1. An occupational pension scheme which, although established in accordance with statutory provisions, is based on an agreement between the employer and employee representatives constitutes an integral part of the contract of employment and has the effect of supplementing the social benefits paid under national legislation of general application with benefits financed entirely by the employer does not constitute a social security scheme governed directly by statute and thus outside the scope of Article 119, but is subject to that provision.

2. Article 119 of the Treaty is infringed by an undertaking which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

   Such factors may lie in the fact that the undertaking seeks to employ as few part-time workers as possible, where it is shown that that objective corresponds to a real need on the part of the undertaking and the means chosen for achieving it are appropriate and necessary.

3. Article 119 does not have the effect of requiring an employer to organize its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension.

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 15 October 1985 *

Mr President,
Members of the Court,

1. By order of 5 June 1984 the Bundesarbeitsgericht [Federal Labour Court] referred the following questions to the Court for a preliminary ruling:

'(1) May there be an infringement of Article 119 of the EEC Treaty in the form of "indirect discrimination" where a department store which employs predominantly women excludes part-time employees from benefits under its occupational pension scheme although such exclusion affects disproportionately more women than men?

(2) If so:

(a) Can the undertaking justify that disadvantage on the ground that its objective is to employ as few part-time workers as possible even though in the department store

* Translated from the French.

sector reasons of commercial expediency do not necessitate such a staff policy?

(b) Is the undertaking under a duty to structure its pension scheme in such a way that appropriate account is taken of the special difficulties experienced by employees with family commitments in fulfilling the requirements for an occupational pension?'

In essence, this case will require the Court to define the scope of its judgment of 31 March 1981 in Case 96/80 (*Jenkins* v *Kingsgate* [1981] ECR 911) regarding part-time work, which was referred to at length by the Bundesarbeitsgericht and by all the parties which intervened during the proceedings. First of all, however, let us consider the facts.

2. The defendant and appellant in the main proceedings, Bilka-Kaufhaus GmbH (hereinafter referred to as 'Bilka'), is part of a chain of department stores in the Federal Republic of Germany, the Hertie group, which employs several thousand people.

The plaintiff and respondent in the main proceedings, Karin Weber von Hartz (hereinafter referred to as 'the respondent'), was born in 1930 and from 15 April 1961 onwards was employed by Bilka as a full-time sales assistant. She held that position for eleven and a half years.

From 1 October 1972 onwards she was given a part-time position at her own request, working approximately one half of the normal full-time hours. Three and a half years later, on 14 April 1976, the respondent left her job at the age of 46, after 15 years' employment with Bilka.

The dispute has arisen out of the treatment of part-time employees under the pension scheme applied by Bilka. The scheme administered by the group of department stores to which Bilka belongs has the legal form of a company scheme under which the company is obliged to pay supplementary retirement benefits. During the period of the plaintiff's employment it developed in the following manner:

(i) Under an agreement of 31 December 1962 benefits were to be paid to employees with 25 years' unbroken service with the company who retired at the age of 65;

(ii) Agreements of 3 September 1966 and 17 January 1969 made the following changes: In order to be entitled to supplementary pension benefits it was necessary for employees to have worked *full-time* for the company for at least 20 years and have retired at the age of 65. Female workers were entitled to benefits on early retirement at the age of 60. This scheme applied to all employees and excluded part-time workers from entitlement to the supplementary pension. The 1969 scheme was expressly incorporated in the new contract of employment entered into by the respondent and Bilka in 1972;

(iii) Finally, an agreement of 26 October 1973 once more gave part-time employees the possibility of entitlement to a retirement pension if they had worked for the company for at least 20 years, including 15 years in full-time employment. Only employees who were already employed part-time before 30 September 1966 were exempt from the requirement of 15 years' full-time employment.

The respondent was refused a supplementary pension on the ground that she did not meet the full-time work requirement laid down in the agreements.

3. The question of 'indirect discrimination' against female workers was raised by the Bundesarbeitsgericht in an earlier appeal on a point of law [Revision] in this case. The Landesarbeitsgericht [Higher Labour Court] to which the case was remitted upheld the respondent's claim, but did so on the ground that the agreement of 26 October 1973 had re-instated part-time employees in the pension scheme to a limited extent, and that it was arbitrary to use a reference date (30 September 1966) which resulted in discrimination against full-time employees who only later began to work part-time. It held, however, that there had been no breach of the principle of equal treatment or of the principle of equal pay for men and women.

When the case came before it on appeal on a point of law a second time, the Bundesarbeitsgericht, criticizing the reasoning of the lower court, referred the matter to this Court.

4. It considered that according to the judgment of the Court of 11 March 1981 in *Worringham and Humphreys* v *Lloyds Bank Ltd* (Case 69/80 [1981] ECR 767) retirement benefits constitute 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty. It then analysed the facts of the case with reference to the judgment of the Court in the *Jenkins* case, referring first of all to paragraph 13 of the decision which reads as follows:

'... if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex'. ([1981] ECR at pp. 925-926).

From the figures provided to the Bundesarbeitsgericht it appears that over a period of nine years on average 72% of Bilka's employees were female and 28% were male. 90% of the male employees worked full-time and 10% part-time, while 61.5% of the female employees worked full-time and 38.5% part-time. Taking the work-force as a whole, therefore, 2.8% were male part-time employees and 27.7% were female part-time employees, a ratio of one man to 10 women.

The Bundesarbeitsgericht takes the view that the pension scheme therefore works to the detriment of 10 times as many women as men. It considers that the principles so far set out in the judgments of the Court are not sufficient to enable it to reach a decision in this case, and that those principles must therefore be further developed by the Court of Justice.

With regard to the *Jenkins* case, it asks in essence whether that judgment refers only to 'disguised' discrimination, which is thus intentional, or if it may also apply to 'indirect' discrimination, that is to say purely objective discrimination. In that case there would be discrimination where

because of women's traditional family responsibilities they were *in fact* excluded from entitlement to benefits.

Since the Court itself emphasized, in the *Jenkins* judgment, the key importance of the fact that 'a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required . . .' (paragraph 13, referred to above), the Bundesarbeitsgericht wishes to know what effect must be given to that factor. The first question referred is intended to clarify that point.

Furthermore, in the same judgment the Court held that

'(11) . . . the fact that work paid at time rates is remunerated at an hourly rate which varies according to the number of hours worked per week does not offend against the principle of equal pay laid down in Article 119 of the Treaty in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex.

(12) Such may be the case, in particular, when by giving hourly rates of pay which are lower for part-time work than those for full-time work the employer is endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker.'

May one therefore, asks the Bundesarbeitsgericht, take into account a staff policy which favours full-time work or must one also consider that such a policy is justified only if it is based on economic grounds? That is the issue raised by Question 2 (a).

Finally, the Bundesarbeitsgericht asks whether an employer is not in any event under an obligation to organize its pension scheme in such a way as to avoid placing at a disadvantage employees who have family responsibilities, that is to say, in practice, women. It has therefore referred to the Court Question 2 (b).

5. In its written and oral observations the United Kingdom raises a preliminary issue. It argues that neither the conditions of access to a pension scheme nor the benefits paid under such a scheme come within the scope of Article 119.

That provision, it says, is therefore not applicable in this case.

The first question raised by the Bundesarbeitsgericht concerns *access* to a pension scheme. In support of its argument the United Kingdom refers to the judgment of the Court of 15 June 1978 in the third *Defrenne* case (Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365) and quotes in full paragraphs 19 to 22 of the decision (at pages 1377 and 1378). The Court confirmed that position in its judgment of 16 February 1982 in the *Burton* case (Case 19/81 *Burton* v *British Railways Board* [1982] ECR 555). The United Kingdom refers to paragraphs 7 and 8 of that decision in which the Court held that the difference in the minimum age for entitlement to payment of a voluntary redundancy benefit (60 for men, 55 for women) did not raise a question of interpretation of Article 119, since the issue (discriminatory conditions of access to the voluntary redundancy scheme) was covered

by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).

Even if the Court were to hold that the question concerns not the conditions of access to a pension scheme but the benefits payable under it, the United Kingdom considers that that issue should not be held to be governed by Article 119. That provision applies only to pay and not to pensions, which are a social security matter and are therefore governed by Article 117. Furthermore, the fact that the Commission has prepared a proposal for a Council directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes (submitted to the Council on 5 May 1983; Official Journal 1983, C 134, p. 7) proves, if there is any need for proof, that the matter goes beyond the scope of Article 119.

Any other solution based on the direct effect of Article 119 in this context would endanger the stability of commercial undertakings by imposing on them unforeseen financial burdens. That concern explains the provisions of Article 10 of the proposal for a directive referred to above.

Such a position is, moreover, in accordance with the spirit of the judgment of the Court of 25 May 1971 in the first *Defrenne* case (Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445). According to the United Kingdom, this case may be an opportunity for the Court to put an end to the uncertainty which still exists, by holding expressly that Article 119 does not apply to employment-related retirement pension schemes.

6. Only the Commission has submitted argument on the problems raised by the conditions of access to the retirement benefits in question and their legal nature.

In its view, the Court's decision in *Burton* cannot be extended to this case. It concerned a difference in the age required for the *receipt* of a benefit. In this case the question is not *when* but *whether* the respondent can, as a part-time worker, receive a retirement pension. The Bundesarbeitsgericht considered that under the German Law of 19 December 1974 on the improvement of company pension schemes, the respondent had an inchoate pension right which was defeated only by the condition regarding the duration of full-time employment laid down in the 1973 agreement.

With regard to the legal nature of the benefit in question, the Commission considers that the Bundesarbeitsgericht's reference to the judgment of the Court in *Worringham and Humphreys* was indeed pertinent. It is true that this case differs from Case 69/80 inasmuch as it does not concern a 'contribution to a retirement benefits scheme which is paid by the employer in the name of the employees by means of an addition to the gross salary and which helps to determine the amount of that salary', held to be '"pay" within the meaning of the second paragraph of Article 119 of the EEC Treaty' (paragraph 17, [1981] ECR at p. 790). Nevertheless, that principle should be extended to this case.

It follows from the Court's previous judgments that the expression 'pay' must be understood in a broad sense. In that regard the Commission quotes paragraph 7 of the decision of the Court in the first *Defrenne* case ([1971] ECR at p. 451), to the effect that:

'Although consideration in the nature of social security benefits is not therefore in principle alien to the concept of pay, there cannot be brought within this concept, as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers.'

The Bilka retirement pension scheme does not meet any of the conditions which would make Article 119 inapplicable. It fulfils the criteria laid down by Advocate General Dutheillet de Lamothe, in his Opinion in the first *Defrenne* case, defining the scope of that article. Finally, according to the Commission, the discrimination at issue is not one of the cases in which the implementation of the principle of equal treatment for men and women is subject to the adoption of the proposed directive referred to above, regarding occupational social security schemes.

7. Let me deal first with this preliminary issue.

In part for the reasons advanced by the Commission, I agree that the *Burton* judgment does not provide a solution to this case. It was not Mr Burton's *right* to take voluntary redundancy that was in question but only the *time* at which he could do so. Here it is the respondent's *right* to a retirement pension which is at issue.

Furthermore, in that judgment the Court clearly states the reason for which it takes the view that laying down a minimum pensionable age for social security purposes which is not the same for men as for women does not amount to discrimination prohibited by Community law.

In paragraph 13 the Court states that 'Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Official Journal 1979, L 6, p. 24)... provides in Article 7 that the directive shall be without prejudice to the right of Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions ...' ([1982] ECR at p. 576). In those circumstances there was thus an express Community provision authorizing the contested measure.

The question whether a retirement pension must be regarded as 'pay' within the meaning of Article 119 therefore remains open. Here again I agree with the Commission that it is necessary to take a broad approach to the concept of 'pay'.

Reference must be made to the judgment of the Court in the first *Defrenne* case, in particular paragraph 7, relied on by the Commission, whose analysis I share.

As you will recall, in that judgment the Court excluded statutory retirement pension schemes from the ambit of Article 119, holding (in paragraph 8) that the financial contribution made by workers, employers and in some case the authorities is 'determined less by the employment relationship between the employer and the worker than by considerations of social policy'.

With that approach in mind, it must be possible to conclude that the retirement pension scheme at issue, governed essentially by agreement, does not fall outside the ambit of Article 119.

In his opinion in that case, Advocate General Dutheillet de Lamothe stated that in his view one of the reasons for the application of Article 119 to supplementary pension schemes of this kind is the 'necessary link between the consideration, the employer, the employed person and the employment, which Article 119 implies' ([1971] ECR at p. 459). Such a link undeniably exists in this case. It must be borne in mind that it is a voluntary scheme which complements and 'tops up the statutory scheme, even if it was encouraged or organized by the authorities, and that it applies only in so far as it is incorporated in the employment relationship, after negotiations between the employer and the employees.

Finally, although it is true that in principle statutory retirement pension schemes are governed by Article 117 of the EEC Treaty, regarding in particular the harmonization of social security systems, it is necessary to examine each case individually having regard to the respective national legislation, as the Commission has done, in order to determine whether or not a pension scheme meets the criteria laid down in the first *Defrenne* judgment.

The Court's case-law in this field is flexible enough to enable the diversity of the national systems to be respected. In my view the Bundesarbeitsgericht was therefore right to put its questions in the context of Article 119 of the Treaty.

Let me go on, therefore, to consider the arguments raised by those questions.

8. In the respondent's view, the *Jenkins* judgment implies that no distinction should be made between 'direct' and 'indirect' discrimination. In this case the company staff structure is sufficient to show that discrimination exists. Part-time work consolidates the traditional division of rôles between men and women, without making women economically independent. It is thus, she says, a manifestation of the conflict inherent in the situation faced by women: home and family on the one hand, employment on the other. Furthermore, in the present economic circumstances it encourages the employment of men in full-time positions.

Bilka's alleged objective — cutting down on part-time employment — cannot justify the discrimination at issue, argues the respondent. An employer who wishes, as a matter of policy, to encourage full-time work is entitled to decide not to recruit part-time workers. He cannot, however, without infringing Article 119, worsen the situation of such workers, who are already at a disadvantage from the point of view of pension rights because of their conditions of employment; they cannot be deprived of their entitlement to a supplementary pension as well. Any other solution would be discriminatory. It is not possible to contract out of the prohibition of discrimination. Compensatory arrangements such as those referred to by the Bundesarbeitsgericht must therefore be applied.

9. Bilka argues that before 1977 labour was scarce, especially in the retail trade, where working hours, particularly in the late afternoon and on Saturdays, were unattractive to job-seekers. It was therefore necessary to give preference to the employment of full-time workers. That preference, which did not depend on the worker's sex, should be regarded as an objectively justified economic reason of the kind referred to in paragraph 12 of the decision in *Jenkins*.

Bilka concludes that a negative reply must therefore be given to the Bundesarbeitsgericht's first question. At the hearing it added that a negative reply should also be given to Question 2 (b), since it reflects obvious confusion of the respective roles of a Member State and of an undertaking.

10. At the hearing the United Kingdom made an alternative submission regarding the question of possible 'indirect' discrimination, arguing that the judgment in *Jenkins* clearly states that Article 119 applies only where there is an element of intention. Intention may be inferred from the absence of any other plausible reason for the contested measure. It cannot be inferred from the fact that the result expected was not achieved, or even from the existence of another way of achieving it. That is, the Court cannot step into the shoes of the employer in assessing his choice of business policy.

More generally, Article 119 does not apply to 'indirect' discrimination. In particular, it does not provide a basis for compensation of the kind referred to by the Bundesarbeitsgericht in Question 2 (b).

11. Referring to paragraphs 10 and 11 of the decision in *Jenkins*, the Commission considers that the terms 'covert discrimination' and 'indirect discrimination' used by the Bundesarbeitsgericht are not particularly useful in defining the scope of the principles laid down by the Court in previous cases.

In its judgment of 8 April 1976 in the second *Defrenne* case (Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455) the Court drew a distinction between 'direct and overt discrimination' and 'indirect and disguised discrimination' (at paragraph 18, p. 473), and held that

'the complete implementation of the aim pursued by Article 119, by means of the elimination of all discrimination, direct or indirect, between men and women workers . . . may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and national level'. (paragraph 19)

Paragraph 17 of the decision in *Jenkins* ([1981] ECR at p. 926) seems to add a distinction between discrimination which may be judicially identified without further assistance and discrimination which can be identified only by reference to more precise criteria laid down by Community or national law.

In the order for reference the Bundesarbeitsgericht interpreted the concept of disguised discrimination too narrowly, limiting it to discrimination specifically based on sex. In the Commission's view it may be inferred from the judgment in *Jenkins* that the direct effect of Article 119 also extends to provisions which discriminate on the basis of criteria other than sex, where their *practical* result is the same and there is no objective justification. The Court did not hold that only deliberate discrimination constituted a breach of Article 119, as the Bundesarbeitsgericht and the English court to which the judgment in *Jenkins* was addressed seem to have supposed, and did not make an exception for cases where the employer shows that he had an objective other than discrimination

against female employees. In that regard paragraphs 11 and 12 of the decision in *Jenkins* should be read in conjunction with the opinion of Advocate General Warner [(1981] ECR at pp. 936-937), where he refers to the decision of the Supreme Court of the United States in *Griggs* v *Duke Power Company*. The conclusion to be drawn is that the Court intended to indicate that the absence of discriminatory intent on the employer's part is not enough to justify a finding that a provision which in fact placed women at a disadvantage was not contrary to the prohibition of discrimination. The intention to discriminate against female workers is only a specific instance of the application of Article 119.

With regard to Question 2 (a), the Commission refers to the judgment of the Court in the second *Defrenne* case, and argues that Article 119 has two objectives: an economic objective, that of prohibiting any practices with regard to pay which distort competition, and a social objective, that of promoting improvement in the working and living conditions of Europeans. On the latter point, Article 119 can be effective only if employers' pay policy does in fact take into account the living and working conditions of women employed part-time. The judgment in *Jenkins* follows the same line of thinking. In paragraphs 11 to 13 it requires an objective justification and excludes any differentiation based on sex between part-time and full-time work.

In the Commission's view Question 2 (b) does not call for a reply, since pay policy is not a matter which is left entirely to the employer's discretion.

Should the Court be of a different opinion, the Commission, in the alternative, considers that the principles of necessity and of proportionality should be applied. Those principles require that the loyalty to the employer of part-time workers, most of whom are women, should be taken into account. If it cannot be taken into account in general, it must at least be taken into account so far as is necessary to avoid discrimination against women.

12. In the second *Defrenne* judgment the Court held that

> '(18) ... a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.' ([1976] ECR at p. 473)

It follows from that decision that Article 119 has direct effect only with regard to 'direct discrimination', as was confirmed in the judgments in *Macarthys* v *Smith* (Case 129/79 27 March 1980 [1980] ECR 1275; see in particular paragraph 10, at p. 1288) and *Worringham and Humphreys* referred to above (paragraph 23, [1981] ECR at pp. 791-792).

But what is to be understood by the term 'direct discrimination?' The Court has defined it as discrimination which may be identified by the Bundesarbeitsgericht 'solely with the aid of the criteria based on equal

work and equal pay' referred to in Article 119 (the second *Defrenne* case, paragraph 18), 'without the need for more detailed implementing measures on the part of the Community or the Member States' (*Macarthys*, paragraph 10).

If a court can assess the situation with which it is confronted on the basis of those criteria alone, the principle of Article 119 may be applied directly.

It is now necessary to determine whether the Bundesarbeitsgericht in this case is in a position to assess the facts before it on the basis of those criteria alone. That would seem to be the case, since the pay practice in question results in *different pay* (in a broad sense) for *identical work* carried out under different conditions (full or part-time).

Let me draw the Court's attention at this point to the terminological ambiguity in the first question put by the Bundesarbeitsgericht. That question concerns the application of Article 119 to 'indirect discrimination' while the Court, as I have just pointed out, considers that the direct effect of Article 119 does not embrace that type of discrimination. But is not the indirect discrimination described by the Bundesarbeitsgericht in fact direct discrimination within the meaning of the judgment in the second *Defrenne* case?

Whatever the answer to that question may be, it is not the *nature* of the discrimination which determines the competence of the court. As Advocate General Warner stated in his opinion in the *Jenkins* case, the decisive criterion is that of the *direct effect* of Article 119. Article 119 has no such effect, says Mr Warner, 'where a court cannot apply its provisions by reference to the simple criteria that those provisions themselves lay down and where, consequently, implementing legislation, either Community or national, is necessary to lay down the relevant criteria' ([1981] ECR at p. 938).

That position, which, in the interest of laying down clear guidelines for Bundesarbeitsgerichts, emphasizes the direct effect of Article 119 rather than the nature of the discrimination, is in accordance with the spirit of the Court's case-law. I fully agree with that view and recommend that the Court adopt it.

13. However that issue may be resolved, the Bundesarbeitsgericht must examine the contested measure taken by Bilka, taking into account the particular composition of that company's part-time staff.

It must make its assessment according to the following rules, laid down in the *Jenkins* case:

(i) A difference in pay applied without distinction to workers of both sexes is not in itself contrary to the provisions of Article 119 (paragraphs 10 and 11); it may 'in particular' be based on 'economic grounds which may be objectively justified' (paragraph 12);

(ii) However, if the difference has a greater effect on female workers than on men, it is contrary to Article 119, unless it is justified by 'factors other than discrimination based on sex' (paragraph 13);

(iii) The *Bundesarbeitsgericht* has *sole jurisdiction* to determine 'in each individual case whether, regard being had to the *facts of the case*, its *history*, and the employer's *intention*', the difference in pay 'is or is not in reality

discrimination' based on sex (paragraph 14; emphasis added).

In this case the Bundesarbeitsgericht requires further guidance. It wishes to know whether, in the event that Bilka establishes before the court hearing the substance of the case that its real objective was, by means of its pension scheme, to encourage workers to enter into contracts of full-time employment, it is necessary to examine whether that policy was necessary for economic reasons. That, according to the order for reference, is the meaning of the expression 'reasons of commercial expediency' used in Question 2 (a).

In my view that question should be answered in the negative. In the absence of any express provision, and under Community law as it now stands, in giving direct effect to Article 119 it is not possible to dismiss as a justification within the meaning of paragraph 13 of the *Jenkins* judgment a reason which is not economic in nature. Nothing would appear to prohibit an employer from implementing a staff policy which encourages full-time employment, if that choice complies with the applicable rules of law and does not reflect an intent to discriminate.

The socio-cultural constraints faced by working women, which underlie this case as they did the *Jenkins* case, must not be exploited by employers. Nor, however, do they impose on employers additional obligations restricting their normal freedom to determine staff policy.

14. Question 2 (b) requires little discussion. Whatever the merits and importance of initiatives in this area, an employer cannot be required to take over the rôle of the authorities in constructing a pension scheme which will compensate for the special difficulties faced by workers who have family responsibilities. Article 119 lays positive duties only on the Member States and not on commercial undertakings, which are subject, within the limits described above, only to an obligation not to discriminate.

15. Having regard to the foregoing, I propose that the Court give the following answers to the questions referred to it by the Bundesarbeitsgericht:

(1) A company supplementary retirement pension scheme which favours full-time workers is contrary to Article 119 of the EEC Treaty if, although applicable without distinction to workers of both sexes, it is in fact intended to reduce the rights of working women who, because of the constraints they are under, make up all or most of the part-time work-force.

(2) Article 119 is directly applicable to such a situation in so far as the Bundesarbeitsgericht is able to arrive at a decision on the basis of criteria of equal work and equal pay, without referring to Community or national measures.

(3) The employer may justify the challenged measure by showing that it was taken for reasons other than discrimination based on sex.

(4) As Community law now stands, an employer cannot be required, in organizing a company pension scheme, to compensate persons who work part-time because of their family responsibilities for the particular difficulties which they face.