1. Compensation paid to a worker on termination of the employment relationship is a form of deferred pay to which the worker is entitled by reason of his employment but which is paid to him on termination of the employment relationship with a view to enabling him to adjust to the new circumstances arising from such termination. It follows that such compensation falls within the definition of pay for the purposes of Article 119 of the Treaty.

2. Article 119 of the EEC Treaty precludes the application of a clause in a collective wage agreement applying to the national public service under which the employers may exclude part-time employees from the payment of a severance grant when in fact a considerably lower percentage of men than of women work part-time, unless the employer shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

3. Where there is indirect discrimination in a clause in a collective wage agreement, the class of persons placed at a disadvantage, whether men or women, must be treated in the same way and made subject to the same scheme, proportionately to the number of hours worked, as other workers, such scheme remaining, for want of correct transposition of Article 119 of the EEC Treaty into national law, the only valid point of reference.

REPORT FOR THE HEARING
delivered in Case C-33/89 *

I — Facts and procedure

Maria Kowalska, the plaintiff in the main proceedings, was a court employee of the defendant in the main proceedings, the Free Hanseatic City of Hamburg from 1 October 1974 to 31 July 1987. Her last gross salary was DM 1 477.01 a month. Her employment was governed by the Bundesangestelltentarifvertrag (Federal Civil Service Employees' Collective Agreement, hereinafter referred to as 'the Collective Agreement'). Under Article 62 of the Collective Agreement, employees who have contracted to work normal working hours are entitled, subject to certain additional conditions, to a severance grant ('Übergangsgeld') on retirement. The parties agree that the plaintiff fulfils all the conditions for the award of the severance grant, with the exception of the condition whereby the severance grant is awarded only to employees who work at least 38 hours. The

* Language of the case: German.

parties also agree that the amount of the severance grant would, if the plaintiff were entitled to it, be DM 4 431.03 (gross) pursuant to Article 2 of the Collective Agreement.

The severance grant, which is paid by way of temporary assistance by virtue of the employer's duty to have regard to the interests of his employees in the event of termination of the employment relationship in the public service for reasons not imputable to the employee (for example, where retirement age is reached, pension rights are exercised *or* the worker suffers incapacity for work) has always been reserved for full-time workers since it is based on the rules governing the civil service, in which part-time work was formerly unknown. In 1961 the severance grant was included in the Collective Agreement for employees under contract in the public service, after numerous amendments; on that occasion the previous overt discrimination against female workers was abandoned and the rules still in force today were agreed upon.

In the public service in the Federal Republic of Germany, the proportion of women working part-time is much greater than the proportion working full-time. In 1987, women accounted for 55.5% of full-time workers in the public services properly so called; in the other services, that proportion was 52.2%. In the public services properly so called, women accounted for 77.3% of part-time workers, and 97.8% in the other services. Among part-time workers working 20 or more hours a week, 90.2% are women.

Having reached the age of 60 on 10 July 1987, the plaintiff left her employment with the defendant on 31 July 1987. She then asked for payment of the severance grant under Article 62 of the Collective Agreement, but this was refused. In her action before the Arbeitsgericht Hamburg, the plaintiff seeks the payment of the grant by the defendant. She maintains in particular that the limitation of the entitlement to the grant to full-time employees constitutes indirect discrimination against women and is contrary to Article 119 of the EEC Treaty and to 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. The distinction drawn in the Collective Agreement between full-time employees and part-time employees has no objective justification. For its part the defendant considers that the difference of treatment between part-time employees and full-time employees is objectively justified by the fact that part-time employees do not place their full working capacity at the disposal of the employer.

Having doubts as to the compatibility of the disputed rules with Community law and as to the legal consequences of any incompatibility of the Collective Agreement with Community law, in view of the freedom of contract enjoyed by parties to collective agreements, the Arbeitsgericht Hamburg stayed the proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Is there indirect discrimination against women" and hence an infringement of Article 119 of the EEC Treaty of 1957 where a collective wage agreement applying to the public service of the Federal Republic of Germany provides for the payment of Übergangsgeld (a severance grant), whose historical basis lies in civil-service law, of up to four months' salary in the event that a person is discharged from his position as an employee without fault on his part (in particular on account of his attainment of the age-limit, retirement on that ground, incapacity for work or suffering significant loss of fitness for work) but excludes from the payment of that grant employees who have not contracted to work the full normal working hours (38 hours per week), and the number of women part-time employees account for a significantly higher proportion of the total number of part-time employees covered by the Collective Agreement than women full-time employees account for in relation to the total number of full-time employees covered by the Collective Agreement?

(2) If question 1 is answered in the affirmative: does Article 119 in conjunction with Article 117 of the EEC Treaty and/or the provisions of Council Directive 75/117/EEC require that part-time employees should be entitled to the said grant (in proportion to the amount of time worked) contrary to that which is provided in the Collective Agreement or is such an entitlement precluded on the grounds of freedom of contract of the parties to the Collective Agreement?'

The national court is of the opinion that the exclusion of part-time employees from entitlement to the severance grant provided for in Article 62 of the Collective Agreement constitutes indirect discrimination against women which cannot be objectively justified. In view of the large number of part-time employees, it considers that there can be no need for public employers to grant special privileges to full-time staff. However, the national court expresses doubts as to whether the existence of indirect discrimination implies, at law, that part-time employees are entitled to equal treatment or whether the freedom of contract enjoyed by the parties to collective agreements prevents the filling of such lacunae as might result from incompatibility of the Collective Agreement with Community law.

The Arbeitsgericht's order for reference was received at the Court Registry on 9 February 1989.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were lodged by the plaintiff, represented by Dr Klaus Bertelsmann, Rechtsanwalt, Hamburg, and by Prof. Heide Pfarr, by the defendant, represented by Wolfgang Scheer and Rolf Stahmer. Rechtsanwälte, Hamburg, and by the Commission of the European Communities, represented by Bernhard Jansen, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By decision of the Court of 18 October 1989, the case was assigned to the Sixth Chamber.

II — Written observations submitted to the Court

The first question

According to the plaintiff, a severance grant under a collective agreement undoubtedly constitutes pay within the meaning of Article 119 of the Treaty. The unfavourable treatment regarding pay accorded to part-time employees by Article 62 of the Collective Agreement by comparison with full-time employees constitutes indirect discrimination against women and is therefore in breach of Article 119 of the EEC Treaty and Directive 75/117. The exclusion of part-time employees from entitlement to the severance grant cannot — in view of the difficulties encountered by female workers in working full time — be justified by circumstances involving no discrimination based on sex. There is no objective justification for excluding part-time employees from entitlement to the severance grant under Article 62 of the Collective Agreement.

As a result of the exclusion of part-time employees from the right to the severance grant they are treated less favourably than they would be if their entitlement was proportional to their working hours: the evaluation of the difference between full-time work and part-time work should not result in part-time employees receiving no benefit at all but should merely have a *proportional effect* on the amount of the benefit. Thus, part-time employees whose working hours are half those of full-time employees should, according to the plaintiff, merely receive half of the severance grant to which full-time employees are entitled. Only an approach of that kind will ensure proportional treatment for part-time employees and the elimination of any discrimination against women which might be practised in that connection.

The defendant considers that the severance grant under Article 62 of the Collective Agreement does not correspond to the concept of pay in the second paragraph of Article 119 of the EEC Treaty since it is not paid as direct consideration for the work done or services rendered but is intended to facilitate the transition to new employment, to another source of income or to retirement for an employee who has had to stop work for certain reasons. Moreover, it states that the severance grant has a legal basis since before conclusion of the Collective Agreement in 1961 the severance grant was paid by virtue of decrees and regulations laying down prescribed scales.

In the alternative, the defendant contends that there is no question of any discrimination against female part-time employees where a provision conferring a right is in fact more favourable, in its area of application, to female workers than to male workers or grants a right specifically to women on the basis of their sex. That applies to Article 62 of the Collective Agreement. The defendant refers in particular to the laws on pensions which provide exclusively for female workers the possibility of drawing a retirement pension on reaching the age of 60; in that case, the

Collective Agreement grants women the benefit of the severance grant. Entitlement to the severance grant in the event of voluntary termination of the employment contract after the birth of a child is also available exclusively to women.

The Commission, however, insists that the severance grant is pay within the meaning of Article 119 of the EEC Treaty because it is a consideration in cash paid direct by the employer to the employee and the grant and the amount thereof depend on the length of the employment relationship and the contractual amount of the monthly remuneration. It refers in that regard to the judgments of 25 May 1971 in Case 80/70 *Defrenne I* [1971] ECR 445 and of 9 February 1982 in Case 12/81 *Garland* [1982] ECR 359. It also refers to the judgment of 8 April 1975 in Case 43/75 *Defrenne II* [1976] ECR 455, in support of its view that the prohibition of discrimination contained in Article 119 of the EEC Treaty applies also to collective agreements. In view of the fundamental nature of that prohibition, the parties to collective agreements cannot be authorized to contravene it.

In the Federal Republic of Germany in the public service, it is apparent from statistics which also exist at Community and national level that the proportion of women working full time is much lower than that of women working part time, the latter category comprising more than 75% women. Moreover, the Commission considers that the arguments put forward by the parties before the national court contain nothing to support the view that discrimination against part-time employees, consisting in excluding them from entitlement to the severance grant in question, can be objectively justified. In that regard, the origin of the clause of the Collective Agreement at issue is revealing since, in its original version, it even provided for direct discrimination against women. The fact that part-time employees, by contrast with full-time employees, only place part of their working capacity at the disposal of their employer could, if appropriate, justify the application of a rule of proportionality but not complete exclusion from a benefit. The fact that the severance grant was introduced on the pattern of staff regulations governing civil servants which made provision only for full-time employees likewise does not provide sufficient justification in the present circumstances. Finally, in view of the importance of part-time work in the labour market, it cannot be claimed that a public employer does not have an obligation to safeguard the interests of its part-time employees comparable to its obligation towards full-time employees. The Commission can therefore see no valid grounds of justification.

The Commission therefore proposes that the first question be answered as follows:

'A provision in a collective agreement which excludes part-time employees from entitlement to a severance grant awarded upon termination of an employment relationship for reasons not attributable to the employees must, in the circumstances of the present case, be regarded as discrimination against women and therefore a breach of Article 119 of the EEC Treaty, unless the employer shows, to the satisfaction of the national court, that that provision is based on objective factors involving no discrimination based on sex.'

The second question

According to the plaintiff, the answer to the second question must be that part-time employees excluded from entitlement to the severance grant by the Collective Agreement have the right — contrary to what the Collective Agreement indicates — to receive the said grant, in proportion to their working hours. In support of that view, she refers to the abovementioned judgment in Case 43/75, and to the judgments of 4 December 1986 in Case 71/85 *Federatie Nederlandse Vakbeweging* [1986] ECR 3855 and of 24 June 1987 in Case 384/85 *Borrie Clarke* [1987] ECR 2865.

The plaintiff considers that where collective legal regimes, such as collective agreements, are contrary to Community law, the only way to end the discrimination is to extend to the category of persons discriminated against entitlement to the benefits which would have been available to them in the absence of discrimination favouring the recipients of those benefits. It would be irreconcilable with the 'fundamental right' enshrined in Article 117 of the EEC Treaty if, where there was discrimination in collective agreements, the defence of the interests of the category of persons discriminated against could lead not to an increase in the lowest pay for the same work but to the adoption of provisions of a different type. However, the parties to the Collective Agreement would be free to adopt for the future, in a new collective agreement, other provisions which were not discriminatory.

According to the defendant, the second question is devoid of purpose. However, in the event of an affirmative answer being given to the first question, it considers that determination of the effects of the breach of Community provisions by the Collective Agreement is in any case a matter of national law since national law provides ample means of ensuring the direct effect of the Community rules. That applies to the collective agreements concluded in the Federal Republic of Germany, where Article 134 of the *Bürgerliches Gesetzbuch* provides that every legal measure (including collective agreements) which is in breach of a legal prohibition is void unless otherwise provided by law. It refers also to Articles 139 and 140 of the *Bürgerliches Gesetzbuch* of which the principles apply also to collective agreements. The infringement of prohibitions laid down in the EEC Treaty is similar to that of a legal prohibition within the meaning of Article 134 of the *Bürgerliches Gesetzbuch*. To that extent, therefore, the direct effect of the Community rules is guaranteed by the national legal order. It is incumbent upon the national courts to decide whether, in the specific circumstances of each case, a contractual provision contrary to the prohibition of discrimination must be held to be void or partially void or must be converted into a valid provision.

In the alternative, the defendant contends that if it is accepted that Article 62 of the Collective Agreement does indeed relate to pay and moreover is found to be discriminatory, then that provision is entirely void. There is no question of partial nullity of the restriction of the grant to full-time employees. That is apparent from the fact that the signatories would not have wished to retain Article 62 of the Collective Agreement if they had been aware that that restriction was null and void.

The result would be the same if Case 43/75 were relied on. In the circumstances with

which that judgment was concerned, the right of the favoured group to a higher wage was not affected by the nullity of the provisions applicable to the non-favoured group, and the Member State sought to make up for the lack of that advantage not by raising the lower wage for the same work but by adopting provisions of a different kind. By contrast, in the present case, the defendant contends, the advantage available to one category and the disadvantage suffered by the other are closely linked.

The severance grant is a special benefit paid by the employer, on an exceptional basis; such a benefit is unusual during active working life and is of a specific legal nature, and therefore its retention is not essential for the achievement of progress in improving living and working conditions.

Finally, the defendant draws attention to the freedom of contract enjoyed by parties to collective agreements in the Federal Republic of Germany. The Treaty of Rome presupposes the existence of such agreements; that is apparent from Article 118 of the EEC Treaty, which is intended to foster cooperation between the Member States in the spheres of trade union law and collective bargaining. That freedom would be encroached upon if the Court were to uphold a 'most favoured category clause' whereby the discriminatory advantage enjoyed by one category over another did not lead to the invalidity of the provision which created it but rather to the recognition, in favour of the aggrieved category, of a right to enjoy the full benefit of the same advantage.

According to the defendant, such a solution could, in any event only affect the past and take effect retroactively for employees who had brought an action or filed a complaint. Moreover, the recognition of a retrospective right would only be possible in the event of the signatories having no course open to them other than that of eliminating the inequality of treatment previously provided for. For the future, however, the parties to collective agreements should be left free to decide how they intend to replace or supplement a void contractual provision by a valid rule. Until such time as the signatories adopted new provisions, the benefit in question could no longer be paid to workers of either sex. In that way, the principle of equal pay for men and women would be observed and likewise there would be no lacuna in the Collective Agreement and thus no need to adopt new provisions.

According to the Commission, it is apparent from the case-law of the Court that the prohibition of discrimination marks the boundary of the freedom of contract in collective agreements. It is also true that the parties to a collective agreement can eliminate existing discrimination in several ways — in the present case, for example, by extending the rules on the severance grant to part-time employees or by abolishing the severance grant, and the first solution would also make it possible to adjust the amount of the benefit. However, until such time as that is done, the rules at present applicable to full-time employees are the only valid point of reference. For part-time employees that means, specifically, in the circumstances of the present case, that they are likewise entitled to the severance grant, provided that they fulfil all the other qualifying conditions, and the application of the principle of proportionality is already safeguarded by the fact that the grant is calculated on the basis of the most recent

wage. It refers in support to Case 43/75, cited above, to the judgment of 24 March 1987 in Case 286/85 *McDermott and Cotter* [1987] ECR 1453, and to Case 384/85, cited above.

In conclusion, the Commission suggests the following answer to the second question:

'If a provision of a collective agreement is contrary to Article 119 of the EEC Treaty, the courts examining it are entitled and required to eliminate the infringement by applying to the disadvantaged workers the more favourable regime applicable to the workers who have not been discriminated against, taking account, where appropriate, of the principle of proportionality.'

T. F. O'Higgins
Judge-Rapporteur