OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 22 May 2008 [1]

1. The present reference from the Bundesarbeitsgericht (Federal Labour Court), Germany, concerns a clause in an occupational pension scheme whereby a widow(er) of a private-sector employee who dies in service is excluded from entitlement to a survivor's pension if that widow(er) is more than 15 years younger than the deceased employee. The Bundesarbeitsgericht asks the Court whether such a clause is contrary to the general principle prohibiting age discrimination identified by the Court in *Mangold* [2] and invites the Court to provide further clarification as to the circumstances in which that principle may apply.

Community law

The Treaty on European Union

2. Article 6 EU states:

'1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

…'

The EC Treaty

3. Article 13 EC, introduced by the Treaty of Amsterdam, provides:

'1. Without prejudice to the other provisions of this Treaty and within the limits of

1 — Original language: English

2 — Case C-144/04 [2005] ECR I-9981. The premiss that that principle is settled law is challenged directly by the United Kingdom, and rather more indirectly by Germany and the Netherlands: see point 29 below.

the powers conferred by it on 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.

…'

Directive 2000/78 [3]

4. The preamble to Directive 2000/78 cites Article 6(1) and (2) of the Treaty on European Union [4] and lists a number of international instruments recognising the universal right of all persons to equality before the law and protection against discrimination. [5] In respect of age discrimination, it notes that the Community Charter of the Fundamental Social Rights of Workers [6] aims to integrate elderly people socially and economically and that the Employment Guidelines for 2000 agreed by the Helsinki European Council on 10 and 11 December 1999 emphasise the need to pay particular attention to supporting older workers. [7]

5. Recital 25 deals specifically with the possibility of justifying differences of treatment in connection with age. It reads:

'The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.'

6. Article 1 states that the purpose of the directive is to lay down a general framework for combating discrimination on the grounds covered as regards employment and

3 — Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). Directive 2000/78 is one of a pair of implementing directives adopted under Article 13 EC, the other being 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) ('the Race Discrimination Directive').

4 — Recital 1.

5 — Recital 4, citing the Universal Declaration of Human Rights adopted and proclaimed by United Nations General Assembly resolution 217 A (III) of 10 December 1948, the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the European Convention on Human Rights') and Convention No 111 of the International Labour Organisation on Discrimination (Employment and Occupation), adopted on 25 June 1958.

6 — Adopted at the Strasbourg European Council on 9 December 1989.

7 — Recitals 6 and 8.

occupation, with a view to putting into effect the principle of equal treatment.

7. Article 2(1) provides: 'For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.'

8. According to Article 2(2)(a), 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation …'. Under Article 2(2)(b), 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having … [inter alia] a particular age … at a particular disadvantage compared with other persons, unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …'.

9. Article 3(1) applies the directive to 'all persons, as regards both the public and private sectors, including public bodies, in relation to … (c) employment and working conditions, including … pay'.

10. Article 6(1) addresses justifications for differences of treatment on grounds of age:

'Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'

Subparagraphs (a) to (c) give examples of such differences in treatment. They include, in specified circumstances, the setting of special conditions for young people and older workers, the fixing of minimum conditions of age, professional experience or seniority, and the fixing of a maximum age for recruitment.

11. Article 6(2) permits Member States, notwithstanding Article 2(2), to provide that the fixing of certain age-related conditions for occupational social security schemes and the use, in the context of such schemes, of age criteria in actuarial calculations does not constitute age discrimination, provided it does not result in sex discrimination.

12. Article 18 stipulates that Member States should transpose Directive 2000/78 by 2 December 2003. However, Member States were permitted to extend that period by three years in respect of the provisions in the directive covering age and disability discrimination. Germany exercised that option and therefore had until 2 December 2006 to transpose those provisions into national law.

The contested guidelines [8]

13. The defendant in the main proceedings runs the occupational pension scheme of Bosch-Siemens Hausgeräte GmbH ('BSH'). [9] Paragraph 6 of the scheme's guidelines ('the Guidelines') sets out the conditions governing retirement pensions. Paragraph 6(4) provides for a pension to be paid to the widow(er) of an employee who has died during his or her employment relationship, if certain conditions have been met. However, payments will not be made if 'the widow/widower is more than 15 years younger than the former employee …' ('the age-gap clause').

The main proceedings and the reference made

14. Mrs Bartsch, the applicant in the main proceedings, was born in 1965. She is the widow of Mr Bartsch, who was born in 1944 and who died in 2004 whilst employed by BSH. Apart from the age-gap clause, the conditions in Paragraph 6(4) of the Guidelines for her to receive a widow's pension were met.

15. Mrs Bartsch applied unsuccessfully to BSH for a pension. Her claim to the Arbeits-

8 — Guidelines of Bosch-Siemens Hausgeräte Altersfürsorge GmbH dated 1 January 1984 in the version of 1 April 1992.

9 — In this Opinion I use the abbreviation 'BSH' to refer both to the defendant in the main proceedings (Bosch-Siemens Hausgeräte Altersfürsorge GmbH) and to the company Bosch-Siemens Hausgeräte GmbH.

gericht (Labour Court) was rejected, and the Landesarbeitsgericht (Regional Labour Court) dismissed her appeal.

16. Appealing to the referring court, Mrs Bartsch claimed, inter alia, that the age-gap clause breached the principle of equal treatment and was therefore invalid.

17. The referring court considers that Mrs Bartsch cannot succeed under domestic law. In particular, although German employment law incorporates the general principle of equal treatment, the age-gap clause is based on a fair reason, namely the limitation of risks assumed by voluntary pension schemes and the aim to make those risks more quantifiable. [10] Those considerations are closely connected to the age-gap clause.

18. However, the referring court wonders whether the qualifications to the general principle of equal treatment that are enshrined in German employment law can survive in the light of the principle of non-discrimination on grounds of age identified by the Court in *Mangold*.

19. The referring court is unclear, on the basis of *Mangold*, whether the general principle prohibiting age discrimination is applicable to situations regardless of whether they have a connection to Community law. If not, the court seeks clarification as to whether such a connection arises either from Article 13 EC or from Directive 2000/78, albeit that the events leading to the reference occurred before the deadline for transposing that directive. [11]

20. The referring court notes that, since *Mangold* arose out of proceedings between private individuals, it would appear that the principle is applicable 'horizontally' to such disputes. *Mangold*, however, involved national legislation which provided for an exception to the prohibition on age discrimination. The referring court asks whether the principle applies horizontally only in respect of such derogating provisions.

10 — At point 107 of this Opinion, I offer a slight reinterpretation of the justification suggested by the referring court.

11 — I reformulate that question at point 27 below.

21. If the principle is applicable, the referring court considers that it applies to the deceased employee, not the survivor. It believes that the age-gap clause could give rise to indirect age discrimination, on the basis that the probability of an employee being affected increases with his or her age. If that is the case, then the referring court considers that the justifications for such a clause available under German law are also appropriate under Community law.

22. Finally, in view of the nature of occupational pension schemes and the principle of protection of legitimate expectations, the referring court questions the extent to which the general principle prohibiting age discrimination should have retroactive effect.

23. The referring court therefore asks the Court:

‘(1) (a) Does the primary law of the European Communities contain a prohibition of discrimination on grounds of age, protection under which must be guaranteed by the Member States even if the allegedly discriminatory treatment is unconnected to Community law?

(b) If question (a) is answered in the negative, does such a connection to Community law arise from Article 13 EC or — even before the time-limit for transposition has expired — from [Directive 2000/78]?

(2) Is any prohibition of discrimination on grounds of age arising from the answer to question 1 also applicable between private employers on the one hand and their employees or pensioners and their survivors on the other hand?

(3) If question 2 is answered in the affirmative:

(a) Does a provision of an occupational pension scheme, which provides that a survivor's pension will not be granted to a surviving spouse in the event that the survivor is more than 15 years younger than the deceased former employee, fall within the scope of the prohibition of discrimination on grounds of age?

(b) If question 3(a) is answered in the affirmative, can such a provision be justified by the fact that the employer has an interest in limiting the risks arising from the occupational pension scheme?

(c) If question 3(b) is answered in the negative, does the possible prohibition of discrimination on grounds of age have unlimited retroactive effect as regards the law relating to occupational pension schemes or is it limited as regards the past, and if so in what way?'

24. BSH, Germany, the United Kingdom and the Commission have submitted written observations. Those parties and the Netherlands presented oral argument at the hearing on 10 October 2007.

25. At the United Kingdom's request, the case was assigned to the Grand Chamber.

Question 1

26. Question 1(a) asks essentially whether Community law contains a prohibition on age discrimination which applies even if the allegedly discriminatory treatment is not connected to Community law.

27. It seems helpful to answer that question more broadly and in three stages. First, is there a general principle of Community law specifically prohibiting age discrimination? Second, if there is, can it apply even if the situation giving rise to the reference does not fall within the scope of Community law (question 1(a))? Third, does the situation giving rise to the reference fall within the scope of Community law (question 1(b))?

Mangold and its progeny

28. The order for reference makes it clear that the referring court's questions are based on the premiss, derived from the Court's judgment in *Mangold*, that there is a general principle in Community law prohibiting age discrimination.

29. The United Kingdom challenges that premiss. It argues that neither international instruments nor the constitutional traditions of Member States provide an adequate basis for recognition of such a principle. The evident intention of the drafters of Article 13 EC to allow the Community legislator to determine measures to combat, inter alia, age discrimination implies that no such principle exists. BSH similarly questions the existence of sufficient sources to found a general principle prohibiting age discrimination. Germany submits that such a general principle would render the enactment and implementation of Directive 2000/78 superfluous. At the hearing, the Netherlands endorsed the written observations of Germany and the United Kingdom.

30. In *Mangold*, the Court observed that Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Rather, it establishes a general framework for combating discrimination on the grounds covered by the directive, 'the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the [first] and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States'. [12] The Court continued:

> '(75) The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, which is the case with [the national provision in issue] as being a measure implementing Directive 1999/70 [[13]] ... and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle ....

12 — Paragraph 74. The English text of the judgment refers in error to the third recital, rather than the first.

13 — Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

(76) Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age ….

(77) In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law ….

(78) … It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of [Directive 2000/78] has not yet expired.'

31. *Mangold* has attracted a certain amount of academic criticism. The general theme of the criticism is that the Court (of its own volition, without good reason and against the wishes of the legislature) extended the scope of a directive, [14] to give it effect before the end of its transitional period and in horizontal circumstances, by making an innovative reference to a general principle of Community law. [15] Consequently, a number of commentators have expressed the opinion that the Court has undermined the purpose of direct effect. [16] Furthermore, the ruling is criticised for having produced a situation of considerable legal uncertainty. [17]

32. Four Advocates General have also commented on *Mangold*.

14 — See, for example, J. Cavallini, 'De la suppression des restrictions à la conclusion d'un contrat à durée déterminée lorsque le salarié est un senior', *La Semaine Juridique Sociale* 2005, pp. 25 to 28; O. Dubos, 'La Cour de justice, le renvoi préjudiciel, l'invocabilité des directives: de l'apostasie à l'hérésie?', *La semaine juridique* 2006, pp. 1295 to 1297; O. LeClerc, 'Le contrat de travail des seniors à l'épreuve du droit communautaire', *Recueil Dalloz* 2006, pp. 557 to 561; M. Nicolella, 'Une application anticipée des directives non transposées?', *Gazette du palais* 2006, p. 22; E. Dubout, on 'Mangold' in *Revue des affaires européennes* 2005, pp. 723 to 733; A. Masson and C. Micheau, 'The Werner Mangold Case: An Example of Legal Militancy', *European Public Law* 2007, pp. 587 to 593; Editorial Comments, *Common Market Law Review* 2006, pp. 1 to 8.

15 — See, for example, K. Riesenhuber, Case Note in *European Review of Contract Law* 2007, p. 62; J. Swift, 'Pale, stale, male', *New Law Journal* 2007, pp. 532 to 534; Editorial Comments, *Common Market Law Review*, cited above. This is viewed positively from a rights perspective in D. Schiek, 'The ECJ Decision in Mangold: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', *Industrial Law Journal* 2006, pp. 329 to 341.

16 — See, for example, Cavallini, Dubos, Editorial Comments, *Common Market Law Review*, all cited in footnote 14.

17 — See, for example, Swift, Cavallini, Nicolella, Dubout, Masson/Micheau (cited in footnotes 14 and 15); D. Martin, 'L'arrêt Mangold — Vers une hiérarchie inversée du droit à l'égalité en droit communautaire?', *Journal des tribunaux du travail* 2006, pp.109 to 116.

33. In *Chacón Navas*, [18] Advocate General Geelhoed noted the potentially far-reaching economic and financial consequences of claims to equal treatment based on the prohibitions set out in Article 13 EC. The interpretation of measures based on Article 13 EC must not be stretched by relying on the words '[w]ithin the limits of the powers conferred by [the Treaty] upon the Community' in that article, and still less by relying on the general policy of equality. Such an approach would impinge upon decisions made by the Member States in the exercise of powers which they still retain. Accordingly, he advocated a more restrained interpretation than that adopted by the Court in *Mangold*.

34. In *Lindorfer*, [19] I suggested that the prohibition of age discrimination identified by the Court in *Mangold* was a particular expression of the general principle of equality before the law. Accordingly, I felt that the better reading of *Mangold* was that discrimination on grounds of age had always been precluded by the general principle of equality, and that Directive 2000/78 had introduced a specific, detailed framework for dealing with, inter alia, that discrimination. I expand on that suggested interpretation below.

35. Advocate General Mazák offered an extended criticism of *Mangold* in *Palacios de la Villa*. [20] He noted that the international instruments and constitutional traditions referred to in *Mangold* enshrine the general principle of equal treatment, but that it was a bold proposition and a significant move to infer from that the existence of a specific principle prohibiting age discrimination. A general principle of equality *potentially* implies a prohibition of discrimination on any ground which may be deemed unacceptable, so that specific prohibitions constitute particular expressions of that general principle. However, it is quite a different matter to infer from the general principle of equality the existence of a prohibition of discrimination on a specific ground and the reasons for doing so are far from compelling. Moreover, neither Article 13 EC nor Directive 2000/78 necessarily reflect an already existing prohibition of all the forms of discrimination to which they refer. Rather, the underlying intention was in both cases to leave it to the Community legislature and the Member States to take appropriate action to that effect. That is what the Court, too, seems to suggest in *Grant*, [21] in which it concluded that Community law, as it stood, did not cover discrimination based on sexual orientation.

36. Most recently, Advocate General Ruiz-Jarabo Colomer has taken the view in

18 — Case C-13/05 [2006] ECR I-6467, at points 46 to 56 of the Opinion.

19 — Case C-227/04 P [2007] ECR I-6767, in particular points 52 to 58 of the Opinion.

20 — Case C-411/05 [2007] ECR I-8531, in particular points 87 to 97 and points 132 to 138 of the Opinion.

21 — Case C-249/96 [1998] ECR I-621.

Maruko [22] that the 'essential character' of the right to non-discrimination on the ground of sexual orientation is of a different order to that which the Court attributed to the principle of non-discrimination based on age in *Mangold*.

37. The Court has now delivered its judgments in those four cases. Despite (or possibly, in the light of) the comments of its Advocates General, in none of those judgments did the Court review — or indeed mention — its decision in *Mangold* in respect of the existence of a general principle of Community law prohibiting age discrimination.

38. In *Lindorfer*, the Court had reopened the oral procedure and convened a new hearing at which it had asked the parties to express their views on, inter alia, the scope of the principle prohibiting age discrimination when calculating actuarial values in the transfer to the Community pension scheme of rights acquired under a national pension scheme. Nevertheless, it decided the case purely on the basis of sex discrimination. It is less surprising that the Court omitted any reference to age discrimination in *Chacón Navas* and *Maruko*, which concerned, respectively, disability discrimination and discrimination on the basis of sexual orientation.

39. *Palacios de la Villa* specifically concerned age discrimination. There, the Court first determined that the national legislation at issue (according to which the fact that a worker had reached the retirement age laid down by that legislation led to automatic termination of his employment contract) created a difference in treatment directly based on age. The Court next established that Directive 2000/78, whose transposition period had already expired at the material time, was applicable to the events giving rise to the dispute before the national court. Hence it was able to decide the case by reference to the directive. The Court ruled that the measure was objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and accepted that it was an appropriate and necessary means to attain that aim. The Court made no mention of a general principle prohibiting age discrimination.

40. The Court's approach in *Palacios de la Villa*, which analyses national legislation

22 — Case C-267/06 [2008] ECR I-1757, point 78 of the Opinion and the footnotes thereto.

that explicitly provides for unfavourable treatment on the ground of age through the prism of Directive 2000/78 and concludes that it is acceptable, is very different from the approach in *Mangold*, in which the Court stated that it was the responsibility of the national court to set aside any provision of national law which conflicts with the principle of age discrimination.

41. In the present case (as in *Mangold*) the period for transposing Directive 2000/78 had not expired at the material time. The question whether there is a specific principle of Community law prohibiting age discrimination is therefore again potentially before the Court.

Is there in Community law a general principle prohibiting age discrimination?

42. The general principle of equality forms part of the foundations of the Community. [23]

Provisions on equality before the law are to be found in the constitutional traditions common to the Member States. [24] General statements on equal treatment likewise appear in a number of international instruments. [25] Specifically, the European Convention on Human Rights provides, in Article 14 (entitled 'Prohibition of discrimination'): 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. [26] The general principle of equality may thus plausibly be regarded as 'the actual principle underlying the prohibition of those forms of discrimination [listed in Article 13 EC]' and its 'source' is indeed 'found … in various international instruments and in the constitutional traditions common to the Member States'. [27]

23 — See Case C-17/05 *Cadman* [2006] ECR I-9583, paragraph 28. The phrase is used, with minor variations, throughout the Court's case-law, starting apparently with Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, paragraph 7.

24 — See the Commission's Report on the Member States' Legal Provisions to Combat Discrimination, available online at http://ec.europa.eu/employment_social/labour_law/docs/reportmsdiscrimination_en.pdf.

25 — See footnote 5 above.

26 — As is clear from the phrase 'set forth in this Convention', Article 14 is not a free-standing provision, but operates in conjunction with other substantive rights guaranteed by the Convention. Protocol 12, however, does contain such a free-standing prohibition on discrimination (of the EU Member States, only Cyprus, Finland, Luxembourg, the Netherlands, Romania, and Spain have ratified the Protocol). It will be noted that discrimination on grounds of age is not specifically identified in either of those long (though non-exhaustive) lists.

27 — All quotations from *Mangold*, cited in footnote 2, paragraph 74. The formula 'the constitutional traditions common to the Member States' is conventionally used as the basis for identifying a fundamental principle of Community law (see Article 6(2) EU, which codifies the Court's earlier case-law).

43. The roots of any clear and specific prohibition on discrimination on grounds of age go back less far. As I noted in my Opinion in *Lindorfer*, such a specific prohibition is, in both national and international contexts, too recent and uneven comfortably to fall within that formula. [28] Indeed, as recently as 1999 the Commission publicly stated: 'There is very little legislation on age discrimination in the Member States.' [29]

44. It is worth pausing to enquire why that should be so. A classic formulation of the principle of equality, such as Aristotle's 'treat like cases alike' [30] leaves open the crucial question of which aspects should be considered relevant to equal treatment and which should not. [31] Any set of human beings will resemble each other in some respects and differ from each other in others. A maxim like Aristotle's therefore remains an empty rule until it is established what differences are relevant for the purposes at hand. For example, if we criticise a law banning redheads from restaurants as being unjust, that is based on the premiss that, as regards the enjoyment of a meal in a restaurant, hair colour is irrelevant. It is therefore clear that the criteria of relevant resemblances and differences vary with the fundamental moral outlook of a given person or society. [32]

45. A moment's historical reflection will show that statements about 'equality', when deconstructed, have often meant 'equality of treatment, in particular respects, for those inside the magic circle' rather than 'equality of treatment in every relevant respect for absolutely everyone'. In the Athens of Pericles, citizens of the polis might claim a right to equal treatment in respect of access to justice or civic advancement; [33] but the concept of equality excluded equal treatment with citizens in those respects for metics [34] or slaves. Spartan equality — a

28 — Opinion in *Lindorfer*, cited in footnote 19, point 55, referring to *Mangold*, cited in footnote 2, paragraph 74.

29 — See the Commission's Report on the Member States' Legal Provisions to Combat Discrimination, cited in footnote 24, p. 70; see further M. Sargeant (ed.), *The Law on Age Discrimination in the EU* (2008).

30 — *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23.

31 — See further S Gosepath, 'Equality', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2007 Edition), available online at http://plato.stanford.edu/archives/fall2007/entries/equality/.

32 — See H.L.A. Hart, *The Concept of Law* (2nd ed., 1994), pp. 159 to 163.

33 — See Pericles' Funeral Oration for the Athenian dead in the first year of the (ultimately disastrous) war against Sparta: 'Our form of government does not enter into rivalry with the institutions of others. Our government does not copy our neighbours', but is an example to them. It is true that we are called a democracy, for the administration is in the hands of the many and not of the few. But while there exists equal justice to all and alike in their private disputes, the claim of excellence is also recognized; and when a citizen is in any way distinguished, he is preferred to the public service, not as a matter of privilege, but as the reward of merit. Neither is poverty an obstacle, but a man may benefit his country whatever the obscurity of his condition (Thucydides, *History of the Peloponnesian War*, Book II, XXXV-XLVI, at XXXVII, in the translation by Benjamin Jowett (1881)).

34 — A resident alien, having some but not all of the privileges of citizenship.

rather different model — similarly excluded Helots and slaves.[35] Both (naturally) excluded women. Nearer to our times, the Declaration of Independence of the United States of America may have proclaimed that 'all men are created equal',[36] but it took the Civil War and a rather long aftermath before truly equal treatment began to extend to the descendants of black slaves.[37] Discrimination on grounds of religion seemed perfectly natural — indeed, ordained by God — during large portions of the history of Europe and the Mediterranean basin.

46. In short, the answers to the questions 'who is covered by the principle of equal treatment?' and 'what aspects of economic, social, political, civic and personal life are encompassed by that principle?' are not immutable. They evolve with society. As they do so, the law reflects that change by starting to state explicitly that certain forms of discriminatory treatment, previously unnoticed or (if noticed) tolerated, will be tolerated no longer. Such legal changes are an extension — a new and further expression — of the general principle of equality.

47. *Marshall I*[38] suggests that EC law did not, from its very inception, regard age as an obviously suspect ground on which to base distinctions. There, the Court was confronted with age as grounds for termination of employment. It responded by establishing that certain provisions of Directive 76/207 guaranteeing equal treatment in working conditions between the sexes can have direct effect and that, whilst the directive did *not* have 'horizontal' direct effect, Mrs Marshall could rely upon it 'vertically' because her employer, the defendant health authority, was an emanation of the State. That well-known ruling tends to indicate that in 1986 differentiating on the basis of age (as distinct from sex) was considered obviously relevant for the purposes of the termination of employment and hence acceptable under the general principle of equality in EC law. If it had not been, presumably Mrs Marshall

35 — A class of serfs in ancient Sparta intermediate in status between ordinary slaves and free Spartan citizens.

36 — 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness …' (Declaration of Independence, 4 July 1776).

37 — The Supreme Court of the United States played a large role in the process of establishing that discriminating on grounds of race was unacceptable. See, for example, *Brown* v *Board of Education of Topeka*, 349 U.S. 294 (1954), in which the Supreme Court overturned its earlier ruling in *Plessy* v *Ferguson*, 163 U.S. 537 (1896), where it had held that 'separate but equal' facilities, including schools, 'for the white and coloured race' were constitutional. Only Justice John Marshall Harlan dissented in the latter case, holding that the 'Constitution is colour-blind and neither knows nor tolerates classes among its citizens'.

38 — Case 152/84 *Marshall* [1986] ECR 723.

would have relied on the prohibition on discrimination by reference to age to buttress her main argument.

48. Once the possible (new) scope of the principle has emerged, the natural next step is to define it more precisely and to put in place the rules to combat the discrimination that has been identified. [39]

49. Admittedly, it may be possible to deal with certain situations (involving some form of straightforward, crude or arbitrary age discrimination) by applying the principle of equal treatment irrespective of age in its bare, unvarnished form. Where the situation is more complex and the dividing line between justifiable differentiation and unjustifiable discrimination is less self-evident, however, effective action to combat discrimination necessarily also involves the elaboration of appropriate definitions. Article 13 EC provides the legal basis for legislative action at EC level to 'combat' various forms of unacceptable inequality of treatment — inter alia, discrimination on grounds of age. It thus enables the Community legislator both to define (inter alia) age discrimination more precisely and to lay down rules designed to eliminate it.

50. For that reason, any argument to the effect that if a principle prohibiting discrimination on grounds of age had already existed, Article 13 EC or Directive 2000/78 would have been unnecessary is fundamentally misconceived. It is precisely *because* the general principle of equality has now been recognised also to include equality of treatment irrespective of age that an enabling legislative provision such as Article 13 EC *becomes* necessary and is duly used as the basis for detailed legislative intervention.

51. The obverse of that coin is that *detailed* specific prohibitions on 'discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' cannot have existed at the moment when Article 13 was incorporated into the EC Treaty. If they had, Article 13 EC would

39 — Compare R. Dworkin, *Taking Rights Seriously* (1977), pp. 22 to 28, who defines the difference between rules and principles by reference to the character of the direction they give. A principle states a reason that argues in one direction, but does not necessitate a particular decision. A rule sets out legal consequences that follow automatically when the conditions provided are met. Conversely, rules lack the dimension of weight that principles have: if two rules conflict, one must be inapplicable or invalid, while two conflicting principles can be weighed against each other.

indeed have been in danger of being a redundant provision.[40] Still less can they have sprung fully armed, like Athene from the head of Zeus, at that precise moment.

52. The analysis that I here put forward is supported by examining more closely the enabling provision contained in Article 13 EC.

53. First, Article 13 EC states that it is 'without prejudice to the other provisions of [the] Treaty' (and thus, *a fortiori*, to the general principles underlying Community law). Its use as a legal base for detailed measures to combat, inter alia, discrimination on grounds of age does not undermine the general principle of equality. Rather, it enables specific manifestations of that general principle to be developed more effectively.

54. Second, Article 13 EC empowers the Council (acting unanimously), after consulting the European Parliament, to 'take appropriate action to combat discrimination based on' various specific grounds. It does not itself define those types of discrimination. It starts from the assumption that, unfortunately, they exist and should be (vigorously) opposed. Taking its lead from Article 13 EC, Directive 2000/78 likewise starts from the assumption that certain forms of discrimination exist. It proceeds — referring not to existing specific prohibitions on such forms of discrimination, but rather (in general terms) to the need to respect fundamental rights — to define what the principle of equal treatment means in certain contexts, as the necessary precursor to guaranteeing that the principle should be respected.

55. Third, the Community legislator has proceeded on the basis that directives enacted under Article 13 EC do not merely facilitate the application of the prohibitions on discrimination on the grounds enumerated in that Treaty article. They also define the precise scope of those prohibitions in certain contexts.[41] I do not see that as undermining the proposition that the basic principle (that discrimination on grounds of age

40 — Further detailed action to combat specific forms of discrimination each already prohibited as general principles of Community law might conceivably have been enacted by the Council under Article 308 EC (ex Article 235) read in conjunction with the Community's objectives enumerated in Article 2. The Member States clearly felt that a separate legal base in the Treaty would be required for such action and duly provided it, in the form of Article 13 EC.

41 — For comparison, see the Race Discrimination Directive, especially Articles 2 ('Concept of discrimination') and 3 ('scope').

should be prohibited) had already come into existence. Rather, it seems to me that — as a matter of legal practicality — it is only possible effectively to combat an evil that has been carefully and specifically defined.

56. That is, in essence, because the difference between (acceptable) differential treatment and (unacceptable) discrimination [42] lies not in whether people are treated differently, but in whether society accepts as *justifiable* the criteria whose application results in different treatment, or whether, on the contrary, they are considered as arbitrary. [43] Detailed legislation will be needed to address this issue: to classify the application of particular criteria in particular circumstances as acceptable or unacceptable and to give binding legal effect to that classification.

57. I therefore agree with the Court in *Mangold* that the origins of the principle — that is, of the *concept* that it is now unacceptable to discriminate on any of the grounds enumerated in Article 13 EC — lie neither in Directive 2000/78 as an implementing directive, nor indeed in Article 13 EC as such. They must be found in a prior time and place. [44]

58. In my Opinion in *Lindorfer*, [45] I suggested that discrimination on grounds of age had always been precluded by the general principle of equality that forms part of Community law. It seems to me that, from its inception, Community law would indeed have precluded certain distinctions based on age. Suppose that in (say) 1960 a Member State had permitted free movement of workers from other Member States except for those aged between 28 and 29 and between 52 and 53. Such an (unlikely) arrangement would surely have been caught by the general principle of equal treatment that has always formed part of Community law. Differentiating between workers in accordance

42 — On this terminological distinction, see M. Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (1976), pp. 7 to 27.

43 — Thus (for example) the principle behind rationing is to apply specific criteria to differentiate between potential recipients and thus to allocate scarce resources. Criteria that are regarded as justifiable are accepted; other criteria are opposed as arbitrary or unfair. But what is justifiable is determined by the view taken by society in that particular time and place. See further the Opinion of Advocate General Poiares Maduro in Case C-303/06 *Coleman*, point 16, and my Opinion of 24 April 2008 in Case C-353/06 *Grunkin and Paul*, points 62 and 71, and see, on the element of arbitrariness in discrimination: Bossuyt, cited in footnote 42, pp. 37 to 39 and 97 to 128.

44 — The transition from concept to full implementation is, I think, often more likely to be evolutionary than the result of some 'big bang'. For example, it would be difficult to pinpoint the exact moment between (say) 1780 and 1807 when the principle emerged that, thanks to the work of reformers such as Peter Peckard, Thomas Clarkson and William Wilberforce, found specific expression in 'An Act for the Abolition of the Slave Trade' (47 Georgii III, Session 1, cap. XXXVI).

45 — Cited in footnote 19.

with those two age bands would have been regarded as arbitrary and unjustifiable. What has happened over the intervening years is that society's perception of more subtle forms of differential treatment on grounds of age has changed from unthinking acceptance to focussed examination.

59. For the reasons that I have set out, it therefore seems to me that *Mangold* should be read as affirming that discrimination on grounds of age is a specific manifestation of discrimination that is prohibited by the general principle of equality of treatment well known in Community law — a principle that indeed long predates both Article 13 EC and Directive 2000/78. Article 13 EC then plays its allotted part by recognising explicitly certain specific (new) types of discrimination and empowering the Community legislator to act to combat them in particular ways and particular contexts.

60. Such a reading also accords with the role and structure of Directive 2000/78.

61. First, that directive specifically addresses the question of combating discrimination based on, inter alia, age in employment and occupation. [46] Clearly age discrimination may arise in other contexts; but these are not (as yet) addressed by an implementing directive based on Article 13 EC.

62. Second, the Member States unquestionably envisaged that, once the transposition period had elapsed, equal treatment *as derived from the directive* should indeed be applied 'horizontally', to 'all persons, as regards both the public and private sectors, including public bodies'. [47]

63. Third, whilst the directive defines what the principle of equal treatment shall mean in respect of matters falling within its scope [48] and also defines direct and indirect discrimination, [49] it clearly envisages that differentiation on the basis of age in the context of employment and occupation will *not* always constitute unlawful discrimina-

46 — See the title, the preamble and Article 1.

47 — Article 3(1).

48 — Article 2(1).

49 — In Article 2(2)a) and 2(2)(b) respectively. The framing of these provisions draws on the Court's established case-law on sex discrimination.

tion. Thus, it distinguishes between 'differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited'. [50] Crucially, therefore, it lays down a series of specific rules that establish the parameters of what differential treatment on grounds of (inter alia) age is acceptable (and why).

64. That a nuanced approach to prohibiting discrimination on grounds of age was intended is, moreover, reinforced by the Community legislator's choice of a directive as the enacting measure under Article 13 EC. Enactment through a regulation has the consequence that the Community rule is 'binding in its entirety and directly applicable in all Member States'. [51] A directive, in contrast, is 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method'. [52] Such an enacting measure, by its very nature, leaves a greater degree of flexibility to individual Member States.

65. In what follows, I shall therefore suggest that the general principle of equality operates in certain circumstances so as to prohibit discrimination based on age, but that there was not, ab initio, a separate, detailed principle of Community law that always prohibited discrimination on grounds of age. I shall nevertheless indicate how I would approach the individual questions referred should I be wrong on that issue.

Can (any) general principle of Community law apply even if the situation giving rise to the reference does not fall within the scope of Community law?

66. That question can be disposed of fairly swiftly. All the parties that have submitted observations [53] concur that the answer is

50 — Recital 25 and the detailed substantive provisions of Article 6(1).

51 — Article 249 EC.

52 — Ibid. Cf. the emphasis laid by the Court on that difference in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 22 to 24, in refusing to hold that a directive might also have horizontal direct effect (thus rejecting the suggestions made by three Advocates General: Advocate General Van Gerven in Case C-271/91 *Marshall II* [1993] ECR I-4367; Advocate General Jacobs in Case C-316/93 *Vaneetveld* [1994] ECR I-763 and Advocate General Lenz in *Faccini Dori* itself).

53 — Mrs Bartsch did not submit written observations to the Court and was not represented at the hearing.

no. In particular, the Court may interpret a general principle of Community law in the context of a preliminary reference only when the situation giving rise to the reference falls within the scope of Community law. [54]

Does the situation in the main proceedings fall within the scope of Community law?

67. BSH, Germany, the Netherlands, and the United Kingdom all submit that neither Article 13 EC nor, before the end of its period for transposition, Directive 2000/78 could bring the situation that gave rise to the main proceedings within the scope of Community law. Article 13 EC is merely an empowering provision without direct effect. If it were capable of providing the necessary link, it would in effect itself directly prohibit age discrimination, thus contradicting its express terms. As to Directive 2000/78, the transposition period, and indeed the very nature of a directive, mean that it cannot provide a link to Community law prior to the end of that period. The effects of a directive during its transposition period are limited to preventing a Member State from adopting incompatible measures. [55] The directive does not, however, widen the scope of application of Community law during that period. Such an effect would undermine the legislator's decision. Finally, unlike the disputed national rules in *Mangold*, the age-gap clause at issue in the present case did not transpose a Community provision, nor was it adopted during the transposition period for Directive 2000/78.

68. The Commission takes the opposite view. It notes that the Court has interpreted the scope of application of Community law very widely in situations concerning discrimination based on nationality in respect of the Treaty freedoms, although it accepts that the present case has no connection to the freedoms or to such discrimination. The Commission considers that the fact that Article 13 EC is an empowering provision does not prevent it from providing the neces-

54 — See, for example, Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 27 and 30, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15. On the general principle of equality and non-discrimination, see Case C-442/00 *Caballero* [2002] ECR I-11915, paragraphs 30 and 32, and *Chacón Navas*, cited in footnote 18, paragraph 56. See also *Mangold*, cited in footnote 2, paragraph 75.

55 — In Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, the Court established that Article 10(2) EC and Article 249(3) EC require that, during the transposition period, the Member States refrain from adopting any measures liable seriously to compromise the result prescribed by the directive (paragraph 45) (see, by analogy, Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, paragraph 42 and points 60 to 63 of my Opinion in that case). Moreover, during the transposition period, national courts must refrain *as far as possible* from interpreting domestic law in a manner which might seriously compromise the attainment of the objective pursued by the directive after the end of that period. That obligation is, however, limited by general principles of law, particularly legal certainty and non-retroactivity, and cannot serve as the basis for an interpretation *contra legem*: Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 119 to 123.

sary link with Community law. In *Saldanha* [56] the Court found that an empowering Treaty provision [57] brought a national rule within the scope of the Treaty. [58]

69. I must begin by observing that general principles of Community law, though fundamental to the proper functioning of EC law, do not operate in the abstract. [59] Specifically, national measures can be reviewed on the basis of their compliance with such general principles only if they fall within the scope of Community law. [60] For that to be the case, the provision of national law [61] at issue must in general fall into one of three categories. It must implement EC law (irrespective of the degree of the discretion the Member State enjoys and whether the national measure goes beyond what is strictly necessary for implementation). [62] It must invoke some permitted derogation under EC law. [63] Or it must otherwise fall within the scope of Community law because some specific substantive rule of EC law is applicable to the situation. [64]

70. The national rules at issue in *Mangold* were measures of public law specifically enacted by the Member State in question (Germany) in order to implement a Community law obligation (the transposition of Directive 1999/70). The transposition period for that directive had long since expired. There was, therefore, a Community law framework of relevant rules — Directive 1999/70 and its implementation into national law — to which the general principle of equal treatment (including equal treatment irrespective of age) could be applied.

56 — Case C-122/96 [1997] ECR I-5325, paragraph 23.

57 — Article 54(3)(g) of the EC Treaty (now Article 44(2)(g) EC).

58 — The Commission makes no such submissions in respect of Directive 2000/78.

59 — See further T. Tridimas, *The General Principles of EU Law* (2nd ed., 2006), pp. 36 to 42; and J. Temple Lang, 'The Sphere in which Member States are Obliged to Comply with the General Principles of Law and Community Fundamental Rights Principles', *Legal Issues of European Integration* 1991, pp. 23 to 35.

60 — See, for example, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28; and *Kremzow*, cited in footnote 54, paragraphs 15 to 19.

61 — By 'provision of national law' I mean a rule of public law or (if the relevant rule of public law merely transfers rule-making powers to a quasi-public or private body) a rule which essentially derives from public law and whose social and policy choices may reasonably be deemed to reflect guidance laid down by the public authorities of the Member State (cf. the careful test laid down by the Court in Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313, paragraph 22, governing when a body is deemed to be part of 'the State' for the purposes of vertical direct effect).

62 — See, for example, Case 230/78 *Eridania* [1979] ECR 2749, paragraph 31; Case 77/81 *Zuckerfabrik Franken* [1982] ECR 681, paragraphs 22 to 28; Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paragraphs 10 and 11; Case 5/88 *Wachauf* [1989] ECR 2609, paragraphs 17 to 22; and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraphs 88 to 93.

63 — See, for example, Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 41 to 45; and Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 24.

64 — See, for example, Case C-71/02 *Karner* [2004] ECR I-3025, paragraphs 48 to 53 (potential impediment to intra-Community trade); Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraphs 23 to 30 (Member States acting as trustees of the Community in an area of exclusive Community competence); Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenheide and Others* [1997] ECR I-7281, paragraphs 45 to 48 (measures adopted by a Member State in the exercise of its competences relating to VAT).

71. Seen in that light, the key paragraphs of the Court's ruling in *Mangold* are rather easier to understand. Having identified that the general principle of equality includes a prohibition on age discrimination, [65] the Court first reminded itself of its duty to 'provide all the criteria of interpretation needed by the national court to determine whether [national] rules are compatible with such a principle' where '[those] rules fall within the scope of Community law'. [66] The national rules in question were 'a measure implementing Directive 1999/70'. [67] They thus fell within the scope of Community law and also provided something on which the general principle of equality — here, prohibiting (arbitrary) age discrimination — could bite.

72. Given that the general principles are fundamental to the whole system of Community law, it then followed that 'observance of the general principle of equal treatment, in particular in respect of age, [could not] as such be conditional upon the expiry of the period allowed the Member States for the transposition of [Directive 2000/78]'. [68] Directive 2000/78 was merely 'intended to lay down a general framework for combating discrimination on the grounds of age'. [69] In the particular context of *Mangold*, however, the general principle could be applied without further elaboration to the national rules implementing Directive 1999/70. It was therefore the responsibility of the national court to apply the fundamental principle to the case before it, and if necessary to set aside a rule of national law in order to guarantee effective protection. [70]

73. In the present case, there is *no* pertinent specific substantive rule of Community law governing the situation on which the general principle of equality can bite. Unlike *Mangold*, there are no national rules implementing a directive whose transposition period has already expired. There is no relevant Treaty provision or other Community secondary legislation. There is only Article 13 EC [71] (which is an empowering provision lacking direct effect) and Direct-

65 — Paragraph 74.

66 — Both quotations from paragraph 75.

67 — Ibid.

68 — Paragraph 76.

69 — Ibid.

70 — Paragraphs 77 and 78. The rule of effective protection here invoked goes back to Case 106/77 *Simmenthal* [1978] ECR 629 and was confirmed in Case C-213/89 *Factortame* [1990] ECR I-2433.

71 — Contrary to what the Commission argues, the situation in the present case differs from the one in *Saldanha*, cited in footnote 56. In that case, the Court held that rules that, in the context of company law, seek to protect the interests of shareholders come within the scope of the Treaty and are for that reason subject to the prohibition on discrimination based on nationality. That was so because Article 44(2)(g) EC 'empowers the Council and the Commission, for the purpose of giving effect to the freedom of establishment, to coordinate to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article [48 EC] with a view to making such safeguards equivalent throughout the Community' (paragraph 23). This statement should be read within the context of an entire chapter of the EC Treaty on the right of establishment (Title III, Chapter 2), as well as, by the time the judgment in *Saldanha* was handed down (1997), a large legislative framework of directives: see in general V. Edwards, *EC Company Law* (1999) and, specifically on the scope of Article 44(2)(g) EC, pp. 5 to 9. That situation is clearly different from the present case.

ive 2000/78 (for which, at the material time, the transposition period was still running and which, accordingly, should be disregarded).

74. In those circumstances, it is not possible to rely on the general principle of equality both to *create* an applicable substantive rule of Community law and to *determine* how that substantive rule should be applied.

75. I therefore consider that there is no specific substantive rule of Community law that may serve as the basis for applying the general principle of equality to the situation giving rise to the reference. I would answer question 1(b) to that effect.

76. My analysis of this question would be the same if, contrary to what I have set out above, there were a specific principle of Community law prohibiting discrimination on grounds of age (rather than a general principle of equal treatment that includes equal treatment irrespective of age).

77. The analysis thus far suffices, in my view, to answer the national court. In the remainder of this Opinion, I therefore examine questions 2 and 3 in the alternative (in case the Court should arrive at a different conclusion on question 1).

Question 2

78. By its second question, the referring court essentially asks whether the prohibition on age discrimination identified by the Court in *Mangold* can be applied horizontally. [72]

72 — It seems to me that it is a misnomer to use the term 'direct effect' (whether vertical or horizontal) to describe the impact of a general principle of Community law. 'Direct effect' in a Treaty article or a provision in a directive means that the individual can take the clear, precise and non-conditional Community law text and rely on that text to override some contrary provision of national law (or to fill a lacuna). In contrast, a general principle of Community law is applied to a set of legislative rules and affects the interpretation to be given to them. Sometimes, it may mean that a particular interpretation is impermissible. But the general principle does not, as such, act as a substitute for an existing legislative text. To my mind, it is not, therefore, 'directly effective', although it unequivocally can, and sometimes does, affect the proper conclusion in law.

Can general principles of Community law be applied horizontally?

79. It is trite Community law that general principles of law are capable of being invoked *vertically* against the State. Thus for example the Court has held that various national measures were precluded by Community law on the basis that they were incompatible with the general principle of equal treatment [73] or with specific manifestations of that principle, such as the prohibition of discrimination on grounds of nationality in various contexts, [74] respect for fundamental rights, [75] the principle of the protection of legitimate expectations [76] and the principle of proportionality. [77]

80. The question is whether *any* general principle of Community law is, or should be, capable of *horizontal* application.

81. In *Bostock*, the Court held that the principle of equal treatment could not, in a situation arising from the Community milk quota regime, bring about retroactive modification of the relations between the parties to a lease, inter alia, by means of direct effect. [78] In *Otto*, the protection against admission of an infringement of Community competition rules, as part of the rights of defence of an individual, was held not to apply in a situation between two private parties. [79]

82. I do not think that those two judgments necessarily establish that general principles of Community law can never apply horizontally. To have applied the principle of equal

73 — See, for example, *Klensch* and *Wachauf*, both cited in footnote 62 (both involving the common organisation of the market in milk and milk products); the cases cited by Advocate General Tizzano in footnote 27 to his Opinion in *Mangold*, cited in footnote 2; and the Opinion of 13 December 2007 of Advocate General Kokott in Case C-309/06 *Marks & Spencer* (VAT refunds).

74 — See, for example, Case 293/83 *Gravier* [1985] ECR 593 (access to vocational training); Case 24/86 *Blaizot* [1988] ECR 379 (access to university education); Case 42/87 *Commission* v *Belgium* [1988] ECR 5445 (education allowances); Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145 (intellectual property rights); Case C-43/95 *Data Delecta* [1996] ECR I-4661 (judicial proceedings).

75 — See, for example, Case 222/84 *Johnston* [1986] ECR 1651 (effective judicial control in the context of the 'occupational requirement' as a justification for a difference of treatment of men and women); *Wachauf*, cited in footnote 62 (right to property in the context of the common organisation of the market in milk and milk products); Case C-60/00 *Carpenter* [2002] ECR I-6279 (right to respect for family life in the context of a potential restriction to freedom to provide services).

76 — See, for example, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325 (legitimate expectations in the context of a new national limitation period within which repayment of sums collected in breach of Community law may be sought).

77 — See, for example, Joined Cases 41/79, 121/79 and 796/79 *Testa* [1980] ECR I-1979 (Member State discretion in extending the period of entitlement to unemployment benefits under Article 69(2) of Regulation No 1408/71; and *Garage Molenheide*, cited in footnote 64.

78 — Case C-2/92 [1994] ECR I-955, paragraph 24. For a comment on *Bostock* and generally on the application of general principles against individuals, see Tridimas, cited in footnote 59, pp. 47 to 50.

79 — Case C-60/92 [1993] ECR I-5683, paragraph 16.

treatment in *Bostock* would have accorded a domestic law retroactive effect (and thus offended other fundamental principles). [80] The principle invoked in *Otto* serves to protect an individual against administrative or penal sanctions. Where proceedings between individuals could not lead, even indirectly, to such a consequence, the protection would be devoid of purpose. [81]

83. To the extent that general principles are applied vertically, they allow individuals to assert fundamental rights against the State. However, to restrict reliance on such rights to vertical situations risks creating the same (sometimes artificial) distinction between the public and private sector as is familiar in the case of directives. [82]

84. Moreover the Court has on occasion recognised that the general principle of equal treatment can be applied horizontally when it is incorporated in a substantive Treaty article. Thus in *Walrave and Koch* it held that the prohibition of discrimination on grounds of nationality contained in what are now Articles 12, 39 and 49 EC applied not only to the action of public authorities but also to rules of private organisations which aimed at regulating in a collective manner gainful employment and services and that the rule on non-discrimination applied in judging all legal relationships located within the Community. [83] *Walrave and Koch* concerned a private association which had a regulatory function and which could therefore perhaps be assimilated to an emanation of the State. The Court went further in *Angonese*, which concerned access to employment in a private bank, and ruled that 'the prohibition of discrimination on grounds of nationality laid down in [Article 39 EC] must be regarded as applying to private persons'. [84]

85. In *Mangold* the Court applied the general principle of equal treatment (including equal

80 — See point 37 of the Opinion of Advocate General Gulmann.

81 — See *Otto*, cited in footnote 79, paragraph 17.

82 — Some, but not all, arguments for and against a horizontal effect of directives can apply to general principles. For a discussion of those arguments, see S. Prechal, *Directives in EC Law* (2nd ed., 2005), pp. 255 to 261.

83 — Case 36/74 [1974] ECR 1405, paragraphs 17 and 18. See also Case C-438/05 *Viking* [2007] ECR I-10779, paragraphs 33 to 38 and 57 to 66 and Case C-341/05 *Laval* [2007] ECR I-11767, paragraphs 86 to 111, in which the Court held that Articles 43 and 49 EC apply between trade unions and private undertakings. In *Viking* the Court did not expressly refer to the prohibition of discrimination underlying Article 43 EC. In *Laval*, however, it recalled its case-law according to which 'Article 12 EC, which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific prohibition of discrimination … So far as the freedom to provide services is concerned, that principle was given specific expression and effect by Article 49 EC …' (paragraphs 54 and 55).

84 — Case C-281/98 [2000] ECR I-4139, paragraph 36.

treatment irrespective of age) to a private dispute between individuals, albeit one governed by national rules of public law put in place to implement a Community law obligation (Directive 1999/70). It therefore seems to me that one should be slow to exclude the possibility that a general principle of Community law may, in appropriate circumstances, be applied horizontally.

Horizontal application in the present case?

86. I have already indicated that, in my view, the situation giving rise to the reference does not fall within the scope of Community law. [85]

87. In those circumstances, I consider that the general principle of equality, and specifically equal treatment irrespective of age as identified by the Court in *Mangold*, cannot be applied horizontally. In so saying, I *accept* that such a principle can apply (both vertically and horizontally) to the extent that it does so within a specific Community law framework [86]

88. However, where there is no such framework, as in the present case, the general principle of equality, and specifically equal treatment irrespective of age, has nothing on which to bite. It therefore cannot be applied (either vertically or horizontally) unless and until the Community legislator has enacted the necessary detailed measures under Article 13 EC and any transposition period has expired. Once that has happened, the general principle will — as Advocate General Mazák has indicated [87] — be used to interpret the implementing legislation rather than operating autonomously.

89. Thus, the precise way in which a Member State chooses to make use of the derogation, in Article 6(1) of Directive 2000/78, from the prohibition on age discrimination is, of course, subject to review by the Court against the background of the general principle of equality, and specifically equal treatment irrespective of age. That review ensures that the social and policy choices made by

85 — See points 67 to 75.

86 — See the discussion at points 69 to 76 above. On my reading, *Mangold* was such a case.

87 — At point 136 of his Opinion in *Palacios de la Villa*, cited in footnote 20.

the Member State fall within the terms of the derogation and hence within the margin of appreciation left to the Member State. [88]

90. I also agree with the United Kingdom that it is not appropriate to expect a private employer to make, without guidance, the social and policy choices that lie behind the Article 6(1) derogation. It is explicitly for the Member State to make those choices and to bear the responsibility for them.

91. I add immediately that, once a Member State has implemented Directive 2000/78, both the rules that the Member State puts in place through its legislation and an individual employer's application of those rules within his private law arrangements with his employees will be subject to judicial control by the national courts and, as appropriate, by this Court. Article 3(1) of Directive 2000/78 makes it clear beyond doubt that the general principle of equality, and specifically equal treatment irrespective of age, operating through the directive will apply to 'all persons, as regards both the public and private sectors, including public bodies, in relation to … (c) employment and working conditions, including … pay'.

92. On this analysis, once the period for transposition of Directive 2000/78 expired, [89] the general principle of equality, and specifically equal treatment irrespective of age, could indeed be invoked 'horizontally' *operating through* Directive 2000/78 without the need for any other element bringing the employment relationship within the scope of Community law. The choices that Member States have made in implementing that directive will fall to be assessed against that background.

93. Accordingly, I suggest that (if necessary) the Court should rule in answer to the second question referred by the national court that the general principle of equality, and specifically equal treatment irrespective of age,

88 — Member States 'unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy': see *Mangold*, cited in footnote 2, paragraph 63, and *Palacios de la Villa*, cited in footnote 20, paragraph 68. In *Mangold*, the Court concluded that the measures in question failed the proportionality test (paragraph 65). In *Palacios de la Villa*, however, it considered that the national authorities were not unreasonable in taking the view that the contested measure might be necessary and appropriate (paragraph 72).

89 — For Germany, that happened on 2 December 2006: see point 12.

cannot be applied between private employers on the one hand and their employees or pensioners and their survivors on the other as a ground for challenging a rule of private law that was not enacted in order to implement a Community law obligation or take advantage of a permissible derogation under Community law, and where there is no substantive rule of Community law that is otherwise applicable.

Question 3

Analysis on the basis of a general principle prohibiting age discrimination

Question 3(a)

94. The referring court essentially asks whether a provision such as an age-gap clause in an occupational pension scheme falls within the scope of the general principle of equality, and specifically equal treatment irrespective of age.

95. There are two possible approaches to the analysis of that question. On the one hand, what types of age-related discrimination are covered by the general principle of equality, and specifically equal treatment irrespective of age? On the other, what did the Community legislator intend to cover by the principle of equal treatment irrespective of age formulated in Directive 2000/78?

96. The first issue is whether the general principle covers relative as well as absolute ages. The answer to that question depends on what is understood under 'discrimination on grounds of relative age'. The term might be taken to cover only less favourable treatment of A (an individual) because he is a particular number of years older (or younger) that B (another individual) or C (a group of individuals). More broadly, it might also be taken to cover less favourable treatment of E and F (a pair of individuals, taken together) because the age difference between them as a pair is greater or less than the age difference between other comparable pairs of individuals (G and H, I and J, and so on).

97. In my view, discrimination on grounds of relative age encompasses both those situations. Both make use of age as the criterion justifying differential adverse treatment and I cannot see a plausible reason for distinguishing between them. The same logic leads me to the conclusion that there is no reason to exclude discrimination based on relative ages from the scope of the general principle of equality, and specifically equal treatment irrespective of age. A person's age, albeit expressed in relative rather than absolute terms, is still the basis for the decision which has an adverse effect on them.

98. This approach also resolves the issue as to whether only discrimination arising from the age-gap clause that affects the *deceased employee* falls under the prohibition, or whether discrimination affecting the *surviving spouse* (in this case, Mrs Bartsch) is also caught. The discrimination (as compared with couples who are closer to each other in age) derives from their combined characteristics and is clearly age-related. It is evident that someone like Mrs Bartsch, who is *more* than 15 years younger than her deceased spouse, is being treated less favourably than she would be if she were in a comparable situation (namely, a widow) but were *less* than 15 years younger than her deceased spouse. Such treatment is directly discriminatory as between different categories of widows of employees in respect of receipt of, or exclusion from, pension rights. The adverse result follows straightforwardly from application of an age-related criterion (an age-gap of more than 15 years) to determine pension entitlement. Mrs Bartsch is adversely affected by not receiving the pension. The personal autonomy [90] of Mr Bartsch has been adversely affected by the inability to make proper provision for his spouse after his death, and by penalising the exercise of his freedom to choose a spouse who is more than 15 years his junior.

99. An application by analogy of the Court's case-law on direct discrimination based on sex would lead to the conclusion that, since direct discrimination cannot be objectively justified (see, for example, *Dekker*), [91] all treatment that differentiates directly on grounds of age is prohibited. Nevertheless, the Community legislator appears clearly to have envisaged, in Directive 2000/78, that certain categories of such treatment *should* be capable of objective justification. [92] That, to my mind, reinforces the analysis that I have put forward in respect of the answer to question 2.

90 — On the importance of choice for personal autonomy, see the Opinion of Advocate General Poiares Maduro in *Coleman*, cited in footnote 43, points 9 to 11, and the works cited in the footnotes thereto.

91 — Case C-177/88 [1990] ECR I-3941, paragraph 12. See further E. Ellis, *EU Anti-Discrimination Law* (2nd ed., 2005), pp. 111 to 113.

92 — See points 109 to 110 below.

Analysis under Directive 2000/78

100. Article 3(1) applies the directive to 'all persons, as regards both the public and private sectors, including public bodies, in relation to … (c) employment and working conditions, including … pay'. According to established case-law, a survivor's pension falls within the concept of 'pay' under Article 141 EC as a benefit deriving from the deceased spouse's employment relationship. [93]

101. The contract of employment created an employment relationship between Mr Bartsch and BSH. The survivors' pension is 'pay' under Article 141 EC and therefore 'pay' for the purposes of Article 3(1) of Directive 2000/78. After the expiry of the period for transposing Directive 2000/78, the validity of the age-gap clause would therefore fall to be assessed under the directive.

102. It seems to me that, as regards the question what types of age-related discrimination are covered, the same arguments apply under the directive as applied in the analysis under the general principle. They are confirmed by a number of specific characteristics of the directive.

103. First, recital 25 makes it clear that age discrimination within the meaning of the Directive is a broad concept. That is also consistent with standard principles of interpretation, which dictate that the concept of discrimination in Article 2 should be read broadly, while the justifications and derogations under Article 2(2)(b)(i) and under Article 6 should be construed narrowly. To read Article 2 as applying only to absolute ages ('the employer treats a 50-year-old less favourably than a 40-year-old'), would be to interpret the principle in that article narrowly. That is not the way in which the Court has interpreted sex discrimination, [94] or any fundamental Treaty-based freedom.

93 — See Case C-379/99 *Menauer* [2001] ECR I-7275, paragraph 18 and the case-law cited there; and Case C-117/01 *K.B.* [2004] ECR I-541, paragraph 26.

94 — Thus, sex discrimination includes discrimination arising from gender reassignment. See Case C-13/94 *P.* v *S.* [1996] ECR I-2143, paragraphs 17 to 20, and Case C-423/04 *Richards* [2006] ECR I-3585, paragraph 24. In *Grant*, cited in footnote 21, paragraph 42 (which, however, predates the entry into force of the Treaty of Amsterdam and hence the introduction of Article 13 in the EC Treaty), the Court took the view that it did not extend to differences of treatment based on a person's sexual orientation.

104. Secondly, as the Commission observes, reading Article 2 as applying only to absolute ages would make it easier to evade the prohibition on discrimination that it contains. An astute employer might get round the prohibition by recasting his existing discriminatory practices in terms of relative, rather than absolute, ages.

105. I therefore read the directive as prohibiting discrimination based both on absolute and relative age. In my analysis of the general principle, I have suggested that 'discrimination on grounds of relative age' would cover both discriminatory treatment affecting the deceased employee and discriminatory treatment affecting the survivor. [95] I cannot conceive that the principle contained in Article 2 of Directive 2000/78, which is intended to 'put into effect' the principle of equal treatment, [96] is to be construed more narrowly in this respect than that general principle.

106. I therefore proceed upon the basis that an age-gap clause such as that at issue in the proceedings before the national court is capable of constituting direct discrimination for the purposes of Article 2(2)(a) of Directive 2000/78, [97] in respect of both Mr Bartsch and the survivor, Mrs Bartsch. It must, however, be remembered that at the material time the period for transposing that directive into national law in Germany had not yet expired.

Question 3(b)

107. The referring court asks whether, if a provision like the age-gap clause gives rise to differential treatment, that discrimination can be justified by the employer's interest in limiting risks assumed by voluntary pension schemes (and his desire to make those risks more quantifiable). [98] However, it seems to me that, once a risk is quantified, it is no longer a 'risk' but a foreseeable obligation for which provision can be made. It also seems clear that actuarial analysis will quantify the obligations likely to arise as a result of 'age gaps'. I therefore proceed on the basis that the referring court essentially wishes to know whether discrimination can be justified by the employer's interest in placing an overall

95 — See point 98.

96 — Article 1 of Directive 2000/78.

97 — Under this provision, *direct* discrimination is taken to occur 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation' on grounds, inter alia, of age. Indirect discrimination is defined in Article 2(2)(b). See point 109.

98 — See point 17 above.

limitation on the costs borne by a voluntary pension scheme.

108. Directive 2000/78 provides a convenient analytical framework for approaching this question. If the events giving rise to the present reference had occurred after the expiry of the transposition period for Directive 2000/78, would an age-gap clause in a private supplementary pension scheme of the kind operated by BSH have been capable of justification?

109. Directive 2000/78 defines both direct and indirect discrimination within Article 2. The two limbs of Article 2(2) start in the same way: '… discrimination shall be taken to occur where …'. Article 2(2)(a) defines direct discrimination without going on to suggest that it may, in principle, be capable of justification. Article 2(2)(b), in contrast, states that 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having … a particular age … at a particular disadvantage unless … that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …'. In other words, if the proviso in Article 2(2)(b) is satisfied, no indirect discrimination shall be taken to have occurred (otherwise, it has). At first sight, that would appear to suggest (*a contrario*) that discrimination falling within Article 2(2)(a) is *not* capable of objective justification. There is, however, obviously an overlap between the terms of Article 2(2)(b) and the framing of the (extensive) justification on objective grounds for age discrimination that is set out in Article 6.

110. Article 6(1) of Directive 2000/78 deals exclusively with justification for one specific type of differential treatment: discrimination on grounds of age. It opens with the words, 'Notwithstanding Article 2(2), Member States may provide …'. Here, no distinction is drawn by the legislator between Article 2(2)(a) (direct discrimination) and Article 2(2)(b) (indirect discrimination). Rather, Member States are permitted to provide that any differences of treatment caught by Article 2(2) 'shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim … and if the means of achieving that aim are appropriate and necessary'. Certain specific 'legitimate aims' are expressly identified ('including legitimate employment policy, labour market and vocational training objectives'), in what is (given the use of the word 'including') meant not to be an exhaustive list. After this introduction, subparagraphs (a), (b) and (c) then identify (again, non-exhaustively) certain types of differential treatment which appear to

involve partly direct discrimination,[99] partly indirect discrimination[100] on grounds of age. Article 6(2) makes provision for certain types of age-related differential treatment for occupational social security schemes.

111. It would be fair to say that the majority of the specific illustrations of 'acceptable' differential treatment in Article 6(1) involve the *direct* use of age as a decision criterion ('older workers', 'minimum conditions of age', 'a maximum age for recruitment').[101] The decision criterion is thus not 'an apparently neutral provision, criterion or practice' (as identified, in Article 2(2)(b) within the definition of indirect discrimination). Rather, it is often differential treatment on grounds of age, pure and simple.

112. The only logical conclusion to be drawn is that Directive 2000/78 expressly permits *particular* kinds of differential treatment based *directly* on grounds of age, *provided* that they are 'objectively and reasonably justified by a legitimate aim … and if the means of achieving that aim are appropriate and necessary'. This analysis of the text is borne out by the Court's judgment in *Palacios de la Villa*,[102] which concerned a compulsory retirement clause in national legislation.[103] Recital 14 of Directive 2000/78 states that '[t]his Directive shall [[104]] be without prejudice to national provisions laying down retirement ages'. However, no substantive provision in the directive exempts retirement clauses from its scope. The Court found that such a clause fell within the directive and constituted direct age discrimination.[105] It nevertheless decided that it served an objective which could, under Article 6(1) of the directive, reasonably and objectively justify a difference in treatment on grounds of age.[106]

113. The age-gap clause does not fit neatly into any of the specific illustrations in

99 — For example, the fixing of a maximum age for recruitment in certain cases (Article 6(1)(c)).

100 — For example, the setting of minimum conditions of seniority in service for access to certain advantages linked to employment (Article 6(1)(a)). Seniority in service, although an 'apparently neutral criterion', is likely to operate indirectly as an age-based criterion.

101 — Compare Advocate General Jacobs's discussion of two types of justification for difference in treatment on grounds of sex, and their relation to direct and indirect discrimination, at points 34 to 35 of his Opinion in Case C-79/99 *Schnorbus* [2000] ECR I-10997.

102 — Cited in footnote 20.

103 — In *Palacios de la Villa*, cited in footnote 20, unlike the present case, the transposition period had of course already expired. See point 39 above.

104 — This is a curious use of 'shall' (an enacting form) in a preamble (which is explanatory). See point 10 of the Interinstitutional Agreement on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1), to which I referred in my Opinion of 10 April 2008 in Case C-345/06 *Heinrich*, points 28, 64, and 65.

105 — Paragraph 51.

106 — Paragraph 66.

Article 6(1)(a), (b) or (c). The employer's interest in placing an overall limitation on the costs borne by a voluntary pension scheme [107] is reminiscent of the factors behind the Article 6(2) derogation. Derogations are, as a general principle of construction, to be interpreted restrictively. At the same time, it is clear that Article 6 does not contain an exhaustive list of permissible derogations.

114. If the Member State had already transposed Directive 2000/78, it would (presumably) have made some policy choices. If it had chosen to invoke Article 6(2) of the directive so as to allow a private employer to include a provision such as the age-gap clause in its occupational pension scheme, the Court would first have to decide whether use of the age-gap clause qualified under the derogation and then (if so) assess the actual scheme for proportionality.

115. On the one hand, the present state of Community law allows Member States and, where appropriate, the two sides of industry at national level fairly broad discretion, not only in whether to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it. [108]

116. On the other hand, the Court has consistently taken a strict approach to pension schemes which, as in the present case, *exclude* certain categories of persons, as opposed to those which provide differential benefits. In particular, it circumscribed the non-retroactive effect of its ruling in *Barber* [109] so as not to apply to the former type of scheme. [110] The Court has also been circumspect in accepting grounds based on

107 — See point 107 above.

108 — See *Palacios de la Villa*, cited in footnote 20, paragraph 68. See also recital 25 to Directive 2000/78.

109 — Case C-262/88 [1990] ECR I-1889. The limitation *ratione temporis* of that ruling was incorporated into Protocol (No 17) on Article 141 of the Treaty establishing the European Community (1992).

110 — See, for example, Case C-57/93 *Vroege* [1994] ECR I-4541, paragraphs 27 to 28; Case C-128/93 *Fisscher* [1994] ECR I-4583, paragraphs 49 to 50; Case C-246/96 *Magorrian and Cunningham* [1997] ECR I-7153, paragraphs 27 to 29; Joined Cases C-270/97 and C-271/97 *Sievers and Schrage* [2000] ECR I-929, paragraphs 39 to 41.

actuarial calculations to justify differential treatment. [111]

117. The referring court states that the age-gap clause is compatible with domestic law because it is based on a 'fair reason', namely the employer's interest in placing an overall limitation of the costs borne by voluntary pension schemes. [112] Further, those considerations are closely connected to the age-gap clause. The cost limitation is based on a demographic criterion: the younger the survivors are in relation to the employees to whom an occupational pension was granted, the longer the period in which the employer has, on average, to provide a survivor's pension.

118. Given the broad discretion which Member States enjoy in the field of social and employment policy, I am prepared to accept that a policy choice made by a Member State so as to allow private pension schemes to include some kind of an age-gap clause might, in principle, serve a legitimate aim within the meaning of Article 6(1) of Directive 2000/78.

119. However, in my view, a scheme that operated — like BSH's scheme — so as to exclude a widow in Mrs Bartsch's position [113] from any payment whatsoever under the scheme would be likely to fail the proportionality test contained in Article 6(1), which requires that the means of achieving legitimate aims should be 'appropriate and necessary'.

120. First, it is apparent from the answer which BSH's representative gave at the hearing that, when the pension scheme was originally set up, the company had had regard purely to the issue of how to distribute the (available) funds.

111 — In *Lindorfer*, cited in footnote 19, paragraph 56, the Court held that a need for sound financial management of a pension scheme could not be invoked to support the need for higher actuarial values for women. See also Advocate General Jacobs's Opinion, at points 49 to 69, and my Opinion, at points 43 to 50, in that case. In Case C-152/91 *Neath* [1993] ECR I-6935 and Case C-200/91 *Coloroll* [1994] ECR I-4389, the Court held that inequality of *employers'* contributions under funded defined-benefit pension schemes arising from the use of actuarial factors did not fall under (what is now) Article 141 EC. In his Opinion on, inter alia, those cases (at [1993] ECR I-4893) Advocate General Van Gerven considered that a need to maintain the financial balance of occupational pension schemes could not justify differences in *employee* contributions and benefits based on actuarial factors. Compare also Case C-264/96 *ICI* [1998] ECR I-4695, Case C-307/97 *St Gobain* [1999] ECR I-2651, Case C-436/00 *X & Y* [2002] ECR I-10829, Case C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409, and Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141 (rejection by the Court of loss of tax revenue as a justification for discrimination contrary to Article 43 EC).

112 — See point 107 above.

113 — That is to say, a widow more than 15 years younger than her deceased husband who died while being employed by BSH. The age-gap clause does not apply if former employees die when already in retirement: see point 13.

121. Second, it is not difficult to imagine ways of limiting the costs borne by voluntary pension schemes that are less extreme than total exclusion of survivors. For example, a reduced benefit could be payable for younger survivors, perhaps determined on a sliding scale; or payments could start only when the survivors reached a certain age.

122. Third, there is nothing in the documents before the Court to suggest that a survivor's pension is payable only if the employee dies at or above a certain age. Thus, in a situation where employee and spouse are of the same age and the employee dies at the age of 40, the survivor will receive a pension. By contrast, a survivor 16 years younger than an employee spouse who dies aged 56 will receive nothing. However, there exists no relevant distinction between those two survivors (both aged 40) in terms of their own life expectancy and hence the length of time during which they are likely to draw a survivor's pension.

123. If question 3(b) is analysed from the perspective of the general principle prohibiting discrimination, applied to the specific ground of age, it is difficult to see how such discrimination on grounds of age would be capable of justification. In any event, the scheme would fail under proportionality.

124. I would therefore conclude, if necessary, that a provision such as the age-gap clause at issue in the main proceedings cannot be justified by the fact that the employer has an interest in limiting the overall costs borne by a voluntary pension scheme.

Question 3(c)

125. The referring court asks whether the possible prohibition of discrimination on grounds of age has unlimited retroactive effect as regards the law relating to occupational pension schemes. If not, in what way is it limited?

126. Although the national court enquires, in the course of the order for reference, as to what is the precise point in time from which the principle prohibiting age discrimination applies and how the application of that principle is to be reconciled with the protection of legitimate expectations, it is clear that question 3(c) is really concerned with whether a

temporal limitation might be placed on the judgment in the present case. [114] I shall therefore answer the question on that basis.

127. Limitations on the retroactivity of a judgment are imposed only exceptionally and on two conditions. First, there must otherwise be a risk of serious economic repercussions; second, individuals and national authorities must have been led to adopt practices which do not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions. [115] Those conditions are cumulative.

128. Any restriction of the retroactive effect of a judgment must, moreover, be laid down by the Court in the first judgment which gives the ruling on the interpretation requested. [116]

129. I do not consider that the retroactive effect of the judgment in the present case should be limited.

130. First, there is no material before the Court (whether from the order for reference or from BSH or Germany [117]) sufficient to indicate a risk of serious economic repercussions if the Court were not to limit the temporal effect of its judgment.

131. Secondly, the Court in *Mangold* did not place any temporal limitation on its judgment. It is that judgment which identified the principle which (on this hypothesis) would here be applied.

132. Even if one took the view that this is the first occasion on which the Court has had to consider the application of that principle to a privately-funded occupational pension scheme, the first of the two (cumulative) conditions would still not be satisfied.

133. No temporal limitation should therefore be placed upon the judgment in the present case.

114 — Germany specifically asked for such a limitation.

115 — See *Richards*, cited in footnote 94, paragraph 42, and Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 57.

116 — *Barber*, cited in footnote 109, paragraph 41; *Vroege* cited in footnote 110, paragraph 31; Case C-292/04 *Meilicke* [2007] ECR I-1835, paragraphs 36 to 37.

117 — Germany asserts that a large number of contracts might be affected by such a ruling, but admits that it has no statistical evidence to adduce in support of that assertion.

Conclusion

134. I therefore propose that, in answer to the questions referred, the Court should rule as follows:

Member States are not under an obligation to guarantee protection under the general principle of equality (including equal treatment irrespective of age) contained in Community law if the alleged discriminatory treatment does not fall within the scope of Community law.

There is no specific substantive rule of Community law that may serve as the basis for applying the general principle of equality (including equal treatment irrespective of age) to the situation giving rise to the reference.