated, pensioner', laid down by that provision, must be interpreted as meaning that it includes pensioners who have entered into a civil partnership in accordance with the LPartG.

31. Mr Römer considers that his right to equal treatment with married, not permanently separated, pensioners follows in any event from Directive 2000/78. He takes the view that the reasons given for the difference in treatment between married pensioners and those who have entered into a civil partnership, based on the ability of married couples to have children, is not persuasive since, even in life partnerships of persons of the same sex, children conceived by one of the partners are raised and may be adopted by an established couple who have entered into a life partnership. He also argues that, since the Directive was not transposed into national law within the period prescribed in Article 18(2), that is to say, by 2 December 2003 at the latest, it applies directly to the defendant in the main proceedings.

32. The Freie und Hansestadt Hamburg contends that the action should be dismissed. It

points out that the term 'married' within the meaning of Paragraph 10(6)(1) of the First RGG cannot be interpreted as requested by Mr Römer. It states, in essence, that Paragraph 6(1) of the Basic Law places marriage and family under the particular protection of the State because they have for a long time constituted the basic unity of the national community and because, for that reason, marriage without children — whether intentional or not — is protected too, for it provides a balance between the sexes at the first level of the national community. Furthermore, it argues, marriage is usually a prerequisite to forming a family, inasmuch as, because it is the most usual form of relationship between men and women recognised by law, it constitutes a framework for the birth of children, and therefore the transformation of the married couple into a family.

33. The Freie und Hansestadt Hamburg also submits that there is a parallel between ordinary taxation and the possibility of making a notional application of tax category III when calculating pensions paid under the First RGG. It points out that the financial resources available monthly to the parties concerned to cover their daily needs are determined both by ordinary taxation during the period of employment and by the notional application of tax category III for calculating pensions. The advantage given to persons who have created a family, or who could have done so, is designed to compensate for the extra financial burden involved.

IV — Reference for a preliminary ruling

34. By order lodged on 10 April 2008, [17] the Arbeitsgericht Hamburg decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling: [18]

'1. Are supplementary pension payments made to former employees of the Freie und Hansestadt Hamburg and their survivors, governed by the [First RGG], "payments... made by state schemes or similar, including state social security or social protection schemes" within the meaning of Article 3(3) of [Directive 2000/78] with the consequence that the matters governed by the First RGG fall outside the scope of that directive ("the Directive")?

2. If the above question is answered in the negative:

2.1 Are the provisions of the First RGG which differentiate, in calculating the amount of pension payable,

17 — That is to say, only a few days after judgment was given in *Maruko*.

18 — It is apparent from the order for reference that the Arbeitsgericht Hamburg has at the same time referred, for the purposes of reviewing the constitutionality of Paragraph 10(6) of the First RGG, to the Bundesverfassungsgericht (the Federal Constitutional Court) and to the Hamburgisches Verfassungsgericht (the Constitutional Court of the Land of Hamburg) a question formulated in terms similar to the third of the questions referred to the Court of Justice.

between married pensioners and all other pensioners, that is, which treat married pensioners more favourably than, specifically, persons who have entered into a life partnership (Lebenspartnerschaft) with a person of the same sex in accordance with the Lebenspartnerschaftsgesetz (Law on life partnership) of the Federal Republic of Germany, "laws on marital status and the benefits dependent thereon" within the meaning of recital 22 in the preamble to the Directive?

2.2 If the above question is answered in the affirmative, does it follow that the Directive does not apply to those provision of the First RGG, even though the Directive itself contains no limitation of its scope corresponding to recital 22 in the preamble?

3. If Question 2.1 or Question 2.2 is answered in the negative: In relation to a person who has entered into a life partnership with a person of the same sex and is not permanently separated from the latter, does Paragraph 10(6) of the First RGG, under which the pension entitlements of married, not permanently separated, pensioners are calculated on the basis of the notional application of tax category III/0 (more favourable to a taxable person) but the pension entitlements of all other pensioners are calculated on the basis of the notional application of tax category I (less favourable to a taxable person), constitute an infringement of Article 1 in conjunction with Article 2 and with Article 3(1)(c) of the Directive?

4. If Question 1 or Question 2(2) is answered in the affirmative or Question 3 is answered in the negative: Does Paragraph 10(6) of the First RGG infringe Article 141 EC or a general principle of Community law by reason of the provision or legal effect described in Question 3?

5. If Question 3 or Question 4 is answered in the affirmative: Does it follow that — until such time as Paragraph 10(6) of the First RGG is amended to remove the unequal treatment complained of — in relation to the calculation of his pension entitlement, a pensioner who has entered into a life partnership and is not permanently separated from his partner is entitled to insist that the defendant treat him in the same manner as it does as a married, not permanently separated, pensioner? If so — if the Directive is applicable and

Question 3 is answered in the affirmative — does this entitlement apply even before the expiry of the transposition period prescribed in Article 18(1) of the Directive?

6. If Question 5 is answered in the affirmative: Is that subject to the qualification — in accordance with the grounds of the Court's judgment in Case C-262/88 *Barber* — that in the calculation of pension entitlement the principle of equal treatment is to be applied only in respect of that proportion of pension entitlement earned by the pensioner for the period from 17 May 1990?'

35. By order of 23 January 2009, the Arbeitsgericht Hamburg decided to supplement its initial request for a preliminary ruling by adding a series of questions worded as follows:

'7. In so far as the Court concludes that there is direct discrimination:

What significance should, in this regard, be attached to the particular circumstance that, on the one hand, under both the Basic Law … and European law, the principle of equal treatment must be observed but, on the other hand, under the law of the Federal Republic of Germany, marriage and the family enjoy the special protection of the State, as expressly decreed in constitutional-law terms in Article 6(1) of the Basic Law?

If the above question is answered in the negative:

Can a directly discriminatory legislative provision be justified — notwithstanding the wording of the Directive — because it has a different aim, where that aim is a component of the Member State's national legal order, but not of European law? In that case, does that other aim pursued by the Member State's national legal order simply take precedence over the principle of equal treatment?

What legal criterion should be applied in order to determine in such cases how to weigh up the principle of equal treatment under European law and that other legal aim of the Member State's national legal order? Is it perhaps the case here too that, as with the criteria for the legal acceptance of indirect discrimination adopted under Article 2(2)(b)(i) [19] of the Directive, (i) the discriminatory provision must be objectively justified by a legitimate aim; and (ii)

19 — A corrigendum to this question was lodged on 11 March 2009, according to which the correct form is "Art. 2 Abs. 2 lit. b, Ziff. i" instead of "Art. 2 Abs. 1 lit. a, Ziff. i".

the means of achieving that aim must be appropriate and necessary?

Does a provision such as Paragraph 10(6) of the First RGG fulfil the requirements for legitimacy under European law in accordance with the answers to be given to the above questions? Does it fulfil these purely on account of the special national-law provision which has no equivalent in European law, in other words, on account of Article 6(1) of the Basic Law?'

V — Analysis

A — *Introduction*

36. It seems to me that, in spite of their apparent complexity, the result of detailed wording and of their being divided into series, the various questions referred for a preliminary ruling from the Court may, in essence, relate to five general issues.

37. First, the national court wishes to know whether the scheme of supplementary pensions paid by the Freie und Hansestadt Hamburg falls within the scope *ratione materiae* of Directive 2000/78, from two different aspects. It raises the question, first, of the scope of the exclusion of payments made by state schemes or similar provided for in that legislation and, secondly, the question of the boundary to be drawn between the competence of the Member States with regard to marital status and the implementation of the provisions of Union law concerning non-discrimination on grounds of sexual orientation.

38. Secondly, if Directive 2000/78 is indeed applicable with regard to Paragraph 10(6) of the First RGG, the court requests guidance in assessing whether there is direct or indirect discrimination having regard to the provisions of that directive.

39. Thirdly, if that is not the case, the court requires, in the alternative, clarification concerning the impact, on the main proceedings, of Article 141 EC and the general principles of Union law.

40. Fourthly, the national court raises the question of the effects *ratione temporis* of the provisions of Union law to which it has referred and of the judgment to be given by the Court of Justice.

41. Fifthly, it asks the Court to define the rules making it possible to resolve a conflict

between the guidelines given by a constitutional rule in the national legal order and the requirements following from the principle of equal treatment in relation to sexual orientation which is applicable under Union law.

42. In my view, it is without a doubt the third of these aspects which presents most difficulties of interpretation, for want of any established case-law on whether there exists a general principle of Union law in the context concerned.

43. In his opinion in *Maruko*, Advocate General Ruiz-Jarabo Colomer gave an in-depth explanation of the legal developments in the recognition of the right to equal treatment for persons of homosexual orientation, in accordance with Union law. [20]

44. The judgment given by the Court in that case held that the combined provisions of Articles 1 and 2 of Directive 2000/78 precluded legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner did not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership placed persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It was for the referring court to determine whether a surviving life partner was in a situation comparable to that of a spouse entitled to the benefit in question. [21]

45. The documents in this case show that the German courts have accepted various interpretations concerning the application of the comparability criteria laid down by the Court. In particular, the question has been raised whether it is a matter of seeking an abstract identity between the legal institutions or rather a sufficient similarity between the legal and factual situations in which the persons concerned find themselves.

46. The case-law developed by the Court concerning non-discrimination based on age also gives rise to the question whether or not non-discrimination based on sexual orientation has the status of a general principle of Union law. An affirmative reply to this question would have an impact on the temporal aspects of this case. A negative reply would require an explanation as to why prohibition of discrimination based on that criterion has a weaker legislative status than that

20 — Points 83 to 95 of that Opinion.

21 — *Maruko*, paragraph 73.

discrimination on the other grounds prohibited by Article 13 EC and by the Charter of Fundamental Rights.

B — *Material scope of Directive 2000/78*

47. Given that the two first questions referred for a preliminary ruling concern the material scope of Directive 2000/78, it is appropriate to examine them together. The national court points out that, for there to be an infringement of the Directive, it is first necessary for the latter to be applicable in the present case, which could, according to the national court, be contested on two grounds: on the basis of Article 3(3) of the Directive and also on the basis of recital 22 in the preamble thereto.

1. Article 3(3) of Directive 2000/78

48. It is apparent from Article 3(1)(c) of Directive 2000/78 that the latter applies to all persons, as regards both the public and private sectors, including public bodies, in relation to, inter alia, conditions of pay.

49. The first question seeks to determine whether that directive applies to the area covered by the RGG, which governs the supplementary pensions paid to former employees of the Freie und Hansestadt Hamburg and their survivors, even though Article 3(3) of the directive excludes 'payments of any kind made by state schemes or similar, including state social security or social protection schemes'. [22]

50. That exclusion is announced in very similar terms in recital 13 in the preamble to the directive, which provides that the directive 'does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty'. [23]

51. Assessment of the scope of Article 3(3) of Directive 2000/78 has caused problems

22 — To summarise an analysis carried out by the national court only from the German version of the legislation, I note that, in the German wording of Article 3(3), the expression 'der staatlichen Systeme' is used as an equivalent to the words 'les régimes publics' which were used in the French version, whereas, in Article 3(1), the adjective 'öffentlichen' is used in place of the adjective 'public' in French.

23 — I recall that, under Article 141(2) EC, '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.

of uniform application in the national legal systems, and it is noted that the terms used vary from one language version to another. In Germany, the national courts have adopted divergent views concerning the more or less restrictive interpretation of that provision. In particular, the possible exclusion of survivors' pensions from the scope of Directive 2000/78 has divided the German courts. [24]

52. First of all, I would point out that several of the Court's judgments, especially *Maruko*, [25] contribute useful criteria for interpreting Article 3(3) of Directive 2000/78, in the light of which that directive is applicable in the present case. I share the view of the applicant in the main proceedings and the Commission and have no doubt that that provision applies to retirement pensions provided, on the basis of the First RGG, to former employees of the Freie und Hansestadt Hamburg and their survivors.

53. The Court has stated that, having regard to Article (1)(c) and (3) read in conjunction with recital 13, the ambit of Directive 2000/78 must be understood not to cover social security and social protection schemes whose benefits are not treated as pay in the sense given to that term for the purpose of applying Article 141 EC, or as any kind of payment by the State aimed at providing access to employment or maintaining employment. *A contrario*, if a pension such as that at issue in the main proceedings may be treated as 'pay' within the meaning of Article 141 EC, it will fall within the ambit of the provisions of Directive 2000/78.

54. However, the concept of 'pay' in Article 141(2) EC (formerly Article 119(2) of the EC Treaty) is interpreted very broadly by the Court. [26] It covers, in particular, any kind of occupational pension as opposed to pensions granted under general statutory schemes. [27]

24 — With regard to the German case-law concerning this point and the repercussions of the judgment in *Maruko*, see: Mahlmann, M., Report on measures to combat discrimination — Directives 2000/43/EC and 2000/78/EC — Country report 2008 — Germany (especially footnote 211), a report accessible on the internet site of the European network of legal experts in the non-discrimination field: http://www.non-discrimination.net.

25 — Judgment cited above, see inter alia paragraph 41 et seq. It is pointed out that this deals with a similar question, but in regard to a survivor's pension granted under an occupational pension scheme.

26 — This concept has been interpreted as including 'any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis'. See inter alia Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 12, and Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 32.

27 — In its judgment in Case C-147/95 *Evrenopoulos* [1997] ECR I-2057), the Court held that a pension scheme peculiar to a State body fell within the scope of Article 119 of the EC Treaty (now Article 141 EC), on the ground that the fact that such a scheme may have been established by the legislature was immaterial since, in the light of the criteria listed, it was possible to consider that the pension was paid by reason of the employment relationship with the body in question.

According to settled case-law, [28] the fact that certain benefits, like retirement pensions, are paid after the termination of the employment relationship does not prevent them from being 'pay' within the meaning of Article 141 EC. [29]

55. In order to determine whether a pension may be regarded as pay, the Court has held that the only possible decisive criterion is the criterion of employment, based on the wording of Article 119 (Article 141 EC) itself, which requires a finding that the pension is paid to the worker by reason of the employment relationship between him and his former employer. [30]

56. However, it is established that the criterion of employment 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. [31] The Court then added other factors which must be taken into account in order to regard a pension under an occupational retirement scheme as 'pay'. It is necessary to examine, first, whether the pension concerns only a particular category of workers, secondly, whether it is directly related to the period of service completed and, finally, whether its amount is calculated by reference to the last [32] salary.

57. In the present case, [33] it is apparent from Paragraph 1 of the HmbZVG that the benefits at issue in the main proceedings satisfy the first of these three criteria, since the supplementary retirement pensions provided by the Freie und Hansestadt Hamburg concern only one particular category of workers.

58. In fact, those pensions are paid in addition to benefits paid under the general social security scheme, which the national court describes as the 'first pillar' of the German pension system, and they differ from private insurance pensions, which represent the 'third pillar'.

28 — See inter alia *Maruko*, paragraph 44 and the case-law cited.

29 — Concerning, for example, retirement pensions paid by the Finnish Government to public servants employed in the defence services of that country, see Case C-351/00 *Niemi* [2002] ECR I-7007.

30 — See inter alia Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 43; *Evrenopoulos,* paragraph 19, and *Maruko*, paragraph 46.

31 — *Maruko*, paragraph 47 and the case-law cited therein.

32 — *Maruko*, paragraph 48 and the case-law cited therein. In my view, the Court could reasonably remove the adjective 'last' from the third condition because it would be more consistent with the current state of pension schemes which, for that calculation, generally take into account several, if not all, salaries rather than restricting themselves to the last one. In the light of the case-law, this criterion, which I therefore consider has lost its relevance, does not appear to be interpreted as absolute in character, since benefits the amounts of which were calculated on the basis of several salaries have not been excluded from the scope of the concept of 'pay'.

33 — Compare with the Court's application, in paragraphs 49 to 57 of the judgment in *Maruko*, of the criteria previously described.

59. According to the national court, the 'second pillar' is constituted by the occupational old-age pension granted, directly or indirectly, by the private or public former employer. The statutory old-age insurance system for former employees of the Freie und Hansestadt Hamburg falls into this category. It is reserved to employees who have belonged, during their working life, to the public sector, but without the status of civil servant, working for Freie und Hansestadt Hamburg under a civil-law contract of employment.

60. According to the information provided by the Commission, that scheme is financed by the workers and the employer which, admittedly, is a public body, but which, in the present case, acts as a private employer only.

61. As regards the second relevant criterion, according to which the pension must be directly related to the period of service completed, Paragraph 6 of the HmbZVG provides that the method of calculation depends on the period of employment. The periods of employment giving entitlement to the supplementary pension ('Ruhegeldfähige Beschäftigungszeit') are set out in Paragraph 8 of that law.

62. As regards the third criterion, which consists in determining whether the amount of the pension has been calculated on the basis of the employee's last salary, it is also apparent from Paragraph 6 of the HmbZVG that the monthly amount of the pension is not fixed by statute but corresponds, for each full year of the period of employment giving entitlement to a pension, to 0.5% of the pay taken into account for calculating the pension, in accordance with Paragraph 7, which determines those salaries ('Ruhegäldfähige Bezüge') in a fairly detailed manner.

63. It follows that the three criteria which characterise the employment relationship, a factor which the Court has regarded as playing a decisive role for the purpose of conferring the categorisation of pay within the meaning of Article 141 EC, are satisfied in respect of the pensions at issue.

64. The national court would seem to be disturbed by, above all, the interpretation of 'state schemes or similar' in Article 3(3) of Directive 2000/78. It raises the question whether, notwithstanding the categorisation as 'pay' in the broad sense of the benefits paid to the applicant in the main proceedings under the First RGG, the Directive is nonetheless inapplicable, given that those pension payments are payments made by state schemes or similar within the meaning of that article. It emphasises that, if the Court were to answer that question in the affirmative, the first part of

recital 13 would be extremely misleading and essentially pointless.

65. To my mind, 'state schemes or similar' other than social security or social protection schemes which fall outside the field of application of the Directive can be special state schemes which are not linked to an employment relationship, such as, for example, the pensions provided by the State for persons handicapped during compulsory military or civil service, ex-servicemen or disabled ex-servicemen, victims of wars or persecutions, eminent artists, etc. As schemes of this kind, state or similar, exist in the Member States, the inclusive term 'including' in Article 3(3) of Directive 2000/78, is not without purpose.

66. It may be inferred from the Court's case-law that the categorisation of that occupational pension scheme cannot be affected by the fact that the Freie und Hansestadt Hamburg is a public body or by the fact that membership in the scheme giving entitlement to the retirement pension at issue in the main proceedings is compulsory. [34] Since the threefold criterion considered above is satisfied in this case, a pension paid by a public employer is no different from a pension paid by a private employer to his former employees.

67. The Court has held that the fact that a pension scheme is determined by statute is not in itself sufficient to bring it within the categories of 'social security' or 'social protection' and therefore to exclude such a scheme from the scope of Article 119 of the Treaty (now Article 141 EC). [35] Besides, the structural elements of a benefits system are not regarded as playing a decisive role, unlike the existence of a link between the employment relationship and the benefit concerned. [36]

68. Since the supplementary retirement pension at issue in the main proceedings essentially depends on the employment relationship which existed between Mr Römer and the Freie und Hansestadt Hamburg, it constitutes 'pay' within the meaning of Article 141 EC and does not fall within the derogation

34 — *Maruko*, paragraph 57 and the case-law cited therein. See also *Niemi*, paragraph 42.

35 — *Evrenopoulos*, paragraph 16, and *Niemi*, paragraph 41.

36 — *Niemi*, paragraph 45. The Court considered that the fact that the pension scheme for public servants of the Finnish State was part of a harmonised system, so that the total pension received by an insured person reflected the work carried out during his entire career, irrespective of the type of work and sector of activity concerned, and the fact that that scheme had been notified as a scheme falling within the scope of Regulation (EEC) No 1408/71 — of 14 June 1971 on the application of social security schemes (OJ 1971 L 149, p.2) — cannot by themselves preclude the application of Article 119 of the Treaty, if the pension benefit was linked to the employment relationship and, as a result, it was paid by the State in its capacity as employer.

provided for by Article 3(3) of Directive 2000/78.

2. Recital 22 in the preamble to Directive 2000/78

69. In the alternative, if the above question is answered in the negative, which I think has to be the case, the Arbeitsgericht Hamburg asks whether the provisions of the First RGG which distinguish, for the purpose of calculating the amount of retirement pension payable, married pensioners from all others, and treat the former more favourably, fall within the proviso referred to in recital 22 in the preamble to Directive 2000/78, and whether it is necessary, in that event, to disapply the Directive, even though no provision in its legislative part contains a limitation of its field of application expressly corresponding to recital 22 in the preamble.

70. It should be pointed out that recital 22 in the preamble to Directive 2000/78 states that the Directive 'is without prejudice to national laws on marital status and the benefits dependent thereon.'

71. The Commission agrees with the view of the national court that Paragraph 10(6)(1) of the First RGG is not a national law on marital status. Indeed, as they both point out, that paragraph contains no provision relating to marriage as such, but requires the pensioners to have the status of a married person, thus making that status a prerequisite for obtaining the more advantageous calculation of the pension for which it provides. That paragraph may, therefore, at the very most constitute a provision governing a benefit dependent on family status within the meaning of recital 22 in the preamble to the Directive.

72. The Arbeitsgericht Hamburg states that it raises this question because two of the higher courts in the Federal Republic of Germany [37] have held it to be plain that the scope of recital 22 in the preamble to the Directive is to be interpreted broadly, by excluding from the field of the Directive's application provisions which link calculation of a benefit, in the broad sense, to marital status, as is the case of Article 10(6)(1) of the First RGG.

37 — The national court states (in paragraph 55 of the first order for reference) that the Bundesverwaltungsgericht followed this line of reasoning on the basis of recital 22 in the preamble to Directive 2000/78 in respect of 'first level family benefits' paid only to married persons, and that the Bundesgerichtshof adopted the same approach with regard to survivors' pensions paid in accordance with the same distinctive criterion in connection with a supplementary occupational retirement pension scheme (that of the pension funds of the Bund and the Länder), and with regard to a more advantageous method of calculating supplementary pensions corresponding entirely to that laid down in Paragraph 10(6) of the First RGG.

73. I agree with the Commission when it considers that recital 22 in the preamble to the Directive does no more than set out the limitation, which goes without saying, of the field of application clearly laid down in Article 3(1) *in limine*, according to which the Directive applies only '[w]ithin the limits of the areas of competence conferred on the Community'. In fact, the Union has no competence to legislate with regard to 'marital status and the benefits dependent thereon'.

74. In *Maruko*,[38] the Court commented on a similar question, indicating that civil status and the benefits flowing therefrom, within the meaning of recital 22 in the preamble to Directive 2000/78, are indeed matters falling within the competence of the Member States and Community law does not detract from that competence. It pointed out, however, that in the exercise of that competence, the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination.

75. I think it would be helpful to explain this statement by saying that the competence left to the Member States in the sphere of civil status means that it is reserved to the Member States to legislate on marriage or on any other form of legally recognised union between persons of the same sex, as of opposite sexes, and on the legal status of children and other family members in the broad sense.

76. It is the Member States that must decide whether or not their national legal order allows any form of legal union available to homosexual couples, or whether or not the institution of marriage is only for couples of the opposite sex. In my view, a situation in which a Member State does not allow any form of legally recognised union available to persons of the same sex may be regarded as practising discrimination on the basis of sexual orientation, because it is possible to derive from the principle of equality, together with the duty to respect the human dignity of homosexuals,[39] an obligation to recognise their right to conduct a stable relationship

38 — *Maruko*, paragraph 59 et seq. and the case-law cited by analogy.

39 — I note that the Hungarian Constitutional Court (Alkotmánybíróság), after annulling, by Decision No 154/2008 of 17 December 2008, Law No CLXXXIV of 2007 on registered civil partnerships for infringement of Article 15 of the Constitution protecting the institution of marriage, because the legislature intended this other form of union not only for homosexuals but for heterosexuals too, has recently held, by Decision No 32/2010 of 25 March 2010, that Law No XXIX of 2009 is compatible with the Constitution because it serves registered civil partnership to homosexual couples. In this latter decision, the Alkotmánybíróság stressed that recognition of the possibility of entering into a registered civil partnership of persons of the same sex was justified by the right to respect for human dignity (Magyar Közlöny 2010/43).

within a legally recognised commitment.[40] However, in my view, this issue, which concerns legislation on marital status, lies outside the sphere of activity of Union law.

77. Conversely, in matters falling within the field of application of Union law, such as the exercise of the fundamental freedoms or workers' conditions of pay in their occupational life, a Member State cannot justify an infringement of that law by invoking the content of national provisions relating to marital status.

78. It must be stated, as the Court said in the context of the *Maruko* case, that, if a benefit such as that at issue in the main proceedings has been identified as 'pay' within the meaning of Article 141 EC and falls within the ambit of Directive 2000/78, for the reasons set out in relation to the reply to the first question raised in the present case, recital 22 in the preamble to that Directive cannot affect the application of the Directive.

79. I consider that the Court's interpretation of recital 22 in the preamble to Directive 2000/78 is capable of preventing the differences in the national case-law referred to by the national court and of ensuring uniform application of that legislation. In any event, that recital, which has no independent binding force, for the reasons already set out by Advocate General Ruiz-Jarabo Colomer,[41] should not be used to allow the recital itself to exclude a review of the compatibility with Directive 2000/78 of provisions of national law which provide that married couples have greater advantages than those granted to registered partners. Indeed, recital 22 in the preamble to Directive 2000/78 merely states the obvious limitation, derived from Article 13(1) EC, of the application of the directive to 'competence conferred on the Community', in accordance with the terms of Article 3(1) *in limine*, of that directive.

80. In any event, I note that when they are acting within the sphere of competences

40 — In that regard, I would point out that by judgment of 24 June 2010 (not yet published in the Reports of Judgments and Decisions), the European Court of Human Rights gave a ruling in *Schalk and Kopf* v *Austria,* in which Austrian nationals of the same sex, living in an official partnership, invoked Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, challenging the authorities' refusal to allow them to marry, an application never before brought before the Strasbourg Court and unanimously dismissed. They further alleged discrimination on grounds of sexual orientation, in that they were denied the right to marry and had no other way having their relationship recognised by law; nevertheless, the European Court of Human Rights held that there was no breach of Article 14 in conjunction with Article 8 of that convention. Lastly, they claimed that they were placed in a financial position disadvantageous compared to that of married couples, but this head of claim was declared manifestly unfounded. I would add that Austrian legislation recognises civil partnership as a form of union open to homosexuals and placed on the same footing as marriage, by and large.

41 — Opinion in *Maruko*, point 76. The value of a recital, such as that at issue here, is confined to its use as a tool of interpretation, inasmuch as it states the reasons for the essential provisions of the directive, and it does not contain a rule having binding effect.

reserved to them, the Member States cannot be relieved of their general obligation to observe Union law, which includes respecting provisions relating to the principle of non-discrimination.

81. It follows, that, contrary to what may have been held in national case-law, recital 22 in the preamble to Directive 2000/78 cannot call in question the application of the Directive to provisions, such as those in the First RGG, which relate to the calculation of pay, in the broad sense, and which use as a crucial factor a specific civil status, namely, that of married person.

82. To conclude, I consider that the answer to the first and second questions should be that the supplementary pensions paid to former employees of the Freie und Hansestadt Hamburg and to their survivors, which are governed by the First RGG read in conjunction with the HmbZVG, fall within the scope *ratione materiae* of Directive 2000/78 and that those national provisions must therefore be examined by the yardstick of the requirements of the Directive.

C — *The existence of discrimination on the basis of sexual orientation within the meaning of Directive 2000/78*

83. The third question is raised in case it should emerge from the replies given to the above questions that, as I believe, Directive 2000/78 is applicable to Paragraph 10(6) of the First RGG, under which, in essence, the pensions paid to married pensioners are more favourable than those paid in the case of a pensioner who has entered into a partnership with a person of the same sex. The national court asks whether that legislation is incompatible with the combined provisions of Articles 1, 2 and 3 (1)(c) of Directive 2000/78, in that it discriminates against the applicant in the main proceedings on the basis of his sexual orientation, directly or only indirectly. [42]

1. Direct discrimination

84. The national court states that it is inclined to think that Paragraph 10(6)(1) of the First RGG is directly discriminatory. It points out that marriage, for persons of heterosexual orientation, and life partnership, for persons

42 — Article 2(2)(a) of Directive 2000/78 provides that direct discrimination on the basis of sexual orientation shall be taken to occur 'where one person is treated less favourably than another [who is] in a comparable situation on the basis [of his sexual orientation]'. On the other hand, Article 2(2)(b) of that directive states that there is indirect discrimination on the basis of sexual orientation 'where an apparently neutral provision, criterion or practice would [nevertheless] put persons having a particular [sexual orientation] at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

of homosexual orientation, represent respectively the form of life union provided for in law or the most usual civil status, even though it is conceivable that, in spite of his homosexual orientation, a person may decide to marry a person belonging to the opposite sex. It should be pointed out that, according to the information given in the order for reference, the fact that only two persons of a different sex may marry each other is not expressly stated by the German Civil Code (BGB), but in practice is regarded as a prerequisite. On the other hand, it is apparent from Article 1(1) of the LPartG that only two persons of the same sex may enter into a life partnership within the meaning of that law.

85. The Freie und Hansestadt Hamburg states that the legislation at issue, which confers a right to the supplementary scheme for any partner under tax category I and not III/0, does not generate a difference in treatment on grounds of sex or of sexual orientation.

86. Mr Römer points out that in *Maruko* the Court did indeed leave it to the national court to ascertain whether there existed a 'comparable situation', but that it nevertheless laid down clear substantive criteria for that purpose. He points out, first, that, in accordance with Directive 2000/78, the Court does not require situations to be identical in nature in the sense of the greatest similarity possible, but only to be of comparable nature. It adds that this must be ascertained by weighing up not the legal institutions, in an abstract manner, but the two categories of persons concerned in the light of the social benefits which are at issue, specifically. Contrary to the case-law of higher German courts which, according to Mr Römer, have misunderstood the Directive and also the criteria for interpretation given in *Maruko*, it is therefore necessary, in the present case, to compare an ex-employee of the Freie und Hansestadt Hamburg living with his/her companion in a registered life partnership with an ex-employee of the Freie und Hansestadt Hamburg living with his/her spouse in marriage. Mr Römer maintains principally that in order to provide the effective remedy against discrimination which the Directive seeks to guarantee, the Court ought to state more clearly the substantive criteria which the national courts must apply when they make the comparison.

87. The Commission considers, like the Arbeitsgericht Hamburg, that in the present case, life partners are treated less favourably than spouses with regard to their pensions, and there is no valid reason which can explain this unequal treatment. It points out that, in particular, the fact that spouses may possibly have the burden of children to bring up cannot justify such a difference, for Paragraph 10(6)(1) of the First RGG favours all married, not permanently separated pensioners, irrespective of the existence of descendants. The Commission also shares the national court's view that there is no empirical evidence to confirm that married pensioners

have a greater need of support in relation to other pensioners who have entered into a life partnership, having regard to the pension situation of their respective partners. It adds that, in any event, the legislation at issue is not appropriate for attaining that objective since it does not take into account the existence of a child born to the pensioner and his/her spouse, and does not even establish that factor as a condition. The Commission considers that, contrary to the approach taken in *Maruko*, it is unnecessary in this case to leave it to the national court to decide whether a spouse and a life partner are in comparable situations as regards the pension concerned, on the ground that, in its order for reference, the national court has already carried out the necessary examinations of the legal status of the life partner and has drawn the appropriate conclusions in that regard. The Commission proposes that it should be held that legislation such as that at issue in the main proceedings constitutes direct discrimination on grounds of sexual orientation.

88. It is apparent from the wording of Article 2(2)(a) of Directive 2000/78 that the existence of direct discrimination, within the meaning of that legislation, depends on the comparable nature of the situations being weighed up. The criteria according to which an examination of that comparability must be carried out are therefore decisive. The Court is obliged to give a reply that satisfies several requirements, namely, not only to provide the national court with all the information it needs to dispose of the main proceedings, while ensuring that it does not encroach upon the competences of the national court, but also to ensure the full effect of Union law, while respecting the areas of exclusive competence of the Member States, particularly as regards civil status.

89. First of all, I would point out that in the great majority of Member States, marriage is a union of a man and a woman. Access to a registered partnership or any similar form of legal union may be restricted to couples of the same sex or may also be available to couples of the opposite sex, as in the case of the civil solidarity pact in French law. The link between homosexuality and the form of the union of two persons is not automatic. Indeed, it is not inconceivable that a person of homosexual orientation may make the social choice of marrying a person of the opposite sex and, conversely, there is nothing to prevent a person of heterosexual persuasion opting for life under a registered partnership with a person of the same sex. However, in my view, we should not adhere to this sophism in legal analysis. It would be contrary to the prevalent situation to refuse to accept that, in a country like Germany, where marriage is excluded for persons of the same sex and where registered life partnership is the legal form of union reserved to them, any difference in treatment practised to the detriment

of persons united in such a partnership constitutes a source of discrimination on the basis of sexual orientation. [43]

90. In *Maruko*, [44] although the Court stated that it was leaving the matter to be examined by the national court, it seems to have opted implicitly for the comparability of situations, setting out clear enough criteria. In accordance with the terms of Article 2(2)(a) of Directive 2000/78, the Court did not refer to identical situations, but to the existence of sufficiently comparable situations, basing its arguments on the analysis of German law carried out by the national court. The European Court of Human Rights adopts the same approach. [45]

91. It may be pointed out that marriage, irrespective of its relevance at the moral, religious or sociological level, is from a legal point of view a complex institution whose content is defined by the rights and obligations of the spouses towards each other, towards third parties and towards society as a whole. Furthermore, the existence of marriage may be a fact which constitutes a pre-condition for various legal effects, whether in social, tax or administrative law. Similarly, a registered civil partnership, or any other form of legally recognised union, is characterised either by the rights and obligations of the parties or by the legal consequences which the legal order concerned attaches to the existence of such a partnership.

92. The Court has been careful to state that comparability must be ascertained with regard to the benefit specifically at issue, that is to say, focusing on the relevant legal facts and not merely taking an overall approach to the legal situation. Accordingly, in *Maruko*, in which the question referred for a preliminary ruling related to the grant of a pension to the life partner of a deceased pensioner, the Court, after stating that a 'gradual harmonisation of the regime [had been] put in place for the life partnership with that applicable to marriage' in German law, pointed out that 'life partnership is to be treated as equivalent to marriage as regards the widow's or widower's pension.' [46]

93. The comparison of situations must therefore be based on a focused analysis, designed to identify in particular the rights and

43 — I therefore concur with the position adopted by the first senate of the Federal Constitutional Court in its order of 7 July 2009 (BVerfG, 1 BvR 1164/07 vom 7.7.2009). In order to recognise the existence of such discrimination, the Constitutional Court pointed out that there is a close link between sexual orientation and the choice between marriage or a registered civil partnership (paragraph 89) and that the German legislature provided for the latter form of legal union in order to enable homosexuals to unite (paragraph 90).

44 — *Maruko*, paragraph 69.

45 — Accordingly, in the judgment in *Burden v United Kingdom* (Application no 13378/05), given on 29 April 2008, the Grand Chamber of the ECHR held that two sisters who had lived together for more than 30 years in a jointly-owned house could not complain of a difference in tax treatment, on the basis of Article 14 of the ECHR, because they were not in a situation comparable to those of spouses or civil partners.

46 — *Maruko*, paragraphs 67 to 69.

obligations of married persons as laid down by provisions of private law and those of persons in a registered civil partnership which are relevant in relation to the pension concerned. In my view, the effectiveness of the prohibition of discrimination on grounds of sexual orientation would not be ensured if the legal institutions were required to be absolutely identical or if rights or obligations irrelevant to the specific situation in the case had to be taken into account.

94. In particular, legislation applicable in the event of the possible dissolution of the union between partners, through death or any other cause, should not affect the comparison of the situation existing during the marriage and during the registered partnership, as regards payments which depend on the fact that the married pensioner is not permanently separated. Conversely, such legislation may affect the assessment of the comparability of the situations of spouses or partners who are separated.

95. Likewise, the effects attached to marriage, by provisions of tax, social or administrative law, as a condition for granting an advantage or a right, ought not to have any effect on the drawing of the comparison of the situations of persons united in marriage or in a registered partnership, for a difference in treatment established by such provisions is rather an indication of the existence of discrimination than a factor defining the comparability of the situations.

96. The Court having already described them in *Maruko*, [47] I think it unnecessary to retrace here the steps taken by German civil law towards bringing the body of rules applicable to registered life partnership into line with the rules existing for marriage.

97. With regard more particularly to the pension at issue, namely, the supplementary retirement pension paid by the Freie und Hansestadt Hamburg to one of its former employees, this falls within the legal sphere of the financial obligations between spouses. I note that, according to the information in the order for reference, life partners owe one another reciprocal duties, on the one hand, of support and assistance and, on the other, to contribute adequately to the needs of the partnership community by their work and from their property, [48] as is also the case between spouses during their life together. [49] Even though the LPartG did not affirm a total unification of the rights of married couples and of couples living in a registered

47 — *Maruko*, paragraph 67 et seq.

48 — Paragraphs 2 and 5 of the LPartG, resulting from the Law of 15 December 2004, revising the law on civil partnerships (Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts) which came into force on 1 January 2005.

49 — Accordingly, Paragraph 5 of the LPartG expressly refers to the parallel provisions of the BGB, providing that 'The second sentence of Paragraph 1360, Paragraph 1360a and Paragraph 1360b of the Civil Code, and the second subparagraph of Paragraph 16, shall apply by analogy'.

life partnership, it nevertheless established broadly similar obligations for the two unions, especially as regards financial matters.

98. According to the national court, following the successive amendments to the LPartG, [50] 'there are no longer significant legal differences between these two personal statuses in the German legal order, namely, marriage and registered life partnership.... The difference is now, in essence, only factual: marriage implies that the spouses are of different sexes, whereas registered civil partnership implies that the partners are of the same sex.' There is therefore not a sufficient difference in situation to justify unequal treatment such as that at issue in the main proceedings.

99. It is apparent from the file that Mr Römer's pension would have been increased, under the final sentence of Paragraph 8(10) of the First RGG, if, in October 2001, he had entered into a marriage with a woman and not into a registered life partnership with a man. That more favourable treatment would not have been linked either to the income of the parties to the union, or to the existence of children or to other factors such as those relating to the spouse's economic needs. Furthermore, during his working life, the contributions payable by the party concerned were wholly unaffected by his marital status, given that he was required to contribute to the pension costs by paying a contribution equal to that of his married colleagues. The difference in treatment found is therefore based solely on a criterion prohibited by Directive 2000/78, namely, sexual orientation.

100. In the light of the facts set out by the national court, it appears that, in the case of the pension at issue in the main proceedings, the situation of persons having entered into a contract of marriage and that of persons linked by a registered civil partnership under the national law applicable are comparable, within the meaning of Article 2(2)(a) of Directive 2000/78. In those circumstances, it is apparent that an increase in a retirement pension based solely on the criterion of marriage, as provided for in Paragraph 10 (6) of the First RGG, constitutes direct discrimination on the basis of sexual orientation.

2. Indirect discrimination

101. The question of the interpretation of Article 2(2)(b) of Directive 2000/78, relating to the concept of indirect discrimination, is raised only if it is found that there has not been direct discrimination, either at the end of the examination of comparability of the situations carried out by the Court itself if it considers it is able to do so, as the Commission suggests, or after the analysis of this kind which will be left for the national court

50 — The Arbeitsgericht Hamburg states that, in particular, that Law of 15 December 2004 revising the law on civil partnerships 'effected even greater approximation of the status of civil partnership and the status of marriage'.

to carry out. It is therefore only in the alternative, and for the sake of completeness, that I intend to make the following observations.

102. The applicant in the main proceedings invites the Court to extend the decision in *Maruko*, by giving a reply to the question relating to indirect discrimination too. In order to maintain that he is the victim of indirect discrimination on grounds of his sexual orientation, Mr Römer argues that linking pensions to a marriage valid only between persons of different sexes leads to that result, without its being objectively justified in accordance with Union law. He points out that the Freie und Hansestadt Hamburg has not explained in what respect the protection of married couples requires him to receive a lower pension than that of his heterosexual colleagues, even though he has paid the same contributions as they have into the occupational pension fund for 45 years.

103. The Commission, relying on the Court's case-law concerning the principle of non-discrimination on grounds of age, [51] points out that the Member States have broad discretion to choose the measures for attaining the objectives of their social policy, but that that power may not have the effect of rendering the implementation of the principle of non-discrimination meaningless.

104. If it should not be established that life partners and spouses are in comparable situations as regards the pension concerned, which would preclude the existence of direct discrimination in this case, the provisions of Article 2(2)(b)(i) of Directive 2000/78 would have to be interpreted in order to help the national court determine whether legislation such as that at issue in the main proceedings is capable of generating indirect discrimination on grounds of sexual orientation.

105. To my knowledge, there is nothing in the case-law concerning the interpretation of the concept of indirect discrimination, in particular on grounds of sexual orientation, within the meaning of Directive 2000/78.

106. As provided in that directive, it is first necessary to consider whether 'an apparently neutral provision [or] criterion...would put persons having... a particular sexual orientation at a particular disadvantage compared with other persons'. The criterion relating to the matrimonial link, laid down in Paragraph 10(6) of the First RGG, may appear to

51 — Inter alia, Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 47 et seq. It should be pointed out that Directive 2000/78 lays down specific rules concerning the grounds which may justify unequal treatment based, either directly or indirectly, on age (See the Opinion delivered on 6 May 2010 by Advocate General Kokott in Case C-499/08 *Andersen*, point 32).

be a neutral differentiating factor. However, since marriage and the advantages deriving from it are exclusively reserved to persons of different sexes, as is the case in Germany, inter alia, the distinctive effect of such a criterion is not insignificant. It is particularly disadvantageous for homosexuals because they have no legal means other than registered partnership to formalise their union and therefore they cannot enter the favoured group unless they renounce their sexual orientation.

107. The approach must here be not subjective, but objective. It is of little importance to ascertain whether or not the requirement of a current marriage is designed specifically to exclude couples of the same sex, seeing that that requirement in itself clearly puts them at a disadvantage compared to couples of different sexes. Admittedly, the provision at issue in the main proceedings excludes all unmarried pensioners, [52] but, in fact, homosexuals are more strongly prejudiced than, for example, cohabiting heterosexuals, for the latter are not definitively deprived of the opportunity of obtaining such an advantage, since they are offered access to marriage, should they one day wish to marry.

108. The fact that a 'particular disadvantage' may result from Paragraph 10(6) of the First RGG is not in itself enough for indirect discrimination to be discernible, since a 'legitimate aim' could justify it 'objectively', within the meaning of Article 2(2)(b)(i) of Directive 2000/70. The explanation given by the Freie und Hansestadt Hamburg relates to concerns of a fiscal nature, whose genuineness and lawfulness are substantiated by no evidence, even though it was incumbent on the defendant in the main proceedings to produce such evidence. The national court refers to the legislature's possible intention of protecting marriage and the family. [53]

109. I should say, first of all, that any causal link between the inequality of treatment at issue and the protection of marriage and the family, which in itself may be a 'legitimate aim', is in my view questionable.

110. Even if the legitimate nature of such an aim may be accepted, the provisions of Paragraph 10(6) of the First RGG do not, in any case, appear capable of passing the examination of validity and proportionality for

52 — However, I note that Paragraph 10(6) of the First RGG provides that the more favourable method of calculation resulting from application of tax category III/0 is used not only for married pensioners but also for unmarried pensioners who may claim family benefits or equivalent benefits.

53 — I shall come back to this in connection with the replies to be given to the last series of questions relating to the effect of Paragraph 6(1) of the German Basic Law, which establishes an objective of that kind.

which Directive 2000/78 provides by requiring 'the means of achieving that aim [to be] appropriate and necessary'. I consider that there are means of promoting the institution of marriage other than harming, even indirectly, the financial interests of homosexual couples, who in any event do not have access to marriage in Germany and therefore cannot turn away from it and opt for a registered life partnership. In any event, the institution of marriage may be protected without its being appropriate or essential to favour one form of legally recognised conjugal life over another. [54]

is or is not objectively justified by a legitimate aim and to what extent the existence of a current marriage as a pre-condition for obtaining that advantage is or is not a proportionate means of attaining that objective.

3. Intermediate conclusion

111. In the light of these considerations, it will be for the national court, which alone is competent to assess the facts of the case before it and to interpret the applicable national legislation, to determine, specifically, whether there is indirect discrimination. It will have to assess to what extent the fact that Mr Römer received a lower pension than a married person, under Paragraph 10(6) of the First RGG,

112. To conclude with regard to all the problems contained in the third question, I propose that the Court reply in that regard that the combined provisions of Articles 1, 2, and 3(1)(c) of Directive 2000/78 preclude legislation such as that at issue in the main proceedings, under which a pensioner who has entered into a registered life partnership does not receive a supplementary retirement pension equal to that granted to a married, not permanently separated, pensioner even though, under national law, that partnership places persons of the same sex in a situation comparable to that of spouses in relation to that pension. The analysis of comparability must be focused on the rights and obligations of spouses and partners, as derived respectively from the provisions applicable to marriage and from those applicable to registered partnership, which are relevant having regard to the conditions for granting the pension in question. It is for the national court to

54 — This may be compared with the order of the German Federal Constitutional Court of 7 July 2009, cited above. The European Court of Human Rights has also stated: 'In cases in which the margin of appreciation afforded to States is narrow, [as in the case of] a difference in treatment based on... sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people — in this instance persons living in a homosexual relationship — from the scope of application of section 14 of the Rent Act' (judgment of 24 July 2003 in *Karner v Austria*, Reports of Judgments and Decisions, 2003-IX, paragraph 41).

determine whether a life partner is in a legal and factual situation comparable to that of a spouse receiving the supplementary retirement pension which is provided for in the occupational pension scheme managed by the Freie und Hansestadt Hamburg.

113. In the alternative, if the analysis of comparability excludes the existence of direct discrimination on grounds of sexual orientation, there would at the very least be indirect discrimination within the meaning of Article 2(2)(b)(i) of Directive 2000/78, if the provisions of Paragraph 10(6) of the First RGG, which provide a more favourable method of calculating a supplementary retirement pension in respect of a married, not permanently separated, pensioner, generate a particular disadvantage to the detriment of any pensioner who has entered into a registered life partnership, and do not objectively reflect a legitimate aim or do not constitute an appropriate and necessary means of attaining that aim, which it will be for the national court to determine.

D — *Infringement of Article 141 EC or of a general principle of Union law*

114. By its fourth question, the national court asks, in essence, whether, if it is not established that Paragraph 10(6) of the First RGG infringes Directive 2000/70/EC, the national legal provision nevertheless infringes Article 141 EC or a general principle of Union law.

115. More specifically, this question is subdivided into three possibilities. This matter was clarified by the Arbeitsgericht Hamburg in its supplementary reference for a preliminary ruling.

116. I note that the first and second situations referred to by the fourth question are those in which the questions relating to a possible exclusion of application of Directive 2000/78 are answered in the affirmative. As for the third part of the fourth question, this refers to the situation of its being held that Paragraph 10(6) of the First RGG does not undermine the principle of non-discrimination, whether direct or indirect, laid down by Directive 2000/78. For the reasons I have set out above, the three parts of this question referred for a preliminary ruling are, in my view, irrelevant. However, for the sake of completeness, in case the Court does not follow my proposals, I shall give the following replies in the alternative.

117. As regards a possible infringement of Article 141 EC, I do not consider that it can be made out in the case in the main proceedings. I would recall that that article establishes the 'principle of equal pay for male

and female workers for equal work or work of equal value'.

118. The legislative content of Paragraph 10(6) of the First RGG cannot breach that principle, given that the difference in treatment in calculating the pensions which acts to the detriment of the applicant in the main proceedings is based on a distinction, not between men and women but between married employees and all others. The national court itself makes this finding, but suggests that that article may nevertheless be a discriminatory provision, on the basis of the fact that the applicant in the main proceedings is a male, inasmuch as Mr Römer could enter into a legal union with another man only by means of a life partnership and not of marriage.

119. Nevertheless, I note, as does the Commission, that the national provision at issue adversely affects pensioners of the same sex, irrespective of whether the civil partnership has been formed by two men or two women. Furthermore, the disadvantage suffered by Mr Römer is not linked to his sex or to that of his partner, but relates only to the non-existence of a marriage. It is apparent to me that such a provision cannot be contrary to Article 141 EC, which covers differences of treatment on grounds of sex and not those on grounds of sexual orientation.

120. The arguments put forward by the national court are similar to the reasoning of the Court of Justice in *K.B.*,[55] according to which Article 141 EC, in principle, precludes legislation which, in breach of the European Convention for the Protection of Human Rights ('ECHR') prevents a heterosexual couple, in which one of the partners is a transsexual who has undergone gender reassignment surgery but who is still entered in the civil population register as being of the same sex as the other partner, from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other, as referred to in Article 141 EC, namely, a survivor's pension.

121. However, even though Mr Römer and his partner are in a situation similar to that of the parties in *K.B.* because marriage is reserved to persons of different sexes, I do not, however, believe that in the present case that obstacle may be described as discrimination on grounds of sex. In that case, the Court called in question the conformity with Community law of the United Kingdom legislation, not in that it does not allow marriage for couples of the same sex, but only in that it gives rise to unequal treatment relating to a pre-condition for the grant of a survivor's pension, namely, the capacity to marry.[56] Similarly, the impossibility [of contracting marriage] afflicting Mr Römer is a consequence of the choice made by the Federal

55 — Case C-117/01 *K. B.* [2004] ECR I-541.
56 — Paragraphs 28, 30 and 33 of that judgment

Republic of Germany, exercising its powers in respect of marital status, to reserve the institution of marriage to couples of the opposite sex. Since homosexuals suffer the consequences of that legislative choice in a similar way, irrespective of whether they are female or male, that requirement cannot in itself be regarded as discriminatory on grounds of sex.

122. As regards the possible infringement of a general principle of Union law by Paragraph 10(6) of the First RGG, in so far as it puts the applicant in the main proceedings at a disadvantage because of his sexual orientation, the national court bases its reference on the judgment in *Mangold.* [57] It points out that, according to that judgment, Directive 2000/78 does not itself lay down the principle of equal treatment in employment and occupation, which must therefore be regarded a general principle of Community law. In its supplementary reference, the national court refers to the possible infringement of '(another) general principle of Community law', in contrast, it seems, to the principle of equal pay for men and women which is contained in Article 141 EC, but it does not state what that other principle might be in the present case.

123. If the Court were to consider that this question is not irrelevant in the light of the combination of possible situations stated therein, I would point out that the judgements in *Mangold* and *Kücükdeveci* [58] definitely confirm that Directive 2000/78 did not lay down the principle of equal treatment in the field of employment and occupation, the source of which is to be found in various international instruments and in the constitutional traditions common to the Member States, as is clear from Article 1 and from the first and fourth recitals in the preamble to the Directive.

124. In that context, the Court has recognised the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of Union law, a principle to which that directive merely gave specific expression, by establishing a general framework in the matter it covers. [59] Moreover, the Court has pointed out that 'any discrimination based on … age … shall be prohibited', in accordance with Article 21(1) of the Charter of Fundamental Rights, which, under Article 6(1) TEU, has the same legal value as the Treaties. [60]

125. It remains to be determined whether that case-law may be transposed in such a way that the prohibition of discrimination on grounds of sexual orientation may have the same status of general principle of Union law

57 — *Mangold*, paragraphs 74 and 75.

58 — *Mangold*, paragraph 74 and *Kücükdeveci*, paragraph 20.
59 — *Mangold,* paragraph 75 and *Kücükdeveci*, paragraph 21.
60 — *Kücükdeveci*, paragraph 22.

as that enjoyed by the prohibition of discrimination on grounds of age.

126. As I have already pointed out, the Treaty of Amsterdam, which was signed on 2 October 1997 and entered into force on 1 May 1999, amended Article 13(1) EC in order to grant the Community, within the limits of its substantive powers, specific powers to combat all kinds of discrimination based on one of the six categories of grounds which it lists, among which is sexual orientation. [61]

127. At that time, not all the Member States condemned discrimination based on that criterion, nor did the ECHR refer to it. In the judgment in *Grant*, [62] the Court stated that, in the current state of the law within the Community, stable relationships between two persons of the same sex were not regarded as equivalent to marriages or stable heterosexual relationships outside marriage. It inferred that a difference in treatment based on sexual orientation was not prohibited since no Community provision expressly prohibited it, and added that it was for the legislature alone to adopt, if appropriate, measures that might affect that position.

128. As Advocate General Ruiz-Jarabo Colomer observed, the restrictive approach thus chosen by the Court contrasted, for example, with the case-law on discrimination based on maternity. [63] Subsequent case-law also reveals a certain reluctance to give effect to the prohibition of discrimination on grounds of sexual orientation. [64]

129. In my view, from a strictly legal perspective, there is no justification for applying the principle of equal treatment less rigorously with regard to discrimination on grounds of sexual orientation than with regard to discrimination based on the other grounds mentioned in Article 13 EC. To accept that there

61 — It was on the basis of this provision that Directive 2000/78 was adopted, and also Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) and Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 3). To complete this legal framework, on 2 July 2008, the Commission presented a proposal for a directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, outside the labour market (COM(2008) 426 final).

62 — Case C-249/96 *Grant* [1998] ECR I-621, paragraphs 35 et seq.

63 — See point 92 of the Opinion in *Maruko*, and the numerous cases cited therein (footnote 90).

64 — Inter alia Joined Cases C-122/99 P and C-125/99 P *D. and Sweden* v *Council* [2001] ECR I-4319), the content of which is considered in point 94 of the *Opinion* delivered by Advocate General Ruiz Jarabo Colomer in *Maruko*.

are, in this area, special sensibilities with legal effect would mean that the Court accords significance to unjustified prejudices, whatever their origin, and denies equal legal protection to persons of a minority sexual orientation.

130. Indeed, the European Court of Human Rights held, in 1999, that a difference of treatment based on sexual orientation was covered by Article 14 of the ECHR, the content of which is not exhaustive, and that such discrimination cannot be tolerated under the Convention. [65] The fundamental rights guaranteed by the ECHR are an integral part of the legal rules compliance with which the European Union guarantees, as general principles, in accordance with Article 6(3) TEU. The prohibition of 'any discrimination based on any ground such as... sexual orientation' was thus laid down in Article 21(1) of the Charter of Fundamental Rights of the EU, the aim of which is not to create new rights but to reaffirm the fundamental rights recognised by Union law. [66]

131. In the light of these considerations, I consider that, in the same way as the Court decided with regard to discrimination on grounds of age, the prohibition of discrimination on grounds of sexual orientation should be regarded as a general principle of Union law. [67]

132. If the legislation at issue in the main proceedings does not fall within the field

65 — Judgment of 21 December 1999 in *Salgueiro Da Silva Mouta v Portugal*, Reports of Judgments and Decisions, 1999 IX, paragraphs 28 and 36. See also the judgment in *S.L. v Austria* of 9 January 2003, Reports of Judgments and Decisions, 2003 I, paragraph 37 ('differences based on sexual orientation require particularly serious reasons by way of justification'), and also the case-law cited in support, and the judgment of 2 March 2010 in *Kozak v Poland*, not yet published in the Reports of Judgments and Decisions (in paragraphs 98 and 99, the ECHR accepted that protection of the family founded on a union of a man and a woman, as stipulated in the Polish Constitution, is, in principle, a legitimate reason that might justify a difference in treatment. It added, however, that the State, in seeking to strike a balance between the protection of the family and the Convention rights of sexual minorities, must take into account developments in society, including the fact that there is not one single way for a individual to conduct his private life. Unable to accept as necessary, in order to protect the family, a 'blanket' exclusion of persons living in a homosexual relationship from succession to a tenancy, the ECHR held unanimously that there had been an infringement of Article 14 in conjunction with Article 8 of the European Convention on Human Rights).

66 — Its preamble states that the Charter 'reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights'.

67 — Paragraph 76 of the judgment in *Mangold* begins as follows: 'observance of the general principle of equal treatment, *in particular* in respect of age...' (emphasis added), which permits the inference that the Court did not intend to limit its approach to that ground alone, since the purpose of Directive 2000/78 is to combat discrimination on the grounds of 'religion or belief, disability, age or sexual orientation' (Article 1) as regards employment and occupation. Similarly, Advocate General Tizzano had observed: 'even before the adoption of Directive 2000/78 and the specific provisions it contains, the Court had recognised the existence of a *general principle of equality*' (emphasis added) (see point 83 of the Opinion in *Mangold* and the case-law cited therein).

of application of Directive 2000/78, which I think highly unlikely, the possibility remains that that legislation — specifically the term 'married' which limits its scope — infringes the general principle of Union law relating to the prohibition of discrimination on grounds of sexual orientation.

133. Nevertheless, it should be pointed out that if the Court bases its review on that general principle, and not on Directive 2000/78, that will affect the reply to be given to the fifth question raised by the national court, namely, as regards the temporal effects of the infringement of Union law.

134. To sum up, I consider primarily that it should not be necessary, in this case, to reply to the fourth question referred for a preliminary ruling. However, if this is not so, I propose, in the alternative, that the Court hold that Paragraph 10(6) of the First RGG cannot constitute an infringement of Article 141 EC but may, which it is for the national court to decide in the light of the information in the case before it, breach the general principle of Union law constituted by the prohibition of discrimination on grounds of sexual orientation.

E — *Temporal aspects of the case*

135. The fifth and sixth questions may be examined together since they both relate to problems of temporal application, from different aspects.

1. Effects in time of the right to equal treatment

136. The national court states that the fifth question seeks to clarify the legal conclusions it must draw from the replies given by the Court to the first four questions referred for a preliminary ruling in order to adjudicate in the present case.

137. It explains that it wonders, in the first place, whether, should the Court consider that the disadvantage suffered by the applicant in the main proceedings constitutes an infringement of Union law, that party could require the defendant in the main proceedings to afford him equal treatment with married, not permanently separated, pensioners, even before amendment of Paragraph 10(6) of the First RGG to that effect.

138. In that regard, the national court points out that, in the present case, the Freie und Hansestadt Hamburg is not an employer governed by private law, even though a civil-law contract of employment is involved, but a public local authority acting both as an employer and as the legislative body responsible for the provision at issue.

139. I consider that, if the existence of discrimination, either direct or indirect, is established, the right to equal treatment may be claimed by the applicant in the main proceedings without needing to wait for the contested national provision to be amended by the German legislature.

140. In the second place, the national court asks, in essence, from what date Paragraph 10(6) of the First RGG should be disapplied. It states that it takes the view that if the Court were to find that that provision infringes only Directive 2000/78, it would seem logical to accord the applicant in the main proceedings the right to claim against the defendant payment of pensions of the same amount as those paid to married pensioners at the earliest from the date of expiry of the transposition period laid down by Article 18(1) of Directive 2000/78, that is to say, from 3 December 2003.

141. It adds that it considers that the starting point could be fixed at a later date, if the Court considers it of crucial importance that in national law, life partnership entered into persons of the same sex has been approximated to the institution of marriage only in several stages. It suggests that, in that case, the legal effects of the interpretation given by the Court could be applicable to the applicant in the main proceedings, for example, only from the time the Law of 15 December 2004 amending the Law to revise the Law on civil partnerships came into force, that is to say, 1 January 2005.

142. While the Commission adheres to the position taken by the national court, the view of the applicant in the main proceedings is similar only as regards the first date proposed by the Court. [68] Mr Römer concedes that the Court may hold that the effect will be limited to the retirement pension payments made after 2 December 2003. However, he considers that his pension payments should, in any event, be calculated from that date on the basis of all the contributions he has paid, irrespective of their date.

143. On the other hand, he objects to the idea that the starting-point could be brought forward in order to take account of a development in the scheme applicable to registered

68 — However, I consider the wording he uses to be ambiguous or even incorrect, since he maintains that 'the [Court's] decision [will clarify] the content of the directive, in the way it should have been interpreted since *2 December 2003, the date on which it came into force*' (emphasis added). However, Article 20 of Directive 2000/78 states that the directive was to come into force on the day it was published in the *Official Journal of the European Communities*, viz., 2 December 2000, while Article 18 provides that the Member States had until 2 December 2003 to transpose it into national law.

life partnership under German law. As regards direct discrimination, he submits that the maintenance obligations between life partners have been the same as those borne by spouses, since the creation of civil partnership in 2001. [69] He infers from that that former employees of the Freie und Hansestadt Hamburg who have entered into a life partnership have always been in the same situation as married former employees as regards access to the supplementary retirement pensions at issue. In the alternative, with regard to indirect discrimination, he states that he has, from the outset, been the victim of discrimination on the basis of his sexual orientation.

144. In replying to this question, different situations could perhaps be distinguished. First, if the Court were to consider that, in this case, there is discrimination linked to the infringement of provisions of Directive 2000/78, it could be considered that the applicant in the main proceedings cannot enjoy the same supplementary pension rights as married pensioners at a date before the expiry of the period given to the Member States to transpose the Directive, namely, 2 December 2003. An argument in support of that is that the Directive cannot be given retroactive effect by a decision to apply it before the end of the transposition period. Secondly, if, on the other hand, the Court were to give a negative reply to the third question, the national court asks, in the alternative, whether Paragraph 10(6) of the First RGG infringes Article 141 EC or a general principle of Union law. In that event, the expiry of the period for transposing Directive 2000/78 would have no effect in dealing with the main proceedings.

145. However, to draw such a distinction would amount to forgetting that, as I have pointed out, the Court has stated that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. [70] The Court inferred therefrom that the principle of non-discrimination on grounds of age was to be regarded as a general principle of Community law and that respect for the general principle of equal treatment cannot, as such, depend on the expiry of the period granted to the Member States for transposing the Directive designed to establish a general framework for combating discrimination based on that criterion. It added that it was for the national court to ensure the full effect of that general principle by disapplying any conflicting provisions of national law, even if the period for

69 — The applicant in the main proceedings states that only the ranking of maintenance claims between spouses in relation to the other maintenance creditors was originally conceived differently, but that that had no effect on the comparability of the duties of reciprocal support of spouses and of partners.

70 — *Mangold*, paragraph 74 and *Kücükdeveci*, paragraph 20.

transposing that Directive, as laid down by Article 18 thereof, had not yet expired.

146. In my view, reasoning identical in every respect must be upheld with regard to the principle of non-discrimination on the basis of sexual orientation. Directive 2000/78 being intended, essentially, to facilitate the specific application of that general principle of Union law, it affects neither the content nor the effect of that principle. As the latter is not laid down in, but only repeated by, the Directive, its infringement and the legal effects to which it gives rise may be regarded as going back to a date earlier than 2 December 2003. Depending on the circumstances, the conclusions which the national court will have to draw in the case before it would not be linked to the date on which Directive 2000/70 came into force or to the expiry of the period for its transposition, given that the general principle of non-discrimination thus recognised transcends such a provision of the secondary law.

147. In the light of the development which I have already traced, it appears that the principle of non-discrimination on grounds of sexual orientation was not recognised by the Court in its case-law in the 1990s. However, I recall that the Strasbourg Court ruled, in December 1999, [71] to the effect that such discrimination is not in accordance with the ECHR. Having regard to the fact that the European Union guarantees, as general principles, the fundamental rights which are protected by that convention, [72] and given that the Charter of Fundamental Rights merely codified the rights already guaranteed in the European Union, [73] it seems to me clear that the right to equal treatment on grounds of sexual orientation already constituted a general principle of law recognised by Union law at the time Mr Römer registered his partnership with his partner, namely, 15 October 2001.

148. If the Court were not to follow my reasoning on this point and wished to stand by the implementation of the provisions of Directive 2000/78, a distinction should be drawn, in respect of the date on which it took effect, depending on the categorisation of the discrimination found by the Court.

149. In the case of direct discrimination, this will be constituted only from the time at which the situation of pensioners who have entered into a life partnership has become comparable to that of married pensioners in respect of the supplementary pension at issue.

150. It could prove that, in accordance with what the national court suggests and contrary to what the applicant in the main proceedings

71 — Judgment of the European Court of Human Rights, *Da Silva Mouta v Portugal* of 21 December 1999.

72 — Article 6(3) TEU.

73 — Preamble to the Charter.

maintains, a sufficient alignment of the rights and duties of marriage and those of life partnership, limited to the aspects relevant to the advantage concerned, was achieved only gradually, and not as soon as the first law governing life partnership was adopted. However, as that threshold of alignment will have to be determined by means of analysis and interpretation of national law, that will be a matter for the national court.

151. In that regard, it should be pointed out that the order for reference states that, in its initial version, resulting from the Law of 16 February 2001, the legal status of life partnership under the LPartG was based partly on that of marriage, but diverged from it for the rest, [74] and that that status has been subject to three reforms, one of which, with effect from 1 January 2005, accentuated the similarities between life partnership and the institution of marriage [75] to such an extent that there are no longer significant legal differences between those two personal statuses proposed by the German legal order. Although that analysis of approximation in stages is disputed by the applicant in the main proceedings, it is clear that the national court will take into account the gradual development of national law which it has described and which, furthermore, unites the position taken by two German supreme Federal Courts in decisions [76] taken as a direct extension of the judgement in *Maruko*. [77] However, whether Mr Römer may claim equal treatment at a certain moment, and not at another, will depend essentially on the criteria which the Court will have considered to be those which the national court will have to use for making the comparison of those two categories of situation.

152. On the other hand, in the case of indirect discrimination, it is not necessary to characterise the existence of legally comparable situations, but only the existence of a particular disadvantage which is not justified by a legitimate aim. The obligation of the national court to draw conclusions in accordance with Union law may then take effect from the creation of life partnership by the German

74 — With regard to retirement pensions, the national court mentions that the LPartDisBG did not provide, as between life partners, for compensatory apportionment of pension rights in the event of dissolution of their partnership, and contained no provision relating to pension rights in the event of death. However, in my view, the effectiveness of the principle of non-discrimination in Union law could not be guaranteed if, when situations are being compared, factors which are purely hypothetical in relation to the specific situation of the parties are taken into account. In the light of the circumstances of the present case, since the partnership entered into in 2001 by Mr Römer merely legalised a stable relationship because it had existed de facto since 1969, and in view of the fact that what is at issue is a pension which lays down the condition that the pensioner is married and not permanently separated, I consider it unjustified to take into account, for the purpose of making that comparison, the rules relating to the dissolution of the union.

75 — In that regard, *Maruko*, especially paragraph 12 et seq.

76 — See the judgment of 14 January 2009 of the Bundesarbeitsgericht (German Federal Employment Court), Urteil vom 14.1.2009, 3 AZR 20/07), particularly paragraph 34, and the order of 7 July 2009 of the Bundesverfassungsgericht (Federal Constitutional Court), particularly paragraph 36 et seq.

77 — The two decisions mentioned above refer expressly to the judgment of 1 April 2008 in *Maruko*.

legislature, namely, 1 August 2001, the date on which the LPartG came into force. In so far as the applicant in the main proceedings is concerned, he could require to be treated, for the purposes of calculating his supplementary pension, as a married, not permanently separated, pensioner from the month following the celebration of his life partnership.

153. I therefore propose that the answer to the fifth question should be that it is for the national court to ensure the full effect of the general principle of non-discrimination on the basis of sexual orientation by disapplying any provision of national law, such as paragraph 10(6) of the First RGG, which is contrary to that principle, even from a date before the period for transposing Directive 2000/78 expired.

2. Limitation of the effects in time of the Court's judgment

154. By its sixth question, the national court asks whether, if the Court should hold that Directive 2000/78, Article 141 EC or any general principle of Union law precludes legislation such as that that at issue in the main proceedings, the entitlement to a pension in the same amount as that paid to married pensioners must be limited in time, and particularly whether it must be considered that, in the calculation of pensions, the principle of equal treatment is to be applied only in respect of the pension entitlement earned by the pensioner by virtue of contribution periods after 17 May 1990, in accordance with the judgment in *Barber*, pronounced on that date. [78]

155. The applicant in the main proceedings and the Commission agree that there is no reason to limit in time the effects of the judgment to be given, the Commission referring to the judgement in *Maruko*, in which a similar question was examined. [79]

156. According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of European Union law clarifies and where necessary defines the meaning and scope of that rule 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 the courts even

78 — Judgment cited above, concerning equal pay for male and female workers, in which the Court held that 'the direct effect of Article 119 of the Treaty [Article 141 EC] may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law' (paragraph 45).

79 — *Maruko*, paragraphs 77 et seq.

to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions are satisfied for bringing an action relating to the application of that rule before the courts having jurisdiction. [80]

157. The Court may, by way of exception, taking account of the serious difficulties which its judgment may create as regards events in the past, be moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court, in proceedings brought before it by means of a reference for a preliminary ruling, gives to a provision. In accordance with a general principle of legal certainty inherent in the Union legal order, a restriction of that kind may be permitted only by the Court in the actual judgment which gives the ruling on the interpretation requested. [81]

158. It should be pointed out that the Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Union legislation by reason of objective, significant uncertainty regarding the implications of Union provisions, to which the conduct of other Member States or the Commission may even have contributed. [82]

159. If the Court should intend to give a reply concerning the temporal limitation of the effect of the judgement it is called upon to give, even though neither the German Federal Republic nor the Freie und Hansestadt Hamburg has asked for it, I would point out that, in the present preliminary ruling proceedings, it is by no means apparent from the documents in the case that the financial balance of the supplementary pension scheme managed by the defendant in the main proceedings risks being retroactively disturbed by the lack of such limitation.

160. I recall that, under the last sentence of Paragraph 8(10) of the First RGG, if the conditions laid down by Paragraph 10(6)(1) of the First RGG, namely, the existence of a matrimonial union without permanent separation, are not met until after the retirement pension has begun to be paid, it is appropriate, if the party concerned so requests, to apply from that date tax category III/0, which is more favourable to pensioners. In the hypothetical case that Mr Römer

80 — See, in particular, a recent judgment of the Court (Grand Chamber) in Case C-73/08 *Bressol and Others and Chaverot and Others* [2010] ECR I-2735, paragraph 90 et seq. and the case-law cited.

81 — See, inter alia, Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455; Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraph 17; Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraphs 36 and 37, and *Barber*, paragraphs 41 and 44.

82 — See, inter alia, Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 42, and *Bressol and Others and Chaverot and Others*, paragraph 93 and the case-law cited therein.

had been able to enter into a marriage in October 2001, instead of a life partnership, the Freie und Hansestadt Hamburg would have had to increase the supplementary pension paid to him, in accordance with the aforementioned provisions. The financing of the retirement scheme concerned must have been planned taking into account the possibility of changes in the marital status of pensioners. There is no indication that that possibility increased significantly owing to the introduction of life partnership into German law.

161. Furthermore, the defendant in the main proceedings, which refrains from adopting a position on this matter, does not even maintain that a financial risk exists. The national court observes that, far from referring to the fear of serious problems, the Freie und Hansestadt Hamburg, on the contrary, pointed out that only a few cases of pensioners living in a civil partnership would have to be the subject of decisions applying the new method of calculating pension entitlement. The applicant in the main proceedings states that there are fewer than 15 000 registered civil partnerships and that the number of retired employees of the Freie und Hansestadt Hamburg having a partner of the same sex is not such as to give rise to serious financial consequences. If the Court were to reply in the affirmative to the questions above, the economic repercussions of that decision would therefore be minimal.

162. I therefore take the view that if an answer had to be given to the sixth question, it would be there was no need to impose temporal limits on the effects of the judgment be given.

F — *The combination of the principle of equal treatment and an objective of national law such as the special protection of marriage and the family*

163. By means of a supplementary order, the Arbeitsgericht Hamburg has raised a seventh series of questions in which it asks, in essence, whether a rule of national constitutional law like the principle of the special protection of marriage and the family by the State, which is laid down in Paragraph 6(1) of the German Basic Law, may place limits on the Community principle of non-discrimination, whether direct or indirect, as it stems in particular from Directive 2000/78.

1. Primacy of the Union law principle of equal treatment

164. The first part of the seventh question relates to the place to be accorded to a German constitutional provision, namely, Paragraph 6(1) of the Basic Law, if the Court were to conclude that there is direct discrimination.

165. A negative reply is required in the light of the fundamental principle of Union law according to which rules of Community law must take precedence over any national provisions, irrespective of the level of the latter, even where they are of constitutional value. [83] The principle of primacy is, therefore, absolute in effect. If that were not the case, the consequence would be to jeopardise the unity and even the effectiveness of Union law.

166. It follows that provisions such as those of the Basic Law which seek to protect marriage and the family, even if they have constitutional status, cannot affect the validity or application of the principle of non-discrimination enshrined in Union law. If Union law precluded national provisions, the primacy of Community law would oblige the national court to apply Community law and to refuse to apply conflicting provisions of national law. [84]

167. The Commission points out that the existence of an infringement of Directive 2000/78 or of a general principle of Union law prohibiting discrimination cannot depend on assessments or undertakings of the national legislature.

168. However, all those considerations presuppose that there is a conflict of legal rules, which cannot, it seems to me, be the case here. In fact, the risk of conflict between Paragraph 6(1) of the German Basic Law and Union law has been sharply reduced since the Bundesverfassungsgericht (Federal Constitutional Court) held that, in the case of a statute relating to an occupational pension scheme, a distinction between marriage and life partnership was not justified and that, therefore, a person who had formed a civil partnership had, like a person who had been married, a right to a survivor's pension in the event of his partner's death. [85] In order to reach that decision, the BVerfG based its reasoning on the provisions of German law, and particularly on Paragraph 3(1) of the Basic Law, which states the principle that all human beings are equal before the law, but it also referred to the judgment in *Maruko*, [86] with respect to the existence of discrimination on grounds of sexual orientation. The BVerfG gave a clear ruling on the effect that the provisions of Paragraph 6(1) of the Basic Law might have on the matter, holding that the fact of referring to marriage and to its protection under

83 — For an application of this principle in respect of a discriminatory provision of the German Basic Law, namely, Paragraph 12a, which generally excluded women from military posts involving the use of arms, see Case C-285/98 *Kreil* [2000] ECR I-69.

84 — See the recent judgment in Case C-314/08 *Filipiak* [2009] ECR I-11049.

85 — Order of 7 July 2009 of the Bundesverfassungsgericht, cited above, which was therefore pronounced after the decision by which the Arbeitsgericht Hamburg referred its supplementary questions to the Court of Justice for a preliminary ruling.

86 — *Maruko*, referred to in paragraph 92 of the aforementioned order of the Bundesverfassungsgericht.

the Constitution and particularly under that article, was not sufficient to justify unequal treatment.

169. It is apparent from all these considerations that the only aim of national constitutional law expressly mentioned by the national court, namely, the special protection of marriage and the family by the State, cannot constitute a restriction of the general principle of equality, as it exists in Union law.

2. Possible justification for discrimination by an aim of national law

170. It will be necessary to reply to the second part of the seventh question in so far as a negative reply will have been given to the first part, to the effect that the principle of equal treatment laid down by Union law must take precedence over any national objective that might not be compatible with that principle.

171. The national court wonders in that case whether, and in what circumstances, an aim of the national legal order of a Member State, such as protection of marriage, may nevertheless be reconciled with that principle of Union law and provide acceptable justification for discrimination based on the sexual orientation which is described.

172. First of all, I would point out that, under Directive 2000/78, a national provision recognised as constituting direct discrimination, within the meaning of that legislation, cannot, in my view, be validated *a posteriori* on the ground that it meets an aim of national law, even if that aim is legitimate. Indeed, Article 2(2)(a) of the Directive [87] does not refer to an objective justification equivalent to that laid down by Article 2(2)(b)(i), concerning indirect discrimination.

173. An interpretation *a contrario* of these latter provisions indicates that indirect discrimination is not constituted if an apparently neutral measure is indeed likely to involve a particular disadvantage for persons of a given sexual orientation, in relation to other persons, but if, however, it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The fulfilment of those legal criteria makes it possible to reject the categorisation of the measure as indirectly discriminatory.

87 — For the record: '(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1.'

174. It is true that the protection of marriage and the family provided for in German law by Paragraph 6(1) of the Basic Law may in itself constitute a legitimate aim. Moreover, that aim is not extraneous to Union law. Indeed, under Article 9 or the Charter of Fundamental Rights, '[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'. That provision was clearly based on Article 12 of the ECHR. [88] Furthermore, Article 33(1) of the Charter provides: 'The family shall enjoy legal, economic and social protection'.

175. However, it seems to me to go without saying that the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it.

176. In order that there be no indirect discrimination in spite of the existence of a 'particular disadvantage' suffered by retired life partners, it is also necessary, in accordance with Article 2(2)(b)(i) of Directive 2000/78, that the means used, in the present case with the aim of protecting marriage and the family, be both appropriate and necessary. As I have already pointed out in this Opinion, I do not consider that to be the case, since the measure at issue is not necessary, still less proportionate, for achieving the aim envisaged.

177. In its decision of 7 July 2009, cited above, the Federal Constitutional Court also adopted a position to that effect, in that it held that the distinction between civil partnership and marriage cannot be justified by the special protection of the latter and it pointed out that the institution of marriage can be protected without the need to place other ways of life at a disadvantage.

178. According to settled case-law, it will be for the national court, which alone has competence to assess the facts of the case before it and to interpret the applicable national legislation, to determine whether and to what extent the legislation at issue in the main proceedings is suitable for ensuring the implementation of a 'legitimate aim' and whether it does not go beyond what is necessary for attaining it, within the meaning of Article 2(2)(b)(i) of Directive 2000/78. [89]

88 — Article 12 of the ECHR, entitled is worded as follows: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

89 — For recent applications, concerning discrimination based on age, see Case C-229/08 *Wolf* [2010] ECR I-1; *Petersen*; and *Kücükdeveci*, and the case-law cited.

179. It is apparent from all ©these considerations that the aim stated in Paragraph 6(1) of the German Basic Law ought not to have a decisive effect or, especially, be a valid basis for justification, for the purposes of assessing whether Paragraph 10(6) of the First RGG generates discrimination, whether direct or indirect, within the meaning of Community law, but that will finally be for the national court to determine.

VI — Conclusion

180. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the Arbeitsgericht Hamburg:

(1) Supplementary retirement pensions governed by legislation such as that at issue in the main proceedings fall within the scope *ratione materiae* of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

(2) The combined provisions of Articles 1, 2, and 3(1)(c) of Directive 2000/78 preclude legislation such as that at issue in the main proceedings, under which a pensioner who has entered into a registered life partnership does not receive a

supplementary retirement pension equal to that granted to a married, not permanently separated, pensioner even though, under national law, that partnership places persons of the same sex in a situation comparable to that of spouses in respect of that pension. The analysis of comparability must be focused on the rights and obligations of spouses and partners, as derived respectively from the provisions of national law applicable to marriage and to registered partnership respectively, which are relevant having regard to the conditions for granting the pension in question. It is for the court making the reference to determine whether a life partner is in a legal and factual situation comparable to that of a spouse receiving the supplementary retirement pension provided for under the occupational pension scheme managed by the Freie und Hansestadt Hamburg.

In the alternative, if the analysis of comparability excludes the existence of direct discrimination based on sexual orientation, there is at the very least indirect discrimination within the meaning of Article 2(2)(b)(i) of Directive 2000/78, if the provisions of Paragraph 10(6) of the First RGG, which provide a more favourable method of calculating a supplementary retirement pension in respect of a married, not permanently separated pensioner, generate a particular disadvantage to the detriment of any pensioner who has entered into a registered civil partnership and do not objectively reflect a legitimate aim or do not constitute an appropriate and necessary means of attaining that aim, which it will be for the national court to determine.

(3) There is no need to answer the fourth question referred for a preliminary ruling. In the alternative, the reply will be that Paragraph 10(6) of the First RGG cannot infringe Article 141 EC but could, which it is for the national court to decide, infringe the general principle of Union law constituted by the prohibition of discrimination on grounds of sexual orientation.

(4) It is for the national court to ensure the full effect of the general principle of non-discrimination on the basis of sexual orientation by disapplying any provision of national law, such as that at issue in the main proceedings, which is contrary to that principle, even, depending on the circumstances, from a date before the period for transposing Directive 2000/78 expired.

(5) A provision of national law, even if it has constitutional status, cannot in itself justify legislation such as that at issue in the main proceedings which conflicts with Union law, particularly with the principle of equal treatment.