OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 6 September 2007 [1]

I — Introduction

1. The Bayerisches Verwaltungsgericht Munchen (Bavarian Administrative Court, Munich) (Germany) has referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Directive'). [2]

2. The proceedings arose as a result of the refusal to award a pension to the survivor of a same-sex partnership between individuals who had not married because, under national law, marriage is restricted to heterosexual unions. The case is thus part of the long process of accepting homosexuality, [3] which is a vital step towards achieving equality and respect for all human beings.

3. The referring court seeks to ascertain whether the claim of the claimant in the main proceedings falls within the scope of the Directive (first and second questions); whether there is discrimination on grounds of sexual orientation, contrary to the Directive (third and fourth questions); and whether there must be a restriction *ratione temporis* of entitlement to the pension (fifth question).

1 — Original language: Spanish.

2 — OJ 2000 L 303, p. 16.

3 — Haggerty, G.E., *Gay Histories and Cultures, An Encyclopedia,* Garland-Publishing, New York and London, 2000, p. 451, explains that the term homosexuality was used for the first time in 1869 by the German-Hungarian writer and translator Karl Maria Kertbeny (1824-1882) in response to a paragraph of the Prussian Criminal Code under which sexual relations between men were classified as a criminal offence. Kertbeny attempted in vain to have the paragraph repealed. The provision was included in the Criminal Code of the German Empire in 1871. The seriousness of the offence was increased under the Third Reich and it remained in force in the Federal Republic until 1969. In the 1880s, Kertbeny's neologism attracted the attention of the well-known sexologist Richard von Krafft-Ebing, who included it in his work *Psychopathia sexualis,* which was very popular in the period 1886-87, and its use spread in clinical and scientific circles at the end of the nineteenth century.

4. Accordingly, it is necessary to analyse two matters: the definition of the concept of pay vis-à-vis the concept of social security benefit, and the concept of discrimination on grounds of sexual orientation. While the Court has frequently considered the first matter, it has dealt with the second on only a few occasions.

II — The legal framework

A — *The Community legislation*

1. The EC Treaty

5. The Treaty of Amsterdam [4] inserted into the EC Treaty a new version of Article 13(1), which provides:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

6. The Treaty of Nice [5] added a paragraph 2 to Article 13 EC, pursuant to which:

'2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.'

2. Directive 2000/78

7. The Directive was adopted on the basis of Article 13 EC, and it is important to draw attention to a number of its recitals. Recital 13 excludes 'social security and social protection schemes whose benefits are not treated

4 — OJ 1997 C 340, p. 1.

5 — OJ 2001 C 80, p. 1.

as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, [and] any kind of payment by the State aimed at providing access to employment or maintaining employment.' Recital 22 states that the Community rules are 'without prejudice to national laws on marital status and the benefits dependent thereon'.

8. Article 1 of the Directive states that the aim of that measure is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

9. Article 2 defines the concept of discrimination, differentiating in paragraph 1 between direct and indirect discrimination. In accordance with paragraph 2, 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1', while 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons'. Paragraph 2 allows for a number of exceptions, such as where the discrimination is perceived to be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

10. Article 3 concerns the scope of the Directive:

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

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

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

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

…

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

…'

B — *The German legislation*

1. The transposition of Directive 2000/78

11. Under Article 18 of the Directive, the time-limit for implementation by the Member States ended on 2 December 2003. [6] However, the Gesetz zur Umsetzung Europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung (Law transposing the European Directives on the principle of equal treatment) was not enacted until 14 August 2006. [7]

2. The survivor's pension and the paying agency

12. Paragraph 1 of the Tarifordnung für die deutschen Theater (Pay scheme for Germany's theatres) of 27 October 1937 [8] provides that all employers must take out an old-age pension and a survivor's pension for the artists they engage. Under Paragraph 4, the employer and the worker each pay half of the premiums.

6 — Pursuant to the second paragraph of Article 18, under certain conditions, Member States were entitled to have an additional period of three years from the stated date of 2 December 2003 in respect of the provisions on age and disability discrimination.

7 — BGBl. I, p. 1897. In addition to Directive 2000/78, the Law also transposes Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22); Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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 (OJ 2002 L 269, p. 15); and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

8 — Reichsarbeitsblatt 1937, part VI, p. 1080.

13. The body responsible for administering the insurance scheme is the Versorgungsanstalt der deutschen Bühnen ('VddB'), a legal person governed by public law, which is represented by the Bayerische Versorgunskammer. The body has its headquarters in Munich and its activities cover the whole territory of the Federal Republic. Its Regulations, dated 12 December 1991, [9] set out the body's composition, its duties, and the benefits it is required to provide.

14. Under Paragraph 27(2) of the Regulations, as conditions for the grant of pensions to survivors, the insurance, whether compulsory or voluntary, must have been in force immediately prior to the operative event and the qualification period must have been satisfied.

15. In particular, Paragraphs 32 and 34 of the Regulations provide that a 'wife' or 'husband' is entitled to a widow's or widower's pension, provided that the 'marriage' was in force on the date of the insured's death.

3. The legislation governing registered partnerships

16. The Lebenspartnerschaftsgesetz (Law on registered civil partnerships; 'LPartG') of 16 February 2001 [10] created, for people of the same sex, a family-law institution which resembles marriage.

17. Paragraph 1(1) provides that, to register such a union, it is necessary to demonstrate the desire to set up a life-long partnership. For the duration of the relationship, the partners must support and care for one another (Paragraph 2). They must contribute to the common needs of the partnership and, with regard to maintenance obligations, they are bound by the provisions of the Civil Code applicable to spouses (Paragraph 5). Like spouses, the partners are subject to the financial system of common ownership of property acquired *ex post facto*, although they are free to agree to a different system (Paragraph 6). In addition, each partner is regarded as a member of the other partner's family (Paragraph 11). In a further similarity to the provisions of the Civil Code, should the partners separate, the maintenance obligation remains (Paragraph 16) and there must be an equalising apportionment of pension entitlements (Paragraph 20).

18. In accordance with Paragraph 46(4) of Book VI of the Sozialgesetzbuch (Social Security Code), [11] registered partnerships are

9 — Bundesanzeiger 1991, p. 8326, and 1992, p. 546, as subsequently amended.

10 — BGBl. I, p. 266, as subsequently amended.

11 — In the version provided by the Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts (Law reviewing civil partnership law) of 15 December 2004 (BGBl. I, p. 3396), which the representative of the VddB is unaware of because he asserted at the hearing that Paragraph 46 excluded equal treatment with regard to pensions.

placed on an equal footing with marriage for the purposes of old-age pension schemes, and spouses and registered partners are treated in the same way in that regard.

III — The facts, the main proceedings and the questions referred for a preliminary ruling

19. Mr Maruko and another man entered into a registered partnership pursuant to the LPartG on 8 November 2001.

20. Mr Maruko's partner worked as a theatre costume designer and had been affiliated to the VddB continuously since 1 September 1959, because, even when affiliation was not compulsory, he had continued paying contributions voluntarily during the period from 1 September 1975 to 30 September 1991. He died on 12 January 2005.

21. On 17 February 2005, Mr Maruko applied for a widower's pension [12] which the VddB, by a decision of 28 February 2005, refused to grant him on the ground that the Regulations made no provision for such survivor's benefits to be paid to registered partners. After appealing unsuccessfully against that decision, the claimant brought an action before the courts.

22. The Bayerisches Verwaltungsgericht Munchen, has concluded that the German provisions do not confer on the claimant any entitlement to the disputed pension because Paragraphs 32 and 34 of the VddB Regulations require that the applicant and the insured must have been married, while the terms 'widower', 'widow', 'husband' and 'wife' are not to be interpreted broadly because the registered partnership institution is restricted to persons who cannot marry one another. Furthermore, the referring court considers that the provisions concerned are compatible with other hierarchically superior national provisions, in particular, Paragraph 3 of the German Basic Law. [13]

23. That being the situation, since it is of the opinion that the action may be upheld only by virtue of the Community provisions, the Bayerisches Verwaltungsgericht Munchen

12 — It is not clear whether the claimant is in receipt of a pension from the German social security system because, when I questioned him about it at the hearing, the claimant's representative admitted he did not know.

13 — Order of 29 February 2000 of the Bundesverfassungsgericht (Constitutional Court) and judgment of 29 July 2005 of the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Administrative Court).

stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is a compulsory occupational pension scheme, such as the scheme at issue in this case administered by the [VddB], a scheme similar to state schemes as referred to in Article 3(3) of Council Directive 2000/78 …?

(2) Are benefits paid by a compulsory professional pension institution to survivors in the form of widow's/widower's allowance to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78?

(3) Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78 preclude regulations governing a supplementary pension scheme of the kind at issue here under which a registered partner does not after the death of the partner receive a survivor's pension equivalent to that available to spouses, even though — like spouses — the registered partner has been living in a union of mutual support and assistance formally entered into for life?

(4) If the preceding questions are answered in the affirmative: Is discrimination on the grounds of sexual orientation permissible by virtue of recital 22 in the preamble to Directive 2000/78?

(5) Would entitlement to the survivor's pension be restricted to periods from 17 May 1990 in the light of the case-law in *Barber* (Case C-262/88)?' [14]

IV — The procedure before the Court of Justice

24. Written observations were lodged, within the period laid down in Article 23 of the Statute of the Court of Justice, by the VddB, the United Kingdom Government and the Commission.

25. The VddB argues that it administers a state social security scheme which, as such, falls outside the scope of Directive 2000/78. The Vddb maintains that a survivor's pension in the form of a widower's allowance

14 — Case C-262/88 *Barber* [1990] ECR I-1889.

granted by a compulsory pension institution does not come within the concept of 'pay' for the purposes of Article 3(1)(c) of the Directive. Furthermore, even if the Directive were to apply, the institution's Regulations do not give rise to direct or indirect discrimination. Moreover, in the opinion of the VddB, the reference to marital status in recital 22 of the Directive is significant, even though that term does not appear in the enacting terms of the Directive. Finally, the defendant asserts that the *Barber* case-law is not applicable because that case arose in a different type of dispute.

26. The United Kingdom submits that it is appropriate to analyse the fourth question first of all in the light of the wording of recital 22 to Directive 2000/78, which excludes benefits linked to marital status such as the one at issue in the present case where entitlement is conditional on marriage. Accordingly, in the view of the United Kingdom, it is not necessary to examine the other questions referred.

27. The Commission considers that the pension claimed is not one which is paid by a state social security scheme or similar, because it satisfies the conditions laid down by the Court for classification as pay, and, consequently, for the application of Article 3(1)(c) of Directive 2000/78. As concerns the third and fourth questions, which it proposes should be answered together, the Commission refers to the interpretative value of recital 22 to the Directive, from which it infers that there is no obligation on the part of the State to place registered civil partnerships on an equal footing with marriage. However, the Commission goes on to point out that, in the event that a State does treat the two institutions in the same way — a matter which it is for the national court to determine — the principle of equal treatment must be respected. In line with that proposition, the Commission concludes that it is possible to rule out direct discrimination but not indirect discrimination. Lastly, the Commission submits that the Court should not reply to the fifth question because the *Barber* judgment dealt with issues which were different from the ones raised in these proceedings.

28. At the hearing, held on 19 June 2007, oral argument was presented by the representatives of Mr Maruko, the VddB, the Netherlands and United Kingdom Governments, and the Commission.

V — Whether Directive 2000/78 may be relied upon

29. First and foremost, there is an important temporal consideration in this case, since the Member States were required to have transposed the Directive into national law no later than 2 December 2003 but Germany did not enact the relevant legislation until 14 August

2006,[15] while the claimant applied for the pension on 17 February 2005.

30. That raises the question of the direct effect of Directives, in relation to which there is a large body of case-law to the effect that whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly.[16] A Community provision is unconditional where it is not qualified by any condition and is not made subject, in its implementation or effects, to the adoption of any measure either by the Community institutions or by the Member States;[17] it is sufficiently precise where it lays down an obligation in unequivocal terms.[18]

31. Furthermore, a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State, and has for that purpose special powers, is included among the bodies against which a directive may be relied upon.[19]

32. Accordingly, it is necessary to examine whether, in view of the transposition out of time of Directive 2000/78, Mr Maruko is entitled to require the VddB to comply with that directive.

33. First, Article 1 of the Directive sets out the aim of combating discrimination on grounds of sexual orientation as regards occupation, with a view to putting into effect the principle of equal treatment; Article 2 defines the concept of discrimination; and Article 3(1) lists the fields in which the Directive applies to individuals, including the field of pay. Thus, Directive 2000/78 contains an unconditional and precise prohibition of any inequality between employees' pay on grounds of sexual orientation.

15 — In Case C-43/05 *Commission* v *Germany* [2006] ECR I-33, the Court held that, by failing to transpose the Directive at the appropriate time, Germany had failed to fulfil its obligations.

16 — Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Case 152/84 *Marshall* [1986] ECR 723, paragraph 46; Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 40; Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraph 29; Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357, paragraph 11; Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 103.

17 — Case 28/67 *Molkerei-Zentrale Westfalen* [1968] ECR 211; Case C-236/92 *Comitato di coordinamento per la difesa della Cavaand Others* [1994] ECR I-483, paragraph 9; Joined Cases C-246/94 to C-249/94 *Cooperativa Agricola Zootecnica S. Antonio and Others* [1996] ECR I-4373, paragraph 18; and Case C-389/95 *Klattner* [1997] ECR I-2719, paragraph 33.

18 — Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855, paragraph 18.

19 — Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 19; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24; Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 29; Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraph 26; and *Fratelli Costanzo*, paragraph 31.

34. Second, the VddB is a public-law body with legal personality and is under the administrative control of the State.

35. I therefore share the view of the Bayerisches Verwaltungsgericht and the Commission that, in the main proceedings, the conditions are met for the recognition of direct effect and the corresponding consequences.

VI — The scope of Directive 2000/78

36. Now that the uncertainty concerning whether the Community legislation may be relied on has been resolved, I invite the Court to reply jointly to the first two questions submitted by the Bayerisches Verwaltungsgericht Munchen, since both concern the scope of Directive 2000/78.

37. Article 3 delimits the scope of the Directive in both positive and negative terms, in that paragraph 1(a) to (d) set out the matters covered while paragraph 3 lists the matters excluded. The referring court asks whether the pension claimed by Mr Maruko may be construed as pay within the meaning of Article 3(1)(c) or as a payment under a State social security scheme within the meaning of Article 3(3), thus falling, respectively, within or outside the provisions of the Directive.

38. For the purpose of resolving those questions and determining the legal nature of the pension at issue, it is necessary to analyse in depth the concepts of 'social security benefit' and 'pay', which are incompatible.

39. By the fourth question, the referring court enquires about the implications of the statement made in recital 22 to the Directive to the effect that benefits dependent on marital status are unaffected by the Directive. That question therefore concerns the scope of the Community measure but must be dealt with independently because it relates to a separate sphere.

A — *Social security benefits*

40. Article 3(3) of Directive 2000/78 excludes payments of any kind made by state schemes or similar, including state social security or social protection schemes, while recital 13 states that the Directive does not

apply to 'social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 EC …'.

41. That serves to preserve the special nature of social security schemes, which are governed by specific measures such as Regulation (EEC) No 1408/71 of the Council of 14 June 1971 ('the Regulation'). [20]

1. Social security benefits

42. By excluding 'payments of any kind', Directive 2000/78 refers to all the 'benefits' and 'pensions' defined in Article 1(t) of Regulation No 1408/71, which include 'all elements thereof payable out of public funds, revalorisation increases and supplementary allowances … as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions'.

43. Although not very precise, that definition reveals that the concept was intended to be a broad one, and it contains certain essential requirements such as the 'public' nature of the funds paid.

44. Article 4(1) of Regulation No 1408/71, which sets out the matters covered, refers to '… all legislation concerning the following branches of social security: … (d) survivors' benefits …'. The wording implies that taking out a widow's/widower's pension is not enough to ensure the application of the Regulation and that such a pension must, in addition, be linked to the social security system. [21]

2. Social security

45. The Regulation does not provide a definition of its subject-matter owing to the differences between the schemes of the Member States, a fact which is referred to in the third

20 — Regulation on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition *1971(II),p. 416*), as subsequently amended.

21 — In any event, the notion of social security benefits is the subject of lively debate. See Mavridis, P. L*a sécurité sociale à l'épreuve de l'intégration européenne. Etude d'une confrontation entre libertés du marché et droits fondamentaux,* Bruylant, Brussels, 2003, p. 214.

and fourth recitals. [22] The absence of a definition does not preclude a more detailed analysis of the concept with a view to providing the most appropriate reply possible to the referring court.

46. Leaving aside debatable precedents [23] and premonitory rhetoric, [24] social security applies to risks which are characterised by their widespread occurrence and by the shared belief that such risks need to be dealt with collectively and jointly. [25]

47. The increased productivity brought about by the Industrial Revolution [26] led to the creation of specific methods of providing protection for the working population. [27] The models vary from country to country but two in particular stand out: the contribution model, where the amount of the benefits is dependent on previous contributions, and the welfare model, which is independent of such contributions.

48. However, nearly all the current systems combine aspects of both models and there is a tendency for the two to converge. [28] In that connection, it is interesting to refer to the second report by William Beveridge, which placed under the umbrella of social security all the measures adopted by the State to protect its citizens against risks which affect individuals and can never be avoided, no matter how advanced the society in which those individuals live. [29]

22 — The lack of a Community definition is evident in all types of legislation. For example, the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32; consolidated version at OJ 1998 C 27, p. 1) excluded social security from its scope (point 3 of the second paragraph of Article 1) but did not define the term since, according to the Jenard Report (OJ 1979 C 59, p. 1), it is 'a field which is in a state of constant development'.

23 — Montoya Melgar, A., 'Don Quijote, patrono y juez laboral. Apuntes de un profesor de Derecho del Trabajo en el IV Centenario del Quijote', *Revista española de derecho del trabajo,* no 126, April-June 2005, p. 14, recalls that Don Quixote explained to the goatherds that the 'order of knights errant' was founded 'to defend maidens, relieve widows, and succour the orphans and the needy' (M. de Cervantes Saavedra, *Don Quixote*, translated by J.M. Cohen, Penguin Books, Harmondsworth, 1986, The First part, Chapter XI, p. 87).

24 — In a speech given in Angostura on 15 February 1819 (published in *Correo del Orinoco,* nos 19 to 22, from 20 February to 13 March 1819), Simón Bolívar, renowned figure of the Latin American independence movement, declared that 'the ideal system of government is one which produces the highest possible levels of happiness, social security and political stability'.

25 — Alarcón Caracuel, M.R. and González Ortega, S., *Compendio de Seguridad Social,* 4th updated edition, Tecnos, Madrid, 1991, p. 15.

26 — Watt's invention of the steam engine in 1769 marks the starting point. A mere 15 years later, in 1784, Cartwright adapted that invention for use in one of the industries at the forefront of the development of capitalism, the textile industry.

27 — In the Imperial Message to the Reichstag of 17 November 1881, Bismarck stated that '… the healing of social wrongs must be sought not solely through the repression of … excesses but by seeking moderate mechanisms by which the well-being of the workers can be improved', and he created a number of social insurances: for sickness (1883), for accidents at work (1884), for invalidity and old age (1889), and for survivors (1911).

28 — Alarcón Caracuel, M.R. and González Ortega, S., op. cit., pp. 27 and 28.

29 — *Full Employment in a Free Society,* London, 1944, p. 11. The first report, *Social Insurance and Allied Services,* London, 1942, was used for the great reform which took place in the United Kingdom between 1945 and 1948.

49. In that regard, a number of features stand out:

— it is the responsibility of the State to enact protective measures, either directly or indirectly; [30]

— the status of beneficiary is accorded merely by virtue of citizenship;

— the aim is to prevent and remedy unavoidable ills.

50. Those features are qualified by reference to a particular time or a particular country, because each period in history aspires to a 'protection ideal'. [31] However, owing to its internationalisation, [32] the material scope of social security now has a certain degree of stability and there is evidence of undeniable progress in the Community interest it provokes. [33]

51. The three features referred to also demonstrate that social security is autonomous with respect to employment law, [34] a fact which is evident in a number of areas, namely, the individuals covered, the protection provided, and the way in which the system is financed and administered. [35]

52. That autonomy from employment law has a bearing on the definition of pay developed by the Court.

30 — The special nature of the manner in which protection is provided serves to distinguish social security from other forms of assistance, such as care from within the family or from religious and trades-union organisations.

31 — Alonso Olea, M. and Tortuero Plaza, J.L., *Instituciones de Seguridad Social*, 17th revised edition, Civitas, Madrid, 2000, p. 21.

32 — Article 25(1) of the Universal Declaration of Human Rights, 1948, provides that 'Everyone has the right to … medical care and … to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' On a more modest but more effective scale, Convention 102 of the International Labour Organisation, which was supplemented in 1967 by Convention 128, groups the areas of protection into nine branches: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. However, the ratifying states are required to provide protection in respect of only three of those branches. At European level, the following are relevant: the European Social Charter (points 3 and 11 to 17), the European Code of Social Security, 1964, and the European Convention on Social Security, 1972.

33 — González del Rey Rodríguez, I., 'Directrices y orientaciones en materia de seguridad social', *La transposición del derecho social comunitario al ordenamiento español*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2005, p. 633 et seq., in particular p. 639.

34 — An approach shared by academic writers in the field of social security. Durand, P., *La politique contemporaine de sécurité sociale*, Dalloz, Paris, 1953, was one of the first to draw attention to the differences between the two branches of law.

35 — Almansa Pastor, J.M., *Derecho de la Seguridad Social*, 7th edition, Tecnos, Madrid, 1991, pp. 64 and 65.

B — *The concept of pay*

1. General

53. Directive 2000/78 applies to all persons in relation to 'employment and working conditions, including dismissals and pay', but it does not define any of those concepts.

54. It would be appropriate, therefore, to refer to the definition of pay in Article 141 EC and the case-law in which that definition has been interpreted. Article 141 EC requires the Member States to guarantee equal pay between male and female workers, and, as is clear from its title, preamble and Article 1, the Directive shares that aim of combating discrimination in the workplace, although it does not concern solely discrimination based on sex. Moreover, recital 13 to the Directive refers specifically to Article 141 EC for the purpose of delimiting the social security benefits to which it applies.

55. The existence of pay is fundamental to the formation of the employment relationship, [36] which explains the broadness of the expression in Article 141(2) EC: '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'.

56. As I have pointed out in previous Opinions, [37] the Court has constructed a legal definition of the term 'pay' gradually over time. The Court has held that the concept includes, by way of example, travel facilities provided by a railway company for employees upon their retirement and which extended to members of their families, so that relatives of former employees had also to enjoy those facilities on the same terms; [38] continued payment of a salary during sick leave; [39] benefits paid in connection with

36 — That is why Sancho Panza complains to Don Quixote about the fact that he has not received the smocks which Altisidora promised him if he cured her: 'Really, sir, I'm the most unfortunate doctor in the whole world. There are physicians who kill their patients and get paid for their trouble, though they do no more than sign a slip of paper for medicines which the apothecary makes up for them, and the trick's done. Yet though bringing that maiden to life has cost me drops of blood, slaps, pinches, pricks and whippings, I don't get a farthing…' (M. de Cervantes Saavedra, op. cit., The Second Part, Chapter LXXI, p. 921).

37 — Of the most recent Opinions, see in particular Case C-356/03 *Mayer* [2005] ECR I-295, points 35 and 36, and Case C-207/04 *Vergani* [2005] ECR I-7453, points 31 and 39.

38 — Case 12/81 *Garland* [1982] ECR 359.

39 — Case 171/88 *Rinner-Kühn* [1989] ECR 2743.

redundancy;[40] compensation paid to staff council members, in the form of paid leave or overtime pay, for attendance of training courses which impart the knowledge necessary for working on staff councils, even though during the training courses they do not perform any of the work provided for in their contract of employment;[41] the right to join an occupational pension scheme;[42] benefit paid by an employer under legislation or collective agreements to a female employee on maternity leave;[43] the end-of-year bonus paid by an employer under a law or collective agreement;[44] compensation paid for the termination of employment;[45] a Christmas bonus, which is voluntary and may be revoked at any time, and which is paid as an incentive for future work and loyalty to the undertaking;[46] a monthly salary supplement;[47] calculation, for the purposes of length of service, with the resulting financial implications, of the duration of military service;[48] and a bridging allowance, paid in addition to a redundancy payment, following the restructuring of an undertaking.[49]

57. A number of common elements are clear in all those judgments, which uphold the view that 'pay' comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, from his employer[50] in respect of his employment ,[51] even if the employment relationship has already been terminated,[52] and irrespective of whether such consideration is paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis.[53]

2. Pensions

58. When applying Article 141 EC to pensions, the Court has qualified the usual criteria.

59. Thus, the Court excluded from the concept of pay retirement pensions directly governed by legislation — hence without any element of agreement — where those

40 — *Barber*.

41 — Case C-360/90 *Bötel* [1992] ECR I-3589.

42 — Case C-57/93 *Vroege* [1994] ECR I-4541 and Case C-128/93 *Fisscher* [1994] ECR I-4583.

43 — Case C-342/93 *Gillespie and Others* [1996] ECR I-475; Case C-411/96 *Boyle and Others* [1998] ECR I-6401; and Case C-147/02 *Alabaster and Others* [2004] ECR I-3101.

44 — Case C-281/97 *Krüger* [1999] ECR I-5127.

45 — Case C-249/97 *Gruber* [1999] ECR I-5295.

46 — Case C-333/97 *Lewen* [1999] ECR I-7243.

47 — Case C-381/99 *Brunnhofer* [2001] ECR I-4961.

48 — Case C-220/02 *Österreichischer Gewerkschaftsbund* [2004] ECR I-5907.

49 — Case C-19/02 *Hlozek* [2004] ECR I-11491.

50 — In paragraph 12 of the judgment in Case C-33/89 *Kowalska* [1990] ECR I-2591, the Court observed that the principle applies to both private employers and public authorities.

51 — Case 80/70 *Defrenne I* [1971] ECR 445, paragraph 6; Case 192/85 *Newstead* [1987] ECR 4753, paragraph 11; Case C-152/91 *Neath* [1993] ECR I-6935, paragraph 28; Case C-167/97 *Seymour-Smith and Pérez* [1999] ECR I-623, paragraph 23; Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, paragraph 56; *Barber*, paragraph 12; *Alabaster and Others*, paragraph 42; and *Vergani*, paragraph 22.

52 — *Barber*, paragraph 12; *Seymour-Smith and Pérez*, paragraphs 23 and 24; and *Hlozek*, paragraph 35.

53 — *Garland*, paragraph 10; *Barber*, paragraph 20; and *Lewen*, paragraph 21.

pensions are applicable to general categories of worker and the contributions are determined by considerations of social policy. [54]

60. However, the Court has held that the concept of pay extends to occupational pension schemes which, although adopted in accordance with statutory provisions, are based on an agreement between the employer and the employees' representatives, are an integral part of the contracts of employment, and supplement the benefits provided for in national legislation with other benefits financed entirely by the employer. [55] In the same way, the Court has included in the concept contracted-out pension schemes which apply only to the employees of certain undertakings, even though the employees pay contributions. [56]

61. The Court has also extended the Community definition to pension schemes for civil servants in the Netherlands, [57] France, [58] Finland [59] and Germany; [60] to widows'/widowers' pensions which are provided under occupational schemes and are dependent on the employment held; [61] and to survivors' pensions, [62] holding that the fact that the pension is not paid to the employee has no effect on the latter. [63]

62. The Court has put forward a number of distinctive guidelines:

— The statutory origin of the scheme is an indication that the benefits are in the nature of social security, [64] although that is not sufficient to exclude Article 141 EC. [65]

— The fact that the pension is supplementary in nature in relation to a benefit provided by a statutory social security scheme is not a conclusive criterion either. [66]

54 — *Defrenne I*, paragraphs 7 and 8.

55 — Case 170/84 *Bilka* [1986] ECR 1607, paragraphs 20 to 23, and Joined Cases C-234/96 and C-235/96 *Deutsche Telekom* [2000] ECR I-799, paragraph 32.

56 — *Barber*, paragraphs 22 to 30.

57 — Case C-7/93 *Beune* [1994] ECR I-4471.

58 — Case C-366/99 *Griesmar* [2001] ECR I-9383.

59 — Case C-351/00 *Niemi* [2002] ECR I-7007

60 — *Schönheit and Becker*.

61 — Case C-109/91 *Ten Oever* [1993] ECR I-4879; Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389; and Case C-147/95 *Evrenopoulos* [1997] ECR I-2057.

62 — Case C-50/99 *Podesta* [2000] ECR I-4039 and Case C-379/99 *Menauer* [2001] ECR I-7275.

63 — *Ten Oever*, paragraphs 12 and 13; *Coloroll Pension Trustees*, paragraph 18; *Evrenopoulos*, paragraph 22; and *Menauer*, paragraph 18.

64 — *Defrenne I*, paragraphs 7 and 8, and *Ten Oever*, paragraph 9.

65 — *Beune*, paragraph 26, and *Niemi*, paragraph 41.

66 — *Barber*, paragraph 27; *Beune*, paragraph 37; *Griesmar*, paragraph 37; and *Niemi*, paragraph 42.

— The arrangements for funding and managing must be taken into account but are not decisive for the purposes of determining whether the pension falls within the scope of Article 141 EC. [67]

— It is necessary to assess whether the pension concerns only a particular category of workers, and if its amount is calculated by reference to the period of service completed and based on the worker's last salary, since those factors preclude considerations of social policy, of State organisation, of ethics, or budgetary concerns from prevailing. [68]

— Accordingly, the decisive factor is not the legal nature of the benefits [69] but rather the relationship with the employment, [70] the sole criterion which, albeit not exclusive, may prove decisive. [71]

67 — *Beune*, paragraph 38; *Griesmar*, paragraph 37; and *Niemi*, paragraph 43.

68 — *Beune*, paragraph 45; *Evrenopoulos*, paragraph 21; *Griesmar*, paragraph 30; *Niemi*, paragraph 47; and *Schönheit and Becker*, paragraph 58.

69 — At the hearing, the Commission asserted categorically that a survivor's pension constitutes pay.

70 — *Garland*, paragraph 10; *Gillespie and Others*, paragraph 12; *Alabaster and Others*, paragraph 42; *Schönheit and Becker*, paragraph 56.

71 — Case C-457/98 *Commission* v *Greece* [2000] ECR I-11481, paragraph 11; *Beune*, paragraphs 43 and 44; *Evrenopoulos*, paragraphs 19 and 20; *Podesta*, paragraph 26; *Griesmar*, paragraph 28; and *Niemi*, paragraphs 44 and 46.

C — *The characteristics of the survivor's pension at issue*

1. Initial observations

63. The VddB relies on a number of judgments of German courts in support of its contention that it administers a scheme similar to a statutory social security scheme.

64. Nevertheless, it is necessary to determine whether the pension at issue comes within the concept of 'pay', as defined in the Community legislation, without analysing in full the scheme administered, because the Court must examine questions referred for a preliminary ruling in the light of Community law, according to the information supplied in the order for reference.

2. Analysis of the pension pursuant to case-law

65. The pension at issue is based on the Tarifordnung für die deutschen Theater, which is equivalent to a collective agreement (Tarifvertrag), although it was not exactly so on the date of enactment — 27 October 1937 — because, under National

Socialism, agreements between management and labour were replaced with regulations laying down working conditions, known as Tarifverordnungen.

66. Like the other benefits provided for in Paragraph 27 of the Regulations of the VddB, that is to say, benefits in respect of retirement, invalidity and survivorship, the pension concerned supplements the benefits provided for in general legislation.

67. The pension is funded by the employer and the employee, while the federal State and the *Länder* do not pay contributions. [72]

68. The scheme is administered by the VddB, a public-law institution with legal personality. The VddB acts independently in accordance with decisions taken by the board of directors, which consists of 15 employers' representatives and 15 employees' representatives who are appointed by the management and labour organisations. The board of directors is subject to review as regards its legality and to monitoring by the Bundesministerium für Arbeit und Sozialordnung (Federal Ministry of Employment and Social Affairs), which has devolved those powers to the competent ministries of the Land of Bavaria. The rules governing the supervision of insurance undertakings, which are not organisations responsible for administering statutory social security schemes, are applicable by analogy. [73]

69. However, those particular features are only circumstantial. In accordance with the case-law cited, it is necessary to focus on the category of employees concerned and the method of calculating the pension.

70. In that connection, first of all, the insured must have been affiliated to the VddB before the operative event took place. That requirement of affiliation is compulsory for theatrical professionals employed by German theatres, in other words for a specific category of workers. [74] However, voluntary affiliation is also permitted owing to the precariousness and the lack of employ-

72 — The Bayerisches Verwaltungsgericht states that the contributions amount to 9% of the salary, reaching 16% where the insured is exempt from contributing to the statutory scheme.

73 — The second sentence of Paragraph 1 of the Gesetz über die Beaufsichtigung der Versorgungsanstalt der deutschen Bühnen und der Versorgungsanstalt der deutschen Kulturorchester of 17 December 1990 (BGBl. I, p. 2866), in the version of the Law of 26 March 2002 (BGBl. I, p. 1219).

74 — In *Griesmar* and *Schönheit and Becker*, all civil servants were regarded as a particular category of workers (paragraphs 31 and 60, respectively); while in *Niemi* employees of the Finnish armed forces were thus regarded (paragraph 49).

ment continuity, which are inherent in the sector. The claimant's partner exercised that right and paid voluntary contributions for more than 16 years.

71. Second, the benefits are not paid under a 'pay-as-you-go' system, where the disbursements in a calendar year are covered by the receipts from the same calendar year, but rather under a 'funded' system, where a separate fund is set up for each insured person, from which the principal and interest are used after the period of employment has ceased. The amount of the pension is calculated on the basis of the amount of the contributions, by applying a readjustment factor (first sentence of Paragraph 32(2) and Paragraph 30(5) of the VddB Regulations). [75]

72. Like the Commission, I conclude from the information set out that the pension at issue is derived from the employment relationship of Mr Maruko's partner. Accordingly, the pension must be classified as pay within the meaning of Article 141 EC, from which it follows that it falls within the scope of Directive 2000/78 in that it comes under Article 3(1)(c) thereof. Therefore, the disputed pension does not constitute a payment under a state social security scheme or similar for the purposes of Article 3(3), because it does not satisfy the criteria relating to the features or the purpose of that type of benefit.

D — *The effect of marital status*

73. Recital 22 to Directive 2000/78 states that the provisions of the Directive are 'without prejudice to national laws on marital status and the benefits dependent thereon.' The referring court draws attention to that recital and asks about its implications for the scope of the Directive.

74. In the opinion of the United Kingdom, recital 22 enshrines a clear, general exclusion, which is set out in Article 3(1), pursuant to which the Directive applies '[w]ithin the limits of the areas of competence conferred on the Community'. Those areas of competence do not include benefits dependent on marital status, such as the one in issue in these proceedings, where the grant of the pension is conditional on marriage, from which the United Kingdom concludes that it is not appropriate to consider the remaining questions referred for a preliminary ruling.

75. For the reasons set out below, I disagree with those arguments, even though they appear persuasive and wellfounded.

76. First, as I have explained in previous Opinions, [76] legislative provisions describe

75 — At the hearing, I questioned the representative of the VddB about the calculation formula and his answers were confused and contained clear contradictions.

76 — Paragraph 34 of the Opinion in Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801.

facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule. [77] But the explanatory memorandum, the preamble or the introductory recitals, which merely seek to illustrate, state the reasons for or explain, do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no binding force, notwithstanding their usefulness as criteria for interpretation, a role which the Court has frequently cited. [78] Accordingly, like the rest of the preamble, recital 22 to Directive 2000/78 merely assists with the interpretation of the provisions of the Directive and its significance must not be overstated.

77. Second, the Community has no powers with regard to marital status, a view which is set out in both Article 3(1) of the Directive and recital 22 in its preamble, thereby leaving intact the competence of the Member States in that sphere. Community law accepts each Member State's definition of marriage, singleness, widowhood, and the other forms of 'civil (marital) status'. However, the Member States must exercise that competence in a manner which does not infringe Community law. [79]

78. Third, the principle of non-discrimination on grounds of sexual orientation is included in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 [80] and is specifically laid down in Article 21 of the Charter of Fundamental Rights of the European Union. [81] The fact that it is fundamental in nature [82] means that respect for the right is guaranteed in the European Union, pursuant to Article 6 EU.

79. Fourth, the discrimination complained of by the claimant concerns a right enshrined

77 — Guasp, J., *Derecho*, publisher unknown, Madrid 1971, p. 7 et seq., defines law as 'all the relationships between people which society stipulates are necessary', and draws attention to two factors which encapsulate the essential nature of that concept: the material factor, consisting of relationships between human beings, and the procedural factor, comprising the need for such relationships.

78 — Case 215/88 *Casa Fleischhandel* [1989] ECR 2789, paragraph 31, cited by the United Kingdom.

79 — In relation to social security, see Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46; Case C-92/02 *Kristiansen* [2003] ECR I-14597, paragraph 31; Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 29; Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 33; Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92; and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23.

80 — Judgment of the European Court of Human Rights of 21 December 1999 in *Da Silva Mouta* v *Portugal*, paragraph 28 (Reports of Judgments and Decisions 1999-IX), and of 24 July 2003 in *Karner* v *Austria*, paragraph 33 (Reports of Judgments and Decisions 2003-IX).

81 — OJ 2000 C 364, p. 1. The principle was also enshrined in Article II-81(1) of the Treaty establishing a Constitution for Europe (OJ 2004 C 310, p. 1).

82 — That fundamental nature affords the principle of non-discrimination on grounds of sexual orientation a different status from the one attributed to the prohibition of discrimination on grounds of age in Case C-144/04 *Mangold* [2005] ECR I-9981. The classification of the latter prohibition as a general principle of Community law (paragraph 75) was used by the Commission as the basis for its reasoning, which was contested at the hearing by the representatives of the Netherlands and the United Kingdom.

in Community legal provisions, namely, the prohibition of discrimination on grounds of sexual orientation in relation to workers' pay, having regard to the fact that a survivor's pension satisfies the characteristics of 'pay' since it is derived from an employment relationship rather than from civil (marital) status.

80. The final reason why I disagree with the arguments advanced by the United Kingdom is because, in accordance with Paragraph 27 of the Regulations of the VddB, the operative event giving rise to the pension claimed by the claimant is the death of his partner, in the same way as the operative events for other pensions are incapacity, invalidity or retirement.

81. Accordingly, there are no grounds for disapplying Directive 2000/78 in the present case.

VII — Discrimination on grounds of sexual orientation

82. If the Court agrees with my view that the pension claimed by Mr Maruko falls within the scope of Directive 2000/78, it will be necessary to determine all the consequences of that finding, by ascertaining whether the refusal of the VddB to grant the pension constitutes discrimination on grounds of sexual orientation.

A — *The prohibition of discrimination on grounds of sexual orientation at Community level*

1. Preliminary points

83. Together with freedom of movement, equal treatment is the most long-standing and well established principle of the Community legal system. Furthermore, the principle of equal treatment has evolved over time, extending beyond the boundaries of equal pay for men and women to apply to other fields and other individuals, as Directive 2000/43 demonstrates. Since its early inclusion in the Treaty, the principle, which has been repeatedly supplemented and strengthened, has become a general framework for preventing unjustified discrimination and promoting genuine, effective equal treatment.

84. Moral prejudices and the social exclusion of groups with certain sexual identities have been overcome along the way. Although the

struggle began in order to combat discrimination against women, subsequent efforts have been directed towards discrimination affecting homosexuals [83] — including the first step towards decriminalising same-sex relationships [84] — or transsexuals, as well as discrimination against bisexuals. [85]

85. The Treaty of Amsterdam aimed to expand the principle, as is clear from Article 13(1) EC, which includes the objective of combating discrimination based on sexual orientation.

86. The inclusion in the Treaty of the right to respect for sexual orientation becomes all the more important in the light of the fact that not all Member States had outlawed that type of discrimination [86] and that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not mention it either, [87] although, as I have explained, the European Court of Human Rights has held that the right to respect for sexual orientation falls within the scope of Article 14 of the convention. [88]

87. For its part, the Court of Justice has had a number of opportunities to prevent discrimination against same-sex couples.

2. The judgment in *Grant* [89]

88. It has been clear since the *Garland* judgment in 1982 that the facilities granted by

83 — The starting point can be found in the Resolution of the European Parliament of 8 February 1994 on equal rights for homosexuals and lesbians in the European Union (OJ 1994 C 61, p. 40), which, in the view of Moliner Navarro, R.M., 'El matrimonio de personas del mismo sexo en el Derecho comparado', *Matrimonio y adopción por personas del mismo sexo*, Cuadernos de Derecho Judicial, no XXVI/2005, Consejo General del Poder Judicial, Madrid, 2006, p. 219, had significant repercussions and provoked a sea change in attitudes to such matters, by giving rise to a number of legislative initiatives.

84 — Amnesty International has condemned the continued persecution of homosexuals in more than 70 countries and the fact that 8 of those countries provide the death penalty for homosexuality, namely Afghanistan, Saudi Arabia, Iran, Mauritania, Pakistan, Sudan, Yemen and certain States in northern Nigeria; and the fact that, in other countries, prison sentences are for life.

85 — Chacartegui Jávea, C., *Discriminación y orientación sexual del trabajador*, Lex Nova, Valladolid, 2001, p. 139.

86 — Wilets, J.D., 'The Human Rights of Sexual Minorities: A Comparative and International Law Perspective', *Fall Human Rights*, no 22, 1995, pp. 22 to 25. In his 1975 film Love and Death, Woody Allen observes that there are homosexual people, heterosexual people and people who are not interested in sex at all and become lawyers. Although the sarcasm is intended to show how difficult it is for the law to govern emotional relationships, the law can define those relationships to varying degrees.

87 — That omission is also apparent in the Universal Declaration of Human Rights of 10 December 1948 and in the International Covenant on Civil and Political Rights of 16 December 1966. In the case of the latter, the United Nations Human Rights Committee has held that the references to 'sex' in articles 2 and 26 include sexual orientation and that the rights set out in the provisions cannot be denied on the basis of a person's sexual orientation (Human Rights Committee, Toonen v Australia, paragraph 8.7, Communication No 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), and *Young* v *Australia*, paragraph 10.4, Communication No 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003)).

88 — Point 78 of this Opinion.

89 — Case C-249/96 [1998] ECR I-621.

railway companies to their employees and to their employees' spouses and dependants, on the basis of the contract of employment, constitute 'pay' within the meaning of Article 141 EC. That was probably the belief which motivated Ms Grant to claim that the refusal by her employer to grant her the travel concession provided for in the contract of employment for the spouse or the unmarried partner of the opposite sex infringed Article 141 EC, because she was in a stable relationship with another woman.

89. Ms Grant maintained that such a refusal amounted to direct discrimination based on sex. Her submission was based on the 'but for' test, which states that if a female worker does not receive the same benefits as her male counterpart, all other things being equal, she is the victim of discrimination based on sex. Ms Grant argued that the mere fact that the male worker who previously occupied her post had obtained travel concessions for his female partner, without being married to her, was enough to identify discrimination. Ms Grant further claimed that such a refusal constituted discrimination based on sexual orientation, which is included in the concept of discrimination based on sex in Article 141 EC, since differences in treatment based on sexual orientation have their origins in atavistic prejudices.

90. The Court held that the refusal by an employer to allow travel concessions to the same-sex partner of one of its workers, where such concessions are allowed to the person of the opposite sex with whom a worker has a stable relationship outside marriage, did not constitute discrimination prohibited by the Community rules (paragraph 50). There was no direct discrimination based on sex because the condition applied to both male and female workers with a partner of the same sex (paragraphs 27 and 28). The Court also noted that in the present state of Community law, stable homosexual relationships are not regarded as equivalent to marriages or stable heterosexual relationships (paragraph 35).

91. Thus, while discrimination on grounds of sex would be unlawful, discrimination based on sexual orientation would not because it is not contrary to any provisions of Community law.

92. The restrictive approach opted for by the Court contrasted, for example, with the case-law on discrimination based on maternity [90] and was surprising because the Court

90 — That line of authority began with Case C-177/88 *Dekker* [1990] ECR I-3941 and Case C-179/88 *Hertz* [1990] ECR I-3979, and continued with Case C-32/93 *Webb* [1994] ECR I-3567; Case C-394/96 *Brown* [1998] ECR I-4185; Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327; Case C-109/00 *Tele Danmark* [2001] ECR I-6993; Case C-284/02 *Sass* [2004] ECR I-11143; Case C-191/03 *McKenna* [2005] ECR I-7631; and Case C-294/04 *Sarkatzis Herrero* [2006] ECR I-1513.

observed in the judgment that the Treaty of Amsterdam, which had been signed only a few months before, would allow the Council to eliminate various forms of discrimination, including discrimination based on sexual orientation (paragraph 48).

3. Subsequent case-law

93. Since *Grant*, other cases have dealt with discrimination linked to sexuality. It is appropriate to refer to the two cases cited in the written observations submitted in the present proceedings.

94. In *D and Sweden* v *Council*, [91] the Court was seised of an appeal in which it was required to examine the refusal to grant an official of the European Communities a household allowance intended for married couples, because, although the official had registered a civil partnership with another man in Sweden, the Staff Regulations of Officials of the European Communities did not permit his status to be assimilated to marriage. The Court noted that there were a great diversity of arrangements in the Community for registering civil partnerships other than marriage (paragraphs 36 and 50), which made treating such unions in the same way difficult (paragraph 37), and the Court stated that it was for the legislature to adopt the measures required to alter that situation (paragraph 38). [92]

95. The case of *K.B.* [93] concerned a sex change. [94] A British female worker applied for her partner, who had undergone female to male gender reassignment surgery, to receive a widower's pension to which he would be entitled as a surviving spouse, since national law did not permit transsexuals to marry under their new gender. Agreeing with the view I put forward in the Opinion, the Court held that the inequality of treatment did not relate to the award of the pension but to a necessary precondition for the grant of such a pension, namely, the capacity to marry (paragraph 30). The Court ruled that Article 141 EC precludes legislation which, by preventing transsexuals from marrying under their reassigned gender, deprives them of a widow's/widower's pension (paragraph 34). [95]

91 — Joined Cases C-122/99 P and C-125/99 P [2001] ECR I-4319.

92 — As Mr Maruko's representative pointed out at the hearing, the situation was altered by means of Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ 2004 L 124, p. 1).

93 — Case C-117/01 [2004] ECR I-541.

94 — Previously, in Case C-13/94 *P* v *S* [1996] ECR I-2143), the Court had held that dismissal on grounds of gender reassignment was contrary to Community law.

95 — In that connection, the Court found in *Richards* that legislation which denies a transsexual who is now a woman entitlement to a pension at the age of 60 and requires her to wait until she is 65, the age fixed for men, is contrary to Community law.

B — *The discrimination based on sexual orientation, as alleged in the main proceedings*

96. Mr Maruko has been refused a survivor's pension because he was not married to his partner and is not a 'widower', a status which is restricted by law to the spouse of the deceased, and because there is no evidence that such a pension has been granted to other individuals in identical or analogous situations. The refusal to award the pension is not based on the sexual orientation of the insured and therefore there is no direct discrimination contrary to Article 2 of Directive 2000/78.

97. However, the Directive also prohibits indirect discrimination, which occurs where an apparently neutral provision puts persons having a particular sexual orientation at a disadvantage, unless that discrimination is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

98. The national legislation precludes marriage in the situation in issue in the present case. However, it is not for the Court to define emotional relationships between persons of the same sex, a matter which is the subject of fierce debate,[96] or to rule on the effects which the legislation of each Member State attributes to the registration of such partnerships.[97] As I stated in the Opinion in *K.B.*, '[i]t is not a question of developing "European matrimonial law" but of ensuring that the principle that there should be no discrimination based on sex is fully effective' (paragraph 76).

99. The main proceedings concern the inequality between married couples and people who form partnerships governed by different legal arrangements. Accordingly, the dispute does not turn on access to marriage but rather on the effects of the two types of union.

100. It is therefore necessary to establish whether those two types of union warrant equal treatment, for which purpose the national court must determine whether the legal situation of spouses is akin to that

96 — In *D and Sweden* v *Council* the Court observed that the word 'marriage' generally means a heterosexual union and that, since 1989, an increasing number of Member States have introduced other statutory arrangements for unions between persons of the same sex or of the opposite sex, which confer on such unions certain effects which, both between the partners and as regards third parties, are the same as or comparable to those of marriage (paragraphs 35 and 36). Moliner Navarro, R.M., op. cit., p. 221 et seq., classifies countries into four main groups according to how they regulate same-sex unions: countries which do not regulate such unions; countries which have adopted legislation governing registered partnerships — containing minimum and maximum models (like the German legislation); countries which have enacted provisions governing same-sex civil unions; and countries which have opened up the institution of marriage.

97 — Alonso Herreros, D., 'Funcionamiento y eficacia de los Registros de uniones civiles de hecho en España y en otros países europeos', *Cuadernos de derecho público,* no 15, January-April 2002, p. 103 et seq., describes the differences between the systems in Sweden, Norway, Denmark, the Netherlands and France.

of persons in a registered civil partnership. In the event that it is not, the criteria for comparison would not be valid.

101. However, the Verwaltungsgericht has advanced its view, which is shared by the Commission, that a partnership registered pursuant to the LPartG consists in a system of rights and obligations similar to that of marriage. [98]

102. On that premiss, refusal to grant a pension on the grounds that a couple has not married, where two persons of the same sex are unable to marry and have entered into a union which produces similar effects, constitutes indirect discrimination based on sexual orientation, contrary to Article 2 of Directive 2000/78.

103. That view does not diverge from the case-law cited, the factual and legal situations of which were different. The *Grant* judgment preceded Directive 2000/78 and, in paragraph 48, the Court hinted that the enactment of provisions prohibiting discrimination based on sexual orientation would have resulted in a different reply to the question analysed. In *D and Sweden*, the judgment was delivered within the legal framework of the Community Staff Regulations. Finally, *K.B.* concerned a transsexual who was not permitted to marry, thereby giving rise to a very specific dispute. [99]

104. Having established that discrimination exists, there do not appear to be any objective grounds justifying the discrimination; nor have any such grounds been put forward in the preliminary-ruling proceedings.

VIII — The temporal limitation of the widower's pension

105. The final question referred by the Bayerisches Verwaltungsgericht Munchen, asks whether the pension may be restricted to periods subsequent to 17 May 1990, in the light of the *Barber* judgment.

106. *Barber* concerned equal pay for men and women. The Court confirmed the direct

98 — Point 4.3 of Section II of the order for reference.

99 — In paragraph 25 of the Opinion in that case, I stated that transsexualism 'is clearly different from the various conditions associated with sexual orientation (heterosexuality, homosexuality or bisexuality), where the individual unequivocally accepts his or her sex'.

effect of Article 119 of the EC Treaty, the precursor to Article 141 EC, with the qualification that such direct effect could not be relied upon in order to claim entitlement to a pension arising before the date of the judgment, except in the case of individuals who had before that date initiated legal proceedings or raised an equivalent claim under the applicable national law, since otherwise the financial balance of many pension schemes would be jeopardised. [100]

107. As the Commission submits, that interpretation comes within the sphere of financial consequences, and, as the referring court and the VddB argue, the features of the Community provision concerned are not decisive.

108. Having thus defined the parameters of the proceedings, case-law permits a restriction of the right to rely on a provision only in exceptional circumstances, [101] where there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force. [102]

109. The assessment of the risk calls for a number of different factors to be taken into account, such as the number of persons affected, the sums to be paid, and the effect on the viability of the paying agency. In the present proceedings there is no information confirming the existence of such a risk. [103] In such circumstances, the Court has two options: it can either expressly rule against limiting the temporal effects or not reply to the question.

110. The first option would definitively remove any uncertainty albeit without a firm basis. The second option, which is preferred by the Commission and which I also favour, appears more prudent, since it would enable a new reference for a preliminary ruling to be submitted containing the information which is currently missing. [104]

100 — After the *Barber* judgment, the Treaty of Maastricht inserted into the EC Treaty, in 1992, Protocol No 17 concerning Article 141, which, for the purposes of applying Article 141, does not regard benefits paid under an occupational social security scheme as pay where those benefits may be attributed to periods of employment before 17 May 1990, unless the workers concerned or those claiming under them had already commenced legal proceedings or raised an equivalent claim under national law.

101 — Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 67; Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 35; and *Richards*, paragraph 40.

102 — *Bidar*, paragraph 69, and *Richards*, paragraph 42.

103 — The German Government, which could have shed light on the matter, did not participate in the proceedings. Nor has the VddB provided any figures, although it objected to the application of the *Barber* case-law to the main proceedings.

104 — Both options would render it unnecessary to reopen the oral stage of the proceedings, which the representative of the United Kingdom requested at the hearing to allow the other Member States an opportunity to make submissions on the temporal effects of the judgment to be given in these proceedings.

IX — Conclusion

111. In the light of the foregoing considerations, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Bayerisches Verwaltungsgericht Munchen:

'(1) A survivor's pension such as the one claimed in the main proceedings, which is dependent on the deceased's employment, falls within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation but does not constitute a payment made by a state social security scheme or similar.

(2) The refusal to grant such a pension because the partners had not married, where marriage is restricted to persons of the opposite sex, even though the partners had entered into a same-sex union the effects of which are substantially the same as those of marriage, amounts to indirect discrimination based on sexual orientation contrary to Directive 2000/78, and it is for the national court to determine whether the legal situation of spouses is similar to that of persons in a registered civil partnership.

(3) It is not appropriate to consider the fifth question.'