OPINION OF ADVOCATE GENERAL LÉGER

delivered on 14 September 1999 *

1. In this case, the House of Lords seeks a preliminary ruling as to whether Community law precludes the application of two national procedural rules to actions brought under Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) by workers who consider that they have been victims of discrimination on grounds of sex as a result of being excluded from occupational pension schemes (hereinafter 'the claimants').

The first procedural rule requires such workers to institute proceedings within a period of six months after their employment ceases. The second rule limits to two years prior to the date of instituting proceedings the period for which they may secure the right to retroactive membership of the pension scheme from which they were excluded.

I — Legal background

A — *Article 119 of the Treaty*

2. Pursuant to the first paragraph of Article 119 of the Treaty, the Member States are to ensure and maintain 'the application of the principle that men and women should receive equal pay for equal work'.

3. The second paragraph of that article provides that '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'.

4. Article 119 of the Treaty enunciates a principle which constitutes one of the foundations of the Community. [1] It produces direct effects and therefore creates rights for individuals which national courts must safeguard. [2]

* Original language: French.

1 — Case 43/75 *Defrenne* [1976] ECR 455, paragraph 12, hereinafter '*Defrenne II*'); Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 26; and Case C-28/93 *Van den Akker and Others* [1994] ECR I-4527, paragraph 21.

2 — See in particular *Defrenne II*, paragraph 24, *Coloroll Pension Trustees*, paragraph 26, and *Van den Akker*, paragraph 21.

5. In contrast to statutory social security schemes, [3] 'occupational' pension schemes fall within the scope of Article 119 of the Treaty. [4] The prohibition of discrimination laid down by that provision thus applies not only to the right to receive benefits under an occupational pension scheme, [5] but also the right to be a member of such a scheme. [6]

B — *The national provisions*

6. In the United Kingdom, the principle of equal pay is given effect by the Equal Pay Act (hereinafter 'the EPA'). That statute was enacted on 29 May 1970 and came into operation on 29 December 1975. [7]

7. The EPA introduced a legal right for employees to enjoy conditions of employment at least as favourable as those enjoyed by members of the opposite sex doing the same work, work regarded as equivalent or work of equal value.

8. Section 1(1) of the EPA provides that every contract under which a woman is employed at an establishment in Great Britain is deemed to include an 'equality clause'. [8]

9. Under section 2(4) of the EPA, any claim in respect of the operation of an equality clause must be brought within a period of six months following the cessation of employment, or else will be time-barred.

10. Section 2(5) of the EPA provides that, in proceedings in respect of a failure to comply with an equality clause, a woman is not to be entitled to be awarded any payment by way of arrears of remuneration or damages in respect of a time earlier than two years before the date on which the proceedings were instituted.

11. In the case of actions to secure equal treatment regarding entitlement to membership of an occupational pension scheme, section 2(5) of the EPA was amended by the

3 — Case 80/70 *Defrenne* [1971] ECR 445, paragraphs 7 and 8.

4 — That is so in particular in the case of supplementary company schemes (Case 170/84 *Bilka* [1986] ECR 1607, paragraphs 10 to 22), schemes whose rules are the result of discussions between social partners (Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 7 to 14) and 'contracted out' occupational schemes under United Kingdom law (Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 21 to 30).

5 — *Barber*, paragraphs 28 to 30, and *Ten Oever*, paragraphs 7 to 12.

6 — *Bilka*, paragraphs 24 to 31; Case C-57/93 *Vroege* [1994] ECR I-4541, paragraphs 11 to 18; Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraphs 8 to 15, and Case C-435/93 *Dietz* [1996] ECR I-5223, paragraphs 11 to 17.

7 — The reason for this deferment was to give industry sufficient time to adapt itself to the principles laid down by the EPA (paragraph 2.2 of the United Kingdom Government's observations).

8 — Under section 1(13) of the EPA, provisions referring to women apply also to men.

Occupational Pension Schemes (Equal Access to Membership) Regulations 1976 (hereinafter 'the Occupational Pension Regulations').

12. The Occupational Pension Regulations offers employees who have been unlawfully excluded from membership of an occupational pension scheme compensation in kind. Under Regulation 12, if the national court considers the action well founded it will declare that the employee is entitled to membership of the pension scheme in question. However, the retroactive effect of that declaration is limited to two years before the institution of the proceedings.

II — Facts and procedure

13. On 28 september 1994, the Court of Justice gave judgment in *Vroege* and *Fisscher*, cited above.

14. In those judgments, it confirmed that entitlement to membership of an occupational pension scheme fell within the scope of Article 119 of the Treaty. [9] It also confirmed that exclusion of part-time workers from membership of such schemes constituted indirect discrimination contrary to Article 119 where it affected a much larger number of women than men, unless justified by objective factors unconnected with any discrimination on grounds of sex. [10]

15. In addition, the Court held that 'the limitation of the effects in time of the *Barber* judgment does not apply to the right to join an occupational pension scheme ...'. [11] It concluded that 'the direct effect of Article 119 can be relied on *retroactively* to claim equal treatment in relation to the right to join an occupational pension scheme and this may be done *as from 8 April 1976*, the date of the *Defrenne [II]* judgment in which the Court held for the first time that Article 119 has direct effect'. [12]

16. The press and trade union organisations publicised those judgments widely in the United Kingdom.

9 — *Vroege*, paragraphs 15 and 18; *Fisscher*, paragraphs 12 and 15.

10 — *Vroege*, paragraph 17.

11 — *Vroege*, paragraph 32, and *Fisscher*, paragraph 28. It should be remembered that, 'by virtue of ... *Barber* the direct effect of Article 119 of the Treaty may be relied upon, for the purpose of claiming equal treatment in the matter of occupational pensions, only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990' (*Ten Oever*, paragraph 20).

12 — *Vroege*, paragraph 30, and *Fisscher*, paragraph 27 (emphasis added).

17. Within months of their being delivered, some 60 000 part-time workers (or former part-time workers) commenced proceedings before industrial tribunals in the United Kingdom.

18. Relying on Article 119 of the Treaty, those workers claim that they were unlawfully excluded from membership of various occupational pension schemes. The defendants in those proceedings are the employers or former employers of the claimants.

19. All the cases concern 'contracted out' [13] pension schemes which, at various times in the past, did not allow part-time workers to become members.

The following pension schemes are more particularly concerned by the present preliminary-ruling proceedings:

— the National Health Service Pension Scheme; [14]

— the Teachers' Superannuation Scheme; [15]

— the Local Government Superannuation Scheme; [16]

— the Electricity Supply (Staff) Superannuation Scheme and the Electricity Supply Pension Scheme; [17] and

— the Midland Bank Pension Scheme and the Midland Bank Key-Time Pension Scheme. [18]

13 — For a description of pension schemes of this type, see the opinion of Advocate General Van Gerven in the *Barber* case (point 17), which refers to the judgment in Case 192/85 *Newstead* [1987] ECR 4753, paragraph 3.

14 — Until 1 April 1991, part-time workers working less than half the number of hours constituting full-time work were not entitled to membership of this pension scheme. Since 1 April 1991, all National Health Service employees may become members.

15 — Until 1 May 1995, part-time teachers were not entitled to join this pension scheme if they were paid on an hourly basis or already received a teacher's pension. They were nevertheless entitled to join if their pay was calculated as a fraction of a full-time worker's pay. Since 1 May 1995, hourly paid teachers are authorised to join the Teachers' Superannuation Scheme.

16 — Until 1 April 1986, those working fewer than 30 hours a week were excluded from membership of this pension scheme. As from 1 April 1986, the right of membership was granted to part-time workers completing a minimum of 15 hours a week and 35 weeks a year. On 1 January 1993 the condition requiring at least 15 hours a week was removed. Since 1 May 1995, all part-time workers may join the Local Government Superannuation Scheme.

17 — Until 1 October 1980, workers employed for less than 34 1/2 hours a week were excluded from membership of this pension scheme. As from 1 October 1980, the right of membership was granted to part-time workers employed for at least 20 hours a week. Since 1 April 1988, all part-time workers may join the Electricity Supply Pension Scheme.

18 — Until 1 January 1989, part-time workers were excluded from membership of this pension scheme. On 1 January 1989, the Midland Bank introduced an additional pension scheme, the Midland Bank Key-Time Pension Scheme. Membership of that scheme was available to part-time workers employed for at least 14 hours per week. As from 1 September 1992, the right of membership was made available to all part-time workers. On 1 January 1994, the two pension schemes were merged. However, periods of employment completed before 1 January 1989 are not taken into account in calculating the pension of part-time workers. Moreover, the right to a pension under the scheme is subject to completion by the person concerned of a qualifying period, for pension purposes, of at least two years.

20. Between 1986 and 1995, those pension schemes were amended in order to guarantee part-time workers entitlement to membership. In particular, the Occupational Pension Schemes (Equal Access to Membership) (Amendment) Regulations 1995 prohibited, from 31 May 1995, all direct or indirect discrimination on grounds of sex regarding membership of any occupational pension scheme.

21. Nevertheless, in their actions, the claimants seek recognition of their entitlement to retroactive membership of the pension schemes concerned for the periods of part-time employment completed by them before the abovementioned amendments. Furthermore, some of those periods of employment go back as far as 8 April 1976.

22. Of the 60 000 actions brought before national courts and tribunals, 22 cases [19] have been selected as 'test cases' with a view to disposing of certain preliminary issues of law.

23. The questions concern the compatibility with Community law of the procedural rules laid down by section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations.

24. The 'test cases' disclose three types of problems. [20]

25. First, certain claimants brought claims before the relevant industrial tribunal more than six months after the end of their employment. Under section 2(4) of the EPA, the claims of those applicants are time-barred and they are therefore deprived of any remedy whereby their earlier periods of part-time employment can be recognised for the purpose of calculating their pension rights.

26. Secondly, certain claimants are calling for equal treatment regarding membership of an occupational pension scheme for periods of part-time employment completed by them more than two years before they brought proceedings. Under Regulation 12 of the Occupational Pension Regulations, those claims are excluded because the retroactive effect of any deemed membership declared by industrial tribunals is limited to the two years preceding the date on which the claim was brought.

19 — Actions brought by women working in the public sector (namely employees of the Wolverhampton Healthcare NHS Trust, of the Ministries of Health, Education, Employment and the Environment and certain local authorities) and in the private sector (namely employees of Midland Bank).

20 — As indicated in the Report for the Hearing (pages 5 and 6).

27. Thirdly, the circumstances of certain claimants are rather special.

They are teachers or lecturers who work regularly, but under successive legally separate contracts. In that regard, the order for reference [21] distinguishes three categories of teacher: those working in the same establishment under a succession of contracts which lasted for the academic year only, with a break for the summer vacation ('sessional contracts'); those teaching in the same establishment under successive contracts covering the periods of courses, with holiday breaks ('termly contracts'); [22] and those working intermittently. [23]

According to the order for reference [24] a succession of contracts may sometimes be covered by an 'umbrella' contract. Under such a contract, the parties are required to renew their various contracts of employment.

In the absence of an umbrella contract, the period laid down in section 2(4) of the EPA starts running at the end of the contract of employment and not at the end of the employment relationship between the teacher and the establishment concerned. [25] As a result, a teacher can secure recognition of periods of part-time employment for pension entitlement purposes only if he has commenced proceedings within the six months following the end of *each* contract under which he was employed.

28. In the main proceedings, the claimants have contended that section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations are incompatible with Community law. First, those provisions render virtually impossible or excessively difficult the exercise of rights conferred on them by Article 119 of the Treaty. Second, those procedural provisions are less favourable than those governing similar actions of a domestic nature, in particular actions based on the Sex Discrimination Act 1975 or the Race Relations Act 1976.

29. The Industrial Tribunal, Birmingham, was entrusted with the test cases at first instance. It gave its decision on 4 December 1995. [26] Essentially, it considered that the

21 — Page 20 of the order for reference

22 — They may be contracts concluded for a term or even for the duration of a specific course.

23 — Teachers who work when called on to do so by their local education authority.

24 — Page 20 of the order for reference.

25 — That is the interpretation given by the House of Lords of section 2(4) of the EPA (page 9 of the order for reference).

26 — Annex 3 to the observations lodged on behalf of Birmingham City Council, Wolverhampton Metropolitan Borough Council, Manchester City Council, Stockport Metropolitan Borough Council, Lancashire County Council and North East Lincolnshire Council.

procedures laid down by the provisions at issue conformed with Community law in that they did not render excessively difficult or virtually impossible the exercise of rights conferred on the claimants by the Community legal order.

30. On appeal, that decision was upheld by the Employment Appeal Tribunal. In its judgment of 24 June 1996, it also considered that the procedural provisions at issue were not any less favourable than those applicable to similar actions of a domestic nature. Section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations applied without distinction to actions alleging an infringement of Article 119 of the Treaty and to actions alleging breach of the principles laid down by the EPA.

31. The judgment of the Employment Appeal Tribunal was in turn upheld by judgment of the Court of Appeal of 13 February 1997.

32. In the exercise of the discretionary power granted to them by the second paragraph of Article 177 of the EC Treaty (now Article 234 EC, second paragraph), those courts gave judgment in the main proceedings without seeking a preliminary ruling from this Court.

33. The House of Lords, however, before which the proceedings came at last instance, considered itself bound to seek a ruling from the Court of Justice.

III — The questions

34. Consequently, it stayed proceedings pending a preliminary ruling on the following questions:

'Where:

(a) a claimant has been excluded from membership of an occupational pension scheme by reason of being a part-time worker; and

(b) consequently, has not accrued pension benefits referable to service with her employer, which benefits become payable upon reaching pensionable age; and

(c) the claimant alleges that such treatment is indirect sex discrimination

contrary to Article 119 of the EC Treaty,

compatible with the principle of EC law that national procedural rules for breach of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119?

the following three questions arise:

1. Is

(a) a national procedural rule which requires that a claim for membership of an occupational pension scheme (from which the right to pension benefits flows) which is brought in the Industrial Tribunal be brought within six months of the end of the employment to which the claim relates;

(b) a national procedural rule which provides that a claimant's pensionable service is to be calculated only by reference to service after a date falling no earlier than two years prior to the date of her claim (irrespective of whether the date on which pension benefits become payable is before or after the date of the claim)

2. In circumstances where:

(a) rights under Article 119 fall, as a matter of domestic law, to be enforced through the medium of a statute which was enacted in 1970, prior to the United Kingdom's accession to the European Community, and came into effect on 29 December 1975, and which, prior to 8 April 1976, already conferred a right to equal pay and equality of other contractual provisions;

(b) the domestic statute contains the procedural rules referred to in question 1 above;

(c) other statutes prohibiting discrimination in the employment field, and the domestic law of contract provide for different time-limits;

(1) Does the implementation of Article 119 through that domestic statute constitute compliance with the principle of EC law that national procedural rules for a breach of Community law must be no less favourable than those which apply to similar claims of a domestic nature?

(2) If not, what are the relevant criteria for determining whether another right of action in domestic law is a domestic action similar to the right under Article 119?

(3) If a national court identifies any such similar claim in accordance with any criteria identified under (2) above, what, if any, are the relevant criteria under Community law for determining whether the procedural rules governing the similar claim or claims are more favourable than the procedural rules which govern the enforcement of the right under Article 119?

3. In circumstances where:

(a) an employee has served under a number of separate contracts of employment for the same employer covering defined periods of time and with intervals between the periods covered by the contracts of employment;

(b) after the completion of any contract, there is no obligation on either party to enter into further such contracts: and

(c) she initiates a claim within six months of the completion of a later contract or contracts but fails to initiate a claim within six months of any earlier contract or contracts;

Is a national procedural rule which has the effect of requiring a claim for membership of an occupational pension scheme from which the right to pension benefits flows to be brought within six months of the end of any contract or contracts of employment to which the claim relates and which,

therefore, prevents service under any earlier contract or contracts from being treated as pensionable service, compatible with:

(1) the right to equal pay for equal work in Article 119 of the EC Treaty; and

(2) the principle of EC law that national procedural rules for breach of Community law must not make it excessively difficult or impossible in practice for the claimant to exercise her rights under Article 119?'

IV — The subject-matter of the order for reference

35. It is clear from the account of the facts that the test cases relate solely to questions of a procedural nature.[27] The object of these proceedings is to enable the House of Lords to appraise the compatibility with Community law of the procedural rules laid down by section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations.

27 — See also page 5 of the order for reference and paragraphs 3 and 4 of the decision of the Birmingham Industrial Tribunal of 4 December 1995.

In light of that assessment, the national courts will decide as to the admissibility of actions before them. They will also determine the length of the periods for which claimants may seek retroactive membership of the occupational pension schemes concerned.

36. At the present stage of the procedure, the Industrial Tribunals have not yet determined whether the exclusion of part-time workers from membership of those pensions schemes constituted indirect discrimination on grounds of sex, contrary to Article 119 of Treaty. No interpretation is therefore requested regarding the factors involved in any such discrimination.

37. Nevertheless, solely for the purposes of my reasoning, I shall assume that such discrimination has been established. Indeed, to answer the questions submitted involves considering the effects of the procedural provisions at issue on the rights conferred on the claimants in the main proceedings by Article 119. And in order to appraise those effects correctly, it is appropriate to start from the premiss that the applicants are in fact entitled to retroactive membership of the pension schemes at issue for all the periods of part-time employment completed by them since 8 April 1976.

V — The answer to the questions

A — *Introduction*

38. According to settled case-law,[28] in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules for legal actions intended to safeguard rights conferred on individuals by virtue of the direct effect of Community law.

39. However, that procedural autonomy is subject to two limitations.

40. First, by virtue of the 'principle of equivalence', procedural rules governing actions enabling individuals to exercise rights conferred by the Community legal order may not be less favourable than those governing similar actions of a domestic nature.

41. Second, by virtue of the 'principle of effectiveness', the procedural rules governing domestic actions may not be such as to render virtually impossible or excessively difficult the exercise of rights conferred by the Community legal order.

B — *The first question*

42. The first question requests the Court to define the scope of the principle of effectiveness. It has two parts.

(1) The first part of the first question

43. In the first part of its first question, the House of Lords asks whether the time-limit laid down by section 2(4) of the EPA has the effect of rendering practically impossible or excessively difficult the exercise by the claimants in the main proceedings of

28 — See, in particular, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/96 *Comet* [1976] ECR 2043, paragraph 13; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 265/78 *Ferwerda* [1980] ECR 617, paragraph 10; Case 61/79 *Denkavit* [1980] ECR 1205, paragraph 25; Case 130/79 *Express Diary Foods* [1980] ECR 1887, paragraph 12; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case 240/87 *Deville* [1988] ECR 3513, paragraph 12; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; *Fisscher*, paragraph 39; Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 41; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, paragraph 17; *Dietz*, paragraph 36; Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 46; Case C-188/95 *Fantask and Others* [1997] ECR I-6783, paragraph 47; Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 19; and Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 18, hereinafter 'the *Levez* judgment' or '*Levez*').

their right to retroactive membership of an occupational pension scheme.

44. The reasons underlying that question are straightforward. Several claimants failed to bring their actions within the six months following the end of their employment. [29] Under the contested provision, they forfeit the opportunity to have their past service recognised for the purpose of calculating their pension rights. The national court wishes to verify that the principle of effectiveness does not preclude the inadmissibility of those actions.

45. The relevant case-law enables that question to be answered succinctly.

46. This Court has consistently acknowledged 'that the setting of reasonable time-limits for bringing proceedings is compatible to Community law'. [30] It considers that '[s]uch periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought'. [31]

47. The time-bar resulting from the expiry of those periods for bringing proceedings constitutes application of the fundamental principle of legal certainty which protects both the individual and the administration concerned. [32] It reflects the need 'to ensure that the legality of administrative decisions cannot be challenged indefinitely'. [33]

48. Moreover, the time-limit laid down by section 2(4) of the EPA may be described as 'reasonable' in the light of the case-law. Indeed, in the past the Court has held much shorter national time-limits to be compatible. [34]

49. Consequently, I consider that the principle of effectiveness does not preclude the application of section 2(4) of the EPA to the claims in the main proceedings.

(2) The second part of the first question

50. In the second part of its first question, the House of Lords asks whether Regula-

29 — Mrs Kynaston, Mrs Fletcher, Mrs Foster, Mrs Harrison and Mrs Lee (paragraphs 92 to 96 of the decision of the Birmingham Industrial Tribunal of 4 december 1995) fall into that category.

30 — *Fantask and Others*, paragraph 48. See also *Rewe*, paragraph 5; *Comet*, paragraphs 16 to 18; *Just*, paragraph 22; *Denkavit*, paragraph 23; *Palmisani*, paragraph 28; *Haahr Petroleum*, paragraph 48; *Edis*, paragraph 20; and *Levez*, paragraph 19.

31 — *Fantask and Others*, paragraph 48.

32 — See, in particular, *Rewe*, paragraph 5; *Comet*, paragraph 18; and *Palmisani*, paragraph 28.

33 — Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475, paragraph 22.

34 — In *Rewe*, the time-limit for a complaint laid down by the German legislation was one month. In *Comet*, the period for bringing proceedings laid down by the Netherlands legislation was 30 days (Opinion of Advocate General Warner in both cases, at pages 2001 and 2002).

tion 12 of the Occupational Pension Regulations has the effect of rendering virtually impossible or excessively difficult the exercise by the claimants in the main proceedings of their right to retroactive membership of an occupational pension scheme.

51. In the course of the procedure, discussion has focused essentially on the judgment of 11 December 1997, in the case of *Magorrian and Cunningham* (hereinafter 'the *Magorrian* judgment'). [35]

52. In that judgment, the Sixth Chamber of the Court examined a rule of procedure identical to Regulation 12 of the Occupational Pension Regulations. [36] It held that the principle of effectiveness precluded the application of a procedural rule of that kind to actions based on Article 119 of the Treaty by workers seeking to enforce their right to retroactive membership of an occupational pension scheme. [37]

53. It is therefore necessary to see whether that conclusion is also applicable to this case.

54. To that end, I shall define the scope of the *Magorrian* decision. I shall then go on to examine the facts of the main proceedings in the light of that decision.

(a) The *Magorrian* decision

55. The factual background in *Magorrian* may be summarised as follows.

The occupational pension scheme concerned guaranteed all members the payment of a lump-sum together with a basic retirement pension. It also included a special scheme, [38] the 'MHO' (Mental Health Officer) Scheme, which granted additional benefits to persons who had worked full-time for at least 20 years.

Mrs Magorrian had completed nine years' full-time service and the equivalent of 11 years on a part-time basis. Mrs Cunningham had completed 15 years' full-time service and the equivalent of 11 years on a part-time basis. Both had therefore completed the equivalent of a minimum of 20 years' full-time service. Nevertheless, by

35 — Case C-246/96 [1997] ECR I-7153.

36 — Regulation 12 of the Occupational Pension Schemes (Equal Access to Membership) Regulations (Northern Ireland) 1976, hereinafter the 'Occupational Pension Regulations (Northern Ireland)'. That regulation provides that, in proceedings concerning access to membership of occupational pensions schemes, the right to be admitted to the scheme is to have effect from a date no earlier than two years before the institution of proceedings (*Magorrian*, paragraph 5).

37 — Paragraph 2 of the operative part.

38 — As stated in paragraph 32 of *Magorrian*.

reason of their part-time work, they were excluded from membership of the MHO Scheme. [39]

Upon retirement, they received a lump-sum and the basic retirement pension. However, they had no entitlement to the additional benefits guaranteed by the MHO Scheme. They therefore brought an action to have account taken of their periods of part-time employment for the purpose of calculating those benefits. Although the national court considered that they had been the subject of indirect discrimination on grounds of sex, Regulation 12 of the Occupational Pension Regulations (Northern Ireland) allowed account to be taken only of their service completed less than two years before the date on which their actions were brought.

It was in those circumstances that the Sixth Chamber of this Court held that Community law precluded the application of a national rule which, in the event of a successful claim, limits to a period of two years prior to the date of the commencement of the proceedings the entitlement of claimants to retroactive membership of an occupational pension scheme and to receive the additional benefits available under that scheme. [40]

56. The United Kingdom Government and the defendants in the main proceedings consider that the decision in *Magorrian* is justified by circumstances specific to that case, and that it cannot therefore be transposed to this one.

They stress that, by excluding all the past service of the claimants, Regulation 12 of the Occupational Pension Regulations (Northern Ireland) prevented Mrs Magorrian and Mrs Cunningham from satisfying the condition for membership of the MHO Scheme. Thus, that provision *totally* deprived the claimants of the additional benefits available under that scheme. It was *only in that sense* that the contested provision made it impossible in practice for the claimants to exercise rights conferred by the Community legal order.

In contrast, in the present cases, Regulation 12 of the Occupational Pension Regulations does not totally deprive the claimants of their right to retroactive membership of an occupational pension scheme. It merely limits the period, prior to the commencement of proceedings, for which they may obtain such membership.

According to settled case-law, [41] the principle of effectiveness does not, in their

39 — *Magorrian*, paragraph 32.

40 — Ibid., paragraph 47.

41 — *Steenhorst-Neerings*, paragraph 16; Case C-410/92 *Johnson* [1994] ECR I-5483, paragraph 23; Case C-394/93 *Alonso-Perez* [1995] ECR I-4101, paragraph 30; and *Levez*, paragraph 20.

opinion, preclude the application of a rule of domestic law which merely limits the retroactive effect of applications for a particular benefit.

57. I cannot share that view.

58. Admittedly, the circumstances of *Magorrian* were special. Nevertheless, the terms of the Court's reasoning extended well beyond the specific circumstances of that case.

59. Let us examine that reasoning.

60. In response to the first question, the Court ruled that 'periods of service completed by part-time workers who have suffered indirect discrimination based on sex must be taken into account as from 8 April 1976, the date of the judgment in [*Defrenne II*], for the purposes of calculating the ... benefits to which they are entitled'. [42]

In so ruling, the Court drew the logical inferences from its earlier case-law, in particular the judgments in *Vroege*, *Fisscher* and *Dietz*, cited above.

In the terms of those judgments, Article 119 of the Treaty confers on part-time workers who have been the victims of indirect discrimination based on sex the right to retroactive membership of the occupational pension scheme in question and to receive the benefits available under that scheme. The upholding of that right constitutes implementation of a wider requirement to the effect that 'where such discrimination has been suffered, equal treatment is to be achieved by placing the worker discriminated against in the same situation as that of workers of the other sex'. [43] Restoration of the non-discriminatory situation therefore implies that the worker discriminated against may require account to be taken, for the purposes of calculating pension entitlement, of periods of part-time employment completed by him since 8 April 1976.

61. In examining the second question referred to it, the Court emphasised that 'the claim is not for the retroactive award of certain additional benefits but for the recognition of entitlement to *full* membership of an occupational pension scheme ...'. [44]

42 — *Magorrian*, paragraph 1 of the operative part.

43 — *Fisscher*, paragraph 35.

44 — *Magorrian*, paragraph 42 (emphasis added).

The Court's judgment drew a distinction between two categories of action: those in which the claimants seek to obtain *arrears* of benefits and those in which the claimants seek recognition of their entitlement to *retroactive membership* ('full' membership) of an occupational pension scheme.

With respect to the first category of action, the Court confirmed that the principle of effectiveness did not preclude the application of a rule of domestic law which 'merely limit[s] the period, prior to commencement of proceedings, in respect of which *backdated* benefits [can] be obtained ...'. [45]

On the other hand, with respect to the second category of action, the Court considered that 'the rule at issue in the main proceedings in this case *prevents the entire record of service completed by those concerned after 8 April 1976 until* ... [two years prior to the date on which the action was brought] from being taken into account for the purposes of calculating the additional benefits which would be payable *even after the date of the claim*'. [46]

62. The Court did not intend to limit that finding to the specific circumstances of the *Magorrian* case. On the contrary, in emphasised that the procedural rule at issue detracted from the very essence of the right to retroactive membership of an occupational pension scheme.

It stated that, 'unlike the rules at issue ... which in the interests of legal certainty merely limit ... the retroactive scope of a claim for certain benefits and [do] not therefore strike at the very essence of the rights conferred by the Community legal order, a rule such as that before the national court in this case is such as to render any action by individuals relying on Community law impossible in practice'. [47]

In order to confirm that analysis, the Court added that 'the effect of that national rule is to limit in time the direct effect of Article 119 of the Treaty in cases in which no such limitation has been laid down either in the Court's case-law or in Protocol No 2 annexed to the Treaty on European Union' [the '*Barber*' Protocol]. [48]

The Court thus considered that, in the same way as a limitation in time of the direct effects of Article 119 of the Treaty, the procedural rule at issue deprives individuals, who would in the normal course be able to exercise the rights which they derive from the provision of Community law in question, of the right to rely on it in respect of their claims.

45 — *Magorrian*, paragraph 43.
46 — Ibid. (emphasis added).
47 — *Magorrian*, paragraph 44.
48 — *Magorrian*, paragraph 45.

63. It follows from these considerations that the course followed in *Magorrian* is not limited to the specific circumstances of that case.

64. Moreover, it seems to me that it should be transposed to this case.

Precisely as in the abovementioned case, Regulation 12 of the Occupational Pension Regulations 'prevents the entire record of service completed by those concerned after 8 April 1976 until ... [two years preceding the date on which their action was brought] from being taken into account for the purposes of calculating the ... benefits which would be payable even after the date of the claim'. [49]

I must also emphasise that, in *Magorrian*, the claimants sought recognition of their right to retroactive membership of a pension scheme in order to receive *additional benefits*. Whatever the outcome of the proceedings, they were thus certain to receive the lump-sum and the basic pension guaranteed by the general occupational pension rules.

Conversely, in the present cases, the claimants seek to establish their right to retroactive membership of the pension schemes at issue in order to receive *basic retirement pensions*. And, if the principle of effectiveness precludes the application of a procedural rule which prevents all the service records of the persons concerned since 8 April 1976 from being taken into account for the purposes of calculating additional benefits, it must, even more clearly, preclude the application of that rule where it prevents account being taken of those service records for the purpose of calculating the basic retirement pensions.

65. The defendants in the main proceedings consider that such a solution could not be reconciled with this Court's case-law, in particular the judgments in *Fisscher* and *Dietz*, cited above. They note that, according to those judgments, 'the national rules relating to time-limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme ...'. [50]

66. I do not find that argument persuasive.

Indeed, in the abovementioned judgments, the Court was not called on to say whether the principle of effectiveness precluded the application of the procedural rules concerned. On the contrary, in view of the purpose of the questions referred to it, it confined itself to referring, in general

49 — *Magorrian*, paragraph 43.

50 — *Dietz*, paragraph 37. See also *Fisscher*, paragraph 40.

terms, to its case-law concerning the autonomy of the Member States in matters of procedure. Thus, it reaffirmed that the rules on time-limits for bringing proceedings under national law could be relied on against workers claiming entitlement to membership of an occupational pension scheme, '*provided that* ... they do not render the exercise of rights conferred by Community law excessively difficult or impossible in practice'. [51] However, in contrast to the *Magorrian* case, the Court did not consider whether the procedural rules at issue satisfied that requirement.

Moreover, the procedural rules at issue in the *Fisscher* and *Dietz* cases, cited above, differed from those with which *Magorrian* was concerned. They merely imposed 'traditional' time-limits or laid down equivalent principles of law (namely the 'rechtsverwerking' under Netherlands law), [52] but did not limit, in the event of a successful action, the right of the claimants to retroactive membership of the occupational pension scheme from which they had been excluded.

67. Finally, I am likewise not persuaded by the argument that Regulation 12 of the Occupational Pension Regulations encourages claimants to be diligent, by requiring them to bring proceedings within the months — and, at the latest, within two years — following their exclusion from membership of an occupational pension scheme.

In contrast to time-limits for bringing proceedings, the contested procedural rule is not such as to contribute to legal certainty because it applies even to claimants who, in accordance with section 2(4) of the EPA, instituted proceedings within the six months following the end of the employment concerned. [53]

(b) The factual circumstances of the main proceedings

68. It is appropriate at this stage to consider the factual circumstances of the main actions.

69. Of the 60 000 actions brought before the national courts and tribunals, we have only limited information. It is therefore impossible to consider all the factual circumstances which might arise in those proceedings.

51 — *Dietz*, paragraph 37 (emphasis added).

52 — See the Opinion of Advocate General Van Gerven in the *Vroege* and *Fisscher* cases, at point 31, and the Opinion of Advocate General Cosmas in the *Dietz* case, paragraph 30.

53 — See, to that effect, *Magorrian*, paragraph 46.

70. Nevertheless, the documents before the Court enable at least three types of situation to be identified. [54]

71. *First*, the application of Regulation 12 of the Occupational Pension Regulations may be liable to deprive certain claimants of the possibility of fulfilling the conditions laid down for eligibility for retirement benefits.

Mrs Foster's case illustrates this first kind of situation.

Between May 1979 and May 1994, Mrs Foster worked part-time for Midland Bank. She was authorised to join her employer's pension scheme on 1 September 1992. In May 1994, she retired. However, she receives no pension. The Midland Bank scheme makes entitlement to retirement benefits conditional upon membership of the scheme for a minimum period of two years. Mrs Foster does not fulfil that condition since she was a member for only 20 months.

On 23 December 1994, she brought an action to secure recognition of her right to retroactive membership of the scheme concerned. [55] In that connection, Regulation 12 of the Occupational Pension Regulations allows her to be granted membership only for her periods of employment since 23 December 1992, that is to say after she actually became a member of the Midland Bank scheme. By preventing account being taken of her service record before she joined, the rule at issue deprives Mrs Foster of any opportunity of fulfilling the condition for eligibility for a retirement pension.

That rule thus renders impossible the exercise of the rights conferred on the claimant by Article 119 of the Treaty.

72. *Secondly*, certain claimants assert the right to retroactive membership of an occupational pension scheme for periods of part-time employment completed by them more than two years before the date on which they instituted proceedings.

Mrs Wainsborough's action is such a case. [56]

54 — I rely essentially on pp. 19 and 20 of the order for reference and on paragraphs 92 to 96 of the decision of the Birmingham Industrial Tribunal of 4 December 1995.

55 — In fact, Mrs Foster brought her action more than six months after her employment ended. Her application is therefore inadmissible. However, for the purposes of my reasoning, I shall treat her application as having been lodged within the period prescribed in section 2(4) of the EPA.

56 — Likewise that of Mrs Preston, Mrs Maltby, Mrs Cockrill, Mrs Nuttall, Mrs Barron, Mrs Gilbert, Mrs Walker, Mrs Culley and Mrs Guerin.

Mrs Wainsborough has worked part-time for Midland Bank since May 1973. She was authorised to join her employer's pension scheme on 1 September 1992. On 8 December 1994 she brought an action to establish entitlement to retroactive membership of that scheme for her periods of employment prior to 1 September 1992. Nevertheless, under Regulation 12 of the Occupational Pension Regulations, membership may be declared only for her periods of employment completed since 8 December 1992, that is to say after she joined the Midland Bank scheme. Consequently, Mrs Wainsborough's claim cannot succeed.

In such circumstances, Regulation 12 of the Occupational Pension Regulations renders impossible any action to secure claimants' entitlement to retroactive membership of an occupational pension scheme and the right to receive benefits under it. It thus strikes at the very essence of the rights conferred by the Community legal order.

73. *Third*, certain claimants assert the right to retroactive membership of an occupational pension scheme for various periods of part-time employment: those which they completed more than two years before bringing their actions and those which they completed less than two years before that date.

Such is Mrs Jones's case. [57]

Mrs Jones has worked as a part-time teacher since April 1977. Since August 1993, she has been a member of the Teachers' Superannuation Scheme. On 6 December 1994, she brought an action to secure retroactive membership of that pension scheme. Under Regulation 12 of the Occupational Pension Regulations, she can be declared a member only for her periods of employment completed since 6 December 1992. Her claim is therefore barred as regards the periods between April 1977 and 5 December 1992.

In situations of this kind, Regulation 12 of the Occupational Pension Regulations does not render the claimants' actions impossible. However, it makes them excessively difficult since it precludes consideration of service completed by the persons concerned from the commencement of their employment to a date two years before that on which they brought their actions.

57 — Or that of Mrs Harris.

74. I consider that, in the three situations mentioned above, Regulation 12 of the Occupational Pension Regulations has the effect of rendering impossible in practice or excessively difficult the exercise by the claimants in the main proceedings of their right to secure retroactive membership of an occupational pension scheme.

75. Accordingly, I suggest that the Court rule that the principle of effectiveness precludes application of the contested provision to the main proceedings.

C — *The second question*

76. The ruling requested in the second question concerns the scope of the principle of equivalence.

77. In the light of the conclusions reached above, it is appropriate to examine this question only with respect to section 2(4) of the EPA. If, as I consider, the principle of effectiveness precludes the application of Regulation 12 of the Occupational Pension Regulations to the proceedings before the national courts, the latter will be required to disapply that provision, in accordance with the case-law of the Court of Justice. [58] Accordingly, it might seem otiose to consider the principle of equivalence in relation to that second procedural rule.

78. I shall nevertheless, for the sake of completeness, consider that principle having regard to both of the contested national provisions.

79. The principle of equivalence embodies a requirement of 'non-discrimination': the exercise of a right under Community law in the national legal context may not be subjected to stricter conditions than the exercise of the corresponding right conferred by national law alone.

80. The House of Lords therefore seeks to determine whether the procedural requirements imposed by section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations, which apply to the proceedings brought by the claimants on the basis of Article 119 of the Treaty, are less favourable than other procedural requirements applicable to similar actions of a domestic nature.

81. To that end, it has referred three questions to the Court. In the first, it asks whether it is consonant with the principle of equivalence to enforce the rights conferred on individuals by Article 119 of the Treaty through the EPA. By the second question, it seeks to ascertain the Commu-

58 — In particular, Case 106/77 *Simmenthal* [1978] ECR 629.

nity law criteria for identifying a 'similar domestic action'. By its third question, it seeks to ascertain the criteria under Community law for determining whether the rules governing similar proceedings of a domestic nature are 'more favourable' than those which apply to proceedings alleging infringement of Article 119 of the Treaty.

82. After the order for reference was received in this case, the Court of Justice gave judgment in *Levez*. As the House of Lords observes, [59] the questions of principle raised by that case are similar to those with which we are concerned today. [60] Consequently, I shall to a considerable extent repeat the reasoning developed by the Court in that judgment.

(1) The first part of the second question

83. First, the House of Lords asks whether, in order to ensure observance of the principle of equivalence, it may consider that an action alleging infringement of the EPA constitutes a domestic action similar to one alleging infringement of Article 119 of the Treaty.

59 — Page 6 of the order for reference.

60 — In that case, the Court was requested in particular to specify the scope of the principle of equivalence in order to determine whether it precluded the application of section 2(5) of the EPA to an action based on Article 119 of the Treaty by an employee seeking to obtain arrears of pay.

84. In my Opinion in *Levez*, [61] I set out the reasons for which, in my view, actions brought under the EPA and under Article 119 of the Treaty should be regarded not as similar but as identical.

85. The Court shared my view since, in that judgment, it held as follows:

'... the [EPA] is the domestic legislation which gives effect to the Community principle of non-discrimination on grounds of sex in relation to pay, pursuant to Article 119 of the Treaty and the Directive [Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19)].

Accordingly ... the fact that the same procedural rules ... apply to comparable claims, one relying on a right conferred by Community law, the other on a right acquired under domestic law, is not enough to ensure compliance with the principle of equivalence ... since one and the same form of action is involved.

61 — Points 41 to 48.

Following the accession of the United Kingdom to the Communities, the [EPA] constitutes the legislation by means of which the United Kingdom discharges its obligations under Article 119 of the Treaty and, subsequently, under the Directive [75/117]. *The Act cannot therefore provide an appropriate ground of comparison against which to measure compliance with the principle of equivalence.*' [62]

86. In this case, I propose that the Court confirm that analysis and therefore answer the question submitted by the national court in the negative.

(2) The second part of the second question

87. Secondly, the House of Lords wishes to ascertain the criteria under Community law for identifying a similar domestic action.

88. In that connection, *Levez* summarises the relevant principles.

Thus, domestic actions which have a *similar purpose* and *cause of action* are similar to actions alleging infringements of Community law. [63]

Moreover, in order to verify compliance with the principle of equivalence, the national court should consider not only the purpose but also the *essential characteristics* of the allegedly similar domestic actions. [64]

Furthermore, every case in which it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions must be analysed having regard to the role played by the national provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts. [65]

Finally, the principle of equivalence cannot be interpreted as requiring Member States to extend their most favourable rules to all actions brought in the field of law concerned. [66]

62 — Paragraphs 46 to 48 (emphasis added).

63 — *Palmisani*, paragraphs 34 to 38; *Edis*, paragraph 36; and *Levez*, paragraph 41.

64 — *Palmisani*, paragraphs 34 to 38, and *Levez*, paragraph 43.

65 — *Peterbroeck*, paragraph 14; *Van Schijndel* and *Van Veen*, paragraph 19; and *Levez*, paragraph 44.

66 — *Edis*, paragraph 36, and *Levez*, paragraph 42.

89. At this stage, a reference to the principles enunciated in *Levez* would be sufficient to answer the question submitted by the House of Lords. In fact, the Court is asked for ruling only on matters relating to the interpretation of Community law which enable a similar action of domestic law to be identified. The referring Court does not request that such a remedy be specifically named.

Furthermore, the Court considers that 'it is for the national court to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence ...'. [67]

Recognition of that authority is justified by the fact that 'the national court... alone has direct knowledge of the procedural rules governing actions in the field of [domestic] ... law ...'. [68]

90. Nevertheless, the concern to give the national court a helpful answer sometimes prompts this Court to make more specific observations regarding possible criteria for comparison. Thus, in *Palmisani*, cited above, [69] it helped the national court to identify, in its national law, the internal remedies which might be comparable to actions to secure redress for damage deriving from the belated transposition of a Community directive.

91. *A priori*, the possibility cannot be excluded that the Court might take a similar approach in this case.

92. It is therefore appropriate to seek to identify a domestic remedy which might be regarded as similar to the main proceedings.

93. In their written observations, the claimants in the main proceedings have suggested numerous points of comparison. They contend that their claims may be compared to actions based on the Sex Discrimination Act 1975, actions based on the Race Relations Act 1976, actions to recover arrears of pay [70] or actions against unlawful deductions from pay. [71]

67 — *Levez*, paragraph 39. See also *Palmisani*, paragraph 33.

68 — *Levez*, paragraph 43.

69 — Paragraphs 33 to 38.

70 — They refer to the Limitation Act 1980 in the Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (paragraph 6.11 of the claimants' observations).

71 — They refer to the Employment Rights Act 1996 (paragraph 6.14 of the claimants' observations).

94. In my opinion in *Levez*, [72] I set out the reasons for which, in my view, actions based on the Sex Discrimination Act 1975 or the Race Relations Act 1976 cannot be usefully compared with actions based on Article 119 of the Treaty. Essentially, such a comparison would savour of an approach in which the problem of discrimination — whether based on sex or race — remains the central issue. I therefore opted for a comparison in the field of employment law, referring to a domestic action whose purpose was identical to that of the action alleging infringement of Community law.

95. In this case, that line of reasoning also prompts me to reject, as a basis for comparison, actions for the recovery of arrears of pay or against unlawful deductions from pay. The claims in the main proceedings are concerned not with arrears of pay or other remuneration but with retroactive membership for the claimants of an occupational pension scheme.

96. In view of that purpose, I consider that the claims in the main proceedings should be compared with an action under domestic law in which a worker seeks, on a basis other than Community law, retroactive membership of an occupational pension scheme.

97. However, a difficulty arises. A multitude of reasons comes to mind for which a worker might not have been duly affiliated to a pension scheme. The cause might be negligence attributable to the employer; negligence on the part of the worker himself; ignorance on the part of either regarding their respective rights and obligations; trickery by the employer, and so forth.

98. In that respect, the criterion of the 'purpose' of the action, laid down in *Levez*, enables the search to be narrowed down.

99. In this case, the claimants in the main proceedings complain of exclusion from membership of an occupational pension scheme even though a Community provision expressly entitled them to such membership. Moreover, their employers should have known that such exclusion was contrary to Community law because, since the judgment in *Bilka*, cited above, it is clear that breach of the rule of equal treatment in recognising such entitlement to membership is caught by Article 119 of the Treaty. [73]

100. If those parameters are transposed to a purely domestic action, it seems that the national court could usefully refer to the situation of a full-time worker who, in breach of binding provisions, was excluded

72 — Points 50 to 69.

73 — See *Vroege*, paragraphs 28 and 29; *Fisscher*, paragraphs 25 and 26; *Dietz*, paragraph 20; and *Magorrian*, paragraphs 28 and 29.

from membership of an occupational pension scheme, even though his employer knew or ought reasonably to have known that such exclusion was illegal.

101. Consequently, I consider that, in order to ensure compliance with the principle of equivalence, the House of Lords might regard as 'similar' to the claims in the main proceedings an action under domestic law by a part-time worker who, for reasons unconnected with discrimination on grounds of sex or race, has been unlawfully excluded from membership of an occupational pension scheme, even though his employer knew or ought reasonably to have known that such exclusion was illegal.

(3) The third part of the second question

102. Thirdly, the House of Lords seeks to ascertain the criteria under Community law for determining whether the procedural requirements governing a similar domestic action are more favourable than those which apply to an action alleging infringement of Article 119 of the Treaty.

103. According to the case-law of this Court, [74] the national courts alone have jurisdiction to compare the procedural rules applicable to similar actions under domestic law and those based on Community law.

104. However, 'the Court can provide the national court with guidance as to the interpretation of Community law, which may be of use to it in undertaking such an assessment'. [75]

105. Thus, in *Levez*, the Court stated that the principle of equivalence would be contravened if an individual relying on a right conferred by Community law had to incur additional *costs* and *delay* by comparison with a claimant relying on a purely domestic law. [76]

106. In this case, the House of Lords has to determine whether the requirements laid down by section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations are stricter than those applying to similar proceedings of a domestic nature identified by it on the basis of the criteria outlined above (hereinafter 'the domestic action'). [77]

74 — *Palmisani*, paragraph 33, and *Levez*, paragraph 39.

75 — *Levez*, paragraph 40.

76 — Paragraph 51.

77 — In the remainder of this Opinion, I shall assume that this 'similar domestic action' is the one which I defined in point 101 of this Opinion.

107. In that context, this case raises two particular questions. [78]

108. First, the rules governing the domestic action may contain procedural requirements which are both more favourable and stricter than those applicable to the main proceedings.

109. Indeed, the period for bringing the domestic action may be shorter than that set by section 2(4) of the EPA. On the other hand, in the event of a successful outcome, the claimant might secure retroactive membership of an occupational pension scheme for a longer period than the two years provided for by Regulation 12 of the Occupational Pension Regulations.

110. In such circumstances, it is appropriate to determine whether the comparison should focus on each of the procedural requirements (an individual comparison) or, on the contrary, should encompass all the procedural rules at issue (a comprehensive comparison).

111. In that connection, this Court considers that 'whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in *the procedure as a whole*, as well as the operation and any special features of that procedure ...'. [79]

112. It follows that the various aspects of the procedural requirements cannot be examined in isolation but must be placed in their general context. [80]

113. Therefore, in order to determine whether the procedural rules laid down by section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations are less favourable than those governing the domestic action, the House of Lords should undertake a comprehensive comparison of the various aspects of the applicable procedural requirements.

114. The second question arises by reason of the number of cases brought before the national courts.

78 — See, in that connection, the United Kingdom's observations (paragraphs 5.34 to 5.40) and the observations lodged on behalf of Southern Electric plc, South Wales Electricity Company plc, Electricity Pension Trustee Ltd, Midland Bank plc, Sutton College, Preston College, Grimsby College and Hull College (paragraphs 54 to 56).

79 — *Levez*, paragraph 44. See also *Peterbroeck*, paragraph 14, and *Van Schijndel and Van Veen*, paragraph 19.

80 — See also the Opinion of Advocate General Cosmas in *Palmisani*, points 22, 26 and 27.

115. In fact, the 'more favourable' nature of the requirements governing domestic actions may vary according to the facts of the main actions. Thus, the procedural requirements governing the domestic action may be regarded as being *more favourable* than the requirements applicable to the main actions as regards *certain claimants* but *less favourable* than the requirements applicable to the main actions as regards *other claimants*. [81]

116. Such a divergence might prompt certain claimants to assert, in reliance upon the principle of equivalence, that the procedural requirements governing the domestic action should be applicable to their claims. On the other hand, other claimants might request, in reliance upon the same principle of equivalence, that the procedural rules laid down by section 2(4) of the EPA and Regulation 12 of the Occupational Pension Regulations be applied to their claims.

117. Like the United Kingdom Government, I think that to allow the principle of equivalence to be applied in that way would be irreconcilable with the principle of legal certainty.

118. The national courts would be called on to adjudicate on the main actions in accordance with divergent rules of law. Moreover, both the competent authorities and the litigants — whether as claimants or defendants — would no longer be in a position to ascertain precisely which rules of national law applied to the proceedings.

119. Consequently, I suggest that the Court rule that, in the context of the principle of equivalence, the procedural requirements governing a similar domestic action and the procedural rules governing actions based on infringements of Community law must be compared objectively and in the abstract, and not subjectively according to the factual circumstances of the various claimants in the main proceedings.

D — *The third question*

120. The third question concerns the particular situation of certain claimants in the main proceedings.

121. It will be remembered that they are teachers or lecturers who work regularly, but under successive and legally separate contracts (hereinafter 'the teacher' or 'teachers'). Their contracts cover, as the case may be, an academic year, a term or even

81 — It should be emphasised that the term 'similar domestic action' cannot vary according to the circumstances of the different claimants in the main proceedings. That action is identified by reference to objective criteria (see point 88 of this Opinion). The 'similar domestic action' would therefore be exactly the same for all the claimants in the main proceedings.

the specific duration of the course. They are interrupted during holiday periods or periods when the person concerned is not teaching.

122. According to the order for reference, [82] a series of contracts of a teacher may, in certain cases, be covered by an 'umbrella' contract. Under such a contract, the teacher and the establishment concerned are under an obligation to renew their various contracts of employment. The parties thus set up a permanent employment relationship. In such circumstances, the time-limit laid down in section 2(4) of the EPA starts running from the end of the employment relationship between the teacher and the establishment. [83]

123. On the other hand, in the absence of an umbrella contract, the teacher and the establishment concerned recover their contractual freedom at the end of each contract of employment. They are then free to continue the employment relationship or not. The House of Lords considered that, in those circumstances, the time-limit laid down in section 2(4) of the EPA began to run as from the expiry date of each contract of employment. [84]

82 — Page 20.

83 — Paragraph 62 of the observations lodged on behalf of Southern Electric plc, South Wales Electric Company plc, Electricity Pension Trustee Ltd, Midland Bank plc, Sutton College, Preston College, Grimsby College and Hull College.

84 — Pages 8 to 10 of the order for reference.

124. The question submitted by the House of Lords concerns, more particularly, teachers whose series of contracts is not covered by an umbrella contract but who nevertheless worked continuously for the same establishment. [85]

125. The national court wishes to verify whether, in those circumstances, it is compatible with Community law to set the starting date of the time-limit under section 2(4) of the EPA as the expiry date of each contract of employment.

126. In that regard, it submits two questions.

(1) The first part of the third question

127. First, the House of Lords asks whether the application of section 2(4) of the EPA in the abovementioned circumstances 'is compatible with the right to equal pay for equal work in Article 119 of the EC Treaty'.

85 — See subparagraphs (a) and (b) of the third question.

128. That question is puzzling

129. Article 119 of the Treaty merely confers 'substantive rights' on individuals. It imposes no obligation on the Member States regarding the introduction of particular procedural rules. Accordingly, that provision is not *in itself* capable of precluding the application of a national procedural rule.

130. In my view, the question of the application of section 2(4) of the EPA in the circumstances described above must be examined in the light of the principle of effectiveness. That principle is in fact the subject of the second question from the House of Lords.

(2) The second part of the third question

131. Secondly, the House of Lords asks whether section 2(4) of the EPA has the effect of rendering virtually impossible or excessively difficult the exercise, by teachers, of their right to retroactive membership of an occupational pension scheme.

132. In its written observations, the Commission maintains that the application of the procedural rule at issue to the actions brought by those teachers was incompatible with the principle of effectiveness in two respects.

First, that procedural rule compels teachers who wish to have their *future* periods of part-time employment recognised for the purpose of calculating their pension rights to introduce an uninterrupted succession of actions for each contract under which they pursue the relevant employment.

Second, the rule at issue prevents account being taken of all the *past* service of the teachers for the purpose of calculating their retirement benefits, even though that service forms part of a continuous employment relationship. Those teachers who brought their first legal action within six months following their last employment contract would be deprived of the opportunity of securing recognition of their service under their earlier contracts.

133. I do not share the Commission's view.

134. As regards *future* periods of employment of teachers, it should be borne in mind that the Occupational Pension Schemes (Equal Access to Membership) (Amendment) Regulations 1995 prohib-

ited, from 31 May 1995, any direct or indirect discrimination based on sex regarding membership of an occupational pension scheme. Therefore, since that date, employers are under a legal obligation to guarantee to teachers working part-time the right of membership of the pension schemes concerned. Those teachers will not therefore be forced to 'validate' their future periods of part-time employment by a succession of legal actions.

135. As regards their *past* service, the application of section 2(4) of the EPA does in fact prevent account being taken of periods of part-time employment under contracts prior to the one or ones in respect of which the persons concerned have brought actions.

136. However, it will be recalled that the Court of Justice 'acknowledge[s], *in the interests of legal certainty* ... that the setting of ... limitation periods... is compatible with Community law ...'. [86]

137. Now, as the United Kingdom Government has emphasised, [87] setting the starting point of the time-limit under section 2(4) of the EPA as the expiry date of each employment contract satisfies requirements of legal certainty.

138. In the absence of an umbrella contract, the teacher and the establishment concerned are free to renew or not renew their various employment contracts. In those circumstances, it is impossible to determine precisely the time at which their employment relationship ends. Correspondingly, it becomes impossible to ascertain precisely the starting point of the period within which legal proceedings must be brought. For reasons of legal certainty, it is therefore necessary to take the view that the employment relationship between the teacher and the establishment concerned ends upon the expiry of each contract of employment and, therefore, to set the starting point of the time-limit as the expiry date of each of those contracts.

139. For those reasons, I conclude that the principle of effectiveness does not preclude the application to proceedings brought by teachers whose successive contracts are not covered by an umbrella contract a time-limit for bringing proceedings under national law of six months starting to run on the expiry date of each contract of employment.

86 — *Fantask and Others*, paragraph 48 (emphasis added).

87 — At paragraphs 6.6 of its observations. See also those lodged on behalf of Southern Electric plc, South Wales Electricity Company plc, Electricity Pension Trustee Ltd, Midland Bank plc, Sutton College, Preston College, Grimsby College and Hull College (paragraphs 67 and 68).

VI — Possible limitation of the effects of the judgment to be delivered

140. In their observations, the United Kingdom Government and the defendants in the main proceedings have drawn the attention of the Court to the financial implications of this case. They consider that, if all the claimants were to secure recognition of their entitlement to retroactive membership of the pensions schemes in question as from 8 April 1976, the total amount payable by the pension schemes would amount to tens of billions of pounds. Their financial equilibrium would be so threatened that certain employers, or former employers, would be unable to discharge their pecuniary obligations.

141. At the hearing, the United Kingdom Government expressly raised the possibility that this Court might limit the effects in time of the judgment to be delivered, in the event of the principle of effectiveness being interpreted as precluding the application of Regulation 12 of the Occupational Pension Regulations in the main proceedings.

142. Since I propose that the Court answer the first question to that effect, it is necessary to consider whether the conditions for imposing such a limitation in time are met.

143. According to settled case-law, 'the Court may exceptionally, having regard to the general principle of legal certainty inherent in the Community legal order and the serious difficulties which its judgment may create as regards the past for legal relations established in good faith, find it necessary to limit the possibility for interested parties, relying on the Court's interpretation of a provision, to call in question those legal relations ...'. [88]

144. In that regard, the Court is 'concerned to establish that these two essential criteria [are] fulfilled before deciding to impose such a limitation, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties'. [89]

145. An examination of the Court's case-law also reveals the existence of a third criterion, which is likewise of essential importance: 'a limitation of the effects in time of an interpretative preliminary ruling can only be in the actual judgment ruling upon the interpretation sought ...'. [90]

88 — *Vroege*, paragraph 21, and *Fisscher*, paragraph 18. See also *Defrenne II*, paragraphs 69 to 75; *Denkavit*, paragraph 17; Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, paragraph 10; Case 826/79 *Mireco* [1980] ECR 2559, paragraph 8; Case 309/85 *Barra* [1988] ECR 355, paragraph 12; and *Barber*, paragraph 41.

89 — *Vroege*, paragraph 21, and *Fisscher*, paragraph 18.

90 — *Vroege*, paragraph 31. See also *Salumi*, paragraph 11; *Denkavit*, paragraph 18; *Mireco*, paragraph 8; *Barra*, paragraph 13; and *Barber*, paragraph 41.

146. I shall consider those three criteria.

147. First, with regard to the existence of 'serious difficulties', the Court has already recognised the risk of 'upset[ting] retroactively the financial balance of many contracted-out pension schemes'. [91] In this case, it seems certain that the pension schemes concerned will be retroactively upset. On the other hand, the extent of such upset is less easy to apprehend. Moreover, at the hearing, the United Kingdom Government described the difficulties encountered by its actuaries in attempting to evaluate precisely the financial ramifications of this case. Lack of information as to the possible total debt of the pension schemes concerned must prompt caution. [92] I consider therefore that the first condition for limiting the forthcoming judgment in time is met.

148. Second, the condition of 'good faith' requires that those concerned could not reasonably have been under any misapprehension as regards the applicability [93] or the scope [94] of the Community provision being interpreted. In this case, two principles of Community law are pertinent: the principle of equal pay and the principle of effectiveness.

As regards the principle of equal pay, the Court has consistently held that: 'As far as the right to join an occupational pension scheme is concerned, ... there was no reason to suppose that those concerned could have been mistaken as to the applicability of Article 119. It has been clear since the judgment in [*Bilka*, cited above] that a breach of the rule of equal treatment as regards recognition of such a right is caught by Article 119 ...' [95]

On the other hand, the question whether those concerned might have doubts as to the scope of the principle of effectiveness is open to discussion. It might be contended that, since the judgments in *Bilka*, *Vroege* and *Fisscher*, cited above, it is clear that a part-time worker who is the victim of indirect discrimination based on sex enjoys the right to retroactive membership of the occupational pension scheme concerned since 8 April 1976. Accordingly, those concerned should have foreseen that a procedural rule limiting the retroactivity of such membership would raise difficulties under Community law. Conversely, it might be thought that, until 11 December 1997, the date of the *Magorrian* judgment, those concerned were not aware that the principle of effectiveness might preclude the application of a procedural rule such as Regulation 12 of the Occupational Pension Regulations.

91 — *Barber*, paragraph 44.

92 — As the case-law appears to require (see *Defrenne II*, paragraph 74).

93 — See, in particular, *Barber*, paragraph 43.

94 — See, in particular, *Denkavit*, paragraphs 19 to 21.

95 — *Dietz*, paragraph 20. See also *Vroege*, paragraphs 28 and 29; *Fisscher*, paragraphs 25 and 26; and *Magorrian*, paragraphs 28 and 29.

149. I shall move on from discussion of this point to an examination of the third condition.

150. This Court has consistently considered that if a judgment ruling for the first time on the interpretation requested did not limit its effects in time, no such limitation can be imposed in a future judgment. [96] Consequently, if the Court considered it necessary to limit in time the principle that Community law precludes the application of a procedural rule such as Regulation 12 of the Occupational Pension Regulations, it could have done so only in the *Magorrian* judgment. [97] However, there is no such limitation in *Magorrian*.

151. In those circumstances, I consider that, unless the Court is to depart from its settled case-law, the effects of the judgment to be delivered cannot be limited in time.

152. The reality of the financial consequences of the judgment to be delivered cannot be denied. However, I think that the fear of such consequences may be tempered.

153. Indeed, it is settled that 'the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contribution relating to the period of membership concerned'. [98]

In this case, all the pensions schemes to which the order for reference relates, with the exception of that of Midland Bank, are 'contributory' schemes, in other words those in which the workers are required to pay contributions.

It follows that the claimants will be able to secure retroactive membership of the schemes concerned — and payment of benefits under them — only if they first pay contributions for all the periods of part-time employment of which they seek recognition.

Furthermore, such 'retroactive' contributions may represent a considerable sum for an individual. It must therefore be expected that a considerable number of claimants will be unable to meet an expenditure which is as substantial as it is unforeseen. Also, certain claimants may simply refuse to contemplate such expenditure.

96 — See, in particular, *Bara*, paragraph 14, and *Vroege*, paragraph 31.

97 — See, *mutatis mutandis*, *Vroege*, paragraph 31.

98 — *Fisscher*, paragraph 37.

Conclusion

154. On the basis of the foregoing considerations, I suggest that the Court rule as follows:

(1) Community law does not preclude the application, to an action based on Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) by a worker asserting his right to retroactive membership of an occupational pension scheme, of a time-limit under national law of six months reckoned from the end of the employment to which the originating application relates.

Conversely, Community law precludes the application, to an action based on Article 119 of the Treaty by a worker who asserts his right to retroactive membership of an occupational pension scheme, of a procedural rule under national law which, in the event of a successful outcome, limits to the two years preceding the date of the originating application the effects of the claimant's entitlement to retroactive membership of the occupational pension scheme from which he was excluded.

(2) In order to ensure compliance with the principle of equivalence, an action alleging breach of the principles laid down by the Equal Pay Act 1970 (United Kingdom) cannot be regarded as a domestic action similar to an action alleging infringement of Article 119 of the Treaty.

Subject to (1) above, Community law does not preclude the application, to an action based on Article 119 of the Treaty by a worker who asserts his right to retroactive membership of an occupational pension scheme, of the procedural rules of national law referred to at (1) above, provided that those procedural

rules are not less favourable than those applicable to similar domestic actions. It is for the national court to decide whether that is the case, in the light of the criteria enunciated in the judgment of 1 December 1998 in Case C-326/96 *Levez* and in the present judgment.

(3) Subject to (2) above, Community law does not preclude the application, to an action based on Article 119 of the Treaty by a teacher

(a) who works regularly for the same employer under successive legally distinct contracts, and

(b) whose series of employment contracts is not covered by an 'umbrella' contract under United Kingdom law, and

(c) who asserts his right to retroactive membership of an occupational pension scheme,

of a time-limit of six months under national law for bringing proceedings which starts to run on the expiry date of each contract of employment.